IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE DELL MCNEILL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 66697

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUES

1. Whether Appellant's lifetime supervision was constitutional
2. Whether the State presented sufficient evidence to support Appellant's violation of lifetime supervision charge
3. Whether the jury instructions given by the district court were correct
4. Whether the district court was correct in denying Appellant's Motion for Judgment of Acquittal
5. Whether Appellant's sentence amounted to cruel and unusual punishment
6. Whether State's witness's testimony resulted in prejudicial error
7. Whether Appellant's due process rights were violated when the State was not required to reveal the criminal history of witnesses
8. Whether the district court erred in allowing the State's expert to testify
9. Whether cumulative error warrants reversal
10. Whether the district court was correct in denying Appellant's Batson challenge

STATEMENT OF THE CASE

On August 10, 2014, Steve Dell McNeill (hereinafter "McNeill"), was charged by way of Criminal Complaint with one count (Count 1) of Violation of Lifetime Supervision by Convicted Sex Offender (Category B Felony – NRS 213.1243-53481) and one count (Count 2) of Prohibited Acts by a Sex Offender (Category D Felony – NRS 179D.441, 170D.447, 179D.440-52950). 1 Appellant's Appendix (hereinafter "AA") 1-2. A preliminary hearing was held on April 29, 2014. 1 AA 3-76. The case was bound up to District Court. 1 AA 76. Defendant was charged by way of Information with the aforementioned counts on May 5, 2014. 1 AA 89-91. An Amended Information and Second Amended Information were filed charging the same counts on July 7, 2014 and July 9, 2014. 1 AA 126-127, 148-149.

McNeill's jury trial began on July 7, 2014. 2 AA 259. On July 9, 2014, Defendant was found guilty of Count 1. 1 AA 169. The Judgment of Conviction was entered on September 18, 2014. 1 AA 190-91. On September 10, 2014, McNeill was sentenced to a minimum of 12 months and a maximum of 36 month, with 150 days credit for time served. 1 AA 238.

Defendant filed a Motion for Arrest of Judgment Pursuant to NRS 176.525 or, in the Alternative, Motion for Judgment of Acquittal Pursuant to NRS 175.381. 1 AA 175-179. The State filed its Opposition on July 29, 2014. 1 AA 180-184. McNeill filed his Notice of Appeal on October 10, 2014. 1 AA 192-194.

STATEMENT OF THE FACTS

Ashley Mangan, a Parole and Probation Officer (hereinafter "P&P) in the Sex Offender Unit, supervised McNeill. 2 AA 344-45. McNeill is a convicted sex offender who was on Lifetime Supervision and had signed agreements to that effect. 2 AA 345. The first time Mangan made contact with McNeill was on March 29, 2013. 2 AA 351. At that point McNeill was homeless. 2 AA 351. Mangan was able to meet with him at the P&P Office and go over his monthly report, which McNeill filled out. 2 AA 352. In this report, Mangan imposed a 5:00 p.m. to 5:00 a.m. curfew, but also noted that he does not have a residence and thus needs to be at the corner of Main and Colorado during that time frame. 2 AA352.

The next meeting between Mangan and McNeill occurred on April 12, 2013. 2 AA 353. During this meeting, Mangan discovered that McNeill was not attending counseling, which was a concern as part of his lifetime supervision was to complete sex offender counseling. 3 AA 353. He also specified the area in which he spent time during the hours of his curfew, between the areas of Main and Wyoming. 2 AA 353. McNeill also asked for an extended curfew, to which Mangan complied and extend to 8:00 p.m. to 5:00 a.m.. At some point in April, after the monthly meeting, Mangan attempted to check on McNeill at 8:20 p.m., but he was not in his reported area. 2 AA 354.

Mangan met with McNeill again in May, where he again filled out a monthly report. 2 AA 354. As she was unable to locate him after curfew in April, she requested at this meeting that McNeill put in more detail where he sleeps so she could locate him. 2 AA 354. They met again in June when McNeill filled out another monthly report. 2 AA 355.

When they met in July, Mangan spoke with McNeill about his noncompliance with curfew, that he was not paying fees, he was not employed and that he was not attending counseling. 2 AA 355-56. Mangan arrested McNeill at this time, but the charges were not pursued by the State. 2 AA 356. In August, McNeill refused to submit to a urinalysis. 2 AA 356. McNeill would not listen to her, so she had him speak with her supervisor, Sergeant Zana. 2 AA 356. McNeill continued to refuse to submit to a urinalysis. 2 AA 356. McNeill stated he would not be "kept like a dog on a leash," and continued to refuse the urinalysis and to follow curfew hours. 2 AA 357. McNeill also refused to come in for the required weekly office visit. 2 AA 357. He told Sergeant Zana that he was only reporting to Mangan as a "courtesy," after which Zana explained that it was required under the law that he do so. 2 AA 367.

In August of 2013, McNeill send a "cease and desist" letter to Captain Sawyer, the head of P&P. 2 AA 357. The letter essentially stated that P&P had no authority over him and should not continue to contact him. 2 AA 357.

Between August of 2013 and March of 2014, Mangan attempted to contact McNeill at his address of Main and Wyoming. 2 AA 357-58. She was unsuccessful. 2 AA 358.

SUMMARY OF THE ARGUMENT

McNeil's lifetime supervision agreement was constitutional, as it did not violate the separation of powers or due process. The district court correctly determined that additional conditions not specifically enumerated in NRS 213.1243 may be established and enforced when supervising a sex offender on lifetime supervision. Based on the constitutionality of McNeil's lifetime supervision agreement, McNeil's claims of error involving jury instructions and his motion for judgment of acquittal are without merit.

Additionally, there was sufficient evidence to convict McNeil of violation of his lifetime supervision agreement. The State successfully proved beyond a reasonable doubt that McNeil was a sex offender who violated the terms of his lifetime supervision agreement. As such, McNeil's sentence did not amount to cruel and unusual punishment.

Furthermore, McNeil was not prejudiced by witnesses' testimony as a sex offender because McNeil stipulated to being both a sex offender and on lifetime supervision. Next, McNeil's due process rights were not violated because the State did not withhold any exculpatory information.

Further, the district court did not err in allowing the State's expert to testify. The witness was not put forth as an expert and testified to her lay opinions.

