IN THE SUPREME COURT OF THE STATE OF NEVADA

KENYA SPLOND,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 72545

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(1) because it is a direct appeal from a Judgment of Conviction based on a jury trial that involved a conviction of eight Category B felonies.

STATEMENT OF THE ISSUES

1. Whether Appellant's claim of ineffective assistance of counsel regarding a prior offer is improperly brought on direct appeal.
2. Whether the District Court did not abuse its discretion in allowing admissible evidence.
3. Whether the District Court correctly denied Appellant's Motion to Suppress.
4. Whether the District Court did not improperly rely on the presentence investigation report in sentencing Appellant.
5. Whether there was no cumulative error.

STATEMENT OF THE CASE

On March 5, 2014, Kenya Splond (hereinafter "Appellant"), was charged by way of Indictment of Count 1 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380,199.480 - 50147); Count 2 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060 - 50426); Count 3 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - 50138) and Count 4 – POSSESSION OF STOLEN PROPERTY (Category B Felony - NRS 205.275(2)(c) - 56060). 1 Appellant's Appendix (hereinafter "AA") 9-11.

On April 8, 2015, an Amended Indictment was filed charging Appellant with Count 1 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - 50147); Count 2 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060 - 50426); Count 3 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - 50138) Count 4 – POSSESSION OF STOLEN PROPERTY (Category B Felony - NRS 205.275(2)(c) - 56060), Count 5 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060 - 50426); Count 6 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - 50138); Count 7 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony - NRS 205.060 - 50426); and

Count 8 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - 50138). 1 AA 81-84.

A jury trial commenced on March 21, 2016, and ended on March 24, 2016. 1 AA 5-6. A verdict was returned on March 24, 2016, finding Appellant guilty on all counts. 1 AA 193-195.

Appellant was sentenced as follows: As to Count 1 – a maximum of sixty (60) months with a minimum parole eligibility of twelve (12) months. 1 AA 224.

As to Count 2 – a maximum of one hundred fifty-six (156) months with a minimum parole eligibility of twenty-right (28) months, concurrent with Count 1. Id.

As to Count 3 – a maximum of one hundred fifty-six (156) months with a minimum parole eligibility of twenty-eight (28) months plus a consecutive term one hundred fifty-six (156) months with a minimum parole eligibility of twenty-eight (28) months for the Use of a Deadly Weapon, to run concurrent with Count 2. Id.

As to Count 4 – a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, concurrent with Counts 1,2, and 3. Id.

As to Count 5 – a maximum of one hundred fifty-six (156) months with a minimum parole eligibility of twenty-right (28) months, consecutive to Counts 1, 2, 3, and 4. Id.

As to Count 6 – a maximum of one hundred fifty-six months (156) with a minimum parole eligibility of twenty-eight (28) months plus a consecutive term of one hundred fifty-six (156) months with a minimum parole eligibility of twenty-eight (28) months for the use of a deadly weapon, concurrent with Count 5. 1 AA 225.

As to Count 7 – a maximum of one hundred fifty-six (156) months with a minimum parole eligibility of twenty-eight (28) months, consecutive to other counts Id.

As to Count 8 – a maximum of one hundred fifty-six (156) months with a minimum parole eligibility of twenty-eight (28) months plus a consecutive term of one hundred fifty-six (156) months, with a minimum parole eligibly of twenty-eight (28) months for the use of a deadly weapon, to run concurrent to with Count 7. Id.

The aggregate total sentence equaled nine hundred thirty six (936) months maximum with a minimum parole eligibility of one hundred sixty-eight months (168) months. Id.

Appellant received nine hundred thirty-five (935) days credit for time served. Id.

On February 13, 2017, Appellant's Judgment of Conviction was filed. 1 AA 223-225.

Appellant filed a Notice of Appeal on March 2, 2017. 1 AA 226-228. He then filed his Opening Brief on March 8, 2018.

STATEMENT OF THE FACTS

January 22, 2014, Cricket Wireless

Samuel Echeverria (hereinafter "Echeverria"), who was working at Cricket Wireless, testified that on January 22, 2014, a black male came into the store with a black hoodie, a black baseball cap, black shirt, black shoes, and regular blue jeans. 2 AA 482. The man presented himself as a customer. 2 AA 482. Appellant came up to the register and asked for a specific battery for his girlfriend. 2 AA 483. Echeverria walked up to the front to see if the battery was in stock, and walked behind the desk to grab the keys to unlock the holsters. 2 AA 483.

Everyone had left the store, except for Appellant and Echeverria. 2 AA 490. When Echeverria started ringing him up for the battery, he looked up and Appellant pulled out a black gun and said, "[g]ive me all the money before I blow your brains out." 2 AA 483. Echeverria described the gun as a black revolver. 2 AA 484. In a photo lineup Echeverria identified Appellant with 100 percent certainty. 2 AA 486. The robbery was also caught on surveillance tape and played for the jury. 2 AA 489. Echeverria immediately called the police after Appellant left the store. 2 AA 491.

Although, Echeverria was not able to identify Appellant in court, he testified that he made a photo lineup identification approximately a month after the robbery,

identifying the person in the number two spot. 2 AA 493. While testifying, he maintained that he was 100 percent certain then that the person who robbed him was in the number two spot in the photo array. 2 AA 491-494.

Alisa Williams (hereinafter "Williams") testified that on January 22, 2014, after getting out of work she saw a black man come out of the Cricket Store and jump into the back seat of a silver car. 3 AA 501-503. She also saw a light-skinned black female with white shades on driving the car. 3 AA 503. She remembered the man had a hat on his head and a scar on his face, more specifically his jaw. 3 AA 505. When testifying, she said the second photo in the photo array looked like it might be him, but was not sure it was him when she testified and was not sure it was him back when she was initially was shown the photo array. 3 AA 505-506.

