IN THE SUPREME COURT OF THE STATE OF NEVADA

GARY LAMAR CHAMBERS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 73446

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(2) because it is an appeal from a Judgment of Conviction that involves Category A and B felonies.

STATEMENT OF THE ISSUES

1. Whether the district court properly denied Appellant's motion in limine to preclude the State from admitting his prior felony convictions.
2. Whether the district court properly granted the State's motion allowing a witness to testify via audiovisual technology.
3. Whether the district court properly admitted the preliminary hearing testimony of an unavailable witness.
4. Whether the district court properly denied Appellant's motion for mistrial
5. Whether the district court properly sentenced Appellant as a habitual criminal
6. Whether there was no cumulative error.

STATEMENT OF THE CASE

On September 27, 2013, a preliminary hearing was held in Justice Court, Department 5. 1 Appellant's Appendix ("AA") AA 0005. Bridgett Graham ("Bridgett") testified at the preliminary hearing. 1 AA 0069. Subsequently, Defendant Gary Chambers ("Chambers") answered the charges alleged in district court. 2 AA 130.

On October 10, 2013, the State charged Chambers by way of Information with one count of Burglary While in Possession of a Firearm; one count of Murder with Use of a Deadly Weapon; one count of Attempt Robbery With Use of a Deadly Weapon; one count of Attempt Murder With use of a Deadly Weapon; one count of Battery With Use of a Deadly Weapon; and one count of Possession of Firearm by Ex-Felon. 1 AA 1-3.

After several trial date continuances, on January 26, 2016, Chambers filed a motion in limine seeking to preclude the State from admitting Chambers' prior convictions. 2 AA 147-153. The State filed its opposition on March 2, 2016. 2 AA 158-165. Chambers filed his reply on April 28, 2016. 2 AA 166. On July 7, 2016, the district court heard argument and denied Chambers' motion. 4 AA 307-309.

On February 21, 2017, trial commenced before the Honorable Judge Richard Scotti. 4 AA 329. That same day, and prior to the start of trial, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. 2 AA 170-172. On February

22, 2017, the State filed a Motion to Admit Preliminary Hearing Transcript regarding Bridgett's testimony because she refused to appear at trial despite the State's efforts. 2 AA 173-175. On February 24, 2017, the State filed a Motion for Audiovisual Testimony of Cynthia Lacey ("Cynthia"). 2 AA 176-191.

On March 1, 2017, the jury returned guilty verdicts against Chambers as to the following counts: Counts 2, 4, and 5. Count 2 – Murder With Use of a Deadly Weapon (Category A Felony - NRS 200.010, 200.030, 193.165); Count 4 – Attempt Murder With Use of a Deadly Weapon (Category B Felony - NRS 193.330, 200.010, 200.030, 193.165); Count 5 – Battery With Use of a Deadly Weapon (Category B Felony - NRS 200.481). 3 AA 268-270. That same day, Chambers entered into a Guilty Plea Agreement regarding Count 6 – Possession of a Firearm by Ex-Felon (Category B Felony - NRS 202.360).[1] 3 AA 271-280.

After the State and Chambers filed sentencing memoranda, Chambers was sentenced on May 23, 2017. 3 AA 281-289; 3 AA 290-300; 4 AA 310. The district court sentenced Chambers as a habitual criminal under NRS 207.012 as to Counts 2 and 4. 4 AA 326-327. Further, the district court sentenced Chambers as a habitual criminal under NRS 207.010 as to Counts 5 and 6. Id. Chambers was ordered to serve life without the possibility of parole on all counts in the Nevada Department

[1] Chambers was found not guilty of Counts 1 and 3 – Burglary While In Possession of a Firearm and Attempt Robbery With Use of a Deadly Weapon, respectively.

of Corrections. Id. The district court ordered that all counts run concurrent and Chambers was awarded zero (0) days of credit for time served. Id. The Judgment of Conviction was filed on June 5, 2017. 4 AA 302-303.

On July 2, 2017, Chambers filed his Notice of Appeal. 4 AA 304-306. Chambers filed his Opening Brief ("AOB") on August 21, 2018.

STATEMENT OF THE FACTS

On the morning of Tuesday, July 9, 2013, Lisa Papoutsis ("Lisa") was in her trailer at Van's Trailer Oasis, Mobile Home Park ("Van's)". 8 AA 753-754. That morning Lisa decided to run some errands and returned to her trailer around 9:00 a.m. 8 AA 755. Lisa's friend, Gary Bly ("Gary"), had spent the night at Lisa's and planned on running errands with Lisa after she returned that morning. 8 AA 754-755; 4 AA 759. Once Lisa returned to her trailer she ate breakfast with Gary. 8 AA 756. As Lisa and Gary ate, Lisa received a call from Chambers. 8 AA 757-758. Chambers wanted to know if he could stop by Lisa's trailer. Id. Lisa told him he could and within 15-20 minutes after he called, Chambers arrived at Lisa's trailer. Id. Chambers entered Lisa's trailer through the front door. Id. Lisa noticed that Gary had made his way towards the restroom when she answered the door. 8 AA 759. Chambers entered the trailer and Lisa observed that he was holding car keys, a wallet, and a gun. 8 AA 760. Specifically, Lisa noticed the gun was in nylon or cloth-like holster. Id. Chambers then told Lisa, "You know what this is about." 8 AA 778.

After Chambers' comment, Lisa feared Chambers was there to rob her so she called out for Gary. 8 AA 761-762. Gary emerged from the back of the trailer and verbally confronted Chambers. 8 AA 763. Although Gary never touched Chambers, Lisa testified Chambers suddenly shot Gary in front of her. 8 AA 763-764. As Gary fell, Lisa reached for her cellphone, but when she turned back to Chambers he had his gun pointed at her torso.8 AA 764-767. Lisa "smacked" Chambers' gun with her left hand. Id. The gun fired and the bullet struck Lisa's hand. Id. Chambers then escaped by running out the front door while Lisa ran out the back door as she sought help. Id. Lisa noticed some of the maintenance men outside.

On the morning of July 9, 2013, Daniel Plumlee ("Daniel"), a maintenance worker at Van's, worked on Lisa's trailer. 9 AA 825-827. That morning, Daniel repaired Lisa's front door. Id. Once he finished his repairs, Daniel exited Lisa's trailer through the back door and headed towards his office. 9 AA 828-829. As Daniel made his way through Lisa's yard, he saw Chambers approaching Lisa's trailer. Id. Daniel observed Chambers entering Lisa's yard. Id. Daniel continued to walk towards his office, but stopped when he heard two gunshots. 9 AA 830-831. Daniel headed back to Lisa's trailer and observed Lisa running out of the backdoor of the trailer as she screamed for help. Id. Daniel then recognized Chambers as the man who exited through the front door of Lisa's trailer. Id. As Chambers exited the trailer, Daniel observed Chambers had a gun in his right hand. 9 AA 832. Chambers

made his way through Lisa's yard and entered the driver's side of a vehicle parked near Lisa's trailer. 9 AA 833-834. Before Chambers took off, Daniel memorized the license plate of the Chambers' vehicle and later conveyed the numbers to the responding officers.

