IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN BELCHER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 72325

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is presumptively assigned to the Nevada Supreme Court pursuant to NRAP 17(a)(2) as it is a direct appeal from a judgment of conviction resulting in a sentence of death.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in denying Appellant's motion to suppress his statement to homicide detectives.
2. Whether Appellant is entitled to a new penalty phase hearing.
3. Whether the district court abused its discretion in denying Appellant's motion to strike the aiding and abetting theory of liability.
4. Whether the district court erred in admitting alleged bad act evidence.
5. Whether Detective Mogg improperly vouched for Ashley Riley.
6. Whether the evidence was insufficient to support Appellant's conviction for robbery.
7. Whether the district court erred in admitting allegedly impermissible hearsay.

8. Whether the district court abused its discretion in denying Appellant's request to admit a Judgment of Conviction of a non-testifying witness.
9. Whether defense counsel's conflict at the preliminary hearing was harmless.
10. Whether the district court abused its discretion in denying Appellant's motion to dismiss based on alleged failure to preserve William Postorino's text messages.
11. Whether the district court abused its discretion in denying Appellant's motion to suppress evidence.
12. Whether the district court abused its discretion in denying Appellant's motion to suppress the photographic line-up.
13. Whether the district court abused its discretion in denying Appellant's motion to suppress Officer Cavaricci's identification of Appellant.
14. Whether the district court committed plain error regarding jury instructions nos. 12, 29, 31, and 55.
15. Whether the district court committed plain error in admitting instructions nos. 5 and 12 during the penalty phase.
16. Whether the death penalty is unconstitutional.
17. Whether there was cumulative error.

STATEMENT OF THE CASE

On January 31, 2011, Appellant Norman Belcher was charged by way of Information with Count 1 – Burglary While in Possession of a Deadly Weapon (Felony - NRS 205.060); Counts 2 and 3 – Robbery With Use Of A Deadly Weapon (Felony - NRS 200.380, 193.165); Count 4 – Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165); Count 5 – Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165); Count 6 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony - NRS 200.481.2e); and Count 7 – Third Degree Arson (Felony - NRS 205.020). Appellant's Appendix, Vol. 1 ("1 AA") 38-43.

On February 10, 2011, the State filed a Notice of Intent to Seek Death Penalty. 1 AA 164-72. On July 18, 2011, Appellant attempted to plead guilty to all seven counts in the Information. 2 AA 234-35. The district court ordered a competency evaluation. Id. at 235-40. Appellant was found to be competent. Id. at 247. On October 24, 2011, the court set a status check on December 5, 2011, in advance of the February 21, 2012 trial setting. 2 AA 252-56.

On January 9, 2012, at the defense's request, the trial setting was continued to February 4, 2013. 2 AA 274-78.

On July 11, 2012, Appellant filed a "Motion to Suppress Impermissibly Suggestive Photographic Identification Procedure." 2 AA 368-439. The State filed an Opposition on July 19, 2012. 2 AA 443 - 3 AA 471. Appellant filed a Reply on July 30, 2012. 3 AA 475-84. On August 22, 2012, after hearing argument, the district court denied Appellant's motion. 3 AA 490-99. The Order was filed on October 3, 2012. 3 AA 515-16.

On October 4, 2012, Appellant filed a "Motion to Suppress Statements and Evidence." 3 AA 517-89. The State filed its Opposition on October 12, 2012. 3 AA 594-600. Appellant's Reply followed on October 31, 2012. 3 AA 609-13. On January 9, 2013, Appellant filed a "Supplemental Reply to State's Opposition to Defendant's Motion to Suppress Evidence and Statements." 3 AA 623-30. The State filed a Supplemental Opposition on January 18, 2013. 3 AA 631-33. Appellant

filed a "Reply to State's Supplemental Opposition to Defendant's Motion to Suppress Statements and Evidence" on January 23, 2013. 4 AA 702-11. On February 14, 2013, the district court issued an Order denying Appellant's motion. 4 AA 712-15.

On January 17, 2013, at the defense's request, the court granted a continuance and reset trial to November 12, 2013. 4 AA 699-700.

On August 13, 2013, Appellant filed a "Motion to Strike Preliminary Hearing and Dismiss Charges." 4 AA 764-830. On August 22, 2013, the State filed an Opposition. 4 AA 831-35. Appellant replied on September 12, 2013. 4 AA 841-83. On October 3, 2013, Appellant filed a "Supplemental Memorandum of Law in Support of Defendant's Motion to Strike Preliminary Hearing and Dismiss Charges." 4 AA 900-14. The court held an evidentiary hearing on October 24, 2013, after which it denied Appellant's motion. 5 AA 951-99. The Order denying Appellant's motion issued on December 4, 2013. 5 AA 1013-19.

On October 1, 2013, Appellant filed a Motion to Continue Trial. 4 AA 887-91. On October 16, 2013, the court reset the trial to September 8, 2014. 5 AA 938.

On October 9, 2013, the State filed its Notice of Evidence in Support of Aggravation. 4 AA 892 - 5 AA 930.

On August 20, 2014, Appellant filed a Motion to Continue Trial. 5 AA 1062-66. The State filed an Opposition on August 28, 2014. The court granted the motion and reset trial for March 2, 2015. 5 AA 1078-79.

On January 21, 2015, Appellant file a "Motion to Continue Calendar Call and Trial Date." 5 AA 1080-83. On January 28, 2015, the State filed an Opposition. 5 AA 1084-86. The court granted Appellant's motion and reset trial to April 27, 2015. 5 AA 1087-96.

On March 26, 2015, Appellant filed a "Motion in Limine for a Jackson v. Denno Hearing Regarding Voluntariness of Defendant's Statement." 5 AA 1128—6 AA 1205. The State filed its Opposition on April 2, 2015. 6 AA 1248-52. Appellant replied on April 7, 2015. 6 AA 1326-41. On April 13, 2015, the court denied Appellant's motion. 6 AA 1368-74.

On March 27, 2015, Appellant filed a "Motion in Limine to Exclude Prior Arrests, Convictions, and Unrelated Bad Act Evidence." 6 AA 1206-28. On April 3, 2015, the State filed a "State's Opposition to Defendant's Motion in Limine to Exclude Prior Arrests, Convictions, and Unrelated Bad Act Evidence and In the Alternative motion to Admit Evidence of Other Bad Acts Pursuant to NRS 48.035 and the Doctrine of Res Gestae." 6 AA 1253-67. On April 13, 2015, the court, at the parties' stipulation, allowed the admission Billy's belief that Appellant had burglarized his house on December 1, 2010, and granted Appellant's motion as to

the exclusion of Appellant's prior convictions and arrests.[1] 6 AA 1367-68. On November 11, 2016, the district court filed its Findings of Fact, Conclusions of Law, and Order. 16 AA 3565-66.

On March 31, 2015, Appellant filed another Motion to Continue Calendar Call and Trial Date. 6 AA 1243-46. The State filed its Opposition on April 3, 2015. 6 AA 1268-71. On April 13, 2015, the court granted Appellant's motion and continued the trial to June 8, 2015. 6 AA 1366.

On May 18, 2015, Appellant filed a "Motion to Dismiss Charges for Brady Violations, Order to Show Cause, and/or Motion to Continue Trial." 7 AA 1543-99. On May 27, 2015, the Court reset the trial for May 2, 2016. 8 AA 1654-57. On October 22, 2015, the court ordered the Las Vegas Metropolitan Police Department ("LVMPD") to produce all internal affair files on the officers and detectives who would testify at trial. 9 AA 2024-33.

On May 5, 2015, Appellant filed a "Motion to Suppress Evidence and for Return of Property." 7 AA 1419-60. At the court's request, Appellant re-submitted the motion on July 28, 2015. 8 AA 1719-60. The State filed its Opposition on August 28, 2015. 8 AA 1782-94. Appellant filed his Reply on September 22, 2015.

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[1] Appellant stipulated to the admission of testimony referencing Billy's belief that Appellant had burglarized Billy's home on December 1, 2010. Appellant agreed that the Petrocelli standard was met as to this testimony and that he wanted "to get into that in order to defend the case." 6 AA 1367-68.

9 AA 1878-92. On October 22, 2015, the court held an evidentiary hearing and granted the motion, in part, as to the items contained within the backpack. 9 AA 2033—10 AA 2098. The Findings of Fact, Conclusions of Law, and Order issued on January 22, 2016. 12 AA 2548-53.

On November 18, 2015, Appellant filed a "Motion to Suppress Unnecessarily Suggestive Identification of Defendant (Evidentiary Hearing Requested)." 10 AA 2099-2262. The State filed an Opposition on December 4, 2015. 10 AA 2263-80. Appellant Replied on January 4, 2016. 10 AA 2285—11 AA 2306. On January 6, 2016, the court granted an evidentiary hearing, which was held on February 18 and March 17, 2016. 12 AA 2536-47, 2613-32, 2681-96. Following this hearing, the court denied the motion. 12 AA 2613-32, 2681-96. The Order was filed on March 28, 3016. 12 AA 2706-07.

On January 20, 2016, Appellant filed a "Motion to Declare Death Penalty Unconstitutional Pursuant to the Constitutions of the United States of America and Constitution of the State of Nevada." 11 AA 2307—12 AA 2535. The State filed its Opposition on February 8, 2016 and Appellant filed his Reply on February 12, 2016. 12 AA 2557-67, 2578-82. On February 18, 2016, the district court denied the motion. 12 AA 2633-36.

On April 11, 2016, at the defense's request, the May 2, 2016 trial setting was re-set to November 28, 2016. 13 AA 2903-15, 2912.

On April 20, 2016, Appellant filed a "Motion to Dismiss Charges for Brady Violation and the Sixth Amendment Right to Compulsory Process" relating to a text message chain between Appellant and the victim's father. 13 AA 2916-55. The State filed its Opposition on April 27, 2016. 13 AA 2956—14 AA 2991. Appellant's Reply followed on May 11, 2016. 14 AA 2992-3001. On May 18, 2016, the district court denied Appellant's motion. 14 AA 3015-39, 3037.

On June 21, 2016, Appellant filed a "Motion to Reconsider Order Denying Defendant's Motion to Suppress Statements and Evidence" as to the district court's February 14, 2013 order. 14 AA 3054-79. The State filed its Opposition on June 30, 2016. 14 AA 3080—15 AA 3222. Appellant filed his Reply on July 6, 2016. 15 AA 3224-69. On July 11, 2016, the district court denied Appellant's motion. 15 AA 3270-85. The Order was filed on August 4, 2016. 15 AA 3286-87.

On November 17, 2016, eleven (11) days before trial, Appellant filed a "Motion in Limine to Preclude Admission of Jail House Recordings and/or Transcripts of Jail House Recordings and/or Letters Written by Defendant to Prosecutor." 15 AA 3381-3400. At Calendar Call on November 21, 2016, the State stipulated that the jail calls or letters to prosecutors would not be used in the State's case-in-chief. 16 AA 3608-10.

On November 18, 2016, ten (10) days before trial, Appellant filed a "Motion to Compel Trial Testimony of Ashley Riley." 15 AA 3401—16 AA 3558. On

November 28, 2016, the parties agreed that the motion was moot, as Ms. Riley was present to testify. 17 AA 3783-84.

On November 22, 2016, six (6) days before trial, Appellant filed a "Motion in Limine to Preclude Certain Evidence, Including Evidence of Gang Affiliation, Hearsay Evidence of Postorino Text Messages, Bridget Chaplin Letter, Staged Photograph of Socks, and Letters Written to Prosecutor." 16 AA 3567-3607. The State responded orally on November 29, 2016. 17 AA 3784-87. The parties agreed that evidence of gang affiliation would not be admissible during the guilt phase. 17 AA 3785. As to the text messages and the hearsay objection, the court denied the motion. 17 AA 3786-92. As to the letter to Bridget Chaplin, the court granted the motion since the State had stipulated to not using it in its case-in-chief. 17 AA 3792-93. The court denied the motion as to the photograph of the socks. 17 AA 3793-97. Finally, as to the letters written by Appellant to the prosecutor, the State stipulated that it would not use them in its case-in-chief, although left open the possibility of using them during the penalty phase, if necessary. 17 AA 3797-98.

On November 28, 2016, the first day of trial, Appellant filed a "Motion to Preclude Instruction and Argument of Conspiracy and Aiding and Abetting as Theories of Criminal Liability and Motion to Strike Such Language from Charging Instrument." 16 AA 3637-55. On November 29, 2016, the State responded in open

court, and on December 1, 2016, the court denied the motion. 17 AA 3798-3815; 19 AA 4200-04.

Jury trial then began. See 16 AA 3658. On December 14, 2016, the jury returned a verdict of guilty as to Count 1 – Burglary While in Possession of a Firearm; Counts 2 and 3 – Robbery with Use of a Deadly Weapon; Count 4 – First Degree Murder with Use of a Deadly Weapon; Count 5 – Attempt Murder with use of a Deadly Weapon; Count 6 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm; and Count 7 – Third Degree Arson. 26 AA 5902-04. As to Count 4, the jury unanimously found Appellant guilty under three alternative theories of first degree murder: the murder was willful, deliberate, and premeditated; the murder was committed during the perpetration or attempted perpetration of robbery; and the murder was committed during the perpetration or attempted perpetration of child abuse. 26 AA 5904.

The penalty phase began on December 15, 2016. 27 AA 6029-6227. That same day, the jury returned its verdict, finding that the following aggravators existed: (1) that Appellant was adjudicated guilty of a felony involving the use of violence to the person of another, where he was convicted of voluntary manslaughter in case no. C219397; (2) that Appellant was previously found guilty of burglary while in possession of a deadly weapon; (3) that Appellant was previously found guilty of robbery with use of a deadly weapon of Nicholas Brabham; (4) that Appellant was

previously found guilty of robbery with use of a deadly weapon of Alexus Postorino; and (5) that Appellant was previously found guilty of Attempt Murder with Use of a Deadly Weapon of Nicholas Brabham. 28 AA 6222-23. As a mitigating circumstance, the jury found that "[Appellant] wants to die." 28 AA 6224. The jury found that the mitigating circumstances did not outweigh the aggravating circumstances, and imposed a sentence of death. Id.

On February 6, 2017, Appellant was adjudicated guilty pursuant to the jury verdict and sentenced as follows: Count 1 – 60 to 180 months in the Nevada Department of Corrections; Counts 2 and 3 – 60 to 180 months in the Nevada Department of Corrections with a consecutive term of 60 to 180 months for the deadly weapon enhancement, Count 2 to run concurrent with Count 1, and Count 3 to run concurrent with Count 2; Count 4 – death, in accordance with the jury verdict, concurrent with Count 3; Count 5 – 96 to 240 months plus a consecutive sentence of 96 to 240 months for the deadly weapon enhancement, to run consecutive to Count 4; Count 6 – 60 to 180 months, concurrent with Count 5; and Count 7 – 19 to 48 months, concurrent with Count 6; 2255 days credit for time served. 29 AA 6441-51.

Appellant's Judgment of Conviction issued on February 6, 2017. 28 AA 6425-27. Appellant's Warrant of Execution and Order of Execution were issued the same day. 28 AA 6428-31; 6432-33.

Appellant filed his Notice of Appeal on February 6, 2017. 28 AA 6434-35. Appellant's Opening Brief was filed on March 19, 2018. The State responds herein.

STATEMENT OF THE FACTS

On December 5, 2010, fifteen-year old (15) Alexus Postorino ("Alexus") was home, where she lived with her father William Postorino ("Billy") and Nicholas Brabham ("Nick"). 20 AA 4536-37. 21 AA 4617-18. By 3:30 a.m. on December 6, 2010, Alexus was dead, shot five times while she was sleeping in her father's bedroom. 21 AA 4618; 24 AA 5326, 5356, 5360.

Billy, whose nickname was "Dollar Bill," had been involved in a prescription drug "business" since late 2009, and this involved Billy altering real prescriptions on his computer, paying multiple people to fill these prescriptions at various pharmacies, then reselling the pills, primarily through Nick. 21 AA 4801-03; see also 20 AA 4540-41. Either Billy or Nick was usually at home because of the large quantities of money and/or drugs that were in the house. 20 AA 4543; 21 AA 4804. At the time of Alexus's murder, Billy was addicted to marijuana and methamphetamine and Nick was a high functioning methamphetamine and marijuana addict. 20 AA 4538-39, 21 AA 4800.

Billy and Appellant (whose nickname was "Bates") had known each other since fifth grade. 21 AA 4797. Billy considered Appellant to be a good friend. Id. Appellant had been to Billy's house about "a hundred times" and Billy's dog knew

Appellant well. 21 AA 4823. Appellant had been upstairs and knew where Billy's safe was, as well as where the drugs and money were kept. 21 AA 4823-24. In 2010, Appellant informed Billy that he needed money, so Billy tried to help him out by including Appellant in his prescription business; specifically, Billy sold prescriptions directly to Appellant so that Appellant could fill the prescriptions out and sell the prescription drugs himself. 21 AA 4797-98, 4804-05.

Shortly before Alexus's murder, Appellant attempted to return several prescriptions to Billy because the pharmacy had not accepted them. 21 AA 4805. Nick and Billy began having problems with Appellant, because of issues with the prescriptions. 20 AA 4543-44. Nick had been around Appellant on a daily basis for approximately one month before the murder. 20 AA 4544-45.

On December 1, 2010, Appellant called Billy to trade prescriptions with new ones claiming that they could not be filled. 21 AA 4806, 4832. Billy told Appellant that he and Nick were out of the house and that only Alexus was home and that she was sick and sleeping. 21 AA 4806; 20 AA 4545. Appellant told Billy that he did not have the time to wait for Nick to return home. 21 AA 4806.

Nick later called Billy to tell him that the house had been burglarized and money and marijuana were missing. 20 AA 4545-46; 21 AA 4806. Specifically money, marijuana, PlayStation games, a duffel bag, and a large bag of 250 Xanax pills had been stolen. 21 AA 4808. Billy suspected Appellant of committing the

burglary because only Nick, Alexus, and Appellant knew that Billy was away from the house as Billy had purchased a new car and his old car remained in the driveway. 21 AA 4806, 4808. Billy called Appellant to confront him about the burglary, and Appellant denied the accusations. 21 AA 4808. Billy then informed Appellant that he was not doing any more business with him and that he was "done with [him]." 21 AA 4808. Appellant later tried to convince Nick that he had not burglarized the house, but when this conversation was relayed to Billy, Billy did not believe Appellant. 20 AA 4547.

Between December 1, 2010, and December 5, 2010, Appellant sent Billy several text messages, including one claiming that Billy still owed him money for the prescriptions Appellant had been unable to fill. 21 AA 4809. During his interview with detectives, Billy showed these text messages to the police. 21 AA 4811.

On December 4, 2010, at 12:48 p.m., Appellant texted Billy that he was owed "450 is being overlooked and now have justifiable reason to get what is owed to me." 21 AA 4811.

Eleven minutes later, at 12:59 p.m., Appellant texted "I'm actually hoping that you don't pay me because I then feel I'm only following protocol and I love it that you just paid rent. I love funk season." Id.

Six minutes later, at 1:05 p.m., Appellant texted "yes, I'm hoping you get upset because I pointed Lisa's, Nick, and your spot out if I end up dead. So $450 or war, and element of surprise." 21 AA 4811.

At 1:21 p.m., Appellant texted "I haven't got my 450 and I've got to collect once school starts," meaning that Appellant was going to teach Billy a lesson. 21 AA 4812; 22 AA 4887.

Seven minutes after that, at 1:28 p.m., Appellant added "I'm going to have some homies roll with me to get that 450 and have to live up to my scheduled appointments. And I actually know you're now getting ready. Hurry." 21 AA 4812.

Finally, at 6:36 p.m. on December 4, 2016: "No, we creep, but I've got a smoke grenade, 20,000 square feet to sell them legally. No questions asked. See, I stay ready and have been doing cardio daily." 21 AA 4812.

Billy considered these text messages to be threatening, but his father was in the hospital and he had little patience; Billy texted back "Are you fucking kidding me, man?" 21 AA 4813. Billy told Appellant he had the $450, but Appellant avoided meeting with Billy and ultimately recovered the $450 through Nick. Id.; 20 AA 4548. Nick believed the problems with Appellant to be over, that the issue was between Billy and Appellant, and that there were no problems with anyone else at that time. 20 AA 4548-49.

Bridgette Chaplin, Appellant's ex-girlfriend and friend, spent time with Appellant a few days before Alexus's murder and Appellant was very angry that Billy accused him of burglarizing his home. 23 AA 5159-60. Bridgette testified that "[Appellant] was upset. He wouldn't sit down. He just kept texting, pacing, walking back and forth." 23 AA 5160. Appellant asked Bridgette what she thought the worst thing that could happen to her was. 23 AA 5160-61. At that time, Bridgette was hiding from federal authorities for violating federal probation so she responded that the worst thing would be getting caught, to which Appellant replied "No, what if something was to happen to your kids." 23 AA 5161. Appellant also told Bridgette that the best way to get rid of evidence was to burn or bury it. 23 AA 5162. Appellant's comment about harming children scared Bridgette and made her nervous; because of this, Bridgette left Appellant without warning. 23 AA 5162.

After this conversation and Alexus's subsequent murder, Bridgette admitted that she had attempted to reach out to Appellant in order to get some information she could exchange to reduce her sentence.[2] 23 AA 5169-70, 5179; 30 AA 6893—31

[2] Bridgette's attorney, Michael Gowdey, Esq., testified that Bridgette was worried about the habitual criminal enhancement for her involvement. 20 AA 4509-10. In exchange for a proffer, Bridgette did not receive habitual criminal treatment, receiving 3 ½ to 10 years instead of 6 to 15 years – or rather, instead of 5 to 12 ½ years, which Mr. Gowdey had already negotiated. 20 AA 4513-14. In the original proffer – prior to knowing what benefit she would receive in exchange – Bridgette gave information that she heard Appellant state that the worst thing that could happen to someone was their child being killed. 20 AA 4528.

AA 6914. Bridgette also admitted that she had received a favorable negotiation from the State, pleading guilty to one charge instead of sixty-two charges. Id.