January 28, 2014, Metro PCS

On January 28, 2014, Graciela Angles (hereinafter "Angles") was working at Metro PCS on 6663 Smoke Ranch. 3 AA 604. Around 2:00 Appellant robbed the store, taking money and a phone. 3 AA 605. He looked at phones and asked Angles about phone plans. Id. He asked about a Galaxy S4, so she went and grabbed it. 3 AA 608. He then asked about the Omega, so she took the Galaxy S4 back and brought out the Omega. Id. He then pulled out the gun and asked her to step back and give him the money. 3 AA 609. In fear, she grabbed all the money out of the

cash drawer, while he was pointing the gun at her, and he took the cash and the Omega and left. 3 AA 609. She immediately called 911. 3 AA 619.

About a month later, a police officer with Metro showed Angles a photo array. 3 AA 610. She circled picture number two, wrote her name under it, and said she was 100 percent sure that was who robbed her. 3 AA 611. She also identified Appellant in court and she further testified she still was 100 percent sure that was who robbed her. 3 AA 612. Video surveillance of the robbery was shown to the jury. 3 AA 615. She was the only employee in the store at the time of the robbery. 3 AA 617.

February 2, 2014, Star Mart

Brittany Slathar (hereinafter "Slathar") was working at Star Mart as a cashier on February 2, 2014, around 2:45 in the morning. 3 AA 513. She saw Appellant come in and go to the gum, she then got up and walked to the counter. 3 AA 514. He picked up some Wrigley Spearmint gum. Id. No one else was in the store. Id. She asked Appellant if he needed anything else and that is when he said two packs of Newport 100s. Id. As she was ringing the cigarettes up, he pulled out a gun and told her to give him all the money. Id.

Slathar told Appellant that she was in a transaction and she could not open her register. Id. He kept saying, "Give me the money. Give me the money. I'm gonna

kill you. You're gonna die." Id. He called her a "dumb white bitch" and told her she was stupid. Id.

Slathar never opened the register because she thought she would have to pay back the money he stole. 3 AA 515. He left, but told Slathar he would be back, and that she was lucky. Id. He grabbed the cigarettes and gum and left. 3 AA 516. She immediately called Metro and Officer Jeremy Landers took her to a certain scene and gave her a Show Up Witness Instruction Sheet. Id. 3 AA 516; 3 AA 599. Slather identified Appellant with 100 percent certainty. 3 AA 518. She read the statement she wrote down for police into the record. 3 AA 517-518. She read, "[t]he male in front of the police car was the man who robbed me at the—robbed me at gunpoint. He was wearing blue jeans, red T-shirt, and black tennis shoes. When he came in the store he was wearing blue jeans, a black hooded sweatshirt and and a beanie light," slash, "dark brown spots." 3 AA 517-518. She testified it was a camouflage beanie. Id. She also identified Appellant in court. 3 AA 523.

Slather said he had a small, black revolver, with no clip. 3 AA 520. When he came into the store, Slather recognized him as a previous customer that had been in the store before. 3 AA 521. The robbery was also caught on video surveillance. 3 AA 524.

Officer Joshua Rowberry (hereinafter "Officer Rowberry") testified that on February 2, 2014, he received a call involving a robbery around 2:57 a.m. at 5001

North Rainbow. 3 AA 569. The information Officer Rowberry received was that the suspect had left the store and he was traveling northbound on Rainbow. 3 AA 572. Officer Rowberry saw a car north on Rainbow. 3 AA 574. He testified it was the only vehicle in the area, it was in close proximity to the robbery, and it was headed northbound away from where the robbery occurred. 3 AA 575. He stopped the vehicle because it was leaving the area of the robbery and because there was damage to the rear of the vehicle as if it was just involved in an accident. 3 AA 577.

As he followed the vehicle, it turned into a residential neighborhood, wherein Officer Rowberry put his lights and sirens on. 3 AA 578. The car stopped, he exited his vehicle, and approached the car on the driver's side rear passenger door. 3 AA 578. He could not see through the windows due to the dark tint. Id. Kelly Chapman (hereinafter "Chapman") was the driver of the vehicle. 3 AA 580. After she rolled down the window, Officer Rowberry noticed there was an adult black male laying in the back seat, covered up by a blanket and breathing heavily. 3 AA 581.

Officer Rowberry gave Appellant instructions to show his hands, which he did not do. 3 AA 581. Officer Rowberry initiated code red on his radio, signaling to other officers he needed backup. 3 AA 582. Once the other officers arrived, Officer Rowberry instructed Chapman and Appellant to step out of the car. 3 AA 583. Officer Rowberry was able to see inside the car when Appellant and Chapman got

out and he saw two packs of Newport cigarettes and a spearmint Wrigley's gum, which were the items taken from the store. 3 AA 584; 3 AA 587.

He also found a black sweatshirt and camouflage beanie. 3 AA 588. A revolver was inside a pocket of the sweatshirt. 3 AA 591. Out of the six possible rounds, there were four rounds in the revolver. Id. Appellant's shirt also had some black dots on it, small cotton fibers from the sweatshirt. 3 AA 594.

Jeffrey Habberman (hereinafter "Habberman") testified that he was the owner of a 38-caliber Colt revolver that was stolen when someone broke into his home and stole the entire gun safe. 3 AA 539. He testified that he did not know the Appellant sitting at counsel table, he did not know a Kenny Splond, he never gave Appellant permission to go into his house, never gave him permission to borrow his firearm, and he never gave permission to any of his friends or relatives to ever use his gun. 3 AA 542-543. Habberman identified Exhibit #28, as a picture of his gun. 3 AA 543.

SUMMARY OF THE ARGUMENT

Appellant contends that the District Court erred in not reinstating a prior offer. However, defense counsel stated on the record that the offer was not acceptable to his client, and Appellant essentially argues an ineffective assistance of counsel claim, which is improper on direct appeal. Second, Appellant alleges that the District Court abused its discretion in allowing testimony that was not properly authenticated, irrelevant, overly prejudicial, and without a proper foundation.

