IN THE SUPREME COURT OF THE STATE OF NEVADA

SAYEDBASHE SAYEDZADA, Appellant, v. THE STATE OF NEVADA, Respondent.	)	No. 71731 **E-File**

FAST TRACK STATEMENT

1. **Name of party:** Sayed Bashe Sayedzada[1]

2. **Name of attorney submitting this fast track statement:**

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3. **Name of appellate counsel if different from trial counsel:** Same.

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eighth Judicial District, County of Clark, District Court Case No. C310000.

5. **Name of judge issuing order appealed from:** William Kephart.

[1] See Appellant's Appendix Volume III at page 316, hereinafter (III:316).

6. **Length of trial.** Two days.

7. **Conviction(s) appealed from:** Cts. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of Possession of Credit or Debit Card Without Cardholder's Consent (all Category D Felonies).

8. **Sentence for each count:** $25 Admin. Fee; $150 DNA analysis fee; genetic testing; $3 DNA collection fee. Ct. 1 – 19-48 months in prison; Ct. 2 – 19-48 months in prison, CONCURRENT with Ct. 1; Ct. 3 – 19-48 months in prison, CONCURRENT with Cts. 1 & 2; Ct. 4 – 19-48 months in prison, CONCURRENT with Cts. 1, 2, & 3; Ct. 5 – 19-48 months in prison, CONSECUTIVE with Cts. 1, 2, 3, & 4; Ct. 6 – 19-48 months in prison, CONCURRENT with all Cts; Ct. 7 – 19-48 months in prison, CONCURRENT with Ct. 5 and CONSECUTIVE with Cts. 1, 2, 3, & 4; Ct. 8 – 19-48 months in prison, CONCURRENT with Cts. 1, 2, 3, & 4; Ct. 9 – 19-48 months in prison, CONCURRENT with Cts. 1, 2, 3, 4, & 8; Ct. 10 – 19-48 months in prison; CONCURRENT with Cts. 1, 2, 3, 4, 8, & 9; Ct. 11 – 19-48 months in prison; CONCURRENT with Cts. 1, 2, 3, 4, 8, 9, & 10; Ct. 12 – 19-48 months in prison; CONCURRENT with Cts. 1, 2, 3, 4, 8, 9, 10, & 11; Ct. 13 – 19-48 months in prison, CONCURRENT with Cts. 5, & 7,1 and CONSECUTIVE with Cts. 1, 2, 3, 4, 8, 9, 10, 11, & 12. Total aggregate sentence of 38-96 months in prison with 384 days CTS.

9. **Date district court announced decision:** 10/10/16.

10. **Date of entry of written judgment:** 10/19/16.

11. **Habeas corpus:** N/A.

12. **Post-judgment motion:** N/A.

13. **Notice of appeal filed:** 11/09/16.

14. **Rule governing the time limit for filing the notice of appeal:** NRAP4(b).

15. **Statute which grants jurisdiction to review the judgment:** NRS 177.015.

16. **Disposition below:** Judgment upon verdict of guilt.

17. **Pending and prior proceedings in this court:** N/A.

18. **Pending and prior proceedings in other courts:** N/A.

19. **Proceedings raising same issues.** Appellate counsel is unaware of any pending proceedings before this Court which raise the same issues as the instant appeal.

20. **Pursuant to NRAP 17, is this matter presumptively assigned to the Court of Appeals?** This case is presumptively assigned to the Court of Appeals because it is a "direct appeal from a judgment of conviction

based on a jury verdict that does not involve a conviction for any offenses that are category A or category B felonies." **NRAP 17(b)(1).**

21. **Procedural history.**

On October 13, 2015, the State filed an Information in District Court, charging Sayed with thirteen counts of Possession of Credit or Debit Card without Cardholder's Consent. (I:14-17). At his arraignment on October 14, 2015, Sayed pled "not guilty". (II:277). After a two-day jury trial beginning on March 22, 2016, Sayed was found guilty of all charges. (I:215-19;IV:651-52).

On March 29, 2016, Sayed filed a Motion for Judgment of Acquittal Notwithstanding the Verdict or, in the Alternative, for a New Trial. (I:220-27). The court denied Sayed's motion. (IV:656-61).

On October 10, 2016, the court sentenced Sayed to an aggregate total of 38 – 96 months in the Nevada Department of Corrections with 384 days credit for time served. (IV:693-98). The court filed a Judgment of Conviction on October 19, 2016. (II:250-51). Sayed timely noticed his appeal on November 9, 2016. (II:253-55).

