IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE BOWSER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 71516

RESPONDENT'S ANSWERING BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE BOWSER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 71516

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 because it is an appeal from a judgment of conviction, pursuant to a jury trial, of a Category B Felony.

STATEMENT OF THE ISSUES

1. Whether the district court erred in denying Appellant's challenge to the State's peremptory strikes against three jurors.
2. Whether the district court erred by denying Appellant's request to redact his own statement referencing co-defendant Green.

3. Whether the district court erred by denying Appellant's request to remove a sleeping juror.
4. Whether the district court erred by refusing to admit into evidence a written toxicology report.
5. Whether the district court erred by denying Appellant's proposed "mere presence" jury instruction.
6. Whether the district court erred by denying Appellant's motion for mistrial.

STATEMENT OF THE CASE

On April 29, 2005, TERRENCE KARYIAN BOWSER (hereinafter "Appellant") was charged by way of Indictment with the following: Count 1 – Conspiracy to Commit Murder (Felony - NRS 200.010, 200.030, 199.480); Count 2 – Murder with Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165); Count 3 – Conspiracy to Discharge Firearm Out of a Motor Vehicle (Gross Misdemeanor - NRS 202.287, 199.480); Count 4 – Discharging Firearm Out of Motor Vehicle (Felony - NRS 202.287); Count 5 – Conspiracy to Discharge Firearm at or into Structure, Vehicle, Aircraft, or Watercraft (Gross Misdemeanor - NRS 202.285, 199.480); and Count 6 – Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft (Felony - NRS 202.285). 1 Appellant's Appendix ("AA") 1-7.

On October 3, 2007, a jury trial convened and on October 11, 2007, the jury found Appellant guilty as charged on all counts. 1 AA 109-110. On October 16, 2007, the jurors returned a verdict of 40 years to Life on Count 2. 1 AA 111. On December 5, 2007, Appellant was sentenced to the Nevada Department of Corrections ("NDOC") as follows: as to Count 1 – a maximum of 120 months with a minimum parole eligibility of 24 months; as to Count 2 – Life with a minimum parole eligibility of 20 years, plus an equal and consecutive term of Life with 20 years minimum parole eligibility; as to Count 3 – 365 days with credit for time served; as to Count 4 – a maximum of 60 months with a minimum parole eligibility of 12 months, to run concurrent with Counts 1 and 2; as to Count 5 – 365 days with credit for time served; and as to Count 6 – to a maximum of 60 months with a minimum parole eligibility of 12 months, to run concurrent with Counts 1 through 5. 1 AA 112-114. Appellant received 1,038 days credit for time served. A Judgment of Conviction ("JOC") was filed on December 13, 2007. Id.

On January 2, 2008, Appellant filed a Notice of Appeal. 1 AA 115-117. On February 26, 2010, the Nevada Supreme Court issued an Order of Reversal and Remand. 1 AA 118-127. Remittitur issued March 27, 2010. Id.

On May 18, 2015, Appellant's re-trial convened and lasted six days. 2 AA 173 - 5 AA 1133. On May 26, 2015, the jury found Appellant guilty of Count 2 – Voluntary Manslaughter with Use of a Deadly Weapon, Count 4 – Discharging

Firearm Out of a Motor Vehicle, and Count 6 – Discharging Firearm at or into Structure, Vehicle, Aircraft, Watercraft. 6 AA 1200-1201. However, the jury found Appellant not guilty of Counts 1, 3, and 5. Id.

On August 19, 2015, Appellant was sentenced to the NDOC as follows: as to Count 2 – to a maximum of 120 months with a minimum parole eligibility of 48 months, plus an equal and consecutive term of 120 months with a minimum parole eligibility of 48 months for use of a Deadly Weapon; as to Count 4 – to a maximum of 120 months with a minimum parole eligibility of 48 months, to run consecutive to Count 2; and as to Count 6 – to a maximum of 72 months with a minimum parole eligibility of 28 months, to run concurrent with Count 4. 6 AA 1236-1238. Appellant received 3,852 days credit for time served. Id. A Judgment of Conviction was filed on August 31, 2015. Id.

On May 20, 2016, Appellant filed a Post-Conviction Petition for Writ of Habeas Corpus. 6 AA 1243-1267. On August 15, 2016, this Court granted Appellant's Post-Conviction Petition for Writ of Habeas Corpus. 6 AA 1268-1275.