On the morning of July 9, 2013, Charles Braham ("Charles"), another maintenance worker at Van's, was loading his vehicle a couple of trailers away from Lisa's trailer when he heard screaming and gunshots. 8 AA 713, 718. As Charles looked up he noticed Bradley Greive ("Bradley"), the manager of Van's, pull up in a truck outside of Lisa's trailer. 8 AA 719. Both Charles and Bradley entered Lisa's yard. Id. Both Charles and Bradley observed Chambers exiting the front door of Lisa's trailer while holding a gun in his right hand. 8 AA 720, 733; 8 AA 739, 741. Charles and Bradley testified that when they noticed Chambers' gun, Chambers had tucked part of the gun into his pocket. 8 AA 722; 741. Both Charles and Bradley observed Chambers enter a vehicle that was parked nearby Lisa's trailer. 8 AA 722; 743. Before Chambers escaped, Bradley noticed a woman sitting in the passenger side of the getaway vehicle. 8 AA 743.

Earlier that morning, Chambers picked up his daughter and her friend Bridgett from an apartment on Craig and Nellis. 1 AA 72-73. Bridgett thought Chambers was giving her a ride to her house. Id. However, Chambers told the women he needed to retrieve a package and drop some keys off; Chambers then stopped at Van's. 1 AA

73-74. Once he arrived, Chambers parked his car in front of a trailer. Id. Bridgett saw Chambers enter a gate and after a few minutes the women heard gunshots. 1 AA 75-76. Bridgett then observed Chambers walking back towards the car and she asked him what had happened. 1 AA 77. Chambers initially said, "Nothing." Id. As Chambers fled the scene in the car Bridgett heard him say, "He shouldn't have wrestled me." 1 AA 77-78. Bridgett further testified that a few days prior to July 9, 2013, she heard Chambers say that he was going "to come up" and "hit a lick." 1 AA 82-83, 84. Bridgett believed the former meant Chambers was going to commit a crime while the latter meant he was going to commit a robbery. 1 AA 83-85.

Officer Brett Brosnahan ("Officer Brosnahan") of the Las Vegas Metropolitan Police Department ("Metro") responded to a shooting call at Van's. 9 AA 844-845. On arrival, Officer Brosnahan made contact with Daniel. 9 AA 846-849. Daniel explained to the officer that a shooting occurred and Chambers fled in a gray vehicle. Id. Most importantly, Daniel relayed the vehicle's license plate number to Officer Brosnahan. Id. Officer Brosnahan quickly broadcasted the number over his radio and entered Lisa's trailer. Id.; 9 AA 850. Inside, he observed a man lying in a semi-fetal position with an apparent gunshot wound to the head. Id. Officer Brosnahan also observed a "hysterical" woman with an apparent gunshot wound to her left hand.[2] 9

[2] Both Lisa and Gary were transported to UMC hospital. 8 AA 768; 9 AA 865. Lisa received treatment for a gunshot wound to the hand. 8 AA 768. Gary was pronounced dead and Dr. Telgenhoff performed an autopsy on Gary. 11 AA 1037-

AA 852. After a backup officer arrived, the officers swept the trailer and did not find any other persons within the trailer. 9 AA 853.

Using the license plate number Daniel reported to Officer Brosnahan and a cell phone number obtained through the course of the investigation, detectives secured a search warrant for an apartment.11 AA 1022-1030. Upon executing the warrant, case agent Matthew Gillis ("Officer Gillis") located the vehicle Chambers used as a getaway car. Id. Metro then towed the vehicle to a crime lab where it was processed. 11 AA 1030-1031. Officer Gillis learned that Cynthia Lacey ("Cynthia"), who was later identified as Chambers' girlfriend, lived in the apartment. 11 AA 1032. During their search, officers found Chambers' identification cards in Cynthia's apartment. Id. Cynthia gave officers information as to Chambers' whereabouts. 11 AA 1033-1034. Officers managed to track and arrest Chambers in the parking lot of a local Jack in the Box by using Cynthia's information. Id. Officers arrested Chambers because Lisa had identified Chambers as the shooter in a photo lineup. 11 AA 1025. Additionally, other witnesses participated in double-blind lineups and identified Chambers as the shooter. 11 AA 1025-1027; 1034-1035.

1039. The autopsy revealed the cause of death to be an intermediate-range gunshot wound to the head. Id. The entrance wound was near the crown of the head, with the projectile traveling left to right, and slightly downward. Id.

SUMMARY OF THE ARGUMENT

First, the district court did not abuse its discretion when it properly denied Chambers' motion in limine to exclude his felony convictions if Chambers testified at trial. This is particularly true because the district court found that the felony convictions were admissible for impeachment purposes.

Second, the district court did not abuse its discretion when it properly allowed a key witness to testify live via BlueJeans audiovisual technology. The district court properly exercised its discretion when it found that the health of the State's witness would be unduly jeopardized if forced to travel.

Third, the district court was within its discretion to admit Bridgett's preliminary hearing testimony at trial because the State proved she was unavailable and Chambers had the opportunity to cross-examine Bridgett at the preliminary hearing.

Fourth, the district court did not abuse its discretion when it denied Chambers' motion for mistrial. Specifically, Chambers failed to show that the State's comments during its closing argument resulted in prejudice or denied Chambers a fundamentally fair trial.

Fifth, the district court properly sentenced Chambers under the large habitual criminal statute, as it has broad discretion in sentencing.

Sixth, there was no cumulative error.

ARGUMENT

I. The district court properly denied Chambers' motion in limine which sought to exclude his felony convictions.

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Hernandez v. State, 124 Nev. 639, 646, 188 P.3d 1126, 1131, (2008); see, e.g., Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Evidence that a witness has been convicted of a felony is admissible for the purpose of attacking credibility; the decision to admit or exclude evidence of prior offenses is within the discretion of the trial court. Owens v. State, 96 Nev. 880, 620 P.2d 1236 (1980); NRS 50.095. Although a prior felony conviction may be admitted for impeachment, a court should exclude such evidence, if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury (NRS 48.035(1)); or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence (NRS 48.035(2)). Edwards v. State, 90 Nev. 255, 524 P.2d 328, (1974); see also Anderson v. State, 92 Nev. 21, 544 P.2d 1200 (1976).

Chambers argues that the district court erred when it denied his motion in limine because Chambers' prior convictions were more prejudicial than probative. AOB at 14-17. Further, Chambers contends that the district court's ruling limited his ability to defend himself. Id. Specifically, Chambers claims that had he testified, it is likely the jury would have convicted him simply because the prior convictions

were similar to the charges in the instant case. Id. Chambers' arguments are unpersuasive.