22. **Statement of facts.**

On the morning of September 23, 2015, security guard Cory Newton was patrolling the Scottsdale Place condominium complex at 1407 Santa

Margarita in Las Vegas, Nevada. (III:526). Around 6:55 a.m., Newton came into contact with Sayed. (III:531-32). Newton believed Sayed was hiding something under his shirt. (III:531-32). Newton asked Sayed how his day was going and if he was a resident of the property. (III:532). Sayed stated he was not a resident. (III:532). When Newton asked Sayed to come over and talk to him, Sayed told him to "fuck off" and ran towards the back wall of the complex. (III:533). Newton ran after him and made contact with Sayed at the back wall. (III:533-34).

At that point, Sayed turned around and punched Newton in the face twice. (III:534). Then, Sayed took off running towards a dumpster that was located between two parked cars. (III:534-35). Newton followed him and deployed his taser. (III:535). Upon being tazed, Sayed collapsed to the left of the dumpster, in front of a black car. (III:535;550).

Newton placed Sayed in handcuffs and sat him up on the curb near where he had fallen with his hands behind his back. (III:536-37;550). Newton pulled out the taser probes and contacted the police and the fire department. (III:537). Newton obtained Sayed's consent to search his person. (III:537).

Although Newton conducted a thorough weapons search, he did not find anything in Sayed's pockets. (III:551). Newton found a purse hanging

around Sayed's neck, hidden beneath his shirt. (III:538). Newton removed the purse and pulled out a credit card with the name "Jamie Black" on it. (III:538-39). When Newton asked his name, Sayed answered honestly. (III:539). Sayed told Newton he'd found the purse. (III:539).

When the fire department arrived approximately thirty minutes later, Newton brought Sayed over to the paramedics where he declined medical treatment. (III:540). Police arrived about fifteen minutes later and placed Sayed in a patrol car. (III:540;553).

While Sayed was sitting in the patrol car, someone moved the black car that had been parked near the location where Sayed had fallen. (III:550-51). With the car gone, Newton noticed six additional credit cards scattered on the ground, along with two iPhones. (III:542;IV:702-05). Newton gave the credit cards and iPhones, along with the purse, to the police. (III:542;558).

When Officer Joel Reese searched the purse, he found seven credit cards and two pair of sunglasses, but no car keys, no cash and no ID cards in the name of Jamie Black. (III:567,IV:702-05). Officer Reese found no other property belonging to Jamie Black on Sayed's person. (III:568).[2]

[2] Per Officer Reese's notes, six credit cards were found on the ground and seven credit cards were found in the tan purse. See (IV:702-07).

After reading the *Miranda* warnings, Officer Reese asked Sayed why he was at the apartment complex. (III:567-68). Sayed explained that he had taken a short-cut. (III:568). When Officer Reese asked him about the purse, Sayed told him he found the purse "down the street" and gestured in a westward direction. (III:560;568-68). When Officer Reese asked Sayed if he knew there were credit cards in the purse, Sayed told him "no". (III:569). Sayed denied knowing who the credit cards belonged to. (III:569).

At CCDC, Officer Reese made photocopies of the credit cards found at the scene and made hand-written notes on the photocopies, indicating whether the cards had been found in the tan purse or on the ground. (III:561-66;IV:702-07). After documenting the credit cards and other property contained in the tan purse, Officer Reese met with Jamie Black and released the property to her. (III:565;IV:605).

At trial, Jamie Black testified that she had left her purse in her unlocked car on the evening of September 22, 2015. (IV:591-93). Jamie kept her wallet, ID, keys, credit cards[3] and at least $100 cash in her purse. (IV:593-94). She kept some "toys" for her daughter, including a portable DVD player, a laptop and some old cell phones in the vehicle. (IV:593-94).

[3] Some of the cards in Jamie's possession belonged to her parents, Michael and Lori Black, and Jamie had permission to use them in connection with a family business. (IV:586;590-92;IV:712-14,720).

Jamie also had some expired credit cards in the center console of her vehicle. (IV:593).

The next day, Jamie discovered that her purse, the "toys" and everything from the center console of the car had been stolen. (IV:596). On the afternoon of September 23, 2015, Officer Reese returned some – but not all – of the stolen property to her. (IV:603-605). He did not return Jamie's ID, her cash, her rewards cards, or her keys. (IV:605). The only "toys" Jamie got back were two cell phones. (IV:597,605-06). Both Jamie and her parents testified that they had not given Sayed permission to use any of the thirteen credit/debit cards at issue in this case. (IV:586,589-90;598-603).