On October 13, 2016, Appellant filed a Notice of Appeal. 6 AA 1276-1277. On February 8, 2017, Appellant filed the instant Opening Brief. The State responds as follows and respectfully requests that this Court order the District Court's Judgment of Conviction be AFFIRMED.

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STATEMENT OF THE FACTS

On January 31, 2005, Las Vegas Metropolitan Police Department ("Metro") officers were dispatched to a local area regarding a shooting. 4 AA 667. Officers learned that a male, later identified as John McCoy ("McCoy"), had been shot and crashed into the property wall of a local residence. 4 AA 669. Upon arrival, McCoy told officers that the shooter was in a brown Lincoln and that there were two black males inside the car. 4 AA 680-681.

A short time later, a North Las Vegas Police Department ("NLVPD") officer in a nearby area observed a Lincoln Continental, without front or rear license plates, traveling with its headlights turned off. 4 AA 705, 719-720. The vehicle then turned its headlights on and as it passed the officer's vehicle, the officer observed that the two male occupants were wearing dark hoods that were pulled up over their heads. 4 AA 706. The officer made a U-turn and began to follow the vehicle. Id. The officer also activated his lights and sirens, but the driver of the vehicle attempted to evade the officer. 4 AA 706-708. The driver made several turns and finally pulled into a driveway. 4 AA 709-710. The driver attempted to back the vehicle out of the driveway, but the officer drew his weapon and commanded the driver to stop the vehicle. Id. Both occupants were taken into custody. 4 AA 712. The driver was identified as the Appellant, Terrence Karyian Bowser, and the passenger was identified as the co-defendant, Jamar R. Green ("Green"). 4 AA 712-713.

A pistol grip pump action shotgun was found on the gravel next to the driveway of the residence. 4 AA 716, 732. The shotgun was empty; however, a box of shotgun shells was seen in plain view on the front seat of the vehicle. 4 AA 715-716. Inside the vehicle, three spent shotgun cases were observed on the front floorboard. 4 AA 715. Officers were later informed that McCoy died as a result of his injuries. 4 AA 691.

At the Clark County Detention Center ("CCDC"), officers made contact with Appellant and he agreed to answer questions. 1 AA 8-97. Appellant initially stated the shooting was a result of a road rage incident, but later admitted the incident was not the result of road rage. 1 AA 54, 74-76. Appellant stated that he and Green joked about what it would be like to shoot into a vehicle. 1 AA 74-76. Appellant told officers he put the box of shotgun shells in his car before he went to meet Green at his residence. 1 AA 40. Appellant stated he had been drinking Hennessey and was drunk. 1 AA 36. After he had something to eat at Green's house, he and Green decided to go cruising. 1 AA 37-38.

Appellant stated Green had his shotgun on his lap as they drove around. 1 AA 38, 77. Eventually, Appellant and Green drove by McCoy. 1 AA 44. Green then told Appellant that McCoy "was talking shit." Id. Appellant did not actually hear McCoy "talking shit," but just took Green's word that he was. 1 AA 47. In addition to not being able to hear anything coming from McCoy's vehicle, Appellant stated

that he could not see into the vehicle as well. 1 AA 68. Appellant and Green then began to follow McCoy. 1 AA 46. Appellant and Green then pull up beside McCoy. 1 AA 49. Appellant stated that he told Green to shoot McCoy. 1 AA 95. Green pointed the shotgun out of the window and Appellant pulled up next to the driver's side of the victim's vehicle. 1 AA 67-69. Appellant stated he heard Green fire at least two rounds. 1 AA 49-50. As Appellant made a U-turn to drive away, they were spotted by a NLVPD officer who tried to stop them. 1 AA 61-62.

SUMMARY OF THE ARGUMENT

In his Opening Brief, Appellant claims that the District Court erred in several ways. First, Appellant claims that the District Court erred in denying the defense challenge to the State's peremptory strikes against three jurors. This claim fails as he is unable to demonstrate purposeful discrimination against a recognized minority group.

Second, Appellant claims that the District Court erred by denying a defense request to redact his own statement to remove references to statements made by co-defendant Green. This claim fails as the references to statements made by Green were included merely to provide context to Appellant's answers.

Third, Appellant claims that the District Court erred by denying a defense request to remove a sleeping juror. This claim fails as the Court found the juror's

answers to be credible when he stated that he was not sleeping, but merely concentrating.

