IN THE SUPREME COURT OF THE STATE OF NEVADA

KEANDRE VALENTINE, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 74468

APPELLANT'S AMENDED OPENING BRIEF

(Appeal from Judgment of Conviction)

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Appellant,	)	
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vs.	)	
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THE STATE OF NEVADA,	)	
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Respondent.	)	
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ROUTING STATEMENT

Keandre Valentine's appeal is not presumptively assigned to Court of Appeals because his convictions arise from a jury verdict involving 11 category B felonies and 3 category E felonies[1] and he challenges more than sentence imposed or sufficiency of evidence. NRAP 17(b)(1).

Court should hear Keandre's appeal because it involves several matters of first impression involving the State's improper use of DNA evidence, court allowing jury to read grand jury testimony at trial, State purposely withholding discovery, inappropriate rebuttal evidence, structural error occurring when court decided Step 3 of a venire challenge, and other issues. NRAP 17(a)(10).

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[1] See footnote 4.

JURISDICTIONAL STATEMENT

NRS 177.015 gives Court jurisdiction to review appeal from jury verdict. IV:819-22. District court sentenced Keandre on 09/28/17 (XIII:2958-89) and filed judgment on 10/16/17 (IV:827-31). Keandre filed Notice of Appeal on 11/06/17. IV:832-36.

ISSUES PRESENTED FOR REVIEW

I. EVIDENCE INSUFFICIENT.

II. COURT CREATED STRUCTURAL ERROR BY PREJUDGING KEANDRE'S CHALLENGE TO THE VENIRE.

III. KEANDRE'S RIGHT TO DUE PROCESS AND CONFRONTATION WERE VIOLATED BY COURT ADMITTING THE ENTIRE GRAND JURY TESTIMONY OF SEVERAL WITNESSES.

IV. KEANDRE'S RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN COURT REFUSED TO ADMIT ALL THE PHOTOGRAPHS OF BOBBY McCOY.

V. KEANDRE'S RIGHT TO DUE PROCESS WAS VIOLATED BY COURT ALLOWING STATE TO VIOLATE DISCOVERY RULES AND ORDERS WITHOUT GRANTING A MISTRIAL.

VI. STATE COMMITTED PROSECUTORIAL MISCONDUCT AND VIOLATED DUE PROCESS BY PRESENTING IMPROPER REBUTTAL EVIDENCE.

VII. PREJUDICIAL ERROR OCCURRED BY COURT ALLOWING JURY TO HEAR AND READ PORTIONS OF KEANDRE'S JAIL CONVERSATIONS.

VIII. JURY INSTRUCTION ERRORS.

IX. PROSECUTORIAL MISCONDUCT.

X. CUMULATIVE ERROR.

STATEMENT OF CASE

On 06/29/16, State filed an Indictment charging Keandre Valentine with 14 felony counts involving crimes of robbery with use of a deadly weapon, attempt robbery with deadly weapon, burglary while in possession of a firearm, possession of personal identifying information, and possession of credit cards without consent.[2]

At his district court arraignment on 07/07/16, Keandre pled not guilty; trial was continued twice. IV:885-89;*Minutes*-IV:842;IV:890-93;899-903;*Minutes*-IV:843-847. Prior to trial, Keandre filed an alibi notice (III:518-19) and several motions, as did the State.

The 10 day jury trial began on 07/24/17, concluding on 08/04/17[3] with the jury returning guilty verdicts on all counts.[4]

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[2] Counts and charges (Footnote 4); Indictment (I:001-6); GJ testimony (I:009-113).

[3] **DAY 1**: 07/24/17 (*Appendix*:V:937-1153; VI: 1164-1238) (*Minutes*-IV:855-57); **DAY 2**: 07/25/17 (VI:1239-1401;VII:1402-1426)(*Min.*-

On 09/28/17, court sentenced Keandre to an aggregate sentence of 8 to 48 years. XIII:2958-89;*Minutes*-IV:879-81.

STATEMENT OF FACTS

This is a case of mistaken identification. Keandre Valentine contended he never committed any robberies and thought Bobby McCoy was the culprit. XIII:2874-75. Both men were African-American with similar physical characteristics but different in height. XIII:2875-77; Exhibits-XIV:2991;XV:3241-32473251. Bobby self-reported as 5'10" tall and 145 lbs. whereas Keandre was 6'2¾". IV:816;XII:2606;2678. Both were staying at an apartment where evidence from the robberies was found. Keandre argued the misidentification occurred because identification

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IV:858-89); **DAY 3**: 07/26/17 (VII:1427-1625) (*Min.*-IV:860-61); **DAY 4**: 07/27/17 (VIII:1626-1799)(*Min.*-IV:862); **DAY 5**: 7/28/27 (IX:1800—2021)(*Min.*-IV:863-64); **DAY 6:** 07/31/17 (X:2022-2269; XI:2270-2342)(*Min.*-IV:865-66); **DAY 7:** 08/01/17 (XI:2342-2519;XII:2520-2429)(*Min.*-IV:867-68); **DAY 8:** 08/02/17 (XII:2530-2760;XIII:2770-2812)(*Min.*-IV:869-71); **DAY 9**: 08/03/17 (XIII:2813-1947)(*Min.*-IV:872-73); **DAY 10:** 08/04/17 (XIII:2948-2956)(*Min.*-IV:874-75).

[4] Jury returned guilty verdicts: *Robbery with use of a deadly weapon* (NRS 200.380;193.165) as listed in Counts 1, 3, 4, 6 ,7, 9, and 11; *Burglary while in possession of a deadly weapon* (NRS 205.060) in Counts 2, 5, and 10; *Attempt Robbery with deadly weapon* (NRS 200.380;193.330. 193.165) in Count 8; *Possession of personal identifying information* (NRS 205.465) in Count 12; *Possession of credit card without consent* (NRS 205.690) in Counts 13-14.

procedures used by the police were suggestive or the witnesses were mistaken. XIII:2882-93.

State contended Keandre committed the crimes because he was the one identified by the witnesses. XIII:2865-68.

The events in this case began around Memorial Day weekend 2016 – a time visitors came to Las Vegas to celebrate the holiday. Chanise William's friends began arriving at her apartment the Thursday and Friday before the weekend. XII:2596. The plan was to chill at her apartment and party together or with other friends. XII:2630;2626. Those staying with Chanise that weekend were: Keandre Valentine (Chanise's cousin), Bobby McCoy, Omara McBride, Damian Trayler, and Chanise's sister, niece, and nephew. IX:1811;X:2281-2;XI:2347;XII:2596-97;2627.

Omara arrived at Chanise's apartment with Keandre, Bobby and another woman on Friday, 05/27/16, in the morning or afternoon. XII:2620;2653;2659. Their arrival marked Chanise's first opportunity to see Omara's new white Mazda, purchased by Omara in California before the trip to Las Vegas. XII:2596-97;2611;2616;2622;2646;2653. Chanise

believed Keandre and Omara drove from California to Las Vegas that Friday but was not sure. XII:2646;2653;2659.[5]

Friday night, the girls went out. XII:2653. Omara parked her white Mazda at the D Casino around 11:26 pm, leaving it for two hours.[6] XII:2629. Chanise remembered walking down Freemont and spending time at the Gold Spike and D casino. XII:2597-2600. Upon returning to the apartment around 3:00 or 4:00 am, Chanise thought she saw Damian, Bobby and Keandre inside. XII:2600-01;2656. She was not sure where Bobby was in the apartment but Keandre was in her bed and Damian went to her son's room. XII:2627;2630-31;2639;2647. She put on her PJ's and fell asleep on the couch. XII:2601;2617;2640.

The next morning, on Saturday 05/28/16, between 7:30 and 8:00 am, Chanise learned police were on the parking lot of her apartment complex investigating Omara's Mazda. IX:1811;X:2133-39; XII:2603;2632;2648; XV:3343-44. Omara came outside to see what was happening and identified the white Mazda as her car. X:2139;2214-18. Chanise also came out to talk to the police. IX:1849-50.

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[5] Keandre told detectives he helped his girlfriend Omara purchase her new 2016 Mazda 3. They arrived in Las Vegas together. XI:2341-48.

[6] Mathew Gambardella's testimony at XII:2588-94;XII:2628-30.

METRO officers were investigating a series of robberies occurring that morning involving a white Mazda. X:2195-2219. When they located Omara's white Mazda, they noticed the hood was warm to the touch, suggesting to them it had recently been driven. X:2137;2214.

After learning the apartment number Chanise and Omara were staying in, Officers entered apartment #218 and detained two males found inside. X:2144;2214-18. Chanise said she did not know who was in the apartment when she went to the parking lot to find out what was going on. XII:2631-32. She did not know when Bobby left. XII:2648. Keandre was detained by police after he was found in bed under the covers wearing flip flops. IX:1813-15;X:2219-21. Police froze the apartment until a search warrant was obtained. IX:1810-19;1854.