Additionally, that the District Court allowed evidence of prior bad acts without a Petrocelli hearing. Appellant's only objection was in regards to foundation, thus most of his claims regarding inadmissible evidence are waived.

Third, Appellant argues the District Court erred by failing to suppress evidence from an improper stop. However, the stop was legally justified on two independent bases. The officer had probable cause for a traffic infraction and reasonable suspicion for an investigative stop.

Fourth, Appellant contends that Parole and Probation's recommendations were inflammatory and arbitrary, causing the Court to rely on impalpable evidence and to sentence him in violation of due process. The District Court judge presided over the trial and heard the competing sentencing arguments and imposed a lawful sentence within her discretion and the statutory guidelines.

Lastly, Appellant claims there was cumulative error. Appellant has not shown there were any errors, thus there are no errors to cumulate. Therefore, the Judgment of Conviction should be affirmed.

ARGUMENT

I. APPELLANT'S CLAIM OF INEFECTIVE ASSISTANCE OF COUNSEL REGARDNG A PRIOR OFFER IS IMPROPERLY BROUGHT ON DIRECT APPEAL

Appellant alleges that the District Court erred in not reinstituting a prior offer to Appellant. AOB at 2, 7. Appellant contends that he never received the prior offer

from the State because his prior defense counsel, Frank Kocka, never communicated the offer to him. AOB at 2. Appellant is essentially alleging an ineffective assistance of counsel claim in regards to his prior defense counsel, Frank Kocka, which is an inappropriate claim to be brought on direct appeal. Pellegrini v. State, 117 Nev. 860, 863, 34 P.3d 519, 534 (2001). Further, Appellant relies on Missouri v. Frye, 566 U.S. 133, 145, 132 S.Ct. 1299, 1408 (2012), and Lafler v. Cooper, 566 U.S. 156, 165, 132 S.Ct. 1376, 1385 (2012) to support his arguments. However, both Frye and Lafler, address a defendant's Sixth Amendment right to effective assistance of counsel. Therefore, this claim is inappropriately raised on direct appeal. Additionally, Appellant does not cite any legal authority or make any legal arguments as to why this claim should be brought on direct appeal instead of through post-conviction. Thus, this claim should be denied.

Appellant never objected or demanded the offer be retendered. Thus, this claim is waived. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

As such, this complaint is reviewable only for plain error. 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). Plain error review asks:

> To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). 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, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). 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.

Martinorellan, 131 Nev. at __, 343 P.3d at 594.

Appellant's claim that his defense counsel never told him of the State's offer is contradicted by the record and thus cannot establish plain error. On Tuesday, March 15, 2016, the first day of trial, counsel for Appellant, the Court, and the State had the following exchange:

> MR. PALAL: Okay. Yes to previous counsel, Mr. Kocka, an offer was made. It was to plead guilty to two robberies with use of a deadly weapon, full right to argue including for consecutive time. I think that was, though, some time ago and to be perfectly frank with the Court, Mr. Lexis and I are relatively new on this case so we don't have that time line—
>
> THE COURT: Well, let me ask Mr. Splond, did you get that offer, sir, earlier?
>
> DEFENDANT: No.
>
> THE COURT: No?

DEFENDANT: No.

THE COURT: Then I'll let you take [sic] to Mr. Claus about it. Remember, the decision is always yours, not anybody else's.

MR. PALAL: And Your Honor, to be clear, I believe that offer was revoked while Mr. Kocka was counsel, I think, well over a year ago.

THE COURT: Okay.

MR. PALAL: And is no longer outstanding?

THE COURT: So there's no current offer?

MR. PALAL: There's no current offer.

THE COURT: And when do you think the offer was made [sic] Mr. Kocka since Mr. Splond never recalls receiving it? Now, I should make a record.

MR PALAL: I believe it was made in 2014, but I will have to—I will have to confer with the original—the deputy who made the original offer.

THE COURT: Okay. And when, is ever, was that offer formally withdrawn?

MR. PALAL: I also believe in the beginning of 2015, Your Honor.

THE COURT: And why do you think that?

MR. PALAL: My communications with the original deputy which is Ms. Lexis. But I will confer—

…

THE COURT: Okay. So, Sir, if you never got that offer from your other attorney, I apologize. They are telling me

now it is withdrawn. So at this point they are not making an offer of any sort if sounds like to you. So I guess we'll just go ahead and proceed and then deal with whatever issues there may be later if there are any.

MR. CLAUS: Yeah. And I don't think there's any disagreement, Your Honor, that no offer was every conveyed to me or conveyed to Mr. Splond.

MR. PALAL: That's correct.

MR. LEXIS: And Your Honor, according to the minutes in C296374, Department 11, on September 15th, 2014,--

THE COURT: Okay. I'm going, hold on, I'm not as fast as you.

MR. LEXIS: Okay.

THE COURT: And this was in front of Judge Smith that day. Ms. Lexis stated she previously conveyed an offer which involved both cases; however, counsel did not like the offer. The request of Mr. Kocka, Court ordered matter continued. So there may have been some discussion about that offer because it looks like it was continued to October 1st for the same issue to be discussed. And that was again in front of Judge Smith. Mr. Kocka advised matter not resolved.

MR. LEXIS: That's correct, Your Honor. And according to Ms. Lexis that's when the offer was revoked and there is no offer at this time.

THE COURT: Okay. So now you get to decide which tie you like better. After the cases were consolidated, was another offer made or was it only prior to the consolidation?

MR. PALAL: It was prior to the consolidation, Your Honor.

> THE COURT: But the representation, at least from the minutes, looks like it was to both cases at the time the offer was made, prior to consolidation.
>
> MR. PALAL: That's correct.

