IN THE SUPREME COURT OF THE STATE OF NEVADA

SAYEDBASHE SAYEDZADA Appellant, v. THE STATE OF NEVADA, Respondent.	Electronically Filed Aug 11 2017 03:29 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 71731

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:

None known.

5. Procedural history.

The State herein adopts SAYEDZADA SAYEDBASHE's ("Appellant") Procedural History.

6. Statement of Facts.

The State herein adopts Appellant's Statement of Facts.

7. Issues on appeal.

1. Whether the District Court correctly denied Appellant's challenges for cause.
2. Whether the District Court correctly denied Appellant's fair cross-section challenge without an evidentiary hearing.
3. Whether the District Court correctly admitted prior bad acts under the res gestae doctrine.
4. Whether the District Court correctly denied Appellant's request to exclude evidence of the purse theft.
5. Whether the District Court correctly admitted into evidence a photograph of Appellant in handcuffs by a police car.
6. Whether there was sufficient evidence to sustain a finding of Intent to Defraud.
7. Whether prosecutorial misconduct occurred.
8. Whether cumulative error occurred.

8. Legal Argument, including authorities:

I. THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S CHALLENGES FOR CAUSE

Appellant alleges that his "constitutional rights to due process and an impartial jury were violated when the court erroneously denied two challenges for cause." AOB 8. Specifically, Appellant alleges that the Court abused its discretion when it passed Karen Shuey-Ridges ("Shuey-Ridges") and Lisa Rich ("Rich") for cause, which "forced [defense counsel] to exercise peremptory challenges on both Shuey-Ridges and Rich." AOB 9-10. However, Appellant's argument fails.

A trial court has broad discretion in its rulings on challenges for cause. Wainwright v. Witt, 469 U.S. 412, 428-429, 105 S.Ct. 844, 854-855 (1985). A prospective juror may be removed "for any cause or favor which would prevent the juror from adjudicating the facts fairly." NRS 175.036(1); accord. NRS 16.050(1)(f).

"The proper standard for determining when a prospective juror may be excluded for cause . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Walker v. State, 113 Nev. 853, 866, 944 P.2d 762, 770 (1997)(quoting Witt, 469 U.S. at 424). Substantial impairment does not reach a prospective juror's preconceived views on the questions presented by the litigation and arises only where a juror is incapable of setting aside such opinions and basing the verdict upon the evidence presented. Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005).

Appellant alleges that both Shuey-Ridges and Rich should have been stricken for cause. AOB at 11. Appellant first takes issue with the fact that Shuey-Ridges "had her bank information stolen and told the court that this experience would 'possibly' affect her ability to be fair and impartial." AOB 9-10. With regard to Rich, Appellant asserts that Rich is "like the victims in this case" because "Rich had her credit cards compromised 'many times' and the situation made her 'very angry.'" AOB at 10. However, Appellant's claim that Shuey-Ridges and Rich could not be fair and impartial fails as it is belied by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984)("bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record); see also Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002)("A claim is

'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made.").

During voir dire, Shuey-Ridges and Rich both stated that they could set aside any preconceived views or opinions they may have and base the verdict upon the evidence presented:

> MR. DICKERSON: Ms. Shuey-Ridges --
>
> [SHUEY-RIDGES]: Yes.
>
> . . .
>
> MR. DICKERSON: You said you were a victim of a crime?
>
> [SHUEY-RIDGES]: Yes, fraud and credit card bill.
>
> MR. DICKERSON: And how has becoming a victim of fraud and credit card theft affected your idea of the criminal justice system?
>
> [SHUEY-RIDGES]: Well, it didn't really go to the justice system of the -- I just took care of it with the bank and closed my accounts and signed papers that I would testify if they found out who stole my identity.
>
> . . .
>
> MR. DICKERSON: Does that experience leave you feeling like you can't be fair and impartial today in this case to this Defendant?
>
> [SHUEY-RIDGES]: I don't think so.
>
> MR. DICKERSON: You feel like you could fairly listen to the evidence --

[SHUEY-RIDGES]: Yes.

MR. DICKERSON: -- and judge -- judge it as it comes out?

[SHUEY-RIDGES]: Yes, I believe so.

MR. DICKERSON: Thank you, Ms. Shuey-Ridges. Ms. Rich, you were also a victim of a crime; isn't that correct?

[RICH]: Correct.

MR. DICKERSON: And that was fraud and the auto burglary?

[RICH]: Yes.

MR. DICKERSON: And how did that experience affect you and your view of society and the criminal justice system?

[RICH]: I have no problems with the criminal justice system. Personally, it makes you angry, but who wouldn't be.

