IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
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LESEAN COLLINS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 69269

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Kathleen Delaney, District Judge
District Court No. C252804

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of murder and one count of robbery. The district court sentenced Appellant Lesean Collins to serve a sentence of life without the possibility of parole, to be served consecutively to the sentence imposed in District Court Case No. C253455, and a concurrent term of 72 to 180 months. 10 App. 1926. The judgment of conviction was filed on November 24, 2015. 10 App. 1925. A timely notice of appeal was filed on November 25, 2015. 10 App. 1927. This Court has jurisdiction pursuant to NRS 177.015.

II. ROUTING STATEMENT

This appeal involves a sentences of life without the possibility of parole, following a jury trial, for convictions for murder and robbery. The issues presented are of a constitutional dimension. This appeal presents an important issue regarding a detective's opinion of the charges and whether disqualification of the prosecutor's office was required. It also addresses exclusion of the defendant from the courtroom on the first day of trial, which has not been addressed by this Court. Lesean submits that pursuant to NRAP 17, this case should be assigned to the Nevada Supreme Court.

III. STATEMENT OF THE ISSUES

A. Whether the judgment is invalid because the district court allowed impermissible testimony by a detective about his opinion on whether Lesean was guilty.

B. Whether the judgment must be reversed because of the district court's refusal to instruct on voluntary manslaughter.

C. Whether the district court improperly denied the motion to disqualify the Office of the Clark County District Attorney.

D. Whether there is insufficient evidence to support the convictions.

E. Whether Lesean was improperly prohibited from attending the first day of trial.

F. Whether the conviction should be reversed based upon cumulative error.

IV. STATEMENT OF THE CASE

On March 25, 2009, the State charged Appellant Lesean Collins with one count of murder and one count of robbery. 1 App. 1-2. It alleged that Lesean killed Brandi Payton by asphyxiation and/or blunt force trauma and/or manner and means unknown and that the killing was deliberate and premeditated and/or committed during the commission or attempted commission of a robbery. 1 App. 1-2. Lesean entered a plea of not guilty. 1 App. 6.

Lesean filed a motion to exclude other bad acts, character evidence, and irrelevant prior criminal activity. 1 App. 120. The State opposed the motion and

indicated that it intended to present evidence that Lesean may have used drugs in the past if the door was opened to that issue. 2 App. 282-85.

On July 9, 2014, during a status check before the district court, Lesean' counsel informed the district court that there was a potential problem because Lesean had a prior arson case, evidence of which he believed the State would seek to introduce at trial, for which a post-conviction petition for a writ of habeas corpus was pending. 2 App. 415, 703. The State informed the district court of its intent to introduce the evidence and a hearing was held. 3 App. 525. The district court denied the motion to exclude the evidence. 4 App. 703. Details are discussed below.

On August 27, 2014, the district court held a status check hearing.[1] 3 App. 689. There was a discussion concerning Lesean's clothing choice for trial. 3 App. 698. On July 17, 2015, during a court appearance, Lesean indicated to his counsel that he did not want to appear at trial. 4 App. 766. Trial began on July 27, 2015. 4 App. 769. Lesean stated his desire to wear his jail clothing and chains for trial. 4 App. 771. Ultimately, it was decided that Lesean would wear his jail clothing, but not chains. 4 App. 773. Due to continuing issues over clothing and chains the district court

[1]Proceedings concerning a motion to disqualify defense counsel were also held. 3 App. 681. As these and other issues concerning Lesean's request for new counsel involve the office of undersigned counsel, the are not addressed here but are instead appropriately raised in a post-conviction petition.

ordered Lesean removed from the courtroom during the initial examination of jurors. 4 App. 780. Details are discussed below.

Prior to opening statements, and outside the presence of the jury, the parties and district court addressed whether defense counsel could elicit testimony about Brandi's actions of selling drugs with Lesean. 6 App. 1124. The State argued that the evidence was irrelevant and prejudicial. 6 App. 1124. Lesean's counsel noted that Detective Mogg interviewed witnesses at the time Brandi was missing and learned from Rufus Hicks that she sold sherm sticks during that period of time. 6 App. 1125. Rufus could not be located at the time of trial. 6 App. 1126. The Court found that absent some exception to the hearsay rule, Mogg would not be able to testify as to what Rufus told him. 6 App. 1126. Theresa Williams was another witness who could provide this information. 6 App. 1127. Lesean's ex-girlfriend, Shalana, also knew about this activity by Lesean and Brandi. 6 App. 1130. Lesean's counsel argued that this was res gestae evidence, not bad act evidence. 6 App. 1127. The district court found that the evidence was relevant as a bad act, but not as res gestae evidence. 6 App. 1132.

Lesean submitted written objections to the State's proposed jury instructions. 8 App. 1523. He objected to the lack of instruction on voluntary and involuntary manslaughter. 8 App. 1523. He proposed jury instructions, including instructions on

voluntary and involuntary manslaughter. 8 App. 1527, 1534-42. The district court refused to give the manslaughter instructions. 10 App. 1747-48. Jury instructions were filed. 10 App. 1843.

On August 12, 2015, the jury found Lesean guilty of first degree murder and guilty of robbery. 10 App. 1878. The sentencing hearing took place on November 18, 2015. 10 App. 1902. The district court imposed a sentence of life without the possibility of parole, to be served consecutively to the term imposed in case C253455, and a concurrent term of 72 to 180 months. 10 App. 1922.

V. STATEMENT OF THE FACTS

Amber Poole and Brandi Payton were friends and talked by phone a few days after August 30, 2008. 6 App. 1170-1175. They briefly talked around 3:30 p.m., and Amber expected Brandi to call her back. 6 App. 1173. Amber learned through calls from Brandi's sister that something had happened to Brandi. 6 App. 1174. Amber talked by phone with Brandi's boyfriend, Rufus Hicks, while Brandi was missing but before her body had been found. 6 App. 1176. Everything seemed normal in the text messages that Brandi and Amber exchanged that day. 6 App. 1178-1180.

Theresa Williams knew Brandi in 2008. 6 App. 1182. They were friends and dealt drugs together. 6 App. 1183. She had known Brandi for about a year and they communicated two or three times a week. 6 App. 1183-1191. Theresa would call

Brandi for drugs and then they would meet for the exchange. 6 App. 1183, 1190. Brandi usually stayed in her car and was cautious about the way she was dealing drugs. 6 App. 1191. Brandi usually drove rental cars and usually changed vehicles more than once a month. 6 App. 1192. Theresa bought sherm sticks from Brandi, which is essentially a cannabis cigarette dipped in liquid PCP. 6 App. 1193. Theresa did not know if Brandi sold other kinds of drugs. 6 App. 1193. Theresa learned that no one had heard from Brandi, which was unusual. 6 App. 1185. She talked with Lesean who was in a car with Donita Beasley. 6 App. 1185-86. Later, Lesean called Theresa and asked about Brandi's whereabouts, asked if anyone had seen her, asked what the street was saying, and asked if anybody had found her. 6 App. 1188, 1195. He said that he was concerned and had been looking for her. 6 App. 1188. Theresa claimed that Lesean had an argument with Brandi before she came up missing and with his history of being in trouble, he would be known as a suspect. 6 App. 1189, 1195. He said he would have to delete the messages on his phone from Brandi because the argument that they had back and forth. 6 App. 1189.

Donita Beasley has known Lesean for 20 years and they are good friends. 6 App. 1200. Donita knows Shalana, who is the mother of Lesean's children, and knew Brandi. 6 App. 1201. Lesean thought of Brandi as a sister. 6 App. 1201, 1209. Donita met Brandi two or three days before learning that Brandi was deceased. 6 App. 1202.

They met when Lesean asked for a ride to the park to meet Brandi. 6 App. 1203, 1209. Lesean introduced them and then walked off into the park with Brandi. 6 App. 1203. They came back 10 or 15 minutes later. 6 App. 1204. Everything seemed fine between them. 6 App. 1209. Brandi returned to her car and Lesean left in Donita's car. 6 App. 1204. Donita gave Lesean a cell phone, but she did not recall when. 6 App. 1204. The bill remained in her name. 6 App. 1205.

Gloria Payton (Sheri) is Brandi's older sister. 6 App. 1224. In September of 2008, they lived in apartments next door to each other and saw each other every day. 6 App. 1226; 7 App. 1262. Brandi lived with Rufus and they had lived together for a couple of years. 7 App. 1263. On September 2nd, Brandi and Sheri talked to each other by telephone in the morning. 6 App. 1227; 7 App. 1264. Brandi planned to meet Sheri for her daughter's cheerleading practice that evening. 6 App. 1228; 7 App. 1264. They talked by phone after 1:00, but before 3:00, about a fax. 6 App. 1228; 7 App. 1265. Brandi said she was busy on the other line and said she would call her back. 6 App. 1229. Sheri called from Brandi's apartment and either used the house phone or Rufus's phone. 7 App. 1268. Rufus was at the apartment that day. 7 App. 1267. Sheri did not see or hear from Brandi again. 6 App. 1229; 7 App. 1270. Sheri tried to call Brandi, but her calls went straight to voice mail. 6 App. 1230, 1271. Brandi had two or three phones. 6 App. 1230.

On September 3rd, Sheri went to the police department and tried to make a missing person's report, but the police department said they would need evidence that she was missing. 6 App. 1232; 7 App. 1276. Sheri went to Avis, to see if Brandi had turned in her rental car. 6 App. 1233. Brandi had rented cars for about a year and Sheri believed she always returned them on time. 6 App. 1233; 7 App. 1274. She sometimes rented cars for a couple of weeks and sometimes for a month. 7 App. 1274. She had only had her current car for a couple of days. 7 App. 1276. Avis told her that the car had not been returned. 6 App. 1234. Sheri went to Brandi's house but did not see that anything was missing. 6 App. 1234. She went back to the North Las Vegas Police Department and they let her fill out a missing persons report. 6 App. 1235. Rufus went with her on both visits to the police department and her mother went to one and possibly the second. 7 App. 1277. Sheri did not tell the police that Brandi was dealing drugs. 7 App. 1277.

Sheri was notified that Brandi's body had been found on September 6, 2008. 6 App. 1237. She provided police officers with a list of Brandi's friends, which included Lesean, and family members, and gave them some of Brandi's cell phone numbers. 6 App. 1239, 1274. Sheri identified some jewelry which was shown in a photograph of Brandi. 7 App. 1259. Brandi usually wore several necklaces, bracelets, and rings. 7 App. 1260. She had her nails done every two weeks. 7 App. 1261. They

were very colorful and long. 7 App. 1261.