The team called to the scene to search Chanise's apartment and the car involved: Detective Ludwig (IX:1804-1859); Officer Ubbens (VII:1176-76) CSA Smith (VII:1543-85); Detective Majors (X:2181-2321); and Officer Wise (X:2128-61).

CSA Smith photographed Omara's 4-door Mazda which had a SKYACTIV Technology emblem on the back; and, in lieu of license plates a black, blue, and white dealer advertisement. VII:1549-2;Exhibits-XV:3233;3343-44. A yellow sticker on the windows suggested the windows

were recently tinted. VII:1553-4. Smith dusted the inside/outside for fingerprints, discovering five latent prints. VII:1552-59.

Later, latent print examiner Gayle Johnson examined the latent prints found on Omara's Mazda. X:2091-2177. Johnson identified four people. Bobby McCoy's right middle finger was found on the exterior right front door below the handle. X:2099. Latasha Allen's right thumb was on the right rear exterior door, along the back edge. X:2097-8. Keandre's right index finger and right middle finger were on the left front-door window. X:2099. An unknown person's print was found on the right rear exterior door handle. X:2098. Other prints were insufficient for identification. X:2093-95.

CSA Smith also photographed and documented the evidence impounded by detectives found inside Chanise's apartment after police obtained a search warrant. VII:1558;1572. A Glock M model 27 handgun was found in two pieces: the slide was found in the NE bedroom and the frame in the SE bedroom. VII:1562-62VIII:1781-82;IX:1822-26. Cartridges for the gun were located in the SE bedroom. VII:1571;IX:1824-25;VII:1786. Smith swabbed the gun for DNA; he recovered no fingerprints. VII:1567.

Other items impounded from the apartment included several cell phones (located in various places), a Visa debit card in the name of Rose Ramirez, and Jordan Alexander's Wells Fargo debit card and Nevada ID (found in the master bedroom). VII:1567-70;VIII:1786-96;IX:1826-29. Cell phones impounded included one Samsung and two IPhones. VIII:1786-96;IX:1820-22;X:2262. No cash or jewelry was recovered. VII:1581; IX:1843. Smith did not attempt to obtain prints or DNA from the cell phones, the ID cards or the credit cards. VII:1582;X:2265-66. Bobby McCoy was not found inside the apartment. IX:1843.

Chanise testified she knew nothing about the debit cards and ID found in her bedroom - she did not put them there. XII:2638-39 As the cell phones, she had several; she thought her visitors had IPhones. XII:2635-37. Chanise never saw anyone with a firearm or bullets and did not know these items were in her apartment. XII:2634-35;2641-42.

As to the swab of the gun, at trial, forensic scientist Beata Vida testified that only a partial DNA profile was obtained. X:2061-67. The DNA profile was of at least 2 people, one being male. X:2087-85. Because the DNA profile did not meet standards allowing for a useable comparison, she gave no opinion and made no further conclusion. X:2066-67.

The reason police were at Chanise's apartment complex that morning was because METRO was investigating five robbery separate incidents involving a white car which they believed was Omara's Mazda.

The **first robbery** took place on Thursday, 05/26/16 at 12:58 pm. VIII:1469. Marvin Bass testified that a white Kia pulled up within 20-25 feet of his car while parked at the Rancho Discount Mall. VII:1469-72;1479. Marvin initially described the car as a white 2-door without plates but later as a 4-door Kia or Fiat. VII:1479;1492-93;1535;1539-40. Marvin also claimed that in lieu of plates there was a white cover; but at the grand jury he said there was a red and white dealer plate. VII:1493-94.

Marvin testified that a black male exited the car and walked towards his driver side window. He described the male as in his mid-20's, with a medium short afro, 6 feet, or 5 feet 10 or 11 inches tall, 160 lbs. VII:1495-6;XIV:3009. On the day of the incident he described the man as a "tall black male adult...20 years old and 6 feet tall, 150 lbs., short afro." X:2187-88. The man pointed a gun at Marvin with his left hand, announced a robbery, and demanded his gold, money, and wallet. VII:1473. Marvin described the gun as a 9mm Glock. VII:1537. With his right hand, the male reached inside the car grabbing Marvin's gold chains with charms off Marvin's neck. VII:1473. When he asked for Marvin's cell phone, Marvin

told him he did not have one. VII:1474. After patting Marvin down, the man told Marvin to look down. However, once he knew the car was driving away, Marvin called 911 and followed the car until he lost sight of it. VII:1476-81.

Police took Marvin's report that same day. VII:1480-81;1493-94. Detective Majors responded, recording his interview. X:2183-88. Majors went to EZ Pawn and impounded a video regarding the incident but the video was missing at the time of trial. X:2295-2300.

The other **four robbery incidents** being investigated by METRO occurred on Saturday, 05/28/16, between 6:53 am and 7:08 am, involving a young African-American male and a white Mazda.

Between 6:53 and 7:00 am, on 05/28/16, while Darrell and Deborah Faulkner were inside their garage, packing items in boxes, a black male pointed a gun at them and told them to get on the ground or he would shoot. IX:1906-10;1957-63. Both sat down. IX:1911. The gun was a black Glock which he held in his left hand. IX:1959;1977. The man asked Darrell where their valuables were and Darrell handed him $100 from his wallet but refused to give-up his wallet. IX:1912;1962-65;1969. The man directed Deborah to dump her purse on the ground but took nothing from her purse or her. IX:1914;1965-66.

When the man left, they closed the garage door and called the police. IX:1915:1966-70. Darrell described the black man as young, slender, goatee, short Jeheri curls, wearing a short sleeved black or navy shirt and black pants or jeans. IX:1979-84. His initial description of the suspect was that he was a black male adult, 18-19 years old, small build, wearing black shorts or blue jeans with a black shirt and blue tennis shoes. X:2195.

Majors and Officer Wise responded to the Faulkner's call. X:2128-2161;X:2195-99. While talking to the Faulkners Majors heard over the radio other robberies were taking place only a few blocks away. X:2199-2209.

At some point, Majors took Darrell to a show-up on the parking lot of Chanise's apartment. The show-up included two possible suspects: Keandre and Damian. Darrell identified Keandre as the perpetrator. IX:1971-73;1987-88;X:2222-;2254-56.

The show-up and the witnesses were photographed by Smith. VII:1574;X:2287-88. In the pictures, Keandre and Damian are substantially different in height and dissimilar in appearance. IX:1841;Exhibit-XIV:30493051XV:3239. Witnesses at the show-up identified Keandre, who had several tattoos on his lower and upper left arm and a tattoo on the inside right wrist, as the suspect, even though none of the witnesses

described a perpetrator with tattoos. Both men stood for the show-ups. IX:1855. The men were not similar in physical characteristics.

During the show-up, victims were 20-15 feet away from the suspect in the show-up. IX:1832. However, an investigator measured the area and determined the victims were 77 or 90 feet away from the suspects. XII:2687. Keandre was in handcuffs.

As part of the show-up procedures, METRO used show-up forms. IX:1834-39. However, the show-up form for Darrell was missing at the time of trial. VIII:2222;2254-55.

At trial, Darrell and Deborah identified Keandra. VI:1925;1973;1990. But when shown a picture of the gun recovered by the police from Chanise's apartment, Darrell was unsure if it was the same one used by the suspect. IX:1985;1990.

At 7:01 am, on 05/28/16, while packing up his mother's car for a trip, Jordan Alexander noticed a brand new white Mazda, 4 door, without license plates, park 10 feet or 3 feet away. VII:1586-90;1671-71. As he turned to exit his car, a black male stood next to him, with a black gun in his left hand, and said: "Give me everything you got." VII:1590;1663-64;1673. Jordan gave the man his wallet, containing his identification, social security card, and Wells Fargo debit card. VII:1590-93.

As the man drove away, Jordan noticed the car had a SKYACTIVE symbol, Mazda emblem, tinted windows, and no license plate. VII:1594-95;1658-61;1659-63. Jordan ran inside, told his mother to call police, and took off after the suspect in his own car. Within 5 minutes he saw a police car, stopped the officer, and explained what occurred. VII:1595-99. He described the male as African-American, with short hair and thin. VII:1613-23. But Jordan also described the black male as 200 lbs, 5'10", young, messy afro, like starting to grow dreads. VII:1664-66.

Later, Jordan was taken to the show-up at Chanise's apartment where he identified Keandre. VII:1605-9;1611-14. At trial he identified Keandre, the debit and identification cards taken from him, and the Mazda. VIII:1591;1609-11;1612-16.

Around 7:00 am, on 05/28/16, while in the driver's seat of his truck in front of his home, Lazaro Bravo-Torres saw a dark skinned male approach. IX:1926-35. The male asked for directions and then walked towards him with a small black handgun in his right hand, saying: "Don't move or I will shoot you." IX:1935-36;1942;1955.