A review of the record reveals that the district court properly denied Chambers' motion in limine after conducting a balancing test. In making its decision, the district court found as follows:

> THE COURT:
>
> Alright. I read the argument carefully and I understand and thank you for providing the Ninth Circuit cases that you did which outline the factors that the Court should consider. I did consider those factors and others. Unfortunately, I'm going to deny the motion in limine pursuant to NRS 50.095.
>
> . . .
>
> I do believe that the prior felony convictions for robbery with use of a deadly weapon and first -degree kidnapping are relevant and admissible. I believe that they go to the issue of credibility. Credibility is an extremely critical issue in this particular case so the evidence is highly probative. I don't think it's unfairly prejudicial to admit that evidence here considering Defendant did receive parole shortly before the commission of the offenses in this case. The prior cases are violent crimes against persons like the crimes in this case. And I think that also any prejudice can be mitigated by cautionary instruction as well as voir dire that you can conduct.

4 AA 308.

At trial, Chambers was serving his sentences on his three prior convictions.[3] 2 AA 147-149. Therefore, no legal basis existed to exclude Chambers' convictions if he chose to testify. In essence, Chambers wanted to exercise his right to testify while simultaneously preventing the State from impeaching his credibility with prior felony convictions that he was currently serving sentences on. This position is simply untenable.

Here, NRS 50.095 allows the admissibility of prior convictions as a mechanism to challenge a witness' credibility if the convictions are not too remote in time. See Yates v. State, 95 Nev. 446, 596 P.2d 239 (1979) (noting that prior felony convictions which are not too remote *are deemed relevant to the credibility of any witness*) (emphasis added). Additionally, had Chambers presented a self-defense theory and testified, the importance of his credibility would have been essential. AOB at 17. Since Gary was murdered and Lisa was the only other witness that observed the events that took place in the trailer, Lisa was the only one capable of refuting Chambers' self-serving statements. Therefore, if Chambers testified, the State had an escalated need to impeach his credibility.

[3] Chambers' prior convictions involved two counts of Robbery With Use of a Deadly Weapon and one count of First Degree Kidnapping. 4 AA 155-156. For each of the robbery counts, Chambers was sentenced to a term of 52 months to 240 months. Id. Additionally, Chambers was sentenced to 5 years to Life on the kidnapping count. Id. The sentencing judge ordered all counts were to run concurrent. Id.

Chambers also cites to non-binding authority in support of his argument that the district court erred in denying his motion in limine. Specifically, Chambers cites to U.S. v. Wallace, 848 P.2d 1464, 1473 (9th Cir. 1988) for a five-factor balancing test that Ninth Circuit trial courts should apply while interpreting the Federal Rules of Evidence. Preliminarily, Chambers' reliance on federal authority is irrelevant because Chambers' case was not tried in federal court. Notwithstanding this fact, the district court considered the same federal authority cited on appeal when it denied Chambers' motion in limine. In fact, the district court thanked trial counsel for providing the Ninth Circuit cases which outline the factors Chambers wanted the court to consider. 4 AA 308. The district court noted that it considered "those factors and others" prior to rendering its decision. Id.

Lastly, Chambers was not denied a meaningful opportunity to present a defense. This Court has held "although the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, defendants must comply with established evidentiary rules designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Rimer v. State, 131. Nev. ___, ___, 351 P.3d 697, 712 (2015). Chambers voluntarily chose not take the stand in his own defense by unequivocally stating that he did "not want to testify." 11 AA 1076. As a result, the jury was not informed of Chambers' prior felonies. Chambers was also permitted to test his defense fully and completely by cross-examining the

State's witnesses and by calling his own witnesses. Moreover, the district court properly found within the evidentiary rules that Chambers' prior felonies were not lacking in probative value and were not unfairly prejudicial. 4 AA 308. Significantly, the district court noted that if Chambers chose to testify any prejudice could have been mitigated by a cautionary instruction. Id. In light of this ruling, Chambers chose not to testify. Therefore, the district court did not abuse its discretion by denying Chambers' motion in limine. Chambers failed to show a legal basis for excluding his prior convictions if he were to testify. Additionally, Chambers' defense was not limited because Chambers voluntarily chose not to testify. Chambers had the ability to cross-examine all of the State's witnesses and present a complete defense to the charges. Accordingly, Chambers' claims are without merit and should be denied.

II. The district court properly allowed witness testimony via simultaneous audiovisual transmission equipment.

This Court reviews a district court's evidentiary rulings under an abuse of discretion standard. Mclellan, 124 Nev. at 266, 182 P.3d at 109. However, whether a defendant's Confrontation Clause rights were violated are "question[s] of law that must be reviewed *de novo*." Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and the accused shall have the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354,

1364 (2004). Thus, testimonial hearsay—i.e. extrajudicial statements used as the "functional equivalent" of in-court testimony—may only be admitted at trial if the declarant is "unavailable to testify, and the defendant had a prior opportunity for cross-examination." Crawford, 541 U.S. at 53-54, 124 S. Ct. at 1365. Therefore, to run afoul of the Confrontation Clause, out-of-court statements introduced at trial must not only be "testimonial" but must also be hearsay, for the Clause does not bar the use of even "testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 51-52, 60 n.9, 124 S. Ct. at 1369 n.9 (*citing* Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 2081-82 (1985)).

Regarding a witness's physical presence in the courtroom, this Court has established a rule which permits the use of audiovisual testimony at trial in criminal proceedings. Supreme Court Rules Part IX-A(B). Rule 2 within that Part is entitled, "Policy favoring simultaneous audiovisual transmission equipment appearances," and states:

> The intent of this rule is to promote uniformity in the practices and procedures relating to simultaneous audiovisual transmission appearances. To improve access to the courts and reduce litigation costs, courts ***shall*** permit parties, to the extent feasible, to appear by simultaneous audiovisual transmission equipment at appropriate proceedings pursuant to these rules.

(Emphasis added.) Thus, where applicable, Nevada Courts must allow witnesses to testify via audiovisual transmission equipment.

Rule 4 of the same Part provides further guidance on when the use of audiovisual equipment is appropriate. The Rule 4 provides, in relevant part, as follows:

> 1. Except as set forth in Rule 3[4], a witness may appear by simultaneous audiovisual transmission equipment in all other criminal proceedings or hearings where personal appearance is required unless the court determines that the personal appearance of the witness is necessary.

In the context of preliminary hearings, under NRS 171.1975, "if a witness resides more than 100 miles from the place of a preliminary examination or is unable to attend the preliminary examination because of a medical condition, or if good cause otherwise exists, the magistrate must allow the witness to testify at the preliminary examination through the use of audiovisual technology." NRS 171.1975.

Chambers alleges that the district court erred when it allowed Cynthia to testify via simultaneous audiovisual transmission equipment. AOB 17-25. Specifically, Chambers argues that the State did not establish that Cynthia could not travel because of health conditions. Id. Further, Chambers avers he was prejudiced

[4] Rule 3 states that audiovisual testimony may be used in all criminal proceedings except juvenile and appellate proceedings.

because the district court allowed Cynthia to testify remotely. Id. These complaints are without merit.

a) The district court properly found that Cynthia's health would be adversely impacted if she was forced to travel.