Ashley Riley was another member of the prescription business, and was one of the people who filled prescriptions in exchange for payment from Nick and Billy. 21 AA 4612-13. At the time of Alexus's murder, both Nick and Ashley were high functioning methamphetamine and marijuana addicts and Ashley needed to smoke methamphetamine to be normal. 21 AA 4612; 4666. Ashley was in a relationship with Errol Harris ("Ravon"). 21 AA 4613-14. Ravon was very controlling and jealous, so Ashley would usually park her car away from Billy's house when she visited Nick or Billy, to avoid arguments with Ravon. 21 AA 4614-15. At this time, Ravon did not have a car. Id. Ravon was a dark-skinned African-American male and was 6'3" and approximately 220 to 225 pounds. Id. Ashley knew Appellant, and knew he was involved in the business with Billy and Nick. 21 AA 4617. Ravon had hit Ashley at least once before when she lied to him about where she was and was talking or spending time with other men. 21 AA 4649-50. None of these men were deceased when Ashley testified at trial. 21 AA 4668.

Nick was romantically interested in Ashley, but Ashley was involved with Ravon. 20 AA 4549-50. Nick had met Ravon "about three different times" before

December 10, 2010; Appellant and Ravon looked completely different – Ravon had brown hair, brown eyes, and a darker complexion. 20 AA 4550-51. Nick had seen Ashley beaten up by Ravon, but he had no reason to believe Ravon was angry with him specifically. 20 AA 4591.

The night of December 5, 2010, Alexus, Nick, and Ashley spent the evening together. 21 AA 21 AA 4613-14, 4618. Nick and Ashley took Alexus to In-n-Out for dinner and then returned home. 21 AA 4617-18. Alexus had been painting her bedroom, so she opted to sleep in Billy's bedroom since he was not home. 20 AA 4550-51; 21 AA 4618-19, 4826. Ashley and Nick smoked marijuana and methamphetamine in Nick's room, as they usually did. 21 AA 4618-19. Ashley had parked her car elsewhere, because she was having problems with Ravon. 20 AA 4550. Ashley was playing on Nick's Xbox and Nick was on his laptop, on his bed. 21 AA 4619. Ravon called Ashley's phone twice but Ashley did not answer, knowing he would get angry with her. 21 AA 4642. Eventually, both Nick and Ashley fell asleep on Nick's bed. Id.

Later, Ashley was awakened by loud banging and glass breaking. 21 AA 4620. She woke Nick up, telling him that someone was breaking in. Id. It took Nick a minute to wake up because "he wasn't all the way awake for a minute." 21 AA 4674. Nick got up, walked out of the bedroom, and the hallway light was on when Nick opened the door. 21 AA 4626-27; 21 AA 4602.

When Nick opened the door he saw Appellant – "I see Bates right at the right of me. And I stand up on my tippy toes and said, 'No, Bates, no.' And then being shot. Probably five or six shots – or being fired." 20 AA 4552. Nick believed Appellant had a gun in his hand, which is why he said "no, Bates, no." 20 AA 4553. Nick saw Appellant when he got shot and also saw "like, a – a shadow figure." 20 AA 4586. Nick believed Appellant shot at him five or six times. 20 AA 4554. Nick said "Help me, I'm dying." Id. Nick then heard footsteps down the hallway, more gunshots, and Alexus screaming. Id. The next thing Nick remembered after police arrived was waking up in the hospital. 20 AA 4560-61.

Ashley screamed every time the gun went off, and she hid in the closet of Nick's bedroom. 21 AA 4620-23. Ashley heard Nick say something like "hey, you shot me." 21 AA 4621. Then Nick stumbled into the closet, white-faced, and fell to the ground, moaning. 21 AA 4622. Nick's skin was freezing cold and Ashley thought Nick was going to die. 21 AA 4625. Nick was unable to answer when she asked him who shot him. 21 AA 4622.

Ashley then heard rummaging through the house and a second series of gunshots. 21 AA 4623. Ashley thought there were two people in the house, because when she heard the shots she could also hear rummaging in another part of the house. 21 AA 4661. Ashley grabbed Nick's phone off the bed and jumped out the second-story window to call 911. 21 AA 4624. Ashley told detectives that she did not

believe Ravon was the shooter, because if it had been him he would have known where she was based on her screams at each gunshot. 29 AA 6264, 6286.

Nick was in a coma after being shot. 21 AA 4817. Billy's sister, Lisa Postorino, tried visiting Nick in the hospital three (3) days after the shooting, but he was unconscious and in a coma. 21 AA 4781. Nick was like family and Lisa would pray over Nick while he was in a coma, in the Intensive Care Unite with a breathing tube down his throat. 21 AA 4783-84. Sometime after Christmas, Lisa and a nurse were present when Nick regained consciousness. 21 AA 4783-84. Without Lisa asking Nick any questions or telling him what had happened, Nick told Lisa "Bates [Appellant] did this." 21 AA 4784. Lisa then called the police to tell them that Nick was conscious. 21 AA 4785.

Nick knew what had happened to him when he woke up, and one of the first things he did was tell Lisa that Appellant had shot him. 20 AA 4562-63, 4571. Nick also told Billy that Appellant shot him. 20 AA 4599. Neither Billy nor Lisa told Nick that Appellant shot him. Id. Nick did not know that Alexus was dead until his mother told him. 20 AA 4567-68. Nick did not watch the news or TV upon waking up. 20 AA 4595. No one ever told Nick that Appellant was the person who shot him. 20 AA 4595.

Nick spoke to the police while he was in the hospital, and told them that Appellant shot him. 20 AA 4563. After Nick said that Appellant shot him, police

conducted a photographic lineup with him and Nick identified Appellant. 20 AA 4568-69. Nick was still in the Intensive Care Unit at the hospital when the preliminary hearing was held and, although he knew and had always stated that Appellant had shot him, the details surrounding the incident became clearer after he was released from the hospital.[3] 20 AA 4564-65. Nick was on pain medication while in the hospital, as well as in the burn unit. 20 AA 4570-71. Nick did not remember ever telling police officers on December 6, 2010, that two masked men had broken in and shot him. 20 AA 4575-76. Nick was "positive" and "certain" that Appellant shot him, because he remembered the blonde hair, pale complexion, and blue eyes. 20 AA 4555; 21 AA 4603. There was no possibility that Ravon was the individual who shot Nick. 21 AA 4603.

Nick was in the hospital for over two months, underwent several surgeries, was in a coma, and testified that only one quarter of his intestines remained after the

[3] Nick testified that originally, when he first spoke to police, and at the preliminary hearing, he thought that he had walked through the front door and was going up the stairs when Appellant shot him. 20 AA 4565. Nick admitted that at the preliminary hearing, he testified that he had told Detective Hardy he was alone in the house with Alexus and was going up the stairs when he was shot by Appellant who was exiting Billy's room, but explained that he was under a lot of medication at the hospital, when he testified at the preliminary hearing. 20 AA 4578, 4582. Nick never thought that anyone but Appellant shot him. 20 AA 4565-66. Appellant extensively cross-examined Nick about his testimony at the preliminary hearing and his statement to Detective Hardy, wherein he stated and testified that Appellant shot him, although the details were different. 20 AA 4577-88.

surgeries. 20 AA 4567, 4571. Appellant stipulated that Nick suffered substantial bodily harm from being shot. 20 AA 4569-70.

At 2:44 a.m. on December 6, 2010, LVMPD Officer Lance Hardman and his partner Officer Ann Reeser[4] responded to the call of shots fired. 21 AA 4751-52, 4761. They arrived at the scene at 2:48 a.m. 21 AA 4764. The house was the only house on the street with the door open and the officers saw that the door had clearly been kicked in. 21 AA 4752, 4767.

Ashley came running out of the backyard, limping and frantically yelling for help. 21 AA 4753. Officer Hardman secured her in the patrol vehicle at 2:52 a.m. 21 AA 4753, 4762. Ashley told Officer Hardman that there were two individuals in the house who had been shot, including a little girl, and that the gunman may still be in the house. 21 AA 4753-54, 4767-68.

While they were waiting for backup, the officers heard someone yelling for help from inside the home; based on this, they entered the house and they could still smell gun smoke inside. 21 AA 4754-55, 4768. On the second story, they found Nick, with several gunshot wounds to his abdomen and leg area; Nick was lying in a closet, drifting in and out of consciousness. 21 A 4755, 4768-69. Officer Reeser remained with Nick to render first aid. 21 AA 4756.

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[4] At trial, Officer Reeser's name had changed to Ann Hardman. 21 AA 4774-75.

Officer Hardman continued to clear the second story and entered another bedroom, which was "disheveled" and in which he found a "little girl" [Alexus] who was not breathing, was unresponsive, and with a gunshot wound to her chest. 21 AA 4757. Officer Hardman stayed with Alexus until medical help arrived. Id. Once Alexus was taken away by ambulance, Officer Hardman continued clearing the house then sat with Ashley in the patrol vehicle until backup arrived. 21 AA 4760.

LVMPD Officer Clinton Weaver followed the ambulance carrying Nick to the University Medical Center ("UMC") to make sure no one talked to Nick. 23 AA 5069. Nick went to the Intensive Care Unit directly after surgery. 23 AA 5069.

Doctor Jay Coates, a surgeon at UMC, performed several of Nick's surgeries. 25 AA 5617-18. Nick arrived by ambulance, and was found to be "alert and oriented as to person, place and time" meaning that he was able to give his name, the date, and confirm he could speak. 25 AA 5620, 5622. It seemed as though Nick was able to respond that he smoked one pack of cigarettes a day, used alcohol occasionally, and denied the use of illegal drugs. 25 AA 5620. Dr. Coates explained that being "alert and oriented" did *not* necessarily mean that Nick would have been able to carry on a full conversation. 25 AA 4522. Nick came in with life-threatening gunshot wounds and, within fifteen to twenty minutes of arriving at UMC, Nick would have been *en route* to an operating room. 25 AA 5619, 5634. Dr. Coates explained that although his notes stated the operation time was at 5:05 a.m., the time

only referred to when Dr. Coates was able to dictate his notes. 25 AA 5623-24. Nick had lost two liters of blood, which constituted between 30 and 40% of his total blood volume. 25 AA 5623-24. After his first operation, Nick was in critical condition, intubated, and in a medically induced coma until at least after his fourth surgery on December 21, 2010. 25 AA 5629-33. Nick needed to consult with a speech therapist after being extubated on January 8, 2011. 25 AA 5632. Nick's fifth and final operation took place on February 4, 2011. 25 AA 5632. Nick was in the hospital for just over two months, and was discharged on February 10, 2011. 25 AA 5633.

LVMPD CSA Noreen Charlton responded to UMC Trauma on December 6, 2010. 24 AA 5355. Alexus was pronounced dead shortly after 3:20 a.m. 24 AA 5356, 5360.

Doctor Larry Simms conducted Alexus's autopsy. 24 AA 5325. Alexus had suffered five gunshot wounds. 24 AA 5326. First, a graze wound on her lateral right thigh. Id. Second, a gunshot to the palm of the hand, breaking a bone in her hand and causing stippling around the wound, which showed the shooter must have been within 24 inches of Alexus at the time he shot her. 24 AA 5329, 5331-32. This hand wound is a classic reflexive defense wound, when the victim hopes to stop the bullet. 24 AA 5332-33. Third, a gunshot wound in Alexus's right neck area: the bullet grazed her head, went through her right earlobe, and went through her neck and

back's soft tissues, and exited from her left upper back. 24 AA 5333-36. Alexus had a broader stippling on the right side of her face, again demonstrating that the shooter shot her from close range. 24 AA 5333-34. Fourth, Alexus had a gunshot through her center chest, which went through her aorta, right lung, spinal column, and exited through her right back. 24 AA 5337-38. The stippling indicated the shot went through Alexus's heart from close range and exited through the right side. 24 AA 5339-40. The fifth shot went straight through the right side of Alexus' chest. 24 AA 4340. Alexus was still moving after being shot the first time, because there was blood on the sole of her left heel. 24 AA 5341. Alexus died of multiple gunshot wounds and the manner of death was homicide. 24 AA 5342.

At the time of the murder, Claudia Ortiz lived in Alexus's neighborhood. 21 AA 4677-78. She and her boyfriend had gone out, and returned home in the early morning hours of December 6, 2010. Id. While her boyfriend Jarod parked the car, she saw a man between her house and Alexus's house. 21 AA 4680. Jarod walked Claudia to the door, and Claudia noted that Alexus's dog was not barking. 21 AA 4681. While she was walking up the stairs of her house, she heard a series of gunshots so she went back downstairs to call Jarod and check whether he was okay; this was around 2:30 a.m. 21 AA 4681. Claudia then went back upstairs, heard more gunshots, and woke her parents. 21 AA 4682. Claudia believed there were two series of gunshots, and a total of seven shots. 21 AA 4682. A bullet from

Alexus's house fired through the hallway window in Claudia's house that faced it, entering Claudia's bedroom door and wall. 21 AA 4682-83. Claudia did not tell police about the man she saw in the shadows between the houses that night. 21 AA 4686.

Brenda Williams also lived in Alexus's neighborhood, and was awakened in the early morning hours by something being dragged outside her window across concrete. 21 AA 4704-06. Brenda believed someone was stealing her garbage cans, which she had just replaced, so she looked out her window. Id. She returned to bed but, upon hearing more dragging, she walked downstairs for a closer look. 21 AA 4711. Brenda saw a man of medium and stocky build dragging something wrapped in a sheet or a blanket from the direction of Alexus's house and towards a car. 21 AA 4711, 4716-17. The man seemed rushed. 21 AA 4712-13. The car he was dragging the item toward was a small, newer, "rounded" white four-door car. 21 AA 4714. The item was too big for the car doors to close, and the man drove off with the back driver's side door open. 21 AA 4717-18. She did not believe the item was a television. 21 AA 4738. Brenda believed the man dragging the item may have had gloves on. 21 AA 4749. Brenda did not call the police, as they arrived around that time, and instead left a voicemail on her ex's phone at 3:00 a.m. 21 AA 4719-20. Brenda told police what she saw that morning, but, as she had to take her children to school, she gave another recorded statement later that day. 21 AA 4722.

On December 6, 2010, Billy called his sister Lisa and asked her to pick Alexus up because a neighbor had called him to say police were there. 21 AA 4779-80. Lisa was not able to access the house because the police had blocked off the street because of a shooting. 21 AA 4780. When Billy first learned that someone had been shot when he returned home in the early morning hours of December 6, 2010, he texted Appellant at 4:26 a.m., "you better not have done anything to my kid, mother fucker, or I will kill you," or something along those lines. 21 AA 4888.

When Billy first talked to the police and was asked if he was having any trouble with anyone, Billy first mentioned Appellant, then Ravon. 21 AA 4818-19. Billy, at this point, believed that his problem with Appellant was over since Appellant had received the $450 he wanted. 21 AA 4853-54. However, Billy and Ravon were on good terms and the last time Billy had seen Ravon, Ravon had driven Alexus and Nick home and Billy and Ravon smoked a joint together. 21 AA 4820. However, Billy had seen Ashley come to his house after Ravon hit her, and Billy told the police that Ravon was a "time-bomb." 21 AA 4851. The only reason Billy mentioned Ravon to the police is because he believed Ashley had also been shot. 22 AA 4821; 22 AA 4891. When Billy did a walk-through of his house with police after the murder, a new 60" TV, a laptop, and a small safe had been taken. 21 AA 4822-23. There was money, jewelry, a couple men's rings, and one of Alexus's bracelets

in the safe. 24 AA 5497-98. Appellant and Ravon looked nothing alike and Ravon did not know where drugs or money were in the house. 21 AA 4823-24.

The items taken from the house on December 6, 2010, the money and the drugs that were stolen belonged to Billy and Nick. 20 AA 4571-72. Nick's wallet was found on the floor of Billy's closet, and there was no reason for his wallet to be there. 20 AA 4598. Nick's laptop was found in Billy's room by the police, and Nick did not remember leaving his laptop on Billy's bed. 21 AA 4606-07. Appellant knew about the new TV, which had been in Billy's room. 21 AA 4823, 4827. When Billy went out on December 5, 2010, his room was not in the disarray police found it in, and there was no reason for Nick's wallet to be on the floor of Billy's closet. 21 AA 4824-25.

Sergeant Anthony Cavaricci had been working as a patrol officer in December 2010. At 3:21 a.m. on December 6, 2010, he stopped and cited a vehicle for speeding at 74mph in a 55mph zone in the area of the 215 and 95. 22 AA 4972-75, 4977-78. The car was a 2009 white, four-door Nissan Versa and was occupied by Appellant (who was the single occupant). 22 AA 4978-79. During the traffic stop, Appellant provided a driver's license under the name of Norman Belcher. 22 AA 4976. Sergeant Cavaricci had a good view of the interior of the car despite the rain and time of night, and his usual practice was to make sure the driver's license photograph resembled the driver and that the physical descriptors also matched. 22 AA 4979,

4982. Had they not matched, Sergeant Cavaricci testified he would have conducted an investigatory stop. Id. Appellant signed his name at the bottom of the citation. 22 AA 4983. Sergeant Cavaricci saw several items in the backseat, but did not believe there was a TV in the backseat. 22 AA 4980. Later that day, on December 6, 2010, homicide detectives asked then-Officer Cavaricci to go into a room and asked him whether he recognized someone from the traffic citation he had issued, and Sergeant Cavaricci identified Appellant. 22 AA 4984-4985.

In the early morning hours of December 6, 2010, Officer Ryan Smith received information to be on a lookout for a compact white car, which was wanted in connection with a homicide. 22 AA 4994-95. At 5:58 a.m. that day, Officer Smith responded to a 911 call for a car on fire at 401 East Lamb, outside Fred's Tavern. 22 AA 4996-97. Remembering the request to be on the lookout for a white four-door compact vehicle, Officer Smith ran the plate and verified the vehicle identification number ("VIN"). 22 AA 4997-98. Officer Smith was concerned that evidence may have been eliminated in the fire. 22 AA 4998-99.

The plates belonged to a Nissan dealership for a loaner vehicle. 22 AA 4999. This burned loaner vehicle had been rented from United Nissan under Appellant's name on December 3, 2010. 25 AA 5011, 5015, 5524-25. This car had an intelligent key that allowed for a push start. 22 AA 5011-12. Appellant only had one of these

keys, and the second one remained at the dealership. 22 AA 5012. The car could not start without the key inside. 22 AA 5012-13.

Dispatch informed Officer Smith that the burned car had been stopped and ticketed earlier that morning. 22 AA 4999-5000. Officer Smith retrieved the name of Officer Cavaricci, and notified homicide detectives about the car fire and traffic ticket associated with that car. 22 AA 5000-01. The car was burned through and charred on the inside, leaving nothing identifiable inside. 22 AA 5004.

Homicide Detective Dean Raetz was called to the scene of the car fire at approximately 7:00 a.m. on December 6, 2010. 23 AA 5103-04. The location was across the street from Fred's Tavern. 23 AA 5110. On the video surveillance from Fred's Tavern's back door, an individual is seen walking towards the area of the car fire at 5:30 a.m., then walking away, and then walking back again. 23 AA 5112-14. At 5:38:03 a.m., this individual is seen running away from the fire area. 23 AA 5115. This individual was wearing a blue puffy jacket. 23 AA 5117. A blue puffy jacket was found in Appellant's apartment closet and looked like the same type of jacket. 23 AA 5119-20. Nick identified that Appellant as the individual on the video surveillance. 20 AA 4573-74. Billy also identified Appellant as the individual in the video by his walk. 24 AA 5498-99.

Detective Ken Hardy was assigned to the investigation of Alexus's murder, and arrived on scene at approximately 4:27 a.m. on December 6, 2010. 24 AA 5507.

The call information ("CAD") included two black male adults in ski masks so police officers canvassed stores nearby for such individuals. 24 AA 5514. Sergeant Sanford secured a search warrant for Alexus's house based in part on this preliminary information about two suspects. 24 AA 5518. However, neighbor Brenda Williams never mentioned anyone wearing ski masks, only one individual wearing hoody-type clothes. 25 AA 5524.

Detective Hardy then learned that Officers Smith and Cavaricci had information about a traffic citation and a burned car that appeared to be connected to the murder. 24 AA 5520—25 AA 5521. Detective Hardy asked Officer Cavaricci to bring a copy of the citation issued at 3:21 a.m., and the VIN from the traffic citation matched the VIN from the car fire. Id.

Based on all this information, Detective Hardy made contact with Appellant at his residence at the Siegel Suites at approximately 7 p.m. on December 6, 2010. 25 AA 5524-26, 5538. Detective Hardy asked Appellant whether he would be willing to speak to Detective Hardy back at his office and Appellant said yes. 25 AA 5526. Detectives Hardy and Long then drove Appellant back to the homicide office and interviewed Appellant. Id.

Appellant's statements during this interview – including that he had returned home from the bars between 2 and 3 a.m. and had then had sex with a woman named Paula Silvestri – did not conform to the evidence obtained during the investigation.

25 AA 5571-72. Appellant also denied ever being stopped for speeding at 3:21 a.m. on December 6, 2010. 25 AA 5572. Appellant stated that someone else was driving his car, and that his car must have been stolen. 25 AA 5569-77; see also 31 AA 6965-72. Appellant also vehemently denied being at the area of the car fire, stating "that's a damn lie." 25 AA 5573. Because Appellant's statements were inconsistent with the evidence, Detective Hardy requested that Officer Cavaricci come in and observe Appellant face-to-face. 25 AA 5572. Detective Hardy also requested ATM records, as suggested by Appellant: the last time a physical location was tied to Appellant's activity on the ATM card was at 11:14 p.m. on December 5, 2010, at the Speed Zone Bar. 25 AA 5574-75.

Detective Hardy also tried speaking with Nick, but as discussed supra, Nick was sedated in the ICU and could not communicate; he was not able to talk to police until January 12, 2011. 25 AA 5530-31; see also 25 AA 5629-33. On December 30, 2010, Lisa called Detective Hardy and told him that Nick could speak and Nick had told her that "Bates had the gun." 25 AA 5531. On January 3, 2011, Detective Hardy tried to speak with Nick, but medical staff turned him away. 25 AA 5531. On January 12, 2011, Detective Hardy met with Nick and took Nick's statement. Id. Nick was heavily medicated and did not remember seeing Detective Hardy before that. 25 AA 5532.

Detective Hardy also interviewed Ravon based on Ashley's connection to him. 25 AA 5533. Ravon told Detective Hardy that he was home at the time of the shooting. 25 AA 5533. Since Ashley had Ravon pick her up on December 6, 2010, and since Detective Hardy could not find any problem between Ravon and Alexus, Detective Hardy did not take Ravon into custody. 25 AA 5533-36. Detective Hardy continued to interview people, even after Appellant had been arrested. 25 AA 5541-43. Detective Hardy requested cell phone records and video surveillance from Fred's Tavern, making multiple forensic requests with police laboratories. 25 AA 5543-44. Detective Hardy's partner interviewed Appellant's proffered alibi witness Paula Silvestri, with whom Appellant said he was having sex with when the murder occurred. 25 AA 5570-71.