Fourth, Appellant claims that the District Court erred by refusing to allow into evidence a written toxicology report which supported Appellant's theory of defense. This claim fails as the toxicology report constitutes hearsay that does not fall within any exception.

Fifth, Appellant claims that the District Court erred by declining to give Appellant's proffered instruction regarding "mere presence" and by addressing a subsequent note from the jury on that issue without Appellant or his attorney being present. This claim fails as Appellant offers no authority to support his argument that the jury instruction was inappropriate and because all parties were present when the Court addressed the juror question.

Lastly, Appellant claims that the District Court erred by denying a defense motion for mistrial due to prosecutorial misconduct. This claim fails as the jury was instructed that arguments of counsel are not evidence, and that any errors made were harmless as the evidence against Appellant was overwhelming.

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ARGUMENT

I.

THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S CHALLENGE TO THE STATE'S PEREMPTORY STRIKES AGAINST THREE JURORS

A. *Standard of Review*

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)). Batson also applies to criminal defendants and forbids their exercise of peremptory challenges to remove potential jurors on the basis of race, gender or ethnic origin. United States v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774 (2000); Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348 (1992). Furthermore, there is no requirement that the defendant and the excluded juror be of the same race. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991); Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803 (1990).

In Purkett v. Elem, 514 U.S.765, 766-67, 115 S.Ct. 1769, 1770-71 (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:

> Under 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 an explanation that is persuasive, or even plausible.

Purkett, 514 U.S.at 766-767, 115 S.Ct. at 1770-1771.

The Nevada Supreme Court adopted the Purkett three step analysis of a Batson claim in Doyle v. State, 112 Nev. 879, 921 P.2d 901, 907-908 (1996) and Washington v. State, 112 Nev. 1067, 1071, 922 P.2d 547, 549 (1996). Accordingly, the opposing party's exercise of its peremptory challenge is governed by a Purkett analysis.

In deciding whether or not the requisite showing of a prima facie case of racial 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 887-888, 921 P.2d at 907. 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 race-neutral explanation. Purkett, 514 U.S. at 767, 115 U.S. at 1770. "The second step of this process does not demand an explanation that is persuasive or even plausible." Purkett, 514 U.S. at 768, 115 U.S. at 1771. "Unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral." Id.; 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 (and probably will) be found to be pretexts for purposeful discrimination. Purkett, 514 U.S. at 768, 115 U.S. at 1771. What is meant by a legitimate race-neutral reason "is not a reason that makes sense, but a reason that does not deny equal protection." 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, 537 U.S. 322, 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.

Lastly, 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. In conclusion it should be noted that although much of the case law cited to from which the aforementioned principles are drawn refer to the defendant, generally, as the party opposing the peremptory challenge, McCollum ensures that Batson applies to all parties including criminal defendants. Georgia v. McCollum, 505 U.S. 42, 112 S.Ct, 2348 (1992).

In the instant matter, Appellant claims that the State "used peremptory strikes against three male jurors who all were members of recognized minorities." AOB at 7. Specifically, Appellant claims that he was denied his right to a fair trial and impartial jury because "the State's race-neutral justification given for striking the

jurors was pretextual." AOB 7-8. Although Appellant claims that the State "used peremptory strikes against three male jurors who all were members of recognized minorities," only Mr. Dalton was such as the ethnicities of the other two jurors remain unclear. [1] 3 AA 546-547. The Court merely assumed for purposes of the challenge that Mr. Silva and Mr. Cano belonged to minority groups. 3 AA 547-548, 556-558. Accordingly, it is the State's position that there can be no purposeful discrimination against a recognized minority group where it is unclear if the juror in question even belongs to a recognized minority group. Such a proposition is nonsensical, and this Court should not countenance such practices.

Further, contrary to Appellant's belief, the trial court never concluded that "the defense had made a prima facie case" of discrimination. AOB at 11. The Court specifically stated that "*[i]f in fact [Cano and Silva] are an Asian and a Hispanic*, I think [the defense] *probably* [] met that prima facie showing." (emphasis added). 3 AA 548. There is nothing in the record that conclusively proves Mr. Cano is Asian and Mr. Silva is Hispanic. As such, Appellant fails to satisfy the first step of the Purkett analysis. To the extent that this Court finds Appellant had made a prima facie case of discrimination, Appellant's claims would still fail as a discriminatory

[1] As to Mr. Silva, Judge Cadish mentioned that she believed him to be Caucasian in her personal notes as she was not sure if he was "Hispanic, Italian, or what frankly." 3 AA 547, 556. As to Mr. Cano, Judge Cadish similarly did not note him as being Asian and that she was "not sure if he is or isn't." 3 AA 547.

intent was not inherent in the State's justification and the trial court found the justification to be credible. 3 AA 556-558.

