IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOSEPH JEFFRIES,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 68338

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(1) because it is a direct appeal from a Judgment of Conviction based on a jury verdict that involves a conviction for an offense that is a Category A felony.

STATEMENT OF THE ISSUE(S)

I. WHETHER THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION DENYING JEFFRIES'S MOTION FOR A NEW TRIAL BASED ON ALLEGED JUROR MISCONDUCT

II. WHETHER JEFFRIES'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT APPROPRIATELY RAISED IN HIS DIRECT APPEAL

III. WHETHER THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY NOT PROVIDING SUPPLEMENTAL CLARIFYING INSTRUCTIONS

IV. WHETHER THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION DENYING JEFFRIES'S MOTION FOR A MISTRIAL BASED ON ALLEGED PROSECUTORIAL MISCONDUCT

V. WHETHER NO CUMULATIVE ERROR OCCURRED

STATEMENT OF THE CASE

On February 14, 2012, Michael Joseph Jeffries ("Jeffries") was charged by way of Information with one count of Murder With Use of a Deadly Weapon (Open Murder)(Category A Felony – NRS 200.010, 200.030, 193.165). 1 Appellant's Appendix ("AA") 87-89.

On March 23, 2015, Jeffries's jury trial commenced. 1 AA 90. On March 26, 2015, the jury returned a verdict finding Jeffries guilty of Second Degree Murder With the Use of a Deadly Weapon. 3 AA 671. On April 14, 2015, the Court heard arguments on Defendant's Motion for a New Trial, which the Court ultimately denied Defendant's Motion. 3 AA 682-86.

On May 27, 2015, Jeffries was adjudicated guilty and sentenced to the Nevada Department of Corrections to a term of Life with the possibility of parole after 10 years, plus a consecutive term of a minimum of 12 months and a maximum of 72 months for the deadly weapon enhancement. 3 AA 687-700. A Judgment of Conviction was filed on June 2, 2015. 3 AA 701-02. A Notice of Appeal was filed on June 29, 2015. 3 AA 703-05. On February 11, 2016, Jeffries filed his Opening Brief.

STATEMENT OF THE FACTS

In October 2011, Mandy Ames ("Mandy") and Jeffries were living together at 8745 Don Horton Avenue. 1 AA 208. On October 22, 2011, Mandy's daughter Brittany Ames ("Brittany") was staying with Mandy and Jeffries. 1 AA 121. That night, Mandy and Jeffries invited people over to their house. 1 AA 210. Mandy's friend Beate Arrington ("Beate") came over and brought some friends with her. 1 AA 211. At some point, the victim Eric Gore ("Eric") came over the house. 1 AA 212. Everyone was drinking and having a good time that night. 1 AA 212. At some point in the night, Eric got into an argument with Megan Moffitt ("Megan") relating to Beate's son Donny. 2 AA 309. Ultimately, Beate told Mandy that they were all leaving because of Megan's argument with Eric. 1 218. However, before leaving Megan attempted to go over to Eric to apologize, but her sister Katie stopped her and told her they needed to leave. 2 AA 309. Once everyone left, Jeffries attempted to calm Eric down because he was still yelling about his argument with Megan. 1 AA 224. Eventually, Jeffries and Eric both went into the kitchen and continued drinking. 1 AA 137.

After a little while, Jeffries and Eric stopped drinking and started arguing again. 1 AA 138. Jeffries kept trying to get Eric to calm down. 1 AA 139. During the argument, Brittany saw Jeffries punch Eric, who fell to the floor. 1 AA 153. Jeffries then came over to Eric and punched him a couple of more times while he

was still down on the floor. 1 AA 154. Eventually, Jeffries got up and went to his bedroom. 1 AA 139. At some point, Mandy told Brittany to go to her room. Id. As Brittany was walking to the room, she saw Jeffries shoot Eric. 1 AA 140-41. Right before Jeffries shot Eric, Brittany could see Eric backing up scared. 1 AA 157. Brittany ran in her room and called her father Richard Ames ("Richard"). 1 AA 200. Brittany told Richard that Jeffries had just shot somebody and that she heard Jeffries state that he was going to get his gun before going into his bedroom. 1 AA 204. After shooting Eric, Jeffries called 911. 1 AA 1-6. Jeffries admitted shooting Eric. Id.

Officer Boyd Brown ("Officer Brown") responded to 8745 Don Horton Avenue. 2 AA 272. Officer Brown observed Jeffries hunched over inside the house and Eric dead on the floor. 2 AA 273, 282. Eric was lying face up with his feet outside the bedroom and his head facing the kitchen area. 2 AA 276. Jeffries kept repeating that he shot his best friend. 2 AA 273. AA 274. Office Brown never heard Jeffries claim that he shot Eric to protect himself. 2 AA 282.

Detective Dean O'Kelley ("Detective O'Kelley") also responded to 8745 Don Horton Avenue. 2 AA 242. Detective O'Kelley's main responsibility was to interview available witnesses and conduct initial follow-up investigation. 2 AA 441. After being read his Miranda right, Jeffries agreed to talk to Detective O'Kelley. 2 AA 462-63. During the interview, Jeffries never stated or mentioned that he was

afraid that Eric was going to get his firearm. 2 AA 463. While interviewing Jeffries, Detective O'Kelley did not notice any injuries to his face or body. 2 AA 462.