2 AA 323- 326.

Previously, on April 20, 2015, Mr. Kocka and Judge Smith had the following exchange:

> THE COURT: Hey. Is this case resolved?
>
> MR. KOCKA: It is not, Your Honor. *I did receive an offer on the case; the offer is not acceptable to my client.* So at this point, Your Honor, I don't know if you want me to do it formally in writing or you'll accept it orally, but I'm going to have to get him over to the PD's office because he wants to go to trial.

2 AA 280 (emphasis added).

Further the Court minutes from April 20, 2015, state:

> Mr. Kocka stated he received an offer of settlement; however, it was unacceptable to his client. At the request of Mr. Kocka, COURT ORDERED, counsel WITHDRAWN and ORDERED, matter SET for status check. Ms. Hojjat to run a conflict check.

Respondent's Appendix (hereinafter "RA") 1. Moreover, the Court minutes reflect that Appellant was present on April 20, 2015. Id. Thus, he heard the response his attorney gave to the Court and did not object to his attorney's representations.

Therefore Appellant's claim that his counsel never informed him of the offer is contradicted by the record and cannot substantiate a claim of plain error.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING ADMISSIBLE EVIDENCE

This Court generally reviews a district court's decision to admit evidence for an abuse of discretion. Hernandez v. State, 124 Nev. 639, 188 P.3d 1126 (2008); see e.g. Mclellan v. State, 124 Nev. 263, 182 P.3d 106, 109 (2008) ("We review a district court's decision to admit or exclude evidence for an abuse of discretion."). District courts have considerable discretion in admitting or excluding evidence. Holmes v. State, 129 Nev. ___, 306 P.3d 415 (2013). Reversal is warranted only were the decision is "manifestly wrong." Id. (quoting Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006)).

Appellant contends that Haberman introduced evidence of a crime Appellant was not charged with, burglary or home invasion of Haberman's home. AOB at 3. Further, that the State failed to request a hearing to introduce the prior bad act evidence to overcome the presumption of inadmissibility. AOB at 11.

Next, Appellant alleges that Haberman gave an improper opinion regarding the status of the gun in State's Exhibit #28. AOB at 3. Appellant argues that Haberman had no foundational knowledge to authenticate, the testimony was irrelevant, and prejudicial. AOB at 12.

A. Introduction of Alleged Uncharged Prior Bad Act of Burglary or Home Invasion

As an initial matter, the State notes that Appellant did not raise an objection to the admission of the alleged prior bad act of burglary or home invasion, and therefore all but plain error is waived. Dermody, 113 Nev. at 210-211, 931 P.2d at 1357; Guy, 108 Nev. at 780, 839 P.2d at 578 (1992); Davis, 107 Nev. at 606, 817 P.2d at 1173. This Court has consistently reaffirmed that "[t]he failure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the grounds not raised below." Pantano v. State, 122 Nev. 782, 795 n. 28, 138 P.3d 477, 486 n. 28 (2006) (quotation omitted). Moreover, appellate review requires that the district court be given a chance to rule on the legal and constitutional questions involved. Lizotte v. State, 102 Nev. 238, 239-40, 720 P.2d 1212, 1214 (1986). Where an appellant fails to preserve an issue on appeal, this Court reviews the issue for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Appellant never raised a prior bad act objection below, or argued for a Petrocelli hearing, but raises the issue for the first time now on appeal without giving the District Court the opportunity to rule on the legal issue.

Appellant fails to address that proving possession of stolen property, was part of the State's burden in this case. As such, the testimony of Jeffrey Haberman (hereinafter "Haberman") was necessary because he was the owner of the stolen gun. The Amended Criminal Indictment read:

> Count 4 - Possession of Stolen Property. Defendant Kenny Splond, aka Kenya Splond, did, willfully, unlawfully, and

> feloniously for his own gain, possess property wrongfully taken from Jeffrey Bruce Haberman, to wit: Colt 38 revolver serial #941609, which Defendant knew, or had reason to believe, had been stolen.

1 AA 83; 1 AA 163.

The following exchange took place with the State and Haberman on direct examination:

> Q: Sir, I'm showing you State's 29. Is that the firearm the gun registration was referring to?
> A: Yes, sir, it is.
> Q: Tell me exactly how it was stolen.
> A: I came home one day, the back door has been pry—my patio door had been pried open. Somebody entered the house, stole the entire gun safe, ripped the front—I had a double dead bolt on the front door. That was ripped out of the door and then went right out. There's still drag marks on the concrete from the safe.
> Q: You know a person named Kenny Splond?
> A: No, sir.
> Q: Have you even seen that man before?
> A: I don't believe so.
> Q: Did you ever give that man permission to go in your house?
> A: No, sir.
> Q: Did you ever give that man permission to borrow your firearm?
> A: No, sir.
> Q: Did you ever give permission for anyone to have this gun at issue?
> A: No, sir.

3 AA 542-543.

This line of questioning was necessary for the jury to understand that the firearm was in fact stolen. It was not used to infer to the jury that Appellant was the

one who burglarized Haberman's home. Although Appellant states that "Haberman testified that Appellant committed the act of home invasion," the State did not allege or argue that Appellant was the alleged perpetrator that stole the gun safe. AOB at 11. The State reiterated it was not arguing that Appellant stole the firearm in closing arguments. The State said the following during closing argument:

> How about the firearm? Jeffrey Haberman. Folks, we're not alleging that he stole the firearm. We're not charging him with stealing the firearm. We're charging him with possession of stolen property.

4 AA 764.

Further, Instruction #23 stated:

> Any person who possesses a stolen firearm and either knows the firearm is stolen or possess the firearm under such circumstances as should have caused a reasonable person to know the firearm is stolen, is guilty of Possession of Stolen Property.

1 AA 185.

Thus, Haberman testifying to the fact that his gun was stolen did not constitute inadmissible prior bad act evidence. It was proper evidence regarding the Possession of Stolen Property charge. Further, the Court issued a limiting instruction. 3 AA 548-552. The instruction stated:

> Evidence was introduced by the State of other crimes that the Defendant is not charged with. Evidence that someone committed a burglary at the home of Mr. Haberman was not received and may not be considered by you to prove that Defendant had any involvement in that burglary. Such

> information was received and may be considered by you only for the limited purpose of proving the weapon was stolen. That information cannot be used by you in determining the guilt of the Defendant in this case. You must weigh this evidence in the same manner as you do all other evidence in this case.

