IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY RICHARD WHITE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 68632

RESPONDENT'S ANSWERING BRIEF

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

SCOTT L. COFFEE
Deputy Public Defender
Nevada Bar #005607
309 South Third Street, #226
Las Vegas, Nevada 89155
(702) 455-4685

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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ROUTING STATEMENT: This appeal is appropriately retained by the Supreme Court 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 offenses that are Category A or B felonies.

STATEMENT OF THE ISSUE(S)

1. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN EXCLUDING THE VOICE MESSAGES

2. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN INSTRUCTING THE JURY

STATEMENT OF THE CASE

On December 27, 2012, the State filed an Information charging White with the following: Count 1 – Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060); Count 2 – Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165); Count 3 – Attempt Murder with Use

of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count 4 – Carrying a Concealed Firearm or other Deadly Weapon (Category C Felony – NRS 202.350(1)(d)3)); and Counts 5 through 9 – Child Abuse, Neglect, or Endangerment (Category B Felony – NRS 200.508(1)). 1 AA 41-45.

On February 4, 2013, White filed a Pre-Trial Petition for Writ of Habeas Corpus challenging Count 1. 1 AA 46-86. The State's Return was filed on March 19, 2013. 1 AA 90-99. The Order granting White's Writ of Habeas Corpus was filed on May 13, 2013. 1 AA 115-22.

The State filed a Notice of Appeal from the granting of White's Petition on March 27, 2013. 1 AA 100-14. This Court affirmed the district court's order granting White's Petition. 1 AA 126-36. Remittitur issued on August 4, 2014. 1 AA 137.

On March 24, 2015, an Amended Information was filed charging White with the following: Count 1 – Murder with Use of a Deadly Weapon; Count 2 – Attempt Murder with Use of a Deadly Weapon; Count 3 – Carrying a Concealed Firearm or Other Deadly Weapon; and Counts 4 through 8 – Child Abuse, Neglect, or Endangerment. 1 AA 194-99. A Second Amended Information was filed on April 6, 2015, charging the same offenses. 1 AA 206-09.

On April 6, 2015, White's jury trial commenced. 2 AA 381-82. On April 17, 2015, the jury returned a verdict finding White guilty of the following: Count 1 – Second Degree Murder with Use of a Deadly Weapon; Count 2 – Attempt Murder

with Use of a Deadly Weapon; Count 3 – Carrying a Concealed Firearm or Other Deadly Weapon; and Counts 4 through 8 – Child Abuse, Neglect, or Endangerment. 2 AA 269-71, 394-95.

The State filed a Sentencing Memorandum on June 19, 2015. 2 AA 272-316; 346-56. White filed a Sentencing Memorandum on July 16, 2015. 2 AA 317-45. On July 20, 2015, White was adjudged guilty and sentenced to the Nevada Department of Corrections as follows: Count 1 – life with the eligibility of parole after serving a minimum of ten years, plus a consecutive term of 192 months with a minimum parole eligibility of 76 months for the deadly weapon enhancement; Count 2 – a maximum of 192 months with a minimum parole eligibility of 76 months, plus a consecutive term of 192 months with a minimum parole eligibility of 76 months for the deadly weapon enhancement, consecutive to Count 1; Count 3 – a maximum of 48 months with a minimum parole eligibility of 19 months concurrent with Counts 1 and 2; Count 4 – a maximum of 60 months with a minimum parole eligibility of 24 months, consecutive to Counts 1 and 2; Count 5 – a maximum of 60 months with a minimum parole eligibility of 24 months, concurrent with all other counts; Count 6 - a maximum of 60 months with a minimum parole eligibility of 24 months, concurrent with all other counts; Count 7 - a maximum of 60 months with a minimum parole eligibility of 24 months, concurrent with all other counts; Count 8 - a maximum of 60 months with a minimum parole eligibility of 24 months,

concurrent with all other counts; with 1,088 days credit for time served. 2 AA 360-61, 399-400. The aggregate total sentence is life with a minimum parole eligibility of 34 years. 2 AA 361. The Judgment of Conviction was filed on July 24, 2015. 2 AA 359-61.

On August 12, 2015, White filed a Notice of Appeal. 2 AA 362-65. White's Opening Brief was filed on February 17, 2016. The State's Answering Brief follows.