B. *Prospective Juror #478: Mr. Silva*

As to Mr. Silva, Appellant claims that the "State's justification for using its strike on Mr. Silva was pretextual." AOB at 12. Appellant heavily relies on the State's comments regarding Mr. Silva's employment status and level of education to support that the State's peremptory strike was pretextual. Id. However, Appellant fails to mention the other factors the State considered in justifying its use of a peremptory strike on Mr. Silva.

Mr. Silva was one of four alternate jurors against whom a peremptory strike could have been brought. 3 AA 548. Accordingly, a comparative juror analysis is only appropriate as to the three other alternate jurors. In its justification, the State explained that it was not going to use its challenge on Ms. Diesfeld because "it was pretty clear" that the defense was going to get rid of her due to the fact that her daughter's boyfriend was the victim of a murder. 3 AA 549. Out of the three remaining alternate jurors, Mr. Silva's answers "were flat and narrow and shallow compared to the other two [alternate jurors]." Id. These flat, narrow, and shallow answers indicated to the State that Mr. Silva was somebody who is "*not as invested* in the community" *when compared to the other two alternate jurors* – not the entire jury pool. Id. (emphasis added).

C. *Prospective Juror #344: Mr. Dalton*

As to Mr. Dalton, Appellant claims that the State's justification for striking Mr. Dalton was "clearly pretextual." AOB at 15. In support of this claim, Appellant compares Mr. Dalton's answers to the answers of other jurors. AOB at 16-20. However, Appellant's comparisons are misplaced as the Court found Mr. Dalton's answer could be "a legitimate cause for concern" when compared to the other jurors' answers. 3 AA 557.

Although the questions Mr. Dalton, Mr. Sonerholm, and Ms. Matys were asked were similar, their answers could not have been more different. All three jurors were asked about what their thoughts would be if Appellant did not testify. 2 AA 363, 382, 435-436. In his response, Mr. Dalton stated that "if [Appellant] were to get up here and testify, I don't feel like the prosecution would come out here to try to figure out the truth, *they would try to turn his words into admitting to the crime*." 2 AA 382 (emphasis added). Mr. Dalton's response indicates that he believes the prosecution would try to twist Appellant's words, whereas Ms. Matys' response simply stated that "[w]ords can be mixed around very easily," and that "somebody could twist [Appellant's] words" if it did not sound right to them. 2 AA 436. Mr. Sonerholm, the other juror Appellant compares Mr. Dalton to, does not even remotely mention twisting or misinterpreting the potential testimony of Appellant. 2 AA 363-364. Mr. Sonerholm only states that "there are several

reasons" why somebody would choose not to testify and that "it can be intimidating." Id.

D. *Prospective Juror #386: Mr. Cano*

As to Mr. Cano, Appellant claims that the "State's justification for striking Mr. Cano was pretextual in nature, considering the similar responses with regard to the seriousness of the situation given by several other nonminority jurors who were retained on the jury." AOB 23-24. However, Appellant's claim is misguided as the State was concerned that Mr. Cano was overwhelmed by the process and would not be comfortable sitting as a juror for this type of case. 3 AA 549-550. The State did not mention anything about Mr. Cano's thoughts on the seriousness of the situation in its justification. Id. While Mr. Cano and Ms. Taylor both spoke about how important the process was and that they are taking things seriously, the Court found that only Mr. Cano questioned his ability to comply with the process. 3 AA 556-557.

Therefore, because Appellant fails to demonstrate that there was purposeful discrimination against a recognized minority group, the District Court correctly denied Appellant's challenge to the State's peremptory strikes against three jurors.

