IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE MASON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 68497

RESPONDENT'S ANSWERING BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE MASON, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 68497

RESPONDENT'S ANSWERING BRIEF

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

ROUTING STATEMENT: This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(a)(2) because it is a direct appeal involving offenses that are category A.

STATEMENT OF THE ISSUES

1. Whether the district court did not err in denying Mason's motion to sever.

2. Whether the district court did not err in properly admitting Rowland's testimony.

3. Whether the district court's comments regarding Rowland were proper.

4. Whether the State did not commit prosecutorial misconduct.

5. Whether there was not cumulative error sufficient to warrant a new trial.

STATEMENT OF THE CASE

On September 29, 2010, Willie Darnell Mason was charged by way of Indictment with: Count 1—Conspiracy to Commit Robbery (Felony – NRS 199.480,

200.380); Count 2—Conspiracy to Commit Murder (Felony – NRS 199.480, 200.010, 200.030); Count 3—Burglary while in Possession of a Firearm (Felony – NRS 205.060); Counts 4 and 6—Robbery with Use of a Deadly Weapon (Felony – NRS 200.380, 193.165); Count 5—Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); Count 7—Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165, 193.330); and Count 8—Battery with Use of a Deadly Weapon with Substantial Bodily Harm (Felony – NRS 200.481). 1 RA 1-8.

On October 7, 2010, Mason was arraigned and he pleaded not guilty. 1 RA 9. On August 22, 2013, Mason filed a Motion to Sever Mason for Trial. 1 RA 10-19. On August 23, 2013, the State filed its Opposition to Defendant's Motion to Sever Defendants. 1 RA 20-33. Mason filed a Reply to the State's Opposition to Motion to Sever Defendants on September 3, 2013. 1 RA 34-41. On September 5, 2013, after reviewing the written pleadings and hearing argument from counsel, the district court denied Mason's Motion without prejudice. 1 RA 42-43. A written order was filed on September 23, 2013, reflecting the district court's oral pronouncement. 1 RA 44-45.

Mason's 16-day jury trial began on January 20, 2015, and on February 17, 2015, the jury returned a verdict of guilty on all of the charges contained in the

Indictment. Additionally, the jury returned a special guilty verdict of First Degree Murder with Use of a Deadly Weapon for Count 5. 1 RA 46-49.

Mason was sentenced on June 23, 2015, to: Count 1—a maximum of 72 months with a minimum parole eligibility of 16 months; Count 2—a maximum of 120 months with a minimum parole eligibility of 26 months, to run consecutive to Count 1; Count 3—a maximum of 180 months with a minimum parole eligibility of 40 months, to run concurrent with court 2; Count 4—a maximum of 180 months with a minimum parole eligibility of 40 months, plus a consecutive term of 180 months with a minimum parole eligibility of 40 months for the deadly weapon enhancement, to run concurrent with Count 3; Count 5—life without parole, plus a consecutive term of 120 months with a minimum parole eligibility of 40 months for the deadly weapon enhancement; Count 6—a maximum of 180 months with a minimum parole eligibility of 40 months, plus a consecutive term of 180 months with a minimum parole eligibility of 40 months for the deadly weapon enhancement, to run consecutive to Count 5; Count 7—a maximum of 240 months with a minimum parole eligibility of 53 months, plus a consecutive term of 240 months with a minimum parole eligibility of 53 months for the deadly weapon enhancement, to run concurrent with Count 6; Count 8—a maximum of 180 months with a minimum parole eligibility of 40 months, to run concurrent with Count 7. Mason was given

1,743 days credit for time served. 1 RA 50-53. The Judgment of Conviction was filed on June 26, 2015. Id.

On February 8, 2016, Mason filed his direct appeal Appellant's Opening Brief.

STATEMENT OF THE FACTS

In the late evening hours of August 6, and the early morning hours of August 7, 2010, Mason, David James Burns, and Monica Martinez were at the Opera House Casino on North Las Vegas Boulevard in Las Vegas, Nevada. 1 RA 112-13. Martinez was prostituting and Burns was carrying a large .44 Ruger revolver with a woodgrain handle. 1 RA 111-13; 3 RA 526. Mason, Burns, and Martinez shared a drink and gambled. 1 RA 113-14. Mason stepped away to take a phone call and when he returned he told Burns and Martinez that they could "go meet [his] people now." 1 RA 114.

