IN THE SUPREME COURT OF THE STATE OF NEVADA

DVONTAE RICHARD, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 70542

RESPONDENT'S ANSWERING BRIEF

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

BRENT D. PERCIVAL, ESQ.
Nevada Bar #003656
1148 S. Maryland Pkwy.
Las Vegas, Nevada 89104
(702) 868-5650

Counsel for Appellant

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

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

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

DVONTAE RICHARD, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 70542

RESPONDENT'S ANSWERING BRIEF

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

ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(2) because it is a an appeal from a Judgment of Conviction based on a jury verdict that involves convictions for offenses that are Category B felonies.

STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion in admitting Detective Weirauch's testimony regarding Kinard's out-of-court statements.

2. Whether the admission of Kinard's testimonial statements violated Richard's Sixth Amendment confrontation rights.

3. Whether Richard's confessions were obtained legally.

STATEMENT OF THE CASE

On July 24, 2015, the State of Nevada charged Appellant Dvontae Richard by way of Information as follows: Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480 – NOC 50147), Count 2 – Burglary While In Possession of a Firearm (Category B Felony – NRS 205.060 – NOC 50426), Count 3 – Grand Larceny of Firearm (Category B Felony – NRS 205.226 – NOC 50526), Count 4 – Grand Larceny (Category C Felony – NRS 205.220.1, 205.226 – NOC 56004), Count 5 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165 – NOC 50138), Count 6 – First Degree Kidnapping With Use of a Deadly Weapon (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055), Count 7 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480 – NOC 50147), Count 8 – Attempt Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.330, 193.165 0 NOC 50145), Count 9 – Battery With Intent to Commit a Crime (Category B Felony – NRS 200.400.2 – NOC 50151), and Count 10 – Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS 202.360 – NOC 51460). 1 Appellant's Appendix ("AA") 22-27.

On February 17, 2016, Richard filed a Motion to Suppress Custodial Statements ("Motion to Suppress"). 1 AA 46-74. The District Court held a hearing pursuant to Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964) on February 18,

2016. 1 AA 75-148. The District Court denied the Motion to Suppress from the bench and entered its findings in a Minute Order. 1 AA 149-150.

The State filed an Amended Information on February 22, 2016, removing Count 10 so that the jury would not accidentally be read to crime, which was to be tried as the second part of a bifurcated trial. 1 AA 151-155. That same day, a five-day jury trial commenced.

On February 26, 2016, the jury returned a verdict acquitting Richard on Count 6 (First Degree Kidnapping With Use of a Deadly Weapon), but convicting him as charged on the eight remaining counts. 4 AA 654-57. Thereafter, the State filed a Second Amended Information reinstating Count 10. 4 AA 644-45. Richard elected not to proceed to trial on Count 10 and pleaded guilty to the charge. 4 AA 645-649.

Richard appeared before the District Court on May 25, 2016, and was sentenced as follows: on Count 1 to a maximum of 72 months with a minimum parole eligibility of 12 months; on Count 2 to a maximum of 180 months with a minimum parole eligibility of 36 months, consecutive to Count 1; on Count 3 to a maximum of 120 months with a minimum parole eligibility of 24 months, consecutive to Count 2; on Count 4 to a maximum of 60 months with a minimum parole eligibility of 24 months, concurrent with Count 3; on Count 5 to a maximum of 180 months with a minimum parole eligibility of 72 months, plus a consecutive term of 180 months with a minimum parole eligibility of 48 months for the Use of a

Deadly Weapon, consecutive to Counts 1, 2, and 3; on Count 7 to a maximum of 72 months with a minimum parole eligibility of 28 months, concurrent with all other counts; on Count 8 to a maximum of 120 months with a minimum parole eligibility of 48 months, concurrent with all other counts; and on Count 9 to a maximum of 120 months with a minimum parole eligibility of 48 months, concurrent with all other counts; and on Count 10 to a maximum of 72 months with a minimum parole eligibility of 28 months, concurrent with all other counts. 4 AA 670-73. The Court announced the aggregate total sentence to be 61 years maximum with a minimum parole eligibility of 16 years. 4 AA 673. Richard received 367 days credit for time served. 4 AA 672.

