IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MARLIN COOPER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 72091

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction (Jury Trial)
Eighth Judicial District Court, Clark County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MARLIN COOPER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 72091

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(2)(A) because it is a direct appeal from a Judgment of Conviction involving category B felonies.

STATEMENT OF THE ISSUE(S)

1. Whether the State presented sufficient evidence.
2. Whether the jury was properly selected.
3. Whether double jeopardy does not apply.
4. Whether Appellant was given the opportunity to confront witnesses.
5. Whether bad acts were improperly introduced.
6. Whether the State did not fail to disclose exculpatory and material evidence.
7. Whether the district court properly instructed the jury.
8. Whether the State did not commit prosecutorial misconduct.

9. Whether cumulative error does not warrant reversal.

STATEMENT OF THE CASE

On March 1, 2016, the State filed an Information charging James Cooper ("Appellant") with one count of Battery Constituting Domestic Violence ("DV"), one count of Battery Constituting DV – Strangulation, and two counts of Child Abuse, Neglect, or Endangerment. 1 AA 39-42.

The State filed a Motion in Limine (MIL) to Admit Evidence of Other Bad Acts Pursuant to NRS 48.085 and Evidence of DV Pursuant to 48.061 on April 25, 2016. 1 AA 59-103. Appellant filed on Opposition on June 17, 2016. 1 AA 102-112.

On June 7, 2016, an Order requiring Material Witness Brittney Jensen to Post Bail or Be Committed to Custody was filed. 1 AA 136.

The State filed a MIL to Admit a Certified Copy of Sunrise Hospital Medical Records, Recorded 911 calls, and Recorded Jail calls on October 18, 2016. 1 AA 177-242. Appellant filed an Opposition to the State's motion on October 24, 2016. 2 AA 243-251. The State filed a Reply on October 27, 2016. 2 AA 252-58.

On October 27, 2016, Appellant filed a Motion to Dismiss Counts One and Two Based Upon Improper Hearsay. 2 AA 259-63. The State filed an Opposition on November 2, 2016. 2 AA 263-93. On November 7, 2016, the court denied Appellant's Motion. 2 AA 364. The court granted the State's MIL for Bad Acts that same day. 2 AA 366-67.

A Petrocelli hearing was held on November 14, 2016. 3 AA 425-26. Brittney, JB, and Officer Alfonsi testified. Id. Trial began on November 14, 2016, and ended on November 17, 2016. 3 AA 425; 6 AA 1042. The jury found Appellant guilty of Count 1: Battery Constituting DV; Count 2: Battery Constituting DV Count 3: Child Abuse, Neglect, or Endangerment and Count 4: Child Abuse, Neglect, or Endangerment. 2 AA 338-39.

On February 15, 2017, Appellant received an aggregate sentence of a maximum of one hundred twenty months and a minimum of forty-eight months. 3 AA 343. A Judgment of Conviction was filed on March 2, 2017. Id.

Appellant filed a Notice of Appeal on March 22, 2017. 2 AA 346. Appellant filed an Appellant's Opening Brief (AOB) on February 1, 2018. The State responds as follows.

STATEMENT OF THE FACTS

On January 22, 2016, Brittney was at home with her two children, eight-year-old ("JB"), five-year-old ("KJ"), and with her boyfriend of five years, Appellant. 4 AA 691-92; 4 AA 751-52. They all lived together at 356 E. Desert Inn Road, Apartment 111. Id. After dinner, Brittney was on the phone with a friend. 4 AA 694. After she got off the phone, she remembered an argument that happened a couple of weeks prior and became upset with Appellant. 4 AA 694-95. A verbal argument

ensued in their bedroom. Id. Both Appellant and Brittney had been drinking that day. 4 AA 693-94.

Officer Pickens (Pickens) and Officer Sylvia (Sylvia) arrived at the apartment, in response to the battery domestic violence call. 4 AA 839-40. There were two 9-1-1 calls made in relation to the event number – one from Appellant, and one from the children and Brittney. 4 AA 762; 6 AA 1054. On the latter, the children are heard crying in the background and Brittney hysterically asks for help because Appellant punched her son and choked her. 4 AA 700-02. On the former call, Appellant tells the operator that Brittney was drunk, that she jumped him in bed and just started pulling his hair out, and that she was the initial aggressor.

Upon arrival, officers heard children crying and Brittney crying. 4 AA 841-42; 4 AA 893. Sylvia and Pickens saw that Brittney was badly injured. 4 AA 842; 5 AA 902-03. Brittney had significant swelling along her face and all over her head. 4 AA 708-10; 4 AA 842. Sylvia and Perkins observed a clear red mark on Brittney's neck that appeared to be some type of ligature mark. 4 AA 843; 5 AA 903. Crime Scene Analyst, Wright also responded to the scene to take photographs and documented the extent of Brittney's injuries. 4 AA 872-74. Paramedics arrived and Brittney was transported to Sunrise Hospital. 4 AA 706, 710.

Pickens spoke with Appellant, who was outside of the apartment smoking a cigarette. 4 AA 895-96. Pickens testified that Appellant's demeanor was calm but

that he did exhibit signs of intoxication. 4 AA 496. Appellant told Pickens that "he didn't want to let this happen again." Id.

Further, Appellant explained that Brittney came into his room angry because she went through his phone and started pulling on his hair. 4 AA 898. Appellant showed Pickens his finger and alleged that Brittney had bit him. Id. Pickens noted Appellant did not have any other visible injuries, except for a few of his dreadlocks having been pulled out. 4 AA 899. Appellant insisted he did not punch or kick Brittney. 4 AA 898.

Brittney had blond dreadlocks that were noticeably different than Appellant's black dreadlocks, which had been ripped out of her head and scattered throughout the apartment. 4 AA 800-801; 5 AA 916. Photographs taken of the apartment showed that the apartment was in a state of disarray. 4 AA 876-77. Pillows were scattered on the floor of the kitchen. 5 AA 919. The shower curtain in the bathroom was torn down and drops of blood were in the shower. 5 AA 924. Blood stains covered the ottoman in the master bedroom. 5 AA 923. Officers noted that the apartment was small, approximately 800 square feet, and the children's room was in close proximity to where the violence took place. 5 AA 904. Officers testified that their observations of the state of the apartment was consistent with what they learned from speaking with JB and Brittney. 4 AA 878; 880; 5 AA 914-17; 5 AA 923.

Sylvia and Perkins testified they spoke with JB upon arriving at the scene. 4 AA 844; 5 AA 906. JB told Officers that Brittney and Appellant were arguing in their bedroom. 4 AA 853; 5 AA 910. The argument became physical when Appellant got out of bed, came over to Brittney and punched her in the stomach, causing her to fall to the ground. 4 AA 853-55; 5 AA 910. Appellant continued to yell at Brittney while she was on the ground. Id.

Brittney got up from the ground and tried to get away from Appellant by running into the kitchen and attempting to close the door behind her. 4 AA 855; 5 AA 911. Appellant chased Brittney, pushed through the kitchen door, knocked her down, and caused her to hit her head against the corner of the kitchen counter as she fell. Id. While Brittney was on the kitchen floor, Appellant kicked her and stomped on her face. Id.

While Brittney was on the ground being stomped on by Appellant, she yelled out for JB to call 9-1-1. Id.; 4 AA 697; 5 AA 912. As JB grabbed the phone to call the police, Appellant turned around to get the phone away from JB. 4 AA 855; 5 AA 912. JB tried to run away from Appellant by running down the hallway toward JB's bedroom, but Appellant chased after JB. Id. Appellant cornered JB in the bedroom, threw JB down onto the bed knocking down a television that was in the room and took JB's phone. Id.

Appellant then, again, turned his rage to Brittney, and the physical beating of Brittney moved from JB's room to Brittney and Appellant's room. 5 AA 914. Appellant continued to beat Brittney in their room, and Brittney pleaded with the Appellant to just leave. 4 AA 855. While Appellant and Brittney were wrestling on the ground, Appellant continuously punched Brittney and Appellant caused Brittney to hit her head on some furniture. Id. When Appellant was finished beating Brittney, he walked out of the apartment. Id.

Pickens explained that he interviewed KJ. 5 AA 906. Understandably, five-year-old KJ did not offer as much detail as her older brother, JB. 5 AA 942. However, JB told Officers that KJ was present in the small apartment when the attacks on their mother occurred. 5 AA 913. JB told Pickens that he felt sore after he was thrown down on the bed but that he did not need medical attention. 5 AA 918. Later, it was discovered Appellant hid the phone in the kitchen cupboard. 5 AA 939.

