IN THE SUPREME COURT OF THE STATE OF NEVADA

DONOVINE MATHEWS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 72701

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)(2)(A) because it is a direct appeal from a Judgment of Conviction involving a Category B felony.

STATEMENT OF THE ISSUE(S)

1. Whether the district court properly excluded Appellant's expert witnesses from testifying.
2. Whether NRS 174. 234 was correctly applied to discovery motions.
3. Whether the district court properly restricted Appellant's scope of cross-examination.
4. Whether the district court properly instructed the jury.
5. Whether the district court precluded Appellant from arguing his theory of the case in closing.
6. Whether the district court was fair.
7. Whether cumulative error occurred.

STATEMENT OF THE CASE

On March 3, 2016, the State filed an Information in district court charging Donovine Mathews ("Appellant") with one count of Child Abuse, Neglect or Endangerment with Substantial Bodily Harm. 1 AA 5-6.

On March 24, 2016, the State identified Dr. Sandra Cetl, a pediatric abuse specialist and Phylip Peltier, an expert in suspicious burns as expert witnesses. The State also listed Dr. Olson, the victim's treating physician, as a witness. 1 AA 99-100.

Appellant filed a Motion for Discovery on May 23, 2016. 1 AA 137-165. On July 14, 2016, the State filed its Opposition to Appellant's Motion for Discovery. 1 AA 166-198. On July 26, 2016, the district court granted in part and denied in part Appellant's Motion for Discovery and granted the State's Motion for Reciprocal Discovery. 2 AA 467, 1 AA 235.

On October 3, 2016, Appellant filed a notice of expert witnesses identifying Lindsey "Dutch" Johnson, Ph.D ("Johnson") as a Forensic and Biomechanics Expert. 1 AA 201. On October 19, 2016, the State filed a Motion to Continue Trial Based on Outstanding Discovery related to Appellant's biomechanics expert. 1 AA 211-224. Appellant opposed the State's Motion to Continue Trial Based on Outstanding Discovery on October 21, 2016. 1 AA 228-234. On October 21, 2016,

the district court granted the State's request for a continuance and trial was set for January 9, 2017. 2 AA 473.

On December 16, 2016, the State filed a Motion in Limine to Strike or Limit Johnson's Testimony. 1 AA 239-50; 2 AA 251-259. Appellant opposed the motion on December 30, 2016, and supplemented his opposition on January 6, 2017. 2 AA 361-86.

Jury trial began on January 9, 2017, and lasted five days. 2 AA 476-86(b). On January 10, 2017, the district court conducted a hearing to determine whether Johnson was qualified to give his expert opinion. 2 AA 479. After the hearing, the district court granted the State's Motion to Strike Johnson's Testimony. 2 AA 479.

On the second day of trial, January 11, 2017, the State's expert, Dr. Cetl, testified. 5 AA 1189. Appellant requested that Johnson be able to rebut Dr. Cetl's testimony. 5 AA 1189-90. The Court denied Appellant's request. 5 AA 1197.

On January 11, 2017, the State disclosed three pages of handwritten notes prepared by Peltier. 2 AA 481-82; 5 AA 1218. Appellant moved for a mistrial, or in the alternative to exclude Peltier as a witness, or in the alternative to permit Johnson to testify. 2 AA 482. The district court denied Appellant's request. 2 AA 482; 5 AA 1217.

Appellant renewed his request to present Johnson's testimony at trial after Peltier's testimony. 2 AA 482. The district court denied Appellant's renewed request. 2 AA 483.

On January 13, 2017, the jury found Appellant guilty of Child Abuse, Neglect or Endangerment with Substantial Bodily Harm (Category B Felony). 2 AA 448. A Judgment of Conviction was filed on March 10, 2017. 2 AA 449-50. Appellant was sentenced on March 7, 2017, to: Count 1: Child Abuse, Neglect or Endangerment with Substantial Bodily Harm, a minimum of thirty-six months to a maximum of one hundred and twenty months in the Nevada Department of Corrections consecutive to C304254-1, with zero days credit for time served. 2 AA 449-50. Appellant filed a Notice of Appeal on March 23, 2017, without the assistance of counsel. 2 AA 451.The Public Defender's Office filed a Notice of Appeal on Appellant's behalf on March 30, 2017. 2 AA 455. The State's response follows.

STATEMENT OF THE FACTS

On January 5, 2016, Detective Phillip DePalma ("DePalma") responded to Sunrise Hospital, regarding a two-year-old child named C.J. who had burns on his hands. 6 AA 1326-27. When DePalma saw C.J. he was laying down in the hospital with bandages wrapped around both hands and he was crying. 6 AA 1330, 1334. C.J. was being treated for second-degree burns on his hands. 6 AA 1406. C.J. was at

the hospital with his mother, Jasmin Cathcart, and his mother's boyfriend, Appellant. 6 AA 1329.

DePalma interviewed Appellant at the hospital. 6 AA 1332-33. Appellant was not in custody and was free to leave. 6 AA 1333. Appellant told DePalma that C.J. had burned his hands on the same day he was taken to the hospital January 5, 2016. 1 AA 16.

Appellant said he was at home watching C.J., and C.J.'s one-year-old sister while C.J.'s mother was in a meeting. 5 AA 1034. Appellant explained that while he babysat, C.J. had gotten burned. 6 AA 1437-38. Jasmin testified that this was the first time Appellant had been left alone to watch her children. 5 AA 1034-35. Upon discovering C.J.'s injury, Appellant said he called Jasmin and informed her that C.J. was burned. 5 AA 1037. Jasmin said after she arrived home, everyone left the residence and there was no time for anyone to clean up before they left. 5 AA 1040-41.

DePalma went to the residence on the same day C.J. was burned. 6 AA 1337. DePalma asked if Appellant would conduct a videotaped re-enactment for the police to demonstrate what happened to C.J. while Appellant was watching over him. 6 AA 1351. Appellant agreed. 6 AA 1441. The reenactment occurred approximately 7-8 hours after taking C.J. to the hospital. 6 AA 1443.

Appellant said C.J. was wearing a diaper, a short-sleeved black t-shirt and socks at the time he was burned with hot water. 6 AA 1348. Appellant said he was not in the room when C.J. was burned. 6 AA 1437-38. Appellant further claimed that when he returned to the kitchen C.J. said "ow" or "hot," and the cup was overturned. 5 AA 1161. Police measured the height of the kitchen counter near the stove where Appellant claimed C.J. burned himself. 6 AA 1349. It measured 35 inches. 5 AA 1161. C.J. was only 37 inches tall. 5 AA 1161.

Appellant told DePalma he boiled water in a pot on the stove to make coffee. 6 AA 1342. During the re-enactment, Appellant also identified the cup that he supposedly poured the boiling water into. 6 AA 1342. The handle of the cup was broken off, and the mug was covered in dried bits of food. 6 AA 1359-60. 6 AA 1343. During the re-enactment, Appellant filled the pot of water to demonstrate how he made his coffee. 6 AA 1355-56. Appellant then said he left the kitchen and went into two different bedrooms to change the victim's sister, J.J's diaper. 5 AA 1043. As he changed J.J's diaper in a bedroom, he heard C.J. screaming. 6 AA 1437. According to Appellant, he did not see what happened to C.J. or how anything unfolded with C.J. 6 AA 1437-38.

DePalma asked Appellant to show police where the coffee was located in the kitchen. 6 AA 1356-57. Appellant was unable to locate any coffee whatsoever in the kitchen, let alone the residence. Id. Appellant claimed he left the coffee cup on the

counter towards the edge. 6 AA 1345. Police did not locate any step stools near the kitchen. 6 AA 1359. Nor was there any water in the pot before the reenactment began where Appellant claimed to be boiling water for his coffee. 6 AA 1356.

The Medical Determination that C.J Was Not Accidentally Burned

Dr. Cetl, a pediatrician who works for Sunrise Hospital Children's Hospital and the Southern Nevada Children's Assessment Center examined the victim's photographs as well as the ER records related to his admission for burn injuries. 5 AA 1137. She is a part-time pediatric emergency room physician as well as a physician who evaluates concerns of child abuse, both physical and sexual in nature. 5 AA 1137-38.

Dr. Cetl reviewed photo documentation taken by law enforcement, spoke with treating physician Dr. Olson, and reviewed UMC and Sunrise Hospital records. 5 AA 1143-44.

In examining the medical records and photographs documenting the extent of the burns to C.J.'s hands, she was informed Appellant claimed the victim, who is 37 inches tall, purportedly grabbed a mug of boiling water on a counter that was 35 inches tall and caused these injuries. 5 AA 1161. Dr. Cetl testified that based on her review of the injuries that version of events was inconsistent with the injuries that she saw on C.J.'s hands. 5 AA 1162.