The record reveals that prior to allowing the parties to *voir dire* Cynthia regarding her health conditions, the district court undertook a careful and detailed analysis of the legal authority provided by the parties. 10 AA 910-939. During *voir dire*, Cynthia testified that she was at work when she felt sharp pains and the left side of her body went numb. 10 AA 959. Cynthia reported this to her supervisor who then called an ambulance and Cynthia was transported to a local hospital and treated for a heart attack. Id. Cynthia explained that post-heart attack her energy declined precipitously and suffered from numbing on her face. 10 AA 962-963. After defense counsel cross-examined Cynthia, the trial court made its findings.

In making its findings the district court relied, in part, on U.S. v. Benson, 79 F. App'x 813 (6th Cir. 2003). The district court noted that the Benson court found that the lower court did not commit error when it allowed a witness to testify via video conference. 10 AA 974. The district court further noted that the Benson court reasoned that the testimony of the testifying witness, regarding her medical condition, was sufficient to determine whether a witness is too ill to travel. Id. In making its findings, the district court assessed Cynthia's credibility and weighed the

sufficiency of Cynthia's testimony regarding her poor health. Id. The district court also noted that two public policy reasons weighed in favor of allowing Cynthia to testify via audiovisual transmission. First, the district court found that after evaluating Cynthia's testimony it was convinced that Cynthia's "health would be unduly jeopardized if forced to travel." 10 AA 975. Second, the district court noted that the State was allowed to "present material, relevant evidence through virtual face-to-face confrontation." 10 AA 975-976. Therefore, because the district court carefully analyzed Cynthia's testimony and concluded that her health would be unduly jeopardized if forced to travel, the district court did not abuse its discretion by allowing Cynthia to testify remotely.

b) Chambers was not prejudiced by Cynthia's testimony.

Chambers does not contend that the State or district court violated the procedures established by this Court regarding audiovisual testimony. Instead, Chambers argues that he was prejudiced because the district court allowed Cynthia to testify remotely. Specifically, Chambers takes issue with the fact that at trial Cynthia was asked a series of questions to which she answered: "I don't remember." 10 AA 979-985. Chambers spends a great deal of time arguing about Cynthia's testimony, but fails to cite to ***any*** legal authority which supports his bold assertion that he was prejudiced by Cynthia testifying remotely via audiovisual transmission. AOB at 24-25. Chambers appears to argue that Cynthia's "I don't remember"

responses amounted to prejudice because the State impeached her by using her prior statements. According to Chambers, this impeachment of Cynthia's testimony, "hurt his defense." AOB at 25. However, Chambers fails to show how Cynthia's lack of recollection establishes prejudice. Chambers' arguments are unpersuasive because he was not prejudiced by Cynthia's remote testimony.

Chambers cannot show prejudice because he was not prevented from "confronting" Cynthia. To the contrary, Cynthia was placed under oath, in front of the jury (via video), and Chambers was given the opportunity to cross-examine Cynthia. 10 AA 977; 986. With respect to confrontation and Cynthia's audiovisual testimony, the district court found as follows:

> THE COURT:
> We have virtual face-to-face confrontation, which should be allowed here where the State has undertaken reasonable efforts to secure the personal attendance of the witness. And through no fault of the State, there's been a determination that the witness is not going to be forcibly brought to the State.
>
> . . .
>
> I think that there is justification for allowing the videotape testimony, particularly here where we have strong indicia of the reliability of the process and the testimony where we're going to have the witness under oath. We have virtual presence, her view is not blocked. We have clear audio and visual clarify [sic]. We have an ability to judge the demeanor of the witness through this process. She can be clearly heard and seen. So, I think for all those reasons this is virtual presence and I find that there's no undue

> prejudice to the defendant and no violation of the Sixth Amendment confrontation clause.

10 AA 975-976.

Regarding cross-examination, Chambers was given an opportunity to effectively cross-examine Cynthia, but instead chose not to ask a single question. 10 AA 986. Consequently, this Court has held that simply because trial counsel chooses not to exercise his *opportunity* to cross-examine a witness that does not mean Chambers was denied his constitutional right to confrontation. (emphasis added); Chavez, 125 Nev. at 338, 213 P.3d at 483 (reasoning that "the Confrontation Clause guarantees an opportunity for effective cross examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish"). This is particularly important in the instant case because Cynthia testified live via a two-way audiovisual transmission in front of the jury and Chambers. Chambers, therefore, had the same opportunity to cross-examine Cynthia as if she were physically present in the courtroom. Chambers not only fails to show prejudice, but Chambers also does not provide relevant authority for this Court to consider his arguments. See Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this Court need not consider claims that are not cogently argued or supported by relevant authority); Byford v. State, 116 Nev. 215, 225, 994 P.2d 700, 707 (2000) (issues unsupported by cogent argument warrants no relief).

Nonetheless, to the extend the Court is inclined to address Chambers' unsupported arguments, the United States Supreme Court has reasoned that physical presence is not the most essential condition of the Confrontation Clause and the Court has "never insisted on actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant." Maryland v. Craig, 497 U.S. 836, 847, 110 S. Ct. 3157, 3164 (1990).

Chambers fails to demonstrate how having an opportunity to cross-examine Cynthia's live two-way testimony amounted to prejudice. Additionally, Chambers has not proffered any evidence that suggests that had Cynthia testified in-person the same impeachment evidence would not have been available and admitted. Accordingly, Chambers' claims should be summarily denied.

III. The district court properly admitted Bridgett's preliminary hearing testimony.

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Hernandez v. State, 124 Nev. 639, 646, 188 P.3d 1126, 1131, (2008); see, e.g., Mclellan, 124 Nev. at 267, 182 P.3d at 109. Further, this Court has reasoned that "[t]he Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Chavez, 125 Nev. at 338-339. Prior witness testimony is admissible if the declarant is unavailable. NRS 51.325. Testimony given during a preliminary hearing may be used in trial if "three

preconditions exist: first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial." Hernandez, 124 Nev. at 645, 188 P.3d at 1131. A witness is unavailable if he or she is absent from the hearing, and is beyond the jurisdiction of the court to compel appearance, and the proponent of her statement has exercised reasonable diligence, but has been unable to procure her attendance. Id.

This Court will determine the adequacy of the opportunity to cross-examine on a case-by-case basis, taking into consideration such factors as the extent of the discovery available at the time of cross-examination and whether there was a thorough opportunity to cross-examine. Chavez, 125 Nev. at 338-339. A mere opportunity is all that is required to satisfy the Confrontation Clause, even if a defendant failed to take advantage of such a chance. State v. Eighth Judicial Dist. Court of Nev., 134 Nev. __, __, 412 P.3d 18, 21 (2018).