Officer Daniel Webb was a correctional officer at the central booking bureau in December of 2010. 24 AA 5381-82. On December 7, 2010, he was working in the central booking area when Appellant was booked. 24 AA 5383. At approximately 10:30 a.m. on December 7, 2010, Appellant called him closer and asked him: "Sir, are you going to put me in max custody because I killed a kid?" 24 AA 5384, 5387. Officer Webb did not know why Appellant was in custody, but wrote the statement down because it was a unique statement. 24 AA 5385.

As discussed supra, Appellant had rented a white Nissan Versa on December 3, 2010. 22 AA 5011, 5015. This car had an intelligent key that allowed for a push

start. 22 AA 5011-12. Appellant only had one of these keys, and the second one remained at the dealership. 22 AA 5012. The car could not start without the key inside. 22 AA 5012-13.

Francesca Sierra worked at the Siegel Suites as a property manager. 23 AA 5079-80. In December 2010, Appellant lived at the Siegel Suites in Apartment 218. 23 AA 5080, 5084-85. Guest keys were required to enter the apartment or lock the door of the apartment upon leaving. 23 AA 5081-83, 5086. According to the door logs for Apartment 218, there was no exit or entry between 11:41 pm. on December 5, 2010 and 6:11 a.m. on December 6, 2010. 23 AA 5086-89. As such, there was no entrance or exit between 2 a.m. and 3 a.m. on December 6, 2010. 23 AA 5101-02.

David Louie reviewed Appellant's bank records for his prepaid debit card. 24 AA 5362-64. The transaction history on December 5 through December 6, 2010, showed that the cardholder withdrew money at 11.14 p.m. on December 5, 2010. 24 AA 5368-69. At 11:21 a.m., the cardholder had problems retrieving funds and called the toll-free number to validate the card information: to do so, the cardholder had to give his date of birth and social security number. 24 AA 5369-70. The next transaction occurred at 3:45 p.m. on December 6, 2010. 24 AA 5370-71.

Appellant's cell phone records were obtained and examined, and Appellant stipulated to the admission of the cell tower locations as requested by Detective

Hardy. 24 AA 5443-53. When cell phones are used, the phone transmits off a tower, and the cell tower logs the telephone information at the time the phone was in the area. 24 AA 5490-91. This cell tower information showed Appellant's phone as having been near the cell tower close to the care fire at 6:06 a.m., but also showed that Appellant's phone was not near 9752 Villa Lorena at the time of the murder. Id.

LVMPD Senior Crime Scene Analyst Erin Taylor responded to Appellant's apartment at the Siegel Suites at 7:50 p.m. on December 5, 2010 and impounded evidence, including two cell phones she gave to the homicide detectives. 23 AA 5188-89, 5212-13. CSA Taylor also impounded several pairs of shoes. 23 AA 5190. She observed wet towels in the bathroom and could smell bleach. 23 AA 5192-93. CSA Taylor also found apparent blood on a pillowcase, deodorant bag, sheets, and jeans in a double Kmart bag on the living room floor. 23 AA 5185, 5192-5200.

LVMPD Detective Paul Ehlers analyzed the two phones recovered from Appellant's apartment. 24 AA 5294-97. They were cheap phones with rudimentary systems, but Detective Ehlers recovered several deleted messages, including a message from Billy to Appellant at 4:26:53 a.m. on December 6, 2010, stating "if you did something to my kid mother, I'm going to kill everything can't lose $." 24 AA 5299-5300, 5304. Detective Ehlers also recovered messages from another number, which stopped at 11:47 p.m. on December 5, 2010 and began again at 6:27 a.m. on December 6, 2010, with the last message reading "I'm coming your way

now. I fell asleep. Forgive me. I'll be at your door shortly. Stopping for shampoo. If it's not okay text me back." 24 AA 5312-13.

The apparent blood found in Appellant's apartment was analyzed and the blood only matched Appellant. 23 AA 5230-34. In the master closet of Alexus's house, a floor swab revealed Alexus's blood and that of a male contributor; however, the male contributor could not be identified because Alexus's blood DNA masked the male contributor's skin DNA. 23 AA 5228-30. Appellant's fingerprints were not recovered from the 9752 Villa Lorena or from Nick's wallet. 23 AA 5252-59. The blood and fingerprints were not compared to Ravon. 23 AA 5238, 5261.

The police, during the course of their investigation, did not recover a firearm that matched the bullets found in Alexus or Nick or at the 9752 Villa Lorena crime scene. 23 AA 5286.

Footwear impressions from 9752 Villa Lorena were not matched to any of the shoes recovered from Appellant's apartment. 24 AA 5412-22.

During Appellant's interview with detectives on December 6, 2010, photographs were taken of Appellant; these photographs showed injuries to the back of Appellant's neck, as well as a few injuries on his fingers and lower arms. 23 AA 5202-04.

At trial, Appellant stipulated that he had set the car on fire because he was worried about losing his license after receiving the speeding ticket. See 20 AA 4472.

Ravon lived with several roommates, one of whom owned a white four-door Grand Prix, which Ravon had access to. 21 AA 4664. Ravon also had access to a small white SUV that belonged to Moses, another of Ravon's roommates. 21 AA 4640, 4663-64. Ashley never listened to the voicemail Ravon left her the night of the murder. 21 AA 4643. Ashley gave police permission to go through her phone, but her phone was not seized by police. 21 AA 4644. Ashley told police about Ravon, that he sometimes sold methamphetamine, and that he lived with several other individuals, including Dale Rasmussen and Moses. 21 AA 4645. Ashley told Detective Mogg about her relationship with Ravon, Ravon's jealousy and anger, and that Ravon had called Ashley the night of December 5, 2010. 21 AA 4648-49. Ashley told Detective Mogg at the time that "if [Ravon] thinks I'm lying, then he'd get pissed off" because he was controlling, jealous, and had already beaten her when jealous. 21 AA 4649. Detective Mogg questioned her about Ravon's jealous behavior toward Nick. 21 AA 4650. Before December 6, 2010, Ravon had gone to Alexus's house and confronted Billy about Nick's relationship with Ashley. 21 AA 4652.

At trial, Appellant presented expert testimony on eyewitness memory and testimony (Dr. Robert Schomer), who testified about the various factors the jury should take into account when determining whether an eyewitness identification is reliable. 26 AA 5766. Dr. Schomer testified that many eyewitnesses exaggerate the

size of an individual in a threatening situation, although larger individuals are rarely reported as smaller than they are in a threatening situation. 26 AA 5758-59. The jury inquired whether someone in a coma could hear information and believe that information was correct. 26 AA 5771. Dr. Schomer confirmed that it was possible. Id.

Appellant also presented expert testimony regarding crime scene investigation, DNA, blood stain pattern analysis, and shoeprint identification (Dr. George Schiro). 26 AA 5772-75. Dr. Schiro testified that none of Appellant's blood, hair, saliva, or DNA was found at Alexus's residence. 26 AA 5780-82. Dr. Schiro admitted that, in his experience, there could be times where there is a crime scene with no evidence tied to the scene. 26 AA 5790-91. Dr. Schiro also confirmed that to cause Alexus's injuries, the shooter would have be standing over her and shooting her from a close distance. 26 AA 5793. Dr. Schiro also admitted that, based on the evidence, Alexus was still alive when some of the shots occurred. 26 AA 5794.

During the penalty phase, LVMPD Investigator Dean O'Kelley testified as to Appellant's prior convictions, including his Voluntary Manslaughter conviction. 27 AA 6055-6101. Alisiana Brooks, Lisa Postorino, Rachel Peterson, and William Postorino, testified during the penalty phase as friends and family of Alexus. 27 AA 6108-36. Dr. Roitman testified in mitigation for Appellant, providing the jury with a report of his findings. 27 AA 6148-84; see also 31 AA 6939-6951.

SUMMARY OF THE ARGUMENT

First, the district court did not abuse its discretion in denying Appellant's motion to suppress his statement. The court properly considered the length and form of questioning, the site of the interrogation, and the objective indicia of arrest, including the Taylor factors, in finding that Appellant was not in custody at the time he gave his statement.

Second, Appellant is not entitled to a new penalty phase hearing because he adamantly refused to participate in any mitigation research at his penalty phase, and Dr. Roitman testified according to his interviews with Appellant. Moreover, there was no concession of guilt, as Dr. Roitman's testimony took place at the penalty phase after Appellant had already been convicted of the First Degree Murder.

Third, Appellant had sufficient notice of the State's aiding and abetting theory of liability, and the State presented evidence to the jury that could have supported a finding of guilt under an aiding and abetting theory. Moreover, the evidence adduced at trial supported Appellant's conviction as the direct perpetrator of the crimes, as demonstrated by Appellant's convictions for First Degree Murder under three alternative theories, and Appellant's conviction for Attempted Murder.

Fourth, neither Bridgette's testimony as to Appellant's statement about harming a child nor Billy's belief that Appellant burglarized his house on December 1, 2010, qualified as prior bad acts under NRS 48.045(2). Moreover, Appellant

stipulated to the admission of the testimony pertaining to the burglary, and cannot now complain of its admission.

Fifth, Appellant fails to demonstrate plain error as to Detective Mogg's testimony stating that she believed Ashley's version of events. This testimony was prompted in response to Appellant's inferences that Detective Mogg was initially skeptical of Ashley.

Sixth, any rational trier of fact could have found the essential elements of robbery beyond a reasonable doubt. Nick was shot; Nick's computer was in Nick's room before he and Ashley fell asleep and was found in Billy's room after the shooting; and Nick's wallet was found on the floor of Billy's bedroom closet after the murder.

Seventh, Ravon's statement through Detective Hardy was not testimonial hearsay because it was not admitted for the truth of the matter asserted, but to show the effect on the listener and to disprove Appellant's inferences that police had not investigated Ravon as a suspect.

Eighth, the district court did not abuse its discretion in excluding Ravon's judgment of conviction. Ravon did not testify and the conviction was over ten years old at the time of trial.

Ninth, one of Appellant's counsel's alleged conflict at the preliminary hearing was harmless error – the decision not to cross-examine Nick was a strategic decision,

his other attorney handled this witness, and the jury found Appellant guilty beyond reasonable doubt at trial.

Tenth, the court did not abuse its discretion in finding that there had been no failure to preserve the text messages Appellant sent to Billy because the text messages were preserved into the record and Appellant fails to show that the State was grossly negligent or acted in bad faith.

Eleventh, the district court did not abuse its discretion in denying (in part) Appellant's motion to suppress the evidence found at Appellant's apartment pursuant to a search warrant. Police had probable cause to search the apartment and any evidence found therein would have inevitably been discovered. Moreover, Appellant fails to show prejudice from the search.

Twelfth, the court did not abuse its discretion in denying the motion to suppress Nick's identification of Appellant. The photographic array was not unnecessarily suggestive and Nick identified Appellant – whom he knew – before viewing the photographic array.

Thirteenth, based on the totality of circumstances, the court did not abuse its discretion in denying the motion to suppress Officer Cavaricci's identification of Appellant.

Fourteenth and fifteenth, there was no plain error in instructing the jury at the guilt or penalty phase and these instructions have repeatedly been upheld by this Court.

Sixteenth, this Court and the United States Supreme Court have repeatedly upheld the death penalty as constitutional and Appellant's claim is therefore without merit.

Seventeenth, there was no cumulative error.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT [5]

Appellant claims that he was in custody at the time he made his statements to Detectives Hardy and Long and, as such, the district court abused its discretion in denying his motion to suppress his statements. AOB at 35-37, see also 31 AA 6952-7015 (Appellant's voluntary statement).[6]

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[5] Appellant's first motion to suppress was denied, with the district court applying the Taylor factors discussed infra, and Appellant's second motion to suppress (the motion to reconsider) was denied after consideration of the Nevada Supreme Court's subsequent opinion in Carroll, as discussed infra. Both of these cases support the district court's conclusion, and Appellant's claim fails.

[6] The State redacted Appellant's original statement, removing any mention of his prior voluntary manslaughter conviction, gangs, or prison as well as removing any statements made by Appellant after he was placed under arrest. 24 AA 5502.

A. Standard of Review

A district court's decision to admit or suppress evidence based on an alleged Fifth Amendment violation involves mixed questions of fact and law. Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). "The district court's purely historical factual findings pertaining to the 'scene- and action-setting' circumstances surrounding an interrogation [are] entitled to deference and will be reviewed for clear error." Id. However, this Court reviews de novo the district court's ultimate determination of whether a person was in custody and entitled to Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966); Casteel v. State, 122 Nev. 356, 361, 131 P.3d 1, 4 (2006).

The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a *Miranda* warning. State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998). In determining whether a person is in custody for *Miranda* purposes, the totality of the circumstances must be considered. Id. at 1082, 968 P.2d at 323.

In *Taylor*, the Nevada Supreme Court concluded that a person is in custody when "there has been a formal arrest, or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave." Id. The Court further concluded that an individual is

not in custody if "police officers only question him on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process." Id. A suspect's or the police's subjective view of the circumstances does not determine whether the suspect is in custody. Id.

A court must consider the totality of the circumstances, including (1) the site of the interrogation, (2) whether the objective indicia of arrest are present, and (3) the length and form of questioning. Id.; Alward v. State, 112 Nev. 141, 155, 912 P.2d 243, 252 (1996). Regarding the objective indicia of an arrest, Taylor identified seven factors to analyze in this regard:

> (1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; and (7) whether the police arrested the suspect at the termination of questioning. All seven factors need not be present in order to determine that the suspect was or was not in custody.

Taylor, 114 Nev. at 1082 n.1, 968 P.2d at 323 n.1 (1998).

Subsequently, the Court considered this issue again in Carroll v. Nevada, 132 Nev. __, __, 371 P.3d 1023 (2016). In Carroll, the Court did not change the law, but applied the factors outlined in Taylor, concluding that, based on these factors and the totality of the circumstances, the defendant had been in custody.

Considering the Taylor factors in this case, the record shows that Appellant was not in custody when he spoke to the detectives. As such, the district court did not err in concluding that Appellant was not in custody. Therefore, the district court did not abuse its discretion in denying Appellant's motions to suppress his statement and this claim should be denied.

B. The District Court Did Not Abuse Its Discretion in Denying Appellant's Motion to Suppress Statements and Evidence

In its February 14, 2013 order denying Appellant's Motion to Suppress Statements and Evidence, the district court analyzed the totality of circumstances and objective indicia of arrest under Taylor, and found that:

> With respect to the objective indicia of arrest analysis, ***[Appellant] was told that the questioning was voluntary and he had agreed to talk*** to the detectives about his whereabouts. He was not formally under arrest. Although [Appellant] was brought to Metro's office and the interview room in handcuffs for officer safety, ***while in the room and during the entire interview, he could move about and was not cuffed. In fact, he had items in his pockets and was able to reach into his pockets when [he] wanted to, wore sunglasses during much of the interview, pulled the car key out of his pocket, and put gum in his mouth***. ***He could not have just walked out of the interview room into Metro's offices without an escort,*** however, and the door to the room was locked when the detectives were out of the room and [Appellant] was left alone. ***[Appellant] voluntarily responded to questions, and chose not to voluntarily respond to some questions, which he was permitted to do***. The ***atmosphere was not police dominated,*** although certainly the detectives directed the conversation to the subjects they wanted to cover and ask [Appellant] about. ***No strong-arm tactics***

> ***or deception were used, as there was no yelling, intimidation, or misrepresentation of the information they had***. They did arrest [Appellant] at the termination of questioning, after he was unable to explain the proximity of his car to the crime scene on the day in question and continued to deny he was there, and the traffic officer who had issued the ticket came to the interview room and definitively identified [Appellant] as the man to whom he had issued the ticket. While [Appellant] was in the interview room for about three and a half hours, ***the interview itself took approximately 54 minutes***. He was in the room about 22 minutes before the detectives came in to question him, ***he was alone for about an hour after the interview until the detectives came in with the traffic officer, and then he was arrested and booked***. Considering these factors and after reviewing the entire interview, ***the Court finds that this was not a custodial interrogation and thus Miranda warnings were not required***. The court also finds that the statements given were voluntary. While [Appellant] asserts that he had used Xanax the prior night and morning, he was coherent and appropriately responded to the questioning throughout.

4 AA 714-15 (emphasis added). The district court considered all the factors, and made factual findings as to the "scene- and action-setting" circumstances surrounding Detective Hardy's interrogation of Appellant, finding that Appellant was not in custody until he was formally placed under arrest.[7] Id.; Rosky, 121 Nev.

[7] Appellant makes much ado about the State's misstatement in its December 4, 2015, Opposition to Defendant's Motion to Suppress Officer Cavaricci's Identification of Defendant – two years after Appellant's motion to suppress statements was denied – where the State wrote "as they had defendant in custody." AOB at 36; 10 AA 2274; see also 10 AA 2287. The State corrected this mistake on the record, on January 6, 2016, explaining that: "That was a misstatement to say he was in custody. ***The State is not conceding***. . .That was just a mistake." 12 AA

at 190, 111 P.3d at 694. These factors, discussed supra, are: (1) the length and form of questioning; (2) the objective indicia of arrest; and (3) the site of the interrogation. Taylor, 114 Nev. at 1082, 968 P.2d at 323.

1. Length and Form of the Questioning

When Appellant was brought to the homicide division for his interview, Detective Hardy stated that:

> [T]he only reason [Appellant] was even mentioned was that the feud that Mr. Postorino brought up that: Oh, I'm in the middle of a feud with Norman Belcher. From there we then – while we were still at the scene [of the murder] we had learned information that a vehicle that was rented to Mr. Belcher was found there Lamb and Stewart maybe on fire. And also from that we had learned that there was a previous event 36 minutes after the homicide, that he had been pulled over by a Officer Cavaricci [who] had issued a citation to the driver, Norman Belcher. So with that, the car being burned up and Mr. Belcher receiving a citation, or a person saying he was Norman Belcher receiving a citation, that was where our investigation was leading us to.

3 AA 651-52.

Moreover, at the time Appellant was interviewed, no one had identified him as the murderer. 3 AA 652. It was only once Appellant denied being issued the citation and claimed his rental car had been stolen that Detective Hardy decided to

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2539. Appellant conveniently neglects to mention that this "concession" was no such thing.

call Officer Cavaricci to identify Appellant. 3 AA 653. Once Officer Cavaricci identified Appellant, Detective Hardy stated that:

> At that point it confirmed that Norman Belcher was lying about being up in the area of the homicide, about the car being stolen, he also had had the electronic key in his pocket. Which we didn't learn until later that there was no way that the car could be stolen unless they had that key. And ***at that point I felt that Norman Belcher was a suspect based on all these facts. He was positively identified by the officer***. And at that time I put him under arrest.

3 AA 655-56. Had Officer Cavaricci said Appellant was not the person to whom he issued the citation earlier that day, Detective Hardy testified Appellant would have left and that the detectives would have continued their investigation. 3 AA 656.

Finally, Appellant chose the line of questioning, refusing to answer certain questions or consider certain topics, and, excluding breaks, the entire interview before Appellant was placed under arrest lasted 54 minutes. See 7 AA 714. Thus, the length and form of questioning suggest that Appellant was not in custody when he gave his statement to Detective Hardy.

2. Objective Indicia of Arrest

At the January 17, 2013, evidentiary hearing on Appellant's Motion to Suppress Statements and Evidence, Detective Hardy testified that when he arrived at the Siegel Suites in the evening of December 6, 2010, he informed Appellant that he wanted to talk to him about his whereabouts earlier that morning. 3 AA 634-85.

Detective Hardy testified he did not have probable cause to arrest Appellant when he met him at the Siegel Suites. 3 AA 667. Appellant already knew that detectives wanted to talk to him about the investigation. 3 AA 647. Detectives asked Appellant whether he "would [] like to come to our office with us so we can talk about this[] and he agreed." Id. Appellant was in handcuffs when Detective Hardy arrived at the Siegel Suites, and within ten to fifteen minutes, Appellant was transported to the homicide division. 3 AA 672. Appellant was not under arrest, but Detective Hardy explained that Appellant was placed in handcuffs while transporting Appellant to the homicide office in Detective Hardy's vehicle, per LVMPD policy. 3 AA 647. Detective Hardy stated that the handcuffs were for officer safety. Id. Appellant was placed in the passenger seat of Detective Hardy's police vehicle. 3 AA 648. The drive lasted approximately thirty minutes. 3 AA 672. Before the interview began, the handcuffs were removed, and remained off throughout the duration of the interview. 3 AA 648.

Detective Hardy testified that when Appellant made it clear he wanted to avoid certain topics – such as drug dealing, the feud between Billy and himself, or Billy's house – detectives respected Appellant's wishes and avoided those topics. 3 AA 651. The room was ***not*** locked when the detectives were inside the room asking Appellant questions, and was only locked when Appellant was in the room alone. 3 AA 682. Detective Hardy also explained that the interview rooms remained locked

at that time of night for safety purposes, to be "comfortable that they're not running around getting into other people's offices or finding weapons or whatever else." 3 AA 658, 682-83. The door would have been locked regardless of who was in the interview room. 3 AA 683. Before questioning began, Appellant's head was on the table and he seemed asleep. 3 AA 679. After questioning ended and as Officer Cavaricci walked in, Appellant again seemed asleep. 3 AA 680. At no point did Appellant ever ask to be let out of the room. 3 AA 683.

Application of the Taylor factors to the instant case illustrates that Appellant was not in custody during his statement at the police station. Appellant voluntarily went to the police station. 3 AA 647. He acknowledged this fact at the outset of the interview. 3 AA 527-28, 649. Appellant was not formally under arrest. Id., 579, 649-50.[8] Appellant's movement was not restricted in the interrogation room. See 4

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[8] Finally, as to Appellant's suggestion that he was entitled to a lawyer when he requested one before he was formally arrested (AOB at 29-30, 35), his claim is without merit. There is no obligation to cease a voluntary interrogation or inform the suspect of their right to leave if the suspect is voluntarily speaking to the police. In Silva v. State, 113 Nev. 1365, 951 P.2d 591 (1997), this Court stated:

> It is well settled that ***one who is not in custody is not entitled to the Fifth Amendment right to counsel. Therefore, the police may continue asking questions, even if he asked for an attorney during the questioning, as long as the statements are voluntary***.

