IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW WASHINGTON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 65998

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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RESPONDENT'S ANSWERING BRIEF

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Routing Statement: This appeal is appropriately retained by the Nevada Supreme Court pursuant to NRAP 17(b)(1) because it is a direct appeal from a Judgment of Conviction based upon a jury verdict involving the conviction of Category A and B felonies.

STATEMENT OF THE ISSUES

1. Whether double jeopardy precludes multiple convictions for discharging a firearm at or into a structure multiple times.
2. Whether the State was obligated to present evidence of the existence of an unnamed co-conspirator.
3. Whether sufficient evidence supports Appellant Matthew Washington's convictions.
4. Whether the jury was properly instructed.
5. Whether the State committed misconduct during closing argument.
6. Whether the police violated Appellant's Fourth Amendment rights during the vehicle search.
7. Whether the State violated Appellant's rights under the Confrontation Clause.
8. Whether prejudicial error occurred when the State presented pictures, collected during field interviews, which depicted Appellant Matthew Washington and his tattoos.
9. Whether the accumulation of errors warrants reversal.

STATEMENT OF THE CASE

On April 7, 2014, Appellant Matthew Washington was charged by way of Amended Information with the following: Count 1 – Conspiracy to Commit Murder (Category B Felony – NRS 199.480, 200.010, 200.030); Count 2 – Murder With Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030); Counts 3, 5, 6 – Attempt Murder With Use of a Deadly Weapon (Category B Felony – NRS 193.330, 200.010, 200.030); Count 4 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481.2e); Count 7 – Battery With Use of a Deadly Weapon (Category B Felony – NRS 200.481); Counts 8-17 – Discharging Firearm At or Into Structure, Vehicle, Aircraft, or Watercraft (Category B Felony – NRS 202.285). 1 AA 658-71.

Jury trial commenced on April 7, 2014. 5 AA 888. On April 11, 2014, the State filed a Second Amended Information to correct a grammatical error, correct the name of the victim for Count 7, and to remove the substantial bodily harm language from Count 4. 8 AA 1497-98. On April 16, 2014, the jury returned a verdict of guilty on all counts. 4 AA 742-46. The State then filed a Second Amended Information, charging Appellant with Possession of Firearm by Ex-Felon. 4 AA 747-48. A separate trial was then held regarding the additional count. 9 AA 1924-29. The jury found Appellant guilty of Count 18 – Possession of Firearm by Ex-Felon. 4 AA 768. The penalty hearing was conducted on April 17, 2014. 10 AA

1952. For Count 2, the jury imposed a sentence of life with eligibility for parole after 20 years. 4 AA 781. On June 18, 2014, Appellant was sentenced to the Nevada Department of Corrections as follows: Count 1 – a minimum of 48 months and a maximum of 120 months; Count 2 – life with the possibility of parole after 240 months, with a consecutive term of a minimum of 60 months and a maximum of 240 months for the use of the deadly weapon, to run concurrent to Count 1; Count 3 – a minimum of 96 months and a maximum of 240 months, with a consecutive term of a minimum of 60 months and a maximum of 240 months for the use of the deadly weapon, to run consecutive to Count 3; Count 4 – a minimum of 48 months and a maximum of 120 months, to run concurrent to Count 3; Count 5 – a minimum of 96 months and a maximum of 240 months, with a consecutive term of a minimum of 60 months and a maximum of 240 months for the use of the deadly weapon, to run consecutive to Count 4; Count 6 – a minimum of 96 months and a maximum of 240 months, with a consecutive term of a minimum of 60 months and a maximum of 240 months for the use of the deadly weapon, to run consecutive to Count 5; Count 7 – a minimum of 48 months and a maximum of 120 months, to run concurrent to Count 6; Counts 8-17 – a minimum of 28 months and a maximum of 72 months for each count, each to run concurrent to the preceding count; Count 18 – Possession of a Firearm by an Ex-Felon – a minimum of 28 months and a maximum of 72 months, to run concurrent with Count 17. 10 AA 2051-52. The Judgment of Conviction was

filed on June 27, 2014. 4 AA 786-89. On June 30, 2014, Appellant filed a timely pro per Notice of Appeal. 4 AA 790-92. On July 17, 2014, through counsel, Appellant filed a timely Notice of Appeal. 4 AA 793-96. Appellant filed the instant Opening Brief on June 2, 2015.

STATEMENT OF THE FACTS

On the evening of November 4, 2013, Laroy Thomas ("Thomas") had been staying with his friend, Marque Hill ("Hill), at an apartment at 2655 Sherwood Street, for approximately two weeks. 7 AA 1372-73. That evening, Nathan Rawls ("Rawls) and Ashely Scott ("Scott") were also staying at the apartment. 7 AA 1374. At approximately 2:00 am on November 5, 2013, Thomas and Rawls left the apartment to get some food from a nearby restaurant, then returned to the apartment. 7 AA 1377-78. Hill went to sleep in the bedroom. 7 AA 1378, 1381. Rawls, Scott, and Thomas were in the living room. 7 AA 1382. Rawls was on the couch, and Scott and Thomas were on the loveseat. 7 AA 1382. Thomas fell asleep on the loveseat. 7 AA 1382.

At "about 4:00 something in the morning" Thomas woke up to "a bunch of gunfire." 7 AA 1382. Thomas heard at least five or six gunshots. 7 AA 1382. Thomas and Scott moved to the floor, and Thomas crawled toward the apartment's back room. 7 AA 1384. Scott had been shot in the foot. 7 AA 1386, 1434-35. Thomas had been shot in the ankle. 7 AA 1386. Thomas shook Rawls and there

was no response; Rawls then stopped breathing. 7 AA 1385. Hill called 911. 7 AA 1471. Police officers arrived at the apartment within a few minutes of the 911 call. 7 AA 1387, 1471. Hill and Thomas both testified that during their time at the apartment, they did not have fights with anyone and did not observe the other people in the apartment having problems with anyone. 7 AA 1405, 1480.

Scott and Thomas received medical care from ambulance personnel, and were both transported to the hospital by ambulance. 7 AA 1388-89. Thomas received surgery, which involved having screws placed in his legs. 7 AA 1389-90. Thomas testified that during his time at the apartment on Sherwood Street, he did not have a weapon and he did not observe anyone else in the apartment with a weapon. 7 AA 1403-04. Scott was given pain relief medication and was discharged from the hospital, and the bullet was removed from her foot nine days later. 7 AA 1439. Before the bullet was removed from her foot, she had difficulty walking and the wound became infected, which was very painful. 7 AA 1440. After the bullet was surgically removed, she continued to have difficulties walking very far or for very long. 7 AA 1441.

On November 5, 2013, Darren DeSoto ("DeSoto") was asleep in his apartment at 2635 Sherwood Street. 6 AA 1242, 1245. At approximately 4:35 am, Desoto woke up when he heard five gunshots. 6 AA 1242. DeSoto looked out his window to find out if he could see anything. 6 AA 1243. He observed a vehicle with its

headlights on, and saw the vehicle drive slowly past his window. 6 AA 1248-49. The vehicle was a silver Dodge Magnum with tinted windows, after-market rims, no front license plate, and no visible chrome.[1] 6 AA 1249. DeSoto's wife called 911. 6 AA 1261. Eventually police officers transported DeSoto and his wife to another location to identify a vehicle. 6 AA 1250. Both DeSoto and his wife identified the vehicle as the one he observed driving past their window after being woken up by gunshots on November 5, 2013. 6 AA 1250, 1259.