Sheri claimed she did not know if Rufus also dealt drugs, but she did not know him to have a job. 7 App. 1278. Sheri did not know of any problems between Brandi and Rufus. 7 App. 1278. Rufus did not attend Brandi's funeral. 7 App. 1278. Sheri kept in touch with him for a short period of time, but they have not had further contact. 7 App. 1278.

On September 6, 2008, Ben Grande and Don Davison were four-wheeling outside of Las Vegas, on a dirt road near Mount Charleston. 6 App. 1211, 1215. They walked around, discovered a body, and called 911. 6 App. 1216. They saw drag marks, backed off, and waited for the police. 6 App. 1217. The body was about 10 yards off of Highway 156. 6 App. 1221.

Raymond Clark from Sprint testified about cell phone records. 7 App. 1283-1300. The records for Brandi's phone on September 2, 2008, showed significant cell phone activity in the morning and early afternoon hours. 7 App. 1300. Exhibit 109 showed a cell tower near 1519 Laguna Palms. 7 App. 1301. At 1:51 p.m., there was a 52 minute phone call, during which she received 3 different phone calls, which were answered. 7 App. 1303. The call ended at 2:43 p.m., and was transmitting from cell tower 239. 7 App. 1303. Tower 144 was closer to 1519 Laguna Palms. 7 App. 1304. A cell call goes to the tower with the strongest signal, not the closest tower. 7 App.

1305. During the 52 minute call, the phone also transmitted to Sprint tower 144. 7 App. 1305. Beginning at 3:52 p.m., a phone call went to voice mail and all subsequent calls went to voice mail, suggesting that the phone was turned off or the battery died. 7 App. 1306.

Exhibit 106 showed the records for number 702-884-1539. 7 App. 1308. The subscriber was Donita Beasley. 7 App. 1309. Clark explained records from September 2, 2008. 7 App. 1310. Between 2:23 p.m. and 4:15 p.m., the phone hit off of Tower 144 and Tower 239. 7 App. 1311. There was no activity on this phone from 2:35 p.m. to 4:09 p.m. 7 App. 1312. The phone hit tower 239 at both of those times. 7 App. 1312. At 7:42 p.m., the phone pinged off of a tower west of 1519 Laguna Palms, and then northwest along US Route 95. 7 App. 1312-15. Between 7:42 and 8:56 pm, there were several phone calls. 7 App. 1315. Later, it appeared that the phone came back, towards Las Vegas. 7 App. 1315. Tower 389 is near State Route 156. 7 App. 1316. On cross-examination, Clark acknowledged that the cell information provided goes to a general area where the cell phone is located. 7 App. 1331. Records now are more precise than those in 2008. 7 App. 1332. Different cell phones have difference ranges. 7 App. 1333. Technical information about the cell towers was not provided. 7 App. 1333. There are a couple hundred cell towers for Las Vegas and they have different ranges depending on population density. 7 App. 1335. How calls can transfer from

one tower to the next and selection of the towers varies based on different factors. 7 App. 1335-39. Structures, mountains, weather and other information can also impact the selection of the tower. 7 App. 1339. There were calls at 1:37 p.m., 1:38 p.m., and 1:45 p.m., showing hits off of Tower 121, which is at 130 West Owens. 7 App. 1341. At 1:46 p.m., there was a call that pinged Tower 351, which is at 200 South First Street, which is the Golden Nugget parking garage. 7 App. 1341-42. There was also a ping at Tower 40, at 400 West Carey, at 1:45 p.m. 7 App. 1342. This would happen because the Golden Nugget had the strongest signal. 7 App. 1342.

Shalana Eddins, who is the mother of Lesean's five children, testified that she had known Lesean for 19 years. 7 App. 1345, 1373. In September of 2008, Shalana lived at 1519 Laguna Palms in North Las Vegas, with her children. 7 App. 1346. Lesean sometimes stayed at the house and he kept clothes there. 7 App. 1346. He took care of their 4-year-old child at the house while Shalana was at work.[2] 7 App. 1347, 1376. He drove the older children to and from school. 7 App. 1375.

Shalana knew that Lesean thought of Brandi as a sister. 7 App. 1382. Shalana was present on an unknown date when Brandi called Lesean. 7 App. 1382. The conversation was fine, but he was upset because of the surprise of learning that she knew his phone number. 7 App. 1382. Lesean used the term "sister" favorably when

[2] The youngest child was born after September of 2008.

he talked about Brandi. 7 App. 1382.

On September 2, 2008, Shalana worked from 8:30 a.m. to 5:30 p.m. 7 App. 1347. She usually called home from work and nothing stood out as being out of the ordinary when she called that day. 7 App. 1384. Lesean picked her up that evening in a Ford Expedition. 7 App. 1348. He had their four kids in the car, along with some helium balloons. App. 1377. Lesean said he had a birthday present for her. 7 App. 1348. It was a bracelet, necklace, and a ceramic pig. 7 App. 1349. The necklace and bracelet looked like a Rolex watch. 7 App. 1349. They did not appear to be new. 7 App. 1349. Lesean said he bought it from a pawn shop for $2,000. 7 App. 1349. She did not see a pawn shop receipt. 7 App. 1350. Shalana did not take the presents. 7 App. 1350. Lesean wore a rope necklace with a cross on it, which Shalana had not seen before. 7 App. 1367. They had argued that day, which was not unusual, and she was not happy with him when he picked her up because of an earlier argument. 7 App. 1378. She did not want anything to do with the jewelry, pig, or balloons because of their argument. 7 App. 1378. Lesean took the jewelry back and she did not see it again. 7 App. 1379. After work, they went to Henderson to pick her mom up and then stopped for food. 7 App. 1350, 1380. They then went home. 7 App. 1351. Lesean drove the car. 7 App. 1351. Her car was usually parked on the left side of the garage. 7 App. 1351. On that day, a gold Hyundai was parked in the garage. 7 App. 1351.

Lesean said that Brandi had rented him a car. 7 App. 1352.

Lesean told Shalana that there was a bleach stain in the carpet because he did an oil change and spilled some oil on the carpet. 7 App. 1353, 1382. During the time that she knew him, she had not seen him do an oil change on his own, but she did see him do an oil change with his dad. 7 App. 1353, 1383. She did not see an oil pan or a bottle of oil. 7 App. 1353. When they entered the house, she saw the bleach stain in the front of the laundry room area. 7 App. 1353-55. She saw drops on the side panel of the laundry room wall. 7 App. 1355. After Lesean was gone, Shalana found a colorful acrylic fingernail inside the house. 7 App. 1355-56, 1384-85. Lesean told her by phone that the nail belonged to Brandi. 7 App. 1356, 1385. Shalana threw away the fingernail. 7 App. 1386. When detectives showed her a photograph of fingernails she told them that was not the fingernail she saw. 7 App. 1386. Her recollection had not changed. 7 App. 1386.

At some point, Lesean left the house in the Hyundai. 7 App. 1347. He said he was going to his friend Tidy, to pick up the garage opener which was missing from Shalana's house. 7 App. 1357, 1387. It had been missing for several days and been the subject of an argument. 7 App. 1385. Shalana called Tidy and then called Lesean. 7 App. 1359. Lesean said he was driving to Stateline. 7 App. 1359. When she called Lesean, she called him at 702-884-1539. 7 App. 1361. Shalana and Lesean argued

while they were on the phone. 7 App. 1361. Later, Shalana went to the car to look for a blanket and saw papers that belonged to Brandi. 7 App. 1363. She went through Lesean's wallet and found a rental car receipt. 7 App. 1363. She woke up during the night, went outside, and found Lesean outside washing the car in the driveway. 7 App. 1364, 1387. It was not unusual for Lesean to wash a car at night. 7 App. 1387.

Early the next morning, around 2:30 a.m., Shalana woke early to take her mother to the bus stop. 7 App. 1364. Lesean was in the car, in the driveway, asleep. 7 App. 1364, 1388. Around 3:00 a.m., he called and said that the police were chasing him. 7 App. 1365. He wanted her to pick him up within the neighborhood. 7 App. 1365. The Hyundai was parked in a driveway. 7 App. 1365. They went back to the house on Laguna Palms. 7 App. 1365. Lesean said he did not know why the police were there, so he left the house. 7 App. 1366. Later, Lesean said that he returned the Hyundai on Thursday. 7 App. 1368. He said that he last spoke to Brandi on Tuesday. 7 App. 1368. Later, Shalana found a headrest, in new packaging, for a Hyundai, in her garage. 7 App. 1369.

Lesean asked her to pawn the rope necklace and cross. 7 App. 1369. The pawn shop would not accept the necklace, but they accepted the cross for $25. 7 App. 1369, 1390.

Shalana learned that Brandi was found dead. 7 App. 1369. She told the police

that she learned this information from Lesean. 7 App. 1370. After finding out that Brandi was dead, Shalana looked in the trash can and found torn papers belonging to Brandi. 7 App. 1370-71. After September 2, 2008, Lesean expressed to her that he needed to speak to her about something related to Brandi, but they did not have that conversation. 7 App. 1371. She talked with detectives on October 1, 2008. 7 App. 1371. The police searched her house after talking to her. 7 App. 1372. There was a fire at her house, that was unrelated to this case, on September 20th. 7 App. 1372. The whole house was destroyed. 7 App. 1372. She identified the jewelry worn by Brandi in two pictures. 7 App. 1372. She thought it was the same jewelry, but she was not certain. 7 App. 1380.

Dr. Simms, a forensic pathologist, testified that he performed an autopsy on Brandi's body on September 7, 2008. 8 App. 1409. The body was severely decomposed and there was insect activity, which caused some areas of tissue loss. 8 App. 1410. Photographs from the autopsy were admitted. 8 App. 1411. Exhibit 111 showed the face, the top of the head and a cloth that was loosely around the neck area. 8 App. 1412. The photographs showed decomposition. 8 App. 1412. His opinion was that the body was in the desert for at least one day. 8 App. 1414. It was consistent with a body that was in the desert from September 2nd until September 6th. 8 App. 1414. Decomposition hinders his ability to determine a cause of death in cases where

there are not significant trauma, gun shot wounds, or stab wounds. 8 App. 1414. In decomposition cases, he probably determines the cause and manner of death in about 30 to 50 percent of the cases. 8 App. 1415. He examined the organs and did not find any natural disease. 8 App. 1415. He did not find any drugs in her system. 8 App. 1416. He did not find any projectiles or bone injuries. 8 App. 1417. There were three injuries to the head which occurred before she died. 8 App. 1417. On the left side of the head, toward the back, there was a 1.5 inch laceration. 8 App. 1418. There was a smaller laceration about the left ear. 8 App. 1418. On the other side of the head there was a linear laceration. 8 App. 1418. The 1.5 inch laceration was quasi stellate (star shaped). 8 App. 1419. This type of injury typically happens when a blunt instrument comes in contact with the skull and squeezes the skin between the skull and the object and the skin splits. 8 App. 1419. This takes a significant amount of force. 8 App. 1419. This was an injury to the scalp, not a fracture of the skull. 8 App. 1419. The injuries could have been made through the use of a rod shaped object, such as a pipe. 8 App. 1420. He could not say that this was a fatal injury. 8 App. 1421. It did not fracture the skull and it was not bleeding. 8 App. 1421. That type of injury could render somebody unconscious. 8 App. 1421. There were some defects in the right side of the abdomen which were consistent with insect activity. 8 App. 1422. An internal examination showed that there was a lot of decomposition. 8 App. 1422.