JB and KJ testified at trial. 4 AA 823; 4 AA 805. Both children did not recall the specifics of what they saw or told Officers. JB's verbal statements to officers regarding this event and his prior written statement from the 2015 DV were admitted. 5 AA 907; 7 AA 1187. However, the children did remember being scared the night of Appellant's attack on their mother. 4 AA 814; 4 AA 825. KJ testfied that she remembered Appellant pushing JB onto the bed in their room. 4 AA 824-25.

Appellant testified in his defense. 6 AA 1043. He claimed that Brittney was angry and started throwing his tool bag and jumped on his head pulling out his hair in the kitchen. 6 AA 1052. Appellant also testified that Brittney bit his finger. 6 AA 1053. After, Appellant called 9-1-1. 6 AA 1054.

Appellant returned to the master bedroom bathroom where he said Brittney tried to enter but was unsuccessful. 6 AA 1057. Although Brittney was bleeding profusely from her face, Appellant argued that the blood around the house was from his finger. 6 AA 1074. He denied ever kicking, stomping, strangling, or punching Brittney. 6 AA 1058. Appellant claimed that after he was attacked by Brittney he left and waited outside for the police to arrive. 6 AA 1062. Appellant asserted that all of his actions were in self-defense. 6 AA 1067. According to Appellant, the children were in their room at the time the attacks occurred. 6 AA 1084. Appellant denied taking a phone away from them or throwing JB on the bed. Id.

ARGUMENT

I.

THE STATE PRESENTED SUFFICIENT EVIDENCE

Appellant argues that the State offered insufficient evidence to support Appellant's convictions. AOB at 14-17.

"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. 748, 753, 291 P.3d

145, 149-50 (2012). The jury, not the court, assesses the weight of the evidence and determines witness credibility. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). When there is substantial evidence in support, the jury's verdict will not be disturbed on appeal. Id. This Court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact. Id. Circumstantial evidence alone may support a judgment of conviction. Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000).

Appellant contends that the State did not prove Child Abuse, Neglect, or Endangerment because KJ was not present in the same room when Appellant hit Brittney and because the children did not sustain any visible physical or mental injuries. AOB at 14.

NRS 200.508(1) provides that a person is guilty of felony Child Abuse, Neglect or Endangerment where:

> A person who willfully causes a child who is less than 18 years of age:
> a. To suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect, *or*
> b. *To be placed in a situation where the child may suffer* physical pain or mental suffering as result of abuse or neglect.

2 AA 309 (emphasis added).

Appellant was charged with two counts of Child Abuse Neglect or Endangerment for "placing JB [and KJ] in a situation where [they] might have suffered unjustifiable physical pain or mental suffering." 2 AA 297.

NRS 200.508(1) does not require that the State prove that JB and KJ were in fact psychically or mentally harmed. The State may pursue two different methods of proving "abuse or neglect." The first way is by proving physical injury of non-accidental nature. NRS 432B.090; 2 AA 297. The second method is to prove negligent treatment/maltreatment. NRS 432B.140.

> Negligent treatment or maltreatment occurs *if a child has been subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic* has been abandoned, is without proper care, control or supervision or lacks the subsistence, education, shelter, medical care or other care necessary for the well-bring of the child because of the faults or habits of the person responsible for the welfare of the child or the neglect or refusal of the person to provide them when able to do so.

Id. (emphasis added).

The State proceeded on both theories, but emphasized the theory of negligent and/or maltreatment. Defendant placed both children in situations where they may have suffered physical pain or mental suffering as a result of abuse or neglect – either one or both physical injury of non-accidental nature and negligent treatment or maltreatment. The State specifically said in closing:

> The child abuse, neglect charge with [JB], he's not charged with punching [JB]. He's charged with beating up

> his mom in front of her, and he's charged with the fact that he threw him on the bed and grabbed the phones out of his hand.

6 AA 1145.

However, Appellant did put JB and KJ in a situation where they could have and did suffer harm. KJ testified that she remembered being in the room while Appellant threw JB onto the bed. 4 AA 824-25. By being in the small apartment at the same time the abuse against JB and Brittney occurred, KJ was also victimized. Additionally, JB told officers the night of the attack that he felt sore after Appellant threw him onto the bed. 5 AA 918. The mere fact that JB does not remember the specific details of each event at trial does not mean that the crime did not occur. JB and KJ both testified that they were scared the night the crime occurred. 4 AA 814, 4 AA 825. Officers testified that when they arrived both children were crying. 4 AA 841.

This Court has never held that a victim of Child, Abuse, Neglect or Endangerment must testify about the specific details of abuse. As the State argued in closing, a person who drives drunk with an infant child in the back seat of a car is still guilty of Child Abuse, Neglect, or Endangerment even though the child cannot testify and the car did not crash. 6 AA 1111-12.

The fact that officers or CSA Wright did not think that child abuse occurred is irrelevant. AOB 16-17. Officers are not the charging authority in this case. The

jury had the opportunity to see pictures of the 800 square foot apartment and see how close the children were in proximity to where the attacks occurred in the kitchen and bedroom. 5 AA 904. The jury had the opportunity to listen to Officers and the children's testimony and determine the credibility of each witness.

Appellant's argument that the children did not suffer any emotional trauma is not consistent with the trial testimony and facts of the case. Appellant himself noted that JB called 911 to get help. AOB at 17. Additionally, KJ and JB testified they were afraid. 4 AA 824; 4 AA 825. Therefore, this Court should not disturb the jury's verdict because sufficient evidence was presented to convict Appellant of two counts of Child Abuse, Neglect, or Endangerment.

Appellant argues that his Battery DV charges were insufficiently supported by hearsay testimony of Sylvia and Pickens. AOB at 17.

The jury was instructed pursuant to NRS 33.018 and NRS 200.48:

> Battery Constituting Domestic Violence occurs when an individual commits a battery upon. . . a person with whom he has had or is having a dating relationship. . .
>
> Battery is defined as any willful and unlawful use of force or violence upon the person of another.

2 AA 305-06.

Appellant was charged with count one for punching the said Brittney in the stomach and/or throwing her to the ground and/or kicking and/or stomping on

Brittney. 2 AA 303. The State based count two upon Appellant's "strangulation" of Brittney. Id.

Appellant misstates that the State's case rested upon the testimony of what the children said to Officers. The photographs of Brittney taken after the attack tell a thousand words and are corroborated by the testimony. 4 AA 710; 3 AA 444. The jury could see the picture of Brittney's eye swollen shut. Id. The jury could see the photographs of blood on furniture throughout the apartment. 5 AA 923-24. The jury saw photographs of blood dripping down Brittney's face. 3 AA 444. For further measure, the jury reviewed Brittney's medical records indicating that she suffered from swelling on both sides of her head and face. 1 AA 230.

Moreover, Brittney testified that she lived with Appellant and had a relationship with him during the time of the attack. 3 AA 435. The jury heard the 9-1-1 calls from Brittney. First responders noted upon arriving on the scene the extent of Brittney's injuries. 4 AA 841-43. Further, evidence was presented that one attack on Brittney occurred in the kitchen and another occurred in the bedroom. 5 AA 911-14.

Appellant argues that the conviction rested on incompetent testimony of what JB said to officers. AOB at 17-18. Appellant alleges the officers did not separate the children while interviewing them. Id. First, these issues were not properly preserved for appeal. Appellant never objected on the grounds that KJ or JB were incompetent

to testify. Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997); McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1998)(where this Court held it will not consider an argument on appeal that was not first argued before and therefore considered by the district court on the merits). Second, the jury was fully apprised of the fact that officers were not present when the crimes occurred. 4 AA 835. Third, even if these issues were properly preserved, Appellant had the opportunity to cross-examine officers about their questioning of KJ and JB. 5 AA 924.

Appellant contends that the Officer's testimony of what KJ and JB said was improper because the Officers did not record what the children said. AOB at 17. At trial, Officer Pickens and Officer Sylvia testified that they did not record any of the interactions with KJ, JB, or Appellant because they did not have the capability at the time to conduct a recorded interview. 4 AA 862; 5 AA 926-27.