Dr. Cetl explained that it is quite common at the hospital to see burns that come from a child who pulls down a hot liquid onto themselves. 5 AA 1158-60. However, Dr. Cetl pointed out in those cases; the spilled liquid pours not only onto just the backs of their hands but also their face, chest, torso, and abdomen. Id. Dr. Cetl noted in actual hot liquid spills; the spills have an irregular burn pattern on the skin of the child. 5 AA 1160. Accidental burn patterns were not present in C.J.'s case. 5 AA 1178. Nor did C.J.'s burns have the features of lessening burn severity around the edges, which is to be expected in accidental liquid burn cases. 5 AA 1162.

Additionally, Dr. Cetl noted that based on the height of C.J. and the height of the counter, the spill likely would have fallen on the front of his body rather than being isolated solely on the back portions of his hands. 5 AA 1161-62. Dr. Cetl's expert opinion was that based on the pattern of the injuries to his hands it was inconsistent with a spill injury. 5 AA 1162. Dr. Cetl also opined that if C.J. had been wearing only a short-sleeved t-shirt, socks, and a diaper, as Appellant had explained she would have expected to see additional injuries on C.J.'s body. 5 AA 1160, 5 AA 1172-73. Specifically, she testified that she would have expected to see injuries to C.J.'s chest, face, and chin. 5 AA 1159, 5 AA 1173.

Upon reviewing the extent of the burn to C.J.'s hands she noted that the burns were localized on the dorsal, or top, portion of his hands. 5 AA 1147-52. This localized area was "high concern" to Dr. Cetl because she stated that in a typical

household burn situation, one would expect to also find burns on the palms of the child's hand. 6 AA 1170-72. After reviewing all of the medical records and photographs, Dr. Cetl's medical opinion was that this injury was an abusive inflicted injury rather than an accidental injury. 5 AA 1177-78.

Dr. Cetl testified, the injury was consistent with someone pouring a hot liquid on top of C.J.'s hands, and it was likely that the child curled his fingers inwards and made fists, thus explaining why the child had no burns to his fingers or the palms of his hands. 5 AA 1178, 1182. Dr. Cetl also noted it was significant given the child wore a short-sleeve t-shirt that there were no splash marks on the child's forearms. 5 AA 1172-73.

SUMMARY OF THE ARGUMENT

The district court correctly excluded Johnson's testimony because he was not qualified. The exclusion of Johnson's testimony was not essential to his defense nor did it violate the Confrontation Clause because Appellant had the opportunity to cross-examine the State's witnesses and argue that the burns could have been accidental through other means other than solely Johnson's testimony. Appellant's assertion that the district court abused its discretion pre-trial and during trial with respect to discovery is belied by the record. The district court properly allowed Appellant to cross-examine the State's witnesses. The jury received proper instructions when the district court denied Appellant's request for an accident or

misfortune instruction because Appellant's instruction was not supported by Appellant's theory of the case. Appellant's closing argument that erroneously asserted "no motive is reasonable doubt" was correctly limited by the district court because motive is not an element of the crime of Child Abuse, Neglect, and Endangerment. Before and during trial the district court did not apply double standards to either the State or Appellant. There is no error to cumulate. Even if the Court does find more than one error, collectively they did not deprive Appellant of a fair trial.

ARGUMENT

I. The district court properly excluded Appellant's expert witness from testifying.

On October 3, 2016, Appellant filed an expert notice that identified Johnson, as a forensic and biomechanics expert. 1 AA 201. After the time of disclosure had passed, Appellant presented a PowerPoint presentation and several videos that represented Johnson's opinion that C.J. was accidentally burned. 2 AA 331- 52, 357-59.

The State filed a Motion in Limine to Strike Johnson's testimony on December 16, 2016. 1 AA 239-50; 2 AA 251-259. After a hearing, the district court denied Appellant's request to allow Johnson to testify because it found that Johnson's testimony lacked factual foundation. 4 AA 966. The district court left open the opportunity for Appellant to renew his request later in the trial. 4 AA 966.

The district court heard Appellant's renewed arguments during trial. 5 AA 1218; 6 AA 1303; 7 AA 1522. Appellant argues that the district court improperly excluded Johnson. AOB at 18.

"Decisions regarding the admissibility of expert testimony lie within the discretion of the trial court." Emmons v. State, 107 Nev. 53, 56, 807 P.2d 718, 720 (1991). See also White v. State, 112 Nev. 1261, 1262-63, 926 P.2d 291, 292 (1996) (recognizing trial judge is in best position to judge whether or not jury was in need of assistance from expert witness). "The competency of an expert witness is a question for the sound discretion of the district court, and we will not disturb the ruling absent a clear abuse of discretion." Yamaha Motor Company v. Arnoult, 114 Nev. 233, 955 P.2d 661, 666 (1998).

NRS 50.275 states that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge." NRS 50.275. Expert testimony generally is admissible to aid the jury when the subject matter is distinctly related to a science, skill or occupation which is beyond the knowledge or experience of an average lay person. NRS 50.275; Yamaha Motor Co., 114 Nev. at 243, 955 P.2d at 661. Conversely, expert testimony is not admissible where the issue involves a matter of common knowledge. Id.

"Before a witness may testify as to his or her expert opinion, the district court must first determine that the witness is indeed a qualified expert. See, e.g., Fernandez v. Admirand, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992).

In Hallmark v. Eldridge, 124 Nev. 492, 189 P.3d 646 (2008), the Nevada Supreme Court extensively reviewed the requirements of NRS 50.275 in determining whether or not it was proper for a designated biomechanics expert to provide testimony. Hallmark, 124 Nev. at 492, 189 P.3d at 646. In addressing this issue the Court stated that:

> To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Id. at 497, 650.

1. Johnson's testimony failed the qualification requirement

"[I]n determining whether a person is properly qualified, a district court should consider the following factors: (1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." Hallmark, 124 Nev. at 499, 189 P.3d at 655. The Court went on to hold that the factors were not exhaustive and that a reviewing court should accord them varying weights which may be different from case to case. Id.

First, Johnson fails the first prong of the qualification test because he lacks formal schooling and academic degrees related to the analysis of liquid burns on children. Appellant's notice stated that Johnson was "an expert in the biomechanics of human injury" and would testify regarding the *mechanics of water spilling* from a mug onto a child, [to] provid[e] analysis of the biomechanics involved in the instant case." 1 AA 201. The attached Curriculum Vitae ("CV") indicated that Johnson that he had a B.S., M.S. and Ph.D. in Mechanical Engineering. 1 AA 203. According to the attached CV, Johnson had not been to medical school, was not a physician, nor was he a physician that specialized in treating burns on adults or children. 1 AA 203-04. Therefore, Johnson lacked the necessary schooling to testify in this case.

Second, Johnson does not hold a license that could be applied to analyzing the facts of the case. Although, Johnson holds an Arizona license as a private investigator, satisfying the license requirement alone does not qualify an expert to testify in a case. Further, Johnson's private investigation license does not require him to receive any training, experience, or any other familiarity with burns.

Third, Johnson lacked employment experience analyzing liquid burns on children. Johnson's CV indicated that he has "15 years of forensic reconstruction experience" and "has managed, developed detailed procedures for, and conducted numerous reconstructions tests…." 1 AA 203. Johnson's CV revealed that he did not have experience in the very thing Appellant indicated he would offer expert

testimony on – reconstructing accidental liquid spills, regardless of whether children or adults are involved. 1 AA 201-204.

Moreover, all eight presentations and published articles by Johnson in his CV involve biomechanics relating to criminal assault, stabbings, driving-related issues or the human cornea. 1 AA 203. Therefore, Johnson lacked the employment experience requirement for analyzing liquid burns on children.

Fourth, Johnson lacked practical experience and specialized training. According to his CV, Johnson never held any position in which he practiced in the medical field, assisted in treating children medically or assisted in treating or helping children who suffered burns be it from liquids or any other substance. 1 AA 203-04.

Although Johnson claims he studied human skin tissue, this is not sufficient to qualify as a burn expert. 7 AA 1528. Johnson's training is not within the field of studying burn patterns. Id. Instead, his training was limited to first aid medical care on the field in the midst of battle and transporting people who have burns to hospitals to try to save their life. 7 AA 1528. Thus, Johnson also failed to meet the practical experience and specialized training requirement as his limited first aid medical care training has nothing to do with analyzing burn patterns or causes of burn injuries. Accordingly, admitting Johnson's unqualified testimony, in this case, would have violated the clear mandate of NRS 50.275.