Lazaro was waiting for his wife Rose Vazkuez-Ramirez who was walking to the truck when the man approached. IX:1870-74. Rose opened the truck door and sat in the passenger seat when she heard her husband

curse. Rose saw the man had a gun. IX:1875-76. The man forced her husband to exit the truck and told her not to move when she got out or he would shoot her. IX:1876. The man searched Lazaro's pants but he did not have a wallet on him. IX:1878.

The man then climbed inside the truck and went through the items in the middle but did not take Lazaro's cell phone which was in the console. IX:1940-42. When the man took Rose's purse, Lazaro told the man the purse belonged to his wife. IX:1940. Inside Rose's purse were her Samsung phone, bank cards, identification, and some money. IV:1879. After taking the purse, the man told Lazaro and Rose to get back inside the truck and drive away. IX:1880. As they drove away, Rose called the police.[7] IX:1942.

Police eventually took Rose and Lazaro for a show-up at Chanise's apartment complex. Police did not use the Spanish show-up forms for Lazaro and Rosa but an officer read the English version in Spanish. IX:1835-41. Rose said she identified one of the men based on his height, weight, and hair. IX:1883-88. Lazaro was taken separately to the show-up and also identified Keandre, saying he was taller. IX:1945-49.

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[7] The truck was photographed and processed for latent prints but none were recovered. X:2119-27.

Lazaro identified Keandre in court. IX:1949. However, at trial, Rose could not identify Keandre, saying she thought Keandre was much taller than the suspect; but after the court took a recess she came back to testify, identifying Keandre. IX:1988-1900. However, Rose noted the prosecutor told her Keandre was found with her belongings and the detectives told her some of her items were found in the apartment he was in. IX:1900-01. Thus, is unclear how this affected her testimony.

At 7:08 am, on 05/28/16, Santiago Garcia was working with Juan Carlos, cutting a tree in the front yard of a home. VIII:1682-83. Juan was on the roof and Santiago on a 12 foot ladder. VIII:1686;1692-3. While on the ladder, Santiago observed an African-American man park a white Nissan, with no license plate, three houses away. The man walked towards the home Santiago was at, opened the gate, and pointed a gun at them. VIII:1684-87;1685;1696. Santiago described the gun as a 9mm semi-automatic. VIII:1692-3. He described the male as medium build and 6 ft. tall. VIII:1771.

When the man told them to get down, Juan went backwards and out of sight. VIII:1686-87;1689. While the gun was pointed at Santiago, the man told him to turn off the trimmer and come down. VIII:1690. Santiago

obliged. The man asked for money or whatever he had and Santiago gave him his IPhone 6 and $500 in cash. VIII:1691-92.

Police arrived approximately 5 minutes after Santiago used the homeowner's phone to call. VIII:1694;X:2209-11. Because Santiago does not write English, the homeowner filled out the police form for him based on his instructions. VIII:1696.

Later, police took Santiago to Chanise's apartment complex where he identified the white car he saw during the robbery as the white Mazda belong to Omara. VIII:1698-1701. He was later taken for a show-up where he identified Keandre by the shape of his head and his beard. VIII:1701-07. He also identified him at trial.

At trial there was some confusion as to his identification of his cell phone. At the grand jury, Santiago identified several different pictures as his IPhone 6 only to admit confusion at trial as to whether any of the pictures showed his IPhone 6. VIII:1701-12;1724-67. In a question, jurors asked if he could turn on the phone that was impounded to see if it was his but the battery was depleted. VIII:1775.

After Keandre was arrested, on 06/01/16, Majors showed Marvin a photographic lineup and he identified Keandre as the person who took his jewelry. VII:1481-88;1498-1502;Exhibit–XIV:3158;XV:3231. However,

none of the other suspects in the lineup matched the description he gave of the suspect at the time of the incident. VII:1501. None of the property taken was returned to him. VII:1502;1503.

In its case-in-chief, Defense presented Dr. Steven Smith. Dr. Smith explained mistaken identifications may occur when a witness is under high levels of stress, such as having a gun pointed at them during a robbery or by being subjected to suggestible identification procedures. XI:2366-73;2477; 2503-04.

Dr. Smith opined the show-up conducted in this instance was flawed because the witnesses were too far away from the suspects to allow the witnesses to make an accurate comparison between what they remembered the suspect looked like and what they were viewing in the show-up. XI:2374-75;2377-79;2507. Another problem was that the Damian, the person standing next to Keandre in the show-up, did not look like the witness' recollection. XI:2375-78;XIV:3048-49. Dr. Smith noted that the description witnesses gave of the perpetrator would not include Damian, the man standing next to Keandre in the picture, because he was not thin, did not have an afro, and was much shorter. XIV:2377;XIV:3049;X:2319.

A third factor undermining the reliability of a show-up occurs if witnesses are shown a person who looks similar to the perpetrator.

XIV:2379-80. Having reviewed pictures of Bobby McCoy and Keandre, Dr. Smith opined that they look similar and that Bobby also fit the description the witnesses recounted. XIV:2380;XI:2460.

Cross-racial identifications can also play a factor in misidentifications. XI:2431. Only two of the alleged victims were the same race as the perpetrator. XI:2432.

While an admonishment may alleviate some suggestive factors, XI: 2440. Dr. Smith said the admonishment given to Jordan Alexander was good but would not completely alleviate the suggestibility factor. XI:2441-43. Likewise, the admonishment given to Bass did not completely erase suggestibility because one of the few identifiers he initially used was that the perpetrator had a short afro. XI:2443-47;2497. The effectiveness of admonishments depends on whether the witness comprehends the warning but does not alleviate the bias. XI:2499-2500.

Dr. Smith also examined the photo spread shown to Bass. XIV:3158. In his opinion, the photo-spread was tainted because it only contained one picture of a person with an afro that came close to the description given by the witnesses – photo 3. XI:2381-85;2445-46. Also, when using a photo-spread it is advisable to do a double bind meaning the person showing the photo-spread does not know which subject the police are targeting. XI:2389.

In this instance, the officer driving the witness to the scene knew that there was a suspect being presented who may likely be the perpetrator. XI:2506

With regard to a witness' confidence in their selection of a suspect, Dr. Smith said studies showed "there is no relationship between confidence and accuracy." XI:2385;2510-11. Each time a witness is asked to identify someone, their confidence increases even if they are identifying the wrong person. XI:2385-86;2501-02.

Accordingly, the errors in the process tainted the witnesses identification of a suspect, allowing the witnesses to mistakenly identify Keandre. XI:2375.77.

State called three rebuttal witnesses. XII:2719-2755. Marvin and Jordan reiterated that Keandra robbed them not the person in Exhibit 179. XII:2719-21;XV:3242-43. Marvin also described his missing jewelry. XII:2719-20.

The third witness, Alma Luevanos was a surprise witness, having never been identified as a witness prior to taking the stand. Luevanos testified she worked at SuperPawn. XII:2728. Luevanos found four pawn tickets from 5/26/16, between 2:46 pm and 2:51 pm, indicating Omara McBride sold a gold chain with a broken clasp with a Gucci link, a gold

chain with a Figaro type of link, a gold square dragon charm, and a gold cross with diamonds. XIII:2727;Exhibits-XIV;2992-99.

SUMMARY OF ARGUMENT

Keandre argued he was misidentified as the suspect in several robberies because he looked similar to Bobby McCoy. His expert Dr. Smith testified about the unduly suggestive identification procedures used by the police in this case. Additionally, several evidentiary and structural errors led to his conviction: court prejudging his challenge to the venire, court allowing jury to read grand jury transcripts, State deliberately failing to disclose discovery, State improperly using DNA results, prosecutorial misconduct, and other issues are raised.

ARGUMENT

I. EVIDENCE INSUFFICIENT.

A. Standard of review.

A criminal defendant's fundamental right to a fair trial includes the presumption of innocence. *Hightower v. State*, 123 Nev. 55 (2007); U.S. Const. Amend. V; Amend. XIV; Nev. Const. Art. 1 § 8; NRS 175.201.

When deciding an insufficiency claim, Court analyzes evidence in the light most favorable to the prosecution and decides whether a jury acting reasonably could be convinced of the defendant's guilt "to that certitude [of

beyond a reasonable doubt] by the [direct and circumstantial] evidence it had a right to consider." *Wilkins v. State*, 96 Nev. 397, 374 (1980). Court reviews the record to determine if competent evidence exists to prove each and "every element of a crime," as well as "every fact necessary to prove the crime" beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); also see NRS 175.191; NRS 175.201;[8] *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Oriegel-Candido v. State*, 114 Nev. 378, 381, (1998).

B. Insufficient evidence.

1. Facts.

Statement of Facts incorporated.