Most importantly Appellant's allegation is not supported by the record, Pickens specifically testified when he is investigating an incident he does not like to interview witnesses together. Id. Pickens kept with his standard method of investigation in this case and kept KJ in her room while he spoke to JB. Id. Pickens and Sylvia explained they spoke with JB separately and noted that JB's rendition of events matched with what he told both Officers. 5 AA 906-07. Further, the Officer's observations of the disheveled apartment were corroborated by JB's explanations. 5 AA 913. The photographs taken by CSA Wright as well as the body camera evidence

added additional support to JB's explanation of events. 4 AA 872-74; 4 AA 832. Moreover, jail calls between Brittney and Appellant were presented where Brittney said she "looked like a fucking clown" after Appellant's attack. 4 AA 716. Therefore, this Court should deny Appellant's claim that insufficient evidence and not disturb the jury's verdict.

II.
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION DURING JURY SELECTION

Appellant claims that the court denied him his constitutional rights by denying his challenge to the State's use of its peremptory challenges pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). AOB at 21. Appellant's jury venire consisted of two African American males that were excused by the court without the State's involvement for cause, two African American females[1] (excluded by peremptory challenges), and one African American male who was selected to be on the jury panel - Juror 006. 3 AA 648-49.

At trial, Appellant argued a Batson violation occurred because the State used two out of its five peremptory challenges to remove two out of the three African-American jurors. 3 AA 647. The court responded that Appellant needed to provide more of an explanation and it appeared that Appellant's argument was based upon the percentage makeup of the jury. 3 AA 648-49. Appellant's only expansion of the

[1] Jurors 217 and 274.

argument was that he felt there was a "pattern" of exclusion because Jurors 217 and 274 were preempted when both said that they could be a fair juror. 3 AA 649-50. Again, the court gave Appellant another opportunity to provide the court with more details showing discrimination and noted it could think of a host of reasons why counsel would want to preempt Juror 274 and 271. 3 AA 650. Appellant could not articulate any further argument. Id. Accordingly, the court did not require the State to provide a race-neutral explanation and denied Appellant's Batson challenge because it found that Appellant had not made a prima facie showing of discrimination. Id.

> An equal protection challenge to the exercise of a peremptory challenge is evaluated using a three-step analysis set. First, the opponent of the peremptory challenge must make out a prima facie case of discrimination. Then, the production burden shifts to the proponent of the challenge to assert a neutral explanation for the challenge that is clear and reasonable specific. Finally, if there has been a prima facia showing of discrimination and the State has given a neutral explanation, then the court must decide whether the opponent of the challenge has proved purposeful discrimination.

McCarty v. State, 132 Nev. __, __, 371 P.3d 1003, 1007 (2016).

Since Appellant has failed to make a prima facie showing of discrimination, Appellant's claim lacks merit. 3 AA 650.

To establish a prima facie case under step one of the Batson analysis, the opponent of the strike must show that the totality of the relevant facts gives rise to

an inference of discriminatory purpose. Watson v. State, 130 Nev. __, ___, 335 P.3d 157, 166 (2014). The opponent of the strike must provide sufficient evidence to permit the trier of fact to "draw an inference that discrimination has occurred." Id. The mere fact that the State used a peremptory challenge to exclude a member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination under Batson's first step. Id. There is "no magic number" of challenged jurors which shifts the burden to the government to provide a neutral explanation for its actions. Turner v. Marshall, 63 F.3d 807, 812 (9th Cir. 1995). The proponent of the strike must give "clear and reasonably specific" explanation of his "legitimate reasons" for exercising the challenges. Brass, 291 P.3d at 149.

A reviewing court affords great deference to a district court's factual findings regarding whether the proponent of a peremptory strike has acted with discriminatory intent, and will not reverse the district court's decision unless clearly erroneous. Watson, 130 Nev. at __, 335 P.3d at 165.

Appellant was not entitled to a handpicked jury of a certain percentage as he appears to indicate. AOB at 25. In Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 702 (1975), the United States Supreme Court provided guidance on the selection of jurors:

> We impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. *Defendants are not entitled to a jury of any particular composition*.

(emphasis added). Therefore, the district court correctly concluded that Appellant failed to establish a prima facie case of discrimination because the argument was based upon the percentage makeup of the jury.

In Watson, a defendant argued that he showed prima facie evidence of discrimination when the State used six out of nine peremptory challenges to strike female jurors. Watson, 130 Nev. at __, 335 P.3d at 168. After all for cause challenges were resolved, the women constituted fifty-six percent of the venire panel. Id. The State used sixty-seven percent of its peremptory strikes to remove women. Id. This Court held that the State's use of six of its nine peremptory challenges against women, standing alone, was not sufficient to give rise to an inference of discrimination. Id.

Here, after all for cause challenges were resolved three African American jurors remained out of the twenty-three person panel. African Americans consisted of 13.04% of the panel.[2] The State then used two out of its five (40%) peremptory challenges to strike Jurors 217 and 274.[3] Juror 006 became part of the twelve person jury and consisted 8.3% of the ultimate vote in the verdict.[4] 6 AA 1155. Appellant, like in Watson, was not able to give any additional information about how

[2] 3 African Americans / 23 total jurors remaining = 13.04%
[3] 2/5 = 40%
[4] 1/12= 8.3%

discrimination was present. Therefore, Appellant's argument that the percentages did not meet what he wanted is not sufficient to meet step one of Batson.

Appellant argues the State's discriminatory use of peremptory challenges was revealed when the State asked the jurors whether anyone was a sovereign citizen or identified with the Black Lives Matter (BLM) movement. AOB at 27. Appellant did not present the district court with this argument. 3 AA 626. Therefore, this Court should reject to hear this claim. Rippo, 113 Nev. at 1259, 946 P.2d at 1030; McKenna, 114 Nev. 1044, 968 P.2d 739. Furthermore, Appellant fails to prove disparate questioning by asking about affiliation with BLM. Individuals of all racial backgrounds can and do identify with BLM and as sovereign citizens.

Although Appellant attempts to infer that Juror 274 was struck from the jury based upon her response to the BLM question, the record demonstrates that Juror 274 said she was not for or against the BLM organization. 3 AA 628, AOB at 27. Since she did not identify as a member of BLM, she could not be struck for her affiliation with the group. However, Juror 274 answer did show a bias towards Appellant:

> *I will stand by him* willing to take a jury trial. To me it says a lot that there's something else that needs to be heard. And if his attorney is willing to do that, because normally, ya'll tell him like we going to make a deal, and that's the facts. And that has to deal with a lot with Black Lives Matter [sic].

3 AA 627 (emphasis added).

Therefore, Appellant did not meet his burden of proving a prima facia case of discrimination and the court did not err in jury selection because the State did not ask disparate questions during jury selection.

Appellant argues that the court erred because they failed to find that Appellant met his burden under step one of Batson, failed to require the State to address step two of Batson, and showed "possible bias" against Appellant in rendering her decision. AOB at 29.

An appellate court reviews a district court's ruling on the determination of discriminatory intent for clear error. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. McCarty, 132 Nev. at __, 371 P.3d at 1007. Where the district court has concluded that a prima facie showing has not been made, the request for and provision of explanations does not convert a first-step Batson case into a third step case. Watson, 130 Nev. at __, 335 P.3d at 169.

As discussed Supra, the district court did not err in finding that Appellant failed to show prima facia discrimination. The district court gave Appellant multiple opportunities to expand their argument in making their Batson challenge. The court first said, "what is the basis for the challenge, I hope there is more than that." 3 AA 648. Appellant repeated the same argument that the State was striking two African American jurors even though they said they could be fair. Id. The court gave counsel

a second opportunity to expand the argument when it said to Appellant "it sounds like your argument has to do with the percentage make-up of the jury." 3 AA 649. The district court listened as Appellant again repeated the same claim that the issue was based upon the percentage make-up of the jury and that "there appear to be no other reasons for disqualifying [Juror 217 and 274] because they all - - both indicated they could be fair." Id. The district court for yet a third time said that unless Appellant could be "a little more specific in [their] analysis, the court would have to deny [Appellant's] motion. 3 AA 650. Appellant said he understood. Id. The court never cut short Appellant's questioning of any of the jurors. Appellant never s asked the district court to require the State to supply reasons for removing Juror 217 and 274. Regardless, the court was not required to order the State to supply reasons until Appellant met his burden of showing prima facia discrimination. McCarty, 132 Nev. at __, 371 P.3d at 1007. In this case, the burden never shifted to the State.