The District Court filed the Judgment of Conviction on May 27, 2016. 4 AA 670-73. Richard filed a Notice of Appeal on June 1, 2016. 4 AA 674-676. After discovering a clerical error, the District Court entered an Amended Judgment of Conviction on June 7, 2016. 4 AA 677-680. Richard then filed a Notice of Appeal from the Amended Judgment of Conviction on June 9, 2016. 4 AA 681-83.

STATEMENT OF THE FACTS

On May 24, 2015, Kirsten Kinard and his cousin were at a Chevron gas station and Terrible Herbst car wash at Flamingo and Arville in Las Vegas, Clark County, Nevada. 1 AA 250, 2 AA 294. Kinard was standing outside the station when a man approached him and "snatched" his chain. 2 AA 295. Kinard was unable to fend

off his attacker because the weight of his chain was pulling his neck down. 2 AA 297. A person with Kinard's attacker, as well as Kinard's cousin, exchanged gunshots. 2 AA 298. Kinard was struck by the gunfire. 2 AA 300.

Soon thereafter, Kinard was transported to University Medical Center (UMC) where he received medical attention for the gunshot wounds. 2 AA 304.

Around 5:00 p.m. on May 24, 2015, Las Vegas Metropolitan Police Department Detective Theodore Weirauch went to the emergency room at UMC and made contact with Richard. 1 AA 84-85. Detective Weirauch introduced himself and observed that Richard was calm and alert. 1 AA 87. He then took out a tape recorder, held it in plain view, and turned it on. 1 AA 88.

Immediately after turning on the tape recorder, Detective Weirauch read Richard his Miranda rights. 1 AA 58, 88. Richard nodded his head in an affirmative manner to acknowledge and waive his rights. 1 AA 58, 88.

Detective Weirauch then questioned Richard for approximately one and one-half minutes. 1 AA 89. Richard informed Detective Weirauch that he was with a friend when he got shot, and that they were trying to obtain a stolen necklace. 1 AA 58-59, 1 AA 89-90. Detective Weirauch then cut the interview short because several medical staff needed to talk to Richard. 1 AA 90.

After Detective Weirauch spoke with Richard, he interviewed Kinard, who told him that the person who attacked him was a black adult male wearing a red

hoodie. 2 AA 428. A few minutes later, Kinard told Detective Weirauch that the medical staff had just wheeled the person who attacked him by the door. 2 AA 429, 433. That person was identified as Richard. 2 AA 433.

The next night, LVMPD Detective Lance Spiotto went to UMC and made contact with Richard. 1 AA 99. Detective introduced himself, read Richard his Miranda rights, and then engaged in "general chitchat" in order to "gauge" how Richard was feeling. 1 AA 101. Detective Spiotto found that Richard was coherent, and since Richard gave no indication that he did not understand what was going on or that he did not wish to speak, Detective Spiotto turned on a tape recorder. 1 AA 102, 113.

Richard told Detective Spiotto that he and another man went to a Chevron station at 4070 Arville in Las Vegas around 3:30 p.m. on May 24, 2015. 1 AA 62. Richard stated that he was planning to buy some marijuana, so he went to the store to first buy a "Swisher." 1 AA 64. He then told Detective Spiotto that when he left the store, he saw a man wearing a gold chain that belonged to Richard. 1 AA 65. He then confronted the man and they were "tusslin' over the chain." 1 AA 68. "That's exactly when shots rang out," Richard said. Id. Richard contended, though, that he did not fire any shots. 1 AA 68.

Richard then admitted to purposely dropping a 9mm weapon in the bushes. 1 AA 66. Richard then gave a detailed description of the things that had allegedly

been stolen from him weeks before these crimes and claimed that he was just trying to see if it was his necklace. 1 AA 103-04.