2. Johnson's Testimony Failed Under NRS 50.275's Assistance Requirement

With regard to the *assistance requirement*, the Court stated that:

> If a person is qualified to testify as an expert under NRS 50.275, the district court must then determine whether his or her expected testimony will assist the trier of fact in understanding the evidence or determining a fact in issue. An expert's testimony will assist the trier of fact only when it is relevant and the *product of reliable methodology*. In determining whether an expert's opinion is based upon reliable methodology, a district court should consider whether the opinion is (1) within *a recognized field of expertise*; (2) *testable and has been tested*; (3) *published and subjected to peer review*; (4) *generally accepted in the scientific community* (not always determinative); and (5) *based more on particularized facts rather than assumption*, conjecture, or generalization. If the expert formed his or her opinion based upon the results of a technique, experiment, or calculation, then a district court should also consider whether (1) the technique, experiment, or calculation was *controlled by known standards*; (2) the testing *conditions were similar to the conditions at the time of the incident*; (3) the technique, experiment, or calculation had a *known error rate*; and (4) *it was developed by the proffered expert for purposes of the present dispute.*

Hallmark, 124 Nev. at 501-02, 189 P.3d at 652-53 (emphasis added). The Court reiterated that these factors were not exhaustive and may be different from case to case. Id.

This Court has held that biomechanics is not a recognized field of expertise in Nevada. Rish v. Simao, 131 Nev. 17, 368 P.2d 1203, 1208 (2016).

In Hallmark, the expert in question offered biomechanical testimony in relation to a vehicular accident. Id. at 502, 652-53. The expert had relied upon photographs, the complaint, the answer, medical records and depositions. Id. The expert, however, did not know the vehicles' starting positions, their speeds at impact, the length of time that the vehicles' were in contact during the impact or the

angle at which the vehicles collided. Id. The District Court permitted the biomechanical expert to testify. Id.

However, on appeal, the Nevada Supreme Court held that it was error for the District Court to permit the expert to offer biomechanical testimony for several reasons. Id. at 503, 653-54. One of the fatal flaws in the district court permitting a biomechanics expert to testify in Hallmark was how little factual information the expert had at his disposal to base his opinions off of. Id. at 502, 652-53. The Hallmark Court noted that the expert's opinion was "highly speculative because he conceded that he formed it without knowing (1) the vehicles' starting positions, (2) their speeds at impact, (3) the length of time that the vehicles were in contact during impact, or (4) the angle at which the vehicles collided." Id.

A. Biomechanics is not a recognized field of expertise in Nevada

The district court correctly excluded Johnson's testimony because it fails under NRS 50.275's assistance requirement. Appellant attempted to introduce the testimony of Johnson, a biomechanics expert. 4 AA 966. Because Johnson's field of biomechanics is not a recognized field of expertise, he fails the first prong of the Hallmark, assistance requirement.

B. Johnson's recreation methods were not tested or testable.

Johnson's reenactments are not supported by any specific research, objective data analysis, or any reliable testing mechanisms. 5 AA 962. Instead, Johnson took

three different children, all of varying age to simply lay their hands flat on a table while a mechanism tipped the cup to spill water on their hands. 5 AA 962, 2 AA 343-56. This offer of proof was woefully insufficient and unreliable, given that no one, not even Appellant claimed to know how the burns occurred or the supposed "spilling of the cup" happened. 2 AA 329.

Furthermore, the setup of Johnson's experiments all required someone or something else to move the cup to cause it to tip over. 4 AA 962. At no point in any of the experiments did the subject child cause the cup to move or spill. 4 AA 962. This is inconsistent with Appellant's theory that the child caused the cup to spill on his own hands. 4 AA 929; 965-66. Appellant claims Johnson's experiment(s) prove an accidental mechanism of injury exists, but it is belied by the theory and methodology of the experiments because Johnson never established or had an experiment where the child could cause the cup to tip and also get his own hands back under the spilling hot water of the cup. 7 AA 1615.

C. Johnson's proposed testimony and PowerPoint theories were not subject to publishing or peer review.

Johnson's PowerPoint and Appellant's proffer of what Johnson would have testified to failed to provide any evidence that Johnson has been published or subject to peer review regarding the reenactment of liquid spill burns on a child. 2 AA 287-360.

D. Johnson's methods were not generally accepted in the scientific community

Johnson failed to provide evidence that the methods he used were generally accepted in the scientific community in his PowerPoint or testimony. 4 AA 930. Instead, he explained that "there are really infinite possibilities" to explain how the cup fell on C.J. Id.

Appellant contends the State's burn expert Peltier, established Johnson's method of burn pattern recreation was "generally accepted" in the scientific community because he claims Peltier testified that "anyone" could do burn recreation. AOB at 23-24. This is a gross misstatement. Peltier explained that his familiarity with burn patterns came from "35 years of receiving cases from all over the world and asking for help." 5 AA 1226. Rather, at the place Appellant cites for their authority, Peltier said after attending the class he teaches on the blue dye method, anyone can use the blue dye method. 6 AA 1294. Appellant does not cite anything to show that Johnson used Peltier's method or attended his class, nor does Peltier state he is the "only burn expert in the world" as Appellant claims. 6 AA 1274. Appellant's argument is non-sensical in that he argues on one hand that Peltier claims "he is the only burn expert in the world," then on the other claims that "anyone could do burn recreation." AOB at 23-24. Therefore, Appellant's reliance on Peltier's testimony is not in line with the record, and Johnson failed to show that his methods were "generally accepted."

E. Johnson's testimony was based upon assumptions, conjecture, and generalization

Johnson had little factual information in which to base his opinions off of. According to Appellant, and Johnson, absolutely no one was in the kitchen at the time C.J. supposedly spilled a cup of boiling water on himself. 5 AA 1043; 6 AA 1437-38; 2 AA 329.

The district court explained why Johnson's testimony was based on assumptions and generalizations:

> Ms. Holiday: But we think it is plausible, in fact, it's very likely, as Dr. Johnson just said, that the mug could have tipped over from left to right spilling over Chance's hands, if he was reaching up onto the countertop, by the way, for the cookies or candy that were on the counter top behind the mug, as we can see in the pictures that the State has provided. It's plausible.
> The Court: Yeah, but you understand you have to have facts –
> Ms. Holiday: Right.
> The Court: -- to support these things.
> Ms. Holiday: The facts
> The Witness: Yeah –
> Ms. Holiday: -- we have were where—
> The Court: Who's testifying that this child was reaching on the counter and reaching for cookies or whatever and – and hit the mug and the mug fell over on his hands?
> Ms. Holiday: There's nobody to testify –
> The Court: Because your client doesn't even say that
> Ms. Holiday: No. There's nobody to testify that [C.J] was reaching on the counter.

4 AA 939-40.

The district court explained to Appellant:

> The Court: -- the only problem with all that is if, if, if, if. You can't just bring someone in here and say if all these things happened. These biomechanic experts have to rely – there has to be a foundation that – there has to be a factual foundation. So there's nobody to testify to that set of facts.

4 AA 946.

Furthermore, the district court explained:

> Ms. Holiday: And so we think bringing an expert in to say it is plausible is – is –
> The Court: But your client didn't say this is how it happened. It would be one thing if your client was going to testify and say the child had his hands on the counter, the child tipped the – the mug. You want to bring someone in here to create a completely – a factual scenario and put it off in front of this jury as though that's what happened. You want the jury to buy into that – what this expert's going to say is actually what happened. Yet, there's no evidence to support that.

4 AA 948.

> The Court: I mean, experts have to testify to a reasonable degree of certainty. He, in my opinion, has created a scenario that fits the – the burn patterns.
> Ms. Holiday: That's correct.
> The Court: He's created it based on no facts whatsoever.

4 AA 950.

Thus, Johnson did not know and could never know critical factual information that is imperative for a sound and reliable accident reconstruction.

i. <u>Johnson's technique, experiments, and calculations were not controlled by known standards.</u>

Johnson's limited factual knowledge was based upon information Appellant's attorneys gave him. 4 AA 926-29. Specifically, when Johnson created his hypothetical scenarios he had no idea 1) where C.J. was positioned, 2) if C.J. ever reached for a cup, 3) what hand or hands if any were used to knock the cup over, 4) if another object or event caused the cup to spill other than a body part belonging to C.J., 5) how the cup spilled onto C.J., 6) C.J.'s body and arm position at the time the liquid is pouring on him, 7) the speed at which the water spilled down on to his body, 8) how C.J. moved when the boiling liquid spilled on him and 9) how long the boiling liquid stayed on his skin at the time of the spill until the time in which he was given assistance or help by Appellant. 7 AA 1615.