Appellant's reliance on Brass to assert judicial bias is faulty. AOB at 31-32. This Court reviews alleged judicial misconduct for plain error when it has not been preserved for appellate review. Oade v. State, 114 Nev. 619, 622, 960 P.2d 336, 338 (1998). Remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence. Fugate v. State, __ Nev. __, __, 396 P.3d 745 (2017).

Appellant still fails to recognize that it was his burden to prove prima facia discrimination prior to advancing to the next step. In Brass, the district court said that it would conduct a Batson hearing after the defense made a challenge on the State's preemptory challenge of Juror 173. Brass, 128 Nev. at __, 291 P.3d at 148. The district court took a break and permanently excused Juror 173 without a hearing. Id. This Court then held that there was error because the defendant did not have the opportunity to respond to the State's neutral explanation. Id. at 149.

Unlike in Bass, here, the district court did not advance to the stage where a hearing was required because no prima facia discrimination was shown. The district court here did not dismiss the juror after advising the parties that it would conduct a hearing. The trial court gave Appellant multiple opportunities to expand their Batson challenge. Appellant did not take advantage of these opportunities. Therefore, this case is not analogous to Bass. Appellant's claim of judicial bias must fail.

III.
APPELLANT'S CONVICTIONS FOR BATTERY DV ARE NOT IMPERMISSIBLE

Appellant contends that double jeopardy applies because Appellant was convicted of two counts of Battery DV. AOB at 33.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This protection applies to Nevada citizens

through the Fourteenth Amendment to the United States Constitution, Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056 (1969), and the Nevada Constitution, Nev. Const. art. 1, § 8.

The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

To determine whether two statutes penalize the same offense, this Court looks to Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180 (1932). The Blockburger test "inquires whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment and successive prosecution." United States v. Dixon, 509 U.S. 688, 696, 113 S. Ct. 2849 (1993); see Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001) ("under Blockburger, if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses").

Appellant cites case law outside of the jurisdiction in an effort to prove that two convictions relating to DV violate double jeopardy. AOB at 34. Nevada Courts have never held that a Defendant cannot be convicted with multiple DV incidents when they beat a victim multiple times during the same day. In Vergara-Martinez v.

State, this Court held that it was not double jeopardy for the State to convict a defendant of battery with the use of a deadly weapon resulting in substantial bodily harm and mayhem after the defendant used a machete to sever the hands and crack the skull of his victim during a single event. Vergara-Martinez v. State, 2016 WL 1375648 (Apr. 2016). The Court reasoned that double jeopardy did not prohibit the dual convictions because each machete stabbing into a victim's person constituted its own distinct separate act of violence resulting in distinct injuries to distinct body parts. Id.

Appellant argues that there were only injuries to Brittney's face. AOB at 18. At trial, Appellant conceded that there was bruising on Brittney's arms. 6 AA 1131. Moreover, the State presented photographs of Brittney's bruised and cut elbow. 4 AA 709. Additionally, Count 2 (where the jury did not find strangulation) was not charged based upon injury to Brittney's stomach or face. 2 AA 296. Instead, Count 2 was charged based upon the ligature mark on Brittney's neck. Therefore, this Court should reject the contention that injuries were sustained only to one area of Brittney's body.

Appellant did not object to the battery DV instruction at trial. 5 AA 975. Appellant did not object to the battery constituting DV instruction. 5 AA 976; 5 AA 993-94; 2 AA 316. Appellant did not object when the jury returned the verdict or at sentencing that the conviction violated the double jeopardy clause.

While the parties were discussing jury instructions, the State noted:

> Ms. Rhodes: For the record, after the proposed, we did include the lesser included that was in here. This one is specifically for the battery domestic violence and then we also included the second one that's specific to the battery domestic violence strangulation.
> The Court: Very well. Any input on that, Ms. Walkenshaw?
> Ms. Walkenshaw: That's correct, Your Honor.

5 AA 978.

Appellant's argument that Appellant's convictions fall under the same "unit of prosecution" must fail. The controlling statute is NRS 33.018 specifically titled "Acts which constitute Domestic Violence." The title alone is clear that DV convictions can occur in multiple different ways.

> Domestic violence occurs when a person commits one of the following acts against. . . any other person with whom the person has had or is having a dating relationship. . .
> a) Battery
> b) Assault
> c) Compelling the other person by force or threat of force to perform an act which the other person has the right to refrain or to refrain from an act which the other person has the right to perform.

The legislature in creating the DV statute by outlining the various ways that DV occurs demonstrates the intent not to force the State to pick and choose which violent action on a DV partner is worthy of being charged. The legislature declared "there is a critical public need to ensure the effective prosecution of persons *who commit acts* of domestic violence in this state." NRS Title 18, Ch. 228 Undesignated

Note (1997). Here, Appellant committed DV against Brittney in both the kitchen and the bedroom. 5 AA 919-23. Appellant kicked, punched and stomped on different parts of Brittney's body including her face, her stomach, and her neck. Most importantly, Appellant's claim is waived due to Appellant's request at trial to submit a lesser included offense to the jury instruction for DV. 5 AA 994-95. Thus, this Court should reject Appellant's argument that a defendant should not be held accountable for multiple attacks. Appellant is not entitled to re-sentencing or a new PSI.

IV.
APPELLANT HAD THE OPPORTUNITY TO CONFRONT THE EVIDENCE AND TESTIMONY AGAINST HIM

Appellant argues that although JB testified at trial, the statements he made to police were improperly admitted as testimonial hearsay. AOB at 38.

This Court generally reviews evidentiary rulings by the district court for an abuse of discretion. Hernandez v. State, 124 Nev. 639,646, 188 P.3d 1126, 1132 (2008). Trial courts have considerable discretion in determining relevance and admissibility of evidence. Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004).

In Delaware v. Van Arsdall, the United State Supreme Court held that "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Pantano v. State, 122 Nev. 782, 790, 138 P.3d 447, 482,

(2006). Further, "[w]hen a witness gives testimony that is marred by forgetfulness, confusion, or evasion. . . the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination. Id. Under Crawford, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. Id.

JB's statements to Sylvia and Pickens were properly admitted as a prior inconsistent statement. At trial, JB testified that he remembered talking to the police but did not remember the statements he made to the police about what he observed the night of Appellant's attack. 4 AA 809-14; 4 AA 846. Sylvia testified that he had interviewed JB after he responded to the 911 call. 4 AA 844. The State asked what JB had told Sylvia. Id. at 845. Appellant objected on hearsay grounds. Id. The State rebutted that the statement should be admitted as a prior inconsistent statement under Crowley as both impeachment and substantive evidence. Id. The district court took a recess to review Crowley. Id. at 847. After, Appellant read Crowley, he changed his objection arguing that JB's statements through Pickens would be collateral extrinsic evidence. Id. at 850. The district court overruled Appellant's objections and allowed Pickens to testify under the reasoning of Crowley. Id.

In Crowley, a witness testified that she had a conversation with an investigator but did not recall telling the investigator that the defendant was intoxicated an acting

inappropriately. Crowley, 120 Nev. at 35, 83 P.3d at 286. The State then called the investigator who testified what the witness had previously told him about the defendant. Id. This Court concluded that the admission of the witness's statements was proper because "when a trial witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement that makes it a prior inconsistent statement pursuant to NRS 51.035(2)(a)." Id.

Similarly, in Pantano, a child victim testified at the preliminary hearing and trial that she did not know what happened during sexual abuse. Pantano, 122 Nev. at 786, 138 P.3d at 480. At trial, the State introduced the child victim's prior statements through an audio taped interview with detectives where the victim explained the abuse. Id. Defendant upon appeal alleged that he was unable to cross-examine the child victim. Id. at 787, 480. This Court found that the court did not err in admission of the recorded interview because defendant cross-examined the victim at trial and she said she did not know what she said to the detectives and that effectively undermined her testimony. Id. 790, 482.

Appellant relies on Flores v. State, 121 Nev. 706, 710, 120 P.3d 1170, 1174 (2005). In Flores, the sole eyewitness to a crime was unavailable to testify. Id. The trial court allowed the eyewitness' testimony through surrogates under NRS 51.315(1) based upon unavailability. Id. This Court held in part that there was a

Crawford violation because it avoided the cross-examination of the eyewitness. After Flores, this Court held in Pantano that the district court may properly admit a statement under NRS 51.385 when a competent child witness testifies regardless of whether the hearsay statement at issue is testimonial. Pantano, 122 Nev. at 790, 138 P.3d at 482.