3 AA 558. This instruction was read to the jury, and it was also included as Instruction #22. 3 AA 558; 1 AA 184.

Evidence is not a prior bad act unless the evidence elicited speaks to chargeable collateral offenses. See Salgado v. State, 114 Nev. 1038, 1042-43, 968 P.2d 324, 326-27 (1998) (explaining that cases in which the evidence does not implicate prior bad acts or collateral offense on the defendant's part, a Petrocelli hearing is not required); 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 bailed known drug user out of jail). Thus, the testimony elicited from Haberman did not constitute uncharged prior bad act evidence. Therefore, a Petrocelli hearing was unnecessary and was not warranted in this case. Furthermore, Appellant fails to meet his burden that this unpreserved claim rises to the level of plain error or affected his substantial rights. Thus, Appellant's claim should be denied.

B. Picture of Haberman's Gun, State's Exhibit #28

At trial, Appellant objected on the grounds of foundation when the State moved to admit State's Proposed Exhibit #28, which Haberman described as "[m]y

colt with four rounds in it." 3 AA 544. Defense counsel again objected to the admission of the photograph at the end of his cross-examination and also asked the Court for an admonition to the jury. 3 AA 547.

Relevance and Prejudice

Appellant raises relevance and unfair prejudice claims against State's Exhibit #28, for the first time on appeal.[1] Appellant did not offer a contemporaneous objection regarding relevance or unfair prejudice during trial, and therefore all but plain error is waived. Dermody, 113 Nev. at 210-11, 931 P.2d at 1357; Guy, 108 Nev. at 780, 839 P.2d at 578; Davis v. State, 107 Nev. at 606, 817 P.2d at 1173.

To be admissible, evidence must be relevant. NRS 48.025. District courts are given great discretion to determine what is relevant. NRS 48.015 ("relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than

[1] Appellant failed to provide State's Exhibit #28 in Appellant's Appendix. It is Appellant's burden to provide a complete record on appeal. Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009); see also Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). The Court "assumes the missing portions of the record support the district court's decision, and does not reverse on this basis." Id.; Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (The burden to make a proper appellate record rests on appellant.); De Santiago-Ortiz v. State, No. 67424, 2016 WL 699867; Cuzze v. Univ. & Cmty. College Sys., 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision.).

it would be without the evidence); see also Archanian v. State, 122 Nev. 1019, 1029 (2006) ("District courts are vested with considerable discretion in determining the relevance and admissibility of evidence…."). Evidence is considered relevant where it is has some tendency in reason to establish a proposition material to the case. Pasgove v. State, 98 Nev. 434, 436 651 P.2d 100, 102 (1982).

The State proffered a photograph of Haberman's gun. 3 AA 544. The picture of the gun was relevant to establishing that is was Haberman's actual gun that was stolen. This was necessary for the State to prove the charge of Possession of Stolen Property. Admitting this photograph into evidence made the fact that this was Haberman's gun more probable than without this piece of evidence.

This photograph would be inadmissible only if its probative value was substantially outweighed by danger of unfair prejudice pursuant to NRS 48.035. The photograph admitted was not more prejudicial than probative. NRS 48.035.

Appellant alleges that the only purpose of this photo was to "inflame the jury by increasing the dangerousness of the offense (by the use of a loaded weapon)." AOB 12. The following exchange occurred on direct examination between the State and Haberman:

> Q: Sir, I'm showing you what has been marked as State's Proposed 28. What is that a picture of?
> A: My colt with four rounds in it.
> Q: True and accurate representation of your firearm?
> A: Yes.

> MR. LEXIS: Your Honor, I move to admit State's Proposed 28.
> THE COURT: Any objection?
> MR. CLAUSE: Yes, Your Honor. Foundation. I mean—
> THE COURT: Overruled.
> (STATE'S EXHIBIT 28 ADMITTED)
> MR. LEXIS: May I publish, Your Honor?
> THE COURT: You may.
> BY MR. LEXIS:
> Q: Is that your firearm, sir?
> A: Yes, sir.
> Q: With rounds in the chamber?
> A: Yes, sir.
> Q: Did you keep rounds in the chamber?
> A: No, sir.
> Q: This gun was empty when it was stolen?
> A: Yes, sir.

3 AA 543-544.

The photo was admitted to show proof of ownership, and to show that the gun found at the scene was the same gun that was stolen from Haberman's home. The fact that Haberman testified that the gun was loaded, was not unfairly prejudicial to Appellant. A reasonable victim would believe that when someone is pointing a firearm it is because that gun is loaded. Thus, this testimony was not overly prejudicial because evidence that Appellant used a firearm in each robbery was admitted into evidence. 2 AA 483; 3 AA 609; 3 AA 514. Haberman testified that the gun was loaded based on his personal knowledge of his firearm. 3 AA 544. This evidence was relevant and did not create unfair prejudice because the photo depicted

the condition of the gun when it was found. 3 AA 591. Thus, Appellant's claim should be denied.

Authentication and Foundation

Pursuant to NRS 52.015(1), "[t]he requirement of authentication . . . is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." Evidence is not admissible until it has been properly authenticated. NRS 48.025; NRS 52.015. Such authentication can be made by a witness who has personal knowledge that the evidence is what it purports to be. NRS 52.025.