SUMMARY OF THE ARGUMENT

Detective Weirauch's testimony regarding Kinard's statements were prior inconsistent statements (and one was an identifying statement) that were admissible as exceptions to the general rule excluding hearsay. When Kinard testified at trial that he did not see what color hoodie the suspect was wearing and denied seeing the suspect's and stated that he could not make an identification, the State was free to introduce his out-of-court statements in order to impeach Kinard as a witness and as substantive evidence of the offenses charged. Therefore, the District Court did not abuse its discretion in allowing the testimony.

Likewise, the testimony did not violate Richard's Sixth Amendment confrontation rights. Though the statements were testimonial, Kinard's testimony and availability for cross-examination cured any potential constitutional defects that the admission of the testimony could have caused. Further, the confrontation clause does not bar testimonial statements from being used for impeachment purposes. On both grounds, then, the statements were admissible and did not violate Richard's right to confront the witnesses against him.

Even if the Court were to find that it was error to admit the statements on either of the grounds Richard argues, the error was harmless. Evidence of guilt was

overwhelming in this case. Most notably, the conviction is attributable to Richard's confessions. Therefore, any erroneously admitted testimony had no effect, ultimately, on the jury's determination of guilt.

Finally, Richard's confessions were legally obtained. His claims that he was not read his Miranda rights are belied by the record, as twice during the evidentiary hearing Richard himself testified that he was read his Miranda rights. Further, the transcripts of both police interviews demonstrate that Richard understood the questions being asked and gave consistent and coherent answers, all of which indicates that he was not too intoxicated for the confessions to be deemed to have been voluntarily given.

For all of these reasons, this Court should affirm the Judgment of Conviction.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DETECTIVE WEIRAUCH'S TESTIMONY REGARDING KINARD'S OUT-OF-COURT STATEMENTS.

Richard's first complaint is that there were three instances when the District Court erroneously admitted hearsay during his trial. He claims that it was hearsay when Detective Weirauch testified regarding victim Kirsten Kinard's description of the suspect who tried to take a gold chain from him and his identification as Richard as that suspect. OB at 21-34. However, both statements fall under the prior

inconsistent statements exception to hearsay, and the latter falls under the identifying statement exception. Thus, testimony about both statements was admissible.

A district court has broad discretion to decide evidentiary issues. Thus, the standard of review for an evidentiary ruling is abuse of discretion. Jackson v. State, 117 Nev. 116, 120 17 P.3d 998, 1000 (2001). A district court abuses its discretion when its ruling is arbitrary and capricious, or if it exceeds the bounds of law and reason. Id.

A. Detective Weirauch's Testimony Regarded Prior Inconsistent Statements Made By Kinard.

At trial, the State called Kirsten Kinard, the victim in this case. 2 AA 293. Kinard immediately indicated that he was a reluctant witness and did not wish to testify. Id. During direct examination, Kinard stated that on the date of the offense, he was at the Chevron station getting his car washed when someone ran up to him and "snatched" his chain. 2 AA 294-95. When asked about what the man who ran up to him was wearing, Kinard stated that the suspect had a hood one, but that he could not remember the color of the hood. 2 AA 297-98. Kinard also stated that he never saw the suspect's face and that he could not identify the suspect as being anyone in the courtroom. Id.

The next day, the State called Detective Weirauch, who testified that when he first made contact with Kinard, Kinard told him that the suspect was "a black male wearing a hoodie." 2 AA 428. Detective Weirauch said Kinard told him the hoodie

was red. Id. The defense did not object to this testimony. Id. Later, Detective Weirauch testified that while Kinard was in the hospital, he flagged Detective Weirauch down and said "I saw the guy get wheeled by and that's the one that actually tried to pull my chain off." 2 AA 433. Detective Weirauch then stated that the person Kinard identified was the defendant, Richard. Id.