On November 5, 2013, at approximately 4:35 am, Officer Christian Parquette of the Las Vegas Metropolitan Police Department (hereinafter "Metro") was patrolling in the Downtown Area Command. 6 AA 1271. Officer Parquette received a notification through dispatch that the suspect vehicle in a shooting in a neighboring command was a silver Dodge Magnum. 6 AA 1271. Officer Parquette drove southbound on Eastern Avenue toward Sahara Avenue in an attempt to locate the suspect vehicle. 6 AA 1272. At approximately 4:39 am, Officer Parquette observed a silver Dodge Magnum heading northbound on Eastern. 6 AA 1272, 1275. Officer Parquette began to follow the vehicle, and notified other officers that she was following what appeared to be the suspect vehicle. 6 AA 1275-76. Officer Parquette and other Metro officers pulled the vehicle over at Eastern and Ogden and conducted

[1]Desoto's wife, Lorraine DeSoto, testified that she also, on November 5, 2013, at approximately 4:35 am, saw a silver Dodge Magnum with tinted windows driving slowly past the window. 6 AA 1255.

a felony vehicle stop. 6 AA 1276. Matthew Washington (hereinafter "Appellant") was the driver of the vehicle. 6 AA 1279. There was another individual in the vehicle, who was identified as Martell Moten ("Moten"). 6 AA 1280. Appellant's girlfriend was the registered owner of the vehicle. 8 AA 1657.

After the two individuals were taken into custody, the doors of the vehicle were left open. 6 AA 1284. Officer Parquette observed, through plain view, the butt of a handgun and a latex glove sticking out from underneath the front passenger seat. 6 AA 1284. Appellant provided consent for officers to search the vehicle. 6 AA 1284. Officer Parquette did not search the vehicle. 6 AA 1285-86.

Metro homicide detectives arrived at the apartment and took over the scene at Eastern and Ogden. 6 AA 1285-86, 1311; 7 AA 1332. Detective Robert Rogers arrived at approximately 6:00 am. 7 AA 1332. Detective Rogers spoke to the patrol officers on scene and then worked on obtaining a search warrant for the vehicle. 6 AA 1334-35. Detective Rogers did not search the vehicle, but from looking through the open car door, observed what appeared to be a handgun underneath the front passenger seat. 7 AA 1336. After the search warrant was obtained, crime scene analysts performed an initial cursory search of the vehicle. 7 AA 1335; 8 AA 1568-69. The crime scene analysts recovered the handgun and latex glove from underneath the front passenger seat. 7 AA 1336. The gun was a Smith and Wesson 9 millimeter firearm. 7 AA 1351; 8 AA 1582. The vehicle was then towed to the

Metro criminalistics garage, where the crime scene analysts performed a more extensive search, which involved taking photographs and processing the entire vehicle for latent prints. 7 AA 1337-38; 8 AA 1583, 1588.

After the crime scene analysts left the scene, Detective Rogers received information indicating that another handgun might be concealed in the vehicle on the driver's side. 7 AA 1339. The crime scene analysts had gone to lunch, and the vehicle was going to be towed, so Detective Rogers decided to search the vehicle himself. 7 AA 1339. Detective Rogers saw a plastic panel below the steering column that was held by clips. 7 AA 1339. Detective Rogers pulled away the panel, and found a firearm inside of the steering column. 7 AA 1339; 8 AA 1593. Crime scene analysts were then dispatched to the scene, where they recovered the firearm. 7 AA 1340; 8 AA 1593. The firearm was a Glock .40 caliber handgun. 7 AA 1351; 8 AA 1582. Several latent fingerprints were found on the vehicle, which fingerprint analysts determined were a match to Appellant's fingerprints. 8 AA 1673-75. DNA analysis revealed the DNA on the latex glove was Moten's. 8 AA 1695.

Metro crime scene analysts recovered seven .40 caliber and six 9 millimeter cartridge casings from the exterior of the apartment at 2655 Sherwood Street. 8 AA 1507, 1510-11. There were 13 separate bullet strikes to the apartment. 8 AA 1650. Metro firearms examiner, Anya Lester, determined that the seven .40 caliber cartridge casings were fired from the Glock recovered from the Dodge Magnum

driven by Appellant. 9 AA 1780. Lester also determined that six 9 millimeter cartridge cases were fired from the 9 millimeter Smith and Wesson handgun recovered from the Dodge Magnum driven by Appellant. 9 AA 1789. Several bullets and bullet fragments were collected from inside the apartment. 8 AA 1536. Lester determined that seven of those bullet fragments originated from the Glock pistol. 9 AA 1783-84.

On November 6, 2013, Dr. Larry Simms performed the autopsy of Rawls' body. 7 AA 1415. Rawls' body exhibited three gunshot wounds. 7 AA 1415-16. One fatal gunshot wound was caused by a bullet entering his right upper back area, then traveling through his chest, and hitting his lungs, heart, and aorta. 7 AA 1417, 1419. Another fatal gunshot wound was caused by a bullet entering Rawls' right upper arm, then traveling through Rawls' chest and lungs, then becoming stuck in the skin near Rawls' rib cage, where Dr. Sims recovered the bullet. 7 AA 1420. Rawls' body also exhibited a non-fatal gunshot wound to the side of his right knee. 7 AA 1422.

SUMMARY OF THE ARGUMENT

Appellant was appropriately convicted of multiple counts of Discharging a Firearm At or Into a Structure, because the unit of prosecution is the number of times the firearm is discharged. The State was not obligated to prove the existence of an unnamed co-conspirator because Appellant was charged under alternative theories

of liability. Sufficient evidence was presented at trial to sustain Appellant's convictions. The jury was appropriately instructed. The State did not commit prosecutorial misconduct during closing arguments, when the prosecutor correctly instructed the jury regarding the inference of specific intent to kill based upon the use of a deadly weapon. The search of Appellant's vehicle did not violate the Fourth Amendment because it occurred pursuant to a valid search warrant. Appellant's Confrontation Clause Rights were not violated because the firearms examiner testified regarding only her own opinions and conclusions, not any other person's. The District Court was not required to conduct a hearing to determine whether the evidence was constitutionally acquired before the evidence could be introduced during the penalty phase, and the evidence presented at the penalty hearing was not unfairly prejudicial. Appellant has failed to establish the existence of a single error, and thus there is no accumulation of errors warranting reversal.

ARGUMENT

I

DOUBLE JEOPARDY DOES NOT PRECLUDE MULTIPLE CONVICTIONS FOR MULTIPLE DISCHARGES OF A FIREARM AT OR INTO A STRUCTURE

Appellant claims that multiple discharges of a firearm into a structure amount to a single violation of NRS 202.385, and therefore he should only have been charged with one count of Discharging a Firearm at or Into a Structure. Such an argument does not implicate double jeopardy concerns. The prohibition against

double jeopardy "protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." Peck v. State, 116 Nev. 840, 847, 7 P.3d 470, 475 (2000); *citing* State v. Lomas, 114 Nev. 313, 315, 955 P.2d 678, 679 (1998); see also Gordon v. District Court, 112 Nev. 216, 220, 913 P.2d 240, 243 (1996). The facts of Appellant's case do not fit within any of those three categories. The statement "multiple punishments for the same offense" refers to instances where two or more statutory provisions proscribe the same offense or illegal act. See Jackson v. State, 128 Nev. __, __, 291 P.3d 1274, 1278 (2012) ("where *two statutory provisions* proscribe the 'same offen[c]e' a legislature does not intend to impose two punishments for that offense.") (emphasis added) (quoting Rutledge v. United States, 517 U.S. 292, 297, 116 S.Ct. 1241, 1245 (1996)). See also Firestone v. State, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) ("We disagree with Firestone that this case requires a double jeopardy analysis; we conclude that the issue is one of statutory interpretation."). This case does not involve the performance of one act constituting the violation of two statutes. This case involves a single statute, and the issue is whether it was violated ten times or only once. Therefore, as Appellant's argument addresses only a single statute, he has not raised a viable double jeopardy concern.

Whether conduct constitutes one or multiple violations of a single statutory provision is determined by the allowable unit of prosecution under the statute. See Jackson, 128 Nev. __, __, 291 P.3d at 1283. "The unit of prosecution of a statutory offense is generally a question of what the legislature intended to be the act or course of conduct prohibited by the statute for purposes of a single conviction and sentence." Brown v. State, 535 A.2d 485, 489, 311 Md. 426, 434 (Md. 1988). See also United States v. Planck, 493 F.3d 501, 503 (2007) ("We must first determine the 'allowable unit of prosecution', which is the actus reus of the defendant.) (citations omitted). "[D]etermining the appropriate unit of prosecution presents an issue 'of statutory interpretation' and substantive law. Jackson, 128 Nev. at __, 291 P.3d at 1283 (quoting Firestone, 120 Nev. at 16, 83 P.3d at 281).