Lastly, cumulative error does not warrant reversal. Although the State contends there was no error, even if this Court did decide to accumulate McNeil's claims cumulative error is not warranted. Therefore, this Court should affirm Appellant's Judgment of Conviction

ARGUMENT

I. MCNEIL'S LIFETIME SUPERVISION WAS CONSTITUTIONAL

McNeil's lifetime supervision agreement was constitutional, as it did not violate the separation of powers or due process. McNeil submits that both the standard requirements included in lifetime supervision agreements and the special requirements approved by the parole board in McNeil's November 2012 lifetime supervision agreement are unconstitutional. Opening Brief (hereinafter "OB"), p. 14. McNeil erroneously contends that although he signed the lifetime supervision agreement containing additional conditions, such conditions that are not enumerated in NRS 213.1243 are unconstitutional and unenforceable as lifetime supervision violations. However, the district court correctly determined that additional conditions not specifically enumerated in NRS 213.1243 may be established and enforced when supervising a sex offender on lifetime supervision. 3 AA 473, 484. The district court found:

> "… in the Nevada Administrative Code, it does give the board, who ultimately is the one that signs off on these conditions of lifetime supervision, the authority to determine what those conditions should be based on who the offender is and what the offender is and what the offender's progress has been with regard to their – and as its specifically stated, 'progress of the sex offender while on parole and probation or an institution or facility of the department, as applicable." III AA 473.

A. McNeil's Lifetime Supervision Conditions Do Not Violate the Separation of Powers

NRS 213.1243 does not impermissibly grant the Board the authority to define what actions give rise to criminal culpability, as to offend the separation of powers. The Nevada Constitution, Art. 3, § 1 provides:

> "The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution."

"The power to define what constitutes a crime lies exclusively within the power and authority of the legislature." Sheriff v. Luqman, 101 Nev. 149, 153, 687 P.2d 107, 110 (1985) (*citing* Schmidt v. State, 94 Nev. 665, 584 P.2d 695 (1978); Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975); Egan v. Sheriff, 88 Nev. 611, 503 P.2d 16 (1972)). However, a legislative body is also necessarily vested with the power to delegate authority to administrative agencies to facilitate the practical execution of the law it enacts. Id. An administrative

agency may therefore enable the application or operation of a statue by enacting policies and procedure to determine relevant facts or set certain conditions without violating the separation of powers clause. Id.

In Luqman, this Court held the legislature's delegation of authority to the pharmacy board to determine the classification of controlled substances did not violate the separation of powers clause. Id. at 154, 697 P.2d at 110-11. The Pharmacy Board was given the sole discretion to determine the dangerousness of particular controlled substances and classify those substances into various schedules. Id. at 152-53, 697 P.2d at 109-10. The defendants claimed the classification scheme constituted an impermissible delegation of legislative authority because it vested the power to define the elements of a crime with the Pharmacy Board. Id. This Court held the delegation of authority did not permit the Pharmacy Board to define elements of crimes because the Pharmacy Board was only exercising its fact-finding authority, and furthermore, the Legislature, and not the Pharmacy Board, established the particular penalties for a violation. Id. at 154, 697 P.2d at 110-11.

Similarly, McNeil argues that the Board is usurping legislative authority because its functions exceed mere fact-finding, thereby effectively allowing the Board to define what conduct would result in a felony conviction for non-compliant offenders. Pursuant to the legislative delegation of authority in NRS

213.1243, the Board enacted NAC § 213.290, which sets forth a regulatory scheme that allows the Board to exercise its fact-finding authority to determine the specific conditions of lifetime supervision for each offender based upon recommendations provided by Parole and Probation. NAC § 213.290(4)-(5). The procedures guiding the Board in establishing conditions of lifetime supervision are driven by the Board's fact-finding actions, and not by some rogue determination. Thus, NRS 213.1243 has not impermissibly granted the Board the authority to unilaterally determine legislative directives.

Moreover, the Legislature, and not the Board, established the penalties for a violation of conditions of lifetime supervision. The Board is therefore not vested with the authority to define the elements of a crime. By Appellant's logic, each time a district court adopts certain conditions of probation or the Board establishes specific conditions for parolees, a new crime has been created and the Legislature's authority has been usurped. This is an absurd result. Because NRS 213.1243 does not constitute an impermissible delegation of legislative authority, it does not violate the separation of powers clause.

B. The Conditions of Lifetime Supervision Allowed Under NRS 213.1243 Are Not Ambiguous, Vague or Overbroad

The conditions of McNeill's lifetime supervision sentence are not impermissibly vague in their terms or application. The conditions were set forth in an agreement which McNeill personally agreed to and signed. This claim is without merit.

A statute is unconstitutionally vague only when it fails to provide adequate notice to the public of what conduct is prohibited, and lacks specific standards, thereby authorizing or encouraging arbitrary and discriminatory enforcement. Sheriff v. Burdg, 118 Nev. 853, 857, 59 P.3d 484, 486-87 (2002). To determine whether a statute is vague, the court must look to the terms at issue; however, the terms cannot be read in a vacuum. Mangarella v. State, 117 Nev. 130, 137, 17 P.3d 989, 993 (2001). Rather, a term can derive its meaning and context from the statutory scheme as a whole. City of Las Vegas v. Eighth Judicial Dist. Ct., 122 Nev. 1041, 146 P.3d 240, 245 (2006). Although "there may be some marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls," a statute is not automatically deemed unconstitutional based upon that fact alone. U.S. v. Petrillo, 332 U.S. 1, 708, 67 S.Ct. 1538, 1542 (1947).

For a statute to be considered facially vague, it must be impermissibly vague in each and every application. Villiage of Hoffman Estates v. Flipside, 455 U.S. 489, 495, 102 S.Ct. 1186, 1191 (1982). Indeed, to succeed on a facial vagueness challenge, the petitioner must prove the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but incomprehensible normative standard, but rather, in the sense that no standard of conduct is specified at all." Coates v. City of Cincinnati, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688 (1971). Accordingly, a statute will gives sufficient notice of proscribed

conduct when, viewing the context of the entire statute, the words have a well-settled and ordinarily understood meaning. Nelson v. State, 123 Nev. 534, 540-41, 170 P.3d 517, 522 (2007).