The defense did object on hearsay grounds to the testimony regarding the identification made in the hospital. 2 AA 429. The State argued that because the testimony was being used as a prior inconsistent statement to impeach Kinard's testimony, it was not hearsay pursuant to NRS 51.035. 2 AA 430-31. The Court then stated that pursuant to "50.1352," it would allow the testimony.[1]

B. Detective Weirauch's Testimony Was Not Hearsay Because It Recounted a Prior Inconsistent Statement, And an Identifying Statement, Made by Kinard.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. NRS 51.035. Hearsay is generally inadmissible, but is subject to certain exceptions. Id. However, when a statement that would otherwise be hearsay is used as a prior inconsistent statement, it is not hearsay. NRS 51.035(2)(a). When a declarant testifies at trial and is subject to cross-examination, and makes a statement that is contrary to, or inconsistent with, a previously made statement that would

[1] As there is no NRS 50.1352, the State believes this is an error on the part of the transcriber, and that the Court did in fact allow the testimony pursuant to NRS 51.035(2), the statute that the State brought to its attention.

otherwise be excluded as hearsay, the prior statement may be admitted for purposes of impeachment so long as two requirements are met: (1) the proffered statement is inconsistent with the declarant's testimony and (2) the declarant testified at trial and was subject to cross-examination. Kaplan v. State, 99 Nev. 449, 451-52, 663 P.2d 1190, 1192-93 (1983). Additionally, prior inconsistent statements can be admitted substantively as evidence of an offense. Crowley v. State, 120 Nev. 30, 35, 83 P.3d 282, 286 (2004); Atkins v. State, 112 Nev. 1122, 1129, 923 P.2d 1119, 1124 (1996). See also Dorsey v. State, 96 Nev. 951, 620 P.2d 1261 (1980) (holding that a prior inconsistent statement need not be given under oath to be admissible as substantive evidence).

Likewise, identifying statements made by a declarant who testifies and is subject to cross-examination are not hearsay. NRS 51.035(2)(c). When the declarant identifies the defendant out-of-court, soon after perceiving the defendant, the identifying statement may be admitted as an exception to hearsay. Jones v. State, 95 Nev. 154, 591 P.2d 263 (1979).

Neither of Kinard's out-of-court statements are hearsay as they fall under the prior inconsistent statements section of NRS 51.035. He testified that he did not know what color hoodie the suspect was wearing when he was attacked, nor did he get a look at the suspect's face that would allow him to identifying the suspect if he were in the courtroom. 2 AA 297-98. Thus, his statements made to Detective

Weirauch soon after the incident at the Chevron station indicating that the suspect was wearing a red hoodie, and then identifying Richard as the suspect, were admissible as prior inconsistent statements for purpose of impeachment and as substantive evidence.

Moreover, the District Court was correct in allowing Detective Weirauch's testimony regarding Kinard's statement identifying Richard in the hospital pursuant to NRS 51.035(2)(c).

For these reasons, the District Court did not abuse its discretion in admitting Detective Weirauch's testimony regarding Kinard's statements.

C. Even If Detective Weirauch's Testimony Was Inadmissible Hearsay, the Admission Was Harmless Error.

Even if this Court finds that Detective Weirauch's testimony should have been excluded as inadmissible hearsay, such an error was harmless and the conviction should still be affirmed.

NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Non-constitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). This Court has held on numerous occasions that errors may be harmless when the "evidence of guilt is overwhelming." See, e.g., McIntosh

v. State, 113 Nev.224, 227, 932 P.2d 1072, 1074 (1997); Kelly v. State, 108 Nev. 545, 552, 837 P.2d 416, 420 (1992).

Here, the evidence was overwhelming thanks to Richard's confessions. Detective Weirauch testified about his interview of Richard and stated that Richard, after being read his Miranda rights, admitted to attacking Kinard because he thought the chain belonged to him. 2 AA 425-27. The conviction in this case is directly attributable to Richard's own confessions and the testimony cited *supra*. Thus, any evidentiary error was harmless for having played no substantial or injurious effect on the jury's determination. Therefore, this Court should affirm the Judgment of Conviction even if it finds that Detective Weirauch's testimony should have been excluded as inadmissible hearsay.