STATEMENT OF THE FACTS

At the beginning of June of 2012, White and his wife, Echo Lucas, separated. 4 AA 853. White and Echo were married and had been living together at 325 Altamira, Las Vegas, Clark County, Nevada, with Echo's children Jayce, Jodey, Jesse, Jett, and Jazzy. 4 AA 851, 853. After their separation, White began staying with his friend Herman Allen. Id. White would still come over to Echo's residence on the weekends to care for the children. 4 AA 854.

While separated, Echo started dating Joe Averman. 4 AA 855-56. Jayce thereafter heard White describe Echo as a "bitch." 4 AA 856. White also told Jodey he hated Joe because Echo was cheating on him with Joe. 5 AA 949. White called and sent text messages to Joe warning him to stay away from Echo or White would kill him and there would be "repercussions." 7 AA 1418. White's threatening calls and text messages to Joe continued up until Echo's death on July 27, 2012. 7 AA 1418.

On July 9, 2012, White posted on Facebook "[h]ave you heard the quote, 'If you love someone set them free, if they come back they're yours, if not they never were'? I like this version instead, 'If you love someone set them free, if they don't come back hunt them down and kill them!' Ha ha ha." 6 AA 1224. He repeated this phrase to his friend Allen seven to ten days before he murdered Echo. 7 AA 1534. On July 14, 2012, White sent a message on Facebook, stating that Echo and he were separated, and that "God is really helping me as a testimony. The adulterers leave to continue in their sins" and "[t]he whore and whoremonger are still alive and I'm not in prison. No joke intended." 6 AA 1226. White also sent text messages to Echo and, on July 20, 2012, White told her via a text message: "I hate you for choosing him over me." 6 AA 1300.

Beginning at 12:25 PM on July 26, 2012, Echo and White again began exchanging text messages about their relationship. 8 AA 1679. When White attempted to call Echo in response to one of her text messages, Echo sent a text message reading: "JUST TEXT PLEASE." 8 AA 1679-80. During this series of text messages, White accused Echo of being indecisive in choosing between him and Joe. 8 AA 1681. At 4:04 PM, White asked Echo if she would be interested in spending some time with him that weekend and Echo declined, claiming she needed to babysit. 8 AA 1681-82. White again expressed frustration to Echo with the status of their relationship before ending their text conversation at 9:06 PM. 8 AA 1682.

On Friday, July 27, 2012, between 2:30 a.m. and 3:00 a.m., White arrived very early to work and notified his boss he needed to leave early because he could not sleep the night before and was tired. 6 AA 1311-12. White's regular shift was between 5:00 AM and 1:30 PM. 6 AA 1309. White's supervisor described White as depressed and quiet on July 27. 6 AA 1312. While at work, White resumed texting Echo at 3:30 AM, stating: "If you still love me at all, you will call me one more time for me to say one last thing to you." 8 AA 1682. After White then made a series of outgoing calls to Echo, she texted him in response "STOP, STOP, STOP." 8 AA 1683. White then sent Echo a series of three text messages reading:

> I hope you're happy. The other day in the store you said you were not. . . . I think your time set back up. I've given you enough time to make a decision. You say you want your marriage back but you prove otherwise. If you really wanted your marriage back, if you wanted just to come back to me instead of having to have more time with Joe. . . Goodbye.

8 AA 1683-84. However, just nine minutes after that message, White texted Echo and told her he would be coming to her house later that morning, whether or not she called the police, because he wanted to see the children and say something to her. 8 AA 1684-85. He thereafter texted that he changed his mind and would not be coming after all. Id.

At around 5:00 AM, White again called Echo and left a voicemail message. 8 AA 1647. White also continued to text Echo accusing her of choosing Joe over him

and ruining their family. 8 AA 1686. At approximately 7:45 or 8:15 AM, before White left his workplace, he spoke with his boss and discussed his marriage problems and that Echo was cheating on him. 6 AA 1313. White stated "I just want to kill them." Id. White soon thereafter left work carrying a backpack. 6 AA 1315.