Other jurisdictions have also held that the Confrontation Clause is not violated when a child victim is unable to remember or testify at trial what they told law enforcement and their statements are later introduced through another witness. In State v. Howell, 226 S.W.3d 892 (Mo. App. S.D. 2007), the court held that the Confrontation Clause was not violated when a child victim was unable to recall any details of the charged offense because the defendant had the opportunity to cross-examine the victim under oath and draw attention to the victim's forgetfulness. Another court in State v. Pierre, 277 Conn 42, 890 A.2d 474 (2006), held where a witness testifies against a defendant and is subject to cross-examination, despite any memory loss, there is no Confrontation violation. Additionally, in State v. Sullivan, 217 Or. App. 208, 174 P.3d 1095 (2007), the court held that a victim's selective memory and testimony at trial did not render her unavailable and the defendant had the full opportunity to cross-examine. Moreover, in State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006), the court held the defendant's confrontation rights were not violated when after a four-year-old testified she could not remember the sexual

assaults, her statements were admitted through detectives and her mother because: 1) the victim was physically present in the courtroom; 2) she confronted the defendant face-to-face; 3) she was competent to testify under oath; 4) the prosecutor asked her directly if defendant had touched her and she asked the victim to tell the jury what she had said to her mother and detective; and 5) the defense retained the full opportunity to cross-examine her and called attention to her lack of memory in closing.

Appellant compares apples and oranges. The Flores court relied on an NRS NRS 51.385 whereas this court relied on NRS 51.035(2)(a). JB and KJ, eyewitnesses to the crimes were present to testify and subject to cross-examination. 4 AA 821.

During closing, Appellant addressed JB's statements and lack of memory to Officers:

> And I think a lot of this really just leads up to [JB's] statement. Why would he say what he did? Why would he say what he did? Well, he saw his mother and his stepfather or his mother's boyfriend get in an argument. His mother was intoxicated, she became violent. That's scary for an eight-year-old.

6 AA 1134.

JB was not the only eyewitness to the crime. KJ was also present when the crimes occurred and testified at trial. At trial, JB was unable to recall his statements just as the witness in Crowley. In response, the State properly admitted his

inconsistent statement through Pickens. Appellant misstates that JB's testimony was the sole basis for the conviction. As discussed supra, the jurors heard testimony from Britney, observed photographs of her injuries, reviewed body camera footage of Brittney's injuries, listened to jail calls, reviewed pictures of the apartment with blood stains, and photographs of the knocked over bloody furniture. 4 AA 782, 4 AA 703-07. Therefore, the district court properly admitted JB's statements as prior inconsistent statements. Even if this Court does find error, it was not prejudicial in light of the other evidence presented.

Appellant argues that Brittney's medical records contain JB's statements. AOB at 41. The issue of the admission of Brittney's medical records was litigated in a pretrial MIL. 1 AA 177-242, 2 AA 243-51. The court admitted the Sunrise Medical records because they were statements made for the purposes of medical diagnosis and treatment. 2 AA 422.

Appellant takes issue with the following segment of the medical record: "Per metro, patient was assaulted earlier today by her boyfriend. States patient's head was slammed into a wall and he stomped on her head/face multiple times with possible strangulation." 7 AA 1233.

Appellant cannot prove that the statement in the medical record was JB's statement. Brittney's 911 call, admitted as an exited utterance, outlines her explaining to operators that Appellant strangled her, she asks "why did you hit me,"

and tells operators Appellant stepped on her face. 2 AA 422; 4 AA 699-703. Additionally, the body camera footage reveals Brittney telling medical personal that Appellant strangled her. 4 AA 832. Appellant cannot show prejudice. Dr. Gavin testified that Brittney's injuries were consistent with strangulation. 5 AA 1024-25. Appellant had the opportunity to rebut these allegations when he testified he did not stomp on Brittney or strangle her. 6 AA 1058. Moreover, the jury did not find Appellant guilty of Battery DV- Strangulation. 2 AA 338. Therefore, the medical records were not admitted in error.

Appellant argues that Pickens' testimony that KJ told him she saw Appellant throw JB on the bed was improper hearsay as the statement was not inconsistent with KJ's trial testimony. AOB at 42. KJ did testify that she was in the room when Appellant threw JB. 4 AA 824. At trial, Appellant did not object to Pickens' testimony that KJ told him she saw Appellant throw JB. 5 AA 907. Appellant's counsel failed to preserve this issue for appeal. Rippo, 113 Nev. at 1259, 946 P.2d at 1030. As such, he should be precluded from asserting this ground now. McKenna, 114 Nev. 1044, 968 P.2d 739.

Even if this Court finds that the testimony was an improper consistent statement KJ's statements to Pickens could have been properly admitted as an excited utterance. KJ was crying and scared when officers arrived and Officer Pickens spoke to KJ after arriving on the scene. 4 AA 824, 893. Officer Pickens

testified he did separate KJ and JB when he spoke to the children. 5 AA 906-907. Therefore, Officer Pickens testimony was not admitted in error.

NRS 178.598 states that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 1283 (1967), which asks "whether 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, 30 P.3d 1128 (2001).

The testimony of JB was not admitted in error. His testimony as discussed Supra was properly admitted under both Crowley and Pantano. Pantano is the most recent controlling authority on this issue. Regardless, the testimony from KJ and JB was not unfairly prejudicial. Jurors heard Brittney's voice on the 911 call, crying that Appellant had hit her with his hands and choked her. 4 AA 701. The photographs of Brittney's injuries, the Officers testimony, and body camera footage all provided this jury with enough evidence despite any error (which the State does not concede) to find Appellant guilty of all charges.

Appellant argues that the court improperly introduced JB's written statement to police from a prior 2015 DV incident between Appellant and Brittney because it did not meet the requirements of a recollection recorded under NRS 51.125. AOB at 43-44; 7 AA 1188. This argument was addressed by the district court in the State's

Bad Act Motion. 1 AA 59. The district court admitted the written statement as a prior inconsistent statement because JB testified that he did not recall the 2015 incident. 4 AA 817-18.

JB's statement to police on July 3, 2015, said that Appellant choked his mother. 5 AA 1187-88. JB's mother tried to give him the phone to call 911. Id. Appellant threatened JB, KJ and Brittney with the knife. Id. JB also wrote that Appellant tried to take the phone away from him when he tried to call 911. Id.

Appellant's only objection at trial was that JB did not have any "specific" memory of writing the statement. 4 AA 818. JB's written voluntary statement was proffered as a recorded recollection, and was not admitted as such at trial.

The statement is admissible under Crowley and Pantano, discussed Supra as a prior inconsistent statement and it was admitted as such. 4 AA 477. JB testified at the Petrocelli hearing and at trial that he did not remember what he told police July 2015. 4 AA 479; 4 AA 818. However, on July 2015, JB wrote a statement outlining what he saw. At the hearing, the court admitted JB's statement to police as a prior inconsistent statement. 4 AA 477. Therefore, the district court properly admitted Exhibit 75 as a recollection recorded and as a prior inconsistent statement.

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V.
THE STATE DID NOT INTRODUCE IMPROPER EVIDENCE OF PRIOR BAD ACTS

Appellant argues that the court improperly introduced evidence of Appellant's prior DV conviction. AOB at 44. Prior to trial, the State filed a Motion seeking to Admit other Bad Acts Pursuant to NRS 48.045. 1 AA 59-103. Appellant filed an Opposition. 1 AA 104-12. Brittney, JB, and Officer Alfonsi testified at the Petrocelli hearing. 3 AA 425-26. After the hearing, the district court held:

> The prior acts as they relate to Brittney and the children are relevant and specifically go to motive, intent, absence of mistake or to disprove that Brittney was at fault because she was intoxicated and initiated the attack on the defendant. It also provides context to the relationship between the defendant and Brittney. It may help the jury understand why Brittney failed to appear at the preliminary hearing and didn't want to proceed in the matter, why she may very well recant her prior testimony and why the State anticipates that she will testify at trial that she attacked the defendant and that she is a hundred percent to blame for the events that took place.

3 AA 495-96.

The district court also explained that it would give and did provide a specific limiting instruction to the jury. 3 AA 496; 2 AA 318.