Silva, 113 Nev. at 1370-1371 (citing Minnesota v. Murphy, 465 U.S. 424 n.3, 104 S. Ct. 1136, 1140 n.3 (1984); State v. Stanley, 809 P.2d 944, 950 (Ariz. 1991)). In Silva, as in this case, the defendant initially was a suspect in a robbery/homicide. He was contacted by homicide detectives, and agreed to accompany them to the homicide office to be interviewed regarding his whereabouts at the time of the

AA 714. Appellant voluntarily answered the homicide detective's general questions. The atmosphere was not police dominated; in fact, Appellant dictated the terms of the conversation by, for example, telling the detectives he would not discuss the murder itself or buying/selling controlled substances. Id.; see, e.g., 3 AA 537 ("I'm not gonna tell you what we do"), 651. The homicide detective's general line of questioning did not exhibit strong-arm tactics or deception. 3 AA 650-52; 4 AA 714-15. Rather, Detective Hardy simply asked questions of Appellant to establish his whereabouts during the murder and his relationship with Postorino. 3 AA 651-52. Finally, although Appellant was arrested at the termination of the questioning, that only occurred because police finally developed probable cause to arrest

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murder. Id. at 1366. During the two hour interview, Silva asked for an attorney. Id. at 1365-1367. The detective did not provide Silva with an attorney and continued to question Silva about his whereabouts, despite Silva's "invocation" of his right to counsel. Id. This Court held that, since Silva was not in custody during his second statement, the detective was not required to discontinue questioning even if Silva asked for an attorney. Only if he were subjected to custodial interrogation would a request for an attorney require the police to immediately cease all questioning until an attorney is present. Id. at 1371 (citing Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 1885 (1981)). Therefore, because Silva was not in custody, he had no Fifth Amendment right to counsel to assert. Accordingly, the Court concluded that the detective did not violate Silva's rights and the district court did not err by admitting the second statement. Likewise, any request for a lawyer made by Appellant before being subjected to a custodial interrogation that requires Miranda warnings, fails.

Appellant. 3 AA 653-56. This was only after the patrol officer identified Appellant as the driver of the Nissan Versa which, in turn, contradicted Appellant's alibi. Id.

Thus, the objective indicia of arrest suggest that Appellant was not in custody when he spoke to the detectives.

3. Site of the Interrogation

Appellant voluntarily accepted to accompany Detective Hardy to the homicide division. 3 AA 527-28, 647, 649. Appellant was placed in handcuffs – for officer safety – and was seated in the passenger seat during his transport in Detective Hardy's police vehicle, as was LVMPD policy. 3 AA 647-48. As soon as Appellant entered the interview room at the homicide division, the handcuffs were removed, and Appellant confirmed he was there voluntarily. 3 AA 648-49.

C. The District Court Did Not Abuse Its Discretion In Denying Appellant's Motion to Reconsider

As discussed supra, three years after this first Motion to Suppress, on June 21, 2016, Appellant filed a "Motion to Reconsider Order Denying Defendant's Motion to Suppress Statements and Evidence," as to the district court's February 14, 2013, order, raising new arguments under Carroll, which had been unavailable in 2013. 14 AA 3054-79. As an initial matter, the State would note that the Carroll Court did

not create new law, but instead applied the Taylor factors to the facts of Carroll's case.[9]

In the instant case, when denying the motion, the district court considered all the factors set out in Carroll, and found that:

> [I]n the Carroll case the Supreme Court found that that environment does suggest that Mr. Carroll was in custody. However in that case they also distinguished the previous Silva case from Nevada Supreme Court in 1997.
>
> In Silva the Court had said that questioning the suspect at a police station does not automatically mean that he was in custody. And the Carroll Court distinguished Silva, because in Silva he was questioned for 1 to 2 hours. He was allowed to speak with someone else *when he requested*. No food or drink was withheld from Silva. The police didn't promise him anything and under the totality of the circumstances in that case it didn't create a custodial interrogation. ***But with Carroll they didn't allow him to use his phone when he wanted to make a call. They took his phone away from him. They told him to sit tight. They didn't take him home when he said he wanted to go home***. They promised him they would confirm his claim that he didn't murder the victim and was acting under the

[9] Although Appellant argues that his situation is similar to the defendant in Carroll and, therefore, Carroll supports Appellant's motion to suppress, this assertion is misplaced because these cases are, in fact, inapposite. AOB at 32-33, 35. For example, the last number dialed by the victim was Carroll's phone number. Detectives asked the defendant whether he would speak with them and, when he agreed, the detectives drove the defendant to the homicide office for questioning. 132 Nev. at __, 371 P.3d at 1027. The defendant, on appeal, claimed that detectives violated his Fifth Amendment Right by not giving him a Miranda warning despite his being in custody. Carroll, 132 Nev. at __, 371 P.3d at 1031-32. This Court found that the defendant had been in custody, upon analyzing the totality of circumstances.

direction of the club management and therefore they say: Thus we cannot reach the same conclusion we reached in Silva.

So in comparing, you know, our case against, you know, is our case more like Silva or more like Carroll, in this circumstance with Mr. Belcher he did eventually ask about leaving apparently page 51. I don't remember the exact page number, but I trust State on that. So and there wasn't questioning after that they broke and that's when they waited for Officer Cavaricci to show up and identify – and he did identify Mr. Belcher. And then Mr. Belcher was arrested and things went from there. ***But there wasn't a time during the questioning that Mr. Belcher asked to leave and they effectively ignore it or said: you know, we're not going to let you leave.*** There wasn't a circumstance about, you know, keeping him from making a phone call or as in Carroll taking the phone away to make sure he couldn't make any phone call. He wasn't in this interview. ***He wasn't pressured[,] he wasn't lied to. He wasn't threatened***.

And in the Carroll case, I want to be clear and I wish I had made a note of the exact page number, but I made a note when I read that in the Carroll case, they noted that he had been questioned for 2 ½ hours excluding breaks is what the Carroll case says. *In our case the actual questioning of Mr. Belcher – I understand he was sitting there for some time in between, but the actual questioning of him was less than an hour.* And he – I do acknowledge that neither Mr. Belcher nor Mr. Carroll in his case was explicitly told he could leave. But *there was the discussion about him having voluntarily agreed to participate in the interview*.

And. . .then the Carroll case goes through the analysis of the 7 factors as well as I had done in this case. And again it's the same factors. *And the court in Carroll seems to have been particularly troubled about perhaps surprising acknowledgment by the detectives about their, you know, purposely taking him downtown to try to intimidat[e] him, bringing in the third detective because he's more*

> *aggressive with him, and* ***the fact that, you know, calling it a voluntary interview when he keeps asking to leave and you don't let him do so.*** I think that's what concerned the Nevada Supreme Court in Carroll.
>
> Ultimately I appreciate the argument and that's why we had our hearing and I made the findings that I made. But ultimately I still think that in this case it is not the same as obviously it's not exactly the same, but it doesn't come down the same way as the Carroll case does. I do think we're still more similar than the Silva case, where it was found not to be a site that it is such that it would convey necessarily being under arrest at the time. So for all the reasons stated in my previous decision I'm denying the motion to suppress.

15 AA 3280-82 (emphasis added). The district court thus compared Appellant's situation to that of the defendant in Carroll, and, for the second time, considered the Taylor factors, and found that Appellant was not in custody prior to his formal arrest. Id.; 15 AA 3286-87.

1. Length and Form of Questioning

In Carroll, this Court found that the detectives had questioned Carroll not as a witness, but as a suspect: detectives questioned Carroll for approximately two and a half hours, excluding breaks, which the detective testified were "to let Carroll 'kind of go a little bit crazy;'" a third detective joined the first two because the third detective was more aggressive in his questioning. Carroll,132 Nev. at __, 371 P.3d at 1034. As detailed supra, the district court found that the total length of questioning was under an hour, and that there was no indication that Appellant was

at the police station in order to intimate him. Moreover, Appellant never asked to leave or make a phone call, unlike Carroll. Finally, as in the denial of Appellant's first motion to suppress, the court found that the length and form of questioning did not suggest that Appellant was in custody. 15 AA 3280-82

2. Objective Indicia of Arrest

In analyzing the Taylor factors as to the objective indicia of arrest, the Carroll Court found that (1) Carroll was not informed he was free to leave, and although the police confirmed he was there voluntarily, detectives did not allow Carroll to leave when Carroll repeatedly stated he wanted to go home before making incriminating statements; (2) police told Carroll he was not under formal arrest; (3) the interrogation room was intended to prevent Carroll from moving freely, detectives were between Carroll and the door, and when Carroll asked to leave, detectives told him to "sit tight;" (4) Carroll voluntarily responded, but Carroll expressed apprehension at speaking honestly with detectives, and Carroll repeatedly stated he wanted to terminate the interview and go home; (5) the detectives dominated the atmosphere because three detectives consistently questioned him together, took away his phone when Carroll said he wanted to make a phone call, and refused to take Carroll home when he asked; (6) detectives used threatening interrogation techniques and deception to elicit incriminating statements from Carroll; and (7) Carroll was driven home at the end of the interrogation. Id. at 1033-34.

Here, as detailed supra, the court already ruled on the admissibility of Appellant's statement, and after considering the Taylor factors under this Court's analysis in Carroll, found that the objective indicia of arrest indicated that Appellant was *not* in custody.

Considering the Taylor factors, (1) Appellant voluntarily accompanied Detective Hardy to the homicide division for the interview; (2) Appellant was not formally under arrest until after Officer Cavaricci identified him; (3) Appellant was not handcuffed in the interview room and detectives were not blocking his access to the door, which was unlocked while detectives were inside; (4) Appellant voluntarily responded to questions and chose what line of questioning he wished to avoid; (5) the detectives did not dictate the line of questioning, leaving Appellant the choice of responding to questions or not, and Appellant never mentioned wanting to place a phone call; (6) detectives did not use strong-arm tactics or deceive Appellant; and (7) Appellant was arrested after the interview, once Officer Cavaricci identified Appellant and gave Detective Hardy probable cause.

Unlike the interview of the defendant in Carroll, here, other than this seventh factor, the Taylor factors favor the State. See generally 3 AA 689—4 AA 691. Accordingly, under Taylor, the objective indicia of arrest, there was no custody at the time Appellant gave his interview.

/ / /

3. Site of Interrogation

The Carroll Court first found that the site of the interrogation suggested that Carroll was in custody. 132 Nev. at __, 371 P.3d at 1034. Carroll was driven in a police vehicle to the homicide office, which the detective told the trial court was 'a more intimidating place to question [Carroll],' the arrangement of the room placed two detectives between Carroll and the door, and police took away Carroll's cell phone while in the interrogation room, refusing to allow him to leave when Carroll stated he wanted to go home. Id. at __, 371 P.3d at 1033.

Here, as in Carroll, Appellant voluntarily accepted to accompany Detective Hardy to the homicide division. Appellant was placed in handcuffs, in the passenger seat, during his transport in Detective Hardy's police vehicle, as was LVMPD policy. 3 AA 647-48. As soon as Appellant entered the interview room at the homicide division, the handcuffs were removed, and Appellant confirmed he was there voluntarily. 3 AA 648-49. While the site of interrogation may arguably suggest custody, the remaining factors to be considered in the Court's analysis point to a lack of custody, as detailed supra.

As Appellant fails to show that the district court's findings were clearly erroneous, these findings are entitled to deference, and this Court should deny Appellant's claim.

II. APPELLANT IS NOT ENTITLED TO A NEW PENALTY PHASE HEARING

Appellant claims he is entitled to a new penalty phase hearing because Dr. Roitman, the defense mitigation expert, testified on direct and cross-examination that Appellant wanted to be sentenced to death. AOB at 38-44.

"[A] defendant must be given the opportunity to present evidence of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense before a death penalty can be imposed." Bishop v. State, 95 Nev. 511, 516, 597 P.2d 273, 276 (1979) (holding that the state may not force standby counsel to argue mitigation contrary to the wishes of a pro per capital defendant) (citing Lockett v. Ohio, 438 U.S. 586 (1978); Roberts v. Louisiana, 431 U.S. 633 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976); Smith v. State, 93 Nev. 82, 560 P.2d 158 (1977)). A defendant may waive the right to present mitigating evidence. Kirksey v. State, 112 Nev. 980, 995-96, 923 P.2d 1102, 1112 (1996); see also Colwell v. State, 112 Nev. 807, 811, 818 P.2d 403, 406 (1996) ("a criminal defendant is entitled to represent himself in whatever manner he wishes, whether that be by introducing mitigating evidence, by not introducing mitigating evidence or even by actively seeking the death penalty").

As an initial matter, Appellant repeatedly complains that he was not present and did not participate at the penalty phase. See AOB at 38, 41. As briefly mentioned by Appellant, Appellant requested to be absent during the penalty phase.

In fact, not only did he not wish to be present, but he also repeatedly stated that he did not want any mitigation evidence to be presented to the jury. Before closing arguments, Appellant told the court that "I also want to put on the record if it goes into the penalty phase, I have no intentions of being a part of that." 26 AA 5908-09. Once the jury retired for deliberations, the following exchange between Appellant and the court took place:

> [APPELLANT]: ***From the beginning I've never participated in mitigation. I've never asked my family to come or none of that, so I have no intentions of being here***.
>
> THE COURT: So you don't even want to sit and be present during a penalty phase –
>
> [APPELLANT]: No.
>
> THE COURT: – if there is one? We don't know yet if there's going to be one.
>
> The Defendant: No, I do not.
>
> THE COURT: Okay, So you wouldn't – you understand during the penalty phase not only could your attorneys present evidence on your behalf, but you would be able to – even if you don't testify, you can allocute, which means you can ask for mercy, talk about your hopes and dreams for the future, things along that line. And first of all, let me ask this. Have your attorneys talked to you about the possibility of being present and allocuting during a penalty phase?

[APPELLANT]: Yes, and you also have years ago when I told you my opinion on that.

THE COURT Right. Right. So – right. We've spent a lot of time together on this case over the years. So you understand what I'm talking to you about in terms of what you would have the opportunity to do during a penalty phase if we have one?

[APPELLANT]: Yes. And as you keep saying, people plead to not get the death penalty**.** ***I like the arrangements of living on death row than I do of life without. So I'm fine with death penalty if I was to be convicted. . .I get a single cell and that's what I need.***

THE COURT: Okay. But you're going to choose not to be present at all during the proceedings?

[APPELLANT]: Yes.

THE COURT: Now, in terms of investigation for counsel to present anything, have you talked to your counsel about their desire to do investigation and have evidence to present during the penalty phase?

[APPELLANT]: Yes, ***and I've never cooperated with the things that they've asked me to help them cooperate with as far as having people come in and try to speak on my behalf.*** I've never – I've never allowed them to do that. *I never allowed the mitigation guy who comes in, I would never give him my family's information or name. And I've instructed my family if they were to contact them to just ignore them.*

> THE COURT: Have your attorneys advised you to cooperate with that investigation?
>
> [APPELLANT]: Yes, they have.
>
> THE COURT: And you've made the decision against your attorneys' advice to not cooperate?
>
> [APPELLANT]: Every year since this began.
>
> THE COURT: Okay. So if counsel doesn't have evidence to present o[r] has very little [to] present, I'm not sure exactly, during the penalty phase –
>
> [APPELLANT]: ***That would be because of me***.
>
> THE COURT: Because of you.
>
> [APPELLANT]: It's my fault.

26 AA 5984-86 (emphasis added).

Not only did Appellant unequivocally state his intention to be absent from the penalty phase, but he also clearly explained that he had blocked all attempts at mitigation by defense counsel and his reason for doing so. Defense counsel then made a record of what counsel did in terms of mitigation, such as having Appellant interviewed and examined by a psychologist, obtaining a psychiatrist to assist in the investigation, attempting to interview Appellant's family members (who refused to participate in mitigation), and obtaining Appellant's school records. 26 AA 5988. Based on this record, the court told Appellant that:

> [B]ased on the conversation we've had, it does appear **to be a knowing, intelligent, and voluntary waiver of your right to be present during the penalty phase**, but here's

> what I would say. **It doesn't have to be final**. If we come back here and we have a conviction on first degree murder, you can change your mind and choose to be here. So I don't want it to be like, well, it's over now because I approved it. **You have a right to not be here based on the conversation we just had. But if you change your mind and want to be here, you're allowed to and have the right to be present**.

26 AA 5991-92 (emphasis added). Appellant nonetheless declined to appear at the penalty phase. 27 AA 6029-38.

Despite repeatedly stating that he did not want to participate in the penalty phase or in presenting any mitigation evidence, and blocking all attempts at mitigation investigation and clearly informing the court of his desire to receive the death penalty if found guilty of first degree murder, Appellant now complains that his own expert witness, Dr. Roitman, who, based on his interviews with Appellant, testified that Appellant wanted the death penalty for various reasons. Appellant challenges this "clearly inappropriate and highly prejudicial testimony" that was admitted on direct and on cross-examination because he claims he never consented to the "extraordinary concession" that he wanted the death penalty. AOB at 38, 41.

Here, Dr. Roitman's testimony, including his account of Appellant's repeated requests for the death penalty – was not presented "for tactical reasons" only – indeed, this testimony was presented because it was the only mitigation Appellant participated in. Moreover, as discussed supra, the jury did, in fact, specifically find that Appellant's desire was a mitigating circumstance.

Further, Appellant's citations to legal authority are misplaced. In Mazzan, trial counsel used the penalty phase not to present mitigating evidence, but to "harshly berate the jury for returning its guilty verdict during the prior phase." Mazzan v. State, 100 Nev. 74, 77, 675 P.2d 409, 411 (1984). Unlike trial counsel in Mazzan, who provided no representation at the penalty phase, trial counsel attempted to obtain mitigation evidence for Appellant's penalty phase but was kept from doing so by Appellant, who instructed his family to not speak to counsel or defense investigators and refused to cooperate with counsel, explicitly stating that he wanted the death penalty to the court and to Dr. Roitman. Appellant cannot now complain that Dr. Roitman's testimony – which was the only mitigation presented – was prejudicial.[10]

Finally, Appellant's reliance on several non-binding federal cases and the United States Supreme Court's decision in McCoy v Louisiana, 138 S. Ct. 1500

[10] Dr. Roitman's report was provided to the jury. 31 AA 6939-6951. In that report, Dr. Roitman referenced Appellant's depression, anxiety, and substance abuse. 31 AA 6841, 6843. The report also referenced his good grades in school (31 AA 6842) as well as his three children, in whose upbringing he participated. 31 AA 6945. Dr. Roitman also reported that Appellant became a devout Christian in prison. 31 AA 6945. Dr. Roitman's report also noted that Appellant refused to assist in mitigation because he believed it was linked to danger to his family. 31 AA 6946. Finally, Dr. Roitman reported that Appellant was sincere, contrite, and humble and had taken responsibility for his actions. 31 AA 6951. Despite Appellant not participating in mitigation, Dr. Roitman's report still provided several options in mitigation for the jury to consider. And the jury did, in fact, expressly find that this was a mitigating circumstance.

(2018) is also misplaced. In McCoy v. Louisiana, trial counsel, despite McCoy's adamant objections and claims of innocence, admitted his client's guilt to three murders to the jury at the guilt phase of McCoy's capital trial. McCoy, 138 S. Ct. at 1507. The United States Supreme Court reversed, finding that "[w]hen a client expressly asserts that the objective of 'his defense is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." Id. at 1509. "Counsel's admission of a client's guilt over the client's express objection is error structural in kind. Such an admission blocks the defendant's right to make the fundamental choices about his own defense." Id. at 1511.

Appellant's situation can be distinguished in two key ways: first, the admission that Appellant wanted the death penalty occurred during the penalty phase, ***after*** Appellant had already been found guilty. Second, unlike McCoy, Appellant, instead of objecting, was blocking all attempts at mitigation, informing the court and counsel that he wanted the death penalty. Dr. Roitman framed Appellant's desire for the death penalty as a desire to protect other inmates, avoid racial conflict, and based on a preference for death row accommodations. 27 AA 6158-61. This argument apparently worked, as the jury found that Appellant's desire to die qualified as a mitigating circumstance. 27 AA 6027-28.

Given Appellant's lack of cooperation as to his penalty phase and his obstruction of trial counsel's attempt to present mitigation, none of Appellant's arguments warrants a new penalty hearing. As such, Appellant's claim should be denied.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO STRIKE THE AIDING AND ABETTING THEORY OF LIABILITY

Appellant argues that the district court abused its discretion in denying his "Motion to Preclude Instruction and Argument of Conspiracy and Aiding and Abetting as Theories of Criminal Liability and Motion to Strike Such Language from Charging Instrument,"[11] filed on the first day of trial. AOB at 44-45; 16 AA 3627-55, 3658. Appellant claims that the State "did not present any facts constituting notice of how Mr. Belcher allegedly aided and abetted." AOB at 45. The Information containing the language was filed on January 31, 2011 – almost six years before trial began. See 16 AA 3634-39.

This Court reviews a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion. Hill v. State, 188 P.3d 51 (2008); McNelton v. State, 115 Nev. 396, 414, 990 P.2d 1263, 1275 (1999). An abuse of discretion is "any unreasonable, unconscionable and arbitrary action taken without

[11] Appellant only challenges the aiding and abetting theory of liability. See AOB 44-45 (wherein there is no mention of conspiracy whatsoever).

proper consideration of facts and law[.]" *Abuse of Discretion*, Black's Law Dictionary (Abridged 6th Ed. 1991).

Both federal and Nevada law punish an aider and abettor as a principal, and subject him to the same punishment he would have received had he directly committed the crime. "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a); Rosemond v. United States, __ U.S. __, 134 S. Ct. 1240, 1245 (2014). This reflects the "centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." Rosemond, 134 S. Ct. at 1245; see also J. HAWLEY & M. MCGREGOR, CRIMINAL LAW 81 (1899).

Nevada has adopted this theory of vicarious liability:

> Nevada law does not distinguish between an aider and abettor to a crime and an actual perpetrator of a crime; both are equally culpable. Under NRS 195.020, every person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission is guilty as a principal.

Sharma v. State, 118 Nev. 648, 652, 56 P.3d 868, 870 (2002); see also Garner v. State, 116 Nev. 770, 782, 6 P.3d 1013, 1021 (2000) ("aiding and abetting the commission of an offense is treated and punished the same as directly committing the offense").

To aid and abet a specific intent crime, the defendant must aid and abet with the specific intent to commit the crime. Sharma, 118 Nev. at 652, 56 P.3d at 870. In Bolden, the Nevada Supreme Court held that an instruction on aiding and abetting was correct, where it explained:

> All persons concerned in the commission of a crime who either directly and actively commit the act constituting the offense or who knowingly and with criminal intent aid and abet in its commission or, whether present or not, who advise and encourage its commission, with the intent that the crime be committed, are regarded by the law as principals in the crime thus committed and are equally guilty thereof.

Bolden v. State, 121 Nev. 908, 914, 124 P.3d 191, 195 (2005).