Chambers argues that the district court abused its discretion by improperly admitting Bridgett's preliminary hearing testimony. AOB at 26-29. Chambers claims he was prejudiced by the admission of Bridgett's testimony because he did not have a meaningful opportunity to cross-examine her at the preliminary hearing. Id. Specifically, Chambers alleges that he was unaware that Bridgett was convicted

of a misdemeanor larceny. Id. Chambers' arguments are unconvincing and he fails to show prejudice.

While considering the State's motion to admit the preliminary hearing transcript, the district court noted that there were no confrontation issues regarding Bridgett's preliminary hearing transcript. 6 AA 587. Rather, the district court was solely concerned with the issue of whether the State could show Bridgett was unavailable. Id.; See NRS 51.055 (defining witness unavailability).

The State represented to the district court that Bridgett disregarded the State's subpoena. 6 AA 574-575. In fact, the State received an email from Bridgett simply stating that she was "not coming." Id. The State asked Bridgett, on multiple occasions, for her telephone number or other contact information, but she refused to provide any. 6 AA 575-576. The State then sought a warrant against Bridgett. Id. When the State tracked Bridgett to an address and made contact with people living at that address, the individuals indicated that Bridgett was "not staying there," they had not "seen [her] in three weeks," and they did not "know where she [was]." 13 AA 1221. This information contradicted the fact that the State knew Bridgett used a server at that address the previous day.[5] Id. Ultimately, the district court found that Bridgett persistently failed to comply with the State's subpoena. 13 AA 1227.

[5] Presumably, the State's investigator traced one of the emails sent by Bridgett during her conversation with the trial deputy to this particular address.

Moreover, the district court found that the State exerted "reasonable efforts" to secure Bridgett's presence at trial. Id. Lastly, during argument, trial counsel raised the issue that after Bridgett's preliminary hearing, he discovered that Bridgett was arrested for petit larceny. 13 AA 1229. Trial counsel argued that the State should have disclosed this information because the arrest involved a crime of dishonesty. 13 AA 1234. The district court disagreed and found as follows:

> Well, I'm going to go ahead and allow the preliminary hearing transcript. I don't see that there's a violation of the 6th Amendment confrontation clause merely where defense counsel is not aware of a petit larceny misdemeanor and is deprived of a chance to then cross-examine the witness on that misdemeanor. I don't find that that rises to the level of depriving the Defendant of a fair opportunity at cross-examination.

Id. Here, Bridgett's prior testimony was properly admitted because the State satisfied the three conditions set forth in Hernandez: (1) Chambers was represented by counsel at the preliminary hearing, (2) counsel cross-examined Bridgett, and (3) Bridgett was actually unavailable at the time of trial. 14 AA 1271, 1351; 2 AA 173-175. While Chambers argues that he was prejudiced because he could not impeach Bridgett's credibility with her misdemeanor petit larceny conviction, that argument should be disregarded because Chambers was afforded "a thorough opportunity to cross-examine the witness" during the preliminary hearing. Chavez, 124 Nev. at 337, 339, 213 P.3d at 482, 484.

The record reveals that during cross-examination Chambers asked Bridgett over 35 questions. 1 AA 85-91. While Chambers' opening brief focuses on Bridgett's direct-examination testimony, Chambers ignores Bridgett's cross-examination testimony. Id. During cross-examination Bridgett admitted that she was "high on methamphetamine" as she waited for Chambers in the car. 1 AA 85. Moreover, she testified that she never saw Chambers with a gun on the day of the shooting. 1 AA 86-87. The fact Bridgett admitted that she was on methamphetamine goes directly to her credibility. Even assuming, *arguendo*, that Bridgett was convicted of a misdemeanor petit larceny, that fact is far less damaging than the testimony elicited by Chambers during Bridgett's cross-examination.

Chambers cites to Yates v. State, 596 P.2d 239, 241, 95 Nev. 446, 449 (1979) to support his argument that crimes of dishonesty are admissible for impeachment purposes. AOB at 28. However, Chambers' reliance in Yates is misplaced. Yates involved a robbery and larceny, both felonies. Yates, 95 Nev. at 449, 596 P.2d at 241. The instant case involves a petit larceny misdemeanor. Moreover, in Yates, the State sought, as appellant seems to argue here, to present evidence of a prior conviction to impeach a witness pursuant to *NRS 50.095*. NRS 50.095(1) permits impeachment by showing that a witness was convicted of a crime "only if the crime was punishable by death or imprisonment for more than 1 year under the law under which the witness was convicted." A petit larceny conviction, as a misdemeanor, is

punishable by, at most, imprisonment for six months. NRS 193.150; NRS 205.240. Therefore, a petit larceny conviction could not be admitted under NRS 50.095.

Assuming, *arguendo*, that a petit larceny conviction were admissible as impeachment evidence, Chambers had the opportunity to introduce the petit larceny conviction to impeach Bridgett, despite the witnesses unavailability. See NRS 51.325(1); NRS 51.069. A conviction, even if admissible under NRS 50.085, cannot be proven by extrinsic evidence and Chambers would not have been permitted to question Bridgett about the facts surrounding her petit larceny conviction. As this Court stated in Drake v. State:

> "Further, we note that "[s]pecific instances of the conduct of a witness . . . other than conviction of crime" are not admissible for the purpose of attacking credibility. NRS 50.085(3). Even in the case of conviction of a crime, in order to be admissible for the purpose of attacking credibility the crime must be one "punishable by death or imprisonment for more than 1 year . . . ." NRS 50.095(1). Therefore, while a defendant might be entitled to ask a witness about an arrest record for prostitution, he would normally not be able to introduce extrinsic evidence of such a record if the only purpose of the evidence was to attack the credibility of the witness. NRS 50.085(3)."

Drake v. State, 108 Nev. 523, 527, 836 P.2d 52, 55 (1992); See also Butler v. State, 120 Nev. 879, 890-91, 102 P.3d 71, 79-80 (2004) (noting that parties may not impeach witnesses on collateral matters by introducing extrinsic evidence), overruled in part on other grounds by Lisle v. State, 351 P.3d 725 (2015); NRS 50.085(3). Therefore, even if Bridgett were questioned about her conviction at trial,

counsel was limited to a "yes" or "no" answer from Bridgett. Given Bridgett's other admissions on cross-examination, a "yes" or "no" answer would not have significantly undermined her credibility and any error, if it existed, was harmless.

Finally, Bridgett's testimony was not unique and her credibility, therefore, was less at issue. The State presented her testimony because it corroborated the testimonies of other witnesses at trial, specifically, Charles, and Bradley. Therefore, Chambers has failed to show prejudice or show how admitting Bridgett's preliminary hearing testimony violated his rights. Accordingly, Chambers' claims should be dismissed.

IV. The district court properly denied Chambers' motion for a mistrial because Chambers was not prejudiced by the State's remarks during its closing argument.