2. Count 4 - Robbery with a deadly weapon of Deborah Faulkner.

. State alleged Keandre took money from the person of or in the presence of Deborah Faulkner. I:004;IV:773. Robbery requires the victim have a possessory interest in the property taken. *Phillips v. State*, 99 Nev. 693 (1983). Deborah testified the man who walked into the garage and

[8] In *Stephans v. State*, 262 P.3d 727 (Nevada 2011), Court found the opposite by relying in part on *McDaniel v. Brown*, 558 U.S. -, -, 130 S.Ct. 665 (2010) rather than NRS 175.201. *Brown* was a federal habeas claim with a different standard of review than that used on direct appeal.

pointed a gun at her did not take anything from her purse even though he asked her to dump it. IX;1906-15. Thus, State failed to prove Count 4.

3. Count 9 - Robbery with a deadly weapon of Lazaro Bravo-Torres.

State charged Keandre with taking the "wallet and cellular telephone" from Lazaro. I:003;IV:774. Lazaro testified he did not have a wallet. IX:1937. Although the suspect went through the console, the suspect did not take Lazaro's cell phone. IX:1942.

4. Count 8 - Attempt Robbery with Use of a Deadly Weapon of Juan Torres.

An attempt is "an act done with the intent to commit a crime, and tending but failing to accomplish it." NRS 193.330. To prove the crime of attempt robbery, State needed to present proof beyond a reasonable doubt that Keandre: (1) intended to rob Juan, (2) performed an act towards the commission of the robbery of Juan, and (3) did not consummate the robbery. *Johnson v. Sheriff, Clark County*, 91 Nev. 161, 163 (1975).

Juan did not testify.

Santiago testified Juan was on the roof of the home when a man point a gun at them. VIII:1686. Santiago claimed the man told Juan to come down but Juan retreated out of sight. VIII:1686-87;1689. When Juan backed up, the gun was pointed at Santiago. VIII:1690. Santiago came down from the ladder and was robbed.

There was no evidence Juan heard the man with the gun or that he understood English. There was no testimony that the man demanded Juan give him anything or that he further demanded Juan come down from the roof. Juan came down after the man left. VIII:1692.

Accordingly, State failed to prove Keandre committed an overt act as pled in the Indictment: "by demanding said money and/or personal property...with use of a deadly weapon..." I:003;IV:774. The man did not demand money or personal property from Juan.

II. COURT CREATED STRUCTURAL ERROR BY PREJUDGING KEANDRE'S CHALLENGE TO THE VENIRE.

A. Fair Cross-Section objection.

The United States and Nevada Constitution guarantee due process and equal protection of laws to any person within its jurisdiction. *See* U.S. Const. Amend. VI; XIV; Nev. Const. Art. 1 Sec. 1; Nev. Const. Art. 1 Sec. 8; Nev. Const. Art. 4 Sec. 21; *Williams v. State*, 121 Nev. 934, 939 (2005).

Before jury entered the courtroom, Keandre objected to the venire not containing a fair cross-section of the community as evidenced in the jury packet information containing the jurors' race. V:945-64. Within the 45

person venire, 3 identified as African-American, 5 as Hispanic, and 4 as other.[9] V:946.

B. Test.

A prima facie violation of the Sixth Amendment's fair cross-section is shown when jurors of a specific race: (1) are a "distinctive" group in the community; (2) representation of this distinctive group in the venire is unfair and unreasonable when compared to the number of persons of this race in the community; and, (3) under representation is due to systematic exclusion of this racial group in jury-selection process. *Williams,* at 940; *Evans v. State*, 112 Nev. 1172, 1186-1187 (1996); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *Duren v. Missouri,* 439 U.S. 357 (1979).

1. Distinctive Group.

Court held Keandre met this factor, finding African-Americans and Hispanics are a distinctive group in the community. V:957.

2. Representation not fair and reasonable.

Determining underrepresentation of a distinctive group requires evaluation of absolute and comparative disparity. *See Williams* at 940, n.9. A comparative disparity over 50% means representation is not likely fair

[9] Keandre asked court to determine the race of the 4 who identified as other but court declined. V:846.

and reasonable in relationship to the number of persons within this group in the community. *Id.*

Keandre argued African-Americans represented 11.5% of the community and Hispanics 30% based on 2013 population statistics.[10] V:948. Keandre noted: (1) only 6.7% of the jury identified as African-American while African-Americans made up 11.5% of the Clark County community; and (2) Hispanics represented 11.1% of the jury but comprised 30% of the community. V:946-49.

Court held the venire contained a fair and reasonable number of African-Americans. V:962. Court concluded 3 African-American prospective jurors in a 45 person venire equaled an absolute disparity of 4.8% and a 41.73% comparative disparity. V:949-51.

As to Hispanics, Court found an absolute disparity rate of 18.9% and a comparative disparity of 63%. V:951. Thus, court held the representation of Hispanics within the venire was not fair and reasonable. V:962.

3. Underrepresentation due to systematic exclusion.

Court said Step 3 was the deciding factor. V:952.

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[10] The 2017 estimated race/population statistics for Clark County indicate African-Americans represented 11% and Hispanics represented 30.4% of the population. United States Census https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src.

Accordingly, Keandre asked permission to question the jury commissioner to discover information specific to his venire: (1) the selection process for the jurors on his venire, and (2) data on the summoning process. V:953. Keandre informed the court that when the jury commissioner testified in another case, she acknowledged an equal number of jury summons were sent to each zip code rather than sent based on population figures. V:955. These meant citizens in lower populated zip codes would be more frequently summoned than those in more populated areas. Therefore, Keandre asked for an evidentiary hearing to support his argument under Step 3. V:954-6.

Court denied his request. V:963.

Court concluded based on the unpublished Battle v. State, 385 P.3d 32 (Nev. 2016) and other cases, Keandre failed to show the lack of Hispanics on the venire was due to systematic exclusion. V:962. Court made the transcript from State v. Williams, Case No. 08-C-241632 a court exhibit in support of its decision. V:963:XIV:3064-80.

Keandre re-raised the issue regarding the venire several other times, requesting an evidentiary hearing.[11] Court never held a hearing.

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[11] V:944-64;VI:1262-63;VII:1430-34.

C. Structural error.

A fatal flaw in trial court's decision-making process was that it pre-judged step 3 by relying on a two year old transcript from another case.

The transcript court relied on was from a hearing on 01/06/15 involving a different defendant, different defense attorney, different venire, and a different jury selection process. V:963;XIV:3064-80. As such, court predetermined its decision on step 3 as did the trial court in *Brass v. State,* 128 Nev. 748 (2012)(structural error occurred when court removed juror from panel after defendant made a *Batson* challenge and then held the *Batson* hearing later). By denying Keandre's request for documentation on the selection process for his particular venire and for an evidentiary hearing with the jury commissioner, the court indicated it already knew it would deny Keandre's objection to the venire, thus pre-judging step 3.

A further flaw in court's pronouncement occurred because the information in the transcript described a prior jury selection process rather than the current process. At the time of the 2015 hearing, the county did not collect racial information on jurors as it does now and the court was in the process of updating its jury selection system. XIV:3064-80. Under the old system, the jury commissioner could formulate limited comparisons, such as the racial composition of an individual jury pool based on the

people responding on a particular day. XIV:3072-74. Thus, this procedure may have been also available for Keandre's jury. However, Keandre's jury was selected under a different new system and the record contains no information as to the new procedures or the racial composition of the pool of jurors for Keandre's venire or the summons process because the jury commissioner was not called to testify.

Another flaw in court's reliance on the 2015 transcript is that the jury commissioner indicated she did not know the racial composition of Clark County – thus calling into question her credibility on selection procedures.

Court's reliance on the 2015 transcript rather than an evidentiary hearing is problematic because it left the record barren as to how Keandre's venire was compiled and denied him the chance to obtain information or to cross-examine the jury commissioner. Thus, he was unable to verify the randomness of the summonses issued or the number issued per zip code or the jury process in general. He was unable to present his argument under step 3.

Additionally, court's reliance on the unpublished decision of Battle is misplaced. In Battle, this Court allowed the trial court to rely on a previous transcript by reviewing the jury commissioner's testimony and concluding "the process explained by the jury commissioner provides no

opportunity for systematic exclusion of specific races." Battle at *2. Here, however, the transcript used by the court indicates the jury commissioner explained an older jury selection system rather than the current one.

Finally, court's reliance on the prior transcript violates NRS 51.325 because there is no evidence that the jury commissioner was unavailable to testify, her prior testimony was from a different proceeding, and Keandre was not a party or in privity to one of the parties in the other proceeding.

In view of the above, the trial court created structural error by pre-judging step 3, and by denying Keandre an evidentiary hearing court prohibited him from obtaining information on the formulation of his jury venire which he needed for his argument. Errors involving constitutional issues are subject to de novo review. *Grey v. State*, 124 Nev. 110, 117 (2008).