In Barren v. State, 99 Nev. 661, 669 P.2d 725 (1983), upon which Appellant relies, this Court reversed the convictions for murder and robbery because the indictment had not specifically alleged that the defendant had aided and abetted a third party, despite the State proceeding primarily on a theory of vicarious liability and arguing that the defendant was guilty on the basis of acts committed by this third person. Id. at 665-66, 669 P.2d at 727-28. In fact, the State purposely failed to apprise the defendant of its theory of accomplice liability until the day of trial. Id. at 669, 669 P.2d at 730. The Indictment in Barren, unlike the Information in the instant case, made no mention whatsoever of the defendant being charged under a theory of aiding and abetting, instead charging the defendant as the direct perpetrator

of the robbery and murder. Id. at 665-66, 669 P.2d at 727-28. The Barren Court held that:

> [W]here the prosecution seeks to establish a defendant's guilt on a theory of aiding and abetting, the indictment should specifically allege the defendant aided and abetted, and should provide additional information as to the specific acts constituting the means of the aiding and abetting so as to afford the defendant adequate notice to prepare his defense.

Id. at 668, 669 P.2d at 729.

Appellant's reliance on Randolph v. State, 117 Nev. 970, 36 P.3d 24 (2001) is similarly misplaced: in Randolph, the defendant was charged as the direct perpetrator by the State, and did not charge him as an aider and abettor. Randolph, 117 Nev. at 976-77, 36 P.3d at 428-29. The Court found that the State was nonetheless entitled to jury instructions on aiding and abetting as the defendant's defense implicated a theory of accomplice liability. Id. at 978, 36 P.3d at 429.

Here, Appellant was on notice that the State had charged him with three different theories of liability. In fact, the State's theories of liability had not changed since it filed its Amended Criminal Complaint on January 21, 2011, and since the preliminary hearing was held on January 21, 2011. See 1 AA 6-10, 43-152. In the Amended Criminal Complaint and in the Information filed on January 31, 2011, the language charging Appellant for each count set out the theories of liability as follow:

> . . .by said Defendant (1) directly committing the acts constituting the offense; and/or (2) acting pursuant to the

> conspiracy, with the specific intent to commit the crime, with one or more unknown confederates whereby each individual is vicariously liable for the foreseeable acts of the other made in furtherance of the conspiracy, and/or (3) *by aiding or abetting one or more uncharged confederates in the commission of this crime with the intent to commit this crime* ***by providing counsel and/or encouragement****, the Defendant and his confederates acting in concert throughout*.

See e.g., 1 AA 38-43 (emphasis added). Unlike the Indictment in Barren, the Information does set out how Appellant aided and abetted this third person.

Moreover, at the preliminary hearing, Ashley testified that immediately after Nick was shot and stumbled back into the closet with her, she heard "some rummaging around, like somebody going through stuff a little bit." 1 AA 107. Ashley testified that it sounded as though it were coming from the master bedroom, but it sounded as though it were coming from more than one area in the master bedroom. 1 AA 108-09. Nick also testified that he saw Appellant shoot him and that there was "s*omebody in the background*, but I couldn't see who it was, it was dark in the room" and that he did not know who this second person was. 1 AA 147-48.[12]

[12] Moreover, the aiding and abetting language was appropriate, because had the jury believed there was more than one person present at the house when Alexus and Nick were shot, given the evidence presented at trial, an aiding and abetting theory was necessary.

Further, even assuming arguendo that the Information was insufficient notice as to the theories of liability, this deficiency was harmless for two reasons. First, the evidence adduced at trial, unlike the evidence presented in Barren, pointed to Appellant having directly committed the crime – this included, but was not limited to, evidence that Appellant was feuding with Billy in the days before Alexus's murder; Appellant told Bridgette that the worst thing that could be done to someone was to harm their child and that the way to destroy evidence was to burn it or bury it; Appellant was cited for speeding at 3:21 a.m. on the morning of the murder, Appellant's rental car was found burned between 5:30 and 6:00 a.m. on the morning of the murder; and Appellant was identified by Nick as the person who shot him on December 6, 2010. 21 AA 4606-08.

Finally, any alleged lack of notice in the Information would be harmless because the jury, in returning its verdict of guilt, found Appellant guilty under all three different theories of First Degree Murder – (1) the murder was willful, deliberate, and premeditated; (2) the murder was committed during the perpetration of or attempted perpetration of a robbery; and (3) the murder was committed during the perpetration of or attempted perpetration of child abuse. 26 AA 5904; 27 AA 5997-98. Therefore, not only is this case considerably different than Barren, but even had Appellant not been on notice of the State's aiding and abetting theory of liability, this lack of notice would have been harmless given the evidence presented

at trial and the jury's special verdict finding Appellant guilty of three different First Degree Murder theories – two of which inherently included accomplice liability.

Accordingly, Appellant's claim is without merit and should be denied.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING BRIDGETTE AND BILLY'S TESTIMONY

Appellant argues that the court abused its discretion in admitting "highly prejudicial character evidence" and/or bad act evidence – (1) Bridgette's testimony that Appellant told her that the worst thing that could happen to someone would be losing a child (AOB at 46); and (2) Billy's testimony that he believed Appellant had burglarized his house on December 1, 2010 – five (5) days before Appellant murdered his daughter (AOB at 46-48).

"The trial court's determination to admit or exclude evidence of a prior bad act is a decision within its discretionary authority and is to be given great deference." Braunstein v. State, 118 Nev. 68, 72, 40 P .3d 413, 416 (2002). This Court reviews the district court's determination regarding the admissibility of prior bad act evidence for an abuse of discretion. See Crawford v. State, 107 Nev. 345, 248, 8111 P .2d 67, 69 (1991).

NRS 48.045(2) reads:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person 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***.

(emphasis added). To deem a bad act admissible, the trial court must consider three factors: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1065 (1997); Bigpond v. State, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012).

To admit evidence of a prior bad act, the State must first seek a hearing outside the presence of the jury pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996). However, the lack of a Petrocelli hearing does not require reversal if: "(1) the record is sufficient to determine that the evidence is admissible under [the modified standard set forth in Bigpond]; or (2) the result would have been the same if the trial court had not admitted the evidence." McNelton v. State, 115 Nev. 396, 405, 990 P.2d 1263, 1269 (1999).

With regard to a determination of prejudice:

> [P]rejudicial" 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) (emphasis added). 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).

In Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009), the Nevada Supreme Court affirmed the district court's determination to admit evidence that the defendant owed debts to the victim and that he had previously engaged in a conversation about killing a man to whom he owed money. The Nevada Supreme Court agreed with the district court's decision that such evidence was admissible as proof of motive, to disprove his contention that he was just an innocent bystander to his wife's scheme, and to prove identity.

However, evidence is not a prior bad act unless the evidence elicited speaks to chargeable collateral offenses. See Salgado v. State, 114 Nev. 1039, 1042-43, 968 P.2d 324, 326-27 (1998) (Petrocelli hearing is not required in cases where the evidence does not implicate prior bad acts or collateral offense on the defendant's part) (emphasis added); Colon v. State, 113 Nev. 484, 494, 938 P.2d 714, 720 (1997) (Petrocelli hearing not required when State elicited testimony that defendant knew where marijuana was grown in her building, associated with drug dealers, and bailing out a known drug user).

A. Appellant's Statement to Bridgette about Harming a Child

Other than claiming that Bridgette's subjective fear was prejudicial and prevented Appellant from receiving a fair trial, Appellant fails to show how Bridgette's testimony about her conversation with Appellant was a prior bad act that should have been excluded at trial. AOB at 46, 48. Before Bridgette's testimony, Appellant challenged Bridgett's proffered testimony. See 22 AA 5036-47.

Appellant's ex-girlfriend Bridgette Chaplin testified that Appellant and Billy's relationship deteriorated after Billy refused to give Appellant more prescriptions. 23 AA 5159. She spent approximately an hour and a half with Appellant in the early days of December, after Billy had accused Appellant of burglarizing his home on December 1, 2010, which Appellant vehemently denied. 23 AA 5159, 5172-73. Bridgette testified as follows:

> Q: Now, did you ever personally witness the defendant as he was expressing that anger or frustration [against Billy]?
>
> A: Yes.
>
> Q: Can you describe how he did it, how he behaved when he was doing it?
>
> A: He was upset. He wouldn't sit down. He just kept texting, pacing, walking back and forth.
>
> Q: And his anger or his frustration, was that directed at you?
>
> A: No.

Q: Was it directed, from your understanding, to Billy?

A: Yes.

Q: Okay. And did you describe him as sort of preaching about it?

A: Yes.

Q: And what does that mean? Can you put that – can you explain that please.

A: He would just ramble on and just lecture about it.

. . . .

Q: Okay. And then how was his demeanor when he was talking about this? Was he just calm, even keeled, or was he –

A: No, he wasn't calm.

Q: All right. How would you describe him?

A: Mad.

Q: Okay. At some point in this period where he's mad and he's talking about that, did he make a comment to you about what's the worse thing that could happen to you?

A: Yes.

Q: All right. What exactly did he say?

A: he asked me what is the worse thing that could happen to me, and at the time I was on the run, so I figured that he was talking about that and I told him that it would be me getting caught.

Q: What was his response to you?

A: He told me, no, what if something was to happen to your kids.

Q: What if something was to happen to your kids?

A: Yes.

Q: That's what the defendant said?

A: Yes.

23 AA 5160-61. Both the State and Appellant asked Bridgette about her numerous charges and the plea deal she ultimately received, as well as the proffer concerning the above-mentioned statements which she provided to the State. 23 AA 5162-68.

First, Appellant's statement to Bridgette is a non-hearsay statement. NRS 51.035(3)(a) states that "'Hearsay' means a statement offered in evidence to prove the truth of the matter asserted unless the statement is offered against a party and is [t]he party's own statement, in either the party's individual or a representative capacity." Thus, Appellant's statement was a statement made by a defendant, elicited by the State, and was therefore, not hearsay.

Second, nothing in Bridgette's testimony references a chargeable offense that would qualify as a prior bad act. Moreover, even assuming arguendo that this statement were a prior wrong or bad act, this statement would nonetheless be admissible to prove either Appellant's intent or motive in killing Alexus since, according to Appellant, this was the worst thing that could happen to a parent such as Billy. Taken in context, wherein Appellant was "texting" and complaining of

Billy's accusations against him before making this statement, this is probative of Appellant's specific intent or motive to kill Alexus.

Finally, Appellant cross-examined Bridgette, eliciting the details of her plea agreement with the State as well as the substantial benefit she received from testifying against Appellant. 24 AA 5168-79. Appellant also received a jury instruction concerning the reliability of an informant's statement that instructed the jury that "the testimony of a witness who may have been conferred a legal benefit by the State in exchange for his or her participation in an investigation must be examined with greater scrutiny that the testimony of an ordinary witness." 26 AA 5857; see also 26 AA 5858.

Accordingly, nothing in the statement of which Appellant complains constitutes a prior bad act, and Appellant's claim should therefore be denied.

B. Billy's Testimony That He Believed Appellant Burglarized His Home

On December 1, 2010 – mere days before Alexus's murder – Billy's house was burglarized and several items were stolen. As discussed supra, Billy and Appellant had been having problems before that, relating to prescriptions that Billy gave Appellant that were not accepted by pharmacies. Billy believed that Appellant was responsible for the burglary and theft, because Appellant was angry with Billy after several prescriptions were denied by pharmacies (21 AA 4805-08); Appellant sent Billy multiple threatening text messages (21 AA 4809-13); and Appellant was

the only person, other than Nick and Alexus, who knew that Billy was not home on December 1, 2010, and knew where the money and drugs that were stolen were kept (21 AA 4806-08). Between December 1 and December 6, 2010, Appellant was with Bridgette, and was upset about Billy's accusations. 23 AA 5160-61; see also supra. In addition, Billy, Bridgette, and Nick testified that Appellant denied burglarizing Billy's home. 20 AA 4547; 21 AA 4808; 23 AA 5159.

However, Billy's belief that Appellant burglarized his house was a mere suspicion and was but one step in the chain of events leading to Appellant killing Alexus and shooting Nick. 22 AA 4832; AOB at 47. This was not a chargeable collateral offense that would qualify as a bad act under NRS 48.045(2), contrary to Appellant's assertion. AOB at 47-48. First, the State fails to find any contemporaneous objection by Appellant as to the admission of testimony concerning this burglary, and Appellant fails to cite to such. In fact, Appellant ***stipulated*** to the admission of testimony referencing Billy's belief that Appellant had burglarized Billy's home on December 1, 2010, agreeing that the Petrocelli standard was met as to this testimony, because he also wanted "to get into [the alleged burglary] in order to defend the case." 6 AA 1367-68.

As such, if at all given Appellant's stipulation, this Court should review the district court's admission of the testimony for plain error. To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the

record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson v. State, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007)); see also Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590,593 (2015); Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson v. State, 111 Nev. 1525,1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123,130 (1995). Here, Appellant fails to make any showing of plain error. In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice." Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). 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.

Moreover, even assuming arguendo that Appellant had objected and had not stipulated to the admission of the testimony, the State did not elicit testimony that Appellant actually committed the burglary. Rather, Billy's testimony about the burglary was evidence of Appellant's intent or motive under NRS 48.045(2): indeed, it was Billy's accusations against Appellant that led to the feud between them, which led to Appellant's threatening text messages to Billy, and his statements to Bridgette about harming a child; which all led to a reasonable inference that Appellant killed Alexus. Accordingly, even if Billy's belief that Appellant burglarized his home

constituted a prior bad act, the testimony would still be admissible as proof of Appellant's motive or intent to harm Billy by killing Alexus.

Therefore, Appellant's claim is without merit and should be denied.

V. DETECTIVE MOGG DID NOT IMPROPERLY VOUCH FOR ASHLEY RILEY

Appellant contends that Detective Mogg improperly vouched for Ashley's credibility by stating that she "believed" Ashley by the end of her December 6, 2010 interview, despite having been skeptical of her at first. AOB at 48-50. Appellant did not object to Detective Mogg's testimony, so the admissibility of the statement is reviewed for plain error. E.g. Vega, 126 Nev. at __, 236 P.3d at 637.

Here, Appellant fails to demonstrate that the admission of Detective Mogg's testimony was error that was readily apparent and was prejudicial to her substantial rights by causing actual prejudice or a miscarriage of justice. Valdez, 124 Nev. at 1190, 196 P.3d at 477. Accordingly, reversal for plain error is not warranted.

"Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." Lisle v. State, 113 Nev. 540, 533, 937 P.2d 473, 481 (1997) (quoting United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980)). However, when the outcome of a case "depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness." Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119

(2002). The State can comment on witness testimony during closing arguments and ask the jury to make reasonable inferences from the evidence. Bridges v. State, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000); State v. Green, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965).

Here, Appellant fails to show that there was a readily apparent error or that this error prejudiced his substantial rights. Not only was there ample additional evidence of Appellant being the shooter – such as Nick's identification of him as such, Appellant's traffic citation and subsequent arson of the rental car, his statements to Bridgette, and his threatening text messages to Billy – but the State did not place the prestige of the government behind the witness or reference facts not in evidence, nor did it argue Detective's Mogg's belief of Ashley in its closing argument.

Appellant neglects to mention that he opened the door to Detective Mogg's statements about Ashley's credibility. In his case-in-chief, Appellant called Detective Mogg as a witness in an apparent attempt to discredit Ashley's testimony and paint Ravon as a viable alternative suspect or in an attempt to demonstrate a lack of investigation by detectives. See 28 AA 6271-77; see also 26 AA 5943-45, 5958. The following exchange took place during Appellant's direct examination of Detective Mogg (with Appellant challenging the lack of follow-up investigation into Ravon):

Q: During the course of that interview [with Ashley], it came out that there was this jealous boyfriend named Ravon Harris, correct?

A: There was a boyfriend, yes.

Q: Yes. And he was described as controlling, jealous and physically abusive, during the course of the interview?

A: I don't know about the physically abusive, but I – yeah, I do believe that she said he was controlling.

Q: . . . .What I wanted to know is that at some point during the interview, you were presented with a phone which indicated that Ravon Harris had been calling [Ashley] that night right before the murder, correct?

. . .

A: Yes. . .

Q: And, in fact, [] he had left a voice message, right?

. . .

A: Okay. Sorry. I see that he did call several times. It says that. But I'm not sure what – he did leave a message. Yes. Okay. I didn't listen to it, though.

. . .

Q: So we don't know what the message said?

A: Correct.

Q: And we had known that when he doesn't know [] where she is, that he gets, as you had said in your interview, 'crazy?'

A: Oh, yeah. I ask her – that was her words, that he gets a little upset when he [] doesn't know.

Q: More than a little, he had beaten her before, right?

A: She never told me he beat her, because [] he didn't know where she was. But, yes, I did imply. . .I think [] what I said was, Has he put hands on? And that's what he said.

Q: Right. ***And you were a bit skeptical during your questioning of her. You had said, Just this doesn't make sense to me.*** I mean, you're over here at Nick Brabham's house, you're supposed to be at home with him, you don't know – you're not letting him know where you are, and you're parking your car around the block, and you're here spending the night with him. ***You were quite skeptical of her story that he would not be that upset, correct?***

A: *I was pushy, and yeah, I have to be pushy, unfortunately. Sometimes people won't always tell you everything, because you're the police*. And sometimes it's really nothing, it's not a problem. They just get kind of scared. So yes, I was a little pushy, because *I needed her to tell me so that I would understand what was going on*.

Q: Right. And that made sense, given the circumstances of this case, in that he had a violent history and that he had also – they had made precautions to park their car in other places when she was there, right?

A: Well, I think she made – she parked the car because she didn't want him to know she was over there. So I don't think I could jump to say that it was that. But I needed to get the whole story. So yes, I was a little pushy, but that was because I was trying to get her so that I would understand why [] she was doing what she was doing.

28 AA 6372-77 (emphasis added).

Following up on Appellant's questions about the police's lack of investigation into Ravon, the State asked on cross-examination:

> Q: And when you're interviewing Ashley. . . Is it fair to say you were going after her pretty good?
>
> A: I was firm. I was definitely firm with her
>
> Q: And you went at her many times, saying, Well, help me figure this out. Ravon – it could be Ravon. He's jealous, he's controlling. And you're saying those things to her?
>
> A: That's correct. I needed to be able to – I needed to see her response, I needed to talk to her, and I needed to believe what she was telling me. So I couldn't ignore these things. I had to put those things out there. And it's tough, and I'm sure I was a little firm, you know. I had to know. I had to be able to see her response – and believe what she was telling me.
>
> Q: And despite the fact that she tells you that Ravon had had an issue, that was a few months prior and it had been squashed?
>
> A: Correct.
>
> Q: And she tells you that [] Ravon does not have access to a gun?
>
> A: Correct.
>
> Q: And every time you go at her, she tells you, Why – what aren't you getting about this? Why would he leave me there?
>
> A: Correct.
>
> Q: Why, if he's there for me, why am I the only one without gunshots? She tells you that every single time?
>
> A: That's correct. *And I even said things to her, like, oh, well, maybe this or that. Because I wanted to see her response. And, like I said, her – her*

> *statements, they made sense. And she – I believed her. So – and but sometimes you have to do that. You have to push a little bit so that you can see, you know.* And she did say, Why aren't you – why aren't you getting it? And I told her, I need to be able to understand. So I was a little rough.
>
> Q: And you said – ***Mr. Modafferi [Appellant's trial counsel] said to you, in the beginning of that interview you are skeptical to what she is saying***?
>
> A: ***I'm skeptical at the beginning of every investigation***.
>
> Q: And that interview goes on for a while . . . . ***By the end of that interview, are you skeptical about what she's saying***?
>
> A: ***No, I believed her***.

28 AA 6280-82 (emphasis added). The State's questions, of which Appellant now complains, were therefore a follow-up to Appellant's own suggestion during direct examination of the witness. Instead of confirming that Detective Mogg did not believe Ashley, Appellant's line of questioning led to Detective Mogg's testimony that she believed Ashley – which was why she did not immediately seek to investigate Ravon as a suspect. Accordingly, there was no improper vouching by the State: there was only Appellant's failed attempt to challenge the investigation.

Moreover, even had Appellant been able to show there was error, the error would have been harmless, as Appellant elicited testimony from several witnesses, including Ashley, Detective Hardy, Detective Long, and various CSAs about Ravon's jealousy towards Ashley and the lack of investigation into Ravon. 23 AA 5238, 5261; 25 AA 5692-93; see also 31 AA 7019-31.

Therefore, Appellant's claim is without merit and should be denied.

VI. THE EVIDENCE WAS NOT INSUFFICIENT TO FIND APPELLANT GUILTY OF ROBBERY

Appellant claims that the evidence was insufficient to convict him of the Robbery with Use of a Deadly Weapon relating to Nick because "to convict [Appellant] based on two items being located in areas around the residence that the occupants did not remember placing them in is highly speculative." AOB at 51.

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). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). "Where there is substantial evidence to support a jury verdict, it [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

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. at 381, 956 P.2d at 1380; see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (Court held it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) (in all criminal proceedings, the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court), cert. denied, 429 U.S. 895, 97 S. Ct. 257 (1976). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20, 99 S. Ct. at 2789. This standard thus preserves the fact finder's role and responsibility "[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.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Moreover, the Nevada Supreme Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980). It is the jury's function to assess the weight of the evidence and the credibility of

witnesses. Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380. The jury is the fact-finder, and the jury decides whether or not there is reasonable doubt.

Here, the evidence was not insufficient as to Count 3. Robbery requires the unlawful taking of personal property by "means of force or violence or fear of injury." NRS 200.380. The State presented both direct and circumstantial evidence to support this charge – including, but not limited to the following: Ashley testified that she and Nick fell asleep with Nick's computer in the room (21 AA 4618-19); Nick's computer was found on Billy's bed and Nick's wallet was found on the floor of Billy's closet, without Nick knowing how it got there (20 AA 4598; 21 AA 4606-07); Ashley heard rummaging before the second series of shots, while she was in the closet with Nick (21 AA 4623); and Nick testified that Appellant shot him several times, constituting the use of force, and his personal property, being his computer and wallet, were taken from his presence and placed in Billy's room and closet after he was shot.

Appellant claims that since the wallet and computer were found in Billy's room, "it is clear that the items were not taken." AOB at 51. However, robbery does not require an intent to permanently deprive the owner of the personal property. E.g., Coats v. State, 98 Nev. 179, 181, 643 P.2d 1225, 1225 (1982) (proof of specific intent to permanently deprive the owner of the property is not required to establish

the crime of robbery). All that is required is that Appellant removed the items from Nick's presence, as was done here.