Section 48.045(2) of the Nevada Revised Statutes provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

> opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Prior to admitting such evidence, the State must establish that (1) the prior act is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the evidence is more probative than prejudicial. Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). With regard to a determination of prejudice:

> "prejudicial" is not synonymous with "damaging." Rather, evidence is unduly prejudicial…only if it "uniquely tends to evoke an emotional bias against the defendant as an individual and…has very little effect on the issues" or if it invites the jury to prejudge "a person or cause on the basis of extraneous factors." Painting a person faithfully is not, of itself, unfair.

People v. Johnson, 185 Cal.App.4th 520, 534 (2010). The admissibility of prior bad acts is within the sound discretion of the trial court and will not be overturned on appeal unless the decision is manifestly wrong. Canada v. State, 104 Nev. 288, 291-293, 756 P.2d 552, 554 (1988).

Furthermore, pursuant to NRS 48.061,

> Evidence of domestic violence and expert testimony concerning the effect of domestic violence, including, without limitation, the effect of physical, emotional or mental abuse, on the beliefs, behavior and perception of the alleged victim of the domestic violence that is offered by the prosecution or defense *is admissible in a criminal proceeding for any relevant purpose*, including, without limitation, when determining:

> (a) Whether a defendant is excepted from criminal liability pursuant to subsection 7 of NRS 194.010, to show the state of mind of the defendant.

(Emphasis added).

Appellant argues that Brittney's testimony regarding Appellant's prior DV case from July 2015 was improper because "the State failed to prove the prior BADV by clear and convincing evidence." AOB at 47. At the Petrocelli hearing, the State provided certified copies of Appellant's Judgment of Conviction and Appellant guilty plea to battery constituting DV resulting from Case No. 15F10224X thereby proving up the DV bad act. 3 AA 487; 7 AA 1199- 1206.

The State did not rely solely on the prior Judgment of Conviction to prove Appellant acts. The State met its burden of clear and convincing evidence because of Brittney's testimony, JB's testimony, and the responding Officer to the July 2015 incident testimony at the Petrocelli hearing. Brittney explained that on July 2, 2015, Appellant was intoxicated an angry that she had asked for the keys. 3 AA 437; 3 AA 349. Appellant became belligerent, Brittney noted that he had a knife in his hand, and she called 911. 3 AA 349-50. Brittney did not want Appellant to be with the children and a physical altercation ensued. Id. Appellant was injured during the altercation while Brittney was trying to get away from him wielding the knife. 4 AA 460. JB's written statement also outlined that during July 2015, Appellant choked his mother and threatened the children and Brittney with a knife. 4 AA 477. Officer

Alfonsi testified that she responded to Appellant's apartment on July 2, 2015, Brittney also had injuries arising out of the incident with Appellant. 4 AA 481-83. Therefore, the district court properly admitted Appellant prior convictions because they were proven by clear and convincing evidence.

Appellant argues that the evidence was more prejudicial than probative. AOB at 48. In Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998), the Defendant stood trial on charges of first degree kidnapping with use of a deadly weapon, sexual assault with use of a deadly weapon, and murder with use of a deadly weapon. After a Petrocelli hearing the State was permitted to introduce evidence of the Defendant's prior rape and kidnapping convictions which had occurred twenty years earlier. The Court upheld the District Court's determination that such evidence was admissible to prove identity, plan, similar *modus operandi*, and intent. It noted that there were sufficient similarities between Bolin's 1975 rape and kidnapping convictions and the victim's murder to warrant the admission of his prior bad act for the purposes of establishing identity. Those similarities included: (1) in each case the victim was abducted late at night after finishing her shift at work and the offenses carried through to the morning; (2) both victims were about the same height, age, build, and hair color; (3) each victim was ambushed; (4) each victim was robbed of her wedding ring and valuables; (4) the defendant used the victims' cars in commission of the

crimes in each case; and, (5) in each case the victim was subjected to a brutal attack after the victims were taken to a remote location.

Here, evidence of the July 2015 incident was relevant to prove the charged crimes by revealing Appellant's common plan to commit these crimes - that plan being to prevent the reporting of his batteries upon Brittney. The two incidents are remarkably similar and the July 2015 evidence shows Appellant's common plan or scheme underlying the charged offenses. Appellant in the July 2015 tried to take the phone away from the children just as he did in the instant case. Further, the July 2015 evidence was not remote in time to the instant case that occurred only six months later, and because the facts of the prior instance are not more horrendous than the facts of this case, the evidence is clearly more probative than prejudicial. Finally, any risk of unfair prejudice was effectively counteracted by the court's limiting instructions. 2 AA 318. Therefore, this Court did not err in the admission of Appellant's prior DV case.

VI.
THE STATE DID NOT FAIL TO DISCLOSE EVIDENCE

Appellant argues that the court improperly allowed the State to redact a portion of Britney's 911 tape referencing marijuana use because it "touched on her state of mind" and was "an important issue in a self-defense case." AOB at 48-49. Prior to trial, the State filed a MIL to Admit 911 calls and Appellant filed an Opposition. 1 AA 177; 2 AA 243; 2 AA 252. The court ruled that the 911 calls were

admissible and excited utterance and as a record made in the course of regularly conducted activity. 2 AA 416-19. The court also admitted Appellant's 911 call as a statement by a party pursuant to NRS 51.035 (3)(a). Id. The court did not address redaction of the calls until trial but agreed that the redaction was proper. 4 AA 470.

The prosecution is only required to disclose "evidence favorable to an accused…where the evidence is material either to guilt or to punishment…" Brady v. Maryland, 373 U.S. 83, 87-88, 83 S.Ct. 1194, 1197 (1963). 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). As such, 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). Regardless, "Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

Appellant attempts to manipulate the record to contend that the redaction of the 911 call was sprung upon him without notice. AOB at 49. Appellant had the *entire* 911 calls in their possession prior to trial, therefore nothing was withheld. The State addressed the matter, outside the presence of the jury prior to playing the 911

calls. 4 AA 732. Both parties had the opportunity to argue about what redactions should occur and the court gave both parties the opportunity to review case law. The State argued that Appellant's allegation that Brittney used marijuana on the 911 call was a bad act and was an unproven allegation. 4 AA 740. Appellant did not present any evidence, certainly not clear and convincing evidence prior to or at trial that Brittney was under the influence of marijuana. The court advised counsel that it could ask Brittney whether she was under the influence of an intoxicating substance and marijuana may be admissible if she offered that testimony. 4 AA 741. Appellant did attack Brittney's mental state and drinking habits upon cross-examination. 4 AA 763, 765, 774. Brittney testified that on January 22, 2016, she had drank heavily and on other occasions where there was DV. Id. Therefore, Appellant cannot show he was prejudiced.

Appellant argues the State improperly withheld Britney's prior misdemeanor conviction for battery DV conviction from 2012. AOB at 49; 4 AA 745; 4 AA 679. The prior conviction was not withheld by the State. Appellant knew about the prior conviction prior to trial. Pre-trial, Appellant tried to subpoena the records from the prior conviction. 4 AA 745. Neither Brady nor any of its progeny require disclosure of evidence that defense through their own efforts could have obtained. Brady, 373 U.S. 83, 83 S. Ct. 1194. Appellant's trial counsel told the court that her investigator had the ability to run SCOPE prior to trial. 4 AA 745. In fact, Appellant mentioned

her prior conviction in opening statement. 4 AA 674, 4 AA 744. Additionally, Appellant never specifically requested evidence of Brittney's prior conviction. Id. at 746.

Further, this material was not exculpatory to defense. Brittney's prior conviction was not a felony and was not a crime of moral turpitude that would shine light on her ability to testify honestly. 4 AA 679. Appellant testified that he knew about Brittney's prior DV case in which Brittney fought with her roommate. 6 AA 1062. Any argument that the conviction should have been admitted for impeachment purposes should be denied by this Court. AOB 50. Appellant fully explored this issue at trial and the jury had evidence regarding Brittney's prior 2012 DV. At trial, Brittney took responsibility for the altercation in 2012 with her roommate. 4 AA 751-53. Brittney never testified that she was peaceful on any occasion. Instead, she took responsibility for provoking the instant case when she testified "I am 100 percent to blame." 4 AA 723.

Due to the fact that Appellant knew about and had in their possession the entire 911 call from the instant case and Brittney's prior conviction nothing was improperly withheld by the State. Therefore, the prosecutor's conduct was not improper and this Court should deny Appellant's claim.