A "[d]enial of a motion for a mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal in the absence of a clear showing of abuse." Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993). Regarding prosecutorial misconduct, this Court applies a two-step analysis. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, this Court determines whether the prosecutor's conduct was improper, and then second, whether the conduct warrants reversal. Id.

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Id. at 1188, 196 P.3d at 476. The proper standard of harmless-

error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89, 196 P.3d at 476. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d 476-77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471 (1986)). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. at 1189, 196 P.3d at 476-77. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

Chambers argues that he was prejudiced by the State's comment during its closing argument. AOB at 31-35. However, commenting on Appellant's *conduct* after the crime was committed, does not constitute prosecutorial misconduct. Therefore, Chambers' arguments are unpersuasive.

During its closing the State made the following statement which prompted an objection from trial counsel: "So, let's consider what did [Chambers] *do* after the crime? What did he do? What didn't he do? He left, right? He didn't stay and talk to police, anything like that. He didn't tell his story, right?" 12 AA 1136 (emphasis added). Immediately, following trial counsel's objection, the district court

admonished the jury.[6] After the parties concluded their closing arguments, Chambers moved for a mistrial based on the State's comments about Chambers not telling "his story." 12 AA 1164. The district court noted that it gave a jury instruction "out of an abundance of caution." Id. The district court denied Chambers' motion, indicated it would review the JAVS regarding the State's closing argument, and once again, noted that its admonition to the jury cured any prejudice to Chambers. 12 AA 1165-1166. The next day the court indicated it listened to the JAVS "three times" and thought that "a reasonable person would understand the context [of the State's comment] was in connection with [Chambers] being silent right after the crime and not being silent here at trial." 12 AA 1197.

Here, the district court properly observed that the State's comment was made in a very limited context: Chambers' behavior after the crime, not Chambers' behavior at trial. A prosecutor's statements must be taken in context, as criminal convictions are not to be overturned lightly. Browning v. State, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) ("When reviewing prosecutorial misconduct, the challenged comments must be considered in context and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.") (internal quotations and citations omitted). The State's comment was not intended to direct

[6] The district court admonished the jury as follows: "The jury will disregard the last remark of the prosecutor regarding telling his story. Please strike that from your minds and don't consider it. Counsel may continue." 12 AA 1136.

the jury's attention to the fact that Chambers did not testify. Nor was the State's comment made regarding Chambers' right to invoke his right to remain silent during a police interview. Rather, the State's comment highlighted Chambers' flight from the crime scene and the fact that Chambers never told police that he acted in self-defense immediately after the incident. To the extent Chambers was prejudiced, the district court instructed the jury to strike the State's comment and not consider it. 12 AA 1136. The district court's curative instruction neutralized any prejudice that may have stemmed from the State's remarks, especially in light of the overwhelming evidence presented to the jury.[7] See Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (stating jurors are presumed to follow the district court's instructions). Since the State's comment referred to Chambers' conduct after the shooting, the comment was not one of constitutional dimension or one that infected Chambers' trial with unfairness as to deny his due process. Significantly, the State notes that Chambers' conduct after the shooting contradicted someone who supposedly acted in self-defense. Chambers' first instinct was not to contact the maintenance workers he saw when he entered Lisa's trailer or call an ambulance. Rather, following the shooting, Chambers opted to exit the front door of the trailer, walk past the maintenance workers while keeping silent of the fact he shot two

[7] The State does not concede that Chambers was prejudiced and any error occurred during trial.

people, and flee the scene. In fact, there is no record of Chambers contacting the authorities. Therefore, the State's comment was entirely permissible. Valdez, 124 Nev. at 1188-1189, 196 P.3d 476-477.

Additionally, assuming this Court finds the State's comment was improper, Chambers' claim still fails under a harmless error standard of review. Id. This is particularly true because Chambers cannot show a substantial right was prejudiced and given the evidence at trial a rational jury would have found Chambers guilty.

NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Constitutional error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001) (quoting Neder v. United States, 527 U.S. 1, 3, 119 S. Ct. 1827, 1830 (1999)). Non-constitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

Here, the State presented extensive and compelling evidence linking Chambers to the crime. The jury was presented with testimony from Lisa who previously knew Chambers and identified him as the shooter. Moreover, Lisa's testimony was corroborated by Daniel, Charles, and Bradley. All of these witnesses

testified they heard gunshots and saw Chambers exit Lisa's trailer as he held a gun in his right hand. Daniel specifically corroborated Lisa's testimony when he observed Lisa exit the back of her trailer while holding her arm and asking for assistance. The jury also heard testimony from Bradley and Charles that they observed Chambers escape in a gray vehicle that was parked near Lisa's trailer. Bradley testified that he saw a woman sitting in the passenger's side of the getaway vehicle and Bradley's testimony was corroborated by Bridgett. She testified that on the day of the incident she waited in the parked car, with Chambers' daughter, outside of one of the trailers at Van's. The jury also heard that Chambers told Bridgett a few days prior to July 9, 2013, that he was going "to come up" and "hit a lick." 1 AA 82-83, 84. Bridgett interpreted Chambers' comments to mean he planned on committing a robbery. The jury also heard live testimony from Cynthia. As a result of Cynthia's inconsistencies during her testimony, the State admitted portions of her recorded interview with police. The jury heard that Chambers admitted to Cynthia that on the day of the incident he called and said that "he got into some s***." See Partial Recording of Interview with Cynthia Lacey Admitted as State's Trial Exhibit 122.[8] Moreover, the jury heard Cynthia mention that days before the incident Chambers said he was going to do something stupid and brought home a

[8] Chambers noted that a Motion for Transmittal of Exhibits would be shortly submitted shortly after Chambers' opening brief was filed. The State is relying on Chambers' representations of Cynthia's interview.

gun that was kept in a black fabric holster.[9] Id.; Valdez, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (reasoning that "this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error."); see also United States v. Young, 470 U.S. 1, 11 (1985) ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context . . .").

Accordingly, Chambers' argument fails because any rational trier of fact would have found Chambers guilty beyond a reasonable doubt in light of the overwhelming evidence presented by the State.

V. The district court properly exercised its discretion when it adjudicated Chambers as a habitual criminal.

This Court reviews a district court's decision to impose habitual criminal status for abuse of discretion. Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993). Issues involving statutory interpretation are questions of law which this Court reviews de novo. Firestone v. State, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004). Additionally, when statutes are "plain and unambiguous, this court will give that

[9] At trial, Lisa specifically testified that the gun Chambers used to shoot her and murder Gary was kept in a nylon or cloth-like holster. 8 AA 760.

language its ordinary meaning and not go beyond it." State v. Allen, 119 Nev. 166, 170, 69 P.3d 232, 235 (2003).