The text messages sent by White became angrier starting at approximately 9:00 AM. 8 AA 1686. At 9:41 AM, White called Echo again and left another voicemail message. 8 AA 1647. When Echo once again responded to White's call by texting him to stop trying to call her, White replied with a text reading: "Obviously you're full of s---, you don't care about me, you don't love me. You know what, I would put up everything to be able to talk to you." 8 AA 1687. When Echo refused White's subsequent text messages demanding her to call him, White sent her the following series of messages starting at 10:06 AM: "Then you don't love me . . . Get ready for hell . . . You will see." 8 AA 1688-89. White then began calling Echo names and daring her to have Joe meet White for a physical altercation. 8 AA 1689-94. At 10:30 AM, White once again texted Echo: "Either you want me or him, it's that simple, but you choose him." 8 AA 1690. White's last text message to Echo was sent at 11:26 a.m. "But now you're all pissed off, now you think I'm an a*** whatever, again or just wait and see." 8 AA 1695.

Just before noon, White arrived at the 325 Altamira residence carrying a backpack. 4 AA 859, 5 AA 1049. When White entered the home he no longer had

the backpack. 4 AA 861. Jayce saw White and felt something was wrong because White never came by on Friday at this time. 4 AA 861-62. White appeared as if "he was looking for somebody . . . like trying to do something." 4 AA 860. White told Echo he wanted to speak to her for five minutes and Echo agreed, leading White to the craft room. 7 AA 1426. After a short time, Jayce heard White and Echo raising their voices. 4 AA 877. Joe, who was in the bedroom located directly across from the craft room, heard Echo say in a fearful, loud voice "no, Troy, please don't, stop." 7 AA 1428. Then the door to the craft room opened. 4 AA 863. Jayce walked over to the hall by that room. Id. Joe also opened the door to the bedroom. 4 AA 863; 7 AA 1428. Echo was trying to exit the room but Troy grabbed her arm and pulled her back into the room. 7 AA 1430. Echo stated "No, please stop, I won't go with Joe again!" 5 AA 945. White pulled out a gun from his waist area and shot Echo at about an arm's length. 4 AA 863-864; 7 AA 1430-1431. When Joe tried to help Echo, White shot him twice, striking his arm and abdomen. 7 AA 1432-1433. A neighbor heard two metallic noises and a woman screaming. 5 AA 1050. Joe fell to the ground with a fractured hip. 7 AA 1433.

Jayce asked White "why'd you shoot my mommy." 4 AA 863. White did not reply but walked back and forth and stated that if he was going to go to prison he was going to kill Joe. 7 AA 1435. White stood over Joe and pointed the gun to his forehead. Id. Jodey and Jayce then came into the room and White tried to get them

out of the bedroom. However, Jodey, Jayce and Jesse hit White and threw things at him in hopes that he would stop. 5 AA 935.

Jayce ran to her mother and asked multiple times if she was ok. 4 AA 865. Echo did not respond, all Jayce heard were gurgling noises coming from Echo. Id. Echo's face was without color. Id.

Joe was on the ground of the bedroom and had blood all over his stomach. 4 AA 867. When Joe asked Jayce for the phone, he gave it to him. 4 AA 867. Jodey ran outside and White followed. Id. When Jodey ran outside he noticed a backpack in the driveway. 5 AA 968-69. Jodey ran to a neighbor's home and asked them to call the police because "my dad just shot my mother and her friend." 5 AA 936; 6 AA 1141-42, 1154-55. The neighbors took Jodey and their children into the house as they called 911. 6 AA 1142. Jodey said White shot his mother and her friend "because his mother was cheating with the friend." 6 AA 1146.

White went back inside, saw Joe with the phone, and took it from him. 4 AA 867. White told Joe he was not going to call anyone and said "I told you this was going to happen if you didn't stay away." 7 AA 1444. White then hid the gun behind his back, went back outside and desperately yelled out "Jodey, Jodey!" 4 AA 868; 5 AA 1058. Joe heard sirens at a distance. 7 AA 1448. White grabbed the keys of a 2008 silver Dodge Durango registered to Echo and him, got in, and fled. 4 AA 868-69, 5 AA 1051.

Officers arrived on the scene and located Joe in a bedroom to the left of the hallway and Echo across the hall in a craft room. 6 AA 1168. Joe was down and bleeding right inside the doorway, Echo was lying on her back and had an apparent gunshot wound to the chest. Id. She did not appear to be breathing and her skin was blue and discolored. Id. Joe's lower torso and leg area were covered with blood. 6 AA 1170. Joe said he was shot by White. 6 AA 1172. Jazzy was found unharmed in a crib near Joe. 6 AA 1174.