MR. DICKERSON: Absolutely understandable. Now taking that experience, are you able to take that for what it is, but still be fair and impartial in your judgment of any evidence that comes out today?

[RICH]: I believe so.

MR. DICKERSON: And so you won't hold that experience against this Defendant?

[RICH]: No.

3AA447-449.

To the extent Appellant alleges that the District Court's denial of his challenges for cause resulted in actual prejudice, Appellant still fails because he does not show how the claim would have been successful. "A district court's erroneous denial of a challenge for cause is reversible error only if it results in an unfair empaneled jury. . . [t]he district court has broad discretion in ruling on challenges for cause." Preciado v. State, 130 Nev. __, __, 318 P.3d 176, 178 (2014)(citations omitted). "If the jury actually seated is impartial, the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury." Blake, 121 Nev. at 796, 121 P.3d at 578. "On appeal, if the prospective juror's responses are equivocal, i.e., capable of multiple inferences, or conflicting, the trial court's determination of the juror's state of mind is binding." Walker v. State, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997)(quotations, bracket, and citation omitted).

It is irrelevant whether Appellant had "used up all of his peremptory challenges" and was "unable to excuse Cinda Towne ("Towne") or Nethania Bridgewater ("Bridgewater")" because Towne and Bridgewater both acknowledged that they can be fair and impartial. AOB 12. Just like Shuey-Ridges and Rich, Appellant takes issue with the fact that Towne and Bridgewater were "[l]ike the victims in this case." Id. However, Appellant's claim is similarly belied by the

record. Hargrove, 100 Nev. at 502, 686 P.2d at 225; see also Mann, 118 Nev. at 354, 46 P.3d at 1230.

Appellant alleges that Towne was not fair and impartial because Towne "had her 'credit card information stolen' and did not know if she could be partial." AOB 12. However, Appellant fails to provide any additional evidence demonstrating that Towne was not fair and impartial. Accordingly, Appellant's claim is nothing more than a bare and naked allegation. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

As to Bridgewater, Appellant alleges that she was not fair and impartial because Bridgewater had her bank account compromised twice, was robbed, and had her purse stolen out of her car. AOB 12. Once again, Appellant's claim is belied by the record as Bridgewater stated that she could be fair and impartial during voir dire. 3AA446-447.

As such, Appellant fails to demonstrate that any of the above jurors he complains about was not fair and impartial. Therefore, the District Court correctly denied Appellant's challenges for cause.

II. THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S FAIR CROSS-SECTION CHALLENGE

Appellant alleges that he was denied a "fair and impartial jury, chosen from a fair cross-section of the community" because "African Americans and Latinos had been systematically excluded from the jury pool." AOB 13. However, Appellant's argument fails.

The Sixth and Fourteenth Amendments give criminal defendants the right to be tried by a jury made up of an impartial and representative cross section of their peers. Taylor v. Louisiana, 419 U.S. 522, 526-527, 95 S.Ct. 692, 696 (1975). However, "[t]he Sixth Amendment only requires that 'venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" Williams v. State, 121 Nev. 934, 939-940, 125 P.3d 627, 631 (2005)(quoting Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996)). This right does not "guarantee a jury or even a venire that is a perfect cross section of the community" but recognizes that, as long as the process behind selecting the jury pool is fair, "random variations that produce venires without a specific class of persons or with an abundance of that class are permissible." Id.

In order to make a prima facie showing that the jury pool violates 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 underrepresentation is *due to systematic exclusion* of the group *in the jury-selection process.*

Williams, 121 Nev. at 940, 125 P.3d at 631(emphasis in original). Juries need not "mirror the community and reflect the various distinctive groups in the population"

as long as the juries are "drawn from a source fairly representative of the community." Taylor, 419 U.S. at 538, 95 S.Ct. at 702.

The State acknowledges that African-Americans and Latinos make up a distinctive group in the community, and that five venire members were members of those groups. However, Appellant's argument fails because he has introduced no evidence demonstrating that the underrepresentation of African-Americans and Latinos in his jury venire was due to systematic exclusion of those groups in the jury-selection process. Absent evidence that the jury rolls in Clark County systematically exclude African-Americans or Latinos, Appellant's challenge to the make-up of his particular venire cannot support a prima facie showing of systematic underrepresentation as required by Williams.