23. **Issues on appeal.** *See Section 24, infra.*

24. **Legal argument, including authorities:**

A. THE DISTRICT COURT VIOLATED SAYED'S CONSTITUTIONAL RIGHTS DURING VOIR DIRE.

1. Denying challenges for cause.

Sayed's constitutional rights to due process and an impartial jury were violated when the court erroneously denied two challenges for cause. See **Ross v. Oklahoma**, 487 U.S. 81, 85 (1988); **U.S.C.A. V, VI, XIV**; **Nev. Const. Art 1, Secs. 1 & 8.**

During voir dire, defense counsel initially challenged six jurors for cause: Cinda Towne, Nethania Bridgewater, Elaine Davey, Karen Shuey-

Ridges and Lisa Rich. (III:420). The court declined to grant those challenges in order to give the State an opportunity to rehabilitate them. (III:420). When defense counsel later renewed its challenges for cause to Shuey-Ridges and Rich, the court expressly denied those two challenges. (III:505). Defense counsel was forced to exercise peremptory challenges on both Shuey-Ridges and Rich. (IV:699). Ultimately, two of the original jurors whom defense counsel had challenged for cause ended up on the panel: Cinda Towne and Nethania Bridgewater. (I:178).

A district court's ruling on a challenge for cause is reviewed for abuse of discretion. See **Jitnan v. Oliver**, 127 Nev. 424, 431–32 (2011). When evaluating a district court's denial of a challenge for cause, this Court asks whether that "'juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" **Weber v. State**, 121 Nev. 554, 580 (2005) (quoting **Leonard v. State**, 117 Nev. 53, 65 (2001)). "Detached language considered alone is not sufficient to establish that a juror can be fair when the juror's declaration as a whole indicates that she could not state unequivocally that a preconception would not influence her verdict." **Weber**, 121 Nev.at 581.

Here, the court abused its discretion when it passed Shuey-Ridges for cause. Like the victims in this case, Shuey-Ridges had her bank information

stolen and told the court that this experience would "possibly" affect her ability to be fair and impartial. (III:402-03). When the State attempted to rehabilitate her, Shuey-Ridges gave an equivocal answer, saying only that she didn't "think" her experience would prevent her from being fair to the defendant. (III:448). Later on, Shuey-Ridges expressed a belief that the defendant should testify in his own defense and that she "would question why" he did not testify. (II:488). Shuey-Ridges went on to comment, "if there's evidence against you... you would want to testify". (III:489). Shuey-Ridges explained that she "would just have a hard time understanding why you wouldn't testify" if you were not guilty. (III:489).

The court also abused its discretion when it passed Rich for cause. Again, just like the victims in this case, Rich had her credit cards compromised "many times" and the situation made her "very angry". (III:404). Because of her experience as a victim of a similar crime, Rich expressed reservations about her ability to sit as an impartial juror:

> THE COURT: Okay. Is there anything about those events that you feel would affect your ability to be fair and impartial here?
>
> PROSPECTIVE JUROR #029: I believe so. It makes me very angry.
>
> THE COURT: Okay. And so how – how would it affect you?
>
> PROSPECTIVE JUROR #029: I don't know.
>
> THE COURT: It makes you mad.

PROSPECTIVE JUROR #029: It makes me mad. I don't know if I could be impartial.

(III:404). When the State tried to rehabilitate her, Rich could not say, unequivocally, that she could be fair and impartial. (III:449). She only "believe[d]" she could be. (III:449). Then, when cross-examined by the defense, Rich admitted she could be "biased" and felt the job of a defense attorney was to "get your client off the – off the hook." (III:461). Rich also agreed with Shuey-Ridges on Sayed's need to testify in his defense, stating: "if I was innocent I would want to – to say that personally." (III:490).

Both of these jurors should have been stricken for cause. See, e.g., **Weber**, 121 Nev. at 581 ("district court erred in denying Weber's challenges" where neither juror "was able to state without reservation that she or he had relinquished views previously expressed which were at odds with their duty as impartial jurors"); **Preciado v. State**, 130 Nev. Adv. Op. 6, 318 P.3d 176, 179 (2014) (court should have granted challenge for cause where prospective juror's "statement that a graphic photo would make her believe the defendant was guilty . . . cast doubt on her impartiality.").

The court's error resulted in actual prejudice to Sayed. To establish prejudice, Sayed must show that at least one of "the jurors who sat in judgment against him [was] not fair and impartial." **Weber**, 121 Nev. at 581 ("any claim of constitutional significance must focus on the jurors who were

actually seated"). When the court refused to strike Shuey-Ridges and Rich for cause, Sayed was forced to use two peremptory challenges to remove them from the jury. (IV:699). Sayed used his remaining three peremptory challenges on three other jurors who expressed concerns that they could not be fair and impartial based on their experiences as victims of similar crimes.[4] (IV:699).