They left Opera House Casino, Martinez drove, and Mason directed them to a nearby 7-Eleven convenience store where they picked up Stephanie Cousins and another man. 1 RA 114-17. Martinez then drove them to Cousins' apartment where Mason, Burns, Cousins, and the third man spent five or ten minutes before returning to Martinez' car. 1 RA 117-18. Martinez, Mason, and Burns "get rid of" the third man before returning to pick up Cousins. 1 RA 1189-19. Once back inside the car, Cousins and Mason discussed committing robberies. 1 RA 119. Cousins presented

the group with several potential targets. 1 RA 119-21. After driving around and considering these potential targets and disagreeing about the possible presence of a firearm at one of the locations, the four ultimately agree to rob an apartment where there were no weapons, only one man, and women and children present. 1 RA 119-25.

Cousins directed Martinez to 5662 Miekle Lane Apartment A, Las Vegas, Clark County, Nevada. 1 RA 127. On the drive to the apartment, Burns stated that "he wasn't going home empty-handed," and "that he was going to go in there shooting and just merk whoever was in there . . . kill whoever was in there." 1 RA 126. Prior to their arrival at the apartment complex, Cousins called the apartment's phone at 3:39 A.M. to inform the occupants that she was on her way. 1 RA 134-25; 2 RA 385-86.

At the apartment, Cornelius Mayo and Derecia Newman were in bed together. 2 RA 386. Derecia answered the phone and spoke to Cousins for a minute or two. 2 RA 386. Also present in the apartment was Derecia's 12-year-old daughter, Devonia Newman, Derecia's sister, Erica Newman, and Derecia's and Cornelius' three children, Cashmere Mayo (age 6), Cornelius Mayo Junior (age 5), and Cordaja Mayo (age 3). 2 RA 280-84. When the 3:39 A.M. phone call was made, Cornelius could hear Devonia watching television in the living room. 2 RA 386.

Upon the arrival of Mason, Burns, Martinez, and Cousins, Martinez backed her car into a parking space near a green dumpster per Cousins' instruction. 1 RA 132-34. Cousins explained that this apartment was where she purchased drugs and Mason asked Martinez for $20 to "make it look like a drug buy." 1 RA 134. Martinez handed $20 from her purse to Mason and Mason gave it to Cousins. 1 RA 134. Then, Mason, Burns, and Cousins exited Martinez' car and walked towards the apartment. 1 RA 134-35.

While Cornelius was in the bathroom, Cousins made a second phone call to the apartment, which Derecia answered. 2 RA 387. Shortly after, Derecia answered a knock at the front door. 2 RA 387-88. From the bathroom, Cornelius heard a commotion, Derecia scream, and Cousins say "no," before he heard two gunshots. 2 RA 387-88. A second or two later, Cornelius heard two more gunshots and someone hitting the wall, before seeing 12-year-old Devonia run into the bathroom and close the door behind her. 2 RA 388-90. Devonia looked scared. 2 RA 389. Cornelius asked her, "what's going on?" and another bullet came through the bathroom door. 2 RA 389-90.

Devonia jumped up, tried to run from the bathroom, and was shot in the stomach upon opening the door. 2 RA 389-90. She fell to the floor holding her stomach. 2 RA 389-91. Cornelius told Devonia that "she would be all right," and dialed 9-1-1. 2 RA 392. Cornelius left the bathroom and checked the bedroom

where Erica Newman and the small children were sleeping, and they were undisturbed. However, Derecia was "sitting on the couch with half her face gone." 2 RA 393. Derecia had an obvious gunshot wound to the left side of her face and was gripping the $20 bill in her hand. 2 RA 484.

Following the commotion, screams, and gunshots, "it was dead silent. It was eerie, quiet." 1 RA 136. Mason and Burns ran back to Martinez' car while ducking down. 1 RA 136. They entered the car, saying "go, go," and Martinez pulled out and made a left on the street. 1 RA 137. Mason called Cousins to find out where she was and they made a U-turn to pick her up. 1 RA 137-38. Cousins was "breathing heavily," "panicked," and "hyperventilating." 1 RA 138. Burns said that he had blood on him, he appeared "irritated," and when Cousins asked for a cigarette, "he told her to shut the fuck up." 1 RA 138-39. Martinez dropped Cousins off near "some houses across from her apartment," and Burns said that "he should have shot her . . . he should have killed her." 1 RA 139-40. Martinez drove back toward her boyfriend Jerome Thomas' apartment and dropped Mason and Burns off at a nearby Rebel gas station. 1 RA 82, 140-41.