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VII.
THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY

Nevada law gives the court discretion to decide whether a jury instruction is correct and pertinent. NRS 175.161(3). In fact, a district court has broad discretion to settle jury instructions. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005). The district court abuses its discretion only when the "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Id. It is not error to refuse to give an instruction when the substance of that instruction is substantially covered by another jury instruction. Ford v. State, 99 Nev. 209, 211, 660 P.2d 992, 993 (1983). Importantly, a trial court may also refuse to give an instruction if it is less accurate than other instructions, or will confuse the jury. Sanchez-Dominguez v. State, 130 Nev. ___, ___, 318 P.3d 1068, 1072 (2014).

Further, erroneous jury instructions are subject to harmless error review. Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000). An instructional error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[,]" and the error is not the type that would undermine certainty in the verdict. Id.

A. Attempt to suppress evidence instruction

Appellant argues that the court erred in giving the following instruction:

> Evidence that the defendant attempted to suppress evidence against himself or to procure false testimony or evidence on his behalf from another person is not in itself

> sufficient to warrant a finding of guilt. It may be considered, however, as evidence of his consciousness of guilt and a circumstance tending to demonstrate his guilt, should you first find that the defendant actually attempted to suppress evidence or procure false testimony or evidence on his behalf from another person. The significance to be accorded such a fact is solely for your consideration as jurors in your deliberations.

2 AA 325; AOB at 52.

Appellant objected to this instruction arguing that Brittney testified that she was not influenced by the Appellant to testify favorably for the defense. AOB at 51. Appellant argues that the State's introduction of jail calls do not establish that Appellant improperly pressured or threatened Brittney to testify for him.

At trial the State asked Brittney:

> Q: So at the beginning of the call, did you hear yourself say is there any way that you can turn yourself in?
> A: Yes.
> Q: And then did you hear James just say, *you know what you got to do*. Just do what you got to do, you know what I'm saying? Did you hear him say that?
> A: Yes

4 AA 720 (emphasis added).

Brittney testified that the main topic of conversation in all of the jail calls with Appellant revolved around bail and getting Appellant out of jail. 4 AA 716. After the jail calls, Brittney wrote a letter to Appellant's lawyer accepting all responsibility for the January 22, 2016, incident. 4 AA 723. Brittney testified that although she was subpoenaed by the State to testify against Appellant, she did not come to court

because she was in support of him. 4 AA 724-25. Moreover, the medical records revealed that Brittney refused all offers of help for counseling and shelter assistance for victims of DV. 6 AA 1144. Here, the evidence fully supported the instruction. Therefore, this Court should find that the jury instruction was proper.

Even if this Court does find error, Appellant had the opportunity to refute the claim that he influenced Brittney's testimony through cross-examination and his own testimony at trial. 4 AA 792. The language of the jury instruction advises the jury that is their determination of whether there has been improper influence and that improper influence alone is not sufficient to establish guilt. Therefore, the jury instruction alone did not act to unfairly prejudice and determine the ultimate outcome of Appellant's case.

B. Lesser Included Instruction

Appellant was charged with felony Child Abuse, Neglect, Endangerment under NRS 200.508(1). Appellant argues the court improperly rejected his instruction for Child Endangerment (Gross Misdemeanor) as a lesser included offense of Child Abuse, Neglect, or Endangerment under NRS 200.508(2). AOB at 53.

Appellant proposed the following instruction:

> When a person is accused of committing a particular crime and at the same time and by the same conduct may have committed another offense of lesser grade or degree, the

> latter is with respect to the former, a lesser included offense.
> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the offense charged, he may, however be found guilty of a lesser included offense, but only if the evidence is sufficient to establish guilt of the lesser included offense beyond a reasonable doubt.
> Child Endangerment (Gross Misdemeanor) is a lesser included offense of Child Abuse, Neglect, or Endangerment (Felony).

7 AA 1217.

The State argued that gross misdemeanor child endangerment is not a lesser included offense of felony child abuse because they are listed in two separate subsections. 5 AA 987. Additionally, felony child abuse qualifies for felony murder whereas gross misdemeanor child abuse does not. Id; Ramirez v. State, 126 Nev. __, __, 235 P.3d 619, 623-24 (2010). Further, the State explained that gross misdemeanor child abuse and felony child abuse had different elements, therefore, Appellant did not meet Blockburger. Id. The court agreed. 5 AA 987.

In determining whether an uncharged offense is a lesser-included offense of a charged offense so as to warrant an instruction pursuant to NRS 175.501, a court applies the elements test from Blockburger. Alotaibi v. State, 131 Nev. __, __, 404 P.3d 761, 764(2017). Under the elements test, an offense is necessarily included in the charged offense if all of the elements of the lesser offense are included in the elements of the greater offense, such that the offense charged cannot be committed without committing the lesser offense. Id. Thus, if the uncharged offense contains a

necessary element not included in the charged offense, then it is not a lesser-included offense and no jury instruction is warranted. Id.

Here, the elements of gross misdemeanor and felony Child Abuse are different under Blockburger. NRS 200.508(1), the subsection Appellant was charged under, is violated where a defendant is the direct active actor of the child abuse. Whereas under NRS 200.508 (2), the subsection Appellant proposed was a lesser included offense, is violated only where a defendant passively commits child endangerment and owes a duty to be responsible for the safety or welfare of the child endangered. Thus, the direct actor element in NRS 200.508(1) is a separate element not included in NRS 200.508(2). Further, the element of having a duty for the welfare or safety of a child in NRS 200.508(2) is not present in NRS 200.508(1). Therefore, NRS 200.508(2) is not a lesser included offense.

Additionally, the legislature specified different punishments for NRS 200.508(1) and NRS 200.508(2). Under NRS 200.508(1)(b), if substantial bodily or mental harm does not result to the child and defendant is a direct actor, the defendant is guilty of a Category B felony punishable by one to six years in prison. In contrast, NRS 200.508(2) is punishable as a gross misdemeanor if the defendant has not been previously convicted of child abuse and is a passive participant in the abuse. In sum, a defendant cannot receive gross misdemeanor treatment if he or she is the direct actor of the child abuse.

Appellant directly committed the harm through negligent treatment in this case. As discussed supra, KJ testified that she remembered being in the room while Appellant threw JB onto the bed. 4 AA 824-25. By being in the small apartment at the same time the abuse against JB and Brittney occurred, KJ was also victimized. Additionally, JB told officers the night of the attack that he felt sore after Appellant threw him onto the bed. 5 AA 918. Therefore, the district court did not err in denying Appellant's proposed instruction.

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C. Two reasonable interpretations

Appellant's complains the court improperly rejected his proposed instruction on two reasonable interpretations. 6 AA 1216. The State objected to the proposed instruction noting that the instructions already contained sufficient reasonable doubt instructions. 5 AA 1001. Appellant responded that his proposed instruction was one of the standard instructions that defense provides and counsel understood the district court's position noting it would be confusing in light of the other instructions. 5 AA

1000-01. The district court was within its discretion to provide the jury with comparable and accurate reasonable double instruction based upon NRS 175.211(1). 2 AA 316; 321.

Appellant's argument is without merit, as this Court has held on numerous occasions that it is *not* error to refuse to give this kind of instruction where the jury has been properly instructed on the standard of reasonable doubt. Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002). Moreover, defendants are not "entitled to instructions that are misleading, inaccurate, or duplicitous," Crawford, 121 Nev. at 754, 121 P.3d at 589, and when the jury is properly instructed on reasonable doubt, as it was here, 4 AA 283, "an additional instruction on the sufficiency of [the] evidence invites confusion." State v. Humpherys, 8 P.3d 652 (Idaho 2000) ("We agree with the conclusion of the courts from the growing majority of states that in all criminal cases there should be only one standard of proof, which is beyond a reasonable doubt. Therefore, we hold that once the jury has been properly instructed on the reasonable doubt standard of proof, the defendant is not entitled to an additional instruction.").

This Court has examined similar language as that proposed by Appellant. In Bails, Defendant argued the court was required to instruct the jury that "if the evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that

interpretation which points to the defendant's innocence, and reject the other which points to his guilt. Bails, 92 Nev. at 96-7, 545 P.2d at 1155. However, this Court held that "it is not error to refuse to give the instruction if the jury is properly instructed regarding reasonable doubt." Id. at 97, 1156. Here, the jury was properly instructed on reasonable doubt and on how to interpret and weigh the evidence. 2 AA 316; 321-23.