Chambers avers that the district court erred in sentencing him as a habitual criminal because the State failed to provide timely notice, under NRS 207.016, of its intent to seek habitual criminal treatment. AOB at 36-47. Additionally, Chambers contends that the district court abused its discretion by adjudicating him as a habitual criminal because most of Chambers' convictions were stale. Id. Chambers' arguments are unpersuasive. The State addresses each argument in turn.

a) 2007 Version of NRS 207.016(2)

On the morning of the first day of trial, February 21, 2017, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. 1 AA 170-172. After Chambers' trial, and prior to sentencing, the State filed a sentencing memorandum requesting the Court adjudicate Chambers as a habitual criminal under NRS 207.010 and NRS 207.012. 3 AA 281-289. In its memorandum the State cited to Butler v. State, 2016 Nev. App. Unpub. LEXIS 456, 1 (Nev. Ct. App. Nov. 18, 2016) to support its position that the district court should apply the 2007 version of NRS

207.016(2) because the 2013 amendment to the statute did not take effect until *after* the crimes were committed.[10][11] 3 AA 281-289 (emphasis added).

At sentencing Chambers argued, as he does here, that the district court should apply the 2013 amended version of NRS 207.016. 4 AA 314-316. Under the amended statute Chambers argued that the State was required to give Chambers notice of its intent to seek habitual treatment two days prior to the start of trial. Id. In considering Chambers' argument regarding the State's intention to seek habitual treatment the district court made the following observations:

> COURT: But [Chambers] knew that in the settlement discussions before trial because you have statements by the District Attorney's office that they intended to pursue habitual treatment.
>
> TRIAL COUNSEL: Right, but --
>
> THE COURT: So, maybe the formal notice wasn't done but [Chambers] had notice so he knew what he was facing and could have factored that into his decision whether to take whatever offers were presented to him.

4 AA 320. Prior to sentencing Chambers as a habitual criminal, the district court noted that there was a "history of repeated and escalating violence" on Chambers'

[10] The 2013 amendment took effect on October 1, 2013. The crimes in the instant case took place on July 9, 2013.

[11] At the time of the sentencing memo, Court of Appeals unpublished opinions could be cited for persuasive value. NRAP 36. (amended October 12, 2017, to permit citations only to Supreme Court unpublished decisions for persuasive value.)

part. 4 AA 325-326. The district court also noted that prior felony convictions were not "too remote in time considering the violence [] involved." Id. The district court also contemplated the fact that there were "only brief periods of time when [Chambers] . . . stayed out of trouble while not in custody." Id. The district court concluded by finding as follows:

> COURT:
>
> I think [Chambers], as evidenced by the prior felonies, is a danger to community [sic]. I think there's [an] extremely remote chance of rehabilitation. It's a horrible situation but a life was taken under violent circumstances. So, for all these reasons, and the Court has considered all of the felony convictions that are in record here, the Court is gonna treat the Defendant as a large habitual felon.

Id.

This Court should apply the 2007 version of NRS 207.016(2). The 2007 version of NRS 207.016(2) provided as follows:

> If a count pursuant to NRS 207.010, 207.012 or 207.014 is included in an information charging the primary offense, each previous conviction must be alleged in the accusatory pleading, but no such conviction may be alluded to on trial of the primary offense, nor may any allegation of the conviction be read in the presence of a jury trying the offense or a grand jury considering an indictment for the offense. A count pursuant to NRS 207.010, 207.012 or 207.014 may be separately filed after conviction of the primary offense, but if it is so filed, sentence must not be imposed, or the hearing required by subsection 3 held, until 15 days after the separate filing.

2007 Nev. Stat., ch. 327, § 56, at 1441.

This is particularly true because the crimes in this case took place over two months prior to the 2013 amendment taking effect. Chambers argues that this Court should apply the 2013 version of NRS 207.016(2) because the law went into effect prior to Chambers' arraignment on October 14, 2013. AOB at 37. However, this argument is unpersuasive because this Court has reasoned that "unless the Legislature clearly expresses its intent to apply a law retroactively, Nevada law requires the application of the law in effect *at the time of the commission of a crime*." See State v. Second Judicial Dist. Court (Pullin), 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008) (emphasis added).

Here, as the Nevada Court of Appeals observed in Butler, the 2013 version of NRS 207.016(2) does not indicate that it should apply retroactively. 2016 Nev. App. Unpub. LEXIS 456, 1 (Nev. Ct. App. Nov. 18, 2016). While Chambers alleges he did not have formal notice that the State intended to seek habitual treatment, the Court should reject this argument because Chambers had notice. The 2007 version of NRS 207.016(2) required the State to (1) allege the previous convictions in the accusatory documents and (2) file its habitual criminal notice after conviction, however, not more than 15 days prior to Chambers' sentencing. The State complied with these requirements. First, in its accusatory pleading, filed on the October 10,

2013, the State noted under Count 6 three of Chambers' previous felonies.[12] 1 AA 1-4. This placed Chambers, and his counsel, on notice that the State was aware of his previous felony convictions and could seek habitual treatment. Second, the State filed its habitual criminal notice on the morning of February 21, 2017, before trial commenced. 2 AA 170. By filing the habitual criminal notice on the first day of trial the State gave Chambers notice that it was seeking habitual treatment three months prior to Chambers' sentencing on May 23, 2017. 4 AA 310. The three month notice was well in advance of the 15 day statutory requirement as set forth in NRS 207.016(2); see Crutcher v. Eighth Judicial Dist. Court, 111 Nev. 1286, 1289, 903 P.2d 823, 825-26 (1995) (explaining that because habitual criminal enhancements affect the sentencing stage of the proceedings the legislature intended that it be charged before sentencing), overruled on other grounds by Hodges v. State, 119 Nev. 479, 78 P.3d 67 (2003). Consequently, Chambers had both constructive and formal notice that the State planned to request habitual treatment in his case. Accordingly, this Court should reject Chambers' argument.

[12] The Information listed the following felony convictions: (1) a 2003 Robbery With Use of a Deadly Weapon and First Degree Kidnapping; (2) a 1997 Larceny from the person in Case No. C142992; and (3) a 1997 Larceny from the person in Case No. C142991. Id.

b) 2013 version of NRS 207.016

Chambers argues that the current version of NRS 207.016, which was amended in 2013, applies to the instant case. AOB at 37-39. NRS 207.016(2) provides as follows:

> If a count pursuant to NRS 207.010, 207.012 or 207.014 is included in an information charging the primary offense, each previous conviction must be alleged in the accusatory pleading, but no such conviction may be alluded to on trial of the primary offense, nor may any allegation of the conviction be read in the presence of a jury trying the offense or a grand jury considering an indictment for the offense. A count pursuant to NRS 207.010, 207.012 or 207.014 may be filed separately from the indictment or information charging the primary offense, but if it is so filed, the count pursuant to NRS 207.010, 207.012 or 207.014 must be filed not less than 2 days before the start of the trial on the primary offense, unless an agreement of the parties provides otherwise or the court for good cause shown makes an order extending the time. For good cause shown, the prosecution may supplement or amend a count pursuant to NRS 207.010, 207.012 or 207.014 at any time before the sentence is imposed, but if such a supplement or amendment is filed, the sentence must not be imposed, or the hearing required by subsection 3 held, until 15 days after the separate filing.