III. KEANDRE'S RIGHT TO DUE PROCESS AND CONFRONTATION WERE VIOLATED BY COURT ADMITTING THE ENTIRE GRAND JURY TESTIMONY OF SEVERAL WITNESSES.

A. Grand Jury transcripts admitted as substantive evidence.

During the redirect examination of Marvin Bass, State sought to introduce his grand jury testimony by admitting the transcript as substantive evidence, pursuant to NRS 51.035(2)(d). VII:1507-29.

Keandre responded by discussing the admission of Marvin's audio recorded statement to the police. VII:1507- 11. During discussions court interrupted, saying: "But –so the first issue...I'm going to overrule your objection" to the admission of the grand jury transcripts. VII:1511.

Court ruled the grand jury transcripts of all witnesses were not rebutting evidence but independently admissible under NRS 51.035(2)(d) because they were grand jury transcripts, unless misleading, confusing, or unduly prejudicial. VII:1511.

Keandre later argued that to allow State to always admit grand jury testimony seemed wrong, noting NRS 51.035(2)(d) did not apply equally to the defense. VII:1522-25. Defense witnesses usually do not testify at the grand jury thus the statute only benefited the State. VII:1525.

Keandre also noted the procedure for introducing the grand jury testimony was different for the State and Defense. Defense could only introduce the grand jury testimony as impeachment evidence if it was inconsistent with the witness' direct examination. VII:1523. The reason for this is that State's witnesses are never cross-examination prior to the Defense questioning them. This meant the only way the Defense could use the grand jury testimony as substantive evidence under NRS 51.035(2)(d)

would be to call State's witnesses during the Defense case-in-chief . VII:1523-25.

Court said: "[I]t's an aspect of the law what would not be too favorable to...the defense bar. But I'm just following the law." VII:1524-25.

State introduced Marvin's grand jury testimony during redirect. Subsequently, during the direct examination of its witnesses, State introduced the grand jury transcripts of Jordan Alexander, Santiago Garcia, and Rosa Vazquez.[12]

B. NRS 51.035(2)(d) is unique.

NRS 51.035(2)(d) defines hearsay as:

> ...a statement offered in evidence to prove the truth of the matter asserted unless:
> ...
> 2. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:
> ...
> (d) A transcript of testimony given under oath at a trial or hearing or before a grand jury;

[12] Marvin (VII:1511;1522;1438-39; Exhibit 171-XIV:3003-14); Jordan (VII:1615-16; Exhibit 172-XIV:3015-26); Santiago (VIII:1712; Exhibit 175-XIV3027-37); Rosa (IX:1901: Exhibit 182-XIV:3038-47).

Neither the federal rules of evidence nor other state's evidentiary rules contain statutes with the language used in NRS 51.035(2)(d).[13] Accordingly, Nevada stands alone.

C. Plain meaning of NRS 51.035(2)(d).

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[13] Fed. R. Evid. 801(d)(1); Ala. R. Evid. 801; Alaska R. Evid. 801; Ariz. R. Evid. 801;Ark. R. Evid. 801; CA Evid. D 10, Ch 1; Colo R Evid. 801; Conn. Code Evid. Sec. 8-1;8-2; Del. R. Evid. 801; D.C. Code Ann. § 14-102 (West); Fla. Stat. Ann. § 90.801 (West); Ga. Code Ann. § 24-8-801 (West); Haw. Rev. Stat. Ann. § 626-1, Rule 802.1 (West); Idaho R. Evid. 801; IL R EVID Rule 801; Ind. R. Evid. 801; Iowa R. Crim. P. 5.801; Kan. Stat. Ann. § 60-459 (West) Kan. Stat. Ann. § 60-460 (West); Ky. R. Evid. 801A; La. Code Evid. Ann. art. 801; Me. R. Evid. 801; Md. Rule 5-802.1; MA R EVID Sec, 801, 613; Mich. R. Evid. 801; Minn. R. Evid. 801; Miss. R. Evid. 801;MO – no statute located; MT R REV Rule 801 (West); Neb. Rev. Stat. Ann. § 27-801 (West); N.H. R. Evid. 801; NJ R EVID N.J.R.E. 803; N.M.R. Evid. 11-801; NY-no statute located; N.C. Gen. Stat. Ann. 8C-1, 801; N.D. R.Evid. 801; hio Evid. R. 801; Okla. Stat. Ann. tit. 12, § 2801 (West); Or. Rev. Stat. Ann. § 40.450 (West); Pa.R.E. 803.1(1) and (2) and Pa.R.E. 613(c); R.I. R.Evid. 801; S.C. R. Evid. 801; S.D. Codified Laws § 19-19-801; Tenn. R.Evid. 803; TX R EVID Rule 801; Utah R. Evid. 801; Vt. R. Evid. 801; Va. Sup. Ct. R. 2:801; Wash. R. Evid. 801; W. Va. R. Evid. 801; Wis. Stat. Ann. § 908.01 (West); Wyo. R. Evid. 801.

Court begins review of NRS 51.035 by looking at the language to give effect to its plain meaning. *Mangarella v. State*, 117 Nev. 130, 133 (2001) *quoting Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502 (1990)(statutes must be given their plain meaning and construed as a whole so "not be read in a way that would render words or phrases superfluous or make a provision nugatory").

The plain meaning of NRS 51.035 does not support the court's decision. The plain language of NRS 51.035 allows State to offer "a statement" not a written document. Although NRS 51.035(2)(d) appears to indicate a transcript from the witness' grand jury testimony is admissible, it is modified by the word "a statement" under the first sentence of the statute and by the words "the statement" under subsection 2. Thus, NRS 51.035(2)(d) does not allow the entire grand jury transcript of a witness to be admitted as an exhibit.

Additionally, NRS 51.035(2)(d) only allows in a statement if the declarant testifies at trial and is subject to cross-examination concerning the statement. Thus, court erred in admitting the entire transcript because it contained statements from the prosecutors and the jury foreman – none of them were witnesses at this trial.

D. NRS 51.035(2)(d) violates a defendant's right to Due Process and Confrontation.

NRS 51.035(2)(d) creates an uneven playing field because it benefits the State more than the Defense, as the trial court noted. VII:1525. The prosecutor selects the witnesses for the grand jury, formulates the content and list of questions, sometimes leads the witness through questioning, and allows no cross-examination during the secret grand jury proceedings. Defense witnesses are not normally called to the grand jury. At trial, NRS 51.035(2)(d) then gives the prosecutor an advantage, allowing State to introduce the witness' entire pre-planned grand jury transcript after or before the Defense cross-examines the witness. This means during jury deliberations, jurors may read the grand jury transcripts containing no cross-examination and use them as substantive evidence for a conviction. By giving the jurors the transcripts, NRS 51.035(2)(d) allows the State to emphasize grand jury testimony over trial testimony. Thus, even though Keandre confronted the witnesses at trial, his rights to due process and confrontation were violated because the only transcripts the jury reviewed during deliberations were those without cross-examination.

Yet in *Maginnis v. State*, 93 Nev. 173, 175–76 (1977), this Court found no violation of the right of confrontation when admitting a declarant's grand jury testimony, as allowed by NRS 51.035(2)(d), because it required

the declarant to testify at trial and be subjected to "full and effective cross-examination" regarding the testimony. *Id. citing California v. Green*, 399 U.S. 149, 158 (1970).

However, *Maginnis* conflicts with NRS 51.125. Under NRS 51.125, a recorded recollection may only be introduced as an exhibit by an *adverse party*, the recorded recollection must be made when the matter is fresh in the declarants mind and the declarant no longer remembers. Moreover, NRS 51.125 only allows introduction of those portions of the transcript used to refresh the witness' recollection. *Barrett v. State*, 105 Nev. 356, 360 (1989). Here, all State's witnesses remembered the event and the State introduced the entire transcripts as an exhibit.

Maginnis was decided prior to *Crawford v. Washington*, 124 S. Ct. 1354, 1374 (2004) thus making the holding questionable.

Maginnis also does not take into account the prosecutor's questioning as testimony. Prosecutors choose the content and sequence of questions to favor their theory. Thus, even though the witness who answers the questions at the grand jury may later be subject to cross-examination at trial, prosecutors are not.

Here, a problem arose by admitting the entire grand jury transcript of Santiago. XIV:3029-37. The Defense asked Santiago about the exhibits he

identified when testifying at the grand jury. VIII:1724-30. At the grand jury he identified his cell phone within Grand Jury Exhibits 19, 16, and 15, but when shown the same exhibits at trial (now marked as Exhibits B, C, and D), he testified that only Exhibit C was his cell phone. VIII:1724-30. Santiago denied ever seeing the other two exhibits even though the grand jury transcript clearly indicated he was shown them. VIII:1724-30.

Defense told court: "I can't authenticate [Exhibits A and B] without calling [the prosecutor] to say he showed it to him. I've already gone over the transcript with him. He still won't acknowledge having ever seen these." VII:1728. Thereafter trial court admitted Exhibits B and D without resorting to the prosecutor testifying because the grand jury transcript was already admitted; State did not object. VIII:1729. Thus, allowing prosecutors to introduce grand jury testimony during direct examination amounts to a violation of due process and the right of confrontation in that it allows the prosecutors to make themselves witnesses at the trial without being subject to cross-examination. *See Tomlin v. State*, 81 Nev. 620, 623 (1965)(if prosecutor knows prior to trial that he is a necessary witness then he should withdraw).

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E. Standard of review and prejudice.

Court uses de novo review for interpreting statute. *Coleman v. State*, 134 Nev. Adv. Op. 28, 416 P.3d 238, 240 (2018).

Here, the error was prejudicial and not harmless based on reasoning previously outlined in this section. The admission of the grand jury transcripts unfairly undermined Keandre's defense of mistaken identification because jury did not have a transcript of witness's testimony from the trial or of Dr. Smith's testimony explaining suggestibility.

Also, Keandre was prejudiced because State violated court's order regarding omitting prefatory language thereby allowing jurors to know the charges presented to the grand jury and that more than 12 other people had decided he may be guilty of these charges. VI:1528-29;XIV:3039.

IV. KEANDRE'S RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN COURT REFUSED TO ADMIT ALL THE PHOTOGRAPHS OF BOBBY McCOY.

Keandre has a constitutional right to present evidence of third-party guilt. *Homes v. South Carolina*, 547 U.S. 319 (2006). A court's refusal to allow evidence of third-party guilt deprives a defendant of a meaningful right to present a complete defense under the 14th and 6th amendments.

Here, court violated Keandre's right to present evidence of third-party guilt by prohibiting the admission of all pictures Keandre had of Bobby

McCoy. XII:2533-41;3246-51. Court only allowed one picture, State's Exhibit 196. XII:2695-96;XV:3242-43.

Keandre was prejudiced because the pictures he sought to admit included Bobby's profile. XV:3247-51. State admitted a side view of Keandre but there was no side view of Bobby allowed. XIV:2991. A comparison of the side view of Keandre and Bobby shows they both have a slight Adams apple, remarkably similar profiles, same shape of face, and a similar haircut. By depriving the jury of the profile of Bobby, court deprived Keandre of relevant information needed for his defense thereby requiring reversal.

V. KEANDRE'S RIGHT TO DUE PROCESS WAS VIOLATED BY COURT ALLOWING STATE TO VIOLATE DISCOVERY RULES AND ORDERS WITHOUT GRANTING A MISTRIAL.

A. Discovery and notice issues.

On 08/19/16, Keandre filed a discovery motion seeking in part any written or recorded statements made by Keandre and State's witnesses. I:185-210. Court granted the motion based on State's statutory and constitutional obligations. IV:893;V:929-36.

Prior to trial, State admitted it did not disclose all Keandre's jail calls. VI:1246-62. Other evidence withheld from the Defense included charts and graphs prepared by State's DNA expert, Darrell's signed but lost

show-up statement, SuperPawn tickets, proposed redactions to jail calls, Ex Pawn video missing, and Keandre's jail call to Chanise on 07/31/16. (XII:2651)

Despite State's claim it complied with discovery (XIV:3095-3107), State admitted it did not disclose the evidence listed above.

After uncovering a multitude of discovery and notice violations, Keandre finally made motions for a mistrial which court denied. XII:2643;2697-2717; XII:2766-84.

B. NRS 174.235(1)(a).

1. Defendant's statements on jail calls.

NRS 174.235(1)(a) requires a prosecuting attorney disclose "any written or recorded statements...made by the defendant...". By motion, Keandre specifically requested all of his conversations intercepted by law enforcement agencies, telephonic or otherwise. I:202. Court ordered discovery pursuant to the statute. IV:893;V:929-36.

After court orders discovery, if State learns of additional discoverable material before or during trial, "the party shall promptly notify the other party...or the court of the existence of additional material." NRS 174.295. Accordingly, under NRS 174.235(1)(a), State was required to disclose all Keandre's statements and conversations on jail recordings.

At the start of trial, State admitted they did not give the Defense all Keandre's statements and refused to do so even though there was a court order. VI:1246-45. State said it only needed to disclose jail calls it intended to introduce in its case-in-chief. State claimed it was not required to reveal impeachment or rebuttal evidence unless it was exculpatory, even if it was the defendant's own statement. However, upon court's prodding, State agreed to reveal any information it found on the jail calls that was inconsistent with Keandre's alibi. VI:1246-62.

Court held State was required to disclose all Keandre's jail calls but the record does not reflect that this occurred. VI:1252. Moreover, State later admitted they purposely withheld a 07/31/16 jail tape of Keandre's conversation with Chanise that they just received because State wanted to impeach Chanise. XII:2697-2717.

State's withholding of the jail calls prejudiced Keandre in two ways. First, State was allowed to decide what he could or could not receive in preparation for his defense. Because State purposely withheld jail calls despite statutory obligations and court order, but suffered no recourse, there may be more tapes that were never disclosed.

Second, by withholding the 07/31/16 call, State deprived Keandre of the ability to defend against statements Keandre made to his witness,

Chanise. State used the call to infer Keandre prepared Chanise for her trial testimony, suggesting she should not testify and giving her direction on what to say regarding where he was sleeping that night. XII:2643. Despite court's order to disclose all jail tapes, State claimed tapes did not need to be disclosed if used them to impeach Chanise's testimony. XII:2697-2717. However, a review of the questioning shows prosecutor was asking her direct questions about what Keandre said. XII:2643-45. Keandre asked for a mistrial which court denied, giving a limiting instruction instead. XII:2701-18.

State also did not promptly disclose proposed redactions to the jail calls that were introduced as evidence. See Issue VII.

2. Darrell's statements.

NRS 174.235(1)(a) requires the prosecuting attorney disclose "any written or recorded statements made by a witness the prosecuting attorney intends to call during the case-in-chief." However, State never disclosed that Darrell read and wrote a statement commenting on a show-up form.

Darrell testified he did not remember filling out a form or signing anything after the show-up but said he was 100% certain about his identification. IX:1987-88. When Defense asked the prosecutor if he had a form signed by Darrell he said he did not. X:2248. However, Det. Majors

testified Darrell filed out the show-up form but the form was now missing. VIII:2222-42;2254-55.

Court understood Defense first learned of the missing form when Majors testified and thereafter discussion ensued regarding a discovery violation or gross negligence on the part of the police. VIII:2223-49. Defense noted METRO's report did not say Darrell was shown any witness instructions or that he filled out the form as did other witnesses. XV:3093. State acknowledged it did not tell the Defense, saying it had nothing to give in discovery and it was not exculpatory. X:2232-34.

However, the plain meaning of NRS 174.235(1)(a) required State disclose the *existence and disappearance* of "any written ...statement" made by a witness State intended to call. Because State withheld this discovery, Darrell was not cross-examined about the form he said he never filled out. Had the Defense known about the missing form, it could have impeached Darrell's testimony and attack his credibility because he said he never filled out a form. Keandre could have argued if Darrell was mistaken about the form then he could also be mistaken about his identification of Keandre.

3. DNA charts.

NRS 174.235(1)(b), (c) requires prosecuting attorney to disclose results and reports from scientific testing and all tangible documents it intends to in its case-in-chief. When State sought to admit DNA charts and information, Defense noted it had not seen all the information. X:2058-60;Exhibits-XV:3335-42. Accordingly, State violated the discovery order by not disclosing expert's charts promptly. Keandre was prejudiced as discussed in Issue IX.

4. Video from EZ Pawn.

Major testified he directed officers to look in different areas for a video of the incident involving Marvin. XI:2295. State claimed a video existed but it was not located. XI:2296. State said an officer or a person from EZPawn would testify that it was a white car matching the description of the suspect. XI:2296. However, the video was missing. XI:2297-2300;2312. Later, State claimed the video was recovered but corrupted. XI:2312. No information about an impounded corrupted video was disclosed to Defense in discovery. XI:2312.

The video from EZPawn was important to the Defense because the camera had a view of the parking lot where the robbery involving Marvin occurred. XII:2665-73. On 05/26/16, the cameras were functional. By not

disclosing to the Defense that police impounded a video from EZPawn State deprived Keandre of the ability to prepare his defense by reconstructing what was possibly a corrupted video. The video was also important because Marvin described the white car differently from every other witness.

5. Pawn tickets from SuperPawn.

State called Alma Luevanos to testify on rebuttal and to introduce pawn tickets showing Omara sold jewelry on 05/26/16 at 2:40-50 pm, the same day Marvin said he was robbed. XII:2718-53;XIV:2992-99.

State admitted it did not disclose this evidence to Keandre, saying it did not have to because it was rebuttal evidence. X:2732-42. Although prosecutor said she received the documents 5 minutes ago, she admitted she asked the detective to look for the jewelry prior to the Defense beginning its case. X:2732. Thus, it appears that after Majors testified on 07/31/17, Day 6 of trial, he was asked to investigate further, found pawn tickets through METRO's data base, and then asked SuperPawn to retrieve the records.

Because State did not rest until 08/01/17, it had an obligation to inform Keandre when the information – not the documents – was discovered because it had a continuing duty to disclose documents the

existence of which is known that it intends to introduce in its case-in-chief. NRS 174.235;NRS 174.295. But for the late discovery by the police, State would have used this evidence in its case-in-chief. State introduced the evidence on Day 8 of trial, 08/02/17, as rebuttal, through Luevanos' testimony without ever revealing the information police learned.

Keandre was prejudiced because he was unable to investigate and evaluate the information before trial and it affected his defense by suggesting he was in town with Omara at the time Marvin was robbed.

See argument at XII:2729-31;2733-84.

C. NRS 174.233 and NRS 174.234.

Keandre filed an alibi notice pursuant to NRS 174.233 and State filed a list of witnesses it intended to present to rebut or discredit the alibi. III:518-19;654-65. Although Keandre did not call his alibi witness to indicate he was in California at the time Marvin was robbed, State called Alma Luevanto who essentially acted as an unnoticed rebuttal alibi witness. XII:2726-63.

NRS 174.233(3) provides that the prosecutor has a continuing duty to disclose rebuttal alibi witnesses. Likewise, NRS 174.234(3) gives the prosecutor a continuing duty to disclose witness it is presenting in its case-in-chief.

Luevanto did not rebut anything Defendant's witnesses said and was essentially used to suggest Keandre was in Las Vegas with Omara when Marvine was robbed. *See Issue VI.* Because State began investigating pawn shops during its case-in-chief and Luevanto's testimony would have been admitted in State's case-in-chief if discovered earlier, State should not be allowed to bypass rules in place for discovery by calling witnesses on rebuttal. XII:2729-31;2733-84.

D. Prejudice warranting a mistrial.

Court abused its discretion in denying Keandre's motions for a mistrial because State's repeated discovery and notice violations and violations of court's orders denied Keandre the ability to obtain a fair trial. *Glover v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 125 Nev. 691, 697 (2009), *as corrected on denial of reh'g* (Feb. 17, 2010)(violation of a court's orders is grounds for a mistrial). See argument at XII:2643;2697-2717;2766-84.

The purpose of discovery rules is to eliminate a trial by ambush or surprise. *White v. State*, 223 Co.3d 859, 867 (Miss.Ct.App. 2017)(reversing conviction when prosecutor waited until the first day of trial to provide defense with jail calls make by the defendant despite a discovery order two years prior). Like Nevada, discovery rules in Mississippi require the

prosecution to disclose any recorded statements of the defendant which court interprets as including all jail calls.

State's suggestion that it alone controls the amount of discovery a defendant will received when it come to the defendant's statements in the form of jail calls is contrary to U.S. Supreme Court rules on effective assistance of counsel. An attorney who only relies on discovery the government discloses without requesting discovery in advance of trial is ineffective. *Kimmelman v. Morrison*, 477 U.S. 365, 384-87 (1986). Therefore, Keandra should not have been forced to accept State's limitations on discovery and only allowed discovery regarding his statements that State chose to admit. State does not know what may or may not be important for his case.

As illustrated above, the failure to disclose jail calls was only one of multiple discovery violations depriving Keandre of the ability of obtaining a fair trial. When Legislature enacts a statute giving a defendant specific rights to discovery, the violation of those rights denies him due process. See *Afzali v. State*, 326 P.3d 1, 3 (Nev. 2014)(discussing statute allowing a challenge to grand jury members).

Court's failure to adequately inquire to determine the individual and cumulative prejudice to Defense when State violates discovery rules

amounts to reversible error. See *Wagner v. State*, 208 So. 3d 1229, 1230–31 (Fla. Dist. Ct. App. 2017). It should be the State's burden to prove the discovery violations were harmless beyond a reasonable doubt. *Bess v. State*, 208 So. 3d 1213, 1214–15 (Fla. Dist. Ct. App. 2017).

VI. STATE COMMITTED PROSECUTORIAL MISCONDUCT AND VIOLATED DUE PROCESS BY PRESENTING IMPROPER REBUTTAL EVIDENCE.

Rebuttal evidence "explains, contradicts, or disproves evidence introduced by a Defendant during his case in chief." *Lopez v. State*, 105 Nev. 68, 81 (1989) citing *Morrison v. Air California,* 101 Nev. 233, 235-36 (1985).

State's three rebuttal witnesses did not rebut evidence presented in Keandre's case-in-chief. XII:2719-2755.

Marvin Bass described the items stolen, said Exhibit 196 was not the robber, and identified Keandre. XII:2719-21;XV:3242-43. Jordan also said Exhibit 196 was not the person who robbed him, it was Keandre. XII:2724.

Basically, State used Marvin and Jordan as identification witnesses in a highly suggestive manner – bringing them to court to re-identify Keandre after they already identified him in court. As Dr. Smith testified, each time a witness is asked to identify the same person their confidence is

bolstered, even if they are misidentifying the suspect. Due process is violated if suggestive identification procedures make it all but inevitable that the witness will identify a specific person regardless of whether or not that person is the one who committed the crime. *Foster v. California,* 394 U.S. 440 (1969). Thus, prosecutor's rebuttal evidence violated Keandre's right to due process by subjecting the jury to extremely suggestive in court identification procedures that should not have been allowed. Basically, prosecutor tried to bolster the witness identification by improperly introducing prior consistent statements.

Likewise, Luevanto did not rebut Defendant's witnesses but introduced new evidence which State should have entered in its case-in-chief, which they could have asked to reopen. State began investigating pawn shops during its case-in-chief and Luevanto's testimony would have been admitted in State's case-in-chief if discovered earlier. XII:2729-31;2733-84. Police have access to pawn shop information so there is no reason why this information could not have been uncovered prior to trial.

Keandre prefaced this as prosecutorial misconduct anda violation of due process because the prosecutor's conduct was improper in presenting highly suggestive identification evidence and sandbagging the Defense as to the pawn slips from SuperPawn involving Omara. *See Valdez v. State*,

124 Nev. 1172, 1188 (2008). Reversal is warranted because by presenting this information and withholding evidence, State gave itself an unfair advantage and presented evidence in violation of statutorily and constitutional guidelines.

VII. PREJUDICIAL ERROR OCCURRED BY COURT ALLOWING JURY TO HEAR AND READ PORTIONS OF KEANDRE'S JAIL CONVERSATIONS.

There was much discussion and argument involving the admissibility of Keandre's jail calls.[14]

Court eventually directed the parties to brief the admissibility of jail calls. State claimed they were admissible as defendant's own statements under NRS 51.035(3). XV:3318-20. Keandre argued they were not relevant and highly prejudicial. XV:3323. Court made a tentative ruling and then allowed further argument. XIV:3088-91.

Eventually, court allowed State to introduce 3 redacted audio jail calls and the transcripts from Keandre's jail calls. XIV:3052;3055-57;3058. Keandre asked for court to only admit the calls by transcript or audio not both. Court disagreed. Thereafter, State introduced the calls through Majors. XI:2278-82.

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[14] IX:1995-2021;X:2022-79.

Prejudicial error occurred in admitting the redacted jail calls because court allowed the jury to clearly know Keandre's custody status - he was in jail. XIV:3052;3055-57;3058. Each call began with the titled "Clark County Detention Center Phone Calls" and included the directive the operator gives to those accepting the calls. XIV:3053;3056;3059. As such, the exhibits clearly emphasized Keandre was in jail and thus were more prejudicial than probative. NRS 48.035. Court could have redacted this information but chose to keep it included.

The evidence was also cumulative, unfairly emphasizing Keandre's statement by introducing them by transcript and tape. NRS 48.035.

Another problem centered on the doctrine of completeness. Keandre argued the redactions for 5/29/16 were incomplete and gave a false impression. X:2025-37. But court disagreed.

At the time of the 5/29/16 jail call, Keandre had been in jail for one day. In this call, someone said: "So Dame and Bobby were in the house too but they just put it all on you." XIV:3062. Keandre responded: "Dame, Dame they let, they let Dame alone cause that he didn't fit the descript. Bobby's been left, 2 days ago." XIV:3062.

Keandre objected to the admission of the call but if court was going to admit it, he asked to include the following the following words from the same transcript:

> Person: So why are you letting her drive it?
> Defendant: You said what? Why is she driving your car?
> Ain't nobody driving my car
> ...
> Defendant: I seen her in the car
> Person: Oh, were you already in j ail?
> Defendant: Yeah, I've been in jail for two days. What are you talking about? X:2026

Keandre contended this section explain his perception of time because he said he had been in jail for two days when in reality it was only one day. It explained that when he said Bobby's been gone for two days, his perception of two days was inaccurate. He meant Bobby was gone since 5/28/16 when Keandre was arrested. X:2026-29.