Here, McNeil alleges his lifetime supervision conditions are vague because he was not given notice as to what additional conditions would be prohibited if he pleaded guilty. OB at 32. Appellant has failed to demonstrate that the conditions of his Lifetime Supervision Agreement, when read as a whole, are vague therefore his constitutional challenge must fail. Even if these terms are construed as vague, the appropriate remedy would be to strike those terms, not eliminate lifetime supervision it its entirety. Essentially, McNeill's argument is simply, once again but couched in different terms that it is unconstitutional he was held to conditions that are not enumerated in NRS 213.1243. However, McNeil's claim is wholly without merit because at the time the conditions are imposed, the Board will determine which conditions are appropriate for each defendant, after a hearing. NRS 213.1243; NRS 213.1095; NRS 213.1096; Johnson v. State, 123 Nev. 139, 144, 159 P.3d 1096, 1098 (2007); Palmer v. State, 118 Nev. 823, 827, 59 P.3d 1192, 1194 (2002).

II. THERE WAS SUFFICENT EVIDENCE TO CONVICIT MCNEIL OF VIOLATION OF HIS LIFETIME SUPERVISION CONDITIONS

There was sufficient evidence to convict McNeil of violations of Lifetime Supervision NRS 213.1243.

A. The State Proved McNeil was a Convicted Sex Offender Sentenced to Lifetime Supervision

McNeil contends that the State failed to prove that he was a convicted sex offender sentenced to lifetime supervision. OB at 38. Specifically, McNeil alleges that the "State needed to present certified copies of the conviction in C204263 during trial but outside the presence of the jury and not subject to jury review." Id. McNeil does not bring this argument in good faith, as McNeil requested and agreed to a stipulation of these issues to avoid prejudicing the jury with the fact his conviction involved a young child. McNeil request that the jury not hear the specifics of his underlying conviction regarding a minor child. He requested of the court the following:

> We would ask that this jury not be informed of what the underlying offense was. And the United States Supreme Court case *Goldcheek* (phonetic) specifically says that where the defense was willing to stipulate it was a felony it was more prejudicial than probative. The jury did not need to know what the underlying felony was.
>
> We would like to stipulate that he is a sex offender and for the jury not to be informed of what the underlying sex offense was. There is no probative value in what the underlying sex offense was. The only probative value in this case is that he is a sex offender and that he is on lifetime supervision. We will stipulate to both of those.

2 AA 261. After the State agreed to the stipulation and further discussion, the court responded:

> Okay. We will go ahead and note the stipulation for the record that that is how we would proceed is that you will be referred to as a convicted sex offender. There has been a stipulation. I don't know how you want to address it at some point with the jury, or if we do, in terms of the parties have stipulated to these facts for purposes of proceeding with the trial because it is going to get out there anyway. Maybe it needs to get out there as sort of a beginning point of the case and then the charges are what the charges are related to that and then we just proceed with the proof of the charges.

2 AA 266. The Court then ordered a Second Amended Information that removed the charges but would keep the date and the reference to the Lifetime Supervision Agreement. 2 AA 266. The defense counsel then proposed the following:

> And the way we would propose if the court and parties have no objection would be Lifetime Supervision Agreement signed by this defendant in 2007. And I believe the new one says and signed in 2012. And then say pursuant to having in 2004 being convicted of a sex offense in the Eighth Judicial District Court, Clark County, Nevada, to-wit by refusing to submit – literally just taking out the convicted of, the name of, the charge and replacing the name of the charge with "of sex offense in the Eighth Judicial District Court."

2 AA 266. The State then agreed to this change. 2 AA 266. Additionally, the Court canvassed McNeill on whether he understood what the stipulation meant:

> The Court: But certainly what we need to accomplish Mr. McNeill, is your counsel is doing a lot of talking for you, obviously, when it comes to certain things like whether or

> not you would intend to testify on your own behalf, which we don't discuss that until its closer to the time to do that. But for the purposes of today, as we are proceeding, we have you through your counsel indicating that you are choosing to do a stipulation to a particular fact, that particular fact being that you are someone who is currently subject to a requirement of lifetime supervision, that you did in fact sign the Lifetime Supervision Agreement back in 2007, and then another one it sounds like in 2012, although I haven't seen the reference to that.
> **And if you stipulate to those facts then that means there is not the same requirement on the State to establish all the details to establish those facts to the jury.** You would just stipulate and agree to them. But if you do that, you are stipulating to facts that are a component of the crime charged. So it's not the same as stipulating that you are guilty, but it is basically stipulating that you are guilty to a fact which may in turn result in you being found guilty to the charge as a whole.
> Do you understand what that means? Do you understand the circumstances of what you are doing?
>
> The Defendant: Yes, I can comprehend that.
>
> The Court: Okay. Can I just get you to indicate for the record then what it is you are agreeing to for purposes of this hearing; what fact or facts are you agreeing to stipulate to.
>
> **The Defendant: I am agreeing I am a sex offender and I am on lifetime supervision.**

2 AA 266-67 (emphasis added). For defense counsel to turn around on appeal and fault the State and the court for agreeing to this proposed stipulation in an effort not to prejudice the jury is not in good faith, and is simply playing games. This claim must be denied.

McNeill further contends that as the jury was not instructed as to the stipulation in the jury instructions, this violated his due process rights as they never reached a decision as to these elements. This claim is without merit as it violated the spirit of the stipulation. See supra

Pursuant to the stipulation, the Information was changed to read that "Steve Dell McNeill pursuant to having in 2004 been convicted of a sex offense that requires lifetime supervision. . ." 1 AA 148-49. The charging document that was read and presented to the jury included the stipulation so as not to prejudice McNeill based on the horrendous facts of his underlying case. This document was also included in Jury Instruction No. 3. 1 AA 153-54. Jury instructions No. 4 and 5 defined "sex offender" and explained lifetime supervision. 1 AA 154-55. Additionally in Jury Instruction No. 10, the jury was told that "The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, **and any facts admitted or agreed to by counsel**." 1 AA 160 (emphasis added). Additionally, the district court instructed the jury about the stipulation:

> The Court: What is relevant to this trial is that, in fact, those facts have been stipulated to; he is a convicted sex offender and he's on lifetime supervision. The issue is that what he's been charged with, violation of lifetime supervision and prohibited acts, and whether or not you find from the evidence and that the law, as we will instruct you later today, that he is in fact guilty, beyond a reasonable doubt, to those charges. That is the only relevant information.

> So I instruct you generally to disregard any information that may lead you to discuss and certainly to direct you to not have and allow it to enter into your deliberations or be part of your deliberations in any way that the underlying matters that brought us to the point where these charges were brought.