II. THE ADMISSION OF KINARD'S TESTIMONIAL STATEMENTS DID NOT VIOLATE RICHARD'S SIXTH AMENDMENT CONFRONTATION RIGHTS.

Richard also argues that the admission of Detective Weirauch's testimony regarding Kinard's statements violated his Sixth Amendment rights to confront the witnesses before him. OB at 35-39. He claims that Kinard's statements were testimonial, and thus, it was improper for the statements to come into evidence through Detective Weirauch's testimony. But Richard ignores that Kinard was available and did testify at trial. Accordingly, no constraints are placed on Kinard's testimonial statements outside of the rules of evidence. Therefore, the admission of

Detective Weirauch's testimony regarding Kinard's statements did not violate his Sixth Amendment rights.

A. Detective Weirauch's Testimony Regarding Kinard's Statements Was Admissible Because Kinard Testified And Was Available For Cross-Examination And the Statements Were Used For Impeachment Purposes.

In Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374 (2004), the United State Supreme Court abrogated the test articulated in Roberts v. Ohio, 448 U.S. 56, 100 S.Ct. 2531 (1980), and held that an out-of-court statement by a witness that is testimonial is barred under the Confrontation Clause of the U.S. Constitution unless the witness is unavailable and the defendant had prior opportunity to cross-examine witness. Acknowledging the new test under Crawford, this Court in Flores v. State, 121 Nev. 706, 714, 120 P.3d 1170, 1175 (2005), (distinguished on other grounds by Estes v. State, 146 P.3d 1114 (2006)), held that "if a witness is unavailable to testify at trial and the out-of-court statements sought to be admitted are "testimonial," the Sixth Amendment Confrontation Clause requires actual confrontation" regardless of whether the statements are supported by "particularized guarantees of trustworthiness."

However, the United States Supreme Court clearly stated in Crawford that when a declarant testifies at trial, admission of his prior testimonial statements creates no constitutional problems:

> Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. It is therefore irrelevant that the reliability of some out-of-court statements "cannot be replicated, even if the declarant testifies to the same matters in court." The Clause does not bar admission of a statement so long as the declarant is present at trial to defend it or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.)

Crawford, 541 U.S. at 59, n. 9, 124 S.Ct. at 1369, n.9 (internal citations omitted).

Detective Weirauch's testimony regarding Kinard's statements, then, was admissible despite the statements being testimonial for two reasons. First, because Kinard was present and available for cross-examination, no constitutional constraints restricted the testimony. Id. Second, because the statements were used, in addition to being substantive evidence, for impeachment purposes[2], there was no bar created by the confrontation clause that would make the admission of the testimony infirm. Id.

For both of these reasons, the District Court's decision to allow Detective Weirauch's testimony did not violate Richard's Sixth Amendment right to confront

[2] The State made it clear while discussing the defense's objection at the bench conference that the testimony regarding Kinard's statements was being used for impeachment purposes. See 2 AA 430 ("MR. LEXIS: I agree it's hearsay but it's also not because it's – it's impeachment and it's a prior inconsistent statement.").

the witnesses against him. Accordingly, this Court should affirm the Judgment of Conviction.

B. If the Statements Did Violate Richard's Sixth Amendment Confrontation Rights, It Was Not Plain Error.

When an appellant does not raise an issue below he waives all but plain error. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 948, 987 (1995); Ford, 111 Nev. at 884, 901 P.2d at 130.

This Court has made it clear that demonstrating plain error is extremely difficult:

> "To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. 336, 339, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at __, 343 P.3d at 594.

In this case, Richard did not object to these statements on confrontation grounds, only to them amounting to hearsay. Thus, even if this Court finds that the

testimony regarding Kinard's statements did violate Richard's Sixth Amendment rights, this Court would have to find the error to be plain in order to grant Richard relief.

Here, where there was overwhelming evidence of guilt, it cannot be that Richard had his substantial rights prejudiced even if it the statements should have been excluded as testimonial. Elizabeth Greer testified that she was present at the gas station on May 24, 2015, and heard the gunshots ring out after witnessing Richard and his acquaintance having a discussion about Kinard and his cousin. 1 AA 249-51, 2 AA 256-57. She also testified that she saw a gentleman wearing a gold chain who was shot in the abdomen lying on the ground. 2 AA 259.