Johnson did not consider and could not consider these critical pieces of information (since they would forever be unknown). Thus, Johnson's testimony is speculative.

ii. Johnson's testing conditions were not similar to the conditions at the time of the incident

Johnson reported that the reenactment videos that he recorded did not use the actual victim. 4 AA 935, 961. For the videos that he recorded, Johnson used different test subjects. 2 AA 331- 52, 357- 59. One subject was the victim's relative size, based on the information available in the medical records, specifically the victim's height and knowing the child was neither obese nor skinny. 4 AA 935. The second subject, was four years old, *two years* older than C.J at the time the burn occurred.

Johnson told the State that he decided to use a four-year-old rather than a two-year-old, like C.J's actual age, because of the difficulties getting a younger child to stand still and perform the reenactment as he desired. 4 AA 970.

Johnson also testified that he did not use the actual mug that Appellant claims tipped over onto the victim. 4 AA 928-29; 4 AA 963. The mug Johnson used had a handle. Id. However, the mug Appellant showed detectives did not have a handle. 6 AA 1359-60. Therefore, the district court properly excluded Johnson's testimony because his testing conditions were not similar to the conditions at the time C.J was burned.

iii. Johnson's techniques, experiment's and calculations did not have a known error rate

Johnson's presented techniques, experiments, and calculations without a known error rate. Johnson admitted, he kept trying and retrying different spills scenarios and would re-watch Appellant's reenactment to find a particular spill that fit Appellant's narrative. 4 AA 925. The error rate was unknown to the district court because Johnson acknowledged he had destroyed his notes of his "experiments." 3 AA 540-41. Johnson also acknowledged that he used a specific computer program to calculate the time and distance during his numerous reenactments. 1 AA 248. However, the name of this program and how it functions were never provided. 1 AA 248.

Had Johnson been permitted to testify, the State, and more importantly the jury, would have been completely in the dark as to error rate for these reenactments.

iv. Johnson's experiments were developed by the expert for the purpose of the present case.

Johnson's testimony and experimentation were prepared solely for use in the current case. Johnson never conducted experiments with liquid burn patterns on children victims before. 1 AA 203-04; 4 AA 920-22. In fact, Johnson simply tried different scenarios of how the burns could occur, concocting the facts, until he found an accident that matched C.J.'s burns and Appellant's reenactment. 4 AA 931. Johnson's "quest" in his testing was to look "at possible explanation for how [C.J] received the burns to the back of his hands." 4 AA 932. Therefore, Johnson's experiments were created for the instant case.

3. Johnson's Proposed Testimony Far Exceeds NRS 50.275's Limited Scope Requirement

Nevada Revised Statute 50.275, is clear that a proposed expert's testimony must be limited "to matters within the scope of [his or her specialized] knowledge."

Johnson's proposed testimony, which was uncovered by a review of his PowerPoint presentation and testimony at the hearing revealed a slew of opinions that far exceed anything that Johnson was remotely trained or qualified to talk about. 4 AA 917. In fact, at the hearing, Johnson testified that he was "not specifically instructed in the area of anatomy and skin layers." 4 AA 921.

Despite the undisputed fact that Johnson has no formal medical training, Johnson's PowerPoint presentation was replete with unqualified medical opinions. 2 AA 287- 2 AA 360; 4 AA 921. Johnson tried to offer a medical opinion in contradiction with respected pediatric doctors, Dr. Olson and Dr. Cetl. 2 AA 357-359. Dr. Cetl and Dr. Olson's area of expertise in treating pediatric patients, including burn patients requires them to analyze the mechanism of injury as part of their expertise. 5 AA 1138; 6 AA 1409, 1403. Specifically, Johnson believed that Dr. Olson's opinion was "not consistent with known injury patterns associated with downward flow of hot liquid…" 2 AA 325, 327, 359; 4 AA 917. He continued by offering his medical opinion that "physical evidence does not support [C.J]'s burns" were the result of a "slow deliberate pour" of "hot water onto his hands" 2 AA 359. Despite having no medical training, or otherwise, regarding immersion burns, he claimed that he is well versed in the patterns that are found with immersion burns. 4 AA 920. Johnson stated "[b]ased on known injury patterns, clean demarcation lines are typically associated with immersion burns." 2 AA 334. Therefore, Johnson's testimony was properly stricken because his testimony exceeded the scope of his expertise.

To the extent Appellant argues that the State's experts exceed the scope of their expertise, Appellant is wrong. AOB 26-28. Although Appellant attempts to lump the State's experts under the same umbrella of expertise, in fact, the State's

experts come from varying backgrounds. Dr. Cetl and Dr. Olson are medical doctors. 1 AA 99-100. However, Dr. Cetl is a pediatric abuse specialist and, Dr. Olson is a treating physician and pediatric ER physician. 5 AA 1137, 6 AA 1400, 1407. Peltier is a burn expert, not a medical doctor or a biomechanical expert.1 AA 114. Johnson is only a biomechanical expert. 1 AA 114.

The State's expert's testimony did not fall outside the scope of their expertise because burn experts can testify regarding tissue damage because it falls within their area of expertise. 5 AA 1138; 6 AA 1409, 1403. In explaining the difference between Johnson and the State's experts, the district court noted the State's experts were not relying on some recreation of how the burns happened or were attempting to recreate what happened. 4 AA 843-44. Therefore, the claim that the State's expert's testified outside their scope of expertise must fail.

4. The district court did not hold Johnson to a different standard than the State's experts

The district court applied the same legal standard to all experts throughout trial. The district court was clear. An expert must have a factual foundation before testifying. 4 AA 940-41.

"Bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or

proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

Johnson clearly lacked the foundation to analyze burn patterns as mentioned above. 4 AA 936. Appellant failed to provide any evidence to show that Johnson a biomechanics expert could testify as a burn expert.

As for Appellant's claim that the State's experts Peltier and Dr. Cetl unfairly bolstered each other's opinions, this Court has recognized that "expert testimony, by its very nature, often tends to confirm or refute the truthfulness of another witness." AOB at 27.[1] Townsend v. State, 103 Nev. 113, 118, 734 P.2d 70, 709 (1987). Therefore, the Court held, it is appropriate for experts to characterize their findings, observations, and conclusions within the framework of their field, irrespective of the effect it may have on the testimony of the complaining witness. Id. In the State's presentation of evidence, it is expected that the State would present expert testimony that is supportive and consistent with the State's theory of the case, rather than inconsistent with their case.

Appellant claims that Peltier improperly testified "there was no possible way that C.J. could have burned the backs of his hands accidentally" and denied Johnson

[1] To the extent Appellant argues that the district court improperly allowed cumulative evidence, the record belies the assertion. The district court allowed the testimony of Peltier and explained that if Appellant's counsel felt the testimony was cumulative, the district court would entertain objections. 5 AA 1222.

the opportunity to rebut. AOB at 21, 27; 6 AA 1301. Appellant misstates the record. 6 AA 1301. Peltier explained that his opinion was that C.J.'s, injuries were not accidental because he concluded: "the liquid was not in his hands, it was not tipped over by [C.J.], it was done by someone else." 6 AA 1301. The testimony cited by Appellant does not match the record. Therefore his claim is unfounded.

Peltier's training, experience, and analysis is markedly different than Johnson's. Peltier's training spans over the course of thirty-six years investigating suspicious burn injuries. 5 AA 1224. Unlike Johnson, Peltier gained his experience analyzing burn patterns by learning from doctors at the UCSD burn center. 5 AA 1230. Peltier has been published on four occasions on the subject of burn injuries. 5 AA 1229. The analysis Peltier provided was different from Johnson as well. Peltier analyzed the burns on C.J. whereas Johnson tried to recreate a similar pattern by spilling water, without the blue dye methods relied upon by Peltier. 5 AA 1224.

Further, Peltier did not improperly testify "without doing an exact mannequin recreation." AOB at 27. The district court asked Peltier whether he needed to do the recreation to give his opinion on water flowing. 5 AA 1266-67. Peltier said he did not need to do a recreation because of his training and experience. 5 AA 1266-67. Therefore, Peltier's testimony was not "highly speculative."

Appellant argues that Dr. Cetl should not have been allowed to testify whether C.J's burns were consistent with a child knocking over a mug on himself.

AOB at 27; 5 AA 1183-84. As mentioned above, Dr. Cetl based her conclusions on her analysis of liquid burn patterns on children, not hypothetical scenarios. 5 AA 1171. Further, Dr. Cetl's opinion is supported by her training and experience. 5 AA 1139. Thus, Appellant's claim is belied by the record.

Finally, Appellant's reliance on Richmond Med. Ctr. For Women v. Herring, 527 F3d. 128, 167 (4th Cir. 2008), is faulty because it is not mandatory in this jurisdiction, is a dissenting opinion, does not apply in this case, and has been overruled.[2]

The district court was fair to both sides throughout the trial. In fact, the district court said, "I'm not going to allow the State to come in and put on some experiment about what could have happened because there's no foundation for it. So I'm not going to let the defense do it either." 4 AA 955-56. Therefore, Appellant's claims that the court applied a double standard are unfounded.