An expanded cartridge was found at the crime scene. 3 AA 497. At trial Detective Dean Raetz, who also responded to 8745 Don Horton Avenue, testified that based on the location of the cartridge Jeffries would have to have gotten the gun from the bed, walk from the bed to the outside of the bedroom door to actually shoot Eric. 3 AA 506-07. Based on the crime scene it would have been impossible for Jeffries to shoot from inside the bedroom and have the cartridge land where it was found. 3 AA 502.

On October 23, 2011, Dr. Lary Simms ("Dr. Simms"), a forensic pathologist with the Clark County Coroner's Office conducted on autopsy on Eric. 2 AA 341. The external examination revealed a gunshot wound to the center of Eric's chest. 2 AA 346. Additionally, Eric had bruising around his nose area and below his left eye. 2 AA 349-50. The internal examination revealed that the bullet went through Eric's heart and out his back. 2 AA 346. Based on the lack of powdered nitroglycerin on Eric's body, Dr. Simms opined that the gun most likely was fired from at least a distance of 24 inches. 2 AA 352. Ultimately, Dr. Simms determined that the cause of death was a gunshot wound to the chest. 2 AA 345. Dr. Simms ruled Eric's death a homicide. Id.

SUMMARY OF THE ARGUMENT

This Court should affirm Jeffries's Judgment of Conviction. First, the District Court did not abuse its discretion denying Jeffries's motion for a new trial based on alleged juror misconduct. The District Court properly found that any claim that the jury was guilty of misconduct was waived by defense counsel's request to re-instruct the jury that they are not to consider punishment, that it was something for the Court to consider in the event that Jeffries was found guilty.

Second, Jeffries's claim of ineffective assistance of counsel is inappropriately raised in his direct appeal. Based on the facial reading of the record, it is reasonable that defense counsel made a strategic decision to reinstruct the jury that they were not to consider punishment in their decision and reinstruct them that the Court decided what, if any, punishment to impose.

Third, the District Court did not abuse its discretion by not providing supplemental clarifying instructions. The District Court properly found that the jury's questions did not suggest confusion or lack of understanding but rather suggested their indecisiveness of whether malice aforethought was present.

Fourth, the District Court did not abuse its discretion denying Jeffries's Motion for a Mistrial based on prosecutorial misconduct. The State made a permissible inference based on the evidence adduced at trial, that Mandy, and indirectly Jeffries, could have potentially influenced the change in Brittany's

testimony. Additionally, under the plain error standard, the State did not improperly vouch for Brittany. The State never put the prestige of the government behind Brittany or indicate any information not presented to the jury to support her testimony.

Finally, Jeffries's claim of cumulative error has no merit. Jeffries has not asserted any meritorious claims of error, and the issue of guilt was not close.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION DENYING JEFFRIES'S MOTION FOR A NEW TRIAL BASED ON ALLEGED JUROR MISCONDUCT

Jeffries claims that the Court erred in denying his motion for a new trial based on alleged juror misconduct. AOB 22-32. The Nevada Supreme Court set forth the standard for motions for new trials based on juror misconduct in Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003). In Meyer, the Court noted that juror misconduct falls into two categories: (1) conduct by jurors contrary to their instructions or oaths, and (2) attempts by third parties to influence the juror process. Id. at 561, 80 P.3d at 453. The Court noted that the first category of juror misconduct includes activities such as conducting independent research or investigations. Id. Not every incidence of juror misconduct requires the granting of a motion for new trial and each cases turns on its own facts. Id.

> A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion

> by the district court. Absent clear error, the district court's findings of fact will not be disturbed. However, where the misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate.

Id.

Before a defendant can prevail on a motion for new trial based on juror misconduct, a defendant must present admissible evidence to establish the occurrence of juror misconduct and a showing of prejudice. Id. at 565, 80 P.3d at 455 "Prejudice is shown wherever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Id.; Zana v. State, 125 Nev. 541, 216 P.3d 244 (2009); Lamb v. State, 251 P.3d 700 (2011).

In this case, during jury deliberations, the jury sent out a note to the Court stating that one of the jurors had looked up the consequences of a guilty plea and was against the penalty. 3 AA 668. After receiving the note, the following colloquy took place:

> THE COURT: Okay. I received your note here that one of the jurors looked up – it says a guilty plea and the penalty for a guilty plea. First of all, there's not a guilty plea here. This was not a guilty plea and I specifically instructed you that you weren't to consider punishment in the case. That's not your job. If there's a finding of guilty on any offense, the Court decides what, if any, punishment should be imposed, but not you. So, I'm going to instruct that you – you might want to re-read Instruction Number 24 which tells you not to consider punishment. Do you understand

> that? You all agreed to follow my instructions. I want you to do that. Well, if you'd go back and consider the appropriate verdict in the case without consideration the punishment, I want you to do that.
> …
> Outside the presence of the jury
>
> MR. KANE: Judge, I wasn't here when the jury was brought in. But I just wanted the record to reflect that the Court's supplemental charge to the jury was done after consultation with counsel.
>
> THE COURT: And it was the request of all – both sides that I tell them not to discuss punishment and go back and consider the verdict.

3 AA 673-74.

After the verdict, Jeffries filed a Motion for a New Trial based on alleged juror misconduct and the Court heard arguments on it on April 14, 205. 3 AA 682-86. The District Court ultimately found that any claim that the jury was guilty of misconduct was waived by defense counsel's request to re-instruct the jury that they are not to consider punishment, that it was something for the Court to consider in the event that Jeffries was found guilty. 3 AA 683. Furthermore, the District Court found that any potential juror misconduct was harmless because it was obvious that the issue of the case was self-defense. Id. The entire case rested on the issue of self-defense, the jury was going to either find Jeffries not guilty or find him guilty of murder. 3 AA 684.