Horacio Hernandez-Lopez also testified at trial, and indicated that he was at the gas station at the time of the incident. 2 AA 269-70. He said that he saw two "Afro-Americans" walking together and approaching Kinard and noted that one was wearing a red hoodie. 2 AA 272. Hernandez-Lopez stated that the man with the red hoodie approached Kinard and "in a violent manner acted with both hands as he was tugging the chain and taking it away." 2 AA 273. He said the man in the hoodie caused the chain to break, which forced Kinard to lunge. 2 AA 274. Hernandez-Lopez then said the man in the hoodie's friend pulled out a gun and started shooting. 2 AA 274-75.

Additionally, there is the most critical evidence – Richard's own confessions. Thus, if the admission of Detective Weirauch's testimony was error, it was harmless and did not prejudice Richard's substantial rights. Accordingly, it fell well short of plain error. Therefore, this Court should affirm the Judgment of Conviction regardless of whether it finds the admission of the testimony to be Crawford error.

III. RICHARD'S CONFESSIONS WERE OBTAINED LEGALLY.

Richard raises three issues challenging the voluntariness of his confessions given while in the hospital. He claims that, when viewed under the totality of the circumstances – i.e., his injuries and the treatment he was receiving while in the hospital – his statements made to Detective Weirauch in the emergency room, as well as his statements made to Detective Spiotto the next day, were involuntarily made. OB at 39-49. Richard also argues that the statements made to Detective Spiotto should have been excluded because Detective Spiotto never read Richard his Miranda rights. OB at 50-53.

However, Richard's statements were given voluntarily and the District Court was correct to deny the Motion to Suppress and admit the statements into evidence. Additionally, Richard's claim that Detective Spiotto never read Richard his Miranda rights is belied by the record. Accordingly, these claims should denied.

This Court generally reviews a district court's decision to admit evidence for an abuse of discretion; however, various issues regarding the admissibility of

evidence that implicate constitutional rights as mixed questions of law and fact are subject to de novo review. Hernandez v. State, 124 Nev. 60, 188 P.3d 1126 (2008); see, e.g., Rosky v. State, 121 Nev. 184, 190-91, 111 P.3d 690, 694 (2005) (adopting the mixed question of law and fact standard for reviewing a district court's decision regarding the admissibility of a criminal defendant's statement offered by the State); Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002) ("Suppression issues present mixed questions of law and fact."). This Court has noted that review of a district court's decision as a mixed question of law and fact is appropriate where the determination, although based on factual conclusions, requires distinctively legal analysis. Rosky, 121 Nev. at 190, 111 P.3d at 694.

A. Richard's Statements Were Given Voluntarily and Were Admissible.

Richard argues that his confessions, given while in the hospital, should have been suppressed because they were allegedly involuntary statements. OB at 39-49. Richard does not allege, however, that any of the regularly considered factors weigh in favor of this Court finding that his statement was involuntary. Rather, he suggests that the statements were involuntary because he was intoxicated. Id.

In Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (1996), this Court addressed how intoxication can affect the admissibility of a confession. "To be admissible, a confession must be made freely and voluntarily, without compulsion or inducement." Id., 112 Nev. at 990, 923 P.2d at 1109 (*citing* Passama v. State, 103

Nev. 212, 213, 735 P.2d 321, 322 (1987)). "A confession must be the product of a free will and rational intellect." Id. "The voluntariness of a confession must be determined from the effect of the totality of the circumstances on the defendant's will." Id., 112 Nev. at 991, 923 P.2d at 1109.

The Kirksey Court noted that the following factors are to be considered when determining whether a confession was voluntary: "the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep."[3] Id. The Court then added that, "[t]he defendant's intoxication alone does not automatically make a confession inadmissible. . . A confession 'is inadmissible only if it is shown "that the accused was intoxicated to such an extent that he was unable to understand the meaning of his comments."'" Id., 122 Nev. at 992, 923 P.2d at 1110 (internal citations omitted).