5. Substantial evidence exists to support the court's rulings

Appellant argues that the district court failed to hear argument on the admission of Johnson's testimony and its ruling denying his testimony was not

[2] The Fourth Circuit overruled Richmond Med. Ctr. For Women v. Herring, 527 F3d. 128, 167 (4th Cir. 2008), with its ruling Richmond Med. Ctr. For Women v. Herring, 570 F.3d 165 (4th Cir. 2009). The Richmond, 2009 case, had nothing to do with abuse of discretion or the district court applying a double standard to experts. Instead, it addressed the constitutionality of Virginia's Partial Birth Infanticide Act.

supported by substantial evidence. AOB at 29. This claim is belied by the record, is bare and naked, and lacks authority.[3] Hargrove, 100 Nev. at 502, 686 P.2d at 225.

First, Johnson offered extensive medical opinions on causation and the manner in which C.J purportedly suffered his burns, despite the fact that he is not a physician and has no education or training in the medical field. 2 AA 357-59. Although Johnson paints his experience and education with a broad brush, Johnson is not a burn expert, he is a biomechanics expert. 1 AA 201. Johnson's experience in determining the cause or mechanism of any burn is nonexistent. The tissues he primarily worked with were the human eye, bruising, and cuts not the burnt skin of a two-year-old child's hands. 4 AA 920, 922. The first aid training and anatomy class he participated in is not the proper educational foundation for making conclusions regarding the causation of or determining the mechanism of a burn. Moreover, Johnson's CV does not state how long ago the first aid training he received in the military was. 1 AA 203-204.

[3] Appellant relies on Wyman v. State, 125 Nev. 592, 217 P.3d 572 (2009), to assert that this Court should find that the district court lacked substantial evidence. AOB at 29- 31. Appellant misunderstands the holding of Wyman. 125 Nev. at 592, 217 P.3d at 572. This Court in Wyman, held that substantial evidence must support a district court's finding that the moving party failed to demonstrate that evidence is material to a defendant's case before denying a request for a certificate of materiality. Id. The instant case does not involve the issue of a request for a certificate of materiality. Thus, Appellant's reliance on this case is faulty.

Second, the district court heard Appellant's multiple renewals to allow Johnson to testify. 5 AA 1218; 6 AA 1303; 7 AA 1522. However, after each request, the ruling remained the same because Johnson was not qualified to testify. All of Johnson's experiments and conclusions were still based upon conjecture and untested methods. Appellant failed to present new evidence of Johnson's qualifications or any other information that would change the court's rulings. Id. As mentioned above, the foundation of Peltier's testimony was markedly different than the foundation and area of expertise of Johnson. Therefore, substantial evidence supported the court's denial of Johnson's testimony.

6. Johnson's testimony was not essential to Appellant's defense and its exclusion did not violate his Constitutional rights.

Appellant argues the only way to refute the State's expert's testimony and argue his theory of the case was by allowing Johnson to testify. AOB at 32.

Although the United States Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, a defendant 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. 36, 32, 351 P.3d 697, 712 (2015).

As discussed above, Appellant did not present a qualified expert. Supra at 11. Furthermore, the district court explained to counsel they could test their theory of the case through cross-examination. 4 AA 952. Appellant was able to cross-examine

Dr. Cetl, Dr. Olson, and Peltier. Therefore, the district court did not violate Appellant's constitutional rights.

II. The district court correctly applied NRS 174.234.

Appellant complains that the district court improperly applied NRS 174.234(2). AOB 34-35.

1. Appellant's due process rights were not denied by the district court's application of NRS 174.234(2)

While the Supreme Court has recognized that the due process clause imposes a duty on the State to disclose evidence favorable to the defendant, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), "there is no general constitutional right to discovery in a criminal case and Brady did not create one." Weatherford v. Bursey, 429 U.S. 545, 559, 97 S. Ct. 837, 846 (1977).

"[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded…" Id. quoting Wardius v. Oregon, 412 U.S 470, 474, 93 S.Ct. 2208, 2212 (1973). A defendant does not have an unfettered right to evidence that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. Taylor, 484 U.S. 400, 410. The United States Supreme Court has further held that where discovery statutes exist, they must create a reciprocal right between the accused and the state. Wardius, 412 U.S. 470, 93 S.Ct. 2208.

In Nevada, the rules of discovery are codified by statute. This Court review[s] the district court's findings of discovery disputes for an abuse of discretion. Means v. State, 120 Nev. 1001, 1007-08 (2004).

A. Expert discovery disclosures were properly ordered by the district court

Appellant alleges first that the district court improperly ordered him to disclose Johnson's reports, tests, videos, photographs, and any other items prepared regardless of whether Appellant intended to use those materials at trial. AOB at 27. However, Appellant fails to mention how the district court determined that he improperly withheld evidence from the State.

Under NRS 174.234, a defendant is under a continuing obligation to provide all reports prepared by an expert witness. Nevada Revised Statute 174.234 states in pertinent part:

> NRS 174.234 Reciprocal disclosure of lists of witnesses and information relating to expert testimony; continuing duty to disclose; protective orders; sanctions.
>
> 2. If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing:
>
> (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony;
>
> (b) A copy of the curriculum vitae of the expert witness; and

(c) A copy of all reports made by or at the direction of the expert witness.

3. After complying with the provisions of subsections 1 and 2, each party has a continuing duty to file and serve upon the opposing party:

(a) Written notice of the names and last known addresses of any additional witnesses that the party intends to call during the case in chief of the State or during the case in chief of the defendant. A party shall file and serve written notice pursuant to this paragraph as soon as practicable after the party determines that the party intends to call an additional witness during the case in chief of the State or during the case in chief of the defendant. The court shall prohibit an additional witness from testifying if the court determines that the party acted in bad faith by not including the witness on the written notice required pursuant to subsection 1.

(b) Any information relating to an expert witness that is required to be disclosed pursuant to subsection 2. A party shall provide information pursuant to this paragraph as soon as practicable after the party obtains that information. The court shall prohibit the party from introducing that information in evidence or shall prohibit the expert witness from testifying if the court determines that the party acted in bad faith by not timely disclosing that information pursuant to subsection 2.

6. In addition to the sanctions and protective orders otherwise provided in subsections 3 and 5, the court may upon the request of a party:

(a) Order that disclosure pursuant to this section be denied, restricted or deferred pursuant to the provisions of NRS 174.275; or

(b) Impose sanctions pursuant to subsection 2 of NRS 174.295 for the failure to comply with the provisions of this section.

7. A party is not entitled, pursuant to the provisions of this section, to the disclosure of the name or address of a witness or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.

Second, NRS 174.245(1)(a) and (b), at the request of the State, a defendant shall permit the State to inspect, copy or photograph: 1) all written or recorded statements of a defense witness and 2) all results and reports of scientific tests or experiments.

Third, a defendant remains under a clear and continuing duty to disclose discoverable material pursuant to Nevada's discovery statutes. NRS 174.295. Furthermore, this statute provides a failure to disclose such material may result in relief in the form of a continuance or even more severe – an exclusion of such evidence at trial. NRS 174.295.

On October 3, 2016, Appellant filed its first notice of witness. 1 AA 201-204. On October 8, 2016, Appellant sent an email to the State that expressly stated that Johnson had not prepared any reports but took some pictures. 2 AA 267. A mere seventeen photographs were attached to this email. The pictures including what appeared to be timing intervals, statistical numbers, pictures of a child that were not the instant victim in this case, and photographs of a spilled coffee mug outside or in locations that were not where the crime in the case occurred. 2 AA 267-84. Appellant did not inform the State of any video reenactments or notes taken by this expert. Id.

At calendar call, Appellant represented it explicitly instructed Johnson not to prepare a report due to its prohibitive cost to the defense. 3 AA 534. When the court questioned Appellant about the photos from the email, Appellant represented to the

court that there were photos merely taken by its expert and not expressly cut and pulled from an accident reconstruction video. 3 AA 530- 31. Appellant did not inform the court or the State about the existence of a video taken by its expert. 3 AA 527-36.

The court also asked Appellant what the statistical numbers on the photos meant and whether there were any calculations done by the expert. 3 AA 531. Rather than agreeing to provide notes to the State, Appellant encouraged the State to call and discuss with its expert about his findings and whether or not any notes existed. 3 AA 531.

On October 18, 2016, at the instruction of the district court, the State contacted Johnson, via telephone. 3 AA 540. Johnson informed the State that he recorded thirty videos during his re-enactment process. 3 AA 540, 549. None were ever provided to the State to review prior to the day before the calendar call and none were provided to the State until October 20, 2016, at 4:30 pm, the day before the district court would hear the State's Motion to Continue Trial. 3 AA 540-42; 3 AA 559.