Officers found two shell casings in the hallway and another on the carpet to the left of where Echo was laying. 6 AA 1176. Las Vegas Metropolitan Police Department Crime Scene Analyst Tracy Kruse processed the scene and located a bullet and a backpack in the driveway. 5 AA 980. An empty firearm holster was located inside the backpack. 5 AA 980, 983. A bullet hole was located on the south facing wall west of the front door. 5 AA 983-84. In the master bedroom, by the far left corner where a crib was located, the dresser mirror had a bullet hole which corresponded with the hole in the exterior of the residence. 5 AA 989, 1020. A black tank top was impounded which had a bullet hole. 5 AA 988. A white iPhone, belonging to Echo, was also impounded from the scene. 5 AA 989; 6 AA 1201.

At approximately 5:30 or 6:00 PM, White turned himself in to the Yavapai Sheriff's Office, in Prescott, Arizona and told officers he had shot his estranged wife and her new boyfriend in Las Vegas earlier that morning. 5 AA 1032; 6 AA 1118-

19. White also stated that the handgun he had used in the shooting that morning was in the spare tire compartment in the car. 6 AA 1120. Subsequently, the Durango was processed and a bullet strike consistent with the vehicle having been parked with the driver's side closest to the front door of Echo's home when the bullet went through the wall was noted. 5 AA 999. A black Taurus PT92 C 9mm firearm, some magazines, and a single cartridge were located inside the vehicle. 5 AA 1000, 1005. The firearm was empty, and a total of 21 rounds were found within the magazines in the vehicle. 5 AA 1003, 1039. White's DNA was found on the firearm. 7 AA 1365.

On July 28, 2012, Dr. Lisa Gavin, a forensic pathologist, conducted an autopsy on Echo. 5 AA 1074. An entrance gunshot wound was located in the right upper quadrant of Echo's abdomen. 5 AA 1080. Stippling was present indicating that Echo was shot from about 6 to 12 inches away. 5 AA 1082-83. The bullet went through the right side of her abdomen, through her diaphragm, liver, pancreas, aorta, spinous process, spine, and stopped in her left back soft tissues and muscle. 5 AA 1083. Echo's lungs collapsed due to the bullet traveling through her diaphragm. 5 AA 1086. Dr. Gavin concluded Echo's manner of death to be homicide. 5 AA 1089.

ARGUMENT

I.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE VOICE MESSAGES

Exclusion of White's voice messages was not an abuse of discretion because they were cumulative hearsay. This Court reviews a district court's decision to admit evidence for an abuse of discretion. Hernandez v. State, 124 Nev. 639, 188 P.3d 1126 (2008). NRS 48.035(2) allows a district court to exercise its sound discretion to exclude relevant evidence substantially outweighed by its cumulative nature. See Thomas v. State, 122 Nev. 1361, 1370, 148 P.2d 727, 734 (2006). Further, an out-of-court statement offered for the truth of the matter asserted is not admissible. NRS 51.035. Any errors in admitting or excluding hearsay is likewise reviewed for abuse of discretion. Wood v. State, 115 Nev. 344, 350, 990 P.2d 786, 790 (1999).

At trial, White asked to admit two voicemail messages he left for Echo in the hours leading up to the murder. 8 AA 1641. The State objected on the grounds the messages, if offered by White, were hearsay and the content of the messages was cumulative in light of the voluminous text messages to be admitted. 8 AA 1642. White countered that the rule of completeness as contained in NRS 47.120 and the state of mind exception provided in NRS 51.105 both allowed for admission. 8 AA 1641-43. The district court listened to the proffered voice messages and sustained the State's objection, finding the evidence cumulative hearsay. 8 AA 1644, 1648. During direct and cross-examination concerning the admitted text messages, the testifying detective read several texts by White to Echo asking her to take him back

and indicating he was sad and upset that their relationship was ending. 8 AA 1681-84, 1686-87, 1698, 1700.

