IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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Appellant,	)	
	)	
vs.	)	
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THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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APPELLANT'S REPLY BRIEF

STATE'S STATEMENT OF FACTS

State neglects to tell this Court that Marvin Bass did more than identify a white car, he identified a white Kia, sometimes saying it had 2 doors and another time 4 doors. VII:1469-72;1479;1492-93;1535;1539-40. Also, Darrell and Deborah Faulkner were already in their garage, they were not ushered in as State claims. IX:1907. Additionally, Rosa was not inside the truck when the suspect first pulled up as State claims. IX:1936-39. Lazaro got out of the truck. IX:1876.

ARGUMENT

I. EVIDENCE INSUFFICIENT.

A. Standards

It is elementary that the State must prove all material allegations charged in the information or indictment. *Higgins v. State*, 501 P.2d 875,

876–77 (Okla. Crim. App. 1972). Allegations within the indictment not only include the elements of the crime but also a "plain, concise and definite written statement of the essential facts constituting the offense charged." NRS 173.075. Thus, facts necessary to support a conviction as listed in the indictment must be proven beyond a reasonable doubt at trial and failure to establish these facts is fatal to the conviction. *Id.* at 876-77; also see NRS 174.063 (defendant required to admit all facts listed within indictment/information when making a guilty plea).

The due process requirement that State provide adequate notice of charges prior to trial continues into the appellate process because Keandre is entitled to know what he is defending himself against on appeal. *People v. Crespo*, 203 Ill. 2d 335, 342–45 (2001), *as modified on denial of reh'g* (Mar. 31, 2003).

In *Crespo*, the appellate court compared the facts listed in the charging document with State's argument on appeal, finding a different factual theory being proposed on appeal. The *Crespo* Court noted State could have presented a different factual theory in the charging document prior to trial but chose not to do so. The *Crespo* Court held that an appellate court may not allow the State to change its factual theory after trial, during the appeal process, because to do so would violate a defendant's right to due

process by depriving him of notice of the nature and cause of the criminal accusations.

Based on the theory announced in *Crespo*, Keandre asks Court to prohibit State from changing its factual theory of the case on appeal.

B. Insufficient

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

In Count 4, State charged Keandre with "taking lawful money...from the person of Deborah or in her presence..." IV:773.

While acknowledging the suspect did not take any money from Deborah, State argues it proved the Defendant robbed Deborah because: (1) Deborah had a possessory interest in the money removed from Darrell Faulkner's wallet since they were married; (2) she was present when the suspect took the money, and (3) he forced them into the garage. RAB:16-17.

However, based on *Crespo*, this Court must disregard State's new theory. State did not plead the indictment as Deborah having a possessory interest in Darrell's property or as her being a victim of money taken from Darrell. Moreover, married couples have separate property as well as community property. NRS 123.130. Thus, marriage alone is insufficient to prove Deborah had a possessory interest in the $100. The court did not

instruct the jury on the law regarding possessory interest between husband and wife.

The $100 given to the suspect by Darrell was not in the open but inside Darrell's wallet and his wallet was inside his pocket. IX:1963-65. Neither Deborah nor Darrell testified they had joint possessory interest in the $100 or that it was marital community property. Therefore, even if Court accepts State's new factual theory, State failed to prove Deborah had a possessory interest in the money in her husband's wallet.

State also did not plead the robbery as Keandre forcing Deborah and Darrell "into their garage." RAB:17-18. Moreover, Deborah and Darrell were inside the garage when the suspect entered and were not forced to go inside. IX:1907;1957.

As for money taken in Deborah's presence, "[A] thing is in the presence of a person ... [when it] is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." *Phillips*, 99 Nev. 693, 695 (1983)(internal quotation marks omitted). In this instance, the money was not within Deborah's reach, inspection, observation or control – it was inside Darrell's pocket. The *Phillips* Court found a defendant not guilty of robbing a customer who entered a store in the middle of an armed robbery because

the customer did not have a possessory interest in the store's property even though the robbery occurred in his presence. Likewise, Deborah did not possess the $100 so she could not "retain possession of it" and State failed to prove she had a possessory interest in the money.

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

State does not acknowledge it charged Keandre with taking a "wallet and cellular telephone" from Lazaro under Count 9. I:003;IV:774.

Instead, State contends it proved Count 9 (alleged taking of a wallet and cellular telephone from Lazaro) by proving the facts listed in Count 11 (alleged taking of Rosa's purse and/or wallet and/or cellular telephone from Rosa). RAB:19-20;I:004.

Because Keandre was not charged with taking Rosa's purse and/or wallet and/or cellular phone in Count 9, State may not change its factual theory on appeal. A change in the factual theory violates due process because Keandre was without notice State was going to argue differently on appeal. *Crespo*. Thus, reversal is warranted, State did not prove the facts listed within the charging document in support of the crime. *See Estes v. State*, 122 Nev. 1123, 1145 (2006).