The unit of prosecution in this case is the *discharge* of the firearm, not the firearm itself. The *act or conduct* prohibited by the statute determines the unit of prosecution. Planck, 493 F.3d at 503; Brown, 535 A.2d at 489, 311 Md. at 434. Appellant fails to support his absurd conclusory assertion that the unit of prosecution is the firearm. A firearm is neither an act nor conduct, and is obviously not the prohibited actus reus in the statute, which prohibits *discharge* of the firearm. NRS 202.285. In Firestone, this Court recognized that it is the defendant's actions, not the attendant circumstances, that determine the number of times a defendant violates a statute. 120 Nev. at 18, 83 P.3d at 282. This Court concluded "[s]ince there was

only one accident, and one 'leaving,' the statute allows only one charge of leaving the scene of an accident, regardless of the number of people involved." Id. at 13, 18, 83 P.3d at 282. Here, a violation of NRS 202.285 occurs when an individual "willfully and maliciously discharges a firearm" into certain types of structures. The actus reus of the crime is the discharge of the firearm, and therefore it is the number of discharges that determines the number of offenses committed. Appellant committed numerous violations of the statute by firing a handgun into the apartment several times. 13 bullet strikes were found in the apartment, and 13 cartridge cases were found at the scene. 8 AA 1507, 1510-11, 1650. Thus, Appellant violated the statute multiple times.

Finally, acceptance of Appellant's argument would lead to an absurd result. See Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 453-54, 109 S.Ct. 2558, 2567 (1989) (*citing* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 12 S.Ct. 511, 512-13 (1892)). According to Appellant's interpretation of the statute, if multiple discharges of a firearm into a structure constitute one offense, then a defendant, who has fired once into a structure, may continue to fire the weapon into the structure with impunity. This is clearly absurd and not the result intended by the legislature. Appellant's argument is without merit.

II
THE STATE WAS NOT OBLIGATED TO PROVE THE EXISTENCE OF AN UNNAMED CO-CONSPIRATOR BECAUSE APPELLANT WAS CHARGED UNDER ALTERNATIVE THEORIES OF LIABILITY

For Counts 2-17, Appellant was charged under the following alternative theories of liability: 1) Appellant directly committed the crimes; 2) Appellant aided or abetted Moten and/or an unnamed co-conspirator in the commission of the crimes; and/or 3) Appellant conspired with Moten and an unnamed co-conspirator, with the intent to commit the charged crimes, thereby being vicariously liable for acts committed in furtherance of the conspiracy. 3 AA 658-71. Appellant claims on appeal that his convictions must be reversed because the pleadings were deceptive, and the State did not prove the existence of the unnamed co-conspirator at trial.

To the extent that Appellant challenges the form of the Information, this claim has been waived for appellate review. "Defenses and objections based on defects in the institution of the prosecution, other than insufficiency of the evidence to warrant an indictment, or in the indictment, information or complaint, other than that it fails to show jurisdiction in the court or to charge an offense, may be raised only by motion before trial. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." NRS 174.105(1)-(2). See also Roseneau v. State, 90 Nev. 161, 162-63, 521 P.2d 369, 369-70 (1974). Appellant made no objections to the form of the Information prior to trial, and therefore Appellant's claim that the Information was "deceptive" has been waived for appellate review. Appellant's Opening Brief, at 35.

Regardless, Appellant's claim fails on its merits. Disjunctive pleadings are authorized under NRS 173.075(2), which states "[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." In interpreting NRS 173.075(2), this Court has stated "[where] a single offense may be committed by one or more specified means, and those means are charged alternatively, the state need only prove *one* of the alternative means in order to sustain a conviction." State v. Kirkpatrick, 94 Nev. 628, 630, 584 P.2d 670, 671-672 (1978) (emphasis added). See also Holmes v. State, 114 Nev. 1357, 1363, 972 P.2d 337, 341-42 (1998) ("The State may proceed on alternate theories of liability as long as there is evidence in support of those theories."). "When alternate theories of criminal liability are presented to a jury and all of the theories are legally valid, a general verdict can be affirmed even if sufficient evidence supports only one of the theories." Bolden v. State, 121 Nev. 908, 913, 124 P.3d 191, 194 (2005) (*citing* Phillips v. State, 121 Nev. 591, 597, 119 P.3d 711, 716 (2005)), overruled on other grounds by Cortinas v. State, 124 Nev. 1013, 1016, 195 P.3d 315, 317 (2008). Thus, the State was not required to prove the existence of an unnamed co-conspirator to prove Appellant was guilty of the charged offenses.[2] The State was only required to prove one of the three alternative theories

[2]At Appellant's preliminary hearing, Metro Detective Jason McCarthy testified that he interviewed Appellant on November 5, 2013. 2 AA 280. Appellant told Detective McCarthy that someone he knew as "LG" called him and told him to come to the

of liability. As discussed more fully below, the State presented sufficient evidence to prove Appellant either directly committed the offenses, aided and abetted another to commit the offenses, and/or conspired with another to commit the offenses. See NRS 195.020.

Appellant presents no compelling reason for this Court to overrule long-standing precedent permitting a charging document to present alternative theories of liability. Appellant's citations to cases regarding insufficient evidence of conspiracy or of aiding and abetting are not relevant here, as they do not address charging in the alternative. See Ikie v. State, 107 Nev. 916, 919, 823 P.2d 258, 260 (1991) (failure to prove aiding and abetting); O'Connor v. State, 590 So.2d 1018, 1021 (Fla. App. 5 Dist. 1991) (failure to prove agreement to commit the crime); People of Illinois v. Harmison, 124 Ill. App. 3rd 236, 239 (1984) (failure to prove agreement to commit the crime).

Further, the language regarding the unnamed coconspirator is at worst surplusage. See Ballentine's Law Dictionary, 41 Am J1st Pl § 51 (defining surplusage as "unnecessary allegations or words in an indictment or information.").

Sherwood Apartments and give his friend, Martell Moten, a ride. 2 AA 281-82. Appellant claimed he drove to the apartment complex, where he witnessed LG and Martell Moten get out of a silver car, after which Appellant heard six or seven gunshots. 2 AA 284. Appellant claimed he then followed them, in his car, out of the apartment complex, and Martell Moten then got out of LG's car and got into the backseat of Appellant's car. 2 AA 284. This testimony was not presented at trial.

"If the words taken to be surplusage are stricken, and there remains sufficient language to constitute a proper charge of all the elements of the crime, the indictment or information remains valid." Hulett v. Sheriff, 91 Nev. 139, 141, 532 P.2d 607, 608 (1975) (*citing* State v. Harkin, 7 Nev. 377 (1872)). Here, if the words "unnamed coconspirator" were struck from Count 1, the remaining language would still contain all of the elements necessary to charge Conspiracy to Commit Murder; Appellant would simply be charged with conspiring with one individual rather than two. 3 AA 659. Regarding Counts 2-17, because Appellant was charged in the alternative, striking the words "unnamed coconspirator" would have no effect, as conspiracy is an alternative theory of liability, not an element of those charges. 3 AA 659-70. Thus, the surplus language does not render the Information invalid, nor does it warrant reversal of Appellant's convictions.

III
SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT APPELLANT'S CONVICTIONS

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974). The relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v.

State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)). "Where there is substantial evidence to support a jury verdict, it will not be disturbed on appeal." Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 374-75, 609 P.2d 309, 313-14 (1980). This Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (*citing* Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976)).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380 (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). This standard preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Juries are free to draw reasonable inferences from facts proved at trial. Sharma v. State, 118 Nev. 648, 659, 56 P.3d 868, 875 (2002) (*citing* Cooper v. State, 94 Nev. 744, 745, 587 P.2d 1318, 1319 (1978).

A. There Was Sufficient Evidence to Convict Appellant of Conspiracy to Commit Murder

"A conspiracy is an agreement between two or more persons for an unlawful purpose." Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) (*citing* Peterson v. Sheriff, 95 Nev. 522, 598 P.2d 623 (1979)), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). "A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator." Doyle, 112 Nev. at 894, 921 P.2d at 911 (quoting State v. Arredondo, 155 Ariz. 314, 317, 746 P.2d 484, 487 (Ariz. 1987).

"Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties." Gaitor v. State, 106 Nev. 785, 790 n.1, 801 P.2d 1372, 1376 n.1 (1990) (quoting State v. Dressel, 85 N.M. 450, 513 P.2d 187, 188 (N.M. 1973)), overruled on other grounds by Barone v. State, 109 Nev. 1168, 1171, 866 P.2d 291, 292 (1993). See also Rowland v. State, 118 Nev. 31, 46, 39 P.3d 114, 123 (2002) ("conspiracy is usually established by inference from the conduct of the parties.") (*citing* Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998)). "Evidence of a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction." Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000), (*citing* Thomas, 114 Nev. at 1143, 967 P.2d at 1122), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). The prosecution is

not required to prove the defendant engaged in an overt act in furtherance of the conspiracy. NRS 199.490. However, proof of a single overt act may be sufficient to support a conspiracy conviction. 112 Nev. at 894, 921 P.2d at 911 (*citing* United States v. Todd, 657 F.2d 212, 216 (8th Cir. 1981)).

Here, there was sufficient evidence for a rational juror to find Appellant guilty of conspiracy to commit murder.[3] There was substantial evidence that Appellant and Moten engaged in a coordinated series of acts in furtherance of murder. Minutes after the shooting, Officer Parquette observed Appellant and Moten in a silver Dodge Magnum, which matched the witness's description, at Eastern and St. Louis. 6 AA 1272, 1275. A map of the area was shown at trial, and the jurors were able to observe how close that location was to the shooting. 6 AA 1275. The firearms found inside the vehicle Appellant was driving were both used in the shooting at 2655 Sherwood Street. 9 AA 1780, 1789. In examining all of the evidence presented, and the reasonable inferences that can be permissibly drawn therefrom, a rational juror was

[3]As discussed above, despite the Information's reference to an "unnamed coconspirator", to prove conspiracy to commit murder, the State was only required to prove Appellant conspired with one other person. See Bolden, 121 Nev. at 912, 124 P.3d at 194 ("Nevada law defines a conspiracy as "an agreement between *two or more persons* for an unlawful purpose.") (*citing* Doyle, 112 Nev. at 894, 921 P.2d at 911) (emphasis added), overruled on other grounds by Cortinas v. State, 124 Nev. 1013, 195 P.3d 315 (2008). Thus, the State's position is that substantial evidence was presented to convince a rational juror that Appellant conspired with Martell Moten.

free to find that Appellant and Moten both fired gunshots at the apartment, then fled the scene together, in the same vehicle. Thus, sufficient evidence was presented to convince a rational trier of fact that Appellant and Moten entered into a conspiracy for the purpose of committing murder.

B. There Was Sufficient Evidence to Convict Appellant of First-Degree Murder With Use of a Deadly Weapon

Nevada law assigns equal culpability to a principal and an aider or abettor to the crime. "Under NRS 195.020, every person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission is guilty as a principal." Sharma, 118 Nev. at 652, 56 P.3d at 870. This Court has held that, "in order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime." Id. at 655, 56 P.3d at 872.

1. The State presented substantial evidence that Appellant acted with malice

There was sufficient evidence for a rational juror to convict Appellant of first degree murder. Murder is defined as "the unlawful killing of a human being" accompanied by "malice aforethought, either express or implied." NRS 200.010. "[T]he killing of one human being by another human being with a deadly weapon is presumed to be malicious until the contrary appears…" Finger v. State, 117 Nev.

548, 573, 27 P.3d 66, 83 (2001) (quoting Davis v. United States, 160 U.S. 469, 485, 16 S.Ct. 353, 357 (1895)). "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." NRS 200.020(1). "Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." NRS 200.020(2). "Whether a defendant was animated by malice, express or implied, is within the province of the jury." Payne v. State, 81 Nev. 503, 508, 406 P.2d 922, 925 (1965).

Malice may be deduced from the circumstances of the murder, "such as the use of a weapon calculated to produce death, the manner of the use, and the attendant circumstances characterizing the act." Moser v. State, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975) (*citing* Payne v. State, 81 Nev. 503, 509, 406 P.2d 922, 926 (1965)). "Malice aforethought may be inferred from the intentional use of a deadly weapon in a deadly and dangerous manner." Keys v. State, 104 Nev. 736, 738, 766 P.2d 270, 271 (1988) (*citing* Moser v. State, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975)). "Malice can be present in the absence of an express intent to kill and 'as applied to murder does not necessarily import ill will toward the victim, but signifies general malignant recklessness of others' lives and safety or disregard of social duty.'" Keys, 104 Nev. at 738, 766 P.2d at 271 (quoting Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970)).

Here, there was substantial evidence that Appellant acted with malice when he took actions that ended Rawls' life. There is no dispute that Rawls was killed with a deadly weapon; the autopsy revealed that Rawls sustained three gunshot wounds, two of which were lethal. 7 AA 1415-20. The use of a deadly weapon to commit a murder is sufficient to infer malicious intent. Keys, 104 Nev. at 738, 766 P.2d at 271. A firearm is a deadly weapon. See NRS 193.165(6). There were 13 total bullet strikes to the apartment. 8 AA 1650. Both of the firearms involved in Rawls' murder were found in the vehicle Appellant was driving. 7 AA 1351; 8 AA 1582; 9 AA 1780, 1789. The firing of a handgun 13 times into an apartment is sufficient to convince a rational juror that Appellant possessed a malicious state of mind.

2. The State presented substantial evidence Appellant acted with willfulness, deliberation, and premeditation

NRS 200.030(1) provides that:

> Murder of the first degree is murder which is:
> (a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing.

"Willfulness is the intent to kill[,]...[d]eliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action…[and] [p]remeditation is a design, a determination to kill, distinctly formed in the mind by

the time of the killing." Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714 (2000)).

The terms "willful," "deliberate" and "premeditated" are not to be interpreted to have independent significance, but are to be read together. Powell v. State, 108 Nev. 700, 708-09, 838 P.2d 921, 926-67 (1992), vacated on other grounds by Powell v. Nevada, 511 U.S. 79, 114 S. Ct. 1280 (1994). In order to prove First Degree Murder beyond a reasonable doubt, the State must show that a "design to kill was distinctly and rationally formed in the mind of the perpetrator, at or before the time the fatal blows were struck," and it does not "matter how short a time existed between the formation of the design to kill and the killing itself." Briano v. State, 94 Nev. 422, 425, 581 P.2d 5, 7 (1978). Furthermore, direct evidence of such a design is rare, and as such it can be shown through circumstantial evidence. Id. at 425, 581 P.2d at 7-8.

Here, Appellant and Moten purposefully brought handguns to the location of the murder. A jury may infer premeditation from the fact that the defendant brought a deadly weapon to the scene of the murder. See Ouanbengboune v. State, 125 Nev. 763, 775, 220 P.3d 1122, 1130 (2009). See also United States v. Blue Thunder, 604 F.2d 550, 554 (8th Cir. 1979); United States v. Brooks, 146 U.S.App.D.C. 1, 449 F.2d 1077 (D.C. Cir. 1971); United States v. Sutton, 138 U.S.App.D.C. 208, 426 F.2d 1202 (D.C. Cir. 1969); Belton v. United States, 127 U.S.App.D.C. 201, 382

F.2d 150 (D.C. Cir. 1967). Whether he fired the fatal shots himself or assisted Moten in doing so, Appellant, by purposefully bringing firearms to the scene, where those firearms were discharged a total of 13 times into an apartment building, was evidence of a design to kill. Further, testimony at trial revealed that the apartment could only be accessed by walking along a walkway and through a courtyard. 7 AA 1396. This indicates Appellant and Moten intentionally selected the apartment. As discussed more fully below, the State presented sufficient evidence for the jury to rationally infer that Appellant believed there were individuals inside the apartment, and that he was not shooting into an abandoned building. In examining all of the evidence presented, and the reasonable inferences that can be permissibly drawn therefrom, a rational juror was free to find that Appellant had a design to kill at the time, or before, the fatal shots were fired.