After stopping at Texas Station Casino, where Martinez used the bathroom and threw up, she returned to Thomas' apartment. 1 RA 141-44. When Martinez arrived, there was a chair and several boxes barricading Thomas' apartment door. 1 RA 144. Burns, Mason, and Thomas were present. 1 RA 144. Thomas had told

Burns to take a shower and to use bleach to wash off the blood. 1 RA 145. Thomas used a blue rag to wipe down the revolver and Donovan Rowland came by the apartment to pick it up. 1 RA 145-47. Thomas gave Rowland the revolver and said that "it was used to shoot some mother and her daughter," and "to get rid of the gun, either sell it or do whatever just to get rid of it." 2 AA 467; 1 RA 147.

The police arrived at the scene of the murder shortly after Cornelius dialed 9-1-1. 2 RA 394. There were a number of bullet strikes throughout the apartment. 2 RA 484. An investigation of the apartment revealed that there were no spent bullet shell casings present, leading police to believe that a revolver was used to commit the murder. 2 RA 489. Additionally, $450 was taken from the apartment. 2 RA 436. A police investigation led officers to speak with Cousins. 2 RA 496. Based on that investigation, police obtained a pen register on Mason's phone. 2 RA 496. Eventually, police determined that Mason, Burns, Martinez, and Thomas had all been inside of Thomas' residence. 2 RA 498-99.

After further investigation, police made contact with, interviewed, and arrested Martinez. 3 RA 506-09. Police obtained video surveillance of the Opera House and the of Greyhound Bus station where Mason and Burns boarded a bus to Los Angeles, California before continuing on to San Bernardino. 3 RA 512. Photographs were sent to the San Bernardino Police Department and ultimately Mason and Burns were arrested and taken into custody. 3 RA 515-16. Later,

Rowland provided the police with the location of the revolver used in the murder. 3 RA 523-24.

ARGUMENT

1. The district court did not err in denying Mason's motion to sever.

On the 9th day of trial, Mason again moved for severance. 2 AA 448. Mason argued that the anticipated testimony by Rowland would identify Mason as the shooter placing Burns in a "position to say that based on [ ] Rowland's testimony that [Burns] is not the shooter, [Mason] is." 2 AA 448. The State argued that Rowland's statements were admissible[1] and that the defendants were welcome to cross-examine Rowland and impeach him with his previous inconsistent statement to the police where he claims that he does not know who the shooter was.[2] 2 AA 450. Ultimately, the district court ruled that Rowland's testimony was admissible because Thomas is a co-conspirator and he was instructing Rowland to dispose of

[1] Mason also alleges that Rowland's testimony is inadmissible in violation of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). This contention is examined in detail below.

[2] To the extent Mason alleges that the State allegedly intentionally elicited a statement from Rowland regarding the identity of the shooter after informing the district court that it would not do so, this misrepresents the record. Instead, the State informed the district court that Rowland's testimony was likely not truthful in implicating Mason as the shooter and that it was the State's position that Burns was the shooter, that the State was unable to control Rowland's (an adverse witness) testimony, and that the State was willing to impeach Rowland on his inconsistent statement and that Rowland would be subject to cross-examination. 2 AA 449-50. The district court agreed stating, "I can't help what he's . . . going to testify to. . . You can cross him on that." 2 AA 453.

the revolver and the statements are admissible "because it was part of a sentence that says get rid of the gun." 2 AA 450-52. After further discussion, the district court explained that "why they needed to get rid of the gun is important," that the defendants were able to cross Rowland on his testimony, and that the motion to sever was denied. 2 AA 452-55.

"Joinder decisions are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." Tillema v. State, 112 Nev. 266, 268, 914 P.2d 605, 606 (1996) (quoting Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990)). In order to promote efficiency and equitable outcomes, Nevada law favors trying multiple defendants together. Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995). As a general rule, defendants who are indicted together shall be tried together, absent a compelling reason to the contrary. Rowland v. State, 118 Nev. 31, 44, 39 P.3d 114, 122 (2002). "A district court should grant a severance only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Chartier v. State, 124 Nev. 760, 765, 191 P.3d 1182, 1185 (2008) (quoting Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002)); see also NRS 174.165. Further, a court making this decision "must consider not only the possible prejudice to the defendant but also the possible prejudice to the

Government resulting from two time-consuming, expensive and duplicitous trials." Lisle v. State, 113 Nev. 679, 688-89, 941 P.2d 459, 466 (1997).

Generally speaking, severance is proper only in two instances. The first is where the codefendants' theories of defense are so antagonistic that they are "'mutually exclusive" such that "'the core of the codefendant's defense is so irreconcilable with the core of the defendant's own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant." Id. (quoting Rowland, 118 Nev. at 45, 39 P.3d at 122-23) (alteration omitted). The second instance is "where a failure to sever hinders a defendant's ability to prove his theory of the case." Id. at 767, 191 P.3d at 1187; see also Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968).