Unfortunately, Sayed was unable to excuse Cinda Towne or Nethania Bridgewater because he had used up all of his peremptory challenges. (III:508). These two jurors, whom Sayed had previously tried to excuse for cause, were not fair and impartial. (III:420). Like the victims in this case, Towne had her "credit card information stolen" and did not know if she could be partial. (III:400). Bridgewater, a self-described "[m]ilitary brat", had her "bank account compromised twice" and was "robbed". (III:380-381,402). Like one of the victims in this case, Bridgewater's purse was stolen out of her car. (III:402). When asked if these experiences would affect her ability to be fair and impartial, Bridgewater said, "Possibly, I'm not

[4] Opal Stokes could not say, without reservation, that she would not hold her experience as a victim of credit card theft against the defendant. (III:397-98). Raymond Kwan admitted that he believed his experience as a victim of credit card and identity theft "will" affect his ability to be fair and impartial. (III:400). Elaine Davey admitted that her experience as a victim of credit and bank card theft could very much affect her ability to be fair and impartial. (III:401). The court denied Sayed's initial request to strike Davey for cause. (III:420).

sure." (III:402). Neither juror could state "without reservation" that they would be fair and impartial. See **Weber**, 121 Nev. at 581. Because the district court's error deprived Sayed of a fair and impartial jury, a new trial is required. See, e.g., **Ross**, 487 U.S. at 85 (1988); **U.S.C.A. V, VI, XIV; Nev. Const. Art 1, Secs. 1 & 8.**

2. Denying fair cross-section challenge without an evidentiary hearing.

The right to a fair and impartial jury, chosen from a fair cross-section of the community, is guaranteed by both state and federal constitutions. **U.S. Const. Amends. VI & XIV; Nev. Const. Art 1, Secs. 1 & 8; Taylor v. Louisiana**, 419 U.S. 522, 528 (1975); **State v. McClear**, 11 Nev. 39 (1876). Potential jurors have an equal protection right during the jury selection process. **Walker v. State**, 113 Nev. 853, 867 (1998). The selection of a jury in violation of the fair cross-section guarantee is a structural error that allows a defendant relief without a showing of prejudice. **US v. Rodriguez-Lara**, 421 F.3d 932, 940 (9th Cir. 2005) (overruled on other grounds by **US v. Hernandez-Estrada**, 749 F.3d 1154 (9th Cir. 2014)).

During voir dire, Sayed raised a fair cross-section challenge to the venire. (III:424-439). Sayed argued that African Americans and Latinos had been systematically excluded from the jury pool. (III:424-427). As a remedy, Sayed asked the court to dismiss the existing venire and replace it with a

new jury panel. (III:432). Alternately, if the court was unwilling to accept Sayed's representations about systematic exclusion, Sayed asked the court to bring in the jury commissioner so that he could make the required showing. (III:433). The court denied Sayed's fair cross-section challenge without permitting him to call the jury commissioner to testify. (III:437-38). That ruling was error.

To establish a *prima facie* violation of the fair cross-section requirement, a defendant 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 under representation is *due to systematic exclusion* of the group *in the jury-selection process*.

Williams v. State, 121 Nev. 934, 940 (2005) (emphasis in original) (quoting **Evans v. State**, 112 Nev. 1172, 1186 (1996)).

Sayed satisfied the first prong of the test because both "African Americans and Hispanics are distinctive groups in the community". **Hernandez-Estrada**, 749 F.3d at 1159.

Sayed satisfied the second prong of the test by showing that that the number of African Americans and Hispanics on the 45-person venire were not "fair and reasonable in relation to the number of such persons in the community". **Williams**, 121 Nev. at 940. Defense counsel pointed out that

even though African Americans make up 11.6 % of the population of Clark County, they were underrepresented on the venire which contained only three African Americans (6% of the venire). (III:425-26). Defense counsel pointed out that even though Latinos made up 30% of the population of Clark County, they were vastly underrepresented in the venire, which contained only two self-identified Latinos (4% of the venire). (III:425-26).

To determine whether a population is fairly represented in a given venire, this Court looks at the "absolute and comparative disparity between the actual percentage in the venire and the percentage of the group in the community." **Williams**, 121 Nev. at 940 n. 9. "Comparative disparities over 50% indicate that the representation . . . is likely not fair and reasonable." **Id.** (quoting **Evans**, 112 Nev. at 1187). Here, the comparative disparity of African Americans on the panel was 47% while the comparative disparity of Latinos on the panel was 86%.[5] Thus, under **Williams**, the representation of these groups was not likely "fair and reasonable".