C. There Was Sufficient Evidence to Convict Appellant of Attempt Murder With Use of a Deadly Weapon

In Nevada, "[a]ttempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill." Keys, 104 Nev. at 740, 766 P.2d at 273. The foregoing definition encompasses all the essential elements of Attempt Murder and, as such, represents the only elements the State needs to show in order to support a conviction for Attempt Murder. Id. NRS 200.020(1) defines express malice as "that deliberate intention unlawfully to take away the life of a

fellow creature, which is manifested by external circumstances capable of proof." NRS 193.200 provides that "[i]ntention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused." Taken together, these provisions recognize that courts often cannot know a defendant's subjective state of mind at the time of an act, and must be able to infer express malice from the circumstances surrounding an act. See Sharma, 118 Nev. at 659, 56 P.3d at 874-75. Accordingly, "[i]ntent to kill, as well as premeditation, may be ascertained or deduced from the facts and circumstances of the killing, such as use of a weapon calculated to produce death, the manner of use, and the attendant circumstances." Dearman v. State, 93 Nev. 364, 367, 566 P.2d 407, 409 (1977).

The State presented evidence that two different firearms were used to discharge a total of 13 cartridges into the apartment where Rawls, Thomas, Hill, and Scott were sleeping. 7 AA 1381, 1382; 8 AA 1650; 9 AA 1780, 1789. As discussed more fully above, such use of a deadly weapon is substantial evidence of intent to kill. A rational juror was free to infer that Appellant possessed the intent to kill by firing the shots himself, or assisting and/or conspiring with Moten to do so.

D. There Was Sufficient Evidence to Convict Appellant of Discharging Firearm At or Into Structure[4]

[4]Appellant does not appear to challenge his convictions for Possession of Firearm by Ex-Felon or Battery With Use of a Deadly Weapon. Appellant's Opening Brief, at 35-38.

NRS 202.285(1) provides: "[a] person who willfully and maliciously discharges a firearm at or into any … apartment…[i]f it is occupied, is guilty of a category B felony." The term "maliciously" refers to "an evil intent, wish or design to vex, annoy or injure another person." NRS 193.0175. "Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty." Id. In interpreting this definition, this Court has concluded "[a]lthough this definition does refer to intentional conduct, it also includes conduct betraying a social duty….'maliciously' is not consumed by intentional conduct." Ewish v. State, 110 Nev. 221, 228 n.4, 871 P.2d 306, 311 n.4 (1994). Thus, an individual acts maliciously if he intentionally commits the prohibited conduct; "specific intent to commit some further act" is not required. Id.

Here, the State presented sufficient evidence that Appellant willfully and maliciously discharged a firearm at an occupied apartment or aided, abetted, counseled, encouraged, commanded, or induced another to do so. Considering the 13 bullet strikes to the apartment, the fact that Appellant was found driving a vehicle that matched the witness's description shortly after the shooting, and that both firearms involved in the shooting were found inside that vehicle, rational jurors could infer Appellant conspired with and/or aided and abetted another person to

discharge a firearm into an apartment, and/or directly did so himself. 6 AA 1249, 1279; 8 AA 1650; 9 AA 1780, 1789.

Appellant's contention that the State only proved misdemeanor conduct is without merit. To prove Appellant was guilty of a Category B felony, the State was required to prove the apartment was occupied. NRS 202.285(1). Regarding Appellant's state of mind, the State was only required to prove he acted willfully and maliciously in the discharge of the firearm, not that he was aware the apartment was not abandoned. See Ewish, 110 Nev. at 228 n.4, 871 P.2d at 311 n.4. The State proved beyond a reasonable doubt that the apartment was occupied, as multiple witnesses testified that Scott, Rawls, Thomas, and Hill were inside the apartment at the time of the shooting. 7 AA 1381-82; 1431; 1463, 1466-67. There were curtains on the windows. 6 AA 1237. Thomas testified that the television in the apartment was on at the time of the shooting. 7 AA 1388. Further, the jury was free to infer that Appellant believed the apartment to be occupied. The shooting occurred at approximately 4:30 am, when most people would be expected to be inside their homes and asleep. 6 AA 1242; 7 AA 1382. Photographs of the apartment complex and the apartment where the shooting occurred were admitted at trial, and thus the jurors were able to determine whether the building appeared occupied or not. 6 AA 1231-37. A reasonable trier of fact could rationally conclude Appellant

conspired with and/or aided and abetted another person to discharge a firearm into an apartment, and/or directly did so himself.

IV
THE JURY WAS PROPERLY INSTRUCTED

This Court reviews a trial court's decision whether to give a jury instruction for abuse of discretion. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005). "District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). Whether an instruction given to the jury is a correct statement of the law is reviewed de novo. Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

A. Informing Jury Charges Were Felonies

"Failure to object to or request a jury instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect the defendant's right to a fair trial." McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998) (*citing* Flanagan v. State, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996)). At trial, Appellant raised no objection to Jury Instruction 3. 9 AA 1860. Thus, this claim has been waived for appellate review. Regardless, Appellant's claim fails on its merits.

It was not an abuse of discretion for the District Court to give Jury Instruction 3, which presented the charges as alleged in the Information, including the applicable statutes and felony classifications. 4 AA 690-701. Unsurprisingly, Appellant fails to cite a single authority to support his assertion that it was error to allow the jury to know the classification of the offenses with which he was charged. There is no requirement that jurors must be prevented from knowing whether or not a defendant is being charged with felonies. In fact, at times a jury is required to be given such information. For example, if a defendant is being charged with Murder under a felony murder theory, the jury is informed that one or more of the other charges are felonies. See NRS 200.030(1)(b). Further, Appellant fails to explain how informing the jurors that the charges were felonies allowed them to consider punishment in their deliberations. As Appellant acknowledges, the jurors were properly instructed not to consider punishment during the guilt phase of the trial. 4 AA 711. There is no indication that the jurors disregarded that instruction.

Further, Appellant fails to explain how presenting such information to the jury prejudiced him. It is disingenuous at best to claim the jurors would not otherwise realize the seriousness of the offenses. Appellant was charged with committing First Degree Murder, the most serious of all offenses, as well as Conspiracy to Commit Murder, Attempt Murder With Use of a Deadly Weapon, and Battery With Use of a Deadly Weapon. RA. It is nonsensical to claim the jurors would not realize such

charges were felonies without being so informed by Jury Instruction 3. Even had Jury Instruction 3 not contained the classifications of the charges, the jury would still have been informed that the charges were felonies when the Information was read to them at the beginning of the trial. 6 AA 1210. Appellant also does not explain how informing the jury that the charges were felonies allowed them to consider punishment. Jury Instruction 3 provided no information regarding the punishments Appellant could receive if convicted. 4 AA 690-701. It was not an abuse of discretion to give Jury Instruction 3, and Appellant's baseless argument should not be entertained by this Court.

B. Motive Instruction

At trial, defense counsel proposed the following instruction:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may be sufficient to leave you with a reasonable doubt as to the guilt of the defendant. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.[5]

3 AA 686-86. Jury Instruction 4 instructed the jurors regarding motive as follows:

> Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

[5]Defense counsel and the District Court discussed the proposed jury instruction in chambers. 9 AA 1860. The District Court gave defense counsel the opportunity to make an additional record regarding the proposed instruction, and defense counsel declined. 9 AA 1860-61.

4 AA 702. Appellant provides no support for his claim that denying his proposed instruction amounted was arbitrary and capricious, or that jurors should be instructed that the absence of motive should be considered as a circumstance of reasonable doubt. "[I]t is not error to refuse to give an instruction when the law encompassed therein is substantially covered by another instruction given to the jury. Ford v. State, 99 Nev. 209, 211, 660 P.2d 992, 993 (1983) (*citing* Hooper v. State, 95 Nev. 924, 604 P.2d 115 (1979)). Jury Instruction 4 accurately instructed the jurors that motive was not an element of the crime, but that they could consider motive or the lack thereof as a circumstance in the case. 4 AA 702. See Briano v. State, 94 Nev. 422, 425, 581 P.2d 5, 7 (1978) ("The state need not prove motive.") (*citing* State v. Plunkett, 62 Nev. 265, 149 P.2d 101 (1944)). Appellant's citation to People v. Estep, 42 Ca. App.4th 733, 738 (1996) does not support Appellant's claim. In that case, the Court of Appeal of California upheld a jury instruction similar to that used in this case, with the additional language: "[p]resence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled." People v. Estep, 42 Cal. App. 4th 733, 738, 49 Cal. Rptr. 2d 859, 862-863 (Cal. App. 3d Dist. 1996). Appellant has not cited a single authority stating that jurors must be instructed that the lack of motive may be sufficient to establish

reasonable doubt. The District Court's denial of Appellant's entirely unnecessary proposed instruction was not an abuse of discretion.