Appellant further alleges that the District Court erred in not granting an evidentiary hearing, and relies on Afzali v. State, 326 P.3d 1 (2014), as support for his position. AOB 16. However, Appellant's reliance on Afzali is misplaced as Afzali specifically dealt with a defendant's right to know the racial composition of a grand jury – *not* a jury trial. Id. Moreover, Appellant knows the racial composition of his jury venire and still cannot establish any systematic exclusion. AOB 14-15. See Battle v. State, 385 P.3d 32 (2016)(Afzali did not apply because the racial composition of the jury venire was readily accessible to all parties in the courtroom

when they appeared before the district court and the defendant).[1] Therefore, the District Court correctly denied Appellant's fair cross-section challenge.

III. THE DISTRICT COURT CORRECTLY ADMITTED PRIOR BAD ACTS UNDER THE RES GESTAE DOCTRINE

Appellant alleges that certain prior bad acts that were admitted at trial were "inadmissible under the res gestae doctrine." AOB 17. Specifically, Appellant alleges that the District Court erred in admitting evidence that Appellant told security officer Cory Newton ("Newton") "to 'fuck off' and punched him in the face before getting tased." Id. Appellant further takes issue with the admittance of evidence that Jamie Black's ("Black") purse had been stolen from her car. Id. However, Appellant's arguments fail.

Generally, evidence of other acts are inadmissible where it is used to show that a defendant has the propensity to commit the crime charged. NRS 48.045(2). However, evidence of an uncharged crime "which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime" is admissible. NRS 48.035(3). This long-standing principle of res gestae provides that

[1] Citation to the unpublished opinion in Battle as persuasive authority is permissible. NRAP 36(c)(3)("A party may cite for its persuasive value, if any, an unpublished disposition issued by this court on or after January 1, 2016."); MB America Inc. v. Alaska Pacific Leasing Company, 123 Nev. Ad. Op. 8, 15, n.1 (2016)(allowing citation to unpublished orders, entered on or after January 1, 2016, for their persuasive value).

the State is entitled to present, and the jury is entitled to hear, "the complete story of the crime." Allen v. State, 92. Nev. 318, 549 P.2d 1402 (1976); see also Bellon v. State, 121 Nev. 436, 117 P.3d 176, 181 (2005)("The State may present a full and accurate account of the crime and such evidence is admissible even if it implicates the defendant in the commission of other uncharged acts.").

Contrary to Appellant's assertions, a hearing on the admissibility of the evidence at issue pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), was not required in this case. This Court has held that rather, where the doctrine of res gestae is invoked:

> [The] determinative analysis is not a weighing of the prejudicial effect of evidence of other bad acts against the probative value of that evidence…*the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts*. If the court determines that testimony relevant to the charged crime cannot be introduced without reference to uncharged acts, it must not exclude the evidence of the uncharged acts.

State v. Shade, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995)(emphasis added). Indeed, res gestae evidence cannot be excluded solely because of its prejudicial nature. Shade, 111 Nev. at 894, fn.1, 900 P.2d at 331, fn.1. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed unless manifestly wrong. Wesley v. State, 112 Nev. 503, 512, 916 P.2d 793, 799 (1996).

To be justified in its decision to admit the evidence, the District Court was required only to find that the evidence was an essential part of the complete story of the crime charged. Although Appellant laughably claims that telling Newton to "fuck off" constitutes disturbing the peace, it is not a bad act. AOB 19. Merely swearing and running away from someone does not fit any of the language of NRS 203.010.

Appellant's claim that evidence of punching Newton and getting tased, as well as evidence of Black's purse being stolen from her car, should not have been admitted also fails. Punching Newton in the face was res gestae as to why and how Newton stopped Appellant and ultimately found him in possession of numerous credit/debit cards ("cards"). Similarly, the fact that Appellant was tased is not a bad act, but rather, res gestae as to how Appellant was stopped. Lastly, Black's testimony did not infer that Appellant stole the purse. Instead, her testimony was further evidence that the purse and cards were not in her possession. 4AA595-596. Black's testimony also demonstrated that she did not consent to Appellant's possession of the cards, where the cards were last seen, and how the cards were arranged – unexpired cards in her wallet and expired cards in the center console of the vehicle. 4AA598-604.

Lastly, Appellant alleges that the District Court "erred in failing to give a Tavares instruction both at the time the testimony was admitted and in the jury

instructions." AOB 21; see Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001). However, when evidence is admitted as res gestae, the Court is not required to give a limiting instruction to the jury on the use of the evidence. See Bellon, 121 Nev. at 444, 117 P.3d at 180. Moreover, Appellant's claim is belied by the record as Appellant opted not to include the cautionary instruction the District Court offered, which told the jury not to consider whether Appellant stole the purse. 3AA338; Hargrove, 100 Nev. at 502, 686 P.2d at 225; see also Mann, 118 Nev. at 354, 46 P.3d at 1230. Therefore, the District Court correctly admitted prior bad acts under the res gestae doctrine.