Although Sayed satisfied the first two prongs of the test, the court denied him the opportunity to establish systematic exclusion by refusing his reasonable request to call the jury commissioner to testify about the makeup

[5] Even assuming the three individuals who self-identified as "other" races could be considered Latino, the panel would still be only be 11.1 % Latino, which was a comparative disparity of 63%. (III:426).

of the jury pools. (III:438). By so ruling, the court precluded him from obtaining information directly from the jury commissioner that could have supported his fair cross-section challenge. The court's ruling ran afoul of **Afzali v. State,** 326 P.3d 1, 3 (Nev. 2014), which held that a defendant was legally "entitled to information relating to the racial composition of [a] grand jury so that he may assess whether he has a viable constitutional challenge." In its holding, this Court agreed that the constitution's "fair cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right." By refusing Sayed's request to call the jury commissioner, the court precluded defense counsel from both discovering and presenting evidence that could have established a fair cross-section claim, rendering his fair cross-section rights meaningless. Sayed is entitled to a new trial with a new venire to remedy the court's error.

B. THE DISTRICT COURT'S ERRONEOUS EVIDENTIARY RULINGS VIOLATED SAYED'S CONSTITUTIONAL RIGHTS.

A district court's decision to admit or exclude evidence is reviewed for abuse of discretion. **Balthazar-Monterrosa v. State**, 122 Nev. 606, 619 (2006). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." **Crawford v. State**, 121 Nev. 744, 748 (2005) (quoting **Jackson v. State**, 117 Nev. 116, 120 (2001)).

1. The District Court erred in admitting prior bad acts under the res gestae doctrine.

Prior to trial, defense counsel objected to the State's presentation of evidence that Sayed told security guard Cory Newton to "fuck off" and punched him in the face before getting tased. (III:327-28). Defense counsel explained that these uncharged bad acts were inadmissible because the State had not filed a pretrial motion to admit them, nor had the court held a **Petrocelli**[6] hearing as required by law. (III:327-28,331). Defense counsel further argued that the acts were inadmissible under the res gestae doctrine. (III:328-33). While acknowledging that "they would be considered bad acts in some regards", the court overruled defense counsel's objections and permitted the evidence to come in at trial under the res gestae doctrine. (III:334-35).

Defense counsel also objected to the State's presentation of uncharged bad acts evidence that Jamie Black's purse had been stolen from her car shortly before Sayed was found with the purse. (III:335). Defense counsel argued that such evidence would lead to an inference that Sayed had stolen the purse, even though he had never been charged with that offense. (III:335-39). The court overruled the objection and permitted Jamie to testify about the theft of her purse at trial. (III:338-39).

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[6] **Petrocelli v. State**, 101 Nev. 46 (1985).

An uncharged bad act may be admitted under the res gestae doctrine only where it "is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime." **Bellon v. State**, 121 Nev. 436, 444 (2005) (emphasis added). Also known as the "complete story of the crime doctrine", the "res gestae" doctrine is "construed narrowly", such that if a witness can testify about the crime without mentioning the uncharged bad act, the act is inadmissible. **Id**.

In this case, there was no need for Cory Newton to say anything about his encounter with Sayed aside from the fact that he found him at the condominium complex carrying a purse and credit cards that did not belong to him. As defense counsel explained,

> The question is can the State introduce the facts of this case without introducing this other bad act, so to speak. And in this case they can. They can talk [about] how the security guard came into an encounter with the Defendant because he was carrying the purse under his sweatshirt. He stopped the Defendant; subsequently the Defendant was taken into handcuffs and then – and he was searched. And they can just skip over the fact of the battery and the tasing and that doesn't change anything with respect to the actual facts of this case.

(III:329). Because Newton's story could be told without reference to the foul language, the punching or the tasing, the res gestae doctrine did not apply in this case. See **Bellon**, 121 Nev. at 444. Likewise, there was no need for Jamie Black to testify that her purse had been stolen from her car.

For purposes of **NRS 205.690**, all she needed to say was that Sayed did not have permission to use or possess her credit cards.

Evidence that Jamie Black's purse had just been stolen, coupled with Sayed's subsequent encounter with Mr. Newton (*e.g.*, telling him to "fuck off",[7] punching him in the face[8] and getting tased[9]) presented the jury with multiple uncharged "bad acts" that were presumptively inadmissible under NRS 48.045. See **Ledbetter v. State**, 122 Nev. 252, 259 (2006). Collectively, these bad acts were unduly prejudicial and should never have been admitted into evidence. As this Court recognized in **Sherman v. State**, 114 Nev. 998, 1008 (1998), because "improper references to prior criminal acts affect the presumption of innocence, the admission of such references violates due process and requires reversal unless the reviewing court determines that the error was harmless beyond a reasonable doubt."

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[7] The act of swearing at Mr. Newton would constitute disturbing the peace. See **NRS 203.010** ("Every person who shall maliciously and willfully disturb the peace or quiet of any neighborhood or person or family by loud or unusual noises, or by tumultuous and offensive conduct, threatening, traducing, quarreling, challenging to fight, or fighting, shall be guilty of a misdemeanor.")