Here, White's voice messages were cumulative hearsay and the district court did not abuse its discretion in excluding them. White contends the voicemail messages were relevant to show his state of mind hours prior to Echo's death. However, all of the text messages sent between Echo and White between July 14 and Echo's murder on July 27 were admitted by the State. 8 AA 1657-58. Among these voluminous text messages were all of the sentiments White articulated on the voicemails, conveying his state of mind that he loved Echo and wanted to reunite with her. Compare Defense Proposed Exhibit OO and PP, previously transferred to this Court with 8 AA 1681-84, 1686-87, 1698, 1700. Thus, to the extent White sought to inform the jury of his state of mind in the hours leading up to the homicide, and specifically his growing frustration over his dying relationship with Echo, the text messages more than adequately provided that evidence and the voicemail messages were cumulative.

On appeal, White now contends that Defense Proposed Exhibit PP was especially probative given the State's argument in rebuttal "that at about approximately 8:30, 9:00 AM, the defendant realized that Echo was never coming back." AOB 12. Defense Proposed Exhibit PP was a voicemail message left at 9:41 AM and included a plea from White that Echo come back to him. 8 AA 1647.

However, this argument is without merit for several reasons. First, the State's argument was a direct response to closing argument by White concerning the timeline of July 27, 2012, which included an argument suggesting the jury make a negative inference based on the fact the proposed voicemails were not admitted. 9 AA 1844-45.[1] Further, as the plain language makes clear, the State's argument was based on an estimate, not an exact time period, and White does not place the argument in its proper context by failing to including it in its entirety:

> The defense made some interesting, very creative argument about the text messages and that they would show that he intended to kick Joe out of the house. Fortunately for you, you have their entire conversation. It's State's Exhibit 85. And what will become abundantly clear to you from this entire conversation is that at about approximately 8:30, 9:00 a.m. the defendant realized Echo was never coming back. Was she confused? Probably so. They'd been married for five years. They had five kids together. She had not worked during the entire marriage. The idea of leaving someone and being a single mom of five children was probably frightening and she probably still had feelings for him at some point. But that [unintelligible] happened over and over again in the weeks leading up [to] this murder. It was not a highly provoking injury to defendant on this day.
>
> The reason the defendant went to that house is because she wouldn't take him back. 10:35:51 a.m. on July 27th, 2012, "You get no time. You either want to leave him and have all that you miss that you told me in the store that Wednesday or – you prove what you wanted. I will say it again. You are driving me crazy," this is 10:52 already, "because you tell me you want me back and then you stay with Joe." 10:52 again. "You fucking telling me you're going to come back to me and [inaudible] need your fucking time with Chelsea. That's fucking driving me crazy." 10:58, "'Cause you suck. You lead me on. You can't make a decision. You want me, you want him." The text messages proceed in that fashion.
>
> And then at 11:24:59 a.m., "You know I'm only crazy like this because of what you're doing to me. For the record I wouldn't be this way if you would just stop and come back to me. You should have spent your time before you told me you wanted me back, and then you could just come back and it's all good. But now you're all pissed off again and now you think I'm an asshole again or just wait and see."

[1] The State objected to this improper argument under Glover v. Eighth Judicial Dist. Ct., 125 Nev. 691, 220 P.3d 684 (2009), and that objection was sustained.

9 AA 1862-63. This argument was wholly proper and the actual texts relied on were all sent well after Defendant's Proposed Exhibit PP.

Second, the State was not required to pinpoint the exact moment White determined to kill Echo because he realized their relationship was over. Instead, the State was required to prove White's premeditated and deliberate decision to kill Echo preceded her death. Certainly if the State would have cited the same text messages in rebuttal and estimated that "at approximately" 10:00 or 10:30 AM, White had realized Echo was never coming back to him, White would have absolutely no grounds for complaint. The thrust of the State's argument was that, prior to Echo's death, White had deliberated and premeditated her murder because he had realized their relationship was over and, contrary to White's closing argument, White then went to Echo's house to commit the premeditated murder of Echo and attempt to murder Joe.

Further, some of White's text messages sent after the State's time estimation at least suggested White's desire to reunite with Echo. See 8 AA 1687 ("Obviously you're full of s---, you don't care about me, you don't love me. You know what, I would put up everything to be able to talk to you."); 8 AA 1691 ("You get not time. You either want to leave him and have all you missed that you told me in the store Wednesday or hang on to him. You proved what you want."). This was not a case where the State deliberately excluded evidence and then made arguments

contradicted by the very evidence excluded. White cannot show that the voicemail message sent at 9:41 AM was uniquely able to counter the State's time estimation.

Finally, because the State's time estimation was based on more than just the text messages, White's claim that the voicemail messages undermined those text messages such that the State's argument would fail is without merit. White told numerous people in the days and hours leading up to the crimes that he wanted to kill both Echo and Joe because they were ending his marriage. See, 6 AA 1226, 1313; 7 AA 1418; 8 AA 1747. As such, even if the proposed voicemail message was offered, the State would have still had more than a sufficient evidentiary basis to contend White had premeditated and deliberated Echo's murder prior to her death and committed the crimes to punish Echo for leaving him for Joe.

White's contention that the voicemail messages were admissible under the rule of completeness likewise lacks merit. NRS 47.120 provides: "When any part of a writing or recorded statement is introduced by a party, the party may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts." By its plain language, NRS 47.120 "is limited to writing and recorded statements and does not apply to conversations." Patterson v. State, 111 Nev. 1525, 1531, 907 P.2d 984, 988 (1995) (quoting FEDERAL RULES OF EVIDENCE 107 advisory committee note).

Here, the State rightly argued that no portion of the voicemail messages had been admitted, and as such they could not come in to "complete" any statements. 8 AA 1642. To the extent White claims the voicemail messages were part of a "conversation" between White and Echo, he is mistaken for multiple reasons. First, Patterson and the plain language of the statute clearly and expressly reject White's effort to expansively interpret NRS 47.120 to include conversations. See also, Beech Aircraft Corp v. Rainey, 488 U.S. 153, 172 (1988) (holding that, when one portion of a single document is submitted, other portions of the same single document may be admitted by the opposing party). Instead, the rule explicitly allows for the completion of "statements" only and the voicemail messages were separate from the text messages under any interpretation of that word.

Second, to describe the voicemail messages as part of a "conversation" between Echo and White is disingenuous. Echo unequivocally refused White's efforts to speak with her on the phone and repeatedly told him to only send text messages. Given Echo's uniform refusal to hear White's voice, White cannot even show that Echo even listened to the voicemail messages, thus making White's alleged "conversation" entirely one-sided. In fact, White appeared to acknowledge the likelihood his voicemail messages were going unheard as he repeated the same sentiments expressed in the voicemail messages in subsequent text messages. See,

e.g., 8 AA 1687, 1691.[2] A common term for such a one-sided conversation is a "statement" and places White right back where he started, arguing for the full admission of a hearsay statement where no portion has been offered by the opposing party.

Finally, even if this Court finds error in the District Court's exclusion of the voicemail messages, it must also find such error harmless. As noted supra, the content included in the voicemail messages was repeated throughout the admitted text messages. Thus, the jury was well aware of White's statements that he was frustrated with the condition of his relationship with Echo and that he desired reconciliation. In light of the fact the words spoken on the voicemail messages were repeated, sometimes verbatim, in the text messages, White fails to articulate what independent purpose or legally probative value the voicemail messages held for the jury. Put simply, the jury received all of the evidence White sought to offer, just not in the medium White preferred. As such, White cannot show any error was prejudicial.

II.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE DEFENSE'S PROPOSED JURY INSTRUCTION

[2] Indeed, even in the voicemail messages themselves, White repeatedly states only that he "hopes" Echo listens to the message. Defense Proposed Exhibit OO and PP.

White contends that the district court erred in declining to use his proffered instruction that provocation causing a heat of passion can take place over a period of time. AOB 16-20. A District Court's decisions in settling jury instructions are reviewed for abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. 1013, 195 P.3d 315, 319 (2008). Though courts should strive to make jury instructions clear and unambiguous, there is no duty to provide an instruction at a defendant's request that is substantially covered by other instructions. Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002); Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). "[I]f a proffered instruction misstates the law or is adequately covered by other instructions, it need not be given." Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989). See also Carver v. El-Sabawi, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005) (finding jury instructions that tend to confuse or mislead erroneous).

White proffered the following instruction:

> While the state of mind constituting heat of passion must be the result of a sudden impulse, the provocation leading to the sudden heat of passion can occur over either a long or short period of time and may be the result of an ongoing series of events.