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II.
THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S REQUEST TO REDACT HIS OWN STATEMENT REFERENCING CO-DEFENDANT GREEN

Hearsay is defined as an out-of-court statement that is offered to prove the truth of the matter asserted and is generally inadmissible. NRS 51.035, 51.065. However, an out-of-court statement that is not offered to prove the truth of the matter asserted does not invoke the hearsay rule. See Browne v. State, 113 Nev. 305, 312, 933 P.2d 187, 191 (1997) (holding that statements offered "solely as foundation for [the witness's] opinion" did not violate the hearsay rule); see also Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) ("[T]he hearsay rule does not exclude a statement 'merely offered to show that the statement was made and the listener was affected by the statement.'"); Shults v. State, 96 Nev. 742, 747-748, 616 P.2d 388, 392 (1980) (determining that testimony by police officers that they had a conversation with a witness did not violate the hearsay rule because the officers did not divulge any specific statements and the testimony was offered merely to "explain the resulting conduct of the police" – a non-hearsay purpose).

In the instant matter, Appellant claims that the district court erred by not redacting references to statements made by co-defendant Green. AOB at 24. Specifically, Appellant claims that "Green's statements that remained part of [Appellant's] statement were prejudicial to [Appellant]." AOB at 25. However,

Appellant's claim is misguided as the detective's statements were offered merely as foundation for Appellant's answers.

As the Court noted, the "alleged statements made by [Green]…are not being introduced for the truth of the matters asserted in those alleged statements" and that "[t]he statement should only be considered by you to provide context to the answers given by [Appellant] and not as substantive evidence against him." 4 AA 893. Here, Detective O'Kelley's ("Det. O'Kelley") statements were not offered to prove the truth of the matter asserted. Rather, the statements were admissible because redacting any mention of Green would completely change the context of Appellant's answers during his interview.

Det. O'Kelley never specifically mentions what Green said during his interview. 1 AA 72-74, 91-92. Instead, Det. O'Kelley used the information gathered from Green's interview to provide context to Appellant's answers. In fact, defense counsel questioned Det. O'Kelley regarding the alleged statements by Green on cross-examination, to which Det. O'Kelley responded by saying that the statements were "a description of what we had learned up to that point in our interview and also what we knew from having talked to Mr. Green." 5 AA 944-948. These statements were never offered to prove the truth of the matter asserted. As such, his statements cannot constitute hearsay.

Therefore, because the references to statements made by Green during Appellant's interview were not offered to prove the truth of the matter asserted, the District Court correctly denied Appellant's request to redact his own statement referencing co-defendant Green.

III.
THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S REQUEST TO REMOVE A SLEEPING JUROR

"Absent a clear showing of abuse of discretion, the trial court's determination will not be disturbed on appeal." Meegan v. State, 114 Nev. 1150, 1155, 968 P.2d 292, 295 (1998). "An abuse of discretion occurs if the court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

A party claiming juror misconduct due to "inattention" cannot merely allege the purported conduct but must affirmatively establish the juror's inattention, and the resolution of any disputed issue of fact rests within the discretion of the trial judge. United States v. Newman, 982 F.2d 665, 670 (1st Cir.), *cert. denied*, 510 U.S. 812, 126 L.Ed.2d 28, 114 S.Ct. 59 (1992). Further, the Nevada Supreme Court has held that a trial court's "own contemporaneous observations of the juror may negate the need to investigate further by enabling the court to take judicial notice that the juror was not asleep or was only momentarily and harmlessly so." Burnside v. State, 352 P.3d 627, 629, 2015 Nev. LEXIS 52, *23, 131 Nev.Adv.Rep. 40 (Nev. 2015)

(quoting Samad v. U.S., 812 A.2d 226, 230 (D.C. 2002)); see also U.S. v. Carter, 433 F.2d 874, 876 (10th Cir. 1970) (concluding that where the trial judge indicated that she watched the juror in question closely and was convinced that the juror was not asleep, "[t]he conduct of the juror in open court was a matter of which the trial court had judicial knowledge and could take judicial notice").

In the instant matter, Appellant claims that the district court erred by not removing a juror ("Sonerholm") who had been sleeping throughout the trial. AOB at 28. Specifically, Appellant claims that the decision to not remove and replace him with an alternate juror was error. AOB at 28-29. However, Appellant's claim is misguided as the district court found that the juror in question was credible when he responded that he was not sleeping, but merely closing his eyes to concentrate. 4 AA 799-801.

The Court stated the following with regard to Sonerholm's demeanor and credibility:

> For the record, I was talking with my clerk who had observed his eyes closed yesterday and had brought it to my attention, and shortly after I looked over at him, after it was brought to my attention, his eyes had opened, so I was seeing if there was any additional information that he might have, and it doesn't sound like there is.
>
> Obviously, I don't want any juror sleeping through testimony that they need to base a verdict on. What we know and have observed is that his eyes were closed. *I don't have any other information that would specifically indicate that he was sleeping such as*

> *snoring or bobbing head or things that can see that indicate that someone's asleep.*
>
> He did, as soon as I asked him about his eyes being closed, quickly let me know that he closes his eyes, but he was listening before I got into any further questions. *I do think he appears credible in making that representation.*

(emphasis added). 4 AA 800-801.

While Appellant correctly states that sleeping is considered juror misconduct, Appellant's claim is misguided. AOB at 30; see United States v. Sherrill, 388 F.3d 535, 537 (6th Cir. 2004). The district court questioned Sonerholm as the finder of fact and found that he was credible when he responded that he was not sleeping, but merely closing his eyes to concentrate. Therefore, the district court correctly denied Appellant's request to remove a sleeping juror.

IV.
THE DISTRICT COURT CORRECTLY REFUSED TO ADMIT INTO EVIDENCE A WRITTEN TOXICOLOGY REPORT

In the instant matter, Appellant claims that the district court erred by "refusing to allow into evidence a written toxicology report which supported [Appellant's] theory of defense." AOB at 31. Specifically, Appellant claims that he was "entitled to present relevant evidence to support his theory of defense," and that he was "prejudiced by the court's failure to allow the evidence, as the likelihood of success of [Appellant's] self-defense theory would have been greatly enhanced with the addition of [the toxicology report]." AOB at 35. However, Appellant's claim is

misguided as the toxicology report constitutes hearsay that does not fall within any exception.

Defense counsel first attempted to introduce the toxicology report as a business record through the custodian of records. 4 AA 865-867. Contrary to Appellant's belief, the toxicology report is not a business record as it is not something recorded in the ordinary course of business. Rather, it is a finding by an expert. See NRS 50.275 ("If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."). Even assuming that the toxicology report can be considered a business record, the report would still be inadmissible hearsay.

Generally, out-of-court statements offered for their truth are not allowed. However, NRS 51.135 provides an exception to that rule. NRS 51.135 states:

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of regularly conducted activity, as shown by the testimony of affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule *unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness*.

(emphasis added). During Appellant's first trial, it was recognized that the toxicology report itself yielded unreliable results. 1 AA 153-154; 4 AA 867, 869-

870. Accordingly, because there is an indication of a lack of trustworthiness, the hearsay exception under NRS 51.135 is inapplicable.

Appellant further argues that because defense counsel elicited information about the toxicology report during Detective O'Kelley's cross-examination, the toxicology report should be admitted as well. AOB at 32-33; 5 AA 960-962. Appellant's claim that this elicitation should therefore enable counsel to introduce the toxicology report is nonsensical. Moreover, defense counsel clearly violated the District Court's order on this issue when Det. O'Kelley was asked whether he received information about the victim possibly having methamphetamine in his system during the time of the accident. 5 AA 960. Judge Cadish expressly stated that "before you ask a question about [the toxicology report or methamphetamine] in the trial, you will ask to approach or otherwise take it up outside the presence…[a]nd at that point you're going to have to let me know why you're getting into [the toxicology report or methamphetamine]." 1 AA 154-155.

Therefore, because the toxicology report is hearsay that does not fall within any exception, the district court correctly refused to admit it into evidence.

V.
THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S PROPOSED MERE PRESENCE JURY INSTRUCTION

The Court should reject this contention for the simple reason that Appellant fails to present any authority in support of this argument. See Maresca v. State, 103

Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). In the instant matter, Appellant claims that the district court erred "by declining to give Appellant's proffered instruction regarding 'mere presence' and by addressing a subsequent note from the jury on that issue without Appellant or his attorney being present." AOB at 35.

As to the mere presence instruction, Appellant's sole issue with the jury instruction is that the first paragraph has been routinely given and the second paragraph "was not necessary to instruct on 'every nuance of what constitutes mere presence.'" AOB at 36. However, Appellant took no issue with the complete jury instruction when it was used at his first trial. 5 AA 1010. Further, Appellant offers no authority to support his argument that the district court erred in its conclusion that the jury instruction was inappropriate. Accordingly, this claim need not be addressed by this Court.