[8] The act of punching Mr. Newton was criminal battery. See **Hobbs v. State**, 127 Nev. 234, 238 (2011) ("In sum, under NRS 200.481, the "willful and unlawful use of ... force ... upon the person of another" amounts to criminal battery; that force need not be violent or severe and need not cause bodily pain or bodily harm.").

[9] As defense counsel explained, any discussion of tasing necessarily implied that a bad act happened to justify the use of the taser. (III:328).

To determine if the State has improperly referenced a defendant's criminal history, this Court asks "whether a juror could reasonably infer from the facts presented that the defendant had engaged in prior criminal activity." **Sherman**, 114 Nev. at 1008 (citing **Homick v. State**, 108 Nev. 127, 140 (1992). Here, a jury could reasonably infer that Sayed had engaged in prior criminal activity where Jamie testified that her purse was stolen from her car and – just hours later – Newton encountered Sayed with the very same stolen purse in a parking lot. The inference that Sayed stole the purse was only strengthened by evidence of his refusal to cooperate with Newton, his flight from Newton with the purse in tow, and testimony that he punched Newton twice in an effort to get away.[10]

Additionally, because the bad acts evidence was inadmissible under

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[10] Although the court indicated that defense counsel was entitled to an instruction that the jury was "not to consider that the loss of that purse, or theft of that purse, was the Defendant" (III:338), such an instruction would not have cured the damage from admission of this inflammatory evidence. Indeed, even though the court agreed that this inference was not permissible, the court later denied Sayed's motion for judgment of acquittal in part, based on the inference that Sayed stole the purse: "Now there wasn't any facts to support that he actually was the one that stole anything from the car. But there's a reasonable inference based on the time frame, where he was coming from, that that was something that had to of occurred." (IV:660).

the res gestae doctrine, the court erred in failing to give a **Tavares**[11] instruction both at the time the testimony was admitted and in the jury instructions. (I:188-214).

By erroneously allowing the jury to hear unduly prejudicial bad acts evidence under the res gestae doctrine, and then failing to properly instruct the jury about the limited uses for such evidence, the court undermined Sayed's presumption of innocence and violated his due process rights under state and federal law. See **Sherman**, 114 Nev. at 1008. Reversal is required.

2. The District Court erred in failing to exclude evidence of the purse theft as a discovery sanction.

Sayed also argued that evidence of the purse theft should have been suppressed as a sanction for the State's untimely disclosure of a police report regarding the theft of Jamie's purse. (III:336-37). The court overruled the objection and permitted Jamie to testify about the theft of her purse at trial. (III:338-39). That ruling was also an abuse of discretion.

Prior to trial, Sayed filed a discovery motion seeking "any police reports, notes, or other documents that contain information pertaining to this case or any witnesses in this case." (I:155). Police reports fell under the

[11] **Tavares v. State**, 117 Nev. 725, 733 (2001) (requiring district courts to give a "specific" limiting instruction immediately prior to the admission of bad acts evidence, and a "general instruction at the end of trial reminding the jurors that certain evidence may be used only for limited purposes.").

category of documents that the State was required to turn over upon request by defense counsel. See generally, **NRS 174.235**. On March 15, 2016, the court ordered the State "to comply with its obligations for discovery under Nevada Revised Statute, under United States Supreme Court case law, and under Nevada Supreme Court case law, including *Brady*." (II:294).

After calendar call, when it was too late for defense counsel to file a pretrial motion, the State finally disclosed a police report describing the theft of Jamie's purse. (III:336). As defense counsel explained, the untimely disclosure made it difficult for to counter claims that Sayed stole the purse. (III:336). Additionally, the police report indicated that "someone else could've stolen the purse". (III:338). However, with the State's disclosure coming after calendar call, defense counsel did not have adequate time to investigate an alternate suspect or alter the defense strategy. (III:338). Therefore, defense counsel sought, as a remedy for the late disclosure, an order precluding the State from discussing the theft of Jamie's purse at trial. (III:336).

"A trial court is vested with broad discretion in fashioning a remedy when, during the course of the proceedings, a party is made aware that another party has failed to comply fully with a discovery order." **Langford v. State**, 95 Nev. 631, 635 (1979). "This court 'will not find an abuse of

discretion in such circumstances unless there is a showing that the State has acted in bad faith, or that the non-disclosure results in substantial prejudice to appellant...." **Jones v. State**, 113 Nev. 454, 471 (1997) (quoting **Langford**, 95 Nev. at 635).

Here, the court abused its discretion by denying Sayed's request to exclude evidence of the purse theft at trial. Defense counsel was substantially prejudiced by the late disclosure of the police report indicating that another suspect may have been responsible for stealing the purse. Such evidence would tend to support Sayed's story to police that he found the purse. However, defense counsel did not have sufficient time to investigate that possibility or safely incorporate that argument into its defense on the eve of trial. Under those circumstances, the only fair way to handle the late disclosure was to preclude all testimony about the theft. The court's failure to do so substantially prejudiced the defense and requires reversal. See Section (B)(1), supra.