As to State's new theory, there is no evidence Rosa's purse and its contents were community property. See NRS 123.130; *Phillips*, 99 Nev.

693, 695 (1983). But State argues jury could make reasonable inferences under counts 4, 8, and 9. RAB:19. State is incorrect because the jury was only asked to reach a finding on the facts as listed in the indictment in Jury Instruction 3.

3. Count 8 - Attempt Robbery with Use of a Deadly Weapon.

In Count 8, State accused Keandre of attempting to take lawful money or personal property from Juan. IV:774.

State claims it proved an attempt robbery by presenting evidence that Keandre demanded Santiago and Juan come down and brandished a gun at them. RAB:17-18.

Although Santiago Garcia initially testified that the suspect told Juan to get down and Juan looked scared, court sustained defense objection thereby prohibiting Santiago from testifying regarding Juan. Santiago then admitted Juan had already backed up by the time the suspect pointed the gun. VIII:1696-87. Thus, there is no evidence the gun was brandished at Juan.

Santiago also said: "He told **us** to get down from what we were going...He was pointing [the gun] at **me**..." VIII:1689 (emphasis added).

> Prosecutor: And where was the gun pointed?
> Santiago: To me, pointed at me.
> Prosecutor: And what did the defendant say next?

Santiago: He told me to shut off the fucking hedge trimmer and put it on the ground.
Prosecutor: And what did you do?
Santiago: I turned it off.
Prosecutor: And then what happened?
Santiago: And then he said give me the fucking money and whatever you have. VIII:1689-90.

State discusses no part of the record that is to the contrary. Thus, there is no evidence Keandre attempted to take Juan's property or that he pointed a gun towards Juan.

As to intent, even though there were two prior robberies and the robbery of Santiago, State failed to prove suspect intended to specifically rob Juan. Santiago did not see the gun until the man entered the yard and pulled it out, pointing it at Santiago - not as he approached the house as State contends. RAB:18; VIII:1685-86. There was no testimony that the man demanded Juan give him anything, or that Juan saw the gun, or the man further demanded Juan come down from the roof, or Juan understood English, or Juan understood what the suspect said. We do not know what Juan thought was going on. Juan came down after the man left. VIII:1692.

In the indictment and Jury Instruction #3, State needed to prove Keandre committed an overt act: "by demanding said money and/or personal property...with use of a deadly weapon..." I:003;IV:774. State failed to meet its burden of proof because the suspect did not demand money

or personal property from Juan. He also did not point a weapon at Juan while demanding money.

Yet State seems to argue a robbery of Juan occurred because the man took Santiago's property. RAB:18. Again, there is no evidence that Juan had joint ownership and possession of Santiago's property and State may not change its factual theory on appeal. *Crespo.*

Wilkins v. State, 96 Nev. 367, 374 (1980) and *Hernandez v. State*, 118 Nev. 513, 531 (2002) do not discuss the sufficiency of the evidence for robbery.

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

State minimizes Keandre's challenge to the venire argument, reducing it to a request for an evidentiary hearing simply based on the limited number of minorities in his venire. RAB:21.

However, Keandre's request for an evidentiary hearing was an attempt to obtain information to support his objection to the venire. Under the Equal Protection Clause and due process, Keandre had the right to challenge the potential violation of his right to a jury from a fair-cross section of the community.

Once Keandre objected and requested information, the court had a duty to release any and all documents involving the jury selection process used in creating his venire. See *Afzali v. State*, 130 Nev. 313 (2014)(court must release documents regarding the selection process used for his grand jury). An evidentiary hearing is needed because the court controls the documents, the process used, and the Jury Commissioner. *See Afzali*. While NRS 6.110(1) dictates a process, the information and documents used in each case are not a matter of public record. Thus, the only way a criminal defendant may obtain information to support his objection to the venire and argue a problem occurred in the process is to ask for the Jury Commissioner to testify. As such, when a defendant objects to the venire and has satisfied the first two steps of the *Williams*[1] test, an evidentiary hearing is needed.

In *Afzali,* this Court recognized the importance of allowing a defendant access to the documents used in the selection process of his grand jury and remanded the case to district court, ordering release of all documents. Once provided with the documents, *Afzali* then made appropriate objections. If this principal applies for the grand jury selection process then the same principal would apply for the selection of a jury at trial, thereby

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[1] *Williams v. State*, 121 Nev. 934, 940 (2005).

requiring the Jury Commissioner to testify and identify documents and the process used in establishing Keandre's specific venire.