3 AA 432-433. Further, Defendant's counsel told the jury during Defendant's closing arguments about the stipulation. 3 AA 549. Defendant's counsel told the jury the following:

> Ms. Bonaventure: He wants you to convict Steve based on the fact he's a convicted sex offender, but that conviction all of us already know. The judge has told us it's in the past. Nobody is to consider it because what we are here for today are violations. Because Steve is on lifetime supervision, he's assigned to follow the rules, and you're here to decide whether or not he broke those rules, nothing else.
>
> …
> I don't want you to be confused, whatever you decide, Steve is going to remain on lifetime supervision. That does not change.
> …
> You have to get a good idea of the big picture because Steve was in lifetime supervision starting in 2007.

Id. at 549-550. Therefore, the State did prove that McNeil was a convicted sex offender on lifetime supervision and any argument to the contrary is without merit.

B. Lifetime Supervision Agreements Were Properly Admitted

McNeill contends that the district court erred in allowing the introduction of three lifetime supervision agreements as they lacked foundation, and thus the court

may not review this evidence regarding deficiency. However, in assessing a sufficiency of the evidence challenge, " 'a reviewing court must consider all of the evidence admitted by the trial court,' regardless whether that evidence was admitted erroneously." McDaniel v. Brown, 558 U.S. 120, 131, 130 S.Ct. 665, 672, 175 L.Ed.2d 582 (2010) (emphasis added) (quoting Lockhart v. Nelson, 488 U.S. at 41, 109 S.Ct. 285 (1988)).4 This is because an appellate court "cannot know what evidence might have been offered if the evidence improperly admitted had been originally excluded by the trial judge." United States v. Sarmiento–Perez, 667 F.2d 1239, 1240 (5th Cir.1982). Stephans v. State, 262 P.3d 727, 734 (Nev. 2011). Additionally the Court stated:

> "Our case law concerning sufficiency of the evidence makes occasional reference to "competent" evidence. See, e.g., Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) (to determine sufficiency, "this court must determine whether the jury, acting reasonably, could have been convinced by the competent evidence of the defendant's guilt beyond a reasonable doubt" (emphasis added)); Braunstein v. State, 118 Nev. 68, 79–80, 40 P.3d 413, 421 (2002); see Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000); Garner v. State, 116 Nev. 770, 779, 6 P.3d 1013, 1019 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). "Competent" in the context of a sufficiency of the evidence analysis does not mean properly admitted; rather, it refers to evidence that was placed before the jury by the court to the exclusion of evidence extraneous to the judicial proceedings. See Crowe v. State, 84 Nev. 358, 366–67, 441 P.2d 90, 95 (1968) ("The test ... for sufficiency upon appellate review is ... whether this court can conclude the trier of facts could, acting reasonably, be

> convinced to the degree of certitude by the evidence which it had a right to believe and accept as true."). Accordingly, we consider all evidence admitted at trial when reviewing Stephans's claim of insufficient evidence, including the evidence erroneously admitted by the district court.

Id. at n. 4. This Court should not consider McNeill's argument to ignore the lifetime supervision agreements entered.

C. There Was Sufficient Evidence that McNeill Violated his Lifetime Supervision Conditions

On November 16, 2007, McNeill signed a Lifetime Supervision agreement in which he agreed to: 1) report as directed by his supervising officer; 2) submit to periodic testing for controlled substances as required by his supervising officer; 3) abide by curfew imposed by supervising officer; and 4) participate in professional counseling if deemed necessary. 3 AA 614. McNeill violated all of these conditions.

Mangan was unable to locate McNeil after curfew in April. 2 AA 354. Mangan requested McNeil to provide in more detail where he sleeps so she would be able to locate him. 2 AA 354. In July, Mangan had a meeting with McNeill regarding his noncompliance with curfew, that he was not paying fees, he was not employed and that he was not attending counseling. 2 AA 355-56. In August, McNeill refused to submit to a urinalysis. 2 AA 356. McNeill also refused to come in for the required weekly office visit. 2 AA 357. He told Sergeant Zana that he was only reporting to Mangan as a "courtesy," after which Zana explained that it was required under the law that he do so. 2 AA 367. Looking at the evidence in the light

most favorable to the State, it is clear the jury could have found McNeill guilty of violating his Lifetime Supervision Agreement.

III. THE JURY INSTRUCTIONS GIVEN BY THE DISTRICT COURT WERE CORRECT

Appellant alleges that the district court abused its discretion by not offering certain jury instructions. OB at 47. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Further, the district court only abuses its discretion with regard to jury instructions when the court's "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Id.

A. No Plain Error in Jury Instructions

McNeil failed to object at trial to Jury Instruction #6 and has not demonstrated plain error, therefore McNeil's issue is precluded from review. Failure to object during trial generally precludes appellate consideration of an issue. Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997). Despite such failure, this Court has the discretion to address an error if it was plain and affected the defendant's substantial rights. Normally, the burden is on defendant to show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 23 P.3d 227, 239 (2001). The United States Supreme Court has explained that the plain error doctrine is limited and "authorizes the Courts of

Appeals to correct only 'particularly egregious errors…that seriously affect the fairness, integrity or public reputation of the judicial proceedings.'" United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 (1982). The Court held that the plain error rule is to be used "sparingly" and only when there has been a fundamental error so basic and prejudicial that justice could not have been done, or when the error deprives the accused of a fundamental right. Young, 470 U.S. at 15.

Here, McNeil alleges that jury instructions were incomplete and an incorrect statement of laws. OB at 49. McNeil did not object to these issues at trial when the court settled jury instructions, therefore there is no patently prejudicial error. Because there is no prejudicial error, this issue cannot be considered on appeal.

B. Jury Instructions were Correct Statement of Law

McNeil contends by incorporating previous arguments that jury instructions were incorrect statements of law based on district courts failure "to explain why conditions listed within NRS 213.1243 are the only conditions allowed for a violation of NRS 213.1243." OB at 50. Whether an instruction is a correct statement of the law is reviewed de novo. Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). McNeil's argument is successfully refuted above.[1] See supra I. Therefore,

[1] Many of McNeill's arguments rely on the foundation that the additional lifetime supervision conditions are not constitutional. The State has proved otherwise. See

McNeil cannot demonstrate that this instruction was an improper statement of law. The district court did not abuse their discretion in instructing the jury and therefore, McNeil's claim must be dismissed.