Even when one of the above situations are presented, a defendant must also show that there is "a serious risk that a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable judgment about guilt or innocence." Marshall, 118 Nev. at 647, 56 P.3d at 379 (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)). To show prejudice from an improper joinder "requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict." Chartier, 124 Nev. at 764-65, 191 P.3d at 1185 (quoting Marshall, 118 Nev. at 647, 56 P.3d at 379). Further, as this Court has long recognized that "some level

of prejudice exists in a joint trial, error in refusing to sever joint trials is subject to harmless-error review." Id.

Mason's assertion amounts to nothing more than his opinion that he would have a better chance at acquittal if he and Burns had separate trials. Lisle, 113 Nev. at 689, 941 P.2d at 466 (Severance will not be granted based on "guilt by association" alone because merely having a better chance at acquittal is insufficient to establish prejudice.). Rowland's testimony did not make Mason's and Burns' defenses antagonistic or hinder Mason in his ability to present his evidence. See Chartier, 124 Nev. at 766-67, 191 P.3d at 1186-87. In Chartier, the defenses were antagonistic because Chartier's co-defendant alleged that Chartier was present at the scene of the crime and committed the murder, even though the State did not assert that theory and there was no evidence supporting it. Id. at 766, 191 P.3d at 1186. Further, Chartier was limited in the evidence he was able to present, because of potential prejudice to his co-defendant. Id. at 767, 181 P.3d at 1186-87.

Rowland's testimony did not create an antagonistic defense. During its closing arguments, the State argued that Burns was the shooter. 4 AA 901, 911-14; 5 AA 1008.[3] Despite Mason's insistence, Mason and Burns did not present mutually

[3] During rebuttal, the State asserted, "I'm going to suggest to you . . . there isn't any doubt that David Burns is the shooter in this case. Right. I mean, that's not going to be – there's no surprise that our position is the evidence establish[ed] he's the shooter." 5 AA 1008.

exclusive defenses. Burns' theory of defense was simply that contrary to the arguments by the State, Burns was not the shooter. 4 AA 997-99. During Burns' closing argument, Burns' defense counsel suggested that Thomas might have been present as the shooter. 4 AA 997. Mason's theory of defense was that the defendants "went up to buy drugs and somebody went crazy." 4 AA 926. Specifically, Mason's defense counsel argued that they were not intending to commit a robbery and murder and instead, their plan was to purchase illegal drugs and that the only way to convict Mason would be under a felony murder theory, which the State has failed to prove. 4 AA 919-25.

These defenses are not antagonistic because Burns' argument that he is not the shooter and Mason's argument that this was not a planned robbery are not mutually exclusive. The jury is free to agree or disagree with either defendant, without being pigeonholed in its decision regarding the other. Rowland's testimony did not contradict this reality or hinder Mason's ability to prove his theory of the case. Even if the jury belied Rowland that Mason was the shooter, Mason's and Burns' theories of defense remain the same. Further, Rowland's statement was impeached by the State using a prior inconsistent statement made to police where he states that he did not know which defendant was the shooter. Therefore, Mason is unable to demonstrate a substantial and injurious effect on the verdict." Chartier, 124

Nev. at 764-65, 191 P.3d at 1185. Further, in light of the overwhelming evidence of Mason's guilt, any alleged error was harmless error.

To the extent Mason asserts that he "was tried by a death-qualified jury," and that this allegedly presented him with bias, this claim is without merit. AOB at 12. Mason concedes that this issue is well-established by Nevada law and his suggestion that the decisions of the Nevada Supreme Court are ripe for review is unavailing. AOB at 12. The United States Supreme Court has rejected the argument that a defendant tried with a codefendant who is facing the death penalty is deprived his right to an impartial jury when tried by a death-qualified jury. See Buchanan v. Kentucky, 483 U.S. 402, 107 S. Ct. 2906 (1987). In McKenna v. State, 101 Nev. 338, 344, 705 P.2d 614, 618 (1985) the Nevada Supreme Court observed that under Witherspoon v. Illinois, 391 U.S. 510, 520 n. 18, 88 S. Ct. 1770 (1968), the Court is "not required to presume that a death-qualified jury is biased in favor of the prosecution.". Rather, a defendant bears "the burden of establishing the non-neutrality of the jury." Id.

Here, Mason makes no argument that any seated juror was biased against him. Nor does he substantiate his claim that he was deprived of his right to a jury that represents a fair cross-section of the community due to the exclusion of jurors who could not qualify for a capital trial. Mason has not demonstrated bias or non-neutrality by any juror, and he was not entitled to a severance of the trial solely

because the jury was death qualified. Arguments not cogently made need not be responded to or considered by this Court, see Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). Claims unsupported by legal citations will not be considered by this Court. See NRAP 28(a)(9)(A), (j); Edwards, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38; see also Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority).