3. The District Court erred by admitting into evidence a photograph of Sayed in handcuffs by a police car.

Prior to trial, defense counsel objected to the admission of State's Exhibit 20, a crime-scene photograph of Sayed standing in front of a police car with his hands cuffed behind his back because it was irrelevant and unduly prejudicial. (III:321,IV:701). After the court overruled the objections

(III:545), the photograph was published to the jury repeatedly during the state's case-in-chief, and on three separate slides in the State's closing Power Point presentation. (III:555,572-575;IV:723,730,737).

The district court abused its discretion by admitting this photograph. As defense counsel argued to the court, the photo was unduly prejudicial because it depicted Sayed in police custody at a time when he was entitled to indicia of innocence. (III:321). See **Haywood v. State**, 107 Nev. 285, 287 (1991) (citing **Illinois v. Allen**, 397 U.S. 337 (1970)) (The rule that a defendant is "innocent until proven guilty means that a defendant is entitled to not only the presumption of innocence, but also to indicia of innocence"); accord **Holbrook v. Flynn**, 475 U.S. 560, 567 (1986).

Not only was the photograph unduly prejudicial, but it was irrelevant to any contested issue at trial.[12] (III:322). Identity was not an issue in this case. (III:321). While the State claimed that the picture was relevant to show "why the security guard felt the need to . . . stop the Defendant" and "make chase once the Defendant began to flee", defense counsel was not challenging Mr. Newton's basis for stopping him. (III:322). As such, the minimal probative value of presenting this picture was vastly outweighed by

[12] See **NRS 48.015** ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence").

the prejudice of showing Sayed in police custody and the picture was inadmissible. See **NRS 48.035(1)** ("Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury").

Admitting this irrelevant picture into evidence, where it was displayed repeatedly throughout trial and closing argument, violated Sayed's constitutional rights to a fair trial and indicia of innocence. See **Haywood**, 107 Nev. at 288; **U.S. Const. amend VI, XIV; Nev. Const. art 1 § 8.** Reversal is required. See **State v. Leyba**, 289 P.3d 1215, 1223-24 (N.M. 2012) (where defendant's booking photo was not relevant to any issue in the case, trial court erred in admitting it); **State v. Sanford**, 115 P.3d 368, 371 (Wash. 2005) (where defendant's booking photo was not relevant to identity, or consciousness of guilt, it was reversible error to admit it at trial).

C. Insufficient Evidence of Intent to Defraud

After trial, Sayed filed a motion for judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial. (I:220-26). In his motion, Sayed argued that there was insufficient evidence to support convictions for possession of the expired credit cards found inside Jamie's purse -- counts 1,2,8,9,10,11 and 12. (I:224-25). The court erroneously

denied the motion. (I:265). As set forth herein, Sayed should be acquitted of counts 1,2,8,9,10 11 and 12 for insufficient evidence.

"The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." **Carl v. State**, 100 Nev. 164, 165 (1984); **U.S.C.A. VI, XIV**. This Court will reverse a conviction when the State fails to present evidence to prove an element of the offense beyond a reasonable doubt. **In re Winship**, 397 U.S. 358, 90 S.Ct.1068 (1970); **Martinez v. State**, 114 Nev. 746 (1998). The standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" **McNair v. State**, 108 Nev. 53, 56 (1992) (quoting **Jackson v. Virginia**, 443 U.S. 307, 319 (1979)). Here, viewing the evidence in the light most favorable to the prosecution, no rational juror could have found, beyond a reasonable doubt, that Sayed had the requisite criminal intent as to counts 1,2,8,9,10, 11 and 12.

To convict Sayed of the crime of Possession of Credit or Debit Card Without Cardholder's Consent, the State needed to prove that Sayed had "the intent to circulate, use, sell or transfer the credit card or debit card with

the intent to defraud." **NRS 205.690**. Yet, the State did not establish that Sayed had the requisite criminal intent with respect to the seven expired credit cards in Jamie's purse. (I:224-25).

The State argued in rebuttal closing that Sayed had separated the credit cards, putting all of the expired credit cards into Jamie's purse and throwing the "unexpired cards . . . the cards Defendant was intending to use" underneath a black car at the apartment complex. (IV:646). As the State argued,

> "you really believe – you don't check your common sense at the door – that all of the unexpired cards happened to just fall out of this purse while the expired cards remain inside it[?] There's a reason on the ground underneath the car all of the cards were either not expired or had recently expired. Why? Those were the cards that were most useful to Defendant.
>
> . . . .
>
> You heard from Jamie Black. The unexpired cards when she last saw them were in her wallet where the expired cards were in the console of her car. Now both her purse containing the wallet and the entire console were removed and somehow taken. So, we have now at a later point in time Defendant possessing the expired cards inside the purse, the cards that were left useful to Defendant, the cards that were still on Defendant's person, and the expired cards . . . that were on the ground.