Haberman had personal knowledge of the firearm because it was his personal firearm and therefore he was able to authenticate it. The following foundation was laid while Haberman was on direct examination with the State:

> Q: Sir, do you own a 38-caliber Colt revolver?
> A: I did. It was stolen.
> Q: When was it stolen?
> A: October 2013.
> Q: And how was it stolen?
> A: Somebody broke into my house, stole the entire gun safe.
> …
> Q: Sir, I'm showing you what has been marked as State's Proposed Exhibit 29.
> A: Yes.
> Q: Do you recognize that firearm?
> A: Yes, I do.
> Q: Does it appear to be your—true and accurate representation of your firearm?
> A: Yes, it does. Colt Detective Special.

…
Q: When did you buy this firearm, sir, or how did you come in—
A: Um, I inherited it from my father, basically.
Q: Okay.
A: He bought is in Los Angles [sic].
Q: And what did you do when you got it?
A: Uh, registered in my name.
MR. LEXIS: Let the record reflect I'm showing opposing Counsel State's Proposed 42. May I approach?
THE COURT: You may.
BY MR. LEXIS:
Q: Sir, I'm showing you a certified copy from the Metropolitan Police Department for a gun registration. Do you recognize that document?
A: Looks familiar. Yes, I do.
Q: Does that include your name?
A: Yes, it does.
Q: What else does it include?
A: My mother's name, her address, my address, the serial number of the gun, manufacturer, and model.
Q: Is all that information true and correct?
A: Yes, it is, sir.
Q: The serial number?
A: Um, yes, sir.

3 AA 538-541.

The State laid the proper foundation to show that Haberman owned the gun, and that he had personal knowledge regarding the gun. Thus, Haberman satisfied the requirements of NRS 520.015 because Haberman had personal knowledge regarding the gun and was able to testify that "the matter in question is what its proponent claims." Further, defense counsel had the opportunity to cross-examine Haberman

as to the weight and credibility of Haberman's testimony, which defense counsel did. 3 AA 544-547. Thus, Appellant's claim is without merit.

However, even if this Court finds the District Court abused its discretion, the error was harmless. Admitting evidence "will be deemed harmless" when the evidence of guilt is strong. Kelly v. State, 108 Nev. 545, 552, 837 P.2d 416 (1992). An error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25 (2000) (quoting Neder v. United States, 527 U.S. 1, 18 (1999). The evidence of guilt was strong and a rational jury would have still found him guilty even without the alleged error.

III. THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS

Appellant claims that the District Court erred in failing to suppress evidence from an allegedly improper stop. AOB at 13. Appellant complains that the officer could not articulate any specific facts to justify the vehicle stop. AOB at 13. However, the Court properly denied the Motion and stated, "[h]ere there was a valid basis for the traffic stop, which led to the discovery of the additional evidence. Even if no citation was issued, the photographic evidence shows the valid basis." 2 AA 432.

"Suppression issues present mixed questions of law and fact." Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002), overruled on other grounds by

Nunnery v. State, 127 Nev. ___, ___, 263 P.3d 235, 250-51 (2011). This court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that this Court reviews de novo. Cortes v. State, 127 Nev. ___, ___, 260 P.3d 184, 187 (2011); State v. Lisenbee, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000). The reasonableness of a seizure is a matter of law reviewed de novo. Id.; United States v. Campbell, 549 F.3d 364, 370 (6th Cir. 2008). When the factual findings depend largely on credibility determinations, appellate court will defer to the district court. Spain v. Rushen, 883 F.2d 712, 717 (9th Cir. 1989), cert. denied, 110 S. Ct. 1937 (1990).

On March 21, 2016, the District Court held an Evidentiary Hearing regarding Appellant's Motion to Suppress. 2 AA 394. Officer Rowberry testified that on February 2, 2014, he received a call involving a robbery at a gas station where a gun was used. 2 AA 396. Officer Rowberry began looking for the male suspect, who was last seen running northbound on Rainbow. Id. At that point, he identified a vehicle that pulled out of a side street. Id. He noticed the rear of the vehicle was "smashed or damaged like it was involved in an accident." 2 AA 399. The Court admitted State's Exhibit #2, which was a depiction of the car with the damage. 2 AA 400.

Officer Rowberry testified that there were parts of the vehicle that were hanging down, that could have possibly fallen off. 2 AA 400-401. Further, he explained that this kind of damage was something that would cause him to initiate a

traffic stop, and this type of damage has caused him to initiate traffic stops in the past. 2 AA 401. Further, he stated that he was permitted to cite someone for that type of damage because it could possibly injure other motorists. Id. Additionally, he testified that because of what he observed he believed he had probable cause to stop the vehicle for a traffic infraction. Id.

Officer Rowberry testified that based on his training and experience, and the calls he has answered involving robberies, suspects have left on foot and ended up in cars. 2 AA 402. Officer Rowberry stopped the vehicle for the traffic infraction and because of the vehicle's close proximity to the robbery. 2 AA 403. Once he stopped the car, he had verbal communication with the female driver. 2 AA 404. When she rolled down the window, he saw a black male laying on the seat under a blanket. 2 AA 404-405. The male did not show his hands when Officer Rowberry commanded him to show him his hands for officer safety purposes. 2 AA 405.

Other officers responded, and the female and Appellant were arrested and taken into custody. 2 AA 406. As they exited the vehicle, the doors were left open, and in plain view on the driver seat there were two packs of Newport cigarettes and an eight-pack of Wrigley spearmint gun. 2 AA 407. Officer Rowberry was aware that the robbery suspect had taken two packs of Newport cigarettes and Wrigley's spearmint gum. 2 AA 407. Another officer arrived at the scene with the victim to

conduct a show up. 2 AA 409. The victim identified the Appellant with 100 percent certainty. Id.

After that, Officer Rowberry contacted a robbery detective, who instructed Officer Rowberry that he had probable cause to search the vehicle. 2 AA 410. Officer Rowberry also believed he had probable cause to search the vehicle. Id. The vehicle was then searched and a black hooded sweatshirt, a camouflage beanie, and a revolver were found. Id.