2. The district court did not err in properly admitting Rowland's testimony.

Mason asserts on appeal the mistaken belief that his Confrontation Clause rights were violated during Rowland's testimony. AOB at 12-14. Specifically, Mason complains his rights were violated when at trial Rowland testified as to why Thomas gave him the revolver used to commit the robbery and murder and why Thomas instructed him to dispose of it. AOB at 13. An examination of the record reveals that each allegation is wholly without merit.

Although this Court generally reviews a district court's evidentiary rulings for an abuse of discretion, whether a defendant's Confrontation Clause rights were violated is considered to be a question of law that is reviewed *de novo*. Chavez v. State, 213 P.3d 476, 484 (Nev. 2009). The Sixth Amendment of United States

Constitution "provides that '[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against them.'" Crawford, 541 U.S. at 42, 124 S.Ct. at 1359 (2004). While the Confrontation Clause does not apply to non-hearsay statements, the Crawford Court determined that if there was hearsay testimony that was "testimonial" in nature, the Sixth Amendment affords a defendant the right to confront the declarant. See Id.

This Court defined "testimonial" hearsay to include (1) "ex parte in-court testimony or its functional equivalent," e.g., "affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions' '; and (3) "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Flores v. State, 121 Nev. 706, 712 120 P.3d 1170, 1174 (2005) (quoting Crawford, 541 U.S. at 51-52, 42 S.Ct. at 1364). Thus, under Crawford, "testimonial" hearsay statements are to be excluded unless two requirements are met. See Id. First, that the declarant must in fact be unavailable and second, that the defendant had a previous opportunity to cross-examine the unavailable declarant. Crawford, 541 U.S. at 67, 42 S.Ct. at 1374.

Mason's alleged violation stems from the testimony of Rowland during trial. Rowland claims that his Confrontation Clause rights were violated as Rowland testified as to the reason Thomas instructed him to get rid of the revolver used in the commission of the robbery and murder. The portion of the trial testimony regarding this co-conspirator's statement that is the subject of Mason's appeal is as follows:

> MR. DIGIACOMO: Okay. When you call him back, is that when he asks you to do something with the gun?
>
> ROWLAND: Yes.
>
> MR. DIGIACOMO: Okay. And do you remember exactly what he told you to do with the gun?
>
> ROWLAND: No.
>
> MR. DIGIACOMO: Did you – do you remember exactly why it is – well, what he told you the reason why you had to do something with the gun?
>
> ROWLAND: Yes.
>
> MR. DIGIACOMO: Okay. Why is it that you needed to [do] something with the gun?
>
> ROWLAND: That it was used in a murder.
>
> MR. DIGIACOMO: Okay. Do you remember any of the – anything else that he told you during that conversation?
>
> ROWLAND: That [Mason] had shot someone and that was pretty much it.

2 AA 486. After this testimony is given, the very statement that Mason contests was impeached by the State:

> MR. DIGIACOMO: All right. Read the answer that you gave to the police.
>
> ROWLAND: The specific thing he said was that Monica, [Mason], and I guess [Burns] went to go do a drug deal, I guess, or whatever to – at the apartment or whatever on Lake Mead and Nellis, whatever it is, and that when I guess Monica met up with the lady something like didn't seem right and everything out – *and one of either [Mason], or h didn't tell me specifically, but he said either [Mason] or [Burns] shot or one of them flipped out and everything went bad from there.* And he never said that he was there, none of that.

2 AA 487-88.

Mason complains that Rowland's statement, "[t]hat [Mason] had shot someone," violated Crawford. First, Mason concedes that this testimony "was offered by an alleged co-conspirator." AOB at 14. In fact, this is merely a non-testimonial statement made by a co-conspirator in furtherance of a conspiracy, which is not considered hearsay under Nevada law. Nevada's Hearsay statute, specifically NRS 51.035(3)(e), expressly states that ""[h]earsay" means a statement offered in evidence to prove the truth of the matter asserted *unless:… [t]he statement is offered against a party and is…[a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy*. (Emphasis added). It is also well established in Nevada that the "duration of a conspiracy is not limited to the commission of the principal crime, but extends to affirmative acts of concealment." Crew v. State, 100 Nev. 38, 675 P.2d 986 (Nev. 1984)(*citing* Foss v. State, 92 Nev. 163, 547 P.2d 688 (1976)). Thus, the actions taken by co-conspirators to evade capture are considered

under Nevada law to be steps in furtherance of a conspiracy. Id. This is precisely what occurred during the conversation between Thomas and Rowland. Thomas informed Rowland that the revolver had been used in the commission of a murder and instructed him to dispose of it so that he and the others may evade capture.[4] Accordingly, the admission of Rowland's statement was entirely proper as a non-hearsay co-conspirator's statement.