9 AA 1778. White acknowledged there was no Nevada authority requiring the instruction but cited to Boykins v. State, 116 Nev. 171, 995 P.2d 474 (2000), and Roberts v. State, 102 Nev. 170, 717 P.2d 1115 (1986), for support. The district court

rejected this instruction, finding it unsupported under Nevada law. 9 AA 1779. The jury was instructed on voluntary manslaughter pursuant to NRS 200.040, NRS 200.050, and NRS 200.060. 2 AA 241-45, 250, 269.

White's requested jury instruction was properly denied in the Court's discretion. As the court noted, and as White concedes on appeal, there is no basis under Nevada law for the proposed instruction. 9 AA 1779. Indeed, White's proposed instruction undermines NRS 200.060, which provides:

> The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for, if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder.

See also Allen v. State, 98 Nev. 354, 356, 647 P.2d 389, 391 (1982); Jackson v. State, 84 Nev. 203, 207, 483 P.2d 795, 797 (1968). Thus, NRS 200.060 does not allow for a prolonged provocation as there cannot be sufficient time between the alleged provocation and the actual killing such that the voice of reason can be heard. See, Cranford v. State, 76 Nev. 113, 119, 349 P.2d 1051, 1054 (1960) (finding evidence of an affair between the defendant's estranged wife and the decedent five months prior to the murder inadmissible because such was remote in time to the actual killing and would have precluded a reduction from murder to manslaughter).[3]

[3] White may contend that NRS 200.060 relates to the time period between the heat of passion and the actual killing and does not apply to provocation. However, the plain language of that statute reads "if there should appear to have been an interval between

Given White's concession that his proposed instruction had no basis in Nevada law and the fact that it runs contrary to NRS 200.060 and related case authority, it is curious that White nonetheless contends the district court erred in not giving the instruction.

On appeal, White offers Boykin and Roberts and argues they support his proposed instruction by analogy. White's reliance is misplaced. First, as White acknowledges, Boykin concerns self-defense, not voluntary manslaughter. White's analogy to Boykins is further strained by the fact that it involved battered spouse syndrome, which the Nevada legislature has seen fit to formally recognize as a statutory factor relevant to self-defense. See NRS 48.061. The same legislature has not enacted a statute providing for legally adequate provocation to occur "over a period of time." Finally, the basis for NRS 48.061, and for the battered spouse defense is formed by significant medical and psychological evidence. There is no such scientific counterpart for White's claim that legally adequate provocation sufficient to excite a sudden and irresistible impulse in the reasonable person may occur "over a period of time." All of these fundamental differences between Boykin and the instant case render the former distinguishable and of no assistance.

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the ***assault or provocation given*** and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder." (emphasis added).

Further, Roberts likewise presents a distinguishable set of facts and does not support White's position. In that case, the defendant was separated from his wife, Loddy, but believed they would reconcile and continued providing for her and their children. 102 Nev. at 171, 717 P.2d at 1115. On the day before the murder, the defendant ran some errands for Loddy and the two made plans to meet together in the afternoon for drinks. Id. When Loddy did not show, the defendant began drinking alone, eventually leaving the last of a series of bars early the next morning. Id. As the defendant drove by a trailer belonging to another man, he saw Loddy's car parked out front, and testified he did not remember anything else until after Loddy was already dead. According to other witnesses, the defendant knocked on the trailer door incessantly until Loddy answered and then immediately shot her. Id. The Court held that, under the evidence of the case, the defendant was entitled to an instruction on voluntary manslaughter, opining that:

> [The defendant] would have been justified in viewing [Loddy] 'standing him up' as a callused insult, greatly aggravated by her taking up sexually with another man on the night of his planned get-together with her. It is not unreasonable to infer from such circumstances that his discovery provoked him into a sudden and excessive anger or heat of passion as the statute reads.

Id. at 173 n.2, 717 P.2d at 1117, n.2.