Here, the jury assessed the weight of the evidence as well as the credibility of the witnesses and found Appellant guilty of robbing Nick with a deadly weapon. Although the evidence may be circumstantial, as neither Ashley nor Nick saw Appellant take the computer and/or wallet, when reviewing the evidence in the light most favorable to the State and in the context of all the evidence, any rational trier of fact could have found the elements of robbery with a deadly weapon beyond a reasonable doubt.[13]

Accordingly, Appellant's challenge to the sufficiency of the evidence should be denied.

VII. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN ADMITTING ALLEGEDLY IMPERMISSIBLE HEARSAY

Appellant complains that Detective Hardy was allowed to testify as to Ravon's statement that he was at home at the time of the murder during his interview

[13] Appellant also challenges the use of this conviction as an aggravating circumstance (AOB at 50 n.11, 51-52). As any rational trier of fact, when viewing the evidence – both circumstantial and direct – in the light most favorable to the prosecution, would have found Appellant guilty of robbery with a deadly weapon of Nick beyond a reasonable doubt, the conviction was properly used as an aggravating circumstance, and Appellant's challenge to this third aggravating circumstance should be denied.

on January 20, 2011. AOB at 52-53. Appellant did not object to Detective Hardy's testimony and, as such, this issue is reviewed for plain error.

As discussed supra, "[t]o amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson v. State, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007)); see also Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590,593 (2015); Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson v. State, 111 Nev. 1525,1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123,130 (1995). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice." Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). 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.

Challenges under the Sixth Amendment Confrontation are issues of law and therefore subject to de novo review. Chavez v. State, 125 Nev. 328, 213 P.3d 476 (2009). To comply with the Confrontation Clause, testimonial hearsay of an absent witness may only be admitted at trial if the defendant had a prior opportunity to cross examine the declarant. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004); City of Las Vegas v. Walsh, 121 Nev. 899, 905, 124 P.3d 203, 207 (2005).

A statement is testimonial if it the primary purpose is to establish or prove past events potentially relevant to later criminal prosecution. Medina v. State, 122 Nev. 346, 143 P.3d 471 (2006); Davis v. Washington, 547 U.S. 813, 822, 26 S. Ct. 2266, 2274 (2006); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527 (2009); Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).

The Medina Court held that:

> Confrontation clause errors are subject to [a] harmless error analysis. The United States Supreme Court has explained that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Under this standard, reversal is not required "if the State could show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

122 Nev. at 355, 143 P.3d at 477 (citations omitted).

Here, Ravon's statement was ***not*** testimonial hearsay under NRS 51.435 because it was not admitted for the truth of the matter asserted, but was admitted to show the effect on the listener and to disprove Appellant's inferences that Detective Hardy had not investigated Ravon. Byford v. State, 116 Nev. 215, 232, 994 P.2d 700, 712 (2000) (finding no hearsay when a statement is offered solely for purpose of showing effect on the listener); Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) (holding that a statement is not hearsay when it is offered to show the effect on the listener and not for the truth of the matter).

After interviewing Nick, Detective Hardy interviewed Ravon based on Ravon's connection with Ashley, who was present but had not been shot. 25 AA 5533. Ravon told Detective Hardy that he as at home at the time of the murder. Id. Appellant did not object to this testimony. Id.

The exchange that Appellant now claims was testimonial hearsay was as follows:

> Q: After interviewing [Nick], did you actually go and interview an Errol Harris?
>
> A: Yes.
>
> Q: Is he an individual that you came to know as Ravon based on the interviews that were done with Ashley Riley?
>
> A: Yes.
>
> Q: And he agreed to meet with you?
>
> A: He had agreed to meet and he gave us a statement as to what he recalled on where he was on December 6th.
>
> Q: Were you asking him where he was on that particular –
>
> A: Yes.
>
> Q: *Okay.* ***Did he indicate that he was home****?*
>
> A: ***Yes****.*
>
> Q: All right. The attention turned – or some attention turned to him based on his connection to Ashley; is that correct?
>
> A: . . . Yes.

. . . .

> Q: From your investigation, was there any issue that potentially could exist between Ravon and Alexus Postorino?
>
> A: Any issue other than her being at the house, no.
>
> Q: No prior issues or interactions or difficulty between Alexus and Ravon?
>
> A: Between Alexus and Ravon, none at all.

25 AA 5531-32 (emphasis added), 5533-34. This statement was therefore only elicited to rebut Appellant's suggestion that Detective Hardy had failed to investigate Ravon.

Indeed, Appellant's theory of defense was largely based on the suggestion that Ravon was the shooter because of his "caustic" relationship with Ashley and his controlling and jealous attitude towards her. 21 AA 4613-15; 22 AA 4851-52; 28 AA 6247; see also 31 AA 7019-40. Throughout the trial – even beginning with his Opening Statement – Appellant implied that the police did not conduct a proper investigation after arresting him: Appellant's defense consisted largely of challenging the LVMPD's failure to compare DNA, fingerprints, or shoeprints to samples taken from Ravon.[14] 23 AA 5238; E.g., 23 AA 5261; 25 AA 5692-93; see also 31 AA 7019-31.

[14] Appellant's opening presentation demonstrated his theory of defense, being that Ravon Harris was a viable suspect that the police had failed to investigate. 31 AA 7019-31.

Moreover, Appellant did not object to Detective Hardy's testimony. In fact, Appellant challenged Detective Hardy's alleged lack of investigation into Ravon on cross-examination, asking Detective Hardy:

> Q: You did not interview Ravon Harris until January 20, 2011; is that correct?
>
> A: That's correct.
>
> Q: That would be approximately 40 days after the murder, right? Maybe 45?
>
> A: . . .45-ish, yes.
>
> Q: Okay. Now, by this time you had already been told by Mr. Postorino that he believed Ravon Harris was a ticking time bomb, correct?
>
> A: Mr. Postorino had told, I believe, Detective Long about Ravon's behavior, yes.
>
> Q: And he not only said he was a ticking time bomb. He said that if that woman Ashley was there, then he was convinced that he was the killer, Ravon.
>
> A: That was his second [] theory.
>
> Q: My point is you knew of these details; right?
>
> A: I did.
>
> Q: And yet, you did not see fit to interview Ravon Harris for 45 days?
>
> A: Correct.
>
> Q: And during that 45-daay period, no evidence was collected from Ravon Harris's house; correct?
>
> A: No.

Q: In fact, no evidence, no search warrant was ever executed at that house?

A: Correct.

Q: And when you finally did talk to him 45 days later, Ravon Harris said I was home the entire time; correct?

A: Yes.

Q: In fact, he said he was home from Saturday, December 4th, until Ashley Riley called him on Monday at about 12:00 or 1:00 in the afternoon

STATE: Judge, I'm going to object to the specificity stating what it is that Ravon said. That's hearsay.

. . .

COURT: Sustained

Q: Did you learn from your investigation that Ravon Harris was home that entire weekend?

A: Yes.

Q: Now, after learning that Ravon said he was home for that entire weekend, did you ask or did you find out whether he could prove whether he was home that entire weekend when you interviewed him 45 days later?

A: No.

25 AA 5588-90. Appellant continued to try to elicit hearsay statements from Ravon, as to the specific things Ravon told Detective Hardy, in order to point out what Detective Hardy failed to investigate. See 25 AA 5590-93.

As the statement of which Appellant complains was neither hearsay nor testimonial, Appellant's claim is without merit and should be denied.

VIII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO ADMIT THE JUDGMENT OF CONVICTION OF A NON-TESTIFYING WITNESS.

Appellant claims that the district court abused its discretion in denying his request to admit a certified copy of Ravon's 2002 Judgment of Conviction for Home Invasion. AOB at 54-56. Appellant claims that this precluded him from being able to present his theory of defense "that the police had failed to adequately investigate Ravon Harris." AOB at 54.

A district court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion. E.g., Hernandez v. State, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008); McLellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). While "'the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense,' ***defendants must comply with established evidentiary rules***, 'designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" Rimer v. State, 131 Nev. Adv. Rep. 36, 351 P.3d 697, 712 (2015) (emphasis added) (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146 (1986); Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973)).

Appellant, before Detective Hardy testifyied, attempted to introduce Ravon's 2002 Judgment of Conviction for Home Invasion. 24 AA 5457-61. The State preemptively objected because (1) Ravon was not a testifying witness; and (2) even if Ravon were to testify, the Judgment of Conviction would not have been admissible based on its age under NRS 50.095 (the JOC was issued 14 years previously). 24 AA 5457-58. Appellant argued that the Judgment of Conviction should come in to demonstrate that Detective Hardy was remiss in not investigating Ravon for the murder and burglary given that Ravon had been found guilty of Home Invasion before. 24 AA 5459, 5460-61. However, Appellant had already brought out Ravon's tendency towards violence regarding Ashley, as well as his motive for attacking Nick. 24 AA 5464-65.

The Court denied Appellant's request to introduce Ravon's Judgment of Conviction stating:

> THE COURT: And *what you're saying is that the detective should have investigated this other guy because he has a prior relevant conviction*.
>
> THE DEFENSE: ***Exactly***.
>
> . . .
>
> THE COURT: And then their point is and part of the reason they were investigating your client is because of a prior relevant conviction.

THE DEFENSE: Which is excludable and should be. . . excluded.

THE COURT: Right.

THE DEFENSE: Right.

. . .

THE COURT: And what's the legal basis for that?. . . that they can't bring in his –

THE DEFENSE: Propensity.

THE COURT: Right.

THE DEFENSE: Exactly.

THE COURT: So in that circumstance, it would be brought in for propensity.

THE DEFENSE: Exactly.

THE COURT: But you[r] argument isn't – *you're making the exact same argument*.

THE DEFENSE: No, I'm not, Judge. He –

THE COURT: He's a suspect for this offense because he has a prior similar offense?

. . .

THE COURT: I'm just going to rule then. . . . I don't think it's admissible***. It sounds like it's sought to be brought in for a propensity purpose***. ***You can talk about other reasons why Ravon should have been a suspect, that he should have followed up and investigated. And I think you've got a lot there for doing so, but that prior conviction of Mr. Harris, it seems like***

> ***it's just being used to argue and later would be argued, not just that he didn't investigate him, but that he likely did this because he did a prior home invasion.***

24 AA 5465-67 (emphasis added).

Appellant argues that he should have been able to introduce Ravon's conviction because of the alleged hearsay statement related by Detective Hardy. AOB at 55. However, Appellant's citation to NRS 51.069(1) relies on the conclusion that Detective Hardy's statement about Ravon's alibi was hearsay. As detailed supra, it was not.

Not only was Ravon's prior Judgment of Conviction a prior bad act under NRS 48.045(2) that was being introduced to show Ravon's propensity towards committing the crime, but it was also inadmissible because Ravon was not a testifying witness. 24 AA 5457, 5464-67.

Moreover, it was also not admissible because his conviction was over ten years old. NRS 50.095 states in relevant part that:

> 1. ***For the purpose of attacking the credibility of a witness***, evidence that the witness has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which the witness was convicted.
> 2. Evidence of a conviction is inadmissible under this section ***if a period of more than 10 years has elapsed since:***
>
> (a) The date of the release of the witness from confinement; or

> (b) *The expiration of the period of the witness's parole, probation or sentence, whichever is the later date*.

(emphasis added).

While Appellant is entitled to present a defense, Appellant is not entitled to circumvent Nevada's evidence rules. Here, Appellant failed to show how Ravon's – who did not even testify at trial – 14 year old Judgment of Conviction would have been admissible under NRS 50.095, NRS 48.045(2), or NRS 51.069(1). Therefore, the district court did not therefore abuse its discretion in denying the admission of Ravon's 2002 Judgment of Conviction.

Finally, Appellant's reliance on Nevada v. Jackson, 569 U.S. __, 133 S. Ct. 1990 (2013) is misplaced. AOB at 54-55. In Jackson, the United States Supreme Court not only held that the Confrontation Clause does not allow a defendant to introduce extrinsic evidence for impeachment of a witness or victim, but also that, while the Constitution guarantees defendants a meaningful opportunity to present a meaningful defense, the court "recognize[s] that 'state and federal rulemakers have broad latitude under the constitution to establish rules excluding evidence from criminal trials." Jackson, 569 at __, 133 S. Ct. at 1992.

Moreover, even assuming arguendo that the district court abused its discretion, such an error would have been harmless since Appellant elicited testimony to support his theory of defense that Ravon was a viable suspect who was

not investigated by the police. In this regard, he elicited testimony that Ravon was violent and jealous from Ashley, Detective Mogg, Billy, and Detective Hardy, and was also able to elicit testimony from various LVMPD detectives and CSAs about their lack of an in-depth investigation into Ravon. E.g., 23 AA 5238, 23 AA 5261.

Accordingly, Appellant's claim is without merit and should be denied.

IX. DEFENSE COUNSEL'S CONFLICT AT THE PRELIMINARY HEARING WAS HARMLESS

Appellant claims that, at the time of his preliminary hearing, there was a conflict of interest between his then-counsel Lance Maningo and the surviving shooting victim Nick, and that this conflict only became apparent after the preliminary hearing when Maningo noticed, in crime scene photographs, his business card among Nick's documents. AOB at 55-57. At the time of the preliminary hearing, Appellant had two attorneys and Appellant's other counsel (Robert Langford) handled Nick's testimony. 1 AA 149.

This Court has recognized that a preliminary hearing is an adversarial proceeding at which a defendant's Sixth Amendment right to counsel attaches. Patterson v. State, 129 Nev. __, __, 298 P.3d 433, 438 (2013). The standard to be applied is whether the denial of counsel at a preliminary hearing was harmless error. Id. (citing Coleman v. Alabama, 399 U.S. 1, 11, 90 S. Ct. 1999 (1970)). "An error is harmless if this court can determine, beyond a reasonable doubt, that the error did

not contribute to the defendant's conviction." Id. (citing Hernandez, 124 Nev. at 653, 188 P.3d at 1136).

On December 2, 2011, Maningo asked for a status check on a possible conflict. 2 AA 257-58. On December 12, 2011, Maningo informed the district court that, in examining crime scene photographs of Nick's wallet, Appellant and Maningo noticed his business card in Nick's wallet. 2 AA 266. Maningo verified with his firm and learned that his firm had represented Nick for approximately five months in 2010 on a case that ultimately negotiated to a misdemeanor. Id. Maningo explained that "the extent of [his] firm's representation of him was status checks for fines, fees, and community service." Id. Maningo had appeared at one hearing on September 23, 2010, "which was the closing of that case and the end of a stay out of trouble period. So I never was there appearing with him." Id. Maningo added that he had run Nick's name, but that he had misspelled Nick's name in his file and, as a result, he had not caught the conflict when he first checked. 2 AA 267.

Although Appellant seemingly indicated that he was not concerned about this conflict (id.), the State requested that Appellant receive a new lawyer. 2 AA 268. The court agreed, and removed Maningo from Appellant's case. 2 AA 270. The State would again note that Maningo did not handle Nick's testimony at the preliminary hearing; Appellant's other counsel Mr. Langford did. 1 AA 149.

Nonetheless, almost two years later, Appellant filed a Motion to Strike Preliminary Hearing and Dismiss Charges. 4 AA 764-830. The court held an evidentiary hearing on the issue on November 5, 2013, wherein Mr. Langford and Maningo both testified. 5 AA 951-1004. The district court denied Appellant's motion, finding that the decision to not cross-examine Nick was strategic, since Nick's preliminary hearing testimony would have been preserved for use at trial even if Nick had died – which was a possibility given Nick's medical condition at the time of the preliminary hearing. 5 AA 1016. The court also found that Maningo was unaware of the conflict at the time of the preliminary hearing. Id.

Moreover, even assuming arguendo that effective cross-examination would have compromised Nick's identification of Appellant at the preliminary hearing, the burden at a preliminary hearing is slight and marginal evidence and Detective Hardy also testified as to Nick's identification of Appellant. 1 AA 129-37; see also 5 AA 1016-17. Detective Hardy's testimony alone, coupled with the admission of the photographic lineup Detective Hardy conducted with Nick at the hospital, constituted probable cause to bind over Defendant on the charges. Id.

Finally, any error at the preliminary hearing is harmless when a defendant is later found guilty beyond a reasonable doubt at trial. Lisle v. State, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998) (quoting United States v. Mechanik, 475 U.S. 66, 70, 106 S. Ct. 938 (1986) (holding that because the defendants were convicted

after trial beyond a reasonable doubt, probable cause undoubtedly existed to bind them over for trial; therefore, any error in the grand jury proceedings connected with the charging decision was harmless beyond a reasonable doubt)). For all these reasons, any conflict at the time of the preliminary hearing was harmless.

As such, Appellant's claim should be denied.

X. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO DISMISS BASED ON AN ALLEGED FAILURE TO PRESERVE TEXT MESSAGES

Appellant argues that he is entitled to a new trial based on the State's failure to preserve "potentially exculpatory evidence" and that the district court abused its discretion in denying Appellant's "Motion to Dismiss Charges for Brady Violation and the Sixth Amendment Right to Compulsory Process" based on this. AOB at 57-58; 13 AA 2916-55.

This Court reviews a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion. Hill v. State, 188 P.3d 51 (2008); McNelton v. State, 115 Nev. 396, 414, 990 P.2d 1263, 1275 (1999).

A. There Was No Failure to Gather Evidence

As an initial matter, Appellant seemingly fails to distinguish between the failure to gather evidence, which was the issue in Daniels v. State, 114 Nev. 261, 956 P.2d 111 (1998) and the failure to preserve evidence under Sheriff v. Warner, 112 Nev. 1234, 926 P.2d 775 (1996). Appellant claims that "the issue surrounds the

failure of the police to properly preserve the cell phone [because] the text message chain, which would have been contained in the cell phone's data, would have proven that the drug debt was settled and there was no motive to attack the victims." AOB at 57.

The State is required to preserve material evidence. State v. Hall, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989). The State's duty to preserve evidence attaches at the time the State has gathered and taken possession of the evidence. See Steese v. State 114 Nev. 479 (1998) (citing March v. State, 859 P.2d 714 (Alaska Ct.App.1993)).[15] However, where police never had control of the evidence, the issue involves a failure to ***gather*** evidence, not a failure to ***preserve***. Steese, 114 Nev. at 491, 960 P.2d at 329.

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[15] To be entitled to relief based upon an alleged failure of the State to ***preserve*** evidence, Appellant must show either: (1) that the State lost or destroyed evidence in bad faith; or (2) that the loss unduly prejudiced the defendant's case and that the evidence possessed an exculpatory value ***that was apparent before the evidence was destroyed***. Warner, 112 Nev. at 1240, 926 P.2d at 778; State v. Hall, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989). This Court has described "bad faith" as police action taken ***specifically for the purpose of making evidence unavailable to the defense***. Warner, 112 Nev. at 1240, 926 P.2d at 778 (emphasis added). Appellant has the burden of demonstrating prejudice from the State's alleged loss or destruction of evidence. Id. To show prejudice, an appellant must show that there was a reasonable anticipation that the evidence would be exculpatory and material to his defense. Id. "It is not sufficient that the showing disclose merely a hoped-for conclusion from examination of the destroyed evidence." Id. "Mere assertions by defense counsel that an examination of the evidence will *potentially* reveal exculpatory evidence does not constitute a sufficient showing of prejudice." Id.

Here, police never had control of Appellant's phone, from which the messages were sent, nor did they collect Billy's cell phone when the text messages were read into Billy's voluntary statement. 14 AA 3017-18. There is no record of Billy's phone being impounded. 14 AA 3020. As such, any claim would be based on an alleged failure to gather evidence.

To be entitled to relief based upon an alleged failure of the State to ***gather*** evidence, Appellant must show: (1) that the State failed to gather evidence that is constitutionally material, i.e., that raises a reasonable probability of a different result if it had been available to the defense; ***and*** (2) that the failure to gather the evidence was the result of gross negligence or a bad faith attempt to prejudice the defendant's case. Daniels v. State, 114 Nev. 261, 266, 956 P.2d 111, 114 (1998); see also Johnson v. State, 117 Nev. __, __, 17 P.3d 1008, 1017-18 (2001); Steese, 114 Nev. at 491, 960 P.2d at 329.

If the evidence which the State failed to gather was material, the court must determine whether the failure to gather that evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice a defendant's case. Daniels, 114 Nev. at 267, 956 P.2d at 115. If the State is merely negligent in failing to gather evidence, no sanctions should be imposed, but the defense can still cross-examine the State's witnesses regarding the failure to gather the evidence. Id. If the State was grossly negligent in failing to gather the evidence, then the defense would

be entitled to a presumption that the evidence was favorable to the defense. Id. If the State exercised bad faith in failing to gather the evidence, then, and only then, would dismissal of the charges be an available remedy. Id.

First, Appellant fails to show a reasonable probability that the result of the trial would have been different had the text messages been preserved. Id. Appellant claims that the text messages were necessary to show that "the drug debt was settled." AOB at 57. Yet this evidence was already elicited from Billy and Nick, who both stated that Billy had reimbursed Appellant the $450 he allegedly owed him, thus settling this "drug debt." 21 AA 4812; see also 14 AA 3036-37. The district court, in denying Appellant's motion, also pointed out that "I don't have any indication that there's any text messages to that effect that weren't preserved." 14 AA 3036-37. The court added that Appellant could cross-examine Billy about the alleged $450 debt – which Appellant did. 22 AA 4853.

Second, Appellant fails to show that the State acted with negligence, gross negligence, or bad faith. Indeed, Appellant fails to note whether he believes the State acted in bad faith, with gross negligence, or whether the State was merely negligent. Since he claims that he is entitled to the reversal of his convictions, Appellant seemingly believes the State acted in bad faith in failing to gather the evidence – without however explaining why he makes this allegation. AOB at 59; see generally Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is

appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court)." State v. Haberstroh, 119 Nev. 173, 187, 69 P.3d 676, 685-86 (2003) (This Court has stated that "[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal").

Here, the detective read the text messages into the record, asking Billy details about the language and confirming dates and times. See 14 AA 3026. The State explained that one of the impounded phones taken from Appellant was the phone from which Billy received the text messages. 14 AA 3028. However, the texts read into the record by the detective and Billy were not in the forensic review of Appellant's phone. 14 AA 3028. Detective Ehlers testified that Appellant's impounded phones were rudimentary and that not all of the deleted text messages could be retrieved. 24 AA 5296-97; see also 14 AA 3033-34. The court indicated that Appellant could cross-examine the detectives as to their failure to impound Billy's phone – which he did. 14 AA 3037-38; 28 AA 6301-02.