At the evidentiary hearing, the State argued that under two different theories, the stop made by Officer Rowberry was legal. 2 AA 429. The State first argued that there was probable cause for a traffic stop:

> The United States Supreme Court said in Ohio v. Robinette at 519 US 33 in 1996 is that, doesn't matter if it's—if a stop is pretextual or not, as long as there's a valid basis to stop the vehicle, if the officer has probable cause that a traffic infraction has occurred. Now, if you look at State's Exhibit 2, for the purposes of this hearing, the back of the vehicle clearly shows that there's probable cause that the vehicle may be unsafe on the road. In the true motivation of the officer, according to the Supreme—United States Supreme Court, is not relevant, as long as there is a basis in law that there's probable cause that a—that there's a traffic infraction.

2 AA 428- 429.

Next, the State argued the stop could be justified as an investigatory stop, which only requires reasonable suspicion. 2 AA 429.

> Now, let's not conflate that with the other way, which the traffic—or the stop could be justified, which is the reasonable suspicion or an investigatory stop. Your Honor, that probable cause is not needed for an investigatory stop, rather a reasonable suspicion is what's required. And what the United State Supreme Court has said on this issue is that even innocent actions, when viewed by police officers who have knowledge of the motives or patterns of certain types of criminal activity, can give rise to reasonable suspicion. And that's in US v. Cortez 449 US 441…And what the officer articulated was, in his training and experience, robbers sometimes go to cars awaiting some distance away. They go to that vehicle and then that vehicle is what ultimately provides them transportation. And what he testified to was that at 2:57 the call came in and 3:03 he conducted the traffic stop, Your Honor. Within six minutes, heading in the general direction that the—that the Defendant—that the suspected robber was running. The only car on the road, the only person on the road is enough for a reasonable suspicion. It's enough to make that stop.

2 AA 429-430.

Traffic Stop

Officer Rawberry had probable cause to stop the vehicle for a traffic infraction. 2 AA 401. Although, Appellant and the female driver were never cited for a traffic citation, that does not bare on whether or not the stop was legally valid.

Officers are authorized to stop vehicles for minor traffic offenses even though it is done as a pretext to inquire about drugs or some other more serious crime. Whren v. U.S., 517 U.S. 806, 813, 116 S.Ct. 1769, 1774 (1996). A vehicle stop and search is valid if the detention is objectively justified, even if the officer's subjective

motivation is to investigate a crime other than the traffic violation on which the stop was based. Id. at 813, 116 S.Ct. at 1774.

In Gama v. State, 112 Nev. 833, 836, 920 P.2d 1010, 1012-1013 (1996), this Court held that "a vehicle stop that is supported by probable cause to believe that a driver has committed a traffic infraction is 'reasonable' under the Fourth Amendment, even if a reasonable officer would not have made the stop absent some purpose unrelated to traffic enforcement." Id. (*citing* Whren, 517 U.S. 806, 116 S.Ct. 1769).

This Court in Gama carved out the "could have" test. Id. at 836, 920 P.2d at 1013. If the officers could have probable cause for a traffic stop, then evidence is not suppressed based upon a claim that a pretextual stop existed. Id. Moreover, other cases have upheld pretextual stops otherwise supported by probable cause. U.S. v. Johnson, 63 F.3d 242 (3rd Cir. 1995) (air fresheners hanging from rearview mirror); People v. Mendoza, 234 Ill. App.3d 826, 599 N.E.2d 1375 (1992) (fuzzy dice hanging from rearview mirror); U.S. v. Rivera, 906 F.2d 319 (7th Cir. 1990) (champagne glass on dashboard); People v. Hanes, 60 Cal. App.4th Supp. 6, 72 Cal. Rptr.2d 212 (1997) (overly tinted windows); People v. Jones, 207 Ill. App.3d 30, 565 N.E.2d 240 (1990) (cracked windshield).

Officer Rowberry had probable cause for a traffic stop due to the damage of the rear end of car. 2 AA 410. Even though his investigation led him to discovering

the suspected robber, this did not make the stop per se unconstitutional. Consequently, any evidence seized pursuant to the stop and search of the car is admissible.

Investigative Stop

Secondly, an officer may conduct a brief investigatory stop if it is justified by the officer's reasonable suspicion that the citizen is engaged in criminal activity. Terry v. Ohio, 392 U.S. 1, 20-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The Fourth Amendment does not require a police officer "who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." Adams v. Williams, 407 U.S. 143, 144, 92 S. Ct. 1921, 1922 (1972).

Officer Rowberry had reasonable suspicion to conduct an investigatory stop. Officer Rowberry received the initial call and spotted the car just two to three minutes later. 2 AA 397. When he first saw the vehicle, it was less than half of a mile away from the place where the robbery was reported. 2 AA 401-402. There were no other cars or people on the road. 2 AA 402.Thus, Officer Rowberry had enough articulable facts to have reasonable suspicion to conduct an investigatory stop. Therefore, the District Court correctly denied Appellant's Motion to Suppress.

IV. THE DISTRICT COURT DID NOT IMPROPERLY RELY ON THE PRESENTENCE INVESTIGATION REPORT IN SENTENCING APPELLANT

Appellant complains that the PSI used by the Court was inflammatory and flawed. AOB at 5. Appellant contends that "[b]ecause Appellant's sentence was increased after mistaken or highly suspect information was removed he was denied due process under the Fourteenth Amendment." AOB at 18. Further, Appellant argues that no materials were forthcoming from Parole and Probation to explain the increased sentence recommended by Parole and Probation despite the decrease in Appellant's erroneous criminal background. AOB at 19.

This Court has granted district courts "wide discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred v. State, 120 Nev. 410, 413, 92 P.3d 1246, 1248 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) (*citing* Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)).

On July 20, 2016, the day set for sentencing, defense counsel asked for an extension of the sentencing dates due to the Clark County Detention Center being on lock down over the weekend. 4 AA 795. The Court asked Mr. Clause, defense counsel, to make sure when he went through the PSI with Appellant, to identify

anything that was his cousin's, Kenny Splond, instead of his offenses. 4 AA 798. The Court noted that the PSI mentioned that there were some issues of cross-over. Id.