The district court did not abuse its discretion because it listened to counsel's argument and noted that in light of the other instructions the two reasonable interpretation instruction was confusing because the jury had already been instructed on reasonable doubt. 5 AA 1000-01. Even if the Court finds that the court erred in rejecting the instruction, the error was harmless because the State's case did not rest solely on circumstantial evidence. The State's case was bolstered by not only circumstantial evidence but also the testimony of Brittney, JB, KJ, Officer Sylvia, Officer Perkins, and Dr. Gavin's testimony.

D. Self-Defense

The court rejected several proposed self-defense instructions offered by Appellant. Appellant contends that the court improperly chose the instructions offered by the State because his proposed instructions were divided into three sections "making them easier for the jury to understand." AOB at 55-56. There is no authority that a district court abuses its discretion where the proposed instructions of

the defense are in the defense's opinion of interpretation "easier to understand." The district court did not abuse its discretion because Appellant's proposed instruction L did not cite the correct statement of the law in the case it cited Runion v. State, 116 Nev. 1041, 13 P.3d 52 (2000). 5 AA 995, 999. The court also found that proposed instruction H did not track the language in the case cited Davis v. State, 130 Nev. __, ___, 321 P.3d 867 (2014). 4 AA 1213; 5 AA 995-96. Moreover, the court noted after reviewing Appellant's proposed jury instructions that additional self-defense instructions would be cumulative. 2 AA 326-28.

Even if this Court did find error, it was harmless. The jury was instructed on self-defense. Id. Appellant testified that he acted in self-defense.6 AA 1067. JB never testified or told police that Brittney was the first to physically attack Appellant. Clearly, the jury evaluated the credibility of both the State's witnesses and Appellant's testimony and found that Appellant did not reasonably act in self-defense. Therefore, Appellant's claim should be denied.

VIII.
THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT

Appellant argues that the State acted improperly because it led KJ's during direct testimony and falsely argued that KJ witnessed the DV in closing argument. AOB at 57-60. Appellant adds that the State improperly objected during Appellant's closing and put forth a new theory of the case in rebuttal. Id. Appellant contends that the State acted improperly by intentionally redacting the 911 call and hiding

Brittney's prior DV conviction. AOB at 51. Appellant did not object to any prosecutorial misconduct at trial. The review of this Court is limited to plain error. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

This Court applies a two-step analysis to claims of prosecutorial misconduct. Id. This Court first determines whether the prosecutor's conduct was improper, and second, whether the conduct warrants reversal. Id., 196 P.3d at 476.

Appellant must demonstrate "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995). This is because a defendant has a right to a fair trial, not 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). Defendant 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.

Harmless-error review is only appropriate if the error has been properly preserved for review. Valdez, 124 Nev. at 1190, 196 P.3d at 477. The failure to object to the prosecutorial misconduct at trial precludes appellate review. Id.

When there is not an objection, all but plain error is waived. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997).

Plain error review asks:

> To amount to plain error, the error must be so unmistakable that it is apparent from a casual inspection of the record. In addition, the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice. Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Matinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (2015).

Although Appellant argues that the State improperly lead KJ on direct, Appellant did not object. AOB at 57; 4 AA 825. Appellant does not meet his burden in showing how the direct examination of KJ affected his substantial rights. There was evidence presented that KJ was afraid the night of the attacks on Brittney. Officers testified that KJ was crying when they arrived on the scene. 4 AA 841-42; 4 AA 893. Additionally, Appellant cannot show prejudice by KJ's affirmative response to the State's question of whether she was in the room when Appellant threw JB on the bed. KJ testified that she shared a room with her brother and was in the apartment the night JB was thrown on the bed by Appellant. 4 AA 825. Therefore, Appellant does not meet the burden of showing plain error.

Appellant complains that the State improperly objected during defense's closing argument alleging the argument was based upon facts not in evidence and

contends the district court improperly sustained the objection. AOB at 60. During closing, Appellant inferred that Pickens' conversation with JB was very brief because Kolarik's body camera footage did not document it. 6 AA 1135-36. The State objected on the grounds that Appellant's inference was faulty because Pickens and Kolarik were not with each other at all times during the investigation. Further, evidence was presented through Pickens that he and JB did have a longer detailed discussion in which JB walked Pickens through the home and explained what had happened. 5 A 904-05. Pickens never testified that Kolarik was present with the body cam when that conversation occurred. Kolarick testified that he was present to provide back up while Sylvia and Pickens were inside the apartment. 4 AA 834. Further, Appellant's argument is not consistent with the trial testimony. During cross-examination, Appellant drew attention to the fact that the officers did not record any conversations with JB. 5 AA 927; 4 AA 862. Pickens testified that he did not record the interview. 4 AA 927. Therefore, the State's objection was not improper.

Appellant also takes issue with the State's closing. Appellant did not object. Appellant now infers that the State improperly inferred that KJ was present when the attacks on Brittney occurred. 6 AA 1114. First, this argument was not preserved for appeal. Therefore, this Court should reject to hear this claim. Rippo, 113 Nev. at 1259, 946 P.2d at 1030; McKenna, 114 Nev. 1044, 968 P.2d 739. Second, evidence

was presented that KJ was present when the attacks occurred. 4 AA 824-25; 4 AA 893. Further, evidence was presented that the apartment was small and the children testified they were present in the apartment on January 22. Therefore, this argument was not improper.

Additionally, the State did not act improperly during rebuttal. AOB at 57-58. Appellant did not object when the State argued:

> Maybe Brittney came in, consistent with Cameron's story, maybe she came in at the end of it and thought that Tuda punched Cameron when he threw him on the bed. That's a possibility. But it's not charged so we don't need to prove that. We don't need to prove that beyond a reasonable doubt.

6 AA 1146.

The rebuttal was not an improper statement. The State is not required to prove uncharged acts beyond a reasonable doubt. Therefore, the State is not asserting a new theory of the case. Second, the State was responding to Appellant's closing argument:

> In the 911 call, we hear Brittney say something about James punching [JB]. And [JB] never says that. He never says that to Officer Sylvia. He never says that to Officer Pickens, despite his very detailed statement that Officer Pickens indicated [JB] told him. He never says that. Never says it on the 911 call. Never says it when he testifies. And James isn't even charged with it, and there's no evidence of it. So if Brittney is saying that on the 911 call what else is she saying that's not true? Because him punching [JB] wasn't true. And so she told you the reason that she said

> those things on the 911 call was so that James would get in trouble, not her.

6 AA 1134.

The State certainly had the opportunity in rebuttal to refute the allegation and direct attention that everything Brittney said was a lie and make it clear to the jury of what Appellant was being charged with. Therefore, this Court should not find prosecutorial misconduct because the argument was proper.

Even if this Court does find error the jury instructions were curative. The jury was instructed that "a verdict may never be influenced by sympathy, prejudice, or public opinion." 2 AA 331. Further, the jury was instructed that counsel's closing argument is not evidence. 2 AA 337.

Finally, the State did not commit prosecutorial misconduct by withholding Brittney's DV conviction or redacting the 911 calls. As Appellant admitted at trial, he had access and knowledge of Brittney's prior DV conviction. 6 AA 1062. Furthermore, the admission of the 911 calls was litigated in pre-trial MIL. 1 AA 177; 2 AA 243-52. Therefore, nothing was improperly withheld and there can be no misconduct.

IX.
CUMULATIVE ERROR DOES NOT EXIST

Appellant argues that collective errors warrant reversal. AOB at 62. 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, 854-5 (2000). Appellant needs to present all three elements to be successful on appeal. Id.

The issue of guilt was not close. The jury convicted Appellant of two counts of battery DV and two counts of child abuse, neglect, or endangerment. 2 AA 338. Pictures and the body camera footage depicting Brittney's injuries and cries that she was strangled tell a thousand words. 4 AA 831; 3 AA 444. The jury received Brittney's testimony and letter admitting all fault and was able to evaluate Appellant's testimony. 4 AA 723. The jury did not accept Appellant's self-defense argument. Certainly, the crimes charged here are grave as they should be for the abuse of both children and domestic partner. However, Appellant is serving his time at a conservation camp. See Certificate of Service. Finally, there is no error to cumulate.

CONCLUSION

For the foregoing reasons, Appellant's Judgment of Conviction should be AFFIRMED.

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Dated this 2nd day of March, 2018.

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 13,848 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 2nd day of March, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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