(IV:646-47). In rebuttal, the State conceded that Sayed had sorted the cards into expired and unexpired categories. According to the State, Sayed intentionally kept the useful cards on his person and left the unusable ones

inside the purse. Where the State argued that Sayed knowingly separated the useful cards from the expired ones, the State could not establish beyond a reasonable doubt that Sayed had the necessary intent to defraud with respect to any of the expired cards.

Additionally, the district court abused its discretion by denying Sayed's motion for acquittal based on a fact that the court knew it was not permitted to consider: the theft of the purse from Jamie's car. In denying Sayed's motion, the court made the following observation:

> The one hanging fact with me was that the witness who owned the cards, who owned the car, indicated that the cards were in a center console separate from the cards that were in her purse that were the valid cards in the purse and that – and the expired cards were in the center console. So considering that – that there's some point in time that [the cards] were separated and then they were re-separated. **Now there wasn't any facts to support that he actually was the one that stole anything from the car. But there's a reasonable inference based on the time frame, where he was coming from, that that was something that had to of occurred."**

(IV:660) (emphasis added).

The State assured the court that it was "not planning on implicating Defendant in this purse burglary." (III:337). The court agreed that the jury would have been entitled to an instruction "that they are not to consider that the loss of that purse, or theft of that purse, was the Defendant." (III:338). Therefore, it was an abuse of discretion for the court to rely on a "reasonable

inference" that Sayed stole the purse to establish Sayed's guilt in this case. Sayed must be acquitted on counts 1,2,8,9,10, 11 and 12.

D. PROSECUTORIAL MISCONDUCT

"When considering claims of prosecutorial misconduct, this court engages in a two-step analysis. First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." **Valdez v. State**, 124 Nev. 1172, 1187 (2008) (footnotes omitted). If an error was not preserved for appeal, the Court will reverse if the error was plain and affected the appellant's substantial rights by "causing 'actual prejudice or miscarriage of justice.'" **Valdez**, 124 Nev. at 1190 (quoting **Green v. State**, 119 Nev. 542, 545 (2003)).

In this case, the State repeatedly argued in closing and rebuttal that the number of credit cards in Sayed's possession gave rise to a "presumption" that he possessed the requisite criminal intent for conviction:

- Now the Judge instructed you on a presumption. You may infer is how you're instructed under the jury instructions, under the law, that a person who had in his or her possession or under his control two or more credit cards in the name of another person. (IV:630-31) (emphasis added).

- Well this is a presumption that needs to be proven beyond a reasonable doubt for you to presume it, for you to infer it. And what we have to shown is that he possessed two or

more cards. . . . Therefore this presumption is open to you." (IV:631) (emphasis added).

- Now Defense said that you can presume – I'm sorry Instruction number 17. . . . We can rely on this presumption to come up with our decision. (IV:647) (emphasis added).

Although Sayed did not object, these arguments were improper because they effectively directed the jury to find that Sayed possessed the necessary criminal intent. See **Brackeen v. State**, 104 Nev. 547, 551 (1988) ("reversible error for the trial court to give an instruction based upon NRS 205.690(3) . . . in which the trial court directed the jury to find a presumed fact against the accused."). Reversal for plain error is required because the State's improper argument lowered its burden of proof on the criminal intent element of the 13 charged crimes, violating Sayed's right to Due Process under the Fifth and Fourteenth Amendments. See **U.S.C.A. V, VI, XIV**.

E. CUMULATIVE ERROR

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." **Valdez v. State**, 124 Nev. 1172, 1195-96 (2008) (quoting **Hernandez v. State**, 118 Nev. 513, 535 (2002). To the extent this Court deems any of the aforementioned errors harmless, reversal is warranted because cumulative error deprived Sayed of his constitutional right to a fair trial. See **Big Pond v. State**, 101 Nev. 1, 3 (1985).

25. **Preservation of issues:** Issue A (preserved), Issue B (preserved), Issue C (preserved), Issue D (plain error), Issue E (preserved).

26. **Issues of first impression or of public interest:** N/A

Respectfully submitted,
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VERIFICATION

1. I hereby certify that this fast track statement 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 fast track statement has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

2. I further certify that this fast track statement complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is either:

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3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast

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track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 24th day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 24th 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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BY */s/ Carrie M. Connolly*
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Defender's Office