IV. THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S REQUEST TO EXCLUDE EVIDENCE OF THE PURSE THEFT

Appellant alleges 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 [Black]'s purse." AOB 21. Specifically, Appellant alleges that the "untimely disclosure made it difficult to counter claims that [Appellant] stole the purse." AOB 22. However, Appellant's argument fails.

It is well-settled that Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000); Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687 (1996). Evidence is material if there is a reasonable probability that a different outcome would have occurred at trial if the

evidence was disclosed. Kyles v. Whitley, 514 U.S. 419, 433-434 115 S.Ct. 1555, 1565 (1995). There are three components to a Brady violation: "(1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the State; and (3) prejudice ensued, i.e., the evidence was material." Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

Appellant fails to satisfy each component of a Brady violation. First, Appellant cannot demonstrate that the police report is favorable to him. If anything, the police report would harm Appellant's case. As to the second component, the police report was not withheld by the State. When the State discovered the police report, the State scanned a copy to defense counsel "literally as soon as we found out this report's existence." 3AA337. Lastly, Appellant cannot demonstrate that the evidence is material. The State never claimed that Appellant stole the purse, and was "not planning on implicating [Appellant] in this purse burglary at all." Id. Evidence of the purse theft does not change the facts as alleged with regard to Appellant's possession of the cards without the victims' consent. Moreover, as discussed *supra*, the District Court offered a curing instruction which was declined by Appellant. 3AA338.

Accordingly, there was no reason for the District Court to place a discovery sanction because Appellant cannot show that there is a reasonable probability that a

different outcome would have occurred at trial. Therefore, the District Court correctly denied Appellant's request to exclude evidence of the purse theft.

V. THE DISTRICT COURT CORRECTLY ADMITTED INTO EVIDENCE A PHOTOGRAPH OF APPELLANT IN HANDCUFFS BY A POLICE CAR

Appellant alleges that the District Court abused its discretion by admitting a photograph of Appellant in handcuffs by a police car. AOB 24. Specifically, Appellant alleges that the photograph was "irrelevant and unduly prejudicial" because it "depicted [Appellant] in police custody at a time when he was entitled to indicia of innocence." AOB 23-24. However, Appellant's argument fails.

It is well settled that a trial court's determination to admit or exclude evidence is to be given great deference and will not be reversed absent manifest error. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). "The admission of photographs of victims is within the sound discretion of the trial court and will be disturbed only if that discretion is abused. Photographic evidence is admissible unless the photographs are so gruesome as to shock and inflame the jury." Wesley v. State, 112 Nev. 503, 512-13, 916 P.2d 793, 800 (1996)(internal citations omitted).

Contrary to Appellant's belief, the photograph is relevant because it fairly and accurately depicted Appellant's appearance the night of the incident, which helped illustrate why Newton made contact with Appellant, i.e., that Appellant had the purse hidden under his shirt and how obvious that would have been on his small frame.

As to the photograph being unduly prejudicial, Appellant's claim is mistaken for two reasons. First, the handcuffs are not visible in the photograph. 4AA701. Second, there was other evidence adduced at trial that Appellant was detained by Newton and Officer Reese. 4AA558. Accordingly, Appellant was not prejudiced by this photograph. Moreover, the photograph is not so gruesome as to shock and inflame the jury. Therefore, the District Court correctly admitted into evidence a photograph of Appellant in handcuffs by a police car.

VI. THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A FINDING OF INTENT TO DEFRAUD

Appellant alleges that he should be "acquitted of counts 1, 2, 8, 9, 10, 11, and 12 for insufficient evidence." AOB 26. Specifically, Appellant alleges that the State "did not establish that [Appellant] had the requisite criminal intent with respect to the seven expired credit cards in [Black]'s purse." AOB 27. However, Appellant's argument fails.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). "When reviewing a criminal conviction for sufficiency of the evidence, this Court determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution." Brass v. State, 128 Nev. __, __, 291 P.3d

145, 149-150 (2012)(internal citations omitted). "Where there is substantial evidence to support a jury verdict, [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996).

Moreover, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380. This standard does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319-320, 99 S.Ct. 2781, 2789 (1979). Rather, it is the jury's role and responsibility as fact finder "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S.Ct. at 2789.