C. District Court Did Not Abuse Discretion When Failing to Sua Sponte Correct Mere Presence Instruction

McNeil alleges that the Court abused its discretion when failing to sua sponte correct McNeil's mere presence instruction to a corpus delecti instruction. OB at 50-51. McNeil alleges that the "district court recognized without directly saying, McNeil actually wanted a jury instruction on corpus delecti rule." OB at 51. McNeil fails to demonstrate at what point the district court "recognized" this fact. However, even if the district court's actions can be interpreted as to recognize that McNeil wanted a corpus delecti instruction, the district court suggested such instruction would be denied.

> The Court: … It would be one thing if the instruction was written – and I'm not suggest this because I don't believe the instruction needs to be given, period – but if it were written as the mere fact that certain dialogue was had in, you know, Sergeant Zanna's office doesn't itself mean that the defendant is guilty of the crime charged. But we simply don't give instruction that go alone those lines.

3 AA -451. A corpus delecti instruction would not be on point in this case. Further, the district court cannot instruct on a defense theory that a defendant did not request.

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supra I. In the interest of brevity, the State will not continue to address the core of many of McNeill's arguments, as it has done so thoroughly in this brief.

Here, if anything, the judge opined and assisted defense counsel. However, there can be no sua sponte absent McNeil's request. Therefore, McNeil again has failed to demonstrate that the district court abused its discretion.

D. Court Provided Sufficient Instruction on Circumstantial Evidence and Reasonable Interpretation

McNeil contends that the jury instructions on circumstantial evidence and reasonable interpretation are incomplete. OB at 53 -54. This Court has held that it is not error to refuse to give an instruction when the substance of that instruction "is substantially covered by another instruction given to the jury." Ford v. State, 99 Nev. 209, 211, 660 P.2d 992, 993 (1983).

a. Circumstantial Evidence

In this case, there was no abuse of discretion or judicial error by the district courts instruction regarding circumstantial evidence. Jury received the following instruction on circumstantial evidence in Jury Instruction No. 10 :

> "… Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you when arriving at your verdict.

3 AA – 534. McNeil argues that the district court erroneously refused to allow him to present his jury instruction on circumstantial evidence. While it is true that a defendant is entitled to have the jury instructed on his theory of the case, the case

law does not support the notion that the defendant has an absolute right to have his instruction given. Margetts v. State, 107 Nev. 616, 818 P.2d 392 (1991). Therefore, McNeil did not have an absolute right to has his proposed jury instruction given. Jury Instruction No. 10, provided by the district court appropriately and adequately informed the jury on circumstantial evidence.

b. Two Reasonable Interpretations

McNeil requested that the court instruct the jury that if the evidence is subject to two reasonable interpretations, one suggesting guilt and the other suggesting innocence, the jury has a duty to adopt the interpretation leading to innocence. As early as 1976 in Bails v. State, 92 Nev. 95, 97, 545 P.2d 1155, 1156 (1976), the Court expressly rejected a Defendant's general entitlement to have the jury instructed with the "two reasonable interpretations" jury instruction: "We have heretofore considered such an instruction in cases involving both direct and circumstantial evidence and have ruled that it is not error to refuse to give the instruction if the jury is properly instructed regarding reasonable doubt." See also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (same); Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980) (same); Hooper v. State, 95 Nev. 924, 927, 604 P.2d 115, 117 (1979) (same). Bails further held the "two reasonable interpretations" instruction is not required even in a case based on purely circumstantial evidence. Bails, 92 Nev. at 97, 545 P.2d at 1156.

Here, the district court instructed the jury in Jury Instruction No. 9 that McNeil was presumed innocent until proven guilty. McNeil does not appear to argue that such jury instructions were made in error, rather McNeil purports to contend that Bails and Mason should be overruled. McNeil has both failed to demonstrate that Bails and Mason should be overruled and that the district court abused their discretion.

E. Any Error is Harmless

Jury instruction errors are subject to harmless error review. Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000), overruled on other grounds by Rosas v. State, 122 Nev. at 1258, 147 P.3d at 1101 (2006). An instructional error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Id. (quoting Neder v. United States, 527 U.S. 1 (1999).

Here, as discussed above, the State clearly proved beyond a reasonable doubt that McNeil violated his lifetime supervision agreement. Therefore, if this court should find error with the jury instructions, McNeil's conviction should be upheld since the error was harmless.

IV. THE DISTRICT COURT WAS CORRECT IN DENYING MCNEILL'S MOTION FOR JUDGMENT OF ACQUITTAL

The district court did not err in denying McNeil's Motion for Arrest of Judgment and/or Motion for Judgment of Acquittal. On July 16, 2014 Defendant filed a Motion for Arrest of Judgment or in the Alternative, Motion for Judgment of Acquittal ("Motion"). 1 AA 175. McNeil argued that "the State failed to allege or prove a violation of conditions enumerated in the statue," again citing the same arguments in supra I. 1 AA 177-178. Further, McNeil contended, in the alternative, given the evidence and instructions provided to the jury, "no reasonable jury could have returned a verdict of guilty if they followed the law they were given." 1 AA 178. Again, McNeil cited the same arguments in supra, II and III. Id. On July 29, 2014, the State filed an opposition to McNeil's Motion, contending that the Motion should be denied based on the same reasons in supra I, II and III. Id. at 180. The Motion was heard on July 30, 2014.On August 8, 2014, the district court issued an order denying McNeil's Motion for the reasons stated in the State's opposition.

McNeil contends that the district court erred in denying his Motion for Arrest of Judgment and/or Motion for Judgment of Acquittal. OB at 57. Again, McNeil's argument hinges on the constitutionally of NRS 213.1243, sufficiency of evidence and jury instructions. OB at 58. For the reasons discussed in supra I, II and III, McNeil's claim should be dismissed.

Moreover, NRS 175.381 permits Motions for Judgment of Acquittal only based on insufficiency of evidence. Based on McNeil's arguments in support of the

Motion, McNeil did not properly raise his motion. 1 AA 177-178. Therefore, the district court did not err when it denied McNeil's Motion and the claim should be dismissed.

V. MCNEILS'S SENTENCE IS NOT CRUEL AND UNUSUAL PUNISHMENT

McNeill's sentence of 12 to 36 months does not amount to cruel and unusual punishment. McNeill contends that the statute itself is unconstitutional as the punishment does not fit the crime.[2] OB at 59. This claim is without merit

The Eighth Amendment to the United States Constitution and Article 1, Section 6 of the Nevada Constitution prohibit the imposition of cruel and unusual punishment. This Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120 Nev. 410, 92 P.2d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

[2] McNeill incorporates his argument that the only condition possibly violated was failure to obtain approval from residence, as he argues the conditions not specifically enumerated in NRS 213.1243. OB at 59. The State has sufficiently shown that all imposed and agreed upon conditions are subject to the lifetime supervision statute. See supra I.