If the Court applies the current version of NRS 207.016(2), it should find that Chambers was on notice that the State intended to seek habitual treatment for several reasons. Chambers argues that the State should have placed him on notice that it intended to seek habitual treatment by his arraignment date: October 14, 2013. AOB at 37. However, Chambers was given notice of his prior felony convictions in the

accusatory pleading filed on October 10, 2013. 1 AA 1-4. Regardless, under both versions of the statute Chambers was placed on notice of his prior convictions because the State included them under Count 6 of the Information. Id. The current version of NRS 207.016(2) requires the State to file its habitual criminal notice two days before the start of trial, unless the district court finds "good cause" for the delay.

Here, the State filed its habitual criminal notice and the district court accepted the State's filing. 2 AA 170. In the context of late notices regarding rebuttal witnesses, this Court has applied an abuse of discretion standard to district court's finding of good cause to excuse a prosecutor's failure to comply with notice requirements. Butler, 120 Nev. at 892, 102 P.3d at 80. In Butler, the Court found that the district court did not abuse its discretion by allowing the State to file a late notice. Id. Specifically, this Court found that the State had "previously given Butler at least some verbal notice" of its intent to call certain rebuttal witnesses. Id. In the instant case, Chambers had more than mere verbal notice of the State's intent to seek habitual criminal treatment.

Along with its habitual criminal notice the State included an affidavit from the trial deputy. Id. The affidavit noted that over two years prior to trial, on October 23, 2014, the State extended Chambers an offer via his attorney. Id. At the time, the State conveyed to Chambers' attorney that it reserved its right to argue for habitual criminal treatment. Id. Nine months prior to the start of trial the State conveyed to

trial counsel, via email, that it intended to seek habitual treatment under NRS 207.012. Id. These two communications with trial counsel placed both trial counsel and Chambers on notice that the State would seek habitual treatment. As discussed above, during sentencing, the district court noted that throughout the settlement discussions it seemed that the State intended to pursue habitual treatment. 4 AA 320. Trial counsel admitted this much was true by simply responding, "[r]ight." Id. Lastly, Chambers was not prejudiced by the State filing its notice seeking habitual treatment on the first day of trial. Chambers fails to address how an extra 48 hours of notice, prior to trial, would have resulted in a more favorable outcome. This is particularly significant because the State's filing placed Chambers on notice of the State's intent months before Chambers was sentenced. Moreover, as trial counsel acknowledged during sentencing, Chambers knew of the possibility of habitual treatment "based on his knowledge of [] his priors." 4 AA 320. Chambers had notice of his own prior felony convictions and considering the totality of the circumstances presented, Chambers also had notice that the State intended to seek habitual treatment. Therefore, the district court did not abuse its discretion by allowing the State to file its criminal habitual notice on the first day of trial.

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c) The prior felony convictions used to adjudicate Chambers as a habitual criminal were not stale.

This Court reviews a district court's decision to impose habitual criminal status for abuse of discretion. Clark, 109 Nev. at 428, 851 P.2d at 427 (1993). In determining the appropriate sentence within the statutory limits, the district court has discretion to consider defendant's prior bad acts. See Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) ("Possession of the fullest information possible concerning a defendant's life and characteristics is essential to the sentencing judge's task of determining the type and extent of punishment.").

Here, the district court had discretion to consider Chambers' criminal convictions and properly exercised that discretion when it sentenced Chambers under the large habitual criminal statute. During sentencing, the district court acknowledged it received and reviewed the State's sentencing memorandum. 4 AA 312. In its memorandum, the State expanded on Chambers' criminal history and his prior felony convictions stemming from 1990 until 2002. 3 AA 281-289. The district court further acknowledged that Chambers had "six prior felony convictions."[13] 4 AA 325. After considering Chambers' prior felony convictions,

[13] Chambers argues that the three 2003 felony convictions arising out of Case No. C185775 should only be counted as one "prior conviction." AOB at 50. Assuming, *arguendo*, this is factually true, Chambers would still be considered a four-time

the district court exercised its discretion, and determined that the convictions were "not too remote in time." 4 AA 326. The district court observed that the two felonies from 2002 were violent and that there were only "brief periods of time" when Chambers stayed out of trouble while not in custody. Id. Lastly, the district court found that Chambers represents "a danger to the community." Id.

A review of the record demonstrates that the district court understood its sentencing discretion. Specifically, the district court considered the parties' arguments, the nature of the crime, the alleged staleness regarding Chambers' prior felony convictions, and exercised its discretion by adjudicating Chambers as a habitual criminal. 4 AA 310-328; See O'Neill v. State, 123 Nev. 9, 15, 153 P.3d 38, 42 (2007); Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) ("NRS 207.010 makes no special allowance for non-violent crimes or *for the remoteness of convictions*; instead, these are considerations within the discretion of the district court.") (Emphasis added). Therefore, Chambers' prior felony convictions were not stale. Accordingly, Chambers' claims should be denied.

VI. 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

convicted felon. Regardless, Chambers was eligible for habitual criminal treatment due to his four felony convictions. NRS 207.010.

error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). Appellant must present all three elements to succeed in proving a cumulative error claim. 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)).

Here, as discussed supra, Chambers fails to demonstrate any error, let alone cumulative error sufficient to warrant relief. Chambers' guilt is evident based on the evidence presented at trial. Chambers argues that the "only direct evidence that he committed any crimes was the testimony of a proven liar and drug dealer." AOB at 51. The State disagrees. First, whether Lisa was a drug dealer is irrelevant. Second, Lisa identified Chambers as the person who shot her and killed Gary. Third, Lisa testified before the factfinder. The jury heard her testimony, weighed it, and concluded her testimony was credible. Moreover, Lisa's testimony was closely corroborated by Daniel, Charles, and Bradley—all of which observed Chambers exit Lisa's trailer with a gun in his hand. The jury also heard testimony from Bridgett and Cynthia which provided key insights as to Chambers' motives leading up to the crimes in this case. The evidence overwhelmingly supported Chambers' conviction. Therefore, Chambers' claim of cumulative error is meritless and this Court should affirm Chambers' Judgment of Conviction.

Lastly, the State submits that if any errors were committed during trial, those errors should be subject to a harmless error analysis in light of the overall record. Pursuant to NRS 178.598, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001). Here, as discussed supra, the State presented extensive and compelling evidence linking Chambers to the crime. Accordingly, because any rational trier of fact could have found the Chambers guilty of all charges, beyond a reasonable doubt, Chambers' arguments fail.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court order the Judgment of Conviction AFFIRMED.

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/ / /

Dated this 16th day of November, 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 proportionately spaced, has a typeface of 14 points and contains 10,765 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 16th day of November, 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 November 16, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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