The Roberts Court did not in any way address the time frame within which provocation can occur. Indeed, the above-quoted footnote suggests that the Court found the defendant's "discovery" of Loddy's sexual relationship with another man

as the legally adequate provocation and her failure to join him for drinks the day before as merely the context within which that provocation occurred.[4] White appears to be conflating a jury instruction with admissible evidence. All that can be said of Roberts is that, at least implicitly, it appears to hold evidence not itself constituting legally adequate provocation may nevertheless be admissible to establish a context within which to view such provocation. However, to that extent, Roberts was wholly complied with in this case as significant evidence of the context building toward Echo's murder was admitted. Thus, White had ample ability to explain to the jury the surrounding circumstances leading to what he believed was a legally adequate provocation causing a sudden heat of passion. Also, and unlike Roberts, White's jury was instructed on voluntary manslaughter and ultimately rejected that option. See 2 AA 241-45, 250, 269. As evidence concerning the context within which White's alleged legally adequate provocation was admitted and the jury was instructed concerning voluntary manslaughter pursuant to the controlling statutes, there was no error under Roberts.

White next turns to authority from other jurisdictions to contend the jury should have been provided the requested instruction. White first points to the non-

[4] It is the State's hope that White is not contending the Roberts court implicitly held that merely being stood up for a social engagement, even over the course of time, would ever rise to the level of legally adequate provocation giving rise to a sudden heat of passion.

binding holding in People v. Wharton, 53 Cal. 3d 522, 809 P.2d 290 (1991). However, White fails to note that Wharton itself relied on state-specific precedent to find the defendant was entitled to such an instruction. See 53 Cal. 3d at 569, 809 P.2d at 318 (*citing* People v. Berry 18 Cal. 3d 509, 134 Cal. Rptr. 415, 556 P.2d 777 (1976). Additionally, Wharton and Berry relied on state-specific statutes governing voluntary manslaughter. Such statutes are distinct and less specific than Nevada statutes governing voluntary manslaughter. Compare Cal. Pen. Code 192 with NRS 200.040, NRS 200.050, NRS 200.060.

Most importantly, the Wharton court found any error in instructing the jury harmless given that nothing in the instructions actually provided ***precluded*** the jury from finding legally adequate provocation spanning a period of time and there was significant evidence and argument relating to provocation over a period of time. Id. at 572, 809 P.2d at 320. Likewise, if this Court chooses to adopt a position that legally adequate provocation can occur over a period of time, it should also find any error in the instant instructions harmless as nothing prohibited the jury from coming to that conclusion based on the evidence. See 2 AA 241 (requiring a sudden heat of passion but not requiring a sudden provocation); 2 AA 242 (instructing the jury to consider "the circumstances in which the killer was placed and the facts that confronted him" to determine whether a sudden heat of passion existed); 2 AA 243 (same). In this respect, White's argument rises from a false premise as the jury was

never instructed a legally adequate provocation ***must*** be sudden. Further, like in Wharton, substantial evidence and argument was offered concerning the hours and days leading up to the murder and the jury was provided ample grounds to find provocation if it so chose. See, 9 AA 1834-39 (Defense closing argument describing the circumstances of the months-long termination of Echo's relationship with White as relating to the provocation leading to her death). As such, there is no reason for this court to reverse based on Wharton.

Moreover, White's reference to Commonwealth v. Galloway, 336 Pa. Super. 225, 485 A.2d 776, 783 (1984), is erroneous as that case does not discuss a time frame for provocation. The "series of events" language included in Galloway was within the context of the reasonable person standard, and was not substantively discussed as relating to provocation. Id. Thus, the term "series of events" as quoted by White, and absent any analysis by the Galloway court, does not imply that the provocation can occur over a period of time and offers nothing to the instant issue. Further, under Pennsylvania law, there is no specific requirement for the heat of passion to be "sudden." Id. Instead, once a sufficient provocation has been established, the measure is merely whether the murder was the result of the subsequent heat of passion or if there was a cooling off period. Therefore, even if Galloway does stand for the proposition White contends, this Court should

nonetheless decline to adopt the same given the significant temporal differences between the voluntary manslaughter statutes of Pennsylvania and Nevada.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm White's conviction and sentences.

Dated this 23rd day of June, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Christopher Burton*
CHRISTOPHER BURTON
Deputy District Attorney
Nevada Bar #012940
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

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 14,000 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 23rd day of June, 2016.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Christopher Burton*
CHRISTOPHER BURTON
Deputy District Attorney
Nevada Bar #012940
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 23, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

SCOTT L. COFFEE
Deputy Public Defender

CHRISTOPHER BURTON
Deputy District Attorney

/s/ E.Davis
Employee, Clark County
District Attorney's Office

CB/Nallely Ocampo/ed