In this case, the District Court did not abuse its discretion finding that Jeffries had waived the issue of potential juror misconduct by making a strategic decision to

have the Court re-instruct the jury. A defendant cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct. United States v. Jones, 597 F.2d 485, 488 n.3 (5th Cir. 1979); see also Oakes v. Howard, 473 F.2d 672, 674 (6th Cir. 1973)(failure to object to facts known at trial claimed later to be prejudicial precludes subsequent consideration of such a claim); State v. Hudson, 268 Neb. 151, 159, 680 N.W.2d 603, 610 (2004)(when a party has knowledge during trial of irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error).

In this case, the District Court properly found that Jeffries had waived any potential juror misconduct by requesting the District Court to re-instruct the jury. Jeffries made a strategic decision to have the Court re-instruct the jury because he believed the juror's research might potentially be to his benefit. The note stated that a juror had looked up the consequences of a guilty plea and was **against the penalty**. 3 AA 668(emphasis added). Jeffries knew that he could question the juror about the research and potentially move for a mistrial. However, the fact that the juror was against the penalty might have actually been beneficial to him. Jeffries made a strategic decision to re-instruct the jury rather than question the juror who looked up

the information, and then be forced to excuse a juror who was to his benefit. Jeffries gambled on a favorable verdict by choosing to reinstruct the jury that they are not to consider punishment, that it was something for the Court to consider in the event that Jeffries was found guilty; a gamble that paid off as the jury ultimately found Jeffries guilty of Second Degree murder, and not the First Degree Murder that the State was seeking. Accordingly, Jeffries's intentional waiver of his right to raise the alleged juror misconduct in a motion for a mistrial waived his right to file a motion for a new trial based on the same alleged juror misconduct. Jeffries knew of the alleged misconduct during trial and made a strategic decision to waive the issue and re-instruct the jury. Thus, he was precluded from asserting the previously waived issue after the jury returned its verdict.

Even assuming *arguendo* that Jeffries had not waived a claim of potential juror misconduct, he has failed to demonstrate that he was prejudiced. The Court in Meyer noted:

> We conclude that a conclusive presumption of prejudice applies only in the most egregious cases of extraneous influence on a juror, such as jury tampering. We reject the position that any extrinsic influence is automatically prejudicial. Instead, we adopt the position of the circuit courts that examine the nature of the extrinsic influence in determining whether such influence is presumptively prejudicial . . . **Jurors' exposure to extraneous information via independent research or improper experiment is likewise unlikely to raise a presumption of prejudice. In these cases, the extrinsic information must be analyzed in the context of the trial as a whole**

> **to determine if there is a reasonable probability that the information affected the verdict**.

Meyer, 119 Nev. at 564-65, 80 P.3d at 455-56 (emphasis added). The Court also set forth factors for the district court to consider in determining whether there is a reasonable probability that the juror misconduct affected the verdict. The Court stated:

> To determine whether there is a reasonable probability that juror misconduct affected a verdict, a court may consider a number of factors. For example, a court may look at how the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.). In addition, a court must consider the extrinsic influence in light of the trial as a whole and the weight of the evidence. These factors are instructive only and not dispositive.

Id. at 565, 80 P.3d at 456.

In Meyer, the Nevada Supreme Court specifically cited to cases that stood for the proposition that a juror's use of a dictionary is not considered prejudicial per se. 119 Nev. at 565 n.28, 80 P.3d at 456 n.28. As such, simply because a juror looked up "a guilty plea and the penalty of a guilty plea" does not mean prejudice to Jeffries is presumed.

In comparing the juror conduct with the factors outlined in Meyer, it is clear that Jeffries has not met his burden in demonstrating prejudice. Factor number one, how the material was introduced to the jury, does not support a finding of prejudice. The only thing the record demonstrates is that a juror conducted a brief inquiry into the guilty plea, the penalty for the guilty plea, and that the juror was against it. 3 AA 668. There is no evidence that any further "research" was conducted. Furthermore, other factors noted in Meyer such as whether the information presented was ambiguous, vague or specific, whether the information was cumulative of evidence presented to trial and whether the information was material or collateral does not support a finding of prejudice.

Finally, the final factor in Meyer indicates that a court should consider the extrinsic evidence in light of the trial as a whole and the weight of the evidence. 119 at 565, 80 P.3d at 456. The evidence in this case was overwhelming. Not only did Jeffries admit to shooting the victim in a phone call to 911 and to the police during a videotaped statement, the single eye witness to the murder, Brittany, stated that she saw Jeffries shoot the victim in a manner that was not consistent with self-defense. 1 AA 1-86. Brittany gave four statements prior to trial. One to her father whom she called right after the murder. 1 AA 200-204. A second one to the police immediately after the murder and a third one during a taped statement at the police department. 1 AA 7-15, 54-70. Finally, Brittany testified at the preliminary hearing.

1 AA 71-86. During every one of these occasions, Brittany was able to relay in significant detail that Jeffries punched Eric several times, including after Eric fell to the floor. 1 AA 7-15, 54-86. Jeffries stated that he was going to get his gun, got up and went to his bedroom to get his gun. Id. Brittany then saw Jeffries shoot Eric as Eric was backing up scared. Id. This evidence was corroborated by the crime scene analysis conducted by the LVMPD. 2 AA 463, 484-507. Based on the overwhelming evidence presented at trial Jeffries fails to demonstrate that he was prejudiced by a juror looking up the potential sentence of a guilty plea. Therefore, the District Court did not abuse its discretion denying Jeffries Motion for a New Trial based on alleged juror misconduct.