Dr. Simms could not ascertain a cause of death to a level of certainty required for him to testify about it. 8 App. 1423. He could not get to the minimal level of proof of greater than 50% as to the cause of death. 8 App. 1424. The main obstructing factor was the decomposition. 8 App. 1424. Two of the fingers of the left hand had decorative nails with polish, and on two of the fingers the decorative fingernails were not there. 8 App. 1426. The right hand had one decorative fingernail missing. 8 App. 1426. He opined that circumstances were consistent with a homicide because it is very unusual for a normal healthy person to wind up in the desert decomposed. 8 App. 1427. He could not rule out every natural disease. 8 App. 1428. It is possible that there was manual strangulation, a choke hold, or smothering. 8 App. 1428. With strangulation there could be fractures to the hard structures in the neck. 8 App. 1428. There was no evidence of a fractured hyoid or cartilage in this case. 8 App. 1429. A person could be smothered after being rendered unconscious or could die from hypothermia if they were placed in a trunk when it was hot outside. 8 App. 1430. The fact that there was a healthy woman in the desert places homicide on the table as a probability. 8 App. 1431. If blood spatter were present on a wall and in the trunk of a vehicle at or near the time of her death, that would basically prove or almost prove the idea of head trauma that occurred before death and if it was in the trunk of a car,

he would say that it was highly indicative of being a homicide.[3] 8 App. 1431.

On cross-examination, Dr. Simms testified that in conducting an examination where there was not an obvious cause of death, he goes through a process of elimination to determine a cause of death. 8 App. 1433. He observed tissue loss to the right arm, right abdomen, the right side of the groin area, and the left leg. 8 App. 1433. Some of this was caused by insect activity. 8 App. 1433. There were not definite lethal or significant injuries. 8 App. 1434. The wounds to the head were not fatal. 8 App. 1435. He believed it was more likely than not that Brandi was unconscious, but could not eliminate the idea that the large head wound did not effect her. 8 App. 1435. He did not see any evidence of strangulation. 8 App. 1437. He did not see abrasions or injuries that were consistent with asphyxiation, though these injuries are not always present. 8 App. 1437. He did not see any hemorrhages of the tongue or petechia. 8 App. 1438. It is possible for a person to die from natural causes

[3]Outside the presence of the jury a record was made concerning a defense objection to questions presented by the prosecutor regarding blood spatter evidence from a trunk and its relationship to whether the death was caused by homicide. 8 App. 1452. The district court first noted that she allowed the testimony, despite the fact that evidence on that issue had not been introduced, because she understood that the evidence would be presented and she did not want Dr. Simms to have to return to court. 8 App. 1452. Defense counsel also objected that the question invaded the province of the jury, and it was up to the jury to decide whether those facts were indicative of being a homicide. 8 App. 1452. The district court found the question permissible. 8 App. 1453. No expert on blood spatter was presented and there was no testimony that any blood in the trunk could have been left there if Brandi was alive at the time of the transfer.

without anything that can be readily identified at the time of autopsy. 8 App. 1439. Examples of natural causes include metabolic derangement, such as diabetes, or abnormal heart rhythm. 8 App. 1439. Dr. Simms acknowledged that blunt force trauma could be caused by a wide range of circumstances, including a fall. 8 App. 1440. Decomposition could impact toxicology testing. 8 App. 1440. Cocaine and ethanol are not stable and testing would be impacted by a decomposed body. 8 App. 1441. His conclusion was that the cause and manner of death were undetermined. 8 App. 1442. The cause and manner of death remain undetermined and that had not changed since he wrote his initial report in September of 2008. 8 App. 1445. He did not find any evidence of hypothermia. 8 App. 1446.

On redirect examination, Dr. Simms testified that signs of strangulation and asphyxiation could be obscured in decomposition. 8 App. 1447. The head injuries did not appear consistent with a single fall. 8 App. 1448. There would not be signs of a struggle if someone was unconscious while being asphyxiated or strangled. 8 App. 1449. On re-cross examination, he confirmed that its possible that a cause and manner of death, such as natural death, can be undetermined even when there is no decomposition. 8 App. 1450.

Detective Clifford Mogg testified about his investigation. 8 App. 1454. He responded to the scene where the body was found, near Highway 156, off of Highway

95. 8 App. 1455. The body was in a small ravine and was not visible from Highway 156. 8 App. 1460. There were apparent drag marks leading up to the body and a couple of small rocks that appeared to have blood on them. 8 App. 1459. Officers also found two black flip-flops, a white rag, and two fingernails that were similar to the fingernails on the body. 8 App. 1459. It appeared that the woman had been dragged to the location where she was found. 8 App. 1460. There was nothing in the pockets of her pants and the right front pant pocket had been turned out. 8 App. 1460. Her bra was off and her shirt had been pulled up along the top of her back, covering the bottom part of her mouth. 8 App. 1461. There was no identification. 8 App. 1461. She had one small ring, but did not have a car or a cell phone. 8 App. 1461. Photographs of the area were introduced and explained to the jury. 8 App. 1462-67. It was around 100 degrees that day. 8 App. 1465. The ground temperature was 130 degrees and the body was 147 degrees. 8 App. 1465.

Detective Mogg discussed other aspects of his investigation. 8 App. 1470-72. He obtained call detail records. 8 App. 1472. He talked with Teresa. 8 App. 1473. She then contacted Donita who provided the detective with cell phone number 702-884-1539. 8 App. 1475. He contacted the North Las Vegas Police Department and learned that Brandi was reported as missing. 8 App. 1475. He learned about the Hyundai and contacted Avis Rental Car. 8 App. 1476. He contacted Rufus. 8 App. 1477. Rufus

allowed officers to look inside the apartment, answered all of their questions, and was cooperative in the investigation. 8 App. 1477. Mogg received call detail records for Brandi's phones and learned that calls stopped on September 2nd at approximately 3:20 p.m. 8 App. 1478. He interviewed Amber. 8 App. 1479. Amber was associated with the last couple of calls that Brandi's phone received, including the last incoming call which was relayed through the cell tower on September 2nd at 3:30 p.m. 8 App. 1479. They later interviewed Rufus at Mogg's office for a follow-up interview, during which detectives confronted him with additional information they discovered about Brandi. 8 App. 1479. They used a ruse in which they accused him of driving her car after she was reported missing, but did not see any abnormal physiological response from him. 8 App. 1480. Rufus again answered all of their questions and was cooperative. 8 App. 1481.

On October 1, 2008, Mogg interviewed Shalana. 8 App. 1481. Officers received information from her about spots on her wall, a stain on the floor with bleach on it, and the fingernail which she found. 8 App. 1482. They obtained a warrant to search the house. They saw the bleach stain and a bottle of bleach in the laundry room. 8 App. 1483. There were six small stains on the wall which appeared to be blood. 8 App. 1484. The search was executed on October 2nd. 8 App. 1487. Mogg was aware that there had been a fire in the home on September 30th. 8 App. 1487.

There was extensive damage to the house. 8 App. 1488. He requested DNA testing for the swabs from the walls. 8 App. 1490. The area on the carpet did not test positive for blood. 8 App. 1490.

Brandi's rental car was found on October 1, 2008. 8 App. 1488. It was found about 6 miles from Shalana's home. 8 App. 1488. The car was sitting on wood and all 4 wheels and tires had been removed. 8 App. 1489. There was dust on the top of the car. 8 App. 1489. Inside the car, there was a towel that appeared to be partially burned and there was a lighter on the seat next to it. 8 App. 1489.

Shalana identified jewelry in a photograph. 8 App. 1493. Detective Mogg was not aware of Lesean buying jewelry from a pawn store in September 2008. 8 App. 1493. Mogg believed the phone records showing contact between Lesean and Brandi were important. 8 App. 1494. Prior to 3:38 p.m. on September 2nd, there had been roughly 48 calls or texts exchanged between Lesean and Brandi, but after that time, there were only six for three or four days. 8 App. 1495. Both of their phones showed hits off the cell towers in the area of 1519 Laguna Palms around 3:30 p.m. that day. 8 App. 1495. He also noticed the progression of cell towers from 1519 Laguna Palms to towers 117 and 389, near U.S. 95 and Highways 156 and 157, from 7:42 p.m. to 8:00 p.m. on September 2nd. 7 App. 1496.

After conducting his investigation, Mogg arrested Lesean for Brandi's murder.

8 App. 1496. He made his decision based upon interviews, the cell phone records, and a report from North Las Vegas police officers that they saw Lesean driving Brandi's vehicle at 2:26 a.m. on September 3rd. 8 App. 1497. Defense counsel objected to the hearsay statement, but the objection was overruled. 8 App. 1498. Counsel also objected the narrative given by the detective as it was improper and invaded the province of the jury. 8 App. 1498. This issue is discussed in detail below. The district court instructed the detective not to discuss the results of DNA testing as that evidence had not yet been presented. 8 App. 1498. Over a defense objection, Mogg testified that the results he received from the house and the vehicle, and Shalana's identification of the jewelry, also led to his conclusion and decision to arrest Lesean. 8 App. 1499.

On cross-examination, Mogg testified that Shalana said that the jewelry was silver. 8 App. 1500. He believed that it was white gold. 8 App. 1500. The crime scene analyst impounded the evidence at the scene. 8 App. 1501. Mogg may have impounded a couple of books, but did not believe he impounded the other evidence. 8 App. 1501. A metal pipe in the desert was not impounded and was therefore not forensically tested. 8 App. 1502. The evidence which was collected was two fingernails, two rocks, a white towel, the shoes, and a fly. 8 App. 1502. A blanket and fibers from the blanket were not collected. 8 App. 1503. Vegetation was not collected.