Additionally, this Court has granted district courts "wide discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (*citing* Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)). As long as the sentence is within the limits set by the Legislature, it will normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 871 P.2d 950 (1994).

A. McNeill was Sentenced Within the Statutory Range

McNeill was found guilty of one count of Violation of Lifetime Supervision by Convicted Sex Offender (Category B Felony – NRS 213.1243-53481). NRS 213.1243(8) states that a "sex offender who commits a violation of a condition imposed on him or her pursuant to the program of lifetime supervision is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years." McNeill was sentenced to a minimum of 12 months and a maximum of 36 month, with 150 days credit for time served. 1 AA 238. This is within the parameters

of the applicable statute. McNeill's sentence was within the limits prescribed by the Legislature and should not be construed as cruel and unusual punishment. Glegola, 110 Nev. at 871.

B. McNeill's Sentence is Not Unconstitutional or Shocking to the Conscience

As McNeil's sentence is within the applicable statutes, McNeil must show that either 1) the statute is unconstitutional or 2) that the "sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Blume, 112 Nev. at 475, 915 P.2d at 284. McNeill attempts to argue both, stating that the statute is unconstitutional because it shocks the conscience. AOB 59.

Again, McNeill's arguments hinges on his argument that only one condition was violated. This is successfully refuted above. See supra I. As McNeill violated multiple conditions of his agreed upon lifetime supervision conditions, including refusing to consent to a urinalysis test, his sentence does not shock the conscience, nor is it unconstitutional. McNeill puts forth no further argument.

VI. PREJUDICIAL ERROR DID NOT OCCUR DUE TO THE TESTIMONY OF WITNESSES THAT MCNEILL WAS A SEX OFFENDER

McNeill was not prejudiced due to the fact that multiple witnesses referred to him as a sex offender. McNeill misstates the stipulated agreement, and ridiculously points to Witherow v. State, 104 Nev. 721, 724 (1988), where this Court determined that reference to prior criminal history is a reversible error.

The instant matter is entirely different as 1) being a sex offender subject to lifetime supervision is *an element of the crime* charged; and 2) McNeill stipulated to that fact. McNeill essentially argues that he was prejudiced because the "jury knew about his prior criminal activity." OB at 62. As part of the stipulation, McNeill requested that the charging document given to the jury be read to say:

> And then say pursuant to having in 2004 being convicted of a sex offense in the Eighth Judicial District Court, Clark County, Nevada, to-wit by refusing to submit – literally just taking out the convicted of, the name of, the charge and replacing the name of the charge with "of sex offense in the Eighth Judicial District Court."

2 AA 266. McNeill proposed that the jury be told he was a convicted sex offender who was placed on lifetime supervision. Any argument regarding potential prejudice due to the jury being aware he had a prior criminal history is patently ridiculous. Despite this, the State will address each objection in turn.

McNeill first takes issue with the fact that the State referred to him as a sex offender and that the State asked the witness if McNeill was a sex offender. 1 AA 345. As showed supra, this was agreed to and proposed by defense counsel and given to the jury. Specifically, McNeill takes issue with the following exchange:

> Mr. Cooper:
> Q. Are you aware if he is a convicted sex offender?
> A. He is.
> Q. And pursuant to his conviction is he required to comply with the requirements of lifetime supervision.
> A. Yes, he is.

2 AA 345. The witness, when asked how someone is placed on Lifetime Supervision, then responded with "Well, eh was incarcerated with" 3 AA 346. After the objection, the court recessed and heard arguments. 3 AA 346. The court was correct in stating:

> Again, let's keep this in perspective. This is a charged crime for someone who has already been stipulated to the facts of and the charging document makes clear, a convicted sex offender. It is not outside the realm of possibility that the jurors would have some belief or understanding that there might have been some sort of incarceration at some point.

2 AA 346. The court further redacted the reference to imprisonment in each of the Lifetime Supervision documents. 2 AA 349. Additionally the Court gave the jury a curative instruction:

> The Court has addressed the objection that was made prior to the break and specifically I wanted to at this time give you a specific direction that there was a statement made by the witness regarding incarceration of the defendant at a certain point in time and that the statement is to be disregarded. It is not to be considered [sic] in anyway. It is not relevant to the charges in this case and, again, should be disregarded and not considered by you in any way.

2 AA 350. "Generally, when evidence is heard by the jury that is subsequently ruled inadmissible, or is applicable only to limited defendants or in a limited manner, a cautionary instruction from the judge is sufficient to cure any prejudice to the defendant." United States v. Escalante, 637 F.2d 1197, 1202-1203 (9th Cir. 1980). "It is the exceptional case in which such instructions are found insufficient to cure

prejudice." Id. at 1203. Any prejudice from the brief mention of incarceration was cured by the redaction and instruction from the court.

McNeill also claims a witness referred to "McNeill's prior sex offense conviction as one of the 23 most egregious offensives." OB at 61. First, this was not objected to at the time, and thus should be reviewed for plain error. A defendant's failure to object to an issue at trial generally precludes appellate review of that issue unless there is plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). When an error is not preserved, this Court employs a plain-error review and asks whether the defendant demonstrated that the error "affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Id. The burden is on the defendant to show actual prejudice or a miscarriage of justice. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). At trial, the witness testified:

> During our conversation he had stated in our banter back and forth about NRS, he was quoting NRS and stating that he wasn't required to register with sex offenders, he wasn't require to report to us. I, of course, was quoting NRS 176.0931 that clearly states that, you, know, lifetimes supervision is where these 23 most egregious offense passed the law on October 1st, 1995.

2 AA 368. As the jury was already aware the he was a convicted sex offender, and that he was on lifetime supervision, the knowledge that he had committed an egregious sexual offense does not amount to actual prejudice or a miscarriage of justice.

McNeill also appears to be contesting the actual motions for mistrial that were denied. OB at 62. The State has adequately responded to the basis for these objections above.

VI. MCNEILL'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN THE STATE WAS NOT REQUIRED TO REVEAL CRIMINAL HISTORY OF WITNESSES

McNeill's due process rights were not violated because the State did not withhold any exculpatory information. McNeil filed a Motion for Discovery ("Motion") on June 24, 2014. 1 AA 96-101. On June 27, 2014, the State filed a response to McNeil's Motion for Discovery. 1 AA 102-110. Discovery matters were heard on June 30, 2014. McNeill contends that the district court erred in not granting points 5 and 6 for their Motion for Discovery. OB at 63. Specifically McNeill cites Brady v. Maryland, 373 U.S. 83, (1963) though it is not a discovery motion.