[3] With regard to the first interview, Richard states that all of the "circumstances surrounding Mr. RICHARD's injuries, location at the hospital, previous treatment at the hospital and the need of medical staff to have access to Mr. RICHARD established that the in custodial (sic) statement obtained by Detective Weirauch was involuntary." OB at 46. However, none of these "circumstances" (i.e., injuries, being in the hospital, or needing medical attention) are relevant to the question of voluntariness. Likewise, Richard's suggestions that, prior to the second interview, Detective Spiotto should have spoken to a doctor about "all of the known information about Mr. RICHARD's injuries and hospitalization" has no bearing on the outcome of the ultimate question. OB at 48.

In Kirksey, the defendant made two incriminating statements to police in Riverside, California regarding a crime committed in Las Vegas, Nevada. Id., 122 Nev. at 991, 923 P.2d at 1109. He challenged the voluntariness of those statements by providing medical records indicating that he was "suffering from symptoms of cocaine addiction and withdrawal during all of the statements." Id. The Court held, though, that this "medical" condition was not sufficient to challenge the voluntariness of the statement and found that because there was no indication that the defendant was so intoxicated "that he was unable to understand the meaning of the statement he made." Id. The Court also noted that "there was little variation in his story," and found that this weighed in favor of finding that he understood the meaning of the statements. Id.

1. Richard's statements to Detective Weirauch were voluntarily given.

Here, Richard argues that his answers to Detective Weirauch's questions either "did not make sense" or were incoherent. OB at 44-45. However, though there are answers that were not loud enough to be heard on the recording, the answers that were given and recorded demonstrate that Richard made sense and understood what he was saying.

The District Court found that, "under the totality of the circumstances surrounding the statements in question, there is not sufficient evidence to question the voluntariness of [Richard]'s statements to . . . Detective Weirauch." 1 AA 150.

The Court stated that "the testimony of" Detective Weirauch gave "no indication that the [Richard] was uncomfortable or incoherent, or unable to understand the meaning of the statements he made or the context in which he made them." Id. The Court also noted that there was an "absence of any evidence that the statements were otherwise obtained by any physical or psychological coercion or improper inducement that the will of [Richard] was overcome." Id.

The record supports the District Court's findings and contradicts Richard's contention that he was too intoxicated and that the recordings demonstrate that he did not understand what he was saying. When asked whether the incident was over a stolen necklace, Richard answered in the affirmative and then told Detective Weirauch that it had been taken from him in a robbery a couple weeks prior. 1 AA 59. He then informed Detective Weirauch that he did not know the name of the man with whom he was at the Chevron station. Id., 1 AA 60.

These answers were consistent with the answers Richard gave to Detective Spiotto the next night. He reiterated that he did not know the man's name, saying that he just calls him "the weed man." 1 AA 62-64. He also elaborated on how the incident started and stated again that it was about a necklace that had been stolen from him. 1 AA 65.

Given that his statements to Detective Weirauch were coherent, and that there was no variation between those statements and the statements given the next night,

the District Court did not abuse its discretion in making its factual findings (that "under the totality of the circumstances surrounding the statements in question, there is not sufficient evidence to question the voluntariness of [Richard]'s statements to . . . Detective Weirauch; 1 AA 150). Thus, the District Court was correct to deny the Motion to Suppress and to admit the statements into evidence. Therefore, this Court should affirm those decisions.

2. Richard's statements to Detective Spiotto were voluntarily given.

With regard to the second interview, conducted by Detective Spiotto, Richard does not even contend that his statements were incoherent or that they demonstrate that he did not understand the questions or his answers. Rather, he simply argues that because Detective Spiotto interviewed him after visiting hours, Richard had undergone surgery earlier in the day, and he was on medication, the statements were not voluntary. OB at 46-49. But Richard's pleading was insufficient to show that he was too intoxicated for his statements to be voluntary.