B. There Was No Brady Violation

Finally, Appellant claims that the State failed to disclose material exculpatory evidence under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). In a Brady claim, whether the evidence is material is a mixed question of law and fact, and therefore this court reviews de novo the district court's ruling. Mazzan v. Warden,

116 Nev. 48, 66, 993 P.2d 25, 36 (2000). In reviewing the undisclosed evidence, we review the evidence as a whole. Id.

The prosecution is only required to disclose "evidence favorable to an accused…where the evidence is material either to guilt or to punishment." Brady, 373 U.S. at 87-88, 83 S. Ct. at 1197. 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, 116 Nev. at 67, 993 P.2d at 37.

In this case, Appellant failed to make any of these showings. First, as detailed supra, the State did not suppress this evidence. The defense was in possession of the text messages because they were read into the recorder which contained the date, time, and content of the messages. 14 AA 3034-35. Those messages have been in the possession of defense since the inception of the case. Id. Second, Appellant failed to show how these messages were favorable to Appellant. The text messages read into the record clearly showed that there was a feud going on between these two individuals during this time period. See 14 AA 3030-34. Third, as detailed supra, Appellant failed to show how these messages were material to Appellant's guilt or

punishment and how the result of the trial would have been different. As Appellant failed to meet the requirements under Daniels or Brady, and the district court did not abuse its discretion in denying Appellant's motion to dismiss the charges for failure to collect the text messages on Billy's phone.

XI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE

Appellant claims the district court abused its discretion in denying Appellant's motion to suppress the search of his apartment. AOB at 60-61.

We generally review a district court's decision to admit evidence for an abuse of discretion; however, we review various issues regarding the admissibility of evidence that implicate constitutional rights as mixed questions of law and fact subject to de novo review. Hernandez v. State, 124 Nev. 60, 188 P.3d 1126 (2008); see, e.g., Rosky v. State, 121 Nev. 184, 190-91, 111 P.3d 690, 694 (2005) (adopting the mixed question of law and fact standard for reviewing a district court's decision regarding the admissibility of a criminal defendant's statement offered by the State); Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002) ("Suppression issues present mixed questions of law and fact."). The interplay of the factual circumstances surrounding a search or seizure and the constitutional standards for when searches and seizures are reasonable requires the two-step review of a mixed question of law and fact: appellate court reviews the district court's findings of historical fact for clear error, but reviews the legal consequences of those factual

findings de novo. Somee v. State, 124 Nev. 434, 441-42, 187 P.3d 152, 157-58 (2008).

On May 5, 2015, Appellant filed a "Motion to Suppress Evidence and for Return of Property." 7 AA 1419-60; 8 AA 1719-60. The State filed its Opposition on August 28, 2015. 8 AA 1782-94. On October 22, 2015, the court held an evidentiary hearing and granted the motion in part – as to the items contained within a backpack that was on Appellant's person – and denying the motion as to the search of the apartment pursuant to a search warrant. 9 AA 2033—10 AA 2098.

An individual has a Fourth Amendment right to be free of unreasonable searches and seizures within the confines of one's own home. Indeed, "when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Florida v. Jardines, 569 U.S. 1, 6, 133 S. Ct. 1409, 1414 (2013).

Here, however, it is unclear what exactly Appellant is arguing, other than claiming that the search was unreasonable – based solely on Appellant's self-serving statement that he observed police entering his apartment before the search warrant had been obtained. AOB at 61.[16]

[16] Appellant states in his brief that he was "detained" at the time he observed police entering his apartment. AOB at 61. The State responded to this issue supra.

The main argument at the suppression hearing pertained to items found in the backpack that Appellant had on his person during the execution of the search warrant, which was suppressed. See 10 AA 2089-94. The court found that "the search [of Appellant's apartment] was conducted in accordance with the search warrant," and stated that:

> I do have testimony now from Mr. Belcher that the police made entry into the apartment before that, *but there is no evidence that anything was taken in that entry or that anything related to that was the basis for the search warrant*. So I guess I'm not –whatever followed the search warrant doesn't – if there was that entry and if it was an illegal entry, what was taken from the search warrant doesn't seem to be the fruit of that entry, unless I'm missing something. And so I think under any set of circumstances the search warrant was appropriately obtained. There was probable cause. The judge found probable cause, and the ultimate search and pictures and impounding of evidence was pursuant to a legal, valid search warrant in the apartment.

10 AA 2096.

In addition, Appellant fails to demonstrate how he was prejudiced by this search.[17] Even assuming arguendo that police entered before the search warrant

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[17] To the extent Appellant intends to argue for the first time in his Reply Brief that the picture of the blue puffy jacket was prejudicial because it identified him as the person running from the burnen car, the State would note that both Billy and Nick identified Appellant as the person on the video surveillance running away from the scene of the arson. 20 AA 4573-74; 24 AA 5498-99. The State respectfully reserves the right to respond to any new claims of prejudice made for the first time by Appellant in his Reply.

was issued, a search warrant was obtained based on probable cause so anything observed or collected from inside the apartment would have been inevitably discovered, albeit a few minutes later. "The inevitable discovery rule provides that 'evidence obtained in violation of the Constitution can still be admitted at trial if the government can prove by a 'preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.'" Camacho v. State, 119 Nev. 395, 402, 75 P.3d 370, 376 (2003); Proferes v. State, 116 Nev. 1136, 1141, 13 P.3d 955, 958 (2000) (quoting United States v. Lang, 149 F.3d 1044, 1047 (9th Cir. 1998) (quoting Nix v. Williams, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509 (1984))). Here, the Court found that "nothing taken from the warrant" seemed to have been obtained from any alleged warrantless entry into Appellant's apartment, and that there was probable cause for the warrant to issue. 12 AA 2551.

Therefore, as the search of the apartment was deemed valid by the district court, as Appellant fails to allege any new facts or show how the district court abused its discretion in denying the motion to suppress. Appellant also fails to show how he was prejudiced by this search. Thus, Appellant's claim should be denied.

XII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS THE PHOTOGRAPHIC LINE-UP

Appellant argues that the district court should have suppressed Nick's identification of Appellant in a photographic line-up as unreliable. AOB at 61-63.

Although Appellant argues that the photographic identification was "impermissibly suggestive" (AOB at 61), the only suggestion that the photographic line-up was suggestive was the fact that Appellant's photograph that was used in the line-up had been disseminated in the media in December of 2010. AOB at 62.

This Court reviews a district court's ruling on a motion to suppress identification testimony for an abuse of discretion. McLellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008).

"Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground *only* if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968); Stovall v. Denno, 388 U.S. 293, 301-02, 87 S. Ct. 1967, 1972 (1967); Coats v. State, 98 Nev. 179, 181, 643 P.2d 1225, 1226 (1982). To determine whether a lineup is impermissibly suggestive, the court must consider the totality of the circumstances and decide whether the lineup was so unnecessarily suggestive and conducive to irreparable misidentification that the defendant was denied due process of law. Stovall, 388 U.S. at 302, 87 S. Ct. at 1972; Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979).

This Court has developed a two-step inquiry to determine whether a pretrial identification is constitutionally sound. Wright v. State, 106 Nev. 647, 799 P.2d 548

(1990). First, the reviewing court must decide whether the procedure was unnecessarily suggestive; and second, if so, whether under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure. Id. at 650, 799 P.2d at 550; see also Banks v. State, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978).

Here, Appellant has not shown that the photo lineup was so impermissibly suggestive such that reversal of his convictions is warranted. In Odoms v. State, 102 Nev. 27, 714 P.2d 568 (1986), the defendant sought to suppress a photographic lineup that was "so impermissibly suggestive as to give rise to a substantial likelihood of misidentification." Id. at 30, 714 P.2d at 569-70. The Court's review of the record, however, revealed that the six photographs used in the line-up matched the general description of the assailant which was provided by the witnesses. Id. at 31. Further, the witnesses independently reviewed the six photographs. Id. Finally, the officer conducting the line-up did nothing to suggest to either eyewitness which photograph to select or which photograph was the defendant. Id. Accordingly, the Odoms Court found that the photographic lineup and the identification procedure were not impermissibly suggestive. Id. (citing French v. State, 95 Nev. 586, 600 P.2d 218 (1979)); see also United States v. Barrett, 703 F.2d 1076 (9th Cir. 1982) (photographic spread not impermissibly suggestive where all men in display are remarkably similar in appearance and the only noticeably difference was that Barrett

wore darker photosensitive glasses); United States v. Carbajal, 956 F.2d 924 (9th Cir. 1991) (photographic line-up allowed where Defendant had facial bruises, but all men Hispanic, about the same range, similar skin, eye, hair coloring, hair length.); United States v. Collins, 559 F. 2d 561 (9th Cir. 1977) (photographic line-up allowed where all six black males in photos similar in age range, five or six had similar hair style as Defendant and half of photos depicted person with a beard and all had facial hair).

Appellant's challenge of the photographic line-up presumes that Nick's encounter with Appellant on December 6, 2010, was so fleeting as to render his subsequent identification of Appellant in the photographic line-up unreliable.[18] However, the record is clear: Nick knew Appellant, and had known Appellant before the shooting, and had time to view him in the hallway light before Appellant shot him. 20 AA 4553. Nick had time to say "No, Bates, no," before Appellant shot Nick. Id. Nick testified that:

[18] Appellant repeatedly states that Nick told police about two intruders in ski masks. AOB at 61, 64. Yet ***at no point*** did anyone testify that Nick told them about the two intruders with the ski masks. The only mention that was made of the intruders was in Sergeant's Sanford's affidavit for the search warrant, which was based on the CAD report. See 20 AA 4406-21. Detective Hardy testified that the CAD report sometimes included erroneous information – such as the statement that a three-year old child had been kidnapped, which *also* appeared in the same CAD report. 25 AA 5707-08.

> From the time I was in the hospital till even now today, the picture in my head is, like, Bates is right in front of me and it's like a – a flash, a camera flash. It's – it's lit up. And I see the blonde hair, his – his pale complexion, I see his blue eyes, and that's what – that's what I see in – when I'm being shot, as I'm being shot.

20 AA 4556.

In fact, days before the photographic line-up was shown to Nick at UMC, Nick had already told Lisa on or before December 30, 2010 and told Billy that "Bates" – whom he knew – had shot him. 20 AA 4562-63, 4571, 4599; 25 AA 5678-79. Nick knew Appellant because he had seen him on a daily basis for approximately one month before the shooting. 20 AA 4544-45. Nick testified that no one at the hospital told him that Appellant was the shooter. 20 AA 4595. Nick did not watch the news or media after he woke up from his medically induced coma. Id. Nick told Detective Hardy on January 12, 2011 that Appellant shot him. 20 AA 4568-69. Only after Nick identified Appellant as the shooter did Detective Hardy conduct the photographic line-up. 25 AA 5638; see also 2 AA 382-404. Thus, unlike the defendant in Foster v. California, 394 U.S. 440, 442, 89 S. Ct. 1127 (1969), Nick identified Appellant several times, both out of court and in court, and ***before*** and after the photographic line-up. The district court, in denying the motion, noted that:

> [T]his isn't someone who had some [] person they've never seen or met before. I mean, I guess, the real – it seems to me that the real issue raised about him identifying your client as the shooter is more about a challenge to why

> he decides or has concluded that Bates is the one who did it, not so much about the picture.

3 AA 495.[19]

As Appellant failed to show that the photographic line-up was unnecessarily suggestive, this Court should not even consider the second prong, which consists of determining whether under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure. However, assuming arguendo that the second prong is considered, Appellant's claim still fails. When dealing with pretrial identification procedures, "[r]eliability is the paramount concern." Jones, 95 Nev. at 617, 600 P.2d at 250.

In deciding whether a show-up identification procedure is reliable, this Court considers several factors, including: (1) the opportunity of the witness to view the suspect at the time of the crime, (2) the degree of attention paid by the witness, (3) the accuracy of the witness' prior description of the suspect, (4) the level of certainty demonstrated at the show-up by the witness, and (5) the length of time between the

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[19] Moreover, Appellant does not challenge the photographs included in the photographic lineup as being, themselves, unnecessarily suggestive. AOB at 61-63. In his underlying motion, Appellant did claim that the booking photograph included in the lineup was distinguished from the other photographs, claiming that he was the only person in the photographic array with light colored hair and without facial hair. See 2 AA 371. However, the district court found that the array was *not* unnecessarily suggestive, because Nick had already given Appellant's general description and identified him by name to the detective, and because Nick was identifying someone he already knew. 3 AA 499.

crime and the show-up. Taylor v. State, 132 Nev. __, __, 371 P.3d 1036, 1044-45 (2016); see also Manson v. Brathwaite, 432 U.S. 98, 112-14, 97 S. Ct. 2243, 2252-53 (1977); Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382 (1972). Under these factors, Appellant's claim fails.

1. The opportunity to view

In Taylor, this Court found that the observation by the victim of the suspects in her apartment constituted a sufficient independent basis for her in-court identification of Taylor, as the victim got "at least one good look at the suspect she identified as Taylor when they stood face-to-face." 132 Nev. at __, 371 P.3d at 1045; see also Banks v. State, 94 Nev. 90, 96, 575 P.2d 592, 597 (1978) (finding that a "good look" at the defendant was sufficient to provide an independent basis for the victim's in-court identification of defendant even if the identification procedure had been unnecessarily suggestive).

Appellant argues that since Nick's story was inconsistent as to where Nick was when he Appellant shot him, Nick's identification was unreliable.[20] Nick testified at the preliminary hearing, from UMC, that he was coming up the stairs

[20] Appellant repeatedly claims Nick told police that two individuals in ski masks shot him. AOB at 61, 64, 65. Yet, once more, the State would note that ***not one witness*** ever testified that *Nick* told them that he was shot by two people in ski masks. This information came from the CAD report, which Detective Hardy testified could include erroneous information – such as the information about a kidnapped three-year old which also appeared on the CAD Report. 25 AA 5707-08.

when *Appellant* shot him. 1 AA 147; see also 20 AA 4587-88. Nick then testified at trial that he was coming out of his bedroom when *Appellant* shot him. 20 AA 4552-53. However, the identity of the shooter was never in question.

2. The degree of attention

Appellant claims that because Nick had smoked methamphetamine and marijuana before falling asleep, he was still under the influence of drugs when he was shot. However, Nick was a high-functioning drug addict, who regularly smoked methamphetamine and marijuana. 20 AA 4538-39. Moreover, Ashley testified that it only took Nick "a minute" to wake up, not because he was intoxicated but "because it takes people a minute or two to wake up." 21 AA 4674. Nothing suggests that Nick's attention, when facing a man he knew and recognized pointing a gun at him, was impaired.

3. The accuracy of the description of the suspect

From the moment Nick woke up from his medically induced coma, he identified Appellant as the individual who shot him. As detailed supra, Nick knew Appellant before Appellant shot him and Nick told Lisa, Billy, and Detective Hardy – before the photographic line-up – that Appellant had shot him. Before that, no one had informed Nick that Appellant was under investigation or arrest for the murder. 20 AA 4599, 4595.

Appellant makes much of the fact that the CAD report and the telephonic search warrant for Alexus's home mentioned two men in ski masks. Yet Appellant cannot identify even one individual to whom Nick directly stated that these two individuals in ski masks came into the home and shot him. In contrast, no witness ever testified that Nick told them directly that he was shot by two individuals in ski masks. Indeed, the record demonstrates that Nick knew Appellant and consistently identified Appellant as the shooter.

4. Nick's level of certainty

Appellant again fails to note that Nick *knew* his shooter before he was shot, and had seen Appellant on a daily basis in the prior month. 20 AA 4544-45. As detailed supra, Nick told Lisa *Appellant* shot him upon waking up. Nick told Billy that *Appellant* shot him. Nick told Detective Hardy, on January 12, 2011, that *Appellant* shot him, before Detective Hardy showed him the photographic array. Nick testified at the primary hearing on January 21, 2011, that *Appellant* shot him. Finally, Nick testified again at trial that he was positive that *Appellant* was the individual who shot him. 20 AA 4553, 4556.

5. The time between the crime and the confrontation

Appellant also suggests that the lack of a spontaneous identification when Ashley asked him "who did this?" – after Nick had been shot multiple times, had lost almost 40% of his blood, collapsed on the floor of his closet, and going in and

out of consciousness (21 AA 4768-69; 25 AA 5623-24) – demonstrates a lack of certainty. AOB at 65. This claim is without merit. Nick testified that he remembered falling to the floor of the closet, then remembered the police showing up. 20 AA 4554. The next thing Nick remembered was waking up in the hospital several weeks later, after awakening from a medically-induced coma. 20 AA 4560-61; 25 AA 5629-33. From that point on, Nick consistently identified *Appellant* as the shooter, as detailed supra.

Accordingly, not only does Appellant fail to meet the first prong of Wright, but he also fails to meet the second prong or successfully challenge Nick's identification under any of the Taylor factors. The district court did not therefore abuse its discretion in denying Appellant's motion to suppress Nick's pretrial identification of Appellant and Appellant's claim should be denied.

XIII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS OFFICER CAVARICCI'S IDENTIFICATION OF APPELLANT

Appellant argues that the district court abused its discretion in denying his motion to suppress Officer Cavaricci's identification of Appellant. AOB at 66-67. Appellant claims that, since Officer Cavaricci came to the homicide office twenty hours after arresting Appellant for speeding and asked homicide detectives to ask

Appellant to raise his head and uncover his face, the identification was unnecessarily suggestive.[21] Id.

This Court reviews a district court's ruling on a motion to suppress identification testimony for an abuse of discretion. McLellan v. State, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008).

This Court has developed a two-step inquiry to determine whether a pretrial identification is constitutionally sound. Wright, 106 Nev. 647, 799 P.2d 548. First, the reviewing court must decide whether the procedure was unnecessarily suggestive; and second, if so, whether under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure. Id. at 650, 799 P.2d at 550; see also Banks, 94 Nev. at 94, 575 P.2d at 595.

Appellant cites Stovall and Jones v. State, 95 Nev. 613, 617, 600 P.2d 247 (1979), to support his assertion that Officer Cavaricci's identification should be analyzed as a unnecessarily suggestive show-up. AOB at 67. This reliance is misplaced.

In Stovall, the United States Supreme Court stated that the test to determine whether a pretrial identification is admissible is whether the confrontation was

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[21] Appellant again claims that he was in custody and that the State "curiously" admitted Appellant was in custody in its Opposition. 10 AA 2774. As detailed supra, the State immediately clarified that that was a misstatement – a fact that Appellant ignores.

unnecessarily suggestive and conducive to irreparable mistaken identification that a defendant may be denied due process of law. 388 U.S. 293, 302, 87 S. Ct. 1967, 1972 (1967). "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation ***depends on the totality of the circumstances surrounding it***." Id. (emphasis added).

In Stovall, the defendant was arrested the day following the murder and was taken by the police to a hospital where the victim's wife, also wounded in the assault, was a patient. After observing Stovall and hearing him speak, she identified him as the murderer. She later made an in-court identification. The Stovall Court found that, based on the totality of circumstances, showing Stovall to the wife was imperative, in part because she was the only person who could exonerate Stovall, no one knew how long she might live; and she was not able to visit the jail. Id.

In Jones, the defendant was charged with two counts of burglary and two counts of robbery. Jones, 95 Nev. at 615, 600 P.2d at 249. The victims were in their hotel room having drinks when the defendant and an accomplice pushed open the door and entered the room, stating, "We are going to rob you." Id. Defendants then ransacked the room and struck one of the victims causing him to lose consciousness. Id. Both victims were bound and robbed. Id. After defendants left the room the victims freed themselves and went and got help. Id. Security was able to apprehend

both defendants quickly and hold them in the office, before asking both victims to come down to the security office to see whether they could identify the two suspects. Id. at 616, 600 P.2d at 249-50. Thirty to forty five minutes after the robbery, both victims walked with security to the security office. Id. During that walk, the guard told the victims that he believed the suspects were the ones who had committed the crime and also mentioned that one of the defendants had been caught leaving the victims' room. Id. At the security office, each victim gave a statement, viewed both suspects, and identified both of them. Id.

The Jones Court stated that:

> An on the scene confrontation between eyewitness and suspect is inherently suggestive because it is apparent that law enforcement officials believe they have caught the offender. However, such a confrontation may be justified by countervailing policy considerations. *For example, a victim's or eyewitness' on the scene identification is likely to be more reliable than a later identification because the memory is fresher. In addition, prompt identifications serve to exonerate people more expeditiously*.

Id. at 617, 600 P.2d at 250 (emphasis added) (citing Banks v. State, 94 Nev. 90, 93, 575 P.2d 592, 595-96 (1978).

In reasoning that the identification process was not suggestive, this Court noted that "the pretrial identification of Jones was not a denial of due process. Each victim had an opportunity to view the suspects at close range during the robbery. The confrontation took place a few minutes after the crime and Jones was

immediately identified by each victim as being the robber." Id. at 617, 600 P.2d at 250. Furthermore, this Court pointed out that "the weight and credibility of identification testimony is solely within the province of the jury. We will not usurp that function, especially, where, as here, the record supports a finding that the pretrial identification of Jones had sufficient individual of reliability to remove any taint of suggestiveness." Id.

Using the logic that the Court applied in Jones, the process used here was not unnecessarily suggestive. The Court must look at the totality of the circumstances of both the event as well as the identification process itself. Here, as discussed supra, Officer Cavaricci stopped and cited Appellant for speeding at 3:21 a.m. on December 6, 2010, in the area of the 215 and 95. 22 AA 4972-75, 4977-78. Appellant was driving a 2009 white, four-door Nissan Versa and he provided Sergeant Cavaricci with a driver's license under the name of Norman Belcher. 22 AA 4976-79. Sergeant Cavaricci usual practice was to make sure the driver's license photograph resembled the driver and that the physical descriptors matched. 22 AA 4982. Additionally, Appellant signed his name at the bottom of the traffic ticket. 22 AA 4983. During that traffic stop, which lasted approximately five minutes, Officer Cavaricci therefore had a short conversation with Defendant, took down his personal information, asked him for his driver's license, wrote him a citation, and importantly, compared his photo on his driver's license to the driver himself.

Twenty hours later, on December 6, 2010, homicide detectives asked Officer Cavaricci to go into a room and asked him whether he recognized someone from the traffic citation he issued. 22 AA 4984-85. Sergeant Cavaricci was able to conclusively identify Appellant as the person to whom he had issued the traffic ticket. 22 AA 4985. Officer Cavaricci was "one hundred and ten percent sure," at the time he identified Appellant at the homicide office, that Appellant was the same person driving the vehicle he had stopped. 22 AA 4984; 31 AA 7008.