V
THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

During closing argument, the prosecutor stated to the jury that in their determination regarding whether the intent to kill was present "you look at the facts and circumstance of the killing. The use of a weapon calculated to produce death and the manner of its use."[6] 9 AA 1878. The prosecutor stated that Appellant and Moten possessed the intent to kill "each time they pulled that trigger of either firearm." 9 AA 1878. Appellant made no objection to this argument at trial, and thus Appellant's claim has been waived for appellate review. See, e.g., Riley v. State, 107 Nev. 205, 208, 808 P.2d 551, 559 (1991) ("to entitle a defendant to have improper remarks of counsel considered on appeal, objections must be made to them at the time"). Regardless, as demonstrated below, Appellant's claim is without merit.

[6]The State is forced to presume this is the portion of the State's closing argument to which Appellant is referring. Appellant provides no citation to the record to clarify what specific statements by the prosecutor form the basis for Appellant's claim. Appellant's Opening Brief, at 40-41. This is a clear violation of NRAP 28(a)(9) (Appellant's argument must contain "appellant's contentions and the reasons for them, *with citations to the authorities and parts of the record* on which the appellant relies.") (emphasis added).

To determine whether prosecutorial misconduct occurred, the Court "must determine whether the prosecutor's conduct was improper," and then, "must determine whether the improper conduct warrants reversal." Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Reversal of a conviction is not warranted if the prosecutorial misconduct is harmless error. Id. For misconduct of a constitutional nature, this Court "will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." 124 Nev. at 1189, 196 P.3d at 476 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967)). When the misconduct is not constitutional, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

The prosecutor made an appropriate argument that accurately instructed the jury that the intent to kill can be inferred from the circumstances of the killing. "Intent to kill, as well as premeditation, may be ascertained or deduced from the facts and circumstances of the killing, *such as use of a weapon calculated to produce death*, the manner of use, and the attendant circumstances." Dearman, 93 Nev. at 367, 566 P.2d at 409 (emphasis added). "[T]he jury may infer intent to kill from the manner of the defendant's use of a deadly weapon." Valdez, 124 Nev. at 1197, 196 P.3d at 481 (*citing* Dearman, 93 Nev. at 367, 566 P.2d at 409). Further, the prosecutor's explanation of the law was nearly identical to the language in Jury Instruction 29, to which Appellant has raised no objection, either at trial or on appeal.

4 AA 727. Thus, the prosecutor was entitled to argue that when Appellant and Moten fired multiple shots from their firearms, into the apartment, they possessed the intent to kill.

In essence, despite his failure to acknowledge the precedent that directly contradicts his position, Appellant is asking this Court to overrule its own long-established case law that jurors may infer intent to kill from a defendant's use of a firearm or other deadly weapon. In a failed attempt to support his argument, Appellant cites a single, non-applicable case, Rose v. State, 127 Nev. __, __, 255 P.3d 291 (2011). Obviously, this Court's holding in that case, that assaultive-type felonies involving threat of immediate injury may not be used as the basis for a Second-Degree Felony-Murder conviction, has no bearing on the instant case, which does not involve the felony murder doctrine. 127 Nev. at __, 255 P.3d at 293. Appellant's bizarre comparison of the State's argument to the felony murder doctrine should not be entertained by this Court. Appellant's preposterous claim is without merit.

VI
APPELLANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN THE POLICE SEARCHED HIS VEHICLE PURSUANT TO A LAWFUL SEARCH WARRANT

A. Standard of Review

Appellant made no objection regarding the lawfulness of the vehicle search at trial, and made no motion to suppress evidence obtained from the vehicle search,

and therefore this claim has been waived for appellate review. See, e.g.,. Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997) (finding failure to object during trial generally precludes appellate consideration of an issue). A motion to suppress evidence must be made before trial. NRS 174.125(1). Regardless, Appellant's argument fails on its merits.

A search for Fourth Amendment purposes occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." Maryland v. Macon, 472 U.S. 463, 469 (1985) (*citing* United States v. Jacobsen, 466 U.S. 109, 113 (1984)). "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." Katz v. United States, 389 U.S. 347, 361 (1967). Pursuant to the Fourth Amendment, unless one of the specified exceptions applies, a search must be authorized by a warrant. Johnson v. United States, 333 U.S. 10, 14-15, 68 S.Ct. 367, 369 (1948). The warrant must be based upon probable cause, be issued by a neutral and detached magistrate, and must describe with particularity the place to be searched and the items to be seized. Id.

B. The Search Was Executed Pursuant to a Valid Search Warrant

There was no Fourth Amendment violation here because the search of the Dodge Magnum was pursuant to valid search warrant. 7 AA 1335.[7] Appellant fails to support his claim that, after the first firearm was recovered from the vehicle, the search warrant was no longer in effect, and an additional search warrant was necessary before additional searching for the second firearm could occur.

Whether a search warrant was executed in a manner that did not infringe upon a defendant's Fourth Amendment rights is determined by how related the police actions are to the "objectives of the authorized intrusion." Wilson v. Layne, 526 U.S. 603, 611, 119 S. Ct. 1692, 1698 (1999). See also Maryland v. Garrison, 480 U.S. 79, 87, 107 S. Ct. 1013, 1018 (1987) (the purposes justifying the issuance of a search warrant limit the permissible extent of the search). "If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." Horton v. California, 496 U.S. 128, 140, 110 S. Ct. 2301, 2310 (1990).

[7]The State notes Appellant does not appear to be challenging the validity of the search warrant that was issued, only that police actions exceeded the authorization provided in that warrant. Due to this issue not being raised below, and Appellant providing no documentation regarding what was authorized by the warrant, the record regarding the warrant's scope is minimal.

Here, the search of the vehicle was conducted pursuant to a lawful warrant.[8] Detective Rogers obtained a warrant to search the Dodge Magnum Appellant had been driving; the warrant did not limit Metro to searching for only a specific firearm. 7 AA 1335, 1336. The search warrant authorized Metro to search the vehicle for evidence of a crime. Pursuant to Nevada statute, a warrant may authorize the search and seizure of property that has been stolen or embezzled, that is intended to be or has been used as the means for committing a crime, or is evidence tending to show that a crime has been committed, or that a particular person has committed a crime. NRS 179.035. Appellant cites nothing in the record that indicates the warrant limited the number of times the vehicle could be searched or the exact property for which the police could seek to obtain. That Detective Rogers, and not the crime scene analysts, initiated the search for the second firearm, and that he pulled off part of the panel to see inside the steering column, is irrelevant because the search warrant authorized a search of the vehicle. 7 AA 1335, 1336, 1339. The warrant clearly authorized Detective Rogers and other Metro employees to search the vehicle for evidence of a crime. Clearly, the recovered firearms were evidence in this case.

[8]The State notes that, although the search was conducted pursuant to a warrant, Appellant also gave consent for police to search the vehicle. 6 AA 1284. Further, even without a warrant, Detective Rogers' search for the second firearm could be justified under the automobile exception to the warrant requirement. See United States v. Ross, 456 U.S. 798, 825, 102 S. Ct. 2157, 2173 (1982) ("If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.").

Appellant has not demonstrated that the search exceeded the scope of that authorized by the warrant.

Unsurprisingly, as none exists, Appellant cites no authority for his baseless assertion that, upon discovery of the first firearm under the front seat of the vehicle, the search warrant magically expired and all probable cause to search the vehicle vanished. Appellant provides no citation to the record to substantiate his claim that the search warrant was limited in this manner. A warrant to search a vehicle does not automatically expire upon the finding of a single weapon, nor does such a warrant limit the police to one search of the vehicle. The only limitation of this type is that the execution of the search warrant must be executed and returned within 10 days of its issue date. NRS 179.075(1).

In Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998), this Court held that performing two separate searches, three days apart, was constitutionally valid and did not exceed the scope of the search warrant. Id. at 525, 960 P.2d at 798. In that case, the warrant was issued authorizing a search of the defendant's home and the execution of a serology kit on the defendant. Id. at 524, 960 P.2d at 798. At the time the warrant was executed, however, the detective mistakenly used a DUI kit instead of the proper serological kit. Id. Three days later, pursuant to the same warrant, the detective obtained a second serology kit from the defendant. Id. This Court held a second search warrant for the second blood draw was unnecessary, stating "the

acquisition of the second serology kit from [the defendant] on July 18, 1995, was constitutionally valid because it was obtained within the ten-day statutory time period prescribed by NRS 179.075(1)." Id. at 525, 960 P.2d at 798.

The facts here are similar to those in Bolin. Detective Rogers obtained a search warrant for the Dodge Magnum. 7 AA 1335. An initial search was completed, and one firearm was recovered from the vehicle. 7 AA 1335, 1336. Soon afterward, Detective Rogers then received new information indicating that a second firearm was possibly contained inside the vehicle. 7 AA 1338-39. Detective Rogers searched the vehicle, discovered a second firearm was located inside of the steering column, and had crime scene analysts dispatched to his location to recover the firearm. 7 AA 1339, 1340. These facts are even more favorable to the police than in Bolin. The search for the second firearm was conducted soon after the initial search for the vehicle, not three days later. 7 AA 1339. The searching of the vehicle clearly was conducted prior to the ten-day time limitation of NRS 179.075(1). Appellant's argument has no support in Nevada's case law or statutes.

Curiously, Appellant cites non-controlling cases that contradict his argument. See United States v. Keszthelyi, 308 F.3d 557, 568 (6th Cir. 2002) ("a single search warrant may authorize more than one entry into the premises identified in the warrant, as long as the second entry is a reasonable continuation of the original search."); United States v. Kaplan, 895 F.2d 618, 623 (9th Cir. 1990) ("the entry and

search two hours later for files listed on the search warrant renders the second entry a continuation of the first."); United States v. Gagnon, 635 F.2d 766, 769 (10th Cir. 1980) (concluding exigent circumstances prevented full execution of the warrant, and thus police were justified in remaining on the property until the entirety of the contraband could be transported); State v. Hai Kim Nguyen, 419 N.J. Super. 413, 427, 17 A.3d 256, 264 (App. Div. 2011) (concluding a search of the defendant's vehicle to obtain the murder weapon, which occurred within a short time after the initial search, was a continuation of the original search).

Appellant has not demonstrated that the search of Appellant's Dodge Magnum was not conducted pursuant to a valid search warrant. His preposterous interpretation of the Fourth Amendment's warrant requirement should not be entertained by this Court.

VII
APPELLANT'S CONFRONTATION CLAUSE RIGHTS WERE NOT VIOLATED

At trial, Anya Lester ("Lester"), a forensic scientist in Metro's Firearms and Toolmarks Analysis Unit, testified that after she forms a conclusion about a firearm or other piece of evidence, "that conclusion has to be verified by a second independent examiner." 9 AA 1798. She testified that "a second examiner physically looks at the same evidence that I look at." 9 AA 1799. She testified that after the verification by a second examiner, "the entire case file goes through a

technical review" to ensure the correct policies and procedures were followed. 9 AA 1799. She testified the entire case file is then given a final administrative review by her manager. 9 AA 1799-80.

Appellant made no objection to Lester's testimony regarding the review of her work by other individuals, and thus failed to preserve this claim for appeal. See, e.g.,. Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997) (finding failure to object during trial generally precludes appellate consideration of an issue). Unpreserved constitutional arguments are reviewed by this Court for plain error. Martinorellan v. State, 128 Nev. __, __, 343 P.3d 590, 593 (2015) ("all unpreserved errors are to be reviewed for plain error without regard as to whether they are of constitutional dimension.").

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364 (2004); see also White v. Illinois, 502 U.S. 346, 359, 112 S.Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in judgment) ("critical phrase within the Clause is 'witnesses against him'"). Thus, testimonial hearsay - i.e. extrajudicial statements used as the "functional equivalent" of in-court testimony - may only be admitted at trial if the declarant is "unavailable to testify, and the defendant had had a prior

opportunity for cross-examination." Crawford, 541 U.S. at 53-54, 124 S.Ct. at 1365. To run afoul of the Confrontation Clause, therefore, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 59, n.9, 124 S.Ct. at 1369 n.9 (*citing* Tennessee v. Street, 471 U.S. 409, 414, 105 S.Ct. 2078, 2081-82 (1985)).

Additionally, pursuant to NRS 51.035, hearsay evidence is evidence of a statement made other than by a testifying witness which is offered to prove the truth of the matter asserted. A witness may testify as an expert witness to matters "within the scope of [his specialized] knowledge," NRS 50.275, based on facts or data "made known to him at or before the hearing," NRS 50.285(1), that are "of a type reasonably relied upon by experts in forming opinions or inferences" and therefore "need not be admissible in evidence," NRS 50.285(2).

In Melendez-Diaz v. Mass., 557 U.S. 305, 311, 129 S.Ct. 2527, 2532 (2009), the Court, in interpreting Crawford, held that forensic reports could not be admitted against a defendant unless the analyst who prepared and certified the report testified and was subject to cross-examination. The Court went on to say, "it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case". Id.

A. The Confrontation Clause Is Not Implicated Because No Testimonial Hearsay Was Admitted Against Appellant

Appellant's right to confrontation was not violated when Lester testified regarding the review procedure Metro employs to ensure the accuracy of its test results. The Confrontation Clause is only implicated when testimonial hearsay is offered against the defendant. See Crawford, 541 U.S. at 53-54, 124 S.Ct. at 1365. Hearsay is a *statement* made other than by a testifying witness which is offered to prove the truth of the matter asserted. NRS 51.035. "A 'statement' subject to the hearsay rule means an oral assertion, an assertion in a record, or nonverbal conduct of a person who intends it as an assertion. A person makes an assertion when that person speaks, writes, acts, or fails to act with the intent to convey an expression of fact or opinion. The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct not intended as an assertion and any oral statement which is not intended as an assertion." 29 Am Jur 2d Evidence § 672.

Here, no statements of other forensic examiners were offered into evidence. Appellant grossly misstates the record by claiming Lester "just gave her opinion and stated others agreed." Appellant's Opening Brief, at 46. Unsurprisingly, Appellant provides no citation to the record to support this flatly incorrect statement. Lester never expressed any assertions or conclusions made by the forensic examiners who routinely review her work. Lester testified regarding the procedures that are

followed in Metro's laboratory, not any specific assertions made by other individuals. 9 AA 1798-1800. On redirect, the prosecutor asked Lester what sort of procedures are followed after Lester finishes testing evidence and has reached her conclusions. 9 AA 1798. Lester then described the review and verification process that is conducted every time she completes the testing of evidence. 9 AA 1798-1800. She did not testify as to any specific conclusions reached by the other examiners, she only described the process by which her results and conclusions are reviewed. Lester's testimony was about the *procedures* followed by the laboratory, not any statements made by those who conducted that process. Appellant claims opinions of non-testifying experts were presented at trial, yet provides no citation of any such opinion. Contrary to Appellant's blatant misstatement of the record, Lester never testified that other forensic examiners formed the same conclusions she did regarding the ballistics evidence in this case. Appellant's Opening Brief, at 44. What is required under Melendez-Diaz and its progeny is that the results of forensic testing not be admitted against a defendant without testimony from the forensic analyst who conducted that testing. See 557 U.S. 305, 311, 129 S.Ct. 2527, 2532. This rule was not violated in this case, as Lester, the analyst who conducted the firearms testing, testified in this case. That other individuals reviewed Lester's work, but their conclusions were not presented at trial, does not amount to a Confrontation Clause violation.