8 App. 1503. Rufus was first interviewed at his residence within a week to ten days, and then a formal interview was conducted on September 24th at the homicide office. 8 App. 1503. Mogg did not reference the interviews in the report he prepared in this case. 8 App. 1504. He did not know the date of the first interview because it was not documented in the report and the report does not reflect what was said when Rufus was first interviewed. 8 App. 1504. The interview was not recorded, so Mogg was going off of his recollection. 8 App. 1505. He did not take photographs inside of Brandi's apartment because he did not see anything out of the ordinary. 8 App. 1505. Although it was an important interview, it was not documented. 8 App. 1505. Mogg knew that Rufus shared a car with Brandi, but they did not search inside of their car. 8 App. 1506. Mogg did not personally do a pawn check. 8 App. 1506. He was relying on information given to him by someone else. 8 App. 1506. Shalana told him that the fingernail at her house was not the same as those in the photograph of Brandi's hands. 8 App. 1506-07. Mogg acknowledged that he was not an expert on blood spatter. 8 App. 1507.

On redirect-examination, Mogg testified that if Rufus would have said anything noteworthy or acted inappropriately in his first interview, Mogg would have noted that in his report and would have done a follow-up investigation. 8 App. 1509. He noted in a report that Shalana said the jewelry was gold. 8 App. 1510.

Sean Montgomery, a North Las Vegas Police Officer, testified that on September 3, 2008, at 2:30 a.m., he was dispatched along with two other units to 1519 Laguna Palms, in response to a call from a neighbor who said that Lesean was in a vehicle in a driveway. 9 App. 1581-82. He saw the license plate was 428 UZS and called in the plate. 9 App. 1584. A person appeared to be sleeping, Montgomery approached the car, and gave him a command to get out of the car. 9 App. 1585. He did not see any criminal activity as he approached the car. 9 App. 1600. The person mumbled something, started up the car, ignored their commands to stop, and drove away. 9 App. 1587. He sped off really fast as the officers chased him. 9 App. 1587. Other officers were also dispatched. 9 App. 1587. They did not catch him that night. 9 App. 1588.

Jason Turner from Avis Rent-A-Car testified that Brandi rented a beige Hyundai Sonata on August 31, 2008. 9 App. 1607. 9 App. 1608. It was due to be returned on September 5. 9 App. 1608. The car was missing for about 30 days. 9 App. 1611.

Maria Lopez was a crime scene investigator in 2008. 9 App. 1616. On October 2, 2008, she collected evidence at 1519 Laguna Palms. 9 App. 1621. There was extensive fire damage at the house. 9 App. 1622. She saw bleach in the laundry room and saw that the carpet was pulled back. 9 App. 1625. That area was tested, but the

presumptive test for blood was negative. 9 App. 1635. Bleach can degrade blood. 9 App. 1636. There were six stains on the laundry room doorway which appeared to be blood. 9 App. 1627. They were photographed, given a presumptive test for blood, which was positive, and then the stains were collected. 9 App. 1629-30.

David Horn, a senior crime scene analyst, testified that on October 1, 2008, he processed a vehicle which was found in an alley 1913 Olwil in Las Vegas. 9 App. 1653. The car was a wreck and various car parts, including the tires, were missing. 9 App. 1655. It looked like the car had been parked for awhile and was dumped there. 9 App. 1656. The license plate was 428 UZS. 9 App. 1657. There was some fire damage in the driver's seat area. 9 App. 1658. DNA samples were taken from the car and items inside the car. 9 App. 1660. There was paperwork in Brandi's name. 9 App. 1662. Fingerprint impressions and footwear impressions were also taken. 9 App. 1663, 1672. The footwear impressions appeared to be of comparison quality. 9 App. 1673. He did not know if comparisons were made as that was the responsibility of the detectives. 9 App. 1673. Soil samples were collected from the trunk. 9 App. 1663. He did not know if they were other compared to other soil samples. 9 App. 1676. He did not see any blood stains. 9 App. 1669. Measurements were taken from the seat to the pedal, to determine the length of the driver's leg. 9 App. 1675. He did not know if any comparisons were made. 9 App. 1675.

Kellie Gauthier testified about DNA testing. 9 App. 1678. She analyzed evidence in this case, including apparent blood from a wall by a laundry door, two fake fingernails, and some rocks. 9 App. 1686-87. Of the samples on the wall, she was able to obtain profiles from three of the six samples. 9 App. 1691. They were consistent with Brandi's DNA. 9 App. 1691. Gauthier testified that Brandi's identity was assumed based upon the statistical probabilities. 9 App. 1695. Her DNA was also consistent with DNA found on three rocks. 9 App. 1696. The fake fingernails from the autopsy and the scene where the body was found were also consistent with Brandi's DNA. 9 App. 1698-99. She later conducted testing on a black trunk mat and white hand towel, and found stains which were consistent with Brandi. 9 App. 1700-01. On cross-examination, Gauthier testified that there was no DNA evidence consistent with Lesean found in fingernail clippings from Brandi. 9 App. 1707. She was not asked to test carpet or padding. 9 App. 1709. She was not asked to do a comparison with a sample from Rufus. 9 App. 1712. Lesean's DNA was not found on the trunk mat. 9 App. 1713. There was a male profile from the Hyundai which did not belong to Lesean. 9 App. 1713.

VI. SUMMARY OF THE ARGUMENT

Lesean was convicted of first degree murder and robbery following the death of his long-time friend Brandi. The State failed to establish any cause of death for

Brandi and otherwise failed to establish that Lesean was guilty of the offenses. This result was achieved because the district court erroneously allowed a detective to explain why he arrested Lesean, which was tantamount to giving an opinion on his guilt. Also, the district court refused to instruct the jury on manslaughter, even though the State failed to present any evidence of malice, intent to kill, or premeditation and deliberation. Reversal is also mandated because the district court removed Lesean from the first day of jury selection because he insisted on wearing jail clothing and refused to disqualify the prosecutor's office, even though Lesean's prior counsel on a related case were employed at the prosecutors office at the time of trial and they had not been properly screened from this case at the time of their employment.

VII. ARGUMENT

A. The Judgment is Invalid Because the District Court Allowed Impermissible Testimony By A Detective About His Opinion On Whether Lesean Was Guilty

Lesean's state and federal constitutional rights to due process, a fair trial, equal protection, and right to a jury trial were violated by the district court's order allowing a detective to give a narrative opinion as to why he arrested Lesean. U.S. Const. amend. I, V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This Court generally reviews a district court's evidentiary rulings for an abuse of discretion. However, the issue of whether a defendant's constitutional rights were

violated is ultimately a question of law that must be reviewed de novo. Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). This Court reviews a district court's decision to admit or exclude expert testimony for an abuse of discretion. Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008).

Detective Mogg testified that after conducting his investigation, he arrested Lesean for Brandi's murder. 8 App. 1496. He made his decision based upon interviews, the cell phone records, and a report from North Las Vegas police officers that they saw Lesean driving Brandi's vehicle at 2:26 a.m. on September 3rd. 8 App. 1497. Defense counsel objected to the hearsay statement, but the objection was overruled. 8 App. 1498. Counsel also objected to the narrative given by the detective as it was improper and invaded the province of the jury. 8 App. 1498. The district court instructed the detective not to discuss the results of DNA testing as that evidence had not yet been presented. 8 App. 1498. Over a defense objection, Detective Mogg testified that the results he received from the house and the vehicle, and Shalana's identification of the jewelry, also lead to his conclusion and decision to arrest Lesean. 8 App. 1499.

Outside the presence of the jury, defense counsel made an additional record concerning objections to Detective Mogg's testimony. 8 App. 1513. Counsel noted that it was improper to ask the detective why he thought there was cause to arrest

Lesean, and then he started talking about things, such as the DNA testing, even though that evidence had not been introduced. 8 App. 1513. Defense counsel noted that the district court said they were going to hear that evidence eventually. Defense counsel objected because this told the jury that the court believed DNA evidence existed, as stated by the detective, and the defense had not been given the opportunity to confront a witness about this evidence. 8 App. 1513. The court's statements implied that the DNA evidence was accurate. 8 App. 1513. Defense counsel requested a mistrial. 8 App. 1514. The State argued that Mogg discussed other evidence that would be coming in and that the comments about DNA were not inappropriate. 8 App. 1514. The prosecutor argued that her "question to the detective was what are the factors that led you in your investigation to ultimately arrest the Defendant is important. We have to prove this case beyond a reasonable doubt, and he can go ahead and assess the factors that led him to that conclusion." 8 App. 1514. The district court denied the motion for a mistrial and found that the questions and the court's discussion were proper. 8 App. 1516-17.

Detective Mogg's testimony as to the reasons why he arrested Lesean was nothing more than a narrative opinion as to why he believed Lesean was guilty. This opinion testimony about the reasons supporting his conclusion that there was probable cause for the arrest was inadmissible, irrelevant and usurped the jury's role

of determining guilt.

Mogg's opinion as to why he believed Lesean was guilty was not admissible as lay witness testimony. NRS 50.265. It was also inadmissable as expert testimony. NRS 50.275. The detective was not noticed as or qualified as an expert, but was allowed to give an expert opinion.

"The threshold test for the admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. The goal, of course, is to provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity. Moreover, expert testimony must also withstand the challenge to all relevant evidence, i.e., whether probative value exceeds prejudicial effect." Townsend v. State, 103 Nev. 117-118, 734 P.2d 705, 708 (1987) (citing NRS 48.035(1)). Expert testimony is admissible if (1) the expert is qualified in an area of "scientific, technical or other specialized knowledge," (2) the expert's specialized knowledge will "assist the trier of fact to understand the evidence or to determine a fact in issue," and (3) the expert's testimony is limited to the scope of his or her specialized knowledge. NRS 50.275. It is axiomatic that the purpose of expert testimony "is to provide the trier of fact [with] a resource for ascertaining truth in relevant areas outside the ken of ordinary laity." Id. at 117, 734 P.2d at 708. Expert testimony must not "transcend [

] the test of jury enlightenment and enter [ ] the realm of fact-finding that [is] well within the capacity of a lay jury." Id. at 118, 734 P.2d at 708. A prosecutor's question to an expert witness, and the answer, is improper if it invades the prerogative of the jury to make unassisted factual determinations where expert testimony is unnecessary." Id. at 119, 734 P.2d at 709.

"To warrant the use of expert testimony two elements are required: (a) the subject of the inference must be so distinctly related to some science, profession, business or occupation as to be beyond the understanding of the average layman; and (b) the witness must have sufficient skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier of fact in his search for truth." State v. Wheeler, 416 So.2d 78, 80 (La. 1982) (citing McCormick on Evidence §§ 12, 13 (1972)). Neither element was established here. The determination of whether a defendant is guilt is very much within the understanding of an average layman and the Detective's opinion does not properly aid the jury. "It is believed that all courts would exclude extreme expressions, even by a witness who has been qualified as an expert, on such matters as how a case should be decided [or] whether the defendant is guilty[.]" Id. (citations omitted). "In such cases, all of the variables weigh heavily against admission of the evidence: The evidence is not truly expert testimony because it relates to matters well within the

jury's understanding and is wholly without value to the trier of fact in reaching a decision; the inference or opinion is abstract and indirect; and it relates to an ultimate issue rather than a collateral matter." Id. at 81. A trial court errs by allowing an officer to testify in a manner that is tantamount to an opinion that the defendant was guilty of the crime charged. Id.

"[O]pinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." People v. Vang, 262 P.3d 581, 587 (Cal. 2011) (internal quotations and citations omitted). A witness, including a detective, may not give a direct opinion on the defendant's guilt or innocence. See United States v. Kinsey, 843 F.2d 383, 388 (9th Cir. 1988). To permit jurors to rely on a witness's opinion of the defendant's guilt 'would be the ultimate abdication of the function of the jury.'" Bennett v. State, 794 P.2d 879, 881 (Wyo. 1990) (quoting Stephens v. State, 774 P.2d 60, 64 (Wyo. 1989)).

Testimony which is the functional equivalent of an opinion that the defendant is guilty is not admissible. "Opinions of guilt are improper whether made directly or by inference." State v. Quaale, 340 P.3d 213, 217 (Wash. 2014). An explicit opinion as to the defendant's guilt is improper lay or expert opinion because the determination of the defendant's guilt is solely a question for the trier of fact."Impermissible

opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of facts by the jury." State v. Kirkman, 155 P.3d 125, 130 (Wash. 2007). "Particularly where such an opinion is expressed by a government or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial." State v. Barr, 98 P.3d 518, 522 (Wash. 2004) (Internal quotation omitted).

Facts similar to those presented here were considered by the Kansas Supreme Court in State v. Steadman, 855 P.2d 919 (Kan. 1993). In that case, the defendant claimed that the trial court erred in permitting a detective to state in his opinion that the defendant was guilty. Id. at 921. One detective testified that it was his opinion that the defendant killed the victim, and that only guilty suspects felt the enormous pressure the defendant felt during interrogation. Id at 922. Another detective testified he thought the defendant was guilty because other suspects were honest and that police lacked probable cause to arrest anyone other than the defendant. Id. He also testified that there was sufficient probable cause to obtain a search warrant. Id. The State in that case conceded that the detectives were not qualified as expert witnesses on these issues. Id. at 924. "In a criminal trial, the defendant has the right to have the jury determine from the evidence whether the defendant is guilty or not. The police

witnesses can testify from their experience as to a role the defendant played in an illegal enterprise – they cannot testify that in their opinion the defendant was guilty of the crime. The admission of witnesses' testimony that in their opinion the defendant was guilty of the crime and exhibited the pressure felt by a guilty person, other persons interviewed were not guilty of the crime, and there was sufficient probable cause for the issuance of a search warrant for the defendant's residence deprived the defendant of his right to a fair trial." Id. Based upon the admission of this testimony, the Kansas court reversed the defendant's conviction and remanded the case for a new trial.

Detective Mogg's testimony was tantamount to an opinion that Lesean was guilty of the charges. "As the subject matter of the opinion approaches the hub on the issue, the risk of prejudice and hence of reversible error consequently increases. This is particularly so when the witness expressing the opinion is one, such as a police officer, in whom jurors and the public repose great confidence and trust." Wheeler, 416 So.2d at 82. See also Bennett, 794 P.2d at 881-82. Here, the detective's testimony amounted to a pseudo-closing argument as to why he believed there was probable cause to support the charges. Given the lack of evidence establishing how Brandi died, the lack of evidence as to the mens rea elements of the offense, and the circumstances under which she died, this evidence was of great significance and

highly prejudicial. Lesean's substantial rights were violated, the State cannot establish that the constitutional error was harmless beyond a reasonable doubt, and the judgment must be reversed.

B. The Judgment must be Reversed Because of the District Court's Refusal To Instruction On Voluntary Manslaughter

Lesean's state and federal constitutional rights to due process of law, equal protection, and a fair trial were violated because the district court refused to instruct the jury on the lesser included offense of manslaughter. U.S. Const. amend. I, V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005). "[A] defendant is entitled to a jury instruction on a lesser-included offense if there is any evidence at all, however slight, on any reasonable theory of the case under which the defendant might be convicted of that offense." Rosas v. State, 122 Nev. 1258, 1264-65, 147 P.3d 1101, 1106 (2006) (internal quotation marks omitted). See also Keeble v. United States, 412 U.S. 205, 208 (1973). Voluntary manslaughter is a lesser-included offense of murder, Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983) (citing NRS 200.040, NRS 200.050, and NRS 200.060). See also Crawford, 121 Nev. at 751, 121 P.3d at 586-87 (recognizing that voluntary manslaughter is a lesser included

offense of first degree murder). "It is 'beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.'" Rosas, 122 Nev. at 1265, 147 P.3d at 1105-06 (quoting Keeble, 412 U.S. at 208). "A defendant is entitled to such an instruction because of the 'substantial risk' that a jury will convict despite a failure to prove the charged offense if the defendant appears guilty of some offense." Id.

Here, the district court elected to instruct the jury on premeditated murder, despite the absence of evidence concerning the circumstances that resulted in Brandi's death, but refused to instruct the jury on manslaughter because the court did not believe that there was justification to provide that instruction based upon the evidence presented. 10 App. 1746-48. Under the facts presented here, the district court was obligated to give an instruction on voluntary manslaughter.

The State failed to present any meaningful evidence whatsoever concerning the time before Brandi's death. Rather, the only evidence was that Brandi exchanged text messages with Amber and everything seemed normal in those messages. 6 App. 1178-80. Theresa testified that Lesean asked about Brandi's whereabouts while she was missing, claimed that Lesean said he had an argument with Brandi, and claimed that Lesean said he would have to delete messages on his phone from Brandi because of

the argument they had back and forth. 6 App. 1189. Although the State presented cell phone record location information, it did not present the text of any messages between Lesean and Brandi. Further, the State presented evidence that Lesean and Brandi had a brother-sister type relationship and had known each for a long time. 6 App. 1201, 1209; 7 App. 1382. Brandi sold drugs, including sherm-sticks. 6 App. 1193; 7 App. 1274. There is no indication of whether or not any alleged argument was over drug deals.[4] The defense theory of the case was that the State failed to meet its burden of proving each of the elements of the charges, including the elements of premeditation and deliberation.[5] There is no requirement that a defendant testify or introduce evidence in order to be entitled to defense instructions. McCraney v. State, 110 Nev. 250, 255, 871 P.2d 922, 925 (1994).

Moreover, there was no evidence as to Brandi's cause of death, so the use of any instrumentality causing death cannot be considered as establishing that the person

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[4]In fact, the State failed to present evidence that Lesean was the person who killed Brandi. Instead the evidence merely showed that a few drops of Brandi's blood were found in the home of Lesean's girlfriend and cell phone records suggested that Lesean may have been in the location where Brandi's body was found.

[5]The State also presented a felony-murder theory. There was no special verdict, so it is impossible to determine whether the jury found Lesean guilty under either a felony-murder theory or a premeditated and deliberate theory. There was no evidence that any intent to commit robbery occurred prior to Brandi's death. The evidence is equally consistent with after-thought robbery, which cannot support a finding of felony-murder. See Nay v. State, 123 Nev. 326, 327, 167 P.3d 430, 431 (2007).

who killed her acted with premeditation and deliberation rather than acting in a heat of passion, assuming she was actually killed by another person and did not die from natural causes or an accident. Cf. Crump v. State, __ Nev. __, __ P.3d __ (3/25/2016) (noting that the use of a ligature and the time required to strangle a person are legitimate circumstances for which to infer that a killing is willful, deliberate and premeditated); Valdez v. State, 124 Nev. 1172, 1203, 196 P.3d 465, 485-86 (2008) (premeditation may be proven through circumstantial evidence, including the nature and extent of the injuries); Leonard v. State, 114 Nev. 1196, 1210-11, 969 P.2d 288, 297 (1998) (finding that the jury could infer premeditation based medical testimony concerning the time it took to strangle the victim).

Additional support for Lesean's contention that the district court should have instructed the jury on voluntary manslaughter is found in the prosecutor's closing argument. 10 App. 1822-23. The prosecutor noted the State presented evidence through Theresa that Lesean said he had a fight with Brandi. 10 App. 1822. The prosecutor then argued:

> They say the defendant and Brandi were friends. He called her his sister. Why would he kill her? Well, you what, read the paper, listen to the news. Unfortunately, people kill loved ones every day. Sometimes they plan it out. Sometimes something happens and seconds later they are so angry by what happened that they kill somebody.

10 App. 1822-23. The State's own argument supports the instruction which was

improperly refused by the district court. See Roberts v. State, 102 Nev. 170, 172-74, 717 P.2d 1115, 1116-17 (1986) (reversing conviction based upon refusal to instruct on voluntary manslaughter after the defendant shot his girlfriend, after finding her at the trailer of another man, because he may have acted under a sudden heat of passion).

In light of the lack of evidence presented, the jury could have just as easily concluded that a verdict of voluntary manslaughter was appropriate. The jury should have been instructed that the State had the burden to prove beyond a reasonable doubt that Lesean did not act in the heat of passion caused by the requisite legal provocation. See Crawford, 121 Nev. at 754, 121 P.3d at 589; Williams, 99 Nev. at 531, 665 P.2d at 261; Mullaney v. Wilbur, 421 U.S. 684, 704 (1975). Such an instruction was consistent with the defense theory of the case, which was that the State failed to establish each of the elements of first-degree murder. Had the jury been properly instructed on the lesser-included offense, there is a reasonable probability that the jury would have returned a verdict for the lesser offense as there was no evidence presented by the State concerning Lesean's state of mind. His judgment of conviction must therefore be reversed. The State cannot establish that the refusal to give the instruction was harmless beyond a reasonable doubt. See Davis v. State, 321 P.3d 867, 874 (Nev. 2014); Arizona v. Fulminante, 499 U.S. 279, 307-08 (1991)

C. The District Court Improperly Denied The Motion To Disqualify The Office Of The Clark County District Attorney

Lesean's state and federal constitutional rights to due process of law, equal protection, a fair trial, and right to conflict-free counsel were violated because the district court refused to disqualify the Office of the Clark County District Attorney, even though Lesean's prior counsel on a related case joined that office and they were not appropriately screened from this case. U.S. Const. amend. I, V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"District courts are responsible for controlling the conduct of attorneys practicing before them, and have broad discretion in determining whether disqualification is required in a particular case." Leibowitz v. Eighth Judicial Dist. Court, 119 Nev. 523, 529, 78 P.3d 515, 519 (2003) (quoting Brown v. Eighth Judicial Dist. Court, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000)). The district court's decision should not be set aside absent a manifest abuse of that discretion. Nevada Yellow Cab Corporation v. Eighth Judicial Dist. Court, 123 Nev. 44, 54, 152 P.3d 737, 743 (2007) (citing Waid v. Dist. Court., 121 Nev. 605, 609, 613, 119 P.3d 1219 1222, 1225 (2005)). The district court's discretion includes the disqualification of a prosecutor's office. Collier v. Legakes, 98 Nev. 307, 309, 646 P.2d 1219, 1220 (1982), overruled in part on other grounds by State v. Eighth Judicial Dist. Court (Zogheib), 321 P.3d 882 (Nev. 2014) (citing Tomlin v. State, 81 Nev. 620, 407 P.2d

1020 (1965) and Hawkins v. Eighth Judicial Dist. Court, 67 Nev. 248, 216 P.2d 601 (1950)).

Tierra Jones and Abigail Frierson were employed as Clark County Deputy District Attorneys at the time of trial. 2 App. 415. They were previously employed as Clark County Deputy Public Defenders. 2 App. 415. During their employment with the Public Defender's office, Jones and Frierson represented Lesean in case number C253455. 2 App. 423. In that case, on April 8, 2009, Lesean was indicted by the Clark County Grand Jury on charges of First Degree Arson, Burglary and Malicious Injury to Vehicle.[6] Lesean's counsel in this case filed a motion to disqualify the District Attorney's Office. 2 App. 420. The next day, they filed a motion to exclude evidence of the arson. 2 App. 440. The State opposed the motions. 3 App. 460, 490. In its opposition to the motion to exclude the arson evidence, the State argued that the arson was relevant in this case to proving motive and intent, identity, plan, and knowledge. 3 App. 474-75, 547. The State also argued that the evidence was relevant and extremely probative. 3 App. 475-76. The State argued that the fact that Lesean's counsel on the arson case were now prosecutors did not require disqualification

[6] Lesean was convicted of the arson. This Court affirmed the judgment on direct appeal. Docket 55716. Lesean filed a post-conviction petition which was pending in the district court during the proceedings in this case. On June 18, 2015, the district court in that case denied the petition. Collin's court appointed counsel failed to file a timely notice of appeal, so the appeal from that order was dismissed by this Court. Docket 68838.

because they had been walled off of this case, but the State did not provide proof or details concerning this assertion. 3 App. 476. The State acknowledged that an ethical shield was not established in this case at the time Jones and Frierson were employed, but was instead established only after this matter was brought to their attention. 3 App. 505.

Jones was assigned to the district attorney's criminal division, and Frierson was assigned to the juvenile division prosecuting dependency cases. 3 App. 504. In opposing the motion to disqualify, and in direct conflict with the position taken on the opposition to exclude the arson as a bad act, the State argued that the murder case and arson case were not related. 3 App. 505-07. The district court heard argument of the motion on August 18, 2014. 3 App. 510. Without holding a hearing, the district court denied the motion. 3 App. 515-6. Subsequently, affidavits from Jones and Frierson were filed concerning the conflict. 5 App. 565-71. Thus the district court ruled on the merits of the motion without holding a hearing and based on affidavits the district court directed to be prepared, thus denying Lesean the ability to even contest the factual validity of the self- serving ex-post facto affidavits. Of note is that the affidavit of Lesean's previous trial counsel Tierra Jones only specified that she had not discussed the murder case with the current prosecutors. It can be implied that

therefore she has discussed her representation during the arson case.[7]

The district court erred in denying the motion to disqualify the District Attorney's Office without conducting an evidentiary hearing and erred in denying the motion when members of the District Attorney's Office represented Lesean during the arson trial and were named as potential defense witnesses. 3 App. 557.

"Attorney disqualification of counsel is part of a court's duty to safeguard the sacrosanct privacy of the attorney-client relationship which is necessary to maintain public confidences in the legal profession and to protect the integrity of the judicial process." Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1576 (D.C. Cir. 1984) (quoted with approval in Ciaffone v. Eighth Judicial Dist. Court, 113 Nev. 1165, 1169, 945 P.2d 950, 952 (1997), overruled in part on other grounds by Leibowitz, 119 Nev. 523, 78 P.3d 515). When considering whether to disqualify counsel, the district court must balance the prejudices that will inure to the parties as a result of its decision. Brown, 116 Nev. at 1205, 14 P.3d at 1270 (citing Cronin v. Eighth Judicial Dist. Court, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989), overruled in part on other grounds by Nevada Yellow Cab, 123 Nev. at 54, 152 P.3d at 743 n. 26). Doubts regarding conflicts should generally be resolved in favor of

[7]Prior to trial, the State informed defense counsel and the district court of its intent to introduce evidence of the arson during this trial. The district court found the evidence admissible but the State elected not to present the evidence at trial. 5 App. 549.

disqualification. Brown, 116 Nev. at 1205, 14 P.3d at 1270 (citing Cronin, 105 Nev. at 640, 781 P.2d at 1153).

Recently, this Court examined the issue of whether a conflict of interest should be imputed to and require disqualification of the entire prosecutor's office. In State v. Eighth Judicial Dist. Court (Zogheib), 321 P.3d 882 (Nev. 2014), the defendant moved to disqualify the Clark County District Attorney's Office due to a conflict of interest because Zogheib was represented by Patrick McDonald, an attorney in District Attorney Steven Wolfson's office, while Wolfson was a criminal defense lawyer prior to becoming District Attorney. Id. at 883-84. Several evidentiary hearings were held regarding the motion to disqualify, and the district court determined that although Wolfson was not Zogheib's attorney, McDonald and Wolfson spoke frequently about the case. Id. The district court in Zogheib further noted that Wolfson testified that after accepting the position of District Attorney, he never made an appearance on the case, never obtained or reviewed additional discovery, and never discussed the case with the deputy district attorney assigned to prosecute the case. Id. The district court ultimately ruled that the Clark County District Attorney's Office should be disqualified due to a conflict of interest between Wolfson and Zogheib, and that the conflict should be imputed to the prosecutor's office because there was an appearance of impropriety, even though Wolfson had

been effectively screened from participating in the case. Id. at 884. The State thereafter filed a petition for writ of mandamus challenging the district court's ruling, and this Court granted the petition upon finding that the district court abused its discretion by granting the motion. Id. In doing so, this Court overruled Collier v. Legakes, 98 Nev. 307, 646 P.2d 1219 (1982), to the extent that it relied on the appearance-of-impropriety standard, and held instead that the proper standard is whether the individual lawyer's conflict would render it unlikely that the defendant would receive a fair trial unless the conflict were imputed to the prosecutor's office. Zogheib 321 P.3d at 883.

1. Jones' and Frierson's prior representation of Lesean creates a conflict of interest.

A conflict of interest exists based on Jones' and Frierson's prior representation of Lesean. The general rule is that "a client must be secure in the knowledge that any information he reveals to counsel will remain confidential." United States v. Schell, 775 F.2d 559, 565 (4th Cir. 1985) (quoted with approval in Ciaffone, 113 Nev. at 1169, 945, P.2d at 952.)

Here, as Lesean's trial counsel in the arson case, there is a reasonable probability that Jones and Frierson obtained privileged, confidential information from Lesean. As acknowledged by the State in opposing the motion to exclude the arson as a prior bad act, the two cases involved the same location, same time period, several

of the same witnesses, and were therefore related insofar as they concern communications with counsel. Pursuant to Nevada Rules of Professional Conduct (NRPC) 1.7 and NRPC 1.9, Jones and Frierson could not represent the State in proceedings against Lesean.

Here, no reasonable argument can be made that Jones' and Frierson's representation of Lesean at the arson trial did not create a conflict. Even in Zogheib, where Wolfson's dealings with the defendant were remarkably less substantial than Jones and Frierson's involvement with Lesean in the arson case, the State nonetheless conceded that Wolfson had a conflict that disqualified him from representing the State against the defendant in the underlying criminal prosecution. Zogheib at 884. Accordingly, this Court should find that Jones' and Frierson's prior representation of Lesean created a conflict of interest.

2. Unless the conflict is imputed to the prosecutor's office, it is unlikely that Lesean could get a fair trial.

Lesean could not get a fair trial unless the conflict created by Jones' and Frierson's prior representation of him was imputed to the prosecutor's office. Because Jones and Frierson are government employees, the question of imputation of conflicts is governed by NRPC 1.11. Zogheib, 321 P.3d at 884.

NRPC 1.11 sets forth the relevant rule as follows:

Special Conflicts of Interest for Former and Current Government

Officers and Employees.

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) Is subject to Rule 1.9(c); and

(2) Shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) The disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) Is subject to Rules 1.7 and 1.9; and

(2) Shall not:

(I) Participate in a matter in which the lawyer participated personally and substantially while in

> private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
>
> . . .
>
> (e) As used in this Rule, the term "matter" includes:
>
> (1) Any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
>
> (2) Any other matter covered by the conflict of interest rules of the appropriate government agency.

Prior to this Court's opinion in Zogheib, the relevant inquiry for determining imputation of conflicts to the district attorney's office was the appearance-of-impropriety test, as enunciated in Collier. However, in Zogheib, the Court rejected that test and set forth the new test, as follows:

> There is, however, a broader concern in criminal cases that cannot be overlooked: the defendant's right to a fair trial. Based on that concern we agree with Collier that an individual prosecutor's conflict of interest may be imputed to the prosecutor's entire office in extreme cases. But rather than making that determination based on an appearance of impropriety, we conclude that the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the entire prosecutor's office is disqualified from prosecuting the case. This approach strikes the correct balance between the competing concerns of the State and the right of the defendant to a fair trial.

Zogheib, 321 P.3d at 886 (internal citations omitted). Here, there are several reasons why Lesean did not receive a fair trial.