Moreover, Appellant's claim that the evidence counsel failed to turn over was not going to be used in Appellant's case in chief is belied by the record. The district court inquired:

> The Court: Do you plan on using those?
> Ms. Holiday: No, Your Honor. We do not plan on –
> The Court: And he doesn't plan on testifying about them at all?

> Ms. Holiday: He plans on testifying about the still photos that were created from five of those videos.
> The Court: You just told me you're going to use it in your case-in-chief then.

3 AA 550.

The district court explained that Appellant also untimely handed over Johnson's remaining notes with calculations even though there was a standing discovery order in place. 3 AA 550. The State never received Johnson's original notes because they had been destroyed by Johnson and had to be recreated. 3 AA 563.

NRS 174.245(b) is clear that the materials the State requested for reciprocal discovery were required by law to be turned over because they either were "known" by the defense or at worst through an exercise of "due diligence may [have] become known." NRS 174.245. Therefore, the district court did not abuse its discretion regarding its order on the disclosure of expert witness discovery.

B. The district court properly granted a continuance based upon Appellant's untimely disclosures.

Appellant contends the district court improperly granted an unnecessary continuance for the State to review discovery. AOB at 37. Due to Appellant's untimely disclosure of discovery, on October 22, 2016, the court granted the State's Motion for a Continuance. 2 AA 473. The State requested the court set a trial date in the ordinary course. 1 AA 223. Trial was set for and began on January 9, 2017. 2 AA 476.

This Court has established that the granting of a continuance rests with the sound discretion of the trial court. McCabe v. State, 98 Nev. 604, 655 P.2d 536 (1982); See also NRS 174.515(1). The granting or denial of a continuance will not be reversed absent an abuse of that discretion. Lord v. State, 107 Nev. 28, 43, 806 P.2d 548 (1991).

The continuance, in this case, was the product of Appellant's own failure to disclose Johnson's report, calculations, and videos. 3 AA 547-48. Appellant contends the videos that were untimely disclosed were short in length in an effort to create the illusion that the continuance was unnecessary. AOB at 37. Appellant fails to mention that each of the videos had underlying calculations that needed to be analyzed by the State before they could properly cross-examine Johnson. 3 AA 559-60. Thus, even though the videos were short in length, the continuance was not an abuse of discretion and proper in order for the State to have a fair opportunity to review untimely discovery.

Additionally, the continuance did not prejudice Appellant. Appellant was serving a sentence of nineteen to forty-eight months in prison for a home invasion. 3 AA 559. Therefore, the district court did not abuse its discretion and Appellant was not prejudiced when the continuance was granted.

2. The State went above its duty to disclose under NRS 174.234.

Appellant argues the State improperly withheld Peltier's notes and that his motion for a mistrial, the exclusion of Peltier as a witness, or permission to have Johnson testify in rebuttal should have been granted. AOB at 38. Appellant fails to explain how Peltier's notes or the district court's rulings on discovery matters would have changed the outcome of his case.

The prosecution is only required to disclose "evidence favorable to an accused…where the evidence is material either to guilt or to punishment…" Brady v. Maryland, 373 U.S. 83, 87-88, 83 S.Ct. 1194, 1197 (1963). Evidence is material if there is a reasonable probability that a different outcome would have occurred at trial if the evidence was disclosed. Kyles v. Whitley, 514 U.S. 419, 433-434 115 S.Ct. 1555, 1565 (1995). As such, there are three components to a Brady violation: "(1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the State; and (3) prejudice ensued, i.e., the evidence was material." Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

To the extent Appellant argues that the district court erred in denying a mistrial, a denial of a motion for a mistrial is within the district court's sound discretion and this Court will not disturb the district court's decision unless there is a clear showing of abuse of discretion. Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993). A mistrial may be granted where "prejudice occurs that

prevents the defendant from receiving a fair trial." Rudin v. State, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004).

First, Peltier's notes were not favorable evidence to Appellant. 7 AA 1641-1643. After the district court reviewed Peltier's notes, she found that there was nothing in the notes that amounted to a conclusion or facts that the parties did not already know. 5 AA 1281.

Second, Peltier's notes were not withheld by the State. Peltier's notes were not a report and were not made at the direction of the State. 5 AA 1216. The State explained that trial counsel gave the notes to Appellant's counsel as a courtesy because she was not sure if Peltier was going to bring his notes on the stand to testify. 5 AA 1216. Because of the foregoing, the State did not have possession of the notes until Peltier came to testify on the trial date. 5 AA 1217. Therefore, the notes were not withheld by the State.

Third, the evidence of Peltier's notes was not material. 7 AA 1641-1643. The district court made a factual finding that the documents the State handed over were notes. 5 AA 1220. Because of this finding, and the contents of the notes, the State was not required to disclose them to Appellant. 5 AA 1217. Therefore, the district

court did not abuse its discretion with respect to discovery and did not improperly deny Appellant's Motion for a Mistrial.[4]

C. DePalma's testimony regarding Appellant's Jail Calls

Appellant argues an abuse of discretion in allowing DePalma to testify about conversations between Jasmin and Appellant on jail calls. AOB at 39. Appellant contends the testimony was used to improperly impeach Jasmin. Id. This argument is belied by the record. The State provided Appellant with jail calls, Friday, prior to trial. 6 AA 1424.

i. Appellant's jail calls were not improperly withheld

Brady does not impose upon the State an obligation "to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). Evidence of impeachment of a witness need not be disclosed until the witness testifies. United States v. Rinn, 586 F.2d 113 (9th Cir. 1978). As discussed below, the State used the jail calls for impeachment purposes.

Appellant was fully able to subpoena the jail calls during his own investigation of the case. Appellant has not attempted to articulate the materiality or exculpatory

[4] As for Appellant's repeated claims that the district court improperly denied Johnson's testimony. AOB at 18-33. It is well settled that a trial court's determination to admit or exclude evidence is to be given great deference and will not be reversed absent manifest error. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

nature of the evidence. Appellant had access to his own investigators, ability to subpoena jail calls, and was free to conduct any legitimate inquiry it saw fit.

Even though Appellant had the jail calls for seven days, Appellant's counsel claimed that they were not prepared for cross-examination on the contents of the jail calls. 6 AA 1353. The district court ruled it would not proceed with the cross-examination of DePalma and gave Appellant time to prepare. 6 AA 1354. Therefore, the testimony regarding Appellant's jail calls was not improperly disclosed by the State and the district court did not abuse its discretion.

ii. Impeachment of Jasmin was proper.

This Court has determined that a declarant's prior sworn testimony which is inconsistent with the declarant's trial testimony is independently admissible as substantive evidence under NRS 51.035(2)(d). Levi v. State, 95 Nev. 746, 748, 602 P.2d 189, 190 (1979).

In Cheatham v. State, 104 Nev. 500, 503, 761 P.2d 419 (1988), the defendant argued prior inconsistent statements made out of court were admitted in violation of his constitutional right to confront a witness. This Court explained that "pursuant to NRS 51.035(2)(a), an out of court statement is admissible if the following two conditions are met: (1) the declarant testifies at trial and is subject to cross-examination concerning the statement; and (2) the out-of-court statement is inconsistent with the declarant's testimony." Id. at 503. Moreover, the defendant's

constitutional right to confront a witness was not violated, because the witness was present at trial, under oath, and subject to full and effective cross-examination by the defense. Id.

Like in Cheatham, the declarant, Jasmin, testified at trial, under oath, and was subject to cross-examination. 6 AA 1428. Jasmin testified that she maintained contact with Appellant through his family due to direction by CPS. 6 AA 1428. The statements made in the jail calls were inconsistent with Jasmin's testimony at trial. 6 AA 1435. During the jail calls, Jasmin told Appellant that CPS would take her children if she continued to directly contact him. 6 AA 1435. Jasmin continued contacting Appellant directly, disregarding CPS' instruction. 6 AA 1436. Thus, the jail calls rebut her testimony that she maintained contact with Appellant through family.

Additionally, Jasmin was asked by Appellant's counsel about Appellant's treatment and relationship with her other child, J.J at length. 6 AA 1428. Jasmin testified that Appellant was great with children, very patient and that he never said anything mean to her or did anything bad. 5 AA 1088; 6 AA 1428. During a jail call conversation, Appellant asked Jasmine if J.J was crying in the background. 6 AA 1436. DePalma testified that he could hear on the jail calls that Appellant was irritated and he said "Is that [J.J]? Tell her to shut her ass up, fuck." 6 AA 1437. Appellant directly placed his character and propensity with children through

Appellant's cross-examination of Jasmin by highlighting his caregiving skills and patience with children. Thus, the district court correctly held Jasmin's testimony could be used for impeachment and rebuttal as they were not raised in the State's case-in-chief. 6 AA 1426; 6 AA 1429.