B. Appellant Has Not Demonstrated Plain Error

As Lester's testimony was proper and did not constitute a Confrontation Clause violation, or even involve the admittance of a statement, Appellant is unable to demonstrate the existence of plain error. To show plain error, a defendant must demonstrate that the error was prejudicial and affected his substantial rights. Vega v. State, 126 Nev. __, __, 236 P.3d 632, 638 (2010). Lester's testimony regarding the review process of her testing procedures and results did not prejudice Appellant. There is nothing in the record to indicate that Lester's testimony regarding the firearms testing would not have been credible absent her testimony about the review and verification process used in the laboratory. Accordingly, Appellant's claim is without merit.

VIII
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING EVIDENCE OBTAINED FROM FIELD INTERVIEWS AND PHOTOGRAPHS DEPICTING APPELLANT'S TATTOOS TO BE INTRODUCED AT THE PENALTY HEARING

During the penalty proceeding, Detective Matthew Gillis testified regarding Appellant's prison disciplinary record, gang affiliations and involvement in other crimes, some of which was based upon information obtained through numerous field interviews. 10 AA 1985-2002. Two pictures of Appellant taken during field interviews were admitted. 10 AA 1989, 1991. Three pictures of Appellant taken while he was in prison, which depicted his tattoos, were also admitted. 10 AA 2000-

01. The pictures depicted tattoos of "Lil" on Appellant's right hand, "Matt" on his left hand, "90s baby" on his left wrist, . 10 AA 2000-01. The pictures also depicted a tattoo on Appellant's arm of "RR" which Detective Gillis testified stood for "Rich Rolling." 10 AA 2002. Another picture depicted Appellant's tattoo of the word "sucka", a racial slur, and a downward pointing arrow. 10 AA 2001-02.

At the penalty hearing, Appellant made no objection to the admission of the photographs taken of him while he was in prison or during field interviews, the testimony based upon field interviews of Appellant, or the photographs depicting his tattoos. Thus, Appellant's claim has not been preserved for appellate review. See, e.g.,. Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997) (finding failure to object during trial generally precludes appellate consideration of an issue). Further, when a defendant claims on appeal that evidence introduced at his penalty hearing was unconstitutionally obtained, but raised no objection to its admittance at the penalty hearing, and the evidence on its face does not appear to be unconstitutionally obtained, this Court will not consider such evidence's admissibility on appeal. Bishop v. State, 95 Nev. 511, 517, 597 P.2d 273, 276 (1979). Regardless, Appellant's claim fails on its merits.

"The decision to admit particular evidence during the penalty phase is within the sound discretion of the trial court, and will not be overturned absent an abuse of that discretion." Domingues v. State, 112 Nev. 683, 697, 917 P.2d 1364, 1374 (1996)

(*citing* Milligan v. State, 101 Nev. 627, 708 P.2d 289 (1985), *cert. denied*, 479 U.S. 870, 107 S. Ct. 238 (1986)). Appellant has not demonstrated that the District Court abused its discretion by allowing testimony concerning Appellant's field interviews, and photographs of Appellant taken during field interviews and in prison, to be presented at the penalty hearing.

The District Court did not abuse its discretion by allowing the admission of the photographs and information obtained through field interviews. NRS 175.552(3) makes clear that evidence not admissible at trial is admissible during a penalty proceeding:

> During the [penalty] hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the Constitution of the State of Nevada may be introduced.

See also Riker v. State, 111 Nev. 1316, 1327, 905 P.2d 706, 713 (1995) ("evidence otherwise not admissible at trial is generally admissible at a penalty hearing."). "Evidence of a defendant's character and specific instances of conduct is admissible in the penalty phase where the evidence is relevant and the danger of unfair prejudice does not substantially outweigh its probative value." Harte v. State, 116 Nev. 1054, 1071, 13 P.3d 420, 431 (2000) (*citing* McKenna v. State, 114 Nev. 1044, 1051-52, 968 P.2d 739, 744 (1998)).

Appellant has not demonstrated, nor even argued, that this evidence was so unfairly prejudicial as to substantially outweigh its probative value. Detective Gillis testified that during numerous field interviews, Appellant admitted to membership or association with the gang the Rolling 60s. 10 AA 1985-86, 1988, 1989, 1991, 1992. Detective Gillis also testified regarding Appellant's probation violation and his involvement in other crimes. 10 AA 1990-2000. All of this was evidence of Appellant's character, which is admissible at a penalty hearing pursuant to NRS 175.552(3). Appellant has not shown that such information was unfairly prejudicial to Appellant.

Appellant attempts to impose a new requirement that lower courts *sua sponte* conduct evidentiary hearings regarding whether evidence was constitutionally obtained prior to its admittance in a penalty proceeding. Appellant fails to cite a single authority for this claim, which is not surprising, as this requirement exists nowhere in Nevada's statutes or case law.[9] Appellant neither requested such a hearing or objected to this evidence during the penalty phase, and has not demonstrated that the field interviews were conducted in an unconstitutional

[9]Appellant's reference to Somee v. State, 124 Nev. 434, 187 P.3d 152 (2008), is unpersuasive, as in that case this Court held that field interviews must comply with constitutional requirements before evidence obtained from them may be admitted against a defendant during the *guilt* phase. Id. at 444, 187 P.3d at 159. This Court made no decision in Somee regarding the use of evidence obtained through field interviews during the penalty phase.

manner. The field interviews, on their face, do not appear to have violated Appellant's constitutional rights. Per the testimony, one interview occurred when Metro was responding to a traffic violation and another when Metro was investigating a shooting incident. 10 AA 1986, 1990. Thus, this Court should not consider Appellant's claim. Bishop, 95 Nev. at 517, 597 P.2d at 276.

Finally, Appellant's claim that the photographs of his tattoos were more prejudicial than probative is entirely unsupported. Evidence regarding the defendant is admissible during the penalty phase, provided the danger of unfair prejudice does not substantially outweigh its probative value. NRS 48.035(1); Harte, 116 Nev. at 1071, 13 P.3d at 431. In Bollinger v. State, 111 Nev. 1110, 901 P.2d 671 (1995), this Court upheld the admission at the penalty hearing of photos depicting the defendant's tattoo of the defendant's nickname "Pyro." Id. at 1112, 1116, 901 P.2d at 673, 675. This Court, *citing* NRS 175.552(3), stated the tattoo was "relevant evidence concerning [the defendant's] character." Id. at 1116, 901 P.2d at 675. Similarly here, Appellant's tattoos were relevant as they demonstrated Appellant's character, and there is no indication they were so prejudicial that their probative value was substantially outweighed. This evidence is certainly no more prejudicial than Appellant's numerous prior convictions, which were also introduced through Detective Gillis's testimony. 10 AA 1996, 1997, 1998. Appellant presents no authority or analysis regarding his claim that the photos were prejudicial, instead

claiming the number of tattoos were "excessive" and then arguing, *ipse dixit*, that the evidence was "more prejudicial than probative."[10] Appellant's claim is unsupported and should not be considered by this Court.

IX
CUMULATIVE ERROR DOES NOT WARRANT REVERSAL

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). A defendant must present all three elements. Id.

There was substantial evidence to secure Appellant's convictions. Thus, the issue of guilt is not close. Regarding the gravity of the crimes charged, Appellant was convicted of grave crimes. See Valdez v. State, 124 Nev. 1172, 1198, 196 P.3d 465, 482 (2008) (stating first degree murder and attempt murder are very grave crimes). In light of this severity, this Court should ignore errors that are inconsequential because "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Johnson v. United States, 520 U.S. 461, 470, 117 S.Ct. 1544, 1550

[10]The State notes that this is not the correct standard for determining the exclusion of evidence. See NRS 48.035(1)(" Although relevant, evidence is not admissible if its probative value is *substantially outweighed by the danger of unfair prejudice*, of confusion of the issues or of misleading the jury.") (emphasis added).

(1997) (quoting R. Traynor, The Riddle of Harmless Error, 50 (1970)); Accord, NRS 178.598.

Regarding the quantity and quality of error issue, Appellant fails to demonstrate any error, let alone establish that these alleged errors combined to violate his right to a fair trial. Therefore, the State requests this Court deny Appellant's request and affirm his convictions.

CONCLUSION

Based on the foregoing, the State respectfully requests that the verdict and sentence be affirmed.

Dated this 6th day of August, 2015.

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 12,914 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 6, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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