Accordingly, a jury is free to rely on circumstantial evidence in rendering its verdict. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). In fact, the Nevada Supreme Court has consistently held that circumstantial evidence alone may sustain a conviction. Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002). Further, "[i]n assessing a sufficiency of the evidence challenge, a reviewing court must consider all of the evidence admitted by the trial court, regardless whether that evidence was admitted erroneously." Stephans v. State, 127 Nev. Adv. Op. 65, 262 P.3d 727, 734 (2011)(emphasis redacted).

The crux of Appellant's argument is because the cards were separated into

expired and unexpired sets, it must follow that Appellant did not have the requisite intent for the expired cards found in the purse. AOB 25-29. While the State did point out this separation of cards, it by no means meant that Appellant had no intent to circulate, use, sell, or transfer the expired cards. Appellant separated the cards into the unexpired and expired sets, yet still retained all of the cards. 4AA604. The fact that Appellant held onto the expired cards is pertinent evidence that the jury could rely on in inferring intent, especially coupled with the fact that the expired cards were together in the purse hanging around Appellant's neck – a place of safekeeping. 3AA538. When confronted by Newton, Appellant flees the scene and uses force in order to facilitate an escape. 3AA531-535. Viewing all of the evidence as a whole, a rational trier of fact could have found that Appellant possessed the requisite intent.

While the expired cards might not have been as readily usable, they still contained account information. The definition of a credit or debit card for purposes of NRS 205.690 includes "without limitation, the number or other identifying physical or electronic description of a debit card." NRS 205.690(5). When viewing the evidence, the expired cards still had visible numbers on them that one could use with an intent to defraud.

Appellant further alleges that it was an "abuse of discretion for the court to rely on 'reasonable inference' that [Appellant] stole the purse to establish [his] guilt

in this case." AOB 28-29. However, regardless of whether the jury made the inference that Appellant stole the purse, it does not show Appellant's intent to use the victims' cards that were in his possession. The jury also had the ability to presume intent in this case. NRS 205.690(3) allows the jury to presume Appellant possessed the cards with the requisite intent when more than two cards are possessed.

> A person who has in his or her possession or under his or her control two or more credit cards or debit cards issued in the name of another person is presumed to have obtained and to possess the credit cards or debit cards with the knowledge that they have been stolen and with the intent to circulate, use, sell or transfer them with the intent to defraud.

NRS 205.690(3). The jury had this avenue available to them when deciding the matter at hand. 4AA619. Either the jury found the sorting of all of the cards persuasive, they relied on the presumption, or a combination of the two theories. The jury need not be unanimous on the means or the theory of criminal liability in arriving at their verdict. Walker v. State, 944 P.2d 762 (1997); Evans v. State, 113 Nev. 885, 944 P.2d 253, 258-260 (1997). Therefore, there was sufficient evidence to sustain a finding of intent to defraud.

VII. NO PROSECUTORIAL MISCONDUCT OCCURRED

Appellant alleges that prosecutorial misconduct occurred. AOB 29-30. Specifically, Appellant alleges that the State "repeatedly argued in closing and rebuttal that the number of credit cards in [Appellant]'s possession gave rise to a

'presumption' that he possessed the requisite criminal intent for conviction." Id. However, Appellant's argument fails.

Claims of prosecutorial misconduct that have not been objected to at trial will not be reviewed on appeal unless they constitute "plain error." Leonard v. State, 17 P.3d 397, 415 (2001). Should the Court disagree, then it is the State's position that Appellant's argument fails.

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)(quotations omitted). 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, that he was denied a substantial right, and as a result, he was materially prejudiced. Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993).

As Appellant concedes, he did not object to the State's arguments, and thus, did not properly preserve this issue. AOB 30. Even assuming that Appellant did object, the State merely applied the facts of the case to the jury instructions. This is

a proper argument to make, and doing so certainly did not lower the State's burden of proof. Therefore, no prosecutorial misconduct occurred.

VIII. NO CUMULATIVE ERROR OCCURRED

Appellant alleges that "reversal is warranted because cumulative error deprived [him] of his constitutional right to a fair trial." AOB 30. However, Appellant's argument fails.

"Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). 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.

9. Preservation of the Issue.

Except for Issue VII, the issues have been properly preserved.

VERIFICATION

1. I hereby certify that this Fast Track Response 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 Response has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the type-volume limitations of NRAP 32(a)(8)(B) because it is proportionately spaced, has a typeface of 14 points and contains 4,832 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, 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 response is true and complete to the best of my knowledge, information and belief.

Dated this 11th day of August, 2017.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Charles Thoman*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 11, 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

DEBORAH L. WESTBROOK
Deputy Public Defender

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Deputy District Attorney

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

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