Appellant's reliance on Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004), is misplaced.[5] In Lobato, the Court defined collateral evidence as facts which are "'outside the controversy, or are not directly connected with the principal matter or issue in dispute.'" Id. at 770. Lobato held that "extrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias, interest, corruption or prejudice, is never collateral to the controversy and not subject to the limitations contained in NRS 50.085(3)" therefore, such extrinsic evidence would be admissible to impeach. Id.

The impeachment here was not a collateral matter as it was impeachment of Jasmin's testimony that Appellant was kind to J.J. and other children. 6 AA 1430-31. Furthermore, the jail calls were Appellant's statement. The use of the jail calls was impeachment to the extent Appellant's statements were used and to prove

[5] Appellant cites an unpublished case in violation of NRAP 36(c)(3). AOB at 40-41. NRAP 36(c)(3) states, a party may cite for its persuasive value, if any, an unpublished disposition issued by the court on or after January 1, 2016. Appellant cites Perez v. State. No 65221, 2014 WL 7277522, at *2 (Nev. Dec. 19, 2014). As such, Appellants arguments should be disregarded.

Jasmin's bias as Appellant told Jasmin in the jail calls that she needs to testify for him. 6 AA 1431. Therefore, the district court did not abuse its discretion.

III. Cross-examination was proper.

Appellant fails to appreciate that the Sixth Amendment right to Confrontation only entitles a criminal defendant to effective cross-examination, not any cross-examination that Appellant wishes. AOB at 41. The district court "retains wide discretion to limit cross-examination based on considerations such as harassment, prejudice, confusion of the issues, and relevancy." Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16, 31 (2004).

In Delaware v. Van Arsdall, 475 U.S. 673 (1986), the U.S. Supreme Court indicated that while the trial court must not curtail a defendant's ability to cross-examine a witness, the right to cross-examine a witness is not without limits. The Court stated:

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Id. at 679 .

Not only did the Supreme Court state that the trial court has discretion to limit cross-examination, but the Confrontation Clause does not guarantee that an unsatisfactory witness or cross-examination is a violation.

1. Appellant was given the opportunity to fully cross-examine Dr. Cetl

Appellant argues the district court "drastically" restricted his ability to challenge Dr. Cetl's opinion during cross-examination and should have allowed Appellant to "get into Dr. Cetl's analysis." AOB at 43.[6] This claim is belied by the record. The district court did want Appellant to cross-examine Dr. Cetl regarding her analysis. 6 AA 1461-62. However, Appellant's initial line of questioning during cross-examination of Dr. Cetl was quite the opposite.

In response to Appellant's same argument the district court responded:

> "it would be nice if that's what you were doing. I mean, I'll allow you to do that. But I'm not going to allow you to pretend like you have Dr. Johnson up on the stand. I mean, because that's what it appears that you're trying to do, is to get her to testify that she can create some sort of scenario in which this is."

6 AA 1462.

[6] Within this section of Appellant's argument, Appellant wrongly implies that Dr. Cetl's opinions were not based on scientific evidence. AOB at 43. The State responded to the objection explaining that Dr. Cetl's findings were based on her training as a pediatrician and her estimations after reviewing thousands of cases on child abuse and neglect. 5 AA 1171. Therefore, Cetl's testimony was based upon scientific methodology.

The district court further explained that Appellant's line of cross was asking Dr. Cetl to presume C.J.'s burns happened a certain way. 6 AA 1470.

Moreover, Appellant's claim fails because the district court allowed Appellant not only to have cross-examination of Dr. Cetl but also, two re-cross-examinations to fully flesh out Dr. Cetl's conclusions. 6 AA 1452, 62; 7 AA 510; 7 AA 5012. Therefore, Appellant's claims are belied by the record.

2. Appellant was given the opportunity to fully cross-examine Dr. Olson

Appellant surmises that Dr. Cetl must have examined [C.J's] hands in the emergency room based on a conversation between DePalma and Dr. Olson outside of the courtroom. AOB at 45-46. Appellant argues that he should have been able to ask Dr. Olson about the alleged conflict between Dr. Olson's and Dr. Cetl's conclusions. Id.

When Appellant alleged that an improper communication occurred outside of the courtroom while the exclusionary rule was invoked, the district court conducted a hearing to determine the substance of the conversation outside the courtroom between DePalma and Dr. Olson. 6 AA 1989-90. The district court concluded that the allegations of an examination by Dr. Cetl that conflicted with Dr. Olson were unfounded. 6 AA 1989-90.

In addition to the fact that Dr. Olson testified that he never saw Dr. Cetl examine C.J. in the hospital, the district court explained:

> The Court: Okay. I believe that Cetl didn't treat him in the ER because there would have been a medical report. It would be outrageous for there to be a lack of medical record especially in a case like this.

6 AA 1418; 6 AA 1396.

The district court also determined that Dr. Olson was upset because he thought the State could have gotten all of the testimony through Dr. Cetl, and therefore, he was called to testify needlessly. 6 AA 1420. Further, the district court cautioned Appellant that "I'm not sure you have to embarrass him in front of the jury by having him acknowledge that he's pissed off he's here." 6 AA 1420.

At trial, disregarding the district court's instruction, Appellant asked Dr. Olson whether Dr. Cetl was involved in the case. 6 AA 1414. The State objected as the question was irrelevant, hearsay, and speculative. 6 AA 1416-17.

This case was not a question of two doctors finding different burn conclusions. 6 AA 1419. Appellant's question was speculative because Dr. Olson did not know what Dr. Cetl's conclusions were. 6 AA 1419. The district court properly ruled that Appellant's question was irrelevant because as the State explained Dr. Olson's anger was sourced by detectives getting a consult from Dr. Cetl and not due to a conflicting opinion. 6 AA 1384.

This Court should deny Appellant's claims due to his failure to show how such questioning would have advanced his theory of the case since Dr. Cetl and Dr.

Olson both concluded that the burns were intentional and not accidental as Appellant argued. 5 AA 1171; 6 AA 1409-10.

3. Appellant was given the opportunity to fully cross-examine Peltier

Appellant argues that he was denied the opportunity to effectively cross-examine Peltier because Appellant did not receive Peltier's notes until trial. AOB at 48-49.

Appellant's argument lacks merit and is belied by the record. Mann, 118 Nev. at 354, 46 P.3d at 1230. In response to Appellant's argument at trial that he was ambushed with new information, the district court explained:

> The Court: Like what? He doesn't have any conclusions. It looks like two pages of factual things that you would have already known. He has some thoughts. I don't even know if those are conclusions. Those appear to be thoughts and then something about defendant statements. This appears to be [Peltier] writing down actual facts that everybody knew about.

5 AA 1218.

Therefore, Appellant was not ambushed and he was not denied the opportunity to prepare an effective cross-examination.

4. The photographs of C.J.'s burned hands were properly admitted

Appellant argues photographs admitted at trial of C.J.'s burned hands were prejudicial and testimonial in nature. AOB at 49.

The admission of photographs is within the sound discretion of the trial court, and absent an abuse of this discretion, the decision will be upheld. Greene v. State, 113 Nev. 157, 931 P.2d 54, 60 (1997).

At trial, Appellant objected to the introduction of Exhibits 14-25 claiming that the photographer who took the pictures was required to lay foundation. 5 AA 1055. The State responded that appropriate foundation was laid because Jasmin was present with her son when the pictures were taken by UMC staff. 5 AA 1054. When presented with the proposed exhibits, Jasmin responded that she recognized the photos, saw the injuries herself, and that the pictures fairly and accurately depicted C.J.'s injuries on the day he was burned. 5 AA 1054. Therefore, foundation was laid by the State to introduce Exhibits 14-25.

Furthermore, the photographs were not improperly admitted because Appellant would have the opportunity to cross-examine Jasmin to determine if the colors of the pictures appeared altered by a filter. 5 AA 1055. Therefore, the district court correctly overruled Appellant's objection and admitted the photos because appropriate foundation was laid. 5 AA 1057.

Appellant fails to cite any authority to support his claim that photograph's Exhibit's 14-25 were testimonial in nature. In Bullcoming v. New Mexico, 564 U.S. 647, 664, 131 S. Ct. 2705 (2011), the court held that a forensic laboratory report was testimonial because it required a scientist to test a sample, formulate an analysis and

prepare a report. The pictures in this case did not require any analysis at all. The child was simply told the put out his hands so a picture could be captured. Therefore, Appellant's claim that the photographs were impermissible testimonial evidence claim must fail.