Additionally, co-conspirator statements are not testimonial and therefore beyond the compass of Crawford's holding. See Crawford v. Washington, 541 U.S. 36, 56, 124 S.Ct. 1354, 1374 (2004) (describing "statements in furtherance of a conspiracy" as "statements that by their nature [are] not testimonial"); see also United States v. Allen, 425 F.3d 1231, 1235 (9th Cir. 2005) (Statements by a co-conspirator made during and in furtherance of a conspiracy are non-testimonial). There was nothing about the circumstances surrounding Rowland's and Thomas' conversation that would have led Thomas to believe that his comments would have been used at a later trial. Flores, 121 Nev. at 712 120 P.3d at 1174. Thomas was instructing Rowland to dispose of the revolver for the primary purpose to ensure they *would not* be arrested by the police for this murder. Thus, there nothing testimonial about these statements and this argument is meritless.

[4] To the extent Mason asserts that Rowland's statement is hearsay within hearsay, this complaint is without merit because Thomas is the declarant of the statement and thus, there is only one level of alleged hearsay. AOB at 11.

However, even if this Court were to find that a Crawford violation was committed, because Mason's objection was preserved in district court for review on appeal, it is still subject to a harmless error analysis. 2 AA 444-46; Polk v. State, 126 Nev. 19, 2010 WL 2224467 (Nev. 2010) (*citing* Medina v. State, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006) (recognizing that any potential prejudice from a Crawford violation will be reviewed under a harmless-error analysis)). Here, to the extent that this Court considered this to a Crawford violation, the error was harmless, because there was overwhelming admissible evidence of Mason's guilt.

Martinez testified that prior to their arrival at the apartment, Burns was carrying a large .44 Ruger revolver with a woodgrain handle. 1 RA 226-28; 3 RA 526. Martinez testified that this was a planned robbery and murder and that Mason asked her for $20 to "make it look like a drug buy." 1 RA 234-41, 249. Martinez testified that on the drive to the apartment, Burns stated that "he wasn't going home empty-handed," and "that he was going to go in there shooting and just merk whoever was in there . . . kill whoever was in there," and then when he returned to the car after the murder he had blood on him. 1 RA 241, 253-54. Cornelius Mayo testified that he heard the gunshots that killed Derecia Newman and entered 12-year-old Devonia's stomach area and that he "saw Derecia sitting on the couch with half her face gone." 2 RA 388-40, 393. Bunting testified that Derecia Newman was found "gripping the $20 bill," and that there were "a number of bullet strikes

throughout the apartment." 2 RA 484. Rowland testified that after the murder, Thomas had told Burns to take a shower and to use bleach to wash off the blood and used a blue rag to wipe down the revolver. 2 RA 260-62. Police obtained pen registers and examined phone call records between the co-conspirators. 2 RA 496-99. Accordingly, there is no basis on this ground to reverse Mason's convictions.

3. Whether the district court's comments regarding Rowland were proper.

Mason contends that the district court made an alleged improper comment "during the course of an objection and the argument that followed." AOB at 15. Specifically, Mason complains that the district court stated, "He's obviously identified with the defendants, not with the plaintiff. Strange identification I must admit." AOB at 15. Mason contends that this comment allegedly had the prejudicial effect of "marrying" Mason to the testimony given by Rowland prior to the comment. AOB at 15-16. However, this claim is unavailing.

"While the district court must protect the defendant's right to a fair trial, a trial judge is charged with providing order and decorum in trial proceedings, and must also concern itself with the flow of trial and protecting witnesses." Rudin v. State, 120 Nev. 121, 140, 86 P.3d 572, 584 (2004) (internal quotations omitted), reversed on other grounds. No judicial proceeding is completely free from unexpected or unusual circumstances. However, under NRS 1.210 and the Nevada Code of Judicial Conduct, judges are given wide discretion to control the proceedings before them

and take the steps necessary to "promote[] public confidence in the independence, integrity, and impartiality of the judiciary." Nevada Code of Judicial Conduct R. 1.2 (2010); see also id. Scope, cmt. 5 (recognizing that, "[t]he Rules of the Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions."). This Court has recognized that, "courts have inherent power to prevent injustice and to preserve the integrity of the judicial process." Halverson v. Hardcastle, 123 Nev. 245, 261-62, 163 P.3d 428, 440 (2007).