Finally, Jefferies's claim that the alleged error constitutes structural error that requires reversal of his conviction is without merit. AOB 29-30, footnote 29. The concept of structural error was considered by the United States Supreme Court in Arizona v. Fulminante, 499 U.S. 279, 309, 111 S.Ct. 1246, 1264-1265 (1991). The United States Supreme Court recognized that "most constitutional errors can be harmless." Id. The Court noted that "the common thread connecting these cases is that each involved 'trial error'-- error which occurred during the presentation of the case to the jury, and which may therefore be quantatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Id. at 308, 111 S.Ct. at 1264. The Court contrasted

"trial error," which is amenable to a harmless-error analysis, with "structural error", which defies examination by harmless-error standards. Id. The Court noted that "structural error" has only been found when there has been an error that has infected the entire trial "from beginning to end." Id. at 309-10, 111 S.Ct. at 1264-65; See also Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963)(total deprivation of the right to counsel), Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927)(a trial judge who lacked impartiality), Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210 (1984)(absence of the right to a public trial)

The alleged error in this case occurred after the presenting of the case to the jury and therefore falls directly within the penumbra of "trial error." See Fulminante, 499 U.S. at 310, 111 S.Ct. at 1265. The alleged error was not such that it infected the entire trial process from beginning to end but rather, because it occurred after the close of evidence it is very amenable to being "quantatively assessed in the context of other evidence presented." Id. at 307-308, 111 S.Ct. at 1264. Therefore, the alleged error does not fall within the magnitude of a structural error.

II
JEFFRIES'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT APPROPRIATELY RAISED IN HIS DIRECT APPEAL

Jeffries claims that counsel was ineffective for not challenging the alleged juror misconduct. AOB 33-35. However, the Nevada Supreme Court has long recognized that claims of ineffective assistance of counsel should not be raised on

direct appeal but rather in post-conviction relief proceedings. Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 535 (2001); see also Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); Gibbons v. State, 97 Nev. 520, 523, 634 P.2d 1214, 1216 (1981). The Court specifically held that where it is possible that counsel could rationalize his performance at an evidentiary hearing for the purpose of determining effective assistance, appellate review is not appropriate. Id. Accordingly, the issue of ineffective assistance of counsel should not be considered in a direct appeal from a judgment of conviction but, rather, should be raised, in the first instance, in the district court in a petition for post-conviction relief so that an evidentiary record regarding counsel's performance at trial can be created. Wallach v. State, 106 Nev. 470, 474 n.1, 796 P.2d 224, 227 (1990).

Jeffries's claim that this Court should entertain his claim of ineffective assistance of counsel on direct appeal because an evidentiary hearing would be unnecessary is without merit. A review of ineffective assistance of counsel claims on direct appeal if an evidentiary hearing would be unnecessary is an exception to the general rule. Pellegrini, 117 Nev. at 883, 34 P.3d at 534. In order for this Court to review claims of ineffective assistance of counsel on direct appeal it must be clear, on its face, from the trial record that counsel was ineffective per se. Mazzan v. State, 100 Nev. 74, 79-80, 675 P.2d 409, 412-13 (1984). In this case, there is nothing in the record to support Jeffries's claim that counsel's was ineffective per se.

Therefore, the appropriate vehicle for this claim is a petition for post-conviction relief.

Jeffries's claim that counsel's decision to reinstruct the jury rather than challenge the jurors conduct was objectively unreasonable is meritless. "Strategy or decisions regarding the conduct of defendant's case are virtually unchallengeable, absent extraordinary circumstances." Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996). "Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that a challenged action might be considered sound strategy." State v. LaPena, 114 Nev. 1159, 1168, 968 P.2d 750, 756 (1998). In this case, the jury submitted a note to the Court that stated that one of the jurors looked up the consequences of a guilty plea and was against the penalty. 3 AA 668. Based on the facial reading of the record, it is reasonable that defense counsel made a strategic decision to reinstruct the jury that they were not to consider punishment in their decision and reinstruct them that the Court decided what, if any, punishment to impose. It is reasonable that counsel may have made a strategic decision that leaving the juror on the jury and not requesting a mistrial would prove advantageous during deliberation. Accordingly, Jeffries's claim is not supported by a clear reading of the record. Therefore, the appropriate vehicle for Jeffries's claim of ineffective assistance of counsel is a petition for post-conviction relief.

III
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY NOT PROVIDING SUPPLEMENTAL CLARIFYING INSTRUCTIONS

Jeffries claims that the Court erred in not providing a supplemental jury instruction regarding malice. AOB 35-40. The Nevada Supreme Court has long held that the trial court has wide discretion in deciding the manner in which to answer jury questions. Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968); see also Scott v. State, 92 Nev. 552, 555, 554 P.2d 735, 737 (1976). If the District Court is of the opinion that the instructions already given are adequate, correctly state the law and fully advise the jury on the procedures they are to follow in their deliberation, the court's refusal to answer a question already answered in the instructions in not error. Id.

During jury deliberations, the jury sent out two questions to the Court. The two questions were as follows:

> Question 1:
> May we have more clarity/explanation on malice aforethought.
>
> Question 2:
> Can we also get further understanding between 2nd degree vs manslaughter
> Does a conscious intent to cause death or great harm before committing the crime fall into the criteria of malice?

3 AA 669-70.

The District Court advised the jury that it could not supplement the instructions provided and directed the jury to the instructions that gave the complete legal definitions of malice aforethought, 2nd degree murder and manslaughter. 3 AA 674-75. Additionally, the District Court advised the jury that it could not respond to their question regarding whether conscious intent to cause death or harm before committing the crime is malice because that was the ultimately decision for them to decide. 3 AA 675. Both the State and Jeffries agreed with the Court's response. 3 AA 675-76. However, Jeffries did request the Court to provide a supplemental instruction that malice must be proven beyond a reasonable doubt; which the District Court denied.[1] 3 AA 676. By failing to object to the Court's instruction to the jury regarding their questions about malice aforethought and the difference between 2nd degree murder and manslaughter, Jeffries failed to preserve this issue for appeal. That failure waives all but plain error. Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012). This Court reviews unpreserved constitutional errors for plain error. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (Nev. 2015). Plain error is "so unmistakable that it reveals itself by a casual inspection of the record." Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). A defendant has the burden to demonstrate that the error affected his substantial rights, by causing

[1] Jefferies requested an instruction that stated, "Ladies and Gentlemen of the jury you are advised that malice must, like every other element of a charge of murder, be proven beyond a reasonable doubt." 3 AA 676.

actual prejudice or a miscarriage of justice. Martinorellan, 131 Nev. at __, 343 P.3d at 591. Thus, reversal for plain error is only warranted if the error is readily apparent and defendant demonstrates that the error is prejudicial to his substantial rights. Id.

To support his claim that the District Court erred in not providing supplementing instructions Jeffries cites to Gonzalez v. State, 131 Nev. __, 366 P.3d 680 (2015). In Gonzalez, the Nevada Supreme Court established an exception to the general rule established in Tellis. The Court held that when the jury's question suggests confusion or lack of understanding of a significant element of an applicable law the court may not refuse to answer the question. Id. at __, 366 P.3d at 683-84. In Gonzalez, during deliberation, a juror sent two questions to the district court judge. The first jury question stated:

> Looking at Instruction no. 17: if a person has no knowledge of a conspiracy but their actions contribute to someone [else's] plan, are they guilty of conspiracy

The second jury question stated:

> People in here are wondering if a person can only be guilty of 2nd degree murder or 1st.Can it be both?

Id. at __, 366 P. 3d at 683.

Both the State and defense counsel agreed that the answers to both questions were a simple no. Id. The district court however refused to provide an answer and instead stated that it was improper for the court to give additional instructions on how to interpret instruction 17 and that the jury must consider all instructions in light of all the other instructions. Id. The Nevada Supreme Court found that the jury's

question suggested the jury's confusion regarding conspiracy. Id. at __, 366 P.3d at 684. Conspiracy is a knowing agreement to act in furtherance of an unlawful act, accordingly, if a defendant does not know that he is acting in furtherance of an unlawful act there can be no conspiracy. Id. The Court held that because the jury's questions suggests confusion or lack of understanding a significant element of the applicable law, the district court abused its discretion when it refused to answer the first question.[2] Id.

In contrast to Gonzalez and contrary to Jeffries's claim, the jury's questions in this case did not suggest confusion or lack of understanding of malice aforethought. Rather, the jury's questions suggested their indecisiveness of whether malice aforethought was present and their desire for the District Court to help them make that decision. Whether the jury's question suggests confusion or lack of understanding of an essential element is a question of fact for the District Court to determine. In this case, the District Court properly found that the jury was not confused but rather wanted the judge to help them make the ultimate decision whether malice aforethought was present. 3 AA 677. Specifically, the District Court stated:

> THE COURT: I got the impression that it isn't a matter of confusion. They want the judge to make the decision for

[2] The Nevada Supreme Court found that the second questions did not suggest confusion or lack of understanding, therefore, the district court did not abuse its discretion refusing to answer it. Id. at __, 366 P. 3d 684.

> them is what they want and it's all-and I've had this happen before. They have a tendency to say: Gee, it's easier if we just ask the Judge to kind of explain this and then he'll tell us what to do and once you tell them that it's their decision, they they'll go back and make one.

3 AA 677

Whether malice aforethought was present is an ultimate question for the jury to decide. In a similar case, People v. Hooker, 54 Ill. App. 3d 53, 369 N.E.2d 147, (1977), the trial court properly refused to interpret instructions which the jury had been given. During its deliberations, the jury sent the following written question to the court:

> "Parameters of definition of 'imminent use of force' -- 'armed robbery' could that be done with a toy gun? -- a stick? Is the expectation of 'imminent use of force' in the mind of the victim pertinent as proof of the dangerousness of the weapon[?]"

Id. at 59, 369 N.E. 2d 151.

Upon inquiry by the court, both sides agreed that the court could not answer the question since it concerned a matter of fact for the jury's own determination. Id. The trial court advised the jury that it could not answer their question and advised them that they must rely on the instructions that have been provided to them. Id. at 60, 369 N.E.3d at 151. On appeal, the Appellate Court of Illinois found that the trial court did not abuse its discretion refusing to answer the jury, stating:

> "We believe any more specific answer or explanation of the trial judge would probably have directed a verdict of guilty. The instructions were clear and in common language which the jury could understand. The trial court

> properly exercised its discretion by not giving additional instructions under the circumstances of this case."

Id. at 60, 369 N.E. at 152 (citing People v. Charles, 46 Ill. App. 3d 485, 489, 360 N.E.2d 1214, 1217 (1977)).

Moreover, the court noted that defense counsel agreed with the trial court that the court should not respond since the jury's question went to a matter of fact. Id. at 60, 369 N.E. at 152. Accordingly, under such circumstances defendant could not complain that the trial court erred by refusing to give additional instruction to the jury. Id. Similarly, in this case the District Court's response was proper. Under the circumstances, the jury's questions were a request for an opinion on the law from the judge, which went a question of fact that must be decided by the jury. Similarly, in this case, the defense counsel agreed with the trial court's response. Therefore, the District Court did not abuse its discretion.

Additionally, to support his claim, Jeffries cites to several non-binding cases, which the Nevada Supreme Court used in their analysis in Gonzalez. AOB 36. However, each cited case is factual distinguishable from this case. In the first case, United States v. Southwell, 432 F.3d 1050, 1053 (9th Cir. 2005), the Ninth Circuit Court held that a failure to provide the jury with clarifying instructions when it has identified a legitimate ambiguity in the original instructions is an abuse of discretion. In this case, unlike Southwell, there was no ambiguity in the original instructions. To the contrary, the instructions in this case were clear and complete recitations of

the applicable law regarding malice aforethought, 2nd degree murder and manslaughter. See 3 AA 650-51, 655-56.

In Harrington v. Beauchamp Enters., 158 Ariz. 118, 120, 761 P.2d 1022, 1024 (1988), during the jury deliberations, the jury sent a note to the judge that read:

> How many years are [sic] a contractor liable for defects in workmanship and materials in comm. property. Contract reads one year. We want to know if another law foregoes contract.

No limitations period, statutory or contractual, was at issue at the trial, and the jury had received no instructions whatsoever on any limitation issue. Id. Defense counsel requested the court to respond to the jury's question by advising the jury that the action had been brought in a timely manner and the jury was to decide the case on the basis of the evidence and instructions they had received. Id. The court denied the request and requested the bailiff to return to the jury room and inform the jury that the lawyers and the judge could not figure out the meaning of their question. Id. The Arizona Supreme Court found that there are situations when a question from a jury so clearly demonstrates confusion on the jury's behalf that additional instructions are necessary, even though the original instructions were complete and clear. Id. at 1021, 761 P. 3d at 1025. In such cases, the court has a duty to respond to the jury in a way that insures that it reaches its verdict based on issues that are relevant to the case. Id. The Court found that the jury's question quite clearly demonstrated the likelihood that some or all of the jurors believed the one-year

limitation provision in the contract had some bearing on the case, which it did not. The Court held that based on the obvious confusion the district court should have granted the request for a responsive clarification. Id. In this case, unlike Harrington, the jury's questions did not demonstrate that the jury was confused about the issues relevant to the case. Rather, as discussed above, the jury's questions suggested their indecisiveness of whether malice aforethought was present and their desire for the District Court's help in making that decision.

In State v. Juan, 148 N.M. 747, 752-53, 242 P.3d 314, 319-20, the trial court issued the following relevant jury instructions:

> In this case, there are two possible verdicts as to this crime. One, guilty, and two, not guilty. Only one of the possible verdicts may be signed by you as to each charge. If you have agreed upon one verdict as to a particular charge, that form of verdict is the only form to be signed as to that charge. The other form of verdict as to that charge is to be left unsigned.

During jury deliberation, the jury submitted a question to the court asking "is a non-verdict or a hung jury an option? It isn't according to instruction number seven?". Id. at 753, 242 P. 3d at 320. The defendant requested that the jury be instructed that it had the option of not reaching a verdict, and the State suggested that the jury be told to rely on the written instructions the court had provided. Id. The trial court indicated that it would "not answer this right now. It was gonna let it sit for a little bit." Id. Two hours later, before the court had responded, the jury returned a verdict

of guilty. Id. The Supreme Court of New Mexico found that the jury's question indicated that they were confused by the trial court's instruction on the law, which instructed the jury that there were only two possible verdicts – guilty or not guilty. Id. at 754, 242 P. 3d 321. The jury's question revealed that the jury was having difficulty arriving at a unanimous verdict and was under the mistaken belief that they were required to continue deliberation indefinitely until a unanimous verdict was achieved. Id. Under such circumstances, the Supreme Court of New Mexico held that the trial court had a duty to respond and inform the jury that it may cease its deliberation and not arrive at a unanimous verdict if they were indeed deadlocked. Id. In this case, unlike Juan, the jury's questions did not indicate that the jury was confused about the burden of arriving at a unanimous verdict nor that the provided jury instruction themselves were confusing. Furthermore, unlike Juan, the District Court in this case did not just ignore the jury's question but rather properly advised them to look at their instructions, which provided the complete legal definitions of malice aforethought, 2nd degree murder and manslaughter. See 3 AA 650-51, 655-56.

Lastly, in People v. Brouder, 168 Ill. App. 3d 938, 946, 523 N.E.2d 100, 105 (1988), the defendant claimed that the trial court committed reversible error when it failed to provide defendant's tendered jury instruction defining "knowingly." After finding defendant not guilty of telephone harassment, the jury informed the court

that it was at a definite deadlock on the resisting arrest charge. Id. The jury sent several written questions to the trial judge that indicated that the jury was confused as to the meaning of "knowing resistance." Id. The jury twice asked the trial judge, "in specific terms, what defines 'knowingly resisting arrest?". Id. The jury also sent a written request to the trial judge, which stated, "we are confused as to the 'knowingly resistance' to being arrested. Does it mean a mental state of refusing to be arrested and thereby running away, physically fighting? Will a step or two away mean resistance?" Id. The trial judge twice sent back a response stating, "you have heard all of the evidence. You have been given the instructions. Continue your deliberations." Id. at 946-47, 523 N.E.2d 105. However, the provided instructions did not define "knowingly." Id. at 947-48, 523 N.E. 2d 106. The defendant requested a jury instruction derived from the Illinois Pattern Criminal Jury Instructions, which defined "knowingly" as a mental state. Id. at 947, 523 N.E.2d 105. The trial court did not rule on whether to admit or deny the requested jury instruction, but reserved its ruling. Id. Before the trial court was able to give its ruling, the jury found defendant guilty of resisting arrest. Id.

The Illinois Appellate Court found that because the jury demonstrated a confusion as to a question of law, the meaning of "knowing resistance", the court abused its discretion not providing the jury with the tendered jury instruction defining "knowingly" as a mental state. Id. at 948, 523 N.E.2d 106. In this case,

unlike Brouder, the jury's questions did suggest that they were confused about a question of law for which they did not have a jury instruction. To the contrary, the jury was provided with complete legal definitions of malice aforethought, 2nd degree murder and manslaughter. See 3 AA 650-51, 655-56.

Finally, contrary to the cases cited by Jeffries, there was no simple or proper answer the District Court could have given to the jury other than advise them that they must read and follow the provided instructions. The jury instructions in this case provided the complete legal definitions of malice aforethought, 2nd degree murder and manslaughter. See 3 AA 650-51, 655-56. There are no other proper supplemental instructions the District Court could have provided to the jury, which were not already given. Notably, in his opening brief, Jeffries fails to demonstrate what other proper clarifying instructions the District Court could gave given in this case. Jeffries makes nothing more than a bare and conclusory claim that the District Court erred by refusing to provide supplemental clarifying instructions. AOB 35-40. Accordingly, under the plain error standard, the District Court did not abuse its discretion by reinstructing the jury to read and follow the instructions provided to them.

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IV.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION DENYING JEFFRIES'S MOTION FOR A MISTRIAL BASED ON ALLEGED PROSECUTORIAL MISCONDUCT

Jeffries claims that the District Court erred in denying his motion for a mistrial based on prosecutorial misconduct. AOB 41-48. The decision to grant or deny a motion for a mistrial rests within the sound discretion of the trial court. Rudin v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004). A defendant's motion for a mistrial must demonstrate prejudice that prevents the defendant from receiving a fair trial. Id. at 144, 86 P.3d at 587. The trial court has discretion to determine whether a mistrial is warranted, and its judgment will not be overturned absent an abuse of discretion. Id. at 142, 86 P.3d at 586; Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993).

In this case, during the State's closing argument, Jeffries moved for a mistrial based on prosecutorial misconduct. 3 AA 623, 637-38. Specifically, Jeffries claimed that the State committed prosecutorial misconduct by implying that he had influenced Brittany's testimony. 6 AA 637-38. Ultimately, the District Court properly found that based on Brittany's testimony the State's argument was proper. Id.

The District Court did not abuse its discretion when it denied Jeffries's Motion for a Mistrial based on prosecutorial misconduct. This Court applies a two-step analysis to claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172,

1188, 196 P.3d 465, 476 (2008). This Court first determines whether the prosecutor's conduct was improper, and second, whether the conduct warrants reversal. Id. "A prosecutor's comments should be considered in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (quoting United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038 (1985)). Moreover, "this Court will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Valdez, 124 Nev. at 1188, 196 P.3d at 476. In this case, there was no witness vouching, expression of personal opinion, or claim of superior knowledge.

First, Jeffries claims that the State improperly accused him of influencing Brittany's testimony. AOB 45-46. During its closing, the State argued:

> "So we now have three versions of statements from Brittany Ames. And now we're here at trial, and Brittany Ames doesn't remember anything.
> ….
> In 2011, there wasn't this influence that – you know, the eminent marriage of her mother to the man that she watched shoot Eric Gore dead.
> That's a huge influence. She hasn't had—back then, during her reliable statement that she did remember, she didn't have the influence of three-and-a-half years of being worked on by mom an – perhaps indirectly, but certainly being worked on—by Mike Jeffries."

3 AA 623

The Nevada Supreme Court has long recognized that "[d]uring closing argument, the prosecution can argue inferences from the evidence and offer conclusions on contested issues." Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997). A prosecutor may properly comment upon the evidence adduced at trial. Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971) (statements made by the prosecutor, in argument, when made as a deduction or conclusion from evidence introduced in the trial, are permissible).

Jeffries cites to William v. State, 103 Nev. 106, 734 P.2d 700 (1987) to support his claim that the State committed prosecutorial misconduct by arguing that Jeffries had potentially indirectly influenced Brittany. AOB 44. In Williams, the Nevada Supreme Court held that the prosecutor had improperly contended that defendant purchased his alibi testimony although there was no evidence from which to draw such an inference. Id. at 106, 734 P.2d at 703. In this case, unlike Williams, the State had evidence from which it could draw an inference that Brittany's testimony had been influenced by her mother, and indirectly by Jeffries.

On October 23, 2011, right after the murder, Brittany gave a statement to the police. 1 AA 7-15. She told Detective Raetz that Jeffries and Eric got in an argument that night. 1 AA 9. Eric was being disrespectful and Jeffries threatened to kick him out of the house. Id. When Eric said, "no you won't", Jeffries snapped and punched Eric in the face and Eric feel the floor. Id. Then, Jeffries started punching Eric like

crazy. Id. Eric was trying to fight back but could not because he was unstable on his feet. 1 AA 10. Brittany then heard Jeffries yell he was going to get his gun out of his room and yelled for Brittany to go to her room. Id. As Brittany was running to the room she looked back and saw Jeffries shoot Eric. Id. At the preliminary hearing a couple of months later, she similarly testified that she saw Jeffries punch Eric and saw Eric fall to the ground. 1 AA 153. Jeffries came over to Eric and punched him a couple of times. 1 AA 154. Brittany also testified that she was able to see Eric's reaction as Jeffries was holding the gun; he was backing up scared. 1 AA 157. However, at trial, Brittany could not "remember" most of the details and downplayed Jeffries actions the night of the murder. 1 AA 138-142. At trial, Mandy testified that she and Jeffries had become engaged after the murder. 1 AA 239. She admitted to talking to Brittany about the little things that go on in Jeffries's life and her feelings for him. Id. Brittany testified that she liked Jeffries and thought he was a good person. 1 AA 146. She thought he was a good person because Mandy talked to her about the things she did with Jeffries when she saw him; Mandy updated Brittany on Jeffries's life. Id. Brittany admitted that she did not want anything to happen to Jeffries. 1 AA 148. Based on the evidence adduced at trial, the State made a permissible inference that Mandy, and indirectly Jeffries, could have potentially influenced the change in Brittany's testimony. Accordingly, the State did not commit prosecutorial misconduct.

Second, Jeffries claims the State committed prosecutorial misconduct by improperly vouching for Brittany when it stated, "I really grew to like Brittany Ames during this whole period that I've had this case." AOB 47. However, this claim was not properly preserved for appeal because Jeffries never objected to the State's statement at trial. Therefore, this claim is reviewed for plain error. Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002) (where a defendant fails to offer a contemporaneous objection, this Court will only review claims of prosecutorial misconduct for plain error).[3] During its closing, the State argued:

> "So we now have three versions of statements from Brittan Ames. And now we're here at trial, and Brittany Ames doesn't remember anything. You know, I—I'm – I really grew to like Brittany Ames during this whole period that I've had this case. You know why? You saw it.
> Here is a wonderful young lady. She's a wonderful young lady. And think about the influence she had on—had in her life that would influence her testimony…"

6 AA 623.

The Nevada Supreme Court has held that a witness's credibility is a proper subject for argument. Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). Arguments concerning witness credibility are improper when they impermissibly vouch for or against a witness and inappropriately invoke the prestige of the district attorney's office. Id. "Vouching may occur in two ways: the prosecution may put

[3] Jeffries never made a contemporaneous objection to the State's statement. 3 AA 623. The only contemporaneous objection made by Jeffries was to the State's argument that he had influenced Brittany's testimony. Id.

the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997). The harm caused by vouching depends on the closeness of the case. Id. Vouching is especially a problem where the characterization of the witness testimony "amounts to an opinion as to the truthfulness of a witness in circumstances where veracity might well have determined the ultimate issue of guilt or innocence." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988).

In reviewing the State's comment under the plain error standard, any error is not plain because a casual inspection of the record demonstrates that the State did not improperly vouch for Brittany. Although the Court commented on the State's use of "I" in its argument, in context, the State's statement was a proper argument on Brittany's credibility. At no point did the State put the prestige of the government behind Brittany or indicate any information not presented to the jury to support her testimony. Lisle, 113 Nev. at 553, 937 P.2d at 481. The State properly argued that jury had the opportunity to observe Brittany and made a permissibly inference that the change in her testimony from previous statements she had given could have been influenced by her mother; who was now engaged to Jeffries. Therefore, the State did not commit prosecutorial misconduct.

Lastly, even assuming *arguendo*, that the State's comments were improper, Jeffries cannot show prejudice. When the alleged misconduct is not of a constitutional nature, this Court "will reverse only if the error substantially affects the jury's verdict." Valdez, 124 Nev. at 1188, 196 P.3d at 476. This Court must consider such statements in context, as a criminal conviction is not to be lightly overturned. Id. Additionally, this Court has held that "the level of misconduct necessary to reverse a conviction depends upon how strong and convincing the evidence of guilt is." Rowland, 118 Nev. at 38, 39 P.3d at 119. If the issue of guilt is not close and the State's case is strong, misconduct will not be considered prejudicial. Id. In this case, as discussed *supra* Section I, overwhelming evidence was admitted against Jeffries such that any alleged prosecutorial misconduct was harmless.

V.
NO CUMULATIVE ERROR OCCURRED

Jeffries alleges that the cumulative effect of error requires reversal of his conviction. AOB 48-50. 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). Jeffries needs to present all three elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial. . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974)).

First, Jeffries has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*.") (emphasis added). Second, although Jeffries was charged with a grave offense, the issue of guilt was not close. As discussed *supra* Section I, there was overwhelming evidence to support Jeffries's convictions. Therefore, Jeffries's claim of cumulative error has no merit and his conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Jeffries's Judgment of Conviction be AFFIRMED.

Dated this 10th day of June, 2016.

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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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 8,892 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 10th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 10th day of June, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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