Defense argued the jury would not have a false perception if this other information was added because jury knew when Keandre was arrested and the transcripts showed the 5/29/16 date and were time stamped. X:2029-37.

Court disagreed, saying it did not support the doctrine of completeness. X:3037.

> NRS 47.120(1) states:
> When any part of a writing or recorded statement is introduced by a party, the party may be required at that time to introduce

> any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts.

"The rule of completeness provides that when either party introduces part of an act...or statement, the opposing party may introduce or inquire into other portions of the whole in order to rebut adverse inferences that 'might arise from the fragmentary or incomplete character of the evidence introduced by his adversary.'" *State v. Graham*, 529 S.W.3d 363, 366–67 (Mo. Ct. App. 2017)(other cites omitted). The purpose behind the rule is to ensure a party does not admit portions of a document out of context. *Id.*

Keandre's position was that Bobby was the perpetrator and he left with the money prior to police searching the apartment. Accordingly, by omitting the requested portion of the conversation, court unfairly prohibited Keandre from making this argument to the jury and the jury was led to believe Bobby left prior to 5/28/16 based on Keandre's misperception of time on the jail call.

In *Domingues v. State*, 112 Nev. 683, 693–94 (1996) Court found trial court erred in limiting the introduction of the defendant's statements during the detective's interview because NRS 47.120 does not limit a defendant's ability to cross-examine other relevant parts of the document. Thus, by restricting his ability to discuss all portions of the call, trial court

unfairly denied Keandre the right of cross-examination and the right to due process.

VIII. JURY INSTRUCTION ERRORS.

A. Standard of Review.

District court has broad discretion when settling jury instructions and the Supreme Court generally reviews the district court's decision under an abuse of discretion or judicial error standard. *Hoagland v. State*, 240 P.3d 1043 (Nev. 2010).

B. Offered/rejected instruction.

1. Two reasonable interpretations.

Keandre proposed an instruction on evidence supporting two reasonable interpretations, "one of which points to the Defendant's guilt and the other of which points to the Defendant's innocence" explaining under the law the jury should reject the one pointing to guilt. XIV:3128. This instruction is structured on the presumption of innocence. See NRS 175.161, *Bails v. State*, 92 Nev. 95 (1976); *Mason v. State*, 118 Nev. 554 (2002); *Crawford v. State*, 121 Nev. 744, 753-54 (2005); CALJIC 2.01.

Court rejected it, saying this was not a circumstantial case and it was unnecessary. XIII:2804-2807. Because Keandre contended he was

misidentified, there were two reasonable interpretations thus making the instruction relevant.

2. Missing Evidence.

Keandre offered *Sanborn* instructions because police failed to preserve the video from EZPawn (XVI:3130) and the identification form filled out by Darrell (XV:3131) was missing. The proposed instructions told the jury there was a rebuttable presumption the evidence was favorable to Keandre. XIII:2807-11. Keandre argued these instructions are warranted under *Sanborn v. State*, 107 Nev. 399 (1991) because he was prejudiced. Court erred in finding police were merely negligent and rejecting the instructions because two items of evidence were missing, Darrell had forgotten about the form and was unable to verify what he wrote, and the video could have exonerated Keandre if it showed Bobby in the car or if the car was not a Mazda.

3. Accessory after the crime.

Defense proposed giving an accessory after the fact jury instruction as a lesser related and because it applied to his theory of defense. XIII:2828-37. State acknowledged this was Keandre's argument in Opening. XIII:2828. Court denied the request, indicating it was a lesser related and not allowed under *Peck v. State*, 116 Nev. 840 (2000) *overruled*

by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006) but thought evidence supported Defense's theory. However, the rational in excluding lesser related instruction in *Peck* was that it was not fair to sandbag the State by hiding the lesser related until closing. Here State admitted it knew since Opening Statements what direction Defense was headed. Therefore, court erred in not giving the proposed instruction.

IX. PROSECUTORIAL MISCONDUCT.

State's expert Beata Vida analyzed the DNA found on the gun and concluded it was consistent with the mixture of two individuals with at least one being male. X:2066-67. However, results only revealed a partial profile which did not meet acceptable reference standards for a comparison. X:2067. She was unable to make any conclusions. X:2067.

Nonetheless, State presented charts and discussed Vida's comparison of Keandre to the known DNA sample mixtures. X:2066-67;Exhibits-XV:3335-42. Keandre objected to the graphs as confusing, noting the jurors had no scientific background and could make the wrong conclusion. X:2069.

Court held the charts were relevant to the reliability of her conclusions. X:2029. The problem – she was unable to make a conclusion.

In closing argument, prosecutor used the charts to suggest the jury could make their own conclusion: "[t]ake a look at it. See what you think.

Make your own determination." XIII:2870. He noted Keandra's DNA matched 12 of 13 allele found on the swab, he had a 28 allele on the same locus as the swab sample, and Keandre also had the same 15, 16, 7, 12, and 13, 13.2, and 14 alleles. XIII:2869-70. Thus, contrary to his own expert, the prosecutor said the similarities in the DNA allele were sufficient for the jury to conclude it was a match.

When Defense objected to prosecutor's closing argument, court said the prosecutor was arguing the weight of the evidence. XIII:2869. However, court was incorrect because the prosecutor misused the DNA results.

Prosecutorial misconduct involving the mishandling of DNA evidence may occur by "presenting unreliable evidence...or misusing scientific evidence." Kimberly Cogdell Boies, *Misuse of DNA Evidence Is Not Always A "Harmless Error": DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 Tex. Wesleyan L. Rev. 403, 404 (2011). "Given the persuasiveness of [DNA] evidence in the eyes of the jury, it is important that it be presented in a fair and reliable manner." *McDaniel v. Brown*, 558 U.S. 120, 136 (2010).

DNA evidence is identification testimony. Prosecutor's argument along with court's decision that jury could consider the weight of the DNA

evidence[15] allowed the jury to incorrectly draw an inference that Keandre's DNA was found on the gun – he was identified. This linkage was critical to State's case because Keandre argued Bobby committed the robberies. Thus, Keandre's right to due process was violated because the prosecutor presented a false, highly suggestive inference based on unreliable evidence.

For reversal based on prosecutorial misconduct, Court asks whether: (1) prosecutor's conduct was improper, and (2) if so, if reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1188 (2008). When a prosecutor's misstatements in closing, though presumably unintentional, directly contravene the defendant's defense reversal is warranted. *Anthony v. United States*, 935 A.2d 275 (D.C. 2007)(prosecutor misrepresented witness's testimony). "[I]t is incumbent upon the prosecutor 'to take care to ensure that statements made in opening and closing arguments are supported by evidence introduced at trial.'" *Id. citing United States v. Small*, 74 F.3d 1276 (D.C. 1996). Prosecutorial misconduct is grounds for reversal *unless* the error is harmless beyond a reasonable doubt. *Brown v. United States,* 951

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[15] Jurors tend to take hold of a trial judge's remarks, which they often 'interpret as shedding light upon his view of the weight of the evidence, or the merits of the issues involved.'" *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App. 2006) *citing Bachus v. State,* 803 S.W.2d 402, 405 (Tex.App.-Dallas 1991).

F.2d 1011, 1014 (9th Cir. 1991) *citing Chapman v. California*, 386 U.S. 18, 24 (1967).

A prosecutor's misuse of DNA evidence is grounds for reversal because jurors are inclined to give DNA evidence immense weight. *Duncan v. Com.*, 322 SE3rd 81, 93 (Ken. 2010). The introduction and argument regarding the DNA was not harmless beyond a reasonable doubt because the information went to the heart of the case – identification. Prosecutor's argument was not accidental. He preplanned his argument by introducing irrelevant, prejudicial charts during Vida's testimony and then using them in closing. Accordingly, court abused its discretion by allowing State to introduce the DNA charts as evidence and allowing the prosecutor to use the charts in closing to argue jury could make their own conclusions in reviewing the charts during deliberations.

X. CUMULATIVE ERROR.

Other than Issue I, requiring automatic reversal and dismissal, if Court finds no singular issue sufficient for reversal then Court analyzes collective effect of all errors. *Big Pond v. State*, 101 Nev. 1, 3 (1985); *Dechant v. State*, 116 Nev. 918, 927-28 (2000); *Valdez v. State*, 124 Nev. 1172, 1195-98 (2008). Reversal is warranted because the identification procedures were suggestive, the crimes are grave serious crimes, and the quality and character

of errors substantial. *See Valdez citing Hernandez v. State*, 118 Nev. 513, 535 (2002).

CONCLUSION

Keandre asks Court reverse/dismiss convictions due to insufficient evidence. He also asks for reversal due to errors addressed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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DATED this 6 day of August, 2018.

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