While a proceeding may be fraught with unusual circumstances, this Court has recognized that remedial action is unnecessary so long as the jury's verdict was not influenced. See Johnson v. State, 122 Nev. 1344, 1359, 148 P.3d 767, 777 (2006) (concluding that the jury was not influenced by the victim's brother fainting after seeing picture of crime scene or jury's discovery of a crack pipe in the jury box).

Here, Rowland had been declared an adverse witness and the State was given permission by the district court to use leading questions during direct examination. 3 AA 508. Subsequently, defense counsel for Burns objected to the State's use of leading questions. 3 AA 514. In making his ruling, the judge simply explained that the witness has seemingly aligned with the defendants. 3 AA 514. The judge was

merely ruling on Burns' objection. Despite, Mason's insistence, the judge's statement in no way prejudices Mason. The judge simply explained his reasoning for his ruling, that Rowland was a hostile witness even though he was called by the State. The district court's comment was properly made in the appropriate interests of controlling the flow of the proceedings, saving time, and avoiding confusion and thus, does not amount to judicial misconduct. See Leonard v. State, 114 Nev. 1196, 1211, 969 P.2d 288, 298 (1998) (holding that a defendant was not deprived of his right to a fair trial when the district court admonished defense counsel to quit wasting time by individually greeting each juror during jury selection); Robins v. State, 106 Nev. 611, 624, 798 P.2d 558, 566-67 (1990) (concluding that the "trial judge was appropriately controlling the flow of the trial without prejudice to" the defendant when it admonished counsel); NRS 50.115(1)(c) HN12 (providing that a judge must "exercise reasonable control over the mode and order of interrogating witnesses . . . to protect witnesses from undue harassment or embarrassment"). Further, in light of the overwhelming evidence presented at trial, it is unlikely that in a 16-day murder trial, this single comment made during the court's duplicative ruling on a repeated objection had the effect of prejudicing the jury to an extent necessitating reversal.

Further, harmless-error review applies, however, only if the defendant preserved the error for appellate review. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Generally, to preserve a claim, the defendant must object to

the misconduct at trial. Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002). When an error has not been preserved, this court employs plain-error review. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing "actual prejudice or a miscarriage of justice." Id.; see also United States v. Olano, 507 U.S. at 734 (1993) ("In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial.").

Here, Mason has failed to demonstrate actual prejudice or a miscarriage of justice necessitating reversal. Here, as previously discussed, the State presenting overwhelming evidence of Mason's guilt. To the extent that Mason contends the credibility of the witnesses who testified at his trial, this apparent attempt is inappropriate. It is up to the jury to decide whether to believe witness testimony and other corroborating evidence. Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). This Court gives deference to the district court's factual findings and credibility is weighed by the trier of fact at the time of trial. The fact that Mason may disagree with or dispute the testimony presented at trial is of no consequence.

4. The State did not commit prosecutorial misconduct.

Mason asserts that "[t]he State committed several instances of prosecutorial misconduct in its closing argument, as well [as] during its case in chief." AOB at

17. When considering claims of prosecutorial misconduct, the court engages in a two step analysis. Valdez v. State, 124 Nev. 1172, 1191, 196 P.3d 465, 476 (2008). First, the court determines whether the prosecutor's conduct was improper, and second, if the conduct was improper, the court determines whether it warrants reversal. Id. The relevant inquiry is whether the prosecutor's statements "so infected the proceedings with unfairness as to result in a denial of due process." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (internal citations omitted). The statements must be viewed in context. Id.

As to the first factor, this Court views the statements in context, and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. ___, ___, 336 P.3d 939, 950–51 (2014). Further, argument is not misconduct unless "the remarks … were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (quoting, Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). Notably, "statements by a prosecutor, in argument, … made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (quoting, Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-19, 945 P.2d 438, 444-45

(1997), receded from on other grounds, Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

With respect to the second step of this analysis, this Court will not reverse a conviction based on prosecutorial misconduct if it was harmless error. Id. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. If it is, this Court applies the Chapman v. California, 386 U.S. 18, 24 (1967), standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. Id. If the misconduct is not of a constitutional dimension, the court "will reverse only if the error substantially affects the jury's verdict." Id., internal citation omitted. Additionally, because Mason did not object to any such instance at trial, this Court reviews these claims for plain error and will only reverse if Mason demonstrates that the error affected his substantial rights by "actual prejudice or miscarriage of justice." Valdez, 124 Nev. at 1190; Rose v. State, 123 Nev. 194, 208, 163 P.3d 408, 418 (2007)), cert. den., 555 U.S. 847, 129 S.Ct. 95 (2008).