State argues no error occurred because the Jury Commissioner followed NRS 6.110(1) and the process outlined by NRS 6.110(1) has been approved of in the past. RAB:20-21.

There is no proof the Jury Commissioner followed the statute in this case because she did not testify. What happened in another case is not sufficient to explain what occurred here. RAB:22. Thus, the record is barren of any suggestion that Keandre's venire was correctly selected as outlined in NRS 6.110(1).

Furthermore, by relying on a transcript involving the testimony of the Jury Commissioner from a different case, the court showed it had prejudged Keandre's objection before he made it. V:963;XIV:3064-80. Court's actions here are similar to those of the trial court in *Buchanan v. State*, 130 Nev. 829 (2014), where court denied the defendant's challenge to the venire before holding an evidentiary hearing on the challenge.

Yet State claims automatic reversal is not warranted because the pre-judging structural error issue addressed in *Brass v. State,* 128 Nev. 748 (2012) is different from what occurred her. However, in both instances, the court pre-judged a defendant's objection before or upon the objection

without allowing a full hearing discussing the objection. Here, court denied Keandre a full hearing by refusing to allow the Jury Commissioner to testify regarding the selection process for his venire thus pre-judging the objection. In *Brass*, the court denied argument on a *Batson* challenge until after the juror was removed. In both instances the court pre-judged the objection.

Another case supporting Alfred's request to question the Jury Commissioner is *Morgan v. State*, 416 P.3d 212 (Nev. 2018). In *Morgan*, trial court initially refused to allow a hearing but later reconsidered when a question arose regarding a problem with the selection process involving a juror's qualifications to serve. By holding the hearing with the Jury Commissioner, the *Morgan* Court found the trial court did not commit structural error by prejudging the objection.

Here, Keandre sought to challenge the selection process by examining the issuance of the juror summons to different zip codes. On appeal, State acknowledges trial court had never before heard of Keandre's argument before or that a problem with issuance could provide fewer minorities on the jury. OB:23. Because court had no understanding of issue, here, as in *Morgan*, court should have held an evidentiary hearing.

By refusing to hold an evidentiary hearing, court violated Keandre's right to due process because he was limited in presenting definitive evidence

showing the summonsing process undermined his ability to obtain a fair cross-section of the community for his venire. Now on appeal, State uses this against Keandre, arguing he does not have the information or documentation he was prohibited from obtaining. Yet, it is not Keandre's fault he does not have specific documents or information.

In its brief, State did not address Keandre's argument as to different procedures currently being used by the Jury Commissioner that were not in effect or discussed in the transcript the court relied on. AOB:28-30. Thus, State accepts these differences as accurate.

Finally, further review of the briefs filed in Battle v. State, unpublished at 385 P.3d 32 (Nev. 8-10-16), indicates the facts are distinguishable from the case at bar. In Battle, the defense did not ask for an evidentiary hearing and court never refused to hold an evidentiary hearing. See State's Fast Track Response, page 12, case no. 68744.

State does not address Keandre's NRS 51.325 argument. AOB:30.

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.

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;

State argues the plain meaning of NRS 51.035(2)(d) gives trial court the authority to admit the entire transcript of a witness' entire grand jury testimony as substantive evidence if they testify at trial. RAB:24-27.

In discussing the plain meaning of the words in NRS 51.035(2)(d), State omits a recent case decided after Keandre filed his Opening Brief: *Richard v. State*, 424 P.3d 626 (Nev. 2018) and does not discuss the conflict between NRS 51.035(2)(d) and NRS 51.125.

B. NRS 51.035(2)(d) and NRS 51.125

State claims NRS 51.125 is irrelevant. RAB:17; Compare AOB:30-38. However, grand jury transcripts are documents of a past recollection recorded. *United States v. Patterson*, 678 F.2d 774, 777–78 (9th Cir. 1982).

In Nevada, under NRS 51.125, the past recollection recorded statute, *grand jury transcripts may only be introduced as an exhibit by an adverse party* after showing the recorded recollection was made when the matter was 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, court's interpretation of NRS 51.035(2)(d), allowing for the admission of the entire grand jury transcript just for the asking, conflicted with NRS 51.125. NRS 51.125 only allows the State to read portions of the past recollection recorded (the grand jury transcript) into the record and only after the foundation requirements were met. Because State's witnesses remembered the event, there was no need for the admission of their prior statements. Thus, NRS 51.125 precluded State from introducing the grand jury transcripts as a court exhibit.

A review of NRS 51.035 and NRS 51.125 shows they were enacted in 1971. Under statutory construction analysis, Court presumes that when enacting legislation, Legislature does so "'with full knowledge of existing statutes relating to the same subject.'" *DeStefano v. Berkus*, 121 Nev. 627, 631 (2005) *quoting State Farