IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN DEMON MORGAN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 70424

RESPONDENT'S ANSWERING BRIEF

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

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Direct Appeal From A Judgment Of Conviction
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This appeal is not appropriately assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is a post-conviction appeal of a conviction for an offense that is a Category B felony.

STATEMENT OF THE ISSUES

1) Whether the district court erred in conducting jury selection.

2) Whether the district court erred by asking defense counsel to correct a misstatement during closing.

3) Whether the district court abused its discretion in denying Appellant's motion to dismiss.

4) Whether the State committed prosecutorial misconduct by stating that "the law applies to everyone" during closing.

5) Whether the district court abused its discretion in denying three frivolous motions for mistrial.

6) Whether the evidence – including but not limited to video and testimony of witnesses – was insufficient.

7) Whether the lower court erred in finding Appellant competent after two doctors concluded that Appellant was, in fact, competent.

8) Whether there was cumulative error.

STATEMENT OF THE CASE

On November 25, 2014, the State charged John Demon Morgan ("Morgan") by way of Information with two felonies: (1) Battery With Intent to Commit a Crime; and (2) Robbery. 1 AA 36-38.

Morgan's arraignment was scheduled for December 1, 2014, however, the arraignment had to be re-set because Morgan was spitting in the courthouse and was subsequently removed. 2 AA 259. At that time, counsel asked that Morgan be referred for a competency hearing. Id.

On December 26, 2014, Morgan received his first competence hearing. 2 AA 261. Two doctors submitted reports, one finding him competent, and the other incompetent. Id. 262. The hearing was continued. Id.

On January 16, 2015, the court set a challenge hearing. 2 AA 264. On February 6, 2015, the challenge hearing was held. 2 AA 296. Before this hearing, a third doctor had evaluated Morgan and found him competent. 2 AA 268-69.

Following the hearing, the court found Morgan competent based on the reports of the two doctors and his case was remanded for arraignment. 2 AA 296.

On February 12, 2015, Morgan entered a not guilty plea, and expressed disagreement with his counsel that he was not competent to stand trial. 2 AA 304. Morgan also expressed an interest in representing himself. Id.

On April 16, 2015, Morgan appeared for a discovery motion. 2 AA 306. Morgan again expressed dismay that his counsel was claiming that he was incompetent and stated: "I'm in complete understanding of everything that's going on." 2 AA 308. Counsel requested, and received, a second competency hearing. Id. 308-10. On May 15, 2015, Morgan was adjudicated incompetent based on the reports of two doctors and was scheduled for transfer to Lakes Crossing. 2 AA 312.

On August 6, 2015, Morgan's Motion to Dismiss was heard. 2 AA 326. In this motion, Morgan argued that his transfer to Lakes Crossing had been delayed and his case should be dismissed. 2 AA 327-29. After hearing argument, the court found that dismissal of the underlying criminal action was "too extreme" and instead ordered that Morgan be transferred within seven days; Morgan was subsequently transferred. 2 AA 343-44.

On December 18, 2015 Morgan returned from Lakes Crossing and was found competent. 2 AA 350. On January 7, 2016, Morgan's request to be released on his own recognizance was denied and the trial date was set. 2 AA 357.

On February 23, 2016, Morgan's jury trial began and lasted three days. 2 AA 384 – 4 AA 859. At the conclusion of trial, the jury found Morgan guilty of Robbery and misdemeanor battery. 1 AA 223.

On April 14, 2016, Morgan was sentenced to 26-120 months for robbery and 6 months for battery, with the sentences running concurrently. 1 AA 225.

STATEMENT OF THE FACTS

On October 30th, 2014, Maria Verduzco ("Maria") was the manager of a gas station and convenience store. 1 AA 9. At about 7 in the morning, Maria was in the back office doing paperwork when she noticed Morgan in the store via the surveillance video at her desk; she then saw Morgan put a bag of nuts in his pocket. Id. 9-11.

After seeing Morgan put the nuts in his pocket, Maria left her office and approached Morgan; Maria asked Morgan "if he [could] take what he put in his pocket, if he [could] take it out." Id. 11. Morgan told Maria "shut the fuck up" and started walking towards her. Id. 13

Morgan then struck Maria and she immediately fell to the floor. Id. 14-15. Maria got up and hit Morgan's backpack with a rack used to hang peanuts. Id. Morgan's backpack ripped and a number of items he had concealed in his bag fell out, including but not limited to, a can of soup. Id. 15 - 16, 22.

Maria backed off for fear of what else might be in Morgan's backpack. Id. 15. Police were notified and responded to the scene; eventually police brought Maria to a show-up where she positively identified Morgan as the person who struck her and fled the store. Id. 20. This entire incident was caught on surveillance video. 3 AA 676.

SUMMARY OF THE ARGUMENT

Morgan's Judgment of Conviction should be affirmed for the following reasons. First, the district court did not err in conducting jury selection, either regarding the use of peremptory challenges, the venire process, or in voir dire. Second, the district court did not abuse its discretion in requesting that counsel correct her misstatement during closing. Third, the district court did not abuse its discretion in denying the motion to dismiss. Fourth, the State did not commit prosecutorial misconduct in stating that the "law applies to everyone and equally everybody should be protected under the law." Fifth, the district court did not abuse its discretion in denying the motions for mistrial. Sixth, the evidence presented was not insufficient to convict Morgan. Seventh, the court did not err in finding Morgan competent based on the reports of two doctors. Finally, the claim of cumulative error fails. As such, the Judgment of Conviction be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN JURY SELECTION.

A. Peremptory Challenges

Morgan raises two issues with peremptory challenges in this case: (1) Morgan takes issue with the process used by the district court in passing only thirteen jurors for cause before beginning the use of peremptory challenges; and (2) Morgan claims that the district court erred in denying his complaint that the State used a peremptory challenge to strike a prospective juror on the basis of sexual orientation. These issues are without merit.

First, the scope of voir dire "rests within the sound discretion of the district court, whose decision will be given considerable deference by this court." Johnson v. State, 122 Nev. 1344, 1354-55, 148 P.3d 767, 774 (2006). "'Voir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.'" Morgan v. Illinois, 504 U.S. 719, 729, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) (alteration omitted) ("The Constitution. . .does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury.") Here, Morgan appears to complain that he was not able to question all the jurors before using peremptory challenges against some of them. However, the record reflects that the court questioned all the jurors initially. 2 AA 402–77. Before that questioning, counsel could submit questions for the court to ask all of the prospective jurors. 2 AA 394–95. After this initial round of court questioning, each side was permitted to make challenges for cause. 2 AA 469–75. Following that, additional

challenges for cause or peremptory challenges were permitted. See generally 2 AA 477–3 AA 621. Morgan does not show, or even argue, that he did not receive a fair and impartial jury. Nor does he show that his right to question jurors was unreasonably restricted. Instead, Morgan merely complains that voir dire was performed according to the court's discretion and not his own.

Second, the United States Supreme Court has held that the racially discriminatory use of peremptory challenges is unconstitutional under the Equal Protection Clause. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). The Supreme Court subsequently extended Batson to hold that its prohibition also applies to discrimination based on gender (J.E.B. v. Alabama, 511 U.S. 127, 114 S.Ct. 1419 (1994)) and ethnic origin (Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859 (1991)). Although this Court has not addressed the issue, the State submits that SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 474 (9th Cir. 2014) holds that sexual orientation is subject to heightened scrutiny under Batson, and believes that sexual orientation should be recognized as a protected class.

In Purkett v. Elem, 514 U.S. 765, 766-67, 115 S.Ct. 1769, 177-0-71 (1995), the United States Supreme Court pronounced a three-part test for determining whether a prospective juror has been impermissibly excluded under the principles enunciated in Batson. Specifically, the Court ruled: "[u]nder our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima

facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand and explanation that is persuasive, or even plausible." Purkett, 514 U.S. at 766-67, 115 S.Ct. at 1770-71; see also Doyle v. State, 112 Nev. 879, 921 P.2d 901, 907-08 (1996) (adopting the Purkett three-step analysis of a Batson claim).

In deciding whether or not the requisite showing of a prima facie case of discrimination has been made, the court may consider the "pattern of strikes" exercised or the questions and statements made by counsel during the voir dire examination. Batson, 476 U.S. at 96-97, 106 S.Ct. at 1723; Libby v. State, 113 Nev. 251, 255, 934 P.2d 220, 222 (1997); Doyle 112 Nev. at 887-88, 921 P.2d at 907. However, a "pattern of strikes" is not absolutely required. In Watson v. State, the Nevada Supreme Court held that:

> Where there is no pattern of strikes against members of the targeted group to give rise to an inference of discrimination, the opponent of the strike must provide other evidence sufficient to permit an inference of discrimination based on membership in the targeted group. In other words, the mere fact that the State used a peremptory challenge to exclude a member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination under Batson's first step; 'something more' is required. Aside from a pattern of strikes against members of

> a targeted group, circumstances that might support an inference of discrimination include, but are not limited to, the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias.

Watson v. State, 335 P.3d 157, 166-67, 2014 Nev. LEXIS 106, 14-16, (Nev. 2014).

In step two, assuming the opposing party makes the above-described prima facie showing, the burden of production then shifts to the proponent of the strike to come forward with a neutral explanation. Purkett, 514 U.S. at 767, 115 U.S. at 1770. "Unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral." Doyle, 112 Nev. at 888, 921 P.2d at 908.

In step three, "the district court must determine whether the explanation was a mere pretext and whether the opponent successfully proved racial discrimination." King v. State, 116 Nev. 349, 353, 998 P.2d 1172, 1175 (2000). At this stage, implausible or fantastic justifications may be found to be pretexts for purposeful discrimination. Purkett, 514 U.S. at 769, 115 U.S. at 1771; Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1999). "[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor, by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Miller-El v. Cockrell, 123 S.Ct. 1029 (2003). Nevertheless, "the ultimate burden of persuasion regarding

racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768, 115 U.S. at 1771; Doyle, 112 Nev. at 889, 921 P.2d at 908.

In reviewing the denial of a Batson challenge, the reviewing court should give great deference to the determining court. Hernandez, 500 U.S. at 364, 111 S.Ct. at 1868-1869; Doyle, 112 Nev. at 889-890, 921 P.2d at 908; Thomas v. State, 114 Nev. at 1137, 967 P.2d at 1118; Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997). The reasoning for such a standard is the trial court is in the position to best assess whether from the "totality of the circumstances" that racial discrimination is occurring. "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." Hernandez, 500 U.S. at 367, 111 S.Ct. at 1870. The Nevada Supreme Court "affords great deference to the district court's factual findings regarding whether the proponent of a strike has acted with discriminatory intent, and we will not reverse the district court's decision 'unless clearly erroneous.'" Watson, 335 P.3d 165-66. (internal citations removed)

In this case, the State exercised a peremptory challenge to strike Juror #24. 3 AA 577, 4 AA 878-82. Morgan made a Batson challenge against the strike of Juror #24 based on sexual orientation; this motion was ultimately denied by the district court. 4 AA 878.

As an initial matter, Morgan challenged the strike simply on the basis that the prospective juror was gay. However, more is required to establish a prima facie case. Watson, 335 P.3d 157, 166-67. Under Watson, the court was permitted to take into account several additional factors, including "the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias." Id. First, there was no "disproportionate effect" of peremptory strikes because the State struck one gay juror when there were at least two gay jurors on the panel. Second, there was no difference in the "nature of the proponent's questions and statements during voir dire" because the State asked "almost every juror if they were married, single, or divorced." AOB 11.[1] Third,

[1] Morgan latches onto a single question to attempt to differentiate the questions the prosecutor asked: "You indicated you're in a relationship…did you say boyfriend, girlfriend, or married" stating that "Juror #24 was the only juror [the prosecutor] asked a question suggesting the juror was homosexual." AOB 15. However, Juror #11 was also an identifiably gay member of the jury pool, and Juror #11 proffered the fact that he was in a same sex relationship: "MS. GRAHAM: Are you married, single, divorced? PROSPECTIVE JUROR#011: I am engaged. MS. GRAHAM: Engaged to be married? PROSPECTIVE JUROR#011: Yes. MS. GRAHAM: Does your fiancée work? PROSPECTIVE JUROR#011: Yes. MS. GRAHAM: What does your fiancée work? PROSPECTIVE JUROR #011: He is the head of props for a Broadway show in New York." 2 AA 494-95. Juror #24, on the other hand, was less clear, and so the prosecutor asked for clarification: "MS. GRAHAM: Understood. And you indicated you're in a relationship? PROSPECTIVE JUROR#024: Yes. MS. GRAHAM: Does -- did you say boyfriend, girlfriend or married? PROSPECTIVE JUROR #024: Partner. He's -- MS. GRAHAM: Partner. What does -- PROSPECTIVE JUROR#024: -- [indiscernible]

there was no disparate treatment of gay potential jurors as every juror was asked approximately the same questions. Fourth, this case is not sensitive to bias.

In denying this challenge, the district court concluded that Morgan did not make a prima facie showing of discrimination:

> THE COURT: Okay. Well, first of all I see no reason why we -- I mean, I don't see a pattern and I think that the prosecution had a reason to strike him. In fact, I'm just surprised that you've made this Batson challenge. But in any event, your objection is denied.

4 AA 880. However, Morgan asserts that this shows that the court "prejudge[ed]" the challenge. AOB 13. This claim is belied by the record; Morgan made his objection and offered his reason for challenging the juror, and the prosecutor responded before the court denied his challenge. 4 AA 879. Additionally, the court expressed "surprise" that Morgan made this Batson challenge. 4 AA 880. The court would not have been "surprised" if it had already decided the issue.

In addition, even assuming arguendo that Morgan had established a prima facie case, the claim still fails. The prosecutor stated that she struck Juror #24 because he opined that "the criticism [of police officers] in the media is correct" and that it was "about time" that such criticism was made. In this regard, Morgan also asked the prospective jurors about their feelings towards police:

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partner, yes. MS. GRAHAM: --your partner do? PROSPECTIVE JUROR#024: He's an artist. MS. GRAHAM: He's an artist. What type medium?" 3 AA 506.

> MS. HOJJAT: I want to talk a little bit about cops. We've been seeing a lot lately on the news about cops. Counsel asked you a little bit about law enforcement. Does anybody here have any strong feelings about the criticism of cops that we're seeing lately in the media? Does anybody feel like, you know what, it's too much? It feels like every time I turn on the news somebody's criticizing a cop and what a cop's done.

3 AA 534. (emphasis added) In response, Juror #24 offered his opinion:

> PROSPECTIVE JUROR #024: I have to say I feel very different than the previous juror about that. I feel that it's about time that the police officers -- the few that are abusing their authority are being -- you know, are being charged and that sort of thing. I think it's gone on way too long that they've been able to abuse the public.
>
> MS. HOJJAT: Okay. Thank you, Mr. Olsen. I appreciate it. We appreciate your contribution.

3 AA 535 (emphasis added). Based on these statements, the prosecutor feared Juror #24 would be biased against police officers and struck him for this reason.

In spite of Juror #24's statements, Morgan claims that this reason was merely a pretext because Jurors #27 and #31 expressed similar opinions but were not struck by the State. AOB 16. This is incorrect. Jurors #27 and #31 did not express similar opinions. Rather, Juror #27 stated that he felt the media criticism of police officers was "sometimes" too much, but that it should be evaluated on a "situation by situation" basis and that the "dialogue was really important." 3 AA 567-68. Juror #31 stated that he "didn't really have strong feelings" on the media criticism, and believed that 99% of police officers were good and that only a very, very small

number were bad. 3 AA 587-89. In contrast, Juror #24 indicated that he held strong feelings, and believed that police officers were "abusing the public." 3 AA 535.[2]

Because the State would present police officer witnesses in this case, striking a juror who expressed an anti-police bias was not based on a discriminatory purpose. As such, the district court did not err in denying this challenge. Therefore, the decision should be affirmed.

B. The Venire Process

Morgan challenges the venire because "there [are] 45 individuals, only 3 of them are African American. That is not representative of our community, our community I believe [is] twelve percent African American, 3 out of 45 would be six percent. So…Defense is lodging [a] challenge to the panel and we would ask for a hearing." 4 AA 869. However, this claim fails.

The Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community. Williams v. State, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005). So long as the jury selection process is designed to select jurors from a fair cross section of the community, random variations that produce venires that do not specifically match community percentages of specific demographics are permissible. Id.

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[2] Compare: Juror #19, 3 AA 535, Juror #4, 3 AA 541-45, Juror #26, 3 AA 546-50, Juror #28, 3 AA 573.

NRS 6.110(1) prescribes the process for the selection of jurors for counties with a population of more than 100,000 people. This statute directs the clerk of the court to select at least 500 names at random from the available lists and then mail those prospective jurors questionnaires. NRS 6.110(1) (emphasis added). This random process has been upheld in Nevada when considered as an ineffective assistance of counsel claim. Kirskey v. State, 112 Nev. 980, 923 P.2d 1102 (1996). Similar processes have been upheld in other states. See, e.g., State v. Flack, 232 W.Va. 708 (2013); Azania v. State, 778 N.E. 2d 1253 (Ind. 2002); People v. Brown, 75 Cal. App. 4th 916 (1999); People v. Ramos, 15 Cal. 4th 1133 (1997); State v. McKenzie, 532 N.W. 2d 210 (Minn. 1995); U.S. v. Rious, 930 F.Supp. 1558 (D. Conn. 1995).

If a defendant seeks to challenge a venire, they must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 275 (1996) (emphasis omitted) (quoting Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979)). If a criminal defendant establishes a prima facie showing, "the burden shifts to the government to show that the disparity is justified by a

significant state interest." Id. at 1187, 926 P.2d at 275. If a defendant moves to strike a jury venire, and the district court determines that an evidentiary hearing is warranted, it is structural error for the district court to deny the defendant's challenge before holding that hearing to determine the merits of the motion. Buchanan v. State, 335 P.3d 207, 210 (Nev. 2014).

In this case, as an initial matter, Morgan did not make a prima facie showing. The State agrees that African American jurors are a "distinct cross section of the community," fulfilling the first portion of Morgan's burden in challenging the venire. Morgan may be able to show that a difference between 6.66% of the venire and 12% of the community is "not fair and reasonable," but Morgan's argument is not very strong. Even assuming arguendo that the 12% figure is correct,[3] this is, at most, one or two jurors (8.88% and 11.11%) in the venire. Given the relatively small size of the venire, minor fluctuations in juror demographics can make a large difference statistically. Morgan appears to be leaning heavily on the statistical analysis without regard for the actual number of potential jurors that the statistic represents. AOB 18-19. Moreover, Morgan does not claim that the allegedly missing one or two jurors was due to systematic exclusion in the jury selection

[3] Morgan has cited census data, and the State does not challenge the accuracy of the data.

process. This is required before the burden shifts to the State to show that the disparity is justified. Morgan has failed to make this showing, and this is fatal.[4]

After the court denied Morgan's challenge, Morgan raised the issue a second time and it was again denied. 3 AA 517-18. Later that day, however, the Jury Commissioner was called to court[5] and explained that jurors are called based on a master list collected from DMV records and Nevada Power accounts. 3 AA 631. The Jury Commissioner further explained the process: those lists are combined and duplicates are removed (3 AA 632); the system randomly selects jurors from among the zip codes in that list and sends them out to citizens of Clark County based on the court's need for jurors each day (Id.); the system was set up to accord with Eighth Judicial Circuit Court Rule 6.10[6] (3 AA 633); the DMV records and the Nevada

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[4] Based on this, the district court denied Morgan's request and did not believe an evidentiary hearing was necessary: "I think they were all chosen at random, counsel, so I'm denying your request at this time." 4 AA 869. Although Morgan cites Buchanan v. State in support of his claim, Buchanan is clear that it is only structural error for the court to state that an evidentiary hearing is required and then deny the request before the hearing. AOB 17. There is no error if the court denies the request because it believes no hearing is necessary. Regardless, an evidentiary hearing was ultimately held.

[5] After lunch, the State suggested that the court call the Jury Commissioner to address Morgan's concerns, even though the motion had been twice denied. 3 AA 519-22. The court agreed to do so.

[6] Rule 6.10 entitled Jury Sources provides: "In locating qualified jurors within Clark County as required by NRS 6.045, the jury commissioner must utilize the list of licensed drivers as provided by the State of Nevada Department of Motor Vehicles and Public Safety and such other lists as may be authorized by the chief judge." Rule

Power records were used because almost all citizens of Clark County have at least one DMV issued ID or electric account (Id.); the Jury Commissioner does not have racial demographic information unless the citizen who receives the summons chooses to fill it out (Id.); humans do not choose the citizens that receive summonses, rather the computer program randomly selects them and mails it out (3 AA 639); and the system was created by Xerox and is in use by a variety of jurisdictions (3 AA 640).

Following this hearing, Morgan suggested that the Jury Commissioner had not done enough to ensure that minorities are not excluded. 3 AA 650-51. However, that is not the standard. Rather, Morgan must show that "underrepresentation is due to systematic exclusion of the group in the jury-selection process." Evans, 112 Nev. 1186, 926 P.2d 275. The Jury Commissioner testified that she did not have the ability to exclude minorities because the racial demographic information is incomplete (at best.) Therefore, even if there were exclusion, that exclusion could, at most, be accidental and not systematic. Moreover, Morgan failed to show (or even allege during trial) that any exclusion occurred at all.

For these reasons, the district court did not err in denying this motion. As such, the order should be affirmed.

6.70 states: "Part VI must be limited to trial juries and jurors, and must be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice."

C. Voir Dire

Morgan raises two issues regarding voir dire: (1) Morgan takes issue with the district court's interaction with a prospective juror who stated that she could not be fair; and (2) Morgan claims that the district court erred in granting objections to some of his jury questions. These claims fail.

"[W]hile impaneling a jury the trial court has a serious duty to determine the question of actual bias. Dennis v. United States, 339 U.S. 162, 168, 70 S. Ct. 519, 521 (1950). "[T]he question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind…[S]uch a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province [and] [s]uch determinations [are] entitled to deference…" Wainwright v. Witt, 469 U.S. 412, 428, 105 S. Ct. 844, 854 (1985). Once the court has given instructions to a jury, the "jury is presumed to follow its instructions." Weeks v. Angelone, 528 U.S. 225, 234, 120 S. Ct. 727, 733 (2000).

Here, Morgan complains that, while investigating veniremen for bias, a prospective juror indicated that it was likely she would be biased toward one of the parties. 2 AA 415 The court then inquired "[b]oth parties are right now at the start line … In your view is one ahead of the … other?" Id. The court asked the question to determine which party the prospective juror believed she was biased toward. The

prospective juror eventually said it was the district attorney. 2 AA 415-16. This questioning occurred when the court was conducting the initial voir dire of the prospective jurors, and Morgan later had the opportunity to clarify any misconception he believed the jurors had. Additionally, the court stated explicitly that Morgan "is presumed innocent," and that the state is required to prove Morgan is guilty "beyond a reasonable doubt." 2 AA 422.

After Morgan objected to the court's question, the court explained its reason for asking it:

> THE COURT: Okay. I think you may have misunderstood what I was doing, counsel. I wanted to make sure that both were at the same starting line whenever I talked about that, not that -- I wanted to make sure that it wasn't a situation where either the Defendant was ahead, meaning that they were going to rule for the Defendant no matter what before hearing the evidence or for the State no matter what. And if I was inartful on that I apologize, but that is certainly what my motive was is that everybody is on the same playing field right now. So I don't think that the Court did anything to imply that the Defendant had to prove anything. In fact I will be instructing the jury, in fact I did, that right now the Defendant is presumed innocent and that the State had to meet a burden beyond a reasonable doubt. So I've already instructed them on that, so -- but I appreciate your point, but I am denying your motion.

2 AA 469. After the jury was empaneled, the court again instructed the jury on the proper presumption of innocence: "The State therefore has the burden of proving each of the essential elements of the Information beyond a reasonable doubt. As the Defendant sits there now he is not guilty. The purpose of this trial is to determine

whether the State will meet that burden…After the State has presented evidence the Defendant may present evidence, but is not obligated to do so." 3 AA 623. At the conclusion of the case, the jury was again instructed on the burden of proof and the presumption of innocence. 1 AA 204, 212, 215, 218, 219. The jury is presumed to have followed these instructions. Weeks, 528 U.S. 234, 120 S. Ct. 733.

In addition, Morgan's assertion that his voir dire was improperly restricted because the court did not allow him to ask improper questions is without merit. Specifically, Morgan complains that he could not ask a juror about his failure to testify after the court had already instructed the panel that no adverse inference was to be drawn if Morgan did not testify. Morgan also complains that the court would not permit him to ask questions about a hypothetical verdict. As discussed supra, voir dire is conducted by the district court, and the court is afforded great discretion in doing so. Johnson, 122 Nev. 1354-55, 148 P.3d 774. Morgan does not cite any relevant authority which suggests that the district court is not permitted to stop defense counsel from asking inappropriate questions regarding hypothetical verdicts or which re-hash instructions the court has already given. Because these minor restrictions do not amount to an unreasonable limitation on the scope of the questions Morgan could properly ask, Morgan's complaint fails.

For these reasons, the district court did not abuse its discretion during voir dire. Accordingly, this claim fails.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN REQUESTING THAT COUNSEL CORRECT A MISSTATEMENT DURING CLOSING.

Morgan's next complaint is that the court requested that his counsel correct a misstatement she made during closing. A court's management of closing arguments is reviewed for an abuse of discretion. See Manley v. State, 115 Nev. 114, 125, 979 P.2d 703, 709-10 (1999). The court is permitted to ensure that counsel does not misstate the law during closing. See Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976). Here, Morgan claims that a witness for the State stated that victim Maria Verduzco was still a manager at the store where the crime occurred at the time of trial. AOB 29-30. However, this witness never stated that Maria was still the manager of the store. See 4 AA 777-85. In fact, Maria was not still the manager. 4 AA 915-16. The court requested that counsel correct the misstatement, or offered to correct the misstatement on its own. 4 AA 917–18. The court did not abuse its discretion in making this request. Moreover, even if there were error, it was harmless because whether Maria was a manager of the store at the time of trial did not bear on the crime committed or make any piece of evidence more or less likely. Therefore, this claim fails.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION TO DISMISS.

Morgan argues that the district court abused its discretion in denying his motion to dismiss because the pleadings were impermissibly vague. Morgan

complains that, because of this alleged vagueness, the State was able to change its theory throughout the trial. This claim should be denied.

Fundamentally, a criminal Information or Indictment need only provide a defendant with "reasonable notice" of the nature of the charges against him so that he can prepare a defense. Under Nevada law, the charging document must set forth sufficient facts to inform the defendant of the nature of the crime charged. NRS 173.075(1); Wright v. State, 101 Nev. 269, 271, 701 P.2d 743, 744 (1985). The primary inquiry is not whether the Information could have been more artfully drafted, but whether the defendant was given adequate notice of the crime charged. Sheriff v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 234 (1979). A pleading need contain no more than is necessary to enable a person of common understanding to know what is intended by the state. See Wright, 101 Nev. 269, 701 P.2d 743; State v. Jones, 96 Nev. 71, 605 P.2d 202 (1980); Brimmage v. State, 93 Nev. 434, 567 P.2d 54 (1977); Siriani v. Sheriff, 93 Nev. 559, 571 P.2d 111 (1977); State v. Wright, 92 Nev. 734, 558 P.2d 1139 (1976); Watkins v. Sheriff, 87 Nev. 233, 484 P. 2d 1086 (1971).

Here, the State specifically alleged certain facts regarding Morgan's actions involving Maria and alleged a specific date when the conduct occurred. Specifically, Morgan was charged in Count 1, Battery with Intent to Commit Robbery as follows: "…the person of another, to wit: MARIA VERDUZCO, with intent to commit

robbery by punching the said MARIA VERDUZCO in the chest and/or neck, knocking her to the ground." And in Count 2, Robbery: "…take personal property, to wit: miscellaneous food items, from the person of MARIA VERDUZCO, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of MARIA VERDUZCO, Defendant using force or fear to obtain or retain possession of the property, to prevent or overcome resistance to the taking of the property, and/or to facilitate escape." 1 AA 1.

Certainly, Morgan was on notice of what conduct caused him to be charged. The pleading was plain, concise, and a definite written statement of the essential facts constituting the charge. The allegations were sufficient to apprise Morgan of the nature of the charge he was expected to defend against. Further, Count 2 specifically stated that Morgan could have used either "force" or "fear" to steal the property in order to be guilty of Robbery. In denying the Motion to Dismiss asserting that the pleading was vague, the district court found the Indictment to be sufficiently clear to put Morgan on notice. 2 AA 379.

Moreover, Morgan claims that the pleading is vague because the State used the same act during closing to fulfill both crimes. AOB 33. However, this is incorrect. During closing, the State reiterated the basis for each of the counts:

> MS. CRAGGS: The Defendant doesn't say, you're right, here's the property back. The Defendant doesn't run around Maria to get out of the store. No, the Defendant instead walks over to her, multiple steps, and you can see

> that in the surveillance video, and he says, excuse my language, get the fuck out of my face. Now, he's 6'1", 185 pounds. And you saw Maria. She's not that big. She requested he give back the property. He walks up. He advances on her. He threatens her. What is this, ladies and gentlemen? This is fear of force or violence used to retain the stolen property. He is using fear to retain the property that is on his person. This is camera angle number 4 at minute 3:16.

4 AA 824 (emphasis added). Fear of force is sufficient to prove Robbery. Of course, Morgan actually striking Maria is sufficient to prove Battery with Intent to Commit Robbery.[7] The State reiterated this argument in its rebuttal. 4 AA 847.

For these reasons, the pleading was not vague and the district court did not abuse its discretion in denying the Motion to Dismiss. As such, the district court's order should be affirmed.

IV. THE STATE DID NOT COMMITT PROSECUTORIAL MISCONDUCT IN ITS CLOSING.

Morgan next alleges that the State committed prosecutorial misconduct by stating that the "law applies to everyone and equally everybody should be protected under the law" during closing argument. AOB 35; 4 AA 827. Morgan objected at trial, and the district court sustained the objection. 4 AA 912. The State moved on immediately. 4 AA 827.

[7] However, Morgan was eventually convicted of only simple Battery, and as he stipulated to that and the jury found him guilty of Robbery, the same "act" was not used to convict Morgan in any instance.

When evaluating prosecutorial misconduct, this Court first reviews the conduct to determine whether it was improper and, if so, then decides whether the error was so prejudicial as to warrant reversal. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). "Improper argument is presumed to be injurious. If the case, however, is free from doubt, the appellate court will not reverse. If it is closely contested, the error will be considered prejudicial." Pacheco v. State, 82 Nev. 172, 179, 414 P.2d 100, 103-04 (1966) (internal citations omitted).

First, the prosecutor did not engage in misconduct because the comment was innocuous. The State did not bolster the witness, ask the jury to place themselves in the victim's shoes, or berate them into convicting Morgan. Second, even assuming arguendo that any prosecutorial misconduct occurred, it does not warrant reversal. This case was not close. The entire incident was captured on surveillance video. 3 AA 676. Indeed, Morgan stipulated that he had committed battery from the outset of the trial. 3 AA 661. As such, the prosecutor's statement did not make it more likely that Morgan was convicted. Therefore, this claim fails.

V. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTIONS FOR MISTRIAL.

"The decision to deny a motion for a mistrial rests in the sound discretion of the trial court and it will not be disturbed on appeal unless there is a clear showing of abuse." Evans v. Nevada, 112 Nev. 1172, 1200, 926 P.2d 265, 283 (1996) (overruled on other grounds by Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008)).

Morgan made three requests for a mistrial which were all denied. The district court did not abuse its discretion in denying these motions. First, Morgan moved for a mistrial based on the testimony from Officer Law that he had to chase Morgan before he was able to arrest him with the assistance of a bystander. 3 AA 721–23. Morgan did not object during this testimony, but later requested a mistrial after the jury had been excused for a break. 3 AA 730. In support of this first request, Morgan cites Bellon v. State, 121 Nev. 436 (2005). AOB 36 (citation corrected). However, Bellon is inapposite because the acts Morgan complains of were not prior bad acts; Bellon involved a defendant who made statements to detectives in Louisiana years after he moved there to escape Nevada investigations into the murder of his wife. Bellon, 121 Nev. 440 – 43. The defendant made a number of threatening statements to police which were later introduced at his murder trial. Id. In contrast, in this case, Officer Law merely testified that Morgan fled from him when he tried to arrest him. 3 AA 721 – 23. Morgan's flight and subsequent arrest occurred the same day he committed the robbery – indeed within just an hour or two. This evidence was relevant and admissible and was not a basis for a mistrial. As such, the court did not abuse its discretion in denying this motion.

Second, Morgan requested a mistrial when the State's investigator testified as to the steps he took to locate a witness who did not appear for trial, despite being summoned. 3 AA 787 – 93. The court denied this request because (1) the District

Attorney had not withheld the witness's address because they had just learned of it the day before; and (2) the investigator's testimony was not improper in itself. 3 AA 791 – 92. Morgan does not (and did not below) attempt to show, or cite any authority, that this is not so. As such, the court did not abuse its discretion in denying this motion.

Third, Morgan's final mistrial request related to his counsel's misstatement during closing. For the reasons discussed in Section II, supra, this request fails and the district court did not abuse its discretion denying this request for a mistrial.

For these reasons, the motions for mistrial were without merit and the district court did not abuse its discretion in denying the motions. As such, this claim fails.

VI. THE EVIDENCE WAS NOT INSUFFICIENT.

This Court will find the evidence sufficient if, in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Oriegel-Candido v. State, 114 Nev. 378, 381 (1998). Here, the entire incident was captured on surveillance video. 3 AA 676. Moreover, Morgan stipulated to battery even from the outset of the case. 3 AA 661. Despite this, Morgan claims that there was no evidence that he left the store with any merchandise belonging to the victim or the store and, therefore, the evidence was insufficient. AOB 39.

To the extent that Morgan now claims that he was prejudiced because he may have called Ruby Cruz at trial to testify about what he "placed on the counter for purchase," this claim is belied by the fact that Morgan refused to answer the lower court's question about whether he intended to call Cruz as a witness multiple times, inferring that Morgan never intended to call Cruz. 4 AA 902 – 04. Morgan's claim is also belied by the record; Officer Law testified that Morgan had a packet of nuts when he was arrested, Maria testified that she saw Morgan take nuts from the store, and the video showed Morgan secret the nuts away on his person. 3 AA 723. As such, a jury could reasonably conclude that the nuts Morgan had on his person when he was arrested came from the store. Additionally, jurors watched the video and saw Morgan take the nuts, threaten and batter Maria, and then flee the store. Therefore, viewing the evidence in the light most favorable to the State, a rational trier of fact could find Morgan guilty and this claim fails.

VII. THE COURT DID NOT ERR IN FINDING MORGAN COMPETENT.

Morgan next complaints that the court erred in finding him competent during his first competency hearing. In Nevada, defendants have a "right not to be tried while incompetent." Scarbo v. Eighth Judicial Dist. Court, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009). Nevada has enacted procedural laws to enforce this right under NRS 178.400 et seq. An incompetent person "does not have the present ability to: (a) Understand the nature of the criminal charges against the person; (b)

Understand the nature and purpose of the court proceedings; or (c) Aid and assist the person's counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding." NRS 178.400.

If questions of competency arise, the court must hold a hearing and "the court shall appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the defendant." NRS 178.415(1). During the competency examination, defense counsel may meet with the court-appointed competency examiners and discuss the defendant's ability to assist them up to that time. Calvin v. State, 122 Nev. 1178, 1182-83, 147 P.3d 1097, 1100 (2006). The court receives the reports generated by the examiners at the hearing. NRS 178.415(2). The court must permit each side to examine the competency examiners. NRS 178.415(3). However, the competency examiners are not required to attend the hearing unless summoned. Scarbo, 125 Nev. 123 n.5, 206 P.3d 978.

A court's determination of competency is a question of fact entitled to deference on review. Calvin, 122 Nev. 1182-83, 147 P.3d 1100. "Such a determination will not be overturned if it is supported by substantial evidence." Id. Additionally, NRS 178.400 et seq has been explicitly held to conform with federal competency standards and, thus, are constitutional under both state and federal law. Id. Following the hearing, the court determines whether the defendant is competent

or not. NRS 178.420. If the defendant is found incompetent, the court shall order psychiatric treatment consistent with NRS 178.425.

Here, Morgan's first competency hearing stemmed from his removal from the courtroom for spitting. 2 AA 259. The court ordered two evaluators to determine Morgan's competency and held a hearing on December 26, 2014. 2 AA 261-62. Because the evaluators were split as to Morgan's competency, the court ordered a third evaluation. Id. On January 16, 2015, the third evaluator found Morgan competent. 2 AA 264. Morgan challenged that decision. Id.

The challenge hearing was held on February 6, 2015. 2 AA 267–32. Morgan only wanted to call the one evaluator who found him incompetent. Id. The State agreed to proceed, and the court received the reports as required. Id. Morgan and the State both questioned the witness. Id. At the end of the hearing, the court found that, because two doctors found Morgan competent and only Morgan's decision not to plead not guilty seemed to indicate that he did not understand the proceedings, Morgan was competent. 2 AA 296. Morgan never objected to the State not calling the other medical examiners, and indeed those medical examiners were not required to attend unless summoned. Scarbo, 125 Nev. 123 n.5, 206 P.3d 978. A failure to object at the hearing is a failure to preserve the issue of appeal and, thus, Morgan is entitled only to a plain error review. Calvin, 122 Nev. 1184, 147 P.3d 1101.

Morgan also argues that the competency procedures are inadequate in Nevada.[8] AOB 44-45. This Court has held that this is not so. Calvin, 122 Nev. 1182-83, 147 P.3d 1100. Morgan may wish to change the statutory competency

[8] Morgan also complains about the competency hearing, claiming that his rights were violated when he had to wait 118 days to be transported for psychiatric treatment. AOB 47–53. This Court reviews a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion. Hill v. State, 188 P.3d 51 (2008); McNelton v. State, 115 Nev. 396, 414, 990 P.2d 1263, 1275 (1999). Morgan sought, and is again seeking, a remedy in this criminal case that is not cognizable at law and has failed to cite a single precedent in support of his position. The "civil case" that Morgan references but does not cite is an unpublished federal civil case against Lakes Crossing and the Director of the Nevada Department of Health and Human Services (Burnside et al v. Whitley, 2:13-cv-01102-MMD-GWF) but that case is not only unpublished but has no precedential bearing on this case. Morgan also cites Oregon Advocacy Center v. Mink, 322 F.3d 1101 (9th cir. 2003). However, that case is also a civil matter requiring the State of Oregon to transport defendants from jail to the Oregon State Hospital within a specific time period under Oregon's statutes and law. The district court held a hearing on this motion and heard from Susan Silwa from the Attorney General's office representing the division that includes Lakes Crossing. 2 AA 326–45. Ms. Silwa explained that in Burnside, the State was undertaking to expand its mental health facilities and that any complaint with the process should be taken up in that court. 2 AA 338–39. The district court denied the motion to dismiss and ordered that Morgan be transported within seven days based on: (1) the failure to cite to relevant legal authority (Leaders v. State, 92 Nev. 250, 252, 548 P.2d 1374 (1976)); (2) the remedy for violation of the consent decree under the non-binding, non-precedential authority Morgan did cite was to order Morgan transported within a number of days according to a schedule that had been set in the civil case – either 7 or 14 days (2 AA 333); and (3) the consent decree by its own terms applied only to "the Nevada Division of Public and Behavioral Health, Lake's Crossing Center for the Mentally Disordered Offender, and the Nevada Department of Health and Human Services" (2 AA 334). Because Morgan cited no relevant legal authority and was asking for a remedy not cognizable under law, and because the court provided a remedy in ordering Morgan transferred to Lakes Crossing within seven days, the district court did not abuse its discretion in denying the motion to dismiss.

requirements, but that remedy must come from the legislature, not the courts. In this case, the court followed NRS 178-400 et. seq. and, thus, Morgan was given a full and fair hearing.

Therefore, the district court did not err in determining Morgan was competent. As such, the order should be affirmed.

VIII. THE COURT COMMITTED NO ERROR, SO THERE IS NOTHING TO CUMULATE.

"A cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990). "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). A defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). Here, as discussed supra, Morgan has failed to demonstrate any error, much less numerous or serious error. As such, there is nothing to cumulate and this claim fails. Moreover, even assuming arguendo that Morgan had shown more than one error, this claim still fails. As discussed supra, the issue of guilt was not close. Therefore, this claim fails.

/ / /

/ / /

CONCLUSION

Based upon the foregoing, the State respectfully requests that the Judgment of Conviction be AFFIRMED.

Dated this 7th day of April, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,532 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 7, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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