This Court reviews a Brady claim *de novo*. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000). Brady and its progeny require that the State disclose evidence favorable to the defense when that evidence is material to guilt or to punishment. Id. There are three components to a Brady violation: "(1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the state; and (3) prejudice ensued, i.e., the evidence was material." Mazzan, 116 Nev. at 67, 993 P.2d at 37.

A prosecutor's obligation to provide discovery to a defendant is limited to only that information required by statute or Brady. See Weatherford v. Busey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and Brady did not create on…' the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded…'" [citation omitted]. In Nevada, NRS 174.235 outlines specifically the affirmative pretrial discovery obligations of the State:

> 1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the request of a defendant, the prosecuting attorney shall permit the defendant to inspect and to copy or photograph any:(a) Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the state, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;
>
> (b) Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; and
>
> (c) Books, papers, documents, tangible objects, or copies thereof, which the prosecuting attorney intends to introduce during the case in chief of the state and which are within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney.

> 2. The defendant is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:
>
> (a) An internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case.
>
> (b) A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the constitution or laws of this state or the Constitution of the United States.
>
> 3. The provisions of this section are not intended to affect any obligation placed upon the prosecuting attorney by the constitution of this state or the Constitution of the United States to disclose exculpatory evidence to the defendant.

Beyond state statute, Brady v. Maryland also requires disclosure by the prosecution only that "evidence favorable to an accused…where the evidence is material either to guilty or to punishment…."373 U.S. at 87. In interpreting the prosecution's discovery obligations under Brady and discovery statutes, this court has recognized the limited nature of the prosecution's duty to disclose.

In issue No. 5 of McNeil's Motion he requested any inconsistent statements made by any material witness in this case, including any statements made to an employee or representative of the State. 1 AA 100. This information is not discoverable under the aforementioned rules. Statements made to the State during pretrial conferences, which are not recorded or written by the witnesses are not subject to disclosure. Such interviews memorialized by the State in the form of notes constitute work product and are specifically not discoverable pursuant to NRS

174.235(2). See NRS 174.235 ("The Defendant is not entitled to an internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case."). In addition, defense counsel can interview the State's witnesses and thus is capable of ascertaining the likely testimony of the State's witnesses. See Steese v. State, 114 Nev. at 495, 960 P.2d at 331 ("Brady does not impose upon the State an obligation 'to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense"). *Supra.*

In issue No. 6 of McNeil's Motion, he requests any criminal history of a material witness in this case, specifically the probation officer. 1 AA 100. The district court denied the request stating:

> **The Court**: Okay. You understand in order to keep their peace officer certification they cannot be convicted of any crime. Post would not allow them to continue their job at this point. And if they were to get a conviction at any time during the term of their employment there's audits, there's intermittent criminal background checks.
>
> And so are you withdrawing that or do you want a ruling?
>
> **Ms. Bonavanture**: I want a ruling, Your Honor.
>
> **The Court**: All rights. It's denied as being an unreasonable burden and a waste of taxpayer money.

2 AA 254. The district court was correct in its denial. Further, the request was overbroad as the State is not required under Brady or its progeny and/or NRS 174.235 to investigate its witnesses to the extent McNeill requested. It is McNeill's

obligation to seek such information, should he find it necessary and worthwhile. Furthermore, McNeill has not set forth a good faith basis to inquire of the victim or a factual predicate to show that such information is relevant and/or proper impeachment under NRS 50.085 and NRS 50.095 and McNeill's request certainly goes beyond that allowed under these statutes. Therefore, McNeill's due process rights were not violated because the State did not withhold any exculpatory information.

VII. THE DISTRICT COURT DID NOT ERR IN ALLOWING THE STATE'S EXPERT TO TESTIFY

The district court was proper in allowing the State's expert to testify. Marcia Lee, is a marriage and family therapist, as well as a referral source for Parole and Probation for working with adult sex offenders. 3 AA 435. Lee was McNeil's therapist in sex offender treatment prior to his termination. Id.

McNeil contends that although the State did not put forth Lee as an expert, Lee testified to her expert opinions during McNeil's trial. OB at 66. However, this claim is without merit because Lee testified only to her lay opinion. 3 AA 434-444. On May 27, 2014, the State filed a Notice of Witnesses and/or Expert Witnesses. On June 2, 2014, the State filed a Supplemental Notice of Witnesses and/or Expert Witnesses. On July 7, 2014, prior to trial, McNeil objected to Lee testifying as an expert, arguing that Lee was not properly noticed as a witness, as he had not received a circum vitae or any reports indicating how Lee had reached her conclusions about

Defendant. 2 AA 262-263. However, the State disclosed that they would not be calling Lee as an expert, but rather having her testify as to her lay opinions. 2 AA 263. McNeil further argued that Lee could not discuss why McNeil was terminated from her program or any expert opinion regarding his propensity to reoffend, in which the district court agreed. 2 AA 264. The district court admonished Lee, stating:

> The Court: So there has been some discussion about how much information can be given. Certainly the fact that he was terminated, certainly the basis upon which he terminated, and the determination was made to terminate him is fine.
>
> But what we cannot have happen with this jury is the kind of sort of details of what was said or what was done in the group setting or in the individual settings that would cause the jury perhaps to become biased against him just because of that behavior.
>
> …
>
> The Court: The Court has determined that those would be substantially prejudicial and outweigh the relevance of that testimony, so which is why precluding the details of the statements made and the actions taken in group or individual.
>
> Ms. Lee: Which is why he was terminated, part of why, a large part of why he was terminated.
>
> The Court: Understood.
>
> Ms. Lee: Okay.
>
> The Court: … There are certain pieces of evidence that are relevant and then there are certain pieces of evidence that although they are relevant, are too prejudicial to the trial to be able to come in.
>
> Ms. Lee: Okay.