As to the Court's handling of the jury question, Appellant compares the instant matter to Manning v. State, 348 P.3d 1015 (2015). However, Appellant's comparison is misplaced as the judge in Manning communicated with the jury outside the presence of all parties after receiving a jury note. Id. Accordingly, the Nevada Supreme Court held that a defendant has the right to be present when a judge communicates to the jury and that a defendant's due process rights are violated when

the court "fails to notify and confer with the parties after receiving a note from the jury." Id. at 1019. In the instant matter, all parties were represented when the court discussed the jury note. 5 AA 1122. Further, while Defendant was not present during this discussion, his presence was waived by defense counsel. Id. The fact that Appellant's "lead counsel" was not present during the discussion is irrelevant.

Therefore, because Appellant offers no support as to the appropriateness of the mere presence jury instruction and because all parties were represented during the discussion of the jury note, the district court correctly denied Appellant's proposed mere presence jury instruction.

VI.
THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S MOTION FOR MISTRIAL

A trial court is accorded substantial deference in determining whether a mistrial is warranted. Meegan v. State, 114 Nev. 1150, 1155, 968 P.2d 292, 295 (1998) (modified on other grounds by Vanisi v. State, 117 Nev. 330, 341, 22 P.3d 1164, 1172 (2001)). "Absent a clear showing of abuse of discretion, the trial court's determination will not be disturbed on appeal." Id. "An abuse of discretion occurs if the court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). In the instant matter, Appellant claims that the district court erred by denying a defense motion for mistrial due to prosecutorial misconduct. AOB at 43. Specifically,

Appellant claims that "the prosecutors made several impermissible and inflammatory comments." Id.

The standard of review for prosecutorial misconduct rests upon Appellant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). Appellant must show that the statements violated a clear and unequivocal rule of law, he was denied a substantial right, and as a result, he was materially prejudiced. Libby, 109 Nev. at 911, 859 P.2d at 1054.

In the instant matter, Appellant's claims of prosecutorial misconduct are misguided as the jury was properly instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence. 6 AA 1189; see also Whorton v. Sheppard, 2010 Nev. LEXIS 72 at *7 (2010) ("We further note that because the jury was instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence and that the jury was properly instructed on the charged crimes, [Appellant] did not demonstrate that there was a

reasonable probability of a different outcome at trial had her counsel objected to the challenged statements.").

Even assuming any or all of the State's comments were improper, the State's comments were harmless in context of the overwhelming evidence against Appellant. NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Constitutional error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001) (quoting Neder v. United States, 527 U.S. 1, 3, 119 S. Ct. 1827, 1830 (1999)). 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).

Here, the evidence was overwhelming against Appellant. McCoy told officers that he was shot by someone in a brown Lincoln that had two black males inside. 4 AA 680-681. Appellant and Green were taken into custody by a NLVPD officer after leading police in a pursuit while driving a Lincoln Continental. 4 AA 706-712. Appellant admitted that he and Green followed McCoy after McCoy was allegedly "talking shit." 1 AA 44, 46. Appellant further admitted that he told Green to shoot at McCoy even though he could not hear or see anything inside McCoy's vehicle. 1

AA 47, 68, 95. Lastly, Appellant admitted that he panicked after hearing Green shoot at McCoy's vehicle and attempted to flee from police. 1 AA 86-87.

Therefore, because the jury was instructed that arguments of counsel were not to be considered as evidence and because the State's comments were harmless, the district court correctly denied Appellant's motion for mistrial.

VII.
CUMULATIVE ERROR DID NOT OCCUR

Appellant briefly argues that his convictions must be reversed because the cumulative effect of errors violated his right to a fair trial. AOB 48-49. This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-855 (2000). Appellant needs to present all three elements to be successful on appeal. Id. Furthermore, any errors that occurred at trial were minimal in quantity and character, and 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).

First, there was sufficient evidence to support Appellant's convictions and, accordingly, the issue of guilt is not close. Second, Appellant has not asserted any meritorious claims of error. Thus, there is no error to cumulate. U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors").

Finally, Appellant was convicted of less than grave crimes. See Valdez v. State, 124 Nev. 1172, 1198, 196 P.3d 465, 482 (2008) (stating crimes of first degree murder and attempt murder are very grave crimes). Therefore, a reversal of Appellant's conviction is not warranted because there was no cumulative error.

CONCLUSION

Based upon the foregoing, the State respectfully requests that this Court order the District Court's Judgment of Conviction be AFFIRMED.

Dated this 1st day of May, 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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 6,514 words and 29 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 1st day of May, 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 1st day of May, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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