In viewing the totality of the circumstances, there is overwhelming evidence that Officer Cavaricci's identification was sound. Much as the victims in Jones, he had face-to-face contact with Appellant for several minutes and he not only got a "good look" at Appellant, but also looked at Appellant's driver's license to match the picture on the license and the physical descriptors to Appellant, the driver. 22 AA 4981-82. Moreover, Officer Cavaricci, unlike the victims in Jones, was trained to observe and be aware of his surroundings and testified that his usual practice was to examine the driver and the driver's license to confirm the driver was the person on the license. 22 AA 4982.

Thus, in light of the totality of the circumstances, there were no overly suggestive tactics used by the detectives in obtaining Officer Cavaricci's identification of Appellant. Accordingly, the district court did not abuse its

discretion in denying Appellant's motion. Therefore, Appellant's claim should be denied.

XIV. THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR REGARDING JURY INSTRUCTIONS

"District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. ___, 195 P.3d 315, 319 (2008). "We review that decision for an abuse of discretion or judicial error; however, we apply de novo review when determining "whether a particular instruction. . .comprises a correct statement of the law." Id. An abuse of discretion is "any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law[.]" *Abuse of Discretion*, Black's Law Dictionary. There is no error if the court refuses to give an instruction when the law encompassed in the proposed instruction is substantially covered by other instructions given to the jury. Hooper, 95 Nev. at 926, 604 P.2d at 116; Ward v. State, 95 Nev. 431, 433, 596 P.2d 219, 220 (1979).

Failure to object to jury instructions precludes appellate review except in circumstances amounting to plain error. Green, 119 Nev. at 545, 80 P.3d at 95. Here, Appellant challenges the guilt phase jury instruction nos. 12, 29, 31, and 55 for the first time. Accordingly, this Court reviews for plain error.

A. Jury Instruction No. 12

Appellant challenges the reasonable doubt instruction, claiming it minimized the State's burden of proof. AOB at 73-74. Appellant did not object to this

instruction when given. Moreover, although citing to federal law, Appellant fails to note that the Nevada Supreme Court has repeatedly found this instruction permissible. See e.g., Lord v. State, 107 Nev. 28, 39, 806 P.2d 548, 554-55 (1991).

In fact, this instruction mirrors NRS 175.211, which states that:

> 1. A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
> 2. ***No other definition of reasonable doubt may be given by the court to juries in criminal actions in this state***.

(emphasis added).

Accordingly, this instruction has been approved by both the Legislature and the Nevada Supreme Court, and as such, Appellant cannot show plain error. Therefore, his challenge to this instruction is without merit and should be denied.

B. Jury Instruction No. 29

Appellant challenges the implied malice instruction, claiming that this instruction is unconstitutionally vague despite this instruction mirroring the statute defining malice and despite this instruction having repeatedly been upheld by this Court. AOB at 69-69; 26 AA 5876.

Despite Appellant's reliance on People v. Phillips, 414 P.2d 353 (Cal. 1966), a fifty-year old California case, to challenge this instruction, the Nevada Supreme Court has held that:

> [N]othing prevents district courts from instructing juries that malice 'may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.' ***The legislature has not prohibited any definition of malice other than that set forth in NRS 200.020, as it has done in regard to defining reasonable doubt.***

Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000) (emphasis added); see also, e.g., Leonard v. State (Leonard II), 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001) (determining that the statutory language defining implied malice is well established in Nevada and accurately informs the jury of the distinction between express and implied malice).

Moreover, NRS 200.020 sets out the definition as malice as follows:

> 1. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
> 2. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Appellant once more fails to note that the jury instruction mirrors this statute exactly.

As this instruction is a correct statement of Nevada law, as enacted by the Legislature and upheld by the Nevada Supreme Court, Appellant's claim should be denied.

C. Jury Instruction No. 31

Appellant challenges the premeditation and deliberation instruction, claiming that the instruction "created a reasonable likelihood that the jury would convict and sentence on a charge of first degree murder without any rational basis for distinguishing its verdict from one of second degree murder." AOB at 72.

The jury instruction reads:

> Premeditation is a design, a determination to kill distinctly formed in the mind by the time of the killing. Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constitution the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

26 AA 5878. This Court has specifically defined premeditation as this instruction does in Byford, 116 Nev. at 237, 994 P.2d at 714; see also, e.g., Valdez, 124 Nev. at 1203 (2008).

As this Court has repeatedly upheld this definition of premeditation, Appellant cannot show plain error and his claim should be denied.

D. Jury Instruction No. 55

Appellant claims that the instruction on equal and exact justice "improperly minimized the State's burden of proof." AOB at 75. This claim is without merit. Again, this instruction has repeatedly been upheld by the Nevada Supreme Court. E.g., Leonard v. State (Leonard I), 114 Nev. 1196, 1208-09, 969 P.2d 288, 296-97

(1998) (upholding the equal-and-exact-justice instruction and stating that it does not concern the presumption of innocence or burden of proof); Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004) (finding defendant's claim that the equal and exact justice instruction violates presumption of innocence was meritless). As this Court has repeatedly upheld this instruction, and as Appellant received an instruction on the presumption of innocence (26 AA 5859) and on the State's burden of proof, Appellant's claim is without merit and should be denied.

XV. THE DISTRICT COURT DID NOT COMMIT ERROR REGARDING INSTRUCTION NOS. 5 AND 12 DURING THE PENALTY PHASE

"District courts have broad discretion to settle jury instructions." Cortinas, 124 Nev. at ___, 195 P.3d at 319. "We review that decision for an abuse of discretion or judicial error; however, we apply de novo review when determining "whether a particular instruction. . .comprises a correct statement of the law." Id. An abuse of discretion is "any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law[.]" *Abuse of Discretion*, Black's Law Dictionary. There is no error if the court refuses to give an instruction when the law encompassed in the proposed instruction is substantially covered by other instructions given to the jury. Hooper, 95 Nev. at 926, 604 P.2d at 116; Ward, 95 Nev. at 433, 596 P.2d at 220.

Failure to object to jury instructions precludes appellate review except in circumstances amounting to plain error. Green, 119 Nev. at 545, 80 P.3d at 95.

Appellant claims the district court committed plain error in admitting penalty phase instruction nos. 5 and 12. AOB at 76-81.

A. Instruction No. 5

Appellant claims that the instruction concerning hearsay during the penalty phase "misstates the scope and role of mitigating evidence" (AOB at 76-77) and argues that "hearsay should not be admissible during the penalty phase of a capital trial" (AOB at 77-80).

NRS 175.552(3) reads in relevant part that:

> During the [penalty] hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to the sentence, ***whether or not the evidence is ordinarily admissible***. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the Constitution of the State of Nevada may be introduced.

Hearsay evidence is also admissible in the penalty phases of capital trials. Thomas v. State, 114 Nev. 1127, 1147, 967 P.2d 1111, 1124 (1998), cert. denied, 528 U.S. 830, 120 S. Ct. 85 (1999). It is admitted as it relates to the character and record of the defendant, but the information presented may not be supported solely by impalpable or highly suspect evidence. Rogers v. State, 101 Nev. 457, 466, 705 P.2d 664, 671 (1985); Young v. State, 103 Nev. 233, 237, 737 P.2d 512, 515 (1987).

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), the United States Supreme Court held that admission of testimonial hearsay at trial violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. However, this ruling "does not alter the pre-Crawford law that the admission of hearsay testimony at sentencing does not violate confrontation rights." United States v. Chau, 426 F. 3d 1318, 1323 (11th Cir. 2005) (citing United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005), cert. denied, --- U.S. ---, 126 S.Ct. 671 (2005)); see also Gaxiola v. State, 121 Nev. 638, 119 P.3d 1225 (2005).

This Court has held that Crawford has not been extended to capital penalty hearings. Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (no violation of Sixth Amendment in admitting testimonial hearsay regarding defendant's juvenile and adult criminal history during penalty phase of capital penalty hearing). The Summers Court also noted that "no federal circuit courts of appeals have extended Crawford to a capital penalty hearing and the weight of authority is that Crawford does not apply to a noncapital sentencing proceeding." Id. at 1332, 148 P.3d at 782. This has not changed since Summers was decided, and Appellant's citations to non-binding federal district court and state court cases fail to provide any support for his assertion that this Court should overrule Summers, Thomas, and Johnson (AOB at 80).

Here, Appellant not only fails to point to binding law to support his contention that this instruction was given in error, but also fails to identify how this instruction affected his substantial rights and constituted plain error.

Appellant also challenges the first sentence which reads "[i]n the penalty hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, and any other evidence that bears on the Defendant's character." AOB at 76-77; 27 AA 6006. However, since Appellant did not object to this instruction this claim is reviewed for plain error affecting his substantial rights. NRS 178.602, Green, 119 Nev. at 545, 80 P.3d at 95.

Jury instructions must be read together, not judged in isolation. See Greene v. State, 113 Nev., 157, 167-68, 931 P.2d 54, 61 (1997), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000); accord Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S. Ct. 396 (1973). In addition to the challenged instruction, the jury was instructed in Jury Instruction No. 10 that:

> Mitigating circumstances are those factors which, while they do not constitute a legal justification or excuse for the commission of the offense in question, may be considered, in the estimation of the jury, in fairness and mercy, as extenuating or reducing the degree of the Defendant's moral culpability.[22]

[22] The State recognizes that this Court, in Watson v. State, 130 Nev. __, __, 335 P.3d 157, 174 (2014), cautioned against this "moral culpability" language, but found that, taken in conjunction with the second paragraph, which was identical to that in Jury Instruction No. 10 in the instant case, the language did not provide support for Watson to demonstrate plain error in the giving of this instruction.

> You must consider any aspect of the Defendant's character or record and any of the circumstances of the offense that the Defendant proffer[s] as a basis for a sentence less than death.
>
> In balancing aggravating and mitigating circumstances, it is not the mere number of aggravating circumstances or mitigating circumstances that controls.

27 AA 6011. This instruction advised the jury that it had to consider Appellant's proffered mitigating circumstances, and acknowledged the breadth of circumstances that may be considered in mitigation.

Moreover, it is not reasonably likely that the jury thought that it could not consider what little mitigation evidence Appellant allowed to he presented. Appellant fails to show that this challenged instruction, by itself, so infected the entire penalty hearing as to the scope of mitigation evidence that the resulting death sentence violated due process.

Accordingly, Appellant fails to show that the giving of this instruction constituted plain error and, as such, his claim should be denied.

B. Instruction No. 12

Appellant challenges Instruction No. 12 claiming that "mitigation need not be directly connected to the offense." As discussed supra, jury instructions must be read together, not judged in isolation. See Greene, 113 Nev., 157, 167-68, 931 P.2d at 61 (subsequent history omitted). As detailed supra, the Court also gave Jury Instruction No. 10, which properly instructed the jury as to the role of mitigating

circumstances. Moreover, given the fact that Appellant adamantly refused to participate in or present any mitigation, Appellant fails to show that the giving of this instruction affected his substantial rights. Accordingly, Appellant fails to show plain error and his claim should be denied.

XVI. THE DEATH PENALTY IS NOT UNCONSTITUTIONAL

Appellant challenges the constitutionality of the death penalty in Nevada. Time and time again the Nevada Supreme Court has denied other defendants' attacks on the constitutionality of the death penalty and has held that the death penalty is constitutional: In Burnside v. State, the Nevada Supreme Court stated:

> Burnside argues that the death penalty is unconstitutional on three grounds, all of which this court has previously rejected: (1) the death penalty scheme does not genuinely narrow the class of defendants eligible for death, see Nunnery, 127 Nev. Adv. Rep. 69, 263 P.3d at 257; Leonard v. State, 117 Nev. 53, 82-83, 17 P.3d 397, 415-16 (2001); (2) death constitutes cruel and unusual punishment, see Gallego, 117 Nev. at 370, 23 P.3d at 242; Colwell v. State, 112 Nev. 807, 814-15, 919 P.2d 403, 408 (1996); Shuman v. State, 94 Nev. 265, 269, 578 P.2d 1183, 1186 (1978); and (3) executive clemency is unavailable, see Nunnery, 127 Nev. Adv. Rep. 69, 263 P.3d at 257; Colwell, 112 Nev. at 812, 919 P.2d at 406-07. He has offered no novel or persuasive argument worthy of deviating from this court's firm posture on those matters.

Burnside v. State, 352 P.3d 627, 651 (Nev. 2015).

In Nunnery v. State, the Court stated:

> Nunnery claims that the death penalty is unconstitutional because (1) Nevada's death penalty scheme does not

> narrow the class of persons eligible for the death penalty, (2) it constitutes cruel and unusual punishment, and (3) executive clemency is unavailable. We have previously rejected similar challenges to the death penalty. See, e.g., Thomas v. State, 122 Nev. 1361, 1373, 148 P.3d 727, 735-36 (2006) (reaffirming that Nevada's death penalty statutes sufficiently narrow the class of persons eligible for the death penalty); Colwell v. State, 112 Nev. 807, 812-15, 919 P.2d 403, 406-08 (1996) (rejecting claims that Nevada's death penalty scheme forecloses executive clemency or violates the Eighth Amendment).

Nunnery v. State, 127 Nev. 749, 782, 263 P.3d 235, 257 (2011). The Nevada Supreme Court has thus made it clear that the controlling law of the State of Nevada is that the death penalty is constitutional. As such, Appellant's claim should be denied.

Additionally, Appellant's claim that there is a lack of consensus on the death penalty, lack of a penological purpose of the death penalty, and risk of wrongful executions all stem from citations to various dissenting opinions that are not binding, nor persuasive. Specifically, Appellant's citation to the United States Supreme Court's decision Glossip v. Gross, 135 S.Ct. 2726 (2015) is not binding on this Court because the language Appellant has cited is from the dissenting opinion. The specific holding of Glossip dealt with the issue of death penalty defendants challenging the use of certain drugs utilized in executions as violating the Eighth Amendment. The United States Supreme Court rejected the inmates' contention and the dissent's arguments with the following:

Readers can judge for themselves how much distance there is between the principal dissent's argument against requiring prisoners to identify an alternative and the view, now announced by Justices Breyer and Ginsburg, that the death penalty is categorically unconstitutional. Post, p. ___, 192 L. Ed. 2d, at 817 (Breyer, J., dissenting). The principal dissent goes out of its way to suggest that a State would violate the Eighth Amendment if it used one of the methods of execution employed before the advent of lethal injection. Post, at ___ - ___, 192 L. Ed. 2d, at 840-841. And the principal dissent makes this suggestion even though the

Court held in Wilkerson that this method (the firing squad) is constitutional and even though, in the words of the principal dissent, "there is some reason to think that it is relatively quick and painless." Post, at ___, 192 L. Ed. 2d, at 840. Tellingly silent about the methods of execution most commonly used before States switched to lethal injection (the electric chair and gas chamber), the principal dissent implies that it would be unconstitutional to use a method that "could be seen as a devolution to a more primitive era." Ibid. If States cannot return to any of the "more primitive" methods used in the past and if no drug that meets with the principal dissent's approval is available for use in carrying out a death sentence, the logical conclusion is clear. ***But we have time and again reaffirmed that capital punishment is not per se unconstitutional***. See, e.g., Baze, 553 U.S., at 47, 128 S. Ct. 1520, 170 L. Ed. 2d 420; id. at 87-88, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (Scalia, J., concurring in judgment); Gregg, 428 U.S., at 187, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (joint opinion of Stewart, Powell, and Stevens, JJ.); id. at 226, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (White, J., concurring in judgment); Resweber, 329 U.S., at 464, 67 S. Ct. 374, 91 L. Ed. 422; In re Kemmler, 136 U.S., at 447, 10 S. Ct. 930, 34 L. Ed. 519; Wilkerson, 99 U.S., at 134-135, 25 L. Ed. 345. ***We decline to effectively overrule these decisions.***

Glossip v. Gross, 135 S. Ct. 2726, 2739 (2015) (emphasis added).

Justice Scalia, added that:

> A vocal minority of the Court, waving over their heads a ream of the most recent abolitionist studies (a superabundant genre) as though they have discovered the lost folios of Shakespeare, insist that now, at long last, the death penalty must be abolished for good. ***Mind you, not once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly contemplates. The Fifth Amendment provides that "[n]o person shall be held to answer for a capita . . .crime, unless on a presentment or indictment of a Grand Jury," and that no person shall be "deprived of life. . .without due process of law.***

135 S. Ct. at 2746-47 (emphasis added).

Appellant argues that there is no consensus on the issue of the death penalty and that, accordingly, the death penalty should be deemed unconstitutional. In arguing that there is a growing national consensus to abandon the death penalty, Appellant relies on Connecticut v. Santiago, 318 Conn. 1 (2015), another non-binding case, which found that the death penalty no longer served a penological purpose beyond what could be achieved through alternative punishment. However, Appellant fails to notice the key difference between these two cases: the Legislature in Connecticut abolished the death penalty in that state – whereas the Legislature of Nevada has not done so, despite repeated efforts in every legislative session. In fact,

in 2015, the Legislature approved the construction of a new death chamber, proving that in Nevada, unlike in Connecticut, the death penalty is still the "consensus."

Moreover, Appellant's penological purpose claim was again structured upon the dissent in Glossip. However, the majority rejected Justice Breyer's penological argument, stating:

> Justice Breyer's third reason that the death penalty is cruel is that it entails delay, thereby (1) subjecting inmates to long periods on death row and (2) undermining the penological justifications of the death penalty. The first point is nonsense. Life without parole is an even lengthier period than the wait on death row; and if the objection is that death row is a more confining environment, the solution should be modifying the environment rather than abolishing the death penalty. As for the argument that delay undermines the penological rationales for the death penalty: In insisting that "the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates," post, at ___, 192 L. Ed. 2d, at 807, Justice Breyer apparently forgets that one of the plaintiffs in this very case was already in prison when he committed the murder that landed him on death row. Justice Breyer further asserts that "whatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole," post, at ___, 192 L. Ed. 2d, at 809. My goodness. If he thinks the death penalty not much more harsh (and hence not much more retributive), why is he so keen to get rid of it? With all due respect, whether the death penalty and life imprisonment constitute more-or-less equivalent retribution is a question far above the judiciary's pay grade. Perhaps Justice Breyer is more forgiving—or more enlightened—than those who, like Kant, believe that death is the only just punishment for taking a life. I would not presume to tell parents whose life has been forever altered

> by the brutal murder of a child that life imprisonment is punishment enough.

Glossip v. Gross, 135 S. Ct. 2726, 2748 (2015) (Scalia, J., concurring).

Additionally, in rejecting Justice Breyer's dissenting argument regarding the deterrent effect of the death penalty, Justice Scalia added that:

> And finally, Justice Breyer speculates that it does not 'seem likely' that the death penalty has a 'significant' deterrent effect. Post, at ___, 192 L. Ed. 2d, at 808. It seems very likely to me, and there are statistical studies that say so. See, e.g., Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. Applied Econ. 163, 166 (2004) ("[I]t is estimated that each state execution deters approximately fourteen murders per year on average"); Dezhbakhsh, Rubin, & Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344 (2003) ('[E]ach execution results, on average, in eighteen fewer murders' per year); Sunstein & Vermeule, Is *Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 713 (2005) ('All in all, the recent evidence of a deterrent effect from capital punishment seems impressive, especially in light of its 'apparent power and unanimity').

Glossip v. Gross, 135 S. Ct. 2726, 2748-2749 (U.S. 2015) (Scalia, J., concurring).

Further, Appellant also argues that the death penalty should be struck down because of the risk of wrongful executions. Specifically, Appellant cites to Justice Breyer's lengthy dissent (and not his "comment" as stated by Appellant). AOB at 85. In Justice Scalia's concurrence in Kansas v. Marsh, which he later elaborated upon in Glossip, Justice Scalia wrote:

The dissent's suggestion that capital defendants are especially liable to suffer from the lack of 100% perfection in our criminal justice system is implausible. Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed. And of course capital cases receive special attention in the application of executive clemency. Indeed, one of the arguments made by abolitionists is that the process of finally completing all the appeals and reexaminations of capital sentences is so lengthy, and thus so expensive for the State, that the game is not worth the candle. The proof of the pudding, of course, is that as far as anyone can determine (and many are looking), none of the cases included in the .027% error rate for American verdicts involved a capital defendant erroneously executed.

Since 1976 there have been approximately a half million murders in the United States. In that time, 7,000 murderers have been sentenced to death; about 950 of them have been executed; and about 3,700 inmates are currently on death row. See Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 518 (2005). As a consequence of the sensitivity of the criminal justice system to the due-process rights of defendants sentenced to death, almost two-thirds of all death sentences are overturned. See ibid. 'Virtually none' of these reversals, however, are attributable to a defendant's 'actual innocence.' Ibid. Most are based on legal errors that have little or nothing to do with guilt. See id., at 519-520. The studies cited by the dissent demonstrate nothing more.

Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those

> ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to, whereas it is easy as pie to identify plainly guilty murderers who have been set free. The American people have determined that the good to be derived from capital punishment – in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes – outweighs the risk of error. It is no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution.

Kansas v. Marsh, 548 U.S. 163, 198-99, 126 S. Ct. 2516, 2539 (2006) (Scalia, J., concurring). Just as the United States Supreme Court has "time and again reaffirmed the capital punishment is not per se unconstitutional" and declined "to effectively overrule these decisions," this Court should do the same and deny Appellant's claim.

XVII. THERE WAS NO CUMULATIVE ERROR

The cumulative error doctrine applies where the Court finds multiple errors that, although harmless individually, cumulate to violate a defendant's constitutional right to a fair trial. Byford v. State, 116 Nev. 215, 241 (2000). By definition, a finding of cumulative error requires that there be more than one error in a given case. McConnell v. State, 125 Nev. 243, 259 (2009). The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo. App. 1986); see also People v. Jones, 665 P.2d 127, 131 (Colo. App. 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial and it must be said without

reservation that the verdict would have been the same in the absence of error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155-56 (1988).

When evaluating a claim of cumulative error, this Court considers "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (citation omitted). As discussed supra, Appellant has not asserted even one meritorious claim of error, much less multiple claims, and, as such, there is "nothing to cumulate." Id. Accordingly, his claim of cumulative error should be denied.

For all these reasons, none of Appellant's claims have merit. As such, the claims should be denied and the Judgment of Conviction affirmed.

CONCLUSION

WHERERORE, based on all the foregoing, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

Dated this 17th day of August, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this capital 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 capital brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this capital brief complies with the type-volume limitations of NRAP 32(a)(7)(B)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 36,590 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 17th day of August, 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 August 17, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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