First, it is important to distinguish the conflicts raised in the case at bar from

those discussed in Zogheib. In Zogheib, after holding an evidentiary hearing on disqualification, the district court concluded that although Wolfson, while working a defense attorney, was involved in discussions regarding the defendant's case, that Wolfson was not in fact Zogheib's attorney. Id. at 883. Conversely, no court could reasonably conclude here that Jones and Frierson were never in fact Lesean's attorneys in the arson case.

Second, the conflicts in this case are distinguishable from those in Zogheib due to the posture of Lesean's arson case at the time of trial. In Zogheib, this Court noted testimony from the evidentiary hearing before the district court in which it was represented that, subsequent to accepting appointment as District Attorney, Wolfson made no further appearances on the defendant's case. Id. at 884. Such is not the case here, where post-conviction hearings in the arson case were pending and the possibility existed that Jones and Frierson would appear as witnesses to testify regarding their representation of Lesean. Accordingly, unlike Wolfson in Zogheib, Jones and Frierson were necessarily still involved in Lesean's arson matter, despite their employment in the District Attorney's Office. Moreover, under NRPC 1.7(a)(2), a conflict of interest existed between Lesean and Jones and Frierson exists because the attorneys had loyalty obligations to both their former client and their current employer and co-workers. Absent Lesean's informed consent waiving the conflict,

confirmed in writing, the conflict remains. NRPC 1.7(b)(4). In other words, given their current employer's interest in obtaining a guilty verdict for Lesean in the case at bar, coupled with their current employer's interest in seeing that Lesean's arson case conviction is upheld, it was unreasonable to expect that Jones and Frierson would be entirely free of those pressures and their sense of responsibility to the District Attorney's Office, and it is therefore unlikely that Lesean could receive a fair trial unless the prosecutor's office was disqualified. These pressures were not present in the Zogheib case, since upon joining the District Attorney's Office, Wolfson became the head of the office and was therefore not subject to internal pressures regarding job security and advancement within the office. The prejudice to Lesean was further compounded by the fact that both of Lesean's attorneys in the arson case were employed by the District Attorney's Office. If only one of them were so employed, an argument could be made that the conflict could be adequately addressed because an attorney not employed by the District Attorney's Office would still be available to testify at a post-conviction hearing regarding representation in the arson case, without the pressures of testifying contrary to the current employer's position. Such is not the case here.

Third, the difference between the relative "hands on" responsibility of deputies assigned to prosecute cases, versus Wolfson's primary responsibility as policy-maker

for the office and his distance from the day-to-day handling of cases as head of the office, was one factor relied upon in Zogheib in determining that the conflict did not need to be imputed to the entire office. Zogheib 321 P.3d and at 886-87. Here, Jones and Frierson were not removed from the direct involvement in cases.

Fourth, although all criminal cases require scrupulous protection of a defendant's rights, because the instant case concerns a murder charge that places the rest of Lesean's life at jeopardy, the potential prejudice to Lesean by failing to disqualify the District Attorney's Office was far greater than the potential prejudice faced by the defendant in Zogheib, which involved charges related to check and marker fraud.

This is an extreme case under the Zogheib analysis which required that the conflict be imputed to the District Attorney's Office. Further, although this case qualifies as "extreme" for purposes of imputing conflicts, Lesean's request was not in itself is not extreme. Indeed, the framework for a remedy has been provided for under NRS 251.100, in which the legislature foresaw such conflicts and directed the district courts to appoint a special prosecutor to assume the prosecutorial duties of a disqualified district attorney. See Attorney General v. Eighth Judicial Dist. Court (Morris), 108 Nev. 1073, 1075-76, 844 P.2d 124, 125 (1992). Lesean could not receive a fair trial unless the conflict between him and Jones and Frierson was

imputed to the District Attorney's Office.

3. The State Did Not Comply With Screening And Notice Requirements.

The State did not comply with screening and notice requirements as required under NRPC 1.11. In Zogheib, both the district court and this Court discussed the sufficiency of screening procedures that had been put in place to ensure that Wolfson had no involvement in the prosecution of the defendant. Zogheib, 321 P.3d at 886-87. Here, the State did not provide timely notice regarding any screening procedures that might have existed to address the conflict based on Jones' and Frierson's prior representation of Lesean. As set forth in Comment 7 to the identically numbered ABA Model Rule 1.11, "[n]otice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent." Both Jones and Frierson were employed with the Clark County District Attorney's Office for a significant amount of time. Even though the need for screening and notice had been apparent since the inception of their employment with the District Attorney's Office, Lesean did not receive any notice, and was therefore unable to ascertain compliance with the Nevada Rules of Professional Conduct.

. . .

4. An Evidentiary Hearing Was Required To Determine Whether The District Attorney's Office Should Be Disqualified.

In order for the district court to properly determine whether the conflict of interest requires disqualification of the District Attorney's Office, including the existence and adequacy of any screening procedures that might have been put in place, an evidentiary hearing was required. See Morris, 108 Nev. at 1075, 844 P.2d at 125 (stating that "district courts may only disqualify district attorney's offices after conducting a full evidentiary hearing and considering all the facts and circumstances") (citing Collier, 98 Nev. 307, 646 P.2d 1219.) Without a hearing there is an insufficient record by which the district court could make a proper a determination, and by which this Court could conduct meaningful review. See Berry v. State, 363 P.3d 1148, 1156 (Nev. 2015).

The violation of Lesean's Fifth and Sixth Amendment rights to a fair trial and conflict free counsel mandate that the judgment be reversed and this case remanded for a new trial following the appointment of a special prosecutor.

D. There is Insufficient Evidence to Support the Convictions

Lesean's state and federal constitutional rights to due process of law, equal protection, and right to be convicted only upon evidence establishing every element of the offenses beyond a reasonable doubt, were violated because there is insufficient evidence to support the convictions. U.S. Const. amend. I, V, VI, XIV; Nevada Const.

Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

In reviewing an insufficiency of the evidence claim, a court must determine whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Thompson v. State, 125 Nev. 807, 816 221 P.3d 708, 714-15 (2009). A conviction that fails to meet that standard violates due process. Mikes v. Borg, 947 F.2d 353, 356 (9th Cir. 1991).

The State failed to prove beyond a reasonable doubt that Brandi was killed by another person. Assuming for the sake of argument that Brandi was killed by another person, the State failed to prove beyond a reasonable doubt that Lesean was the person who killed her. Assuming for the sake of argument that Brandi was killed by another person and that Lesean was the person who killed her, the State failed to prove that the killing was with malice, and was the result of a premeditated, willful, and deliberate act. Likewise, the State failed to prove that Brandi was killed in the course of a robbery, or that a robbery even took place. Essentially, the State presented no evidence as to the events that led to Brandi's death, and instead presented only conjecture and guesswork based upon actions taken after her death.

The evidence presented by the State does not prove that Brandi died because of criminal agency. Lesean recognizes that cause of death can be shown by

circumstantial evidence. See Higgs v. State, 222 P.3d 648, 654 (Nev. 2010); West v. State, 119 Nev. 410, 416, 75 P.3d 808, 812 (2003). Nonetheless, the State remains obligated to present evidence which establishes, beyond a reasonable doubt, that her death was caused by criminal agency. Here, Dr. Simms testified that he could not determine the cause or manner of death. 8 App. 1445. His conclusion was that the cause of death was undetermined and that was reflected in his autopsy report. 8 App. 1445. There were no obvious wounds which were fatal. 8 App. 1414, 1423. Although her organs did not show any natural disease, decomposition and insect activity interfered with his ability to fully exam the body. 8 App. 1410, 1414, 1433. Dr. Simms could not rule out all natural diseases and he acknowledged that sometimes a person dies of natural causes without anything that can be readily identified at the time of the autopsy. 8 App. 1428, 1439. Although he did not find any drugs in her system, he acknowledged that decomposition could limit his ability to detect some chemicals, such as cocaine and ethanol. 8 App. 1416, 1441. There were three injuries to her head, but none of these were fatal. 8 App. 1417-20, 1435. In any event, there was no testimony that these injuries were the result of criminal agency rather than an accident, a fall, or other cause. 8 App. 1440. The pathologist opined that it was possible Brandi died of manual strangulation, a choke hold, or smothering, but there was no evidence to support these guesses. 8 App. 1428. There were no fractures to

the hyoid, cartilage, or hard structures in the neck. 8 App. 1428. There was no evidence of strangulation, such as hemorrhages of the tongue or petechia. 8 App. 1438. Although a few spots of Brandi's blood were found in Shalana's home and in Brandi's rental car, there was no testimony establishing how these spots were related to Brandi's death or how they were created. There were no definite lethal or significant injuries to Brandi's body. 8 App. 1434.

This case differs from Higgs as there is no evidence of poisoning as there was in that case. Higgs, 222 P.3d at 654-55. Likewise, this case differs from West as there was no plastic bag covering the mouth and nose of the deceased, she was not placed in a sealed garbage can in a storage unit, as there was in that case. West, 119 Nev. at 418. Moreover, this case is distinguishable from Sheriff v. Middleton, 112 Nev. 956, 958, 921 P.2d 282, 284 (1996), in which this Court found that the district court improperly granted a pretrial petition for a writ of habeas corpus, which evaluates the evidence under a probable cause standard, in a case involving evidence of two kidnappings, the discovery of one body in a dumpster and another in the desert nine months after she disappeared. The first body had a hand and foot which were tied and a human bite mark on her breast. Id. at 959, 921 P.2d at 284. Her body was wrapped in a sleeping bag, with large plastic garbage bags, and warning labels. Id. The other body was found scattered in the desert, with signs of animal activity, and a rope was

found near the body. Id. at 959, 921 P.2d at 284. Ultimately, officers found property belonging to the victims in a storage unit rented by the defendant and found other evidence implicating the defendant. Id. 959-60, 921 P.2d at 285. There was no indication that the victims and the defendant had any type of relationship or even knew each other. Considering all of the relevant evidence, the Court found that there was enough evidence to meet the probable cause standard. Id. at 962, 964, 921 P.2d at 287. Here, in contrast, Brandi was not kidnapped from her home, her body was not tied with rope, or bitten severely. Rather, this case is far more consistent with the facts of Frutiger v. State, 111 Nev. 1385, 907 P.2d 158 (1995) and Hicks v. Sheriff, 86 Nev. 67, 464 P.2d 462 (1970), where this Court found insufficient evidence of criminal agency, despite actions which took place by the defendants after the deaths of the alleged victims in those cases.

The State failed to prove beyond a reasonable doubt that Brandi was killed by another person and that she did not die from natural causes, an accident, a drug overdose, or some other cause which involved someone other than herself. As set forth above, the pathologist could not determine the cause of death and could not rule out these potential causes. The facts concerning what happened to Brandi's body after her death are equally consistent with actions taken by someone who panicked at either seeing her die or discovering her body, who would worry about possible accusations

against him or her, and a poor choice of how to react in response.