Because Richard does not challenge that the statements demonstrate that he did not understand the questions or what he was saying, he cannot and has not demonstrated that the statements were given involuntarily. Any evidence that he might have been intoxicated, by itself, is not sufficient to prove that his statements were involuntarily made. Kirksey, 112 Nev. at 992, 923 P.2d at 1110. Additionally, like in Kirksey, there is no indication "that he was unable to understand the meaning

of the statement he made." Thus, even if Richard had directed the Court's attention to the transcript of the second interview, it would have clearly demonstrated that he was not so intoxicated as to render the statements involuntary. See 1 AA 61-74. Therefore, this Court should find that the statements made to Detective Spiotto were given voluntarily and that the District Court did not abuse its discretion in finding such. 1 AA 150. Based on those factual findings, the District Court was correct to deny the Motion to Suppress and to admit the statements into evidence. Accordingly, this Court should affirm those decisions.

B. **The Record Indicates That Detective Spiotto Read Richard His *Miranda* Rights.**

It is well-settled that Miranda v. Arizona established requirements to assure protection of the Fifth Amendment right against self-incrimination under "inherently coercive" circumstances. Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612 (1966). Pursuant to Miranda, a suspect may not be subjected to an interrogation in official custody unless that person has previously been advised of, and has knowingly and intelligently waived, the following: the right to silence, the right to the presence of an attorney, and the right to appointed counsel if that person is indigent. Miranda, at 444, 1612. Failure by law enforcement to make such an admonishment violates the subject's Fifth Amendment guarantee against compelled self-incrimination. Id.

Twice during the Jackson v. Denno hearing, Richard admitted to having his Miranda rights read to him by Detective Spiotto. He first testified to that during direct examination by his attorney:

> Q. You've heard you have the right to remain silent. You choose to give up that right, anything you say can will (sic) be used against you a (sic) court of law?
>
> A. Yes, sir.
>
> Q. You have heard you have the right to a retained or appointed attorney at the time of questioning?
>
> A. Yes, sir.
>
> Q. If you choose to give up that right – if you cannot afford and (sic) attorney one will be appointed for you so he can be present while you're questioned. You've heard those warnings before, correct?
>
> A. Yes, sir.
>
> Q. You've heard them on TV?
>
> A. Yes, sir.
>
> Q. You've probably heard them while you were in Clark County Detention Center, correct?
>
> A. Yes, sir.
>
> Q. Were those warnings given to you at any time while Detective Spiotto – the second detective who testified – was in your room on May 25, 2015?
>
> A. It wasn't exact as all of those questions. But it was similar to it.

> Q. Did you understand what was being said to you?
>
> A. I was just told he was there to interview me about a shooting. I could have a lawyer if I wanted to answer the question. I didn't need a lawyer to answer the questions. He just wanted to know who I was with and where I was at the time.

1 AA 127-128. Then, on cross-examination, Richard reaffirmed that he had been read his Miranda rights:

> Q. The second statement to the last guy, Detective Spiotto, I want to talk about that for a minute.
> You said to your attorney that you do remember him reading you your Miranda rights, correct?
>
> A. Yes, sir.

1 AA 131.

Additionally, Detective Spiotto testified at the hearing, as well as at trial, that he read Richard the Miranda rights. 1 AA 102, 3 AA 539. Richard's admissions and Detective Spiotto's testimony support the District Court's finding that Detective Spiotto read Richard his Miranda rights before the interview. AA 149-50. Thus, the District Court did not abuse its discretion in making such a finding. The District Court, then, was correct in denying the Motion to Suppress and in admitting the statements into evidence. Accordingly, this Court should affirm those decisions.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Judgment of Conviction.

Dated this 17th day of May, 2017.

Respectfully submitted,

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

BY */s/ Steven S. Owens*

STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 6,040 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of May, 2017.

Respectfully submitted

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

BY */s/ Steven S. Owens*
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #004352
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 17, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

BRENT D. PERCIVAL, ESQ.
Counsel for Appellant

STEVEN S. OWENS
Chief Deputy District Attorney

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

SSO/Alexander Robbins/ed