5. Appellant was given the opportunity to fully cross-examine Jasmin

"The district court has considerable discretion in determining the admissibility of evidence and this court will not disturb a district court's ruling absent an abuse of that discretion." In re Termination of Parental Rights as to N.J., 116 Nev. 790, 8 P.3d 126, 135 (2000).

The district court properly sustained the State's objections

Appellant argues that he was precluded from cross-examining Jasmin and proving Appellant lacked the motive to harm C.J. by sustaining the State's objections. AOB at 50. First, he argues the district court improperly sustained the State's objection when Jasmin was asked if she ever saw Appellant spank J.J. 5 AA 1089; AOB at 50. Second, he argues the district court improperly sustained the State's objection when Appellant asked Jasmin about Appellant's experience caring for other children. AOB at 50; 5 AA1090, 1093-94.

The district court sustained the State's objections because the questions were irrelevant and speculative. 5 AA 1090, 1093-94. The court explained that the District Attorney had not opened the door as to explaining motive and that how Appellant

acted around everyone else's children were not relevant to the instant case. 5 AA 1091. Regardless of Appellant's claims, any alleged error was harmless because the jury was instructed that it could consider evidence of motive or lack of motive as a circumstance in the case. 2 AA 436.

Appellant was able to impeach Officer Bethard

Appellant argues the district court improperly prevented Appellant from asking Jasmin about CJ's, a two-year-old's, communications with Officer Bethard at the hospital. 5 AA 1099; AOB at 52.

"The jury is the sole and exclusive judge of the credibility of the witnesses and the weight to be given their testimonies." Dorsey v. State, 96 Nev. 951, 954, 620 P.2d 1261, 1263 (1980).

Appellant's claim is belied by the record as Appellant was able to impeach. 5 AA 1099. After the hearsay objection was sustained, Appellant was able to rephrase the question. Appellant asked Jasmin "did Officer Bethard ask [C.J] how he was injured" and "did [C.J.] answer him in some way." 5 AA 1099. Jasmin answered affirmatively to both questions thereby impeaching Officer Bethard. 5 AA 1099. The fact the jury ultimately weighted the credibility of Officer Bethard and DePalma above Jasmin despite impeachment does not substantiate a claim that Appellant was denied an opportunity for cross-examination.

/ / /

IV. The district court properly instructed the jury

Appellant argues that the district court improperly denied Appellant's proposed jury instruction on "accident/misfortune" and by doing so denied Appellant of his opportunity to present his theory of the case. AOB at 53. At trial, Appellant requested that the jury to be instructed as follows:

> A person who committed an act or made the omission charged, through misfortune or accident, when it appears that there was not evil design, intention or culpable negligence, must be found not guilty of the charge.

7 AA 1520; 1686.

The State objected to the instruction and explained:

> In this case, the evidence of the defense theory is that the defendant did not do any act, let alone an act by accident or with the intention. The jury is informed as to what the intent is that needs to be with the action taken. So the jury will be properly instructed as to the need to have an intent to willful cause of the injuries to C.J. and this instruction is improper

7 AA 1521.

Nevada law gives the court discretion to decide whether a jury instruction is correct and pertinent. NRS 175.161(3). In fact, a district court has broad discretion to settle jury instructions. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005). The district court abuses its discretion only when the "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Id. It is not error to refuse to give an instruction when the substance of that instruction is substantially

covered by another jury instruction. Ford v. State, 99 Nev. 209, 211, 660 P.2d 992, 993 (1983).

Further, erroneous jury instructions are subject to harmless error review. Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000). An instructional error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error[,]" and the error is not the type that would undermine certainty in the verdict. Id. A district court must not instruct a jury on theories that misstate the applicable law. Vallery v. State, 118 Nev. 357, 46 P.3d 66, 76-77 (2002).

Appellant contends that if the accident/misfortune instruction was given, it "could have" lead the jury to determine that Appellant accidentally burned C.J.'s hands. Appellant at the last minute of trial while settling jury instructions, concocted the argument to the court that the proposed instruction was proper because Appellant could have accidentally burned C.J's hands while attempting to wash them but made up a story afterwards because "he felt bad about what happened." AOB at 55. This is a gross misrepresentation of Appellant's theory of the case. Not a shred of evidence was presented to the jury to support Appellant's new claim. Appellant argued throughout his entire trial that he was not in the room when C.J. was burned and could not know how exactly how the burns happened. 6 AA 1437-3; 5 AA 1043;

6 AA 1437-38; 2 AA 329. Therefore, no evidence was presented that would permit such an instruction.

Additionally, any error was harmless as explained below in the cumulative error section. Thus, a new trial is not required because the jury was properly instructed.

V. The district court properly precluded Appellant from arguing an improper statement of the law.

Appellant alleges the district court improperly sustained the State's objection to Appellant's argument during closing. Appellant argued:

> The State is asking you to convict Donovine beyond a reasonable doubt when they cannot even explain to you why he would do something like this. No motive is reasonable doubt

7 AA 1569.

The State moved to strike arguing that Appellant was arguing facts not in evidence. 7 AA 1576-77. The district court sustained the objection and instructed the jury to disregard. 7 AA 1576-77.

The purpose of closing arguments is to enlighten the jury, and to assist in analyzing, evaluating, and applying the evidence, so that the jury may reach a reasonable conclusion. Taylor v. State, 132 Nev. ___, ___, 371 P.3d 1036, 1045 (2016). However, counsel must make it clear that the conclusions that he or she urges the jury to reach are to be drawn from the evidence. Id. The crime of Child Abuse,

Neglect, or Endangerment does not require that the State prove motive as an element. NRS 200.508.

The court properly struck Appellant's argument because it improperly instructed the jury that the State needed to prove motive to find Appellant guilty. Moreover, Appellant's closing did not enlighten the jury in applying the evidence because Appellant argued facts, not in evidence. 7 AA 1576-77. Appellant's arguments were not proper, therefore, they were properly stricken.

Appellant contends that the State improperly argued that Appellant could have burned C.J by the hot water in the mug or by holding his hands under the faucet. AOB at 58. During closing argument, trial counsel enjoys wide latitude in arguing facts and drawing inferences from the evidence. Greene v. Nev., 113 Nev. 157, 177, 931 P.2d 54, 67 (1997). The State argued facts that were in evidence. Peltier testimony was that C.J's burns were consistent with an emersion burn. 5 AA 1247, 1269. Therefore, a new trial is not required.

VI. Appellant's trial was fair

Appellant argues that district court was "so clearly biased against" Appellant and that its discriminatory treatment was seen particularly in closing argument. AOB at 59. "Judicial misconduct must be preserved for appellate review, and the failure to object or assign misconduct will generally preclude review by this court." Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998). For the Court to entertain

this allegation, the misconduct would have to rise to the level of plain error. Id. This Court and the United States Supreme Court have often held: "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 (1975).

Neither judicial misconduct nor plain error occurred in this case. Appellant did not make an objection or a record to preserve a claim of judicial misconduct for appeal. Accordingly, Appellant waived his claim of judicial misconduct. Therefore, this Court should not grant Appellant a new trial.

VII. There is no error to cumulate

This court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288 (1985).

The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Big Pond, 101 Nev. at 3. 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).

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 (1988).

First, the issue of innocence was not close. After a five day trial with multiple expert witnesses, law enforcement witnesses, and the victim's mother's testimony, the jury convicted Appellant of the crime he was charged with. 2 AA 448. The jury was able to review photos that preserved the scene where the burn occurred, view Appellant's voluntary reenactment video, and hear the voluntary interview that took place between DePalma and Appellant.

Appellant was the only adult left with C.J. in the apartment at the time the burns occurred. 5 AA 1034. Experts explained that the types of burn patterns that scarred C.J.'s hands were not the result of an accidental spill. 5 AA 1147-52; 6 AA 1301; 5 AA 1171; 6 AA 1409-10.

Additionally, Appellant's defense that he was outside the room making coffee when C.J. was burned lacked corroborating evidence and is why the jury refused to believe him. As the State noted, when asked by DePalma where the coffee was, Appellant was unable to find it. 6 AA 1356-57.

The district court did not commit error. The errors Appellant alleges are bare and naked, and are merely repetitive allegations of improper judicial conduct due to the denial of permitting Johnson to testify. Even if the court did commit error, any error was harmless because of the amount of evidence that was presented that the

burn patterns on C.J's hands were not accidental. 5 AA 1147-52; 6 AA 1301; 5 AA 1171; 6 AA 1409-10.

Finally, the State acknowledges that the crime Appellant was convicted of is indeed a grave crime. However, due to the amount of evidence presented to the jury that C.J.'s burns were not accidental, Appellant's Judgment of Conviction should be upheld.

CONCLUSION

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

Dated this 18th day of December, 2017.

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 proportionately spaced, has a typeface of 14 points and contains 13,854 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 18th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 18, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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