Even if Brandi had been killed by another person, there was no evidence that Lesean was the person responsible for her death. Rather, the State's evidence merely suggested that he, or someone else with his cellular telephone, traveled in the location where her body was found, disposed of her car, and he possibly had possession of her jewelry. These facts do not establish that he was the person who killed her.

Likewise, assuming for the sake of argument that Brandi was killed by another person and that Lesean was the person who killed her, the State failed to prove that the killing was with malice, and was the result of a premeditated, willful, and deliberate act. The evidence established that Brandi and Lesean were long time friends, and were like a brother and sister. Theresa, who was Brandi's friend and drug customer, testified that Lesean said he had an argument with Brandi before she came up missing. This was the only evidence about what took place before Brandi's death. This evidence does not show malice, an intent to kill, or that the killing was premeditated and deliberate. Without such evidence, Lesean cannot be found guilty of first or second degree murder.

Finally, the State failed to prove that Brandi was killed in the course of a robbery, or that a robbery even took place. At best, there may be some evidence suggesting that Lesean had Brandi's jewelry and car but this evidence was

insufficient to establish beyond a reasonable doubt that he took these items through force or the threat of force, as required by NRS 200.380. Given the relationship between Lesean and Brandi it is equally consistent that he had possession of her jewelry as payment for debt or security for money owed to him, and that she loaned her rental car to him. Moreover, even assuming that a robbery could be established, the evidence is consistent with an after-thought robbery, which cannot be the basis of a felony-murder charge. Nay v. State, 123 Nev. 326, 167 P.3d 430 (2007).

The State failed to prove beyond a reasonable doubt that Lesean was guilty of any of the charges. His judgment of conviction must therefore be reversed.

E. Lesean was Improperly Prohibited From Attending the First Day of Trial

Lesean's state and federal constitutional rights to due process of law, equal protection, a fair trial, and right to be present for all critical stages of the trial were violated because the district court prohibited Lesean from attending the first day of trial. U.S. Const. amend. I, V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This Court reviews de novo a district court's actions which are alleged to violate a defendant's constitutional right to be present at trial. Manning v. State, 348 P.3d 1015, 1018 (Nev. 2015).

On August 27, 2014, the district court held a status check hearing. 3 App. 689.

Lesean informed the district court that he did not want to wear civilian clothing for trial, and instead wanted to where his prisoner clothing. 3 App. 698. The prosecutor responded "As he wishes." 3 App. 698. The district court stated that they would have further discussions about that on Tuesday, which was the first day of trial, and then stated that the court was not going to do anything or allow anything that was set the case up for reversal. 3 App. 698-99.

Trial began on July 27, 2015. 4 App. 769. Lesean stated his desire to wear his jail clothing and chains for trial. 4 App. 771. The district court assumed this meant that Lesean was not going to be present at trial, as he had previously indicated was his intent. 4 App. 771. The court acknowledged that Lesean stated he want to remain present for jury selection, but wanted to stay in his jail clothing and did not want his chains removed. 4 App. 771. The district court stated her belief that he was taking these actions to set the trial up for appeal and stated that was not going to happen. 4 App. 771. The court stated that he had the right not be compelled to be present for trial, but did not have the right to be present in a way that would set the trial up for a mistrial. 4 App. 771. Upon questioning Lesean, he stated we was going to be at trial and asserted his right to be present. 4 App. 771. He stated he did not want to wear other people's clothes and that he was comfortable wearing the clothes he was wearing. 4 App. 772. The State objected to Lesean wearing chains and prison

clothing. 4 App. 772. Lesean's counsel stated his position that wearing jail clothes and shackles was prejudicial to the defendant, and he gave that advice to Lesean, but he could not force a client to wearing something he did not wish to wear. 4 App. 772. Lesean's counsel also noted that if Lesean testified the jury would learn of his prior conviction so there would be no prejudice to wearing the clothing, and again stated his desire wear the jail clothes, which he found to be comfortable. 4 App. 772. The district court ruled that the chains were coming off, the shirt which stated "CCDC" could be turned inside out, and the orange socks would be removed. 4 App. 772-73. The second alternative was that he could change into the street clothes provided by his counsel. 4 App. 773. The third alternative was that he could return to the detention center. 4 App. 773. Lesean declined all three options. 4 App. 773. He refused to take the chains off. 4 App. 775. The district court against stated that she would not allow Lesean to appear as a shackled defendant before the jury. 4 App. 775. The State suggested that he be allowed to appear in chains, but that the district court instruct the jury that it was his decision to appear that way. 4 App. 775. The court stated that it would not tolerate attention seeking behavior and would not allow Lesean to appear wearing jail garb and chains. 4 App. 775-77. Lesean agreed to have his chains removed but did not want to turn his shirt inside out or orange socks removed. 4 App. 778. He again stated that he was comfortable in his clothing. 4 App. 778. Lesean's

counsel asserted that it was Lesean's constitutional right to be present and his right to wear the clothing he desired. 4 App. 778. The State cited to Estelle v. Williams and argued that the case stood for the proposition that a defendant cannot be compelled to go to trial in jail clothes because of the impairment of the presumption of innocence and asked that rather than sending him back that the court inform the jury that it was his choice. 4 App. 778-79. Defense counsel noted his desire to have the defendant's presence and input during jury selection, and argued that there was no need to instruct the jury about the clothing because it would highlight the issue. 4 App. 779. The State took back its suggestion and agreed that an instruction would draw attention. 4 App. 779. The court found that the prejudice from appearing in jail clothing superceded the right to be present for the first portion of jury selection and ordered Lesean removed from the courtroom. 4 App. 779. The court indicated that he would be brought to trial the next day, by any means necessary, so that a canvass could be conducted regarding his clothing and ability to attend trial under the court's directive that he could not do so while wearing jail clothing. 4 App. 779-80. The court then proceeded with jury selection. 4 App. 780.

The second day of trial, Lesean appeared in court and announced that he felt comfortable and safe in the jail clothes and chains. 4 App. 802-04. The court canvassed Lesean and his counsel and determined that he waived his right to wear

civilian clothes and allowed him to be present in the courtroom. 4 App. 804-11. The third day of trial, Lesean appeared for court in civilian clothing, without shackles. 5 App. 922.

Under the Fifth and Sixth Amendments, a defendant is guaranteed the right to be present at every stage of his trial. See United States v. Gagnon, 470 U.S. 522, 526 (1985); Illinois v. Allen, 397 U.S. 337, 338 (1970). Voir dire is a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present. Gomez v. United States, 490 U.S. 858, 873 (1989). "'[W]here the indictment is for a felony, the trial commences at least from the time when the work of empaneling the jury begins.'" Lewis v. United States, 146 U.S. 370, 374 (1892) (quoting Hopt v. Utah, 110 U.S. 574, 578 (1884)). "Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethic, racial, or political prejudice . . . or predisposition about the defendant's culpability." Gomez, 490 U.S. at 873 (citations omitted). The district court's order removing Lesean from the courtroom during the first day of trial violated his constitutional rights to be present during the critical stage of jury selection.

In Estelle v. Williams, 425 U.S. 501, 503 (1976), the United States Supreme Court held that a defendant has a constitutional right to a fair trial and that the presumption of innocence of the accused lies at the foundation of the administration

of criminal law. The Court recognized that compelling a defendant to attend trial in prison or jail clothing violated a defendant's right to a fair trial as it impaired the presumption of innocence. Id. at 504-05. The Court did not hold, however, that a defendant could be forced to wear civilian clothing or that he could not waive his right to appeal without jail clothing or shackles. Id. at 506. The "evil proscribed is compelling a defendant, *against his will*, to be tried in jail attire. Id. at 507 (emphasis added). "The reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments." Id. at 508. Accordingly, the Court held that a defendant must object to wearing jail garments if that issue is to be preserved for appeal. Id. At no point did the Court find that a defendant must not be allowed to wear jail clothing or face removal from the courtroom as a sanction for making such a decision.

Lesean submits that his improper exclusion from jury selection on the first day of trial is structural error which cannot be deemed harmless. See Gomez, 490 U.S. at 876 (finding structural error based upon improper use of a Magistrate for jury selection). Even if harmless error analysis applies, the State cannot establish beyond a reasonable doubt that Lesean's absence from the first day of jury selection did not impact his trial. Numerous jurors were questioned and several jurors were dismissed outside of Lesean's presence, so he was unable to give his opinion and insight to his

counsel about these matters. 4 App. 780-98 (note these pages include four transcript pages to one appendix page, so Lesean's absence was longer than what might otherwise appear). Lesean was substantially prejudiced by the district court's violation of his constitutional rights and the judgment must therefore be reversed.

F. The Conviction Should Be Reversed Based Upon Cumulative Error

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Butler v. State, 120 Nev. 879, 900, 102 P.3d 71, 85 (2004); United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal"). "The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007) (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Montana v. Egelhoff, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." Id. (citing Chambers, 410 U.S. at 290 n.3).

Each of the claims specified in this appeal requires reversal of the judgment. Lesean incorporates each and every factual allegation contained in this appeal as if

fully set forth herein. The cumulative effect of these errors demonstrates that the trial deprived Lesean of fundamental fairness and resulted in a constitutionally unreliable verdict. Whether or not any individual error requires the vacation of the judgment, the totality of these multiple errors and omissions resulted in substantial prejudice. The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless beyond a reasonable doubt. In the alternative, the totality of these constitutional violations substantially and injuriously affected the fairness of the proceedings and prejudiced Lesean. He requests that this Court vacate his judgment and remand for a new trial.

VIII. CONCLUSION

Lesean respectfully submits that his judgment must be vacated because there is insufficient evidence to support his conviction. In the alternative, he is entitled to a new trial.

DATED this 13th day of May, 2016.

Respectfully submitted,

/s/ JONELL THOMAS

By:_____

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CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).

2. I hereby certify that this brief does comply with 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 Word Perfect Office 11 in 14 point font of the Times New Roman style.

3. I hereby certify that this brief does not comply with the page limitation requirement of NRAP 32(a)(7)(A)(ii) that the opening brief in a non-capital case shall not exceed 14,000 words. A Motion for Excess Words (17,545) is being submitted simultaneously with this brief.

4. 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 of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the

requirements of the Nevada Rules of Appellate Procedure.

DATED this 13th day of May, 2016.

/s/ JONELL THOMAS

_____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 13th day of May, 2016, a copy of the foregoing Opening Brief (and Appendix) was served as follows:

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