3 AA 424- 429. At no point during her testimony did Lee refer to either of the prohibited topics. McNeil now claims that Lee's testimony regarding McNeil's termination from the program "due to subjective factors she observed in group," was essentially expert testimony. OB at 66. However, McNeil made only one objection throughout Lee's testimony and such objection was only on relevancy grounds and overruled. 3 AA 443. McNeil fails to demonstrate and cite to the record where Lee strayed in her testimony, therefore the State cannot do a thorough analysis of the issue. The State maintains that Lee testified within the bounds of the testimony permitted by the district court's earlier ruling. However, if Lee did in fact stray in her testimony, McNeil fails to allege where and fails to meet his burden of plain error. Therefore, this claim should be dismissed.

VIII. CUMULATIVE ERROR DOES NOT WARRANT REVERSAL

McNeill contends that the alleged prosecutorial misconduct was of a constitutional dimension, and thus cumulated to deny McNeill his constitutional right to a fair trial. McNeill's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (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, 855 (2000).

Here, while the charges against McNeil were serious as he was convicted of a Category B felony, the issue of guilt was not close, as the evidence against McNeill

was overwhelming. Further, each and every one of his claims is without merit as discussed above. As such, even if this Court did decide to accumulate McNeill's claims, his argument still fails.

IX. THE DISTRICT COURT WAS CORRECT IN DENYING MCNEILL'S BATSON CHALLENGE

The District Court was correct in denying McNeill's Batson challenge. McNeill alleges this claim based on the State striking five white males, as McNeill is a white male. OB at 33-34. This claim is without merit, as the State cited several reasons for the strikes and McNeil failed to demonstrate purposeful discrimination. Although the District Court explain skepticism, the court did ultimately go forward with the Batson analysis. 2 AA 306. The District Court did not err in its Batson application. 2 AA 306.

The U.S. Supreme Court has held that the racially discriminatory use of peremptory challenges is unconstitutional under the Equal Protection clause. Batson v. Kentucky, 476 U.S. 79 (1986). Batson applies to criminal defendants and forbids their exercise of peremptory challenges to remove potential jurors on the basis of race, gender or ethnic origin. United States v. Martinez-Salazar, 528 U.S. 304 (2000) and Georgia v. McCollum, 505 U.S. 42 (1992).

In Purkett v. Elem, 514 U.S.765, 766-67 (1995), the United States Supreme Court pronounced a three part test for determining whether a prospective juror has been impermissibly excluded under the principles enunciated in Batson: 1) "once

the opponent of a peremptory challenge has made out a prima facie case of racial discrimination;" 2) "the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation;" and 3) "[once] a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett, 514 U.S.at 766-767. In reviewing the denial of a Batson challenge, the reviewing court should give great deference to the determining court. Hernandez v. New York, 500 U.S. at 364, 111 (1991),

The State was able to provide race-neutral reasons for the peremptory challenges. First, the State explained that Juror No. 55 had a dispute with police officer in the past. At that he indicated it was "a very contentious dispute and police officers were subsequently falsifying issues with him or his business." 2 AA 304. As the State had solely law enforcement officer witnesses, it is clear that any prejudice toward law enforcement was a race-neutral reason.

Additionally, The State put forth multiple race-neutral reasons regarding Juror No. 927:

> Mr. Cooper: Well your honor, no kids was just indicating to me that he had no real responsibilities. I think he also indicated that he was also single. He I single, he has no kids and he gets picked up for drugs and littering and that was not the type of person that I would want on my jury because he has shown that he does not really have that

> much in responsibility, and in this case that is going to be very important to actual ascertain what the responsibly of the defendant had, whether or not they were reasonable to a certain extent, and whether or not he followed through with those responsibilities. For someone that does not have the responsibilities that a lot of people his age have, I would say I did not want him on my jury.

2 AA 304. The State indicated that Juror No. 927 was arrested for drug possession and littering. 2 AA 304. Because he has had bad interactions with police officers, the State was again concerned about his ability to stay open-minded regarding the State's witnesses. 2 AA 304. The State also mentioned that because he was single, had no children, and had been arrested in the past he may not have much responsibility and that "it [was] going to be very important to actually ascertain what the responsibility of the defendant had [sic], whether or not they were reasonable to a certain extent, and whether or not he followed through with those responsibilities." 2 AA 305.

Juror No. 000 also did not have children, which shows a pattern of concern on the State's part regarding those who do not have regular responsibilities. 2 AA 305. The State explained:

> Mr. Cooper: … he just doesn't have the responsibility that someone with children have so he might not look as favorably upon the responsibilities that are being put upon this defendant think that they are over burdensome, that he shouldn't have to go through with that.
>
> And then he also did indicate that he took a law class in college and seemed to be very proud about that so I

> think that he might try to interpret the law in his own way and not give full deference to this court that's due.

2 AA 305. The State cited similar reasons for striking Juror No. 24. The State reasoned:

> Mr. Cooper: (referencing his reasoning for Juror No. 000) And that's actually the same reason I kicked the last one, Burris, No. 24. He was an attorney.
> …
> He said a couple things to me that indicated to me that he had somewhat of a bias against the prosecution and actually as he was leaving he looked at the defense attorneys and said, Good luck. So I mean, it seemed that he did have a bias and that bias was confirmed when he said good luck to them. So I had reason for him as well.

2 AA 306. The Court held that the State had provided sufficient race-neutral reasons for their strikes. 2 AA 306. The Court further noted there were 8 white males that remained on a panel of 12 total individuals. 2 AA 306. And as the State explained, with only five peremptory strikes they have to make a determination about what is most important to them. 2 AA 305. While, as McNeill argues, some of the jurors may have not had children, the State used the peremptory strikes on people who had multiple concerning factors. Id.

Moreover, McNeil failed to prove purposeful discrimination. McNeil alleged that the State's race-neutral reasons were pretextual. Id. McNeil presented a comparative juror analysis, whereby he reasoned that other jurors whom were not

white had similar traits as those the State had stricken, including no children and past criminal arrests. 2 AA 305. The States responded:

> Mr. Cooper: And, Your Honor, I can't kick everyone. That's not as simple as it goes. I have to base it on their answers so that's why I kicked them. It had nothing to do with their race. I can't kick everyone. I don't know what I'm supposed to do.

Id. The Court noted there were 8 white males that remained on a panel of 12 total individuals. 2 AA 306. Further, the district court correctly found that despite the discrepancies, the State provided sufficient race-neutral reasons for their strikes and therefore they were not a pretext against race or gender. 2 AA 306. The district court did not err therefore this Court is bound by its ruling.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm Appellant's Judgment of Conviction.

Dated this 27th day of August, 2015.

Respectfully submitted,

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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 10,725 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 27th day of August, 2015.

Respectfully submitted

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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 27, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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