First, Mason complains that the State allegedly made improper commentary during its rebuttal argument. AOB at 20. Specifically, Mason asserts that "[t]hese comments are examples of impermissible burden shifting, and impermissible commentary on the credibility of witnesses." AOB at 19.

During Burns' closing statement, defense counsel pointed the jury's attention to the jury instruction on witness credibility and the assertion that "there's going to be conflicts in this case." 4 AA 967. Burns' defense counsel argued that the State presented witnesses as "not credible for Fact A, but extremely credible for fact B," made efforts "to pick and choose how they deliver material to [the jury]," chose to ask testifying witnesses only favorable questions, and made efforts "to deceive," the jury. 4 AA 968, 971-74, 992-93. Burns' defense counsel then proceeded to highlight the alleged inconsistencies and doubts related to various witnesses' testimony and credibility. 4-5 AA 996-1004. Ultimately, defense counsel made a final plea to the jury that Cornelius Mayo, Martinez, and Rowland "are not believable." 5 AA 1004.

During rebuttal, the prosecutor stated, "[s]o let's start off with Mr. Sgro's suggestion that, well, one, apparently we were manipulating witnesses. But two, the quality of witnesses. . ." 5 AA 1008. The prosecutor then went on to rebut the assertions made by Burns' counsel that many of the witnesses "are not believable." 5 AA 1004-09. The prosecutor merely contended that the State was stuck with the witnesses as they were and does not get to hand pick its witnesses for each individual case. Additionally, the prosecutor properly submitted to the jury that the credibility of each witness was not as important as the facts that their testimony revealed. 5 AA 1008-09. These comments made during rebuttal were made by the prosecutor in direct response to statements made by Burns' counsel during Burns' closing

argument. 5 AA 1008. The prosecution may respond to defenses arguments and characterization of the evidence. Williams, 113 Nev. at 1018-19, 945 P.2d at 444-45 (1997). Further, a prosecutor may offer commentary on the evidence that is supported by the record. Rose v. State, 123 Nev. 194, 163 P.3d 408 (2007), cert. den., 555 U.S. 847, 129 S.Ct. 95 (2008).

Second, Mason asserts that "[t]he State made further improper commentary during its rebuttal, and effectively gave the jury an incorrect instruction on the law regarding witness credibility." AOB at 20. Specifically, Mason complains that the prosecutor said, "[b]ut more importantly, it's not about were they telling the truth on the stand completely about that. Right?" 5 AA 1009. Here, despite Mason's contention, the State did not provide the jury with any instruction on credibility. Instead, the State merely rebutted the defense argument that certain witnesses were not credible and attempted to redirect the jury's attention to the facts presented by their testimony. Again, statements by a prosecutor, in argument, made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable and the prosecution may respond to defenses arguments and characterization of the evidence. Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (quoting, Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)); Williams, 113 Nev. at 1018-19, 945 P.2d at 444-45 (1997).

Additionally, the jury was properly instructed on the weighing of witness credibility, attorney arguments, and reasonable doubt and the jury is generally presumed to follow the district court's instructions. 3 RA 657-59, 662-63; Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Therefore, Mason is unable to demonstrate that the alleged affected his substantial rights by "actual prejudice or miscarriage of justice," and thus, he is unable to demonstrate plain error. Valdez, 124 Nev. at 1190; Rose v. State, 123 Nev. 194, 208, 163 P.3d 408, 418 (2007).

5. Whether there was not cumulative error sufficient to warrant a new trial.

A defendant is not entitled to a perfect trial, but only to a fair trial. Rudin v. State, 120 Nev. 121, 136, 86 P.3d 572, 582 (2004). However, "[t]he cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (quoting Hernandez v. State, 118 Nev 513, 535, 50 P.3d 1100, 1115 (2002)). This Court reviews claims of cumulative error based on the following factors: (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, 854-55 (2000).

Mason was charged with 8 counts, including several violent crimes: Battery with Use of a Deadly Weapon with Substantial Bodily Harm, Robbery with Use of

a Deadly Weapon, and Murder with Use of a Deadly Weapon. As discussed above, the issue of Mason's guilt was not close. Mason was convicted by a jury in light of overwhelming evidence presented demonstrating his guilt of the charges. Mason has failed to demonstrate any error. Even if Mason has demonstrated marginal errors, he has failed to prove that they were not harmless.

CONCLUSION

Based on the foregoing reasons, the district court's Judgment of Conviction should be AFFIRMED.

Dated this 8th day of March, 2016.

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 page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 7,248 words and does not exceed 30 pages.
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 8th day of March, 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 March 8, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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