On August 10, 2016, defense counsel had the following exchange with the Court:

> MR. CLAUS: Your Honor, I am going to be requesting another continuance here, a 30-day continuance. I've talked to the State, they don't have any opposition to it, I believe. We have the confusion of Mr. Splond in his PSI with his—
>
> THE COURT: Cousin, Kenny.
>
> MR. CLAUS: --cousin. So—
>
> THE COURT: Kenya versus Kenny, easy to confuse.
>
> MR. CLAUS: And I think that might be why Your Honor on the supplemental they went from recommending so many concurrents to switching around to some consecutive recommendations, as you may or may not have noticed, Your Honor.
>
> THE COURT: Yeah.
>
> MR. CLAUS: But I think that's due to their confusion with his more storied relations. So with that being said, Your Honor, a 30-day continuance request.
>
> MR. PALAL: I have no objection to the continuance. As far as the basis for the change in recommendation, I don't know that that's true.
>
> THE COURT: I don't either.

> MR. PALAL: But no objection to the continuance to make sure we get the PSI correct.
>
> THE COURT: Mr. Splond, are you okay with continuing your sentencing while they try and investigate the issues?
>
> THE DEFENDANT: Yes.

4 AA 801-802.

On September 17, 2016, defense counsel asked the Court for another continuance, and it was granted. 4 AA 805-806. On October 12, 2016, defense counsel explained to the Court that he had issued subpoenas and reached out to Parole and Probation, but had not heard anything back yet. 4 AA 808. On November 23, 2016, defense counsel told the Court that Parole and Probation was being nonresponsive in regards to the information he was requesting. 4 AA 811. He explained to the Court that he was filing a Motion to Compel, and the Court stated he needed to serve the Attorney General as well. 4 AA 811-812. On December 21, 2016, defense counsel stated to the Court that the Motion to Compel hearing was set for January 4, 2017. 4 AA 818.

On January 23, 2017, the day of sentencing, the Court, Mr. Claus, and Mr. Keene, Senior Deputy Attorney General, discussed the status of the situation with Parole and Probation:

> MR. CLAUS: Well, Your Honor, to be perfectly frank, I think I've—there's nothing to be produced reading their motion. I'd still ask for an order. I think I predicted the State's nature of their opposition in my motion itself, but

I don't think that these materials are confidential. I'd submit to the Court.

THE COURT: Regardless of whether they're confidential, the State has said we don't have any.

MR. CLAUS: Exactly.

MR. KEENE: That's correct, Your Honor. I called up to records myself, as I've stated in my affidavit, asked them to provide me with everything in the file, and they said you have it.

THE COURT: Okay.

MR. KEENE: We've produced everything.

THE COURT: I can't order them to produce documentation that does not exist.

MR. CLAUS: Understood, Your Honor.

THE COURT: Okay. So given the response that's been provided by the Attorney General's Office, I'm going to not require any additional protection of information from P&P pursuant to that subpoena.

MR. CLAUS: If I could, Your Honor, though while the State can't produce anything, you can't order them to produce it just for the sake of the record should this ever become an issue on the appeal or post-conviction relief settings that, you know, the State comes up with something out of the P&P file.

THE COURT: If information had in fact existed, I would order them. So I am ordering it, but conditioned on the information I've been provided there is no information to be turned over. How's that?

MR. CLAUS: Very well, Your Honor.

4 AA 825-826.

Parole and Probation turned over all relevant and necessary documents. 4 AA 825. Furthermore, Parole and Probation did not owe an explanation for the change in recommendation. Mr. Keene, on behalf of the Attorney General, represented that any information Parole and Probation had in regards to Appellant was previously turned over. 4 AA 825. Furthermore, the District Court delayed sentencing six months to ensure that Parole and Probation had turned over all documentation to defense counsel. 4 AA 794; 4 AA 824. Thus, even if this Court finds there was error, the error was harmless.

Appellant was sentenced by an experienced judicial officer who presided over the trial and personally experienced the evidence firsthand. Furthermore, she was aware of the confusion between Appellant and his cousin, and was also aware of Appellant's concerns regarding the PSI. Defense counsel expressed those exact sentiments during sentencing:

> And in truth, Your Honor, I didn't think that you were the sort of judge that would look at the latest PSI report and say, well, everything's recommended consecutively versus the first PSI report that recommends concurrency treatment between a number of these charges, and say, well, because PSI—because P and P recommended consecutive treatment, I'm going to go with that. Even though we know now P and P cannot provide any justification whatsoever as to how one number got to the other.

4 AA 840-841.

The Court sentenced Appellant to a lawful sentence. The Court heard all the arguments made by Appellant. Moreover, there is no evidence whatsoever that the Court relied on erroneous information in her sentencing determination. Thus, even if this Court finds there was error, it was harmless.

V. THERE WAS NO CUMULATIVE ERROR

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). Appellant needs to present all three elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial. . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (*citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974).

First, Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*.") (emphasis added). Second, the evidence of guilt is not close. Multiple victims identified Appellant and the robberies were caught on video surveillance. 3 AA 615; 3 AA 524; 2 AA 489. Further, both Slather and Angles identified Appellant with 100 percent certainty. 3

AA 518; 3 AA 612. Finally, Appellant was not convicted of grave crimes. See Valdez, 124 Nev. at 1198, 196 P.3d at 482 (2008) (stating crimes of first degree murder and attempt murder are very grave crimes). In this case, Appellant's convictions are lesser offenses than murder, and, therefore, the third factor does not weigh in Appellant's favor. Therefore, Appellant's claim of cumulative error has no merit and his conviction should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm Appellant's Judgment of Conviction.

Dated this 1st day of May, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points and contains 9,425 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 1st day of May, 2018.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 1, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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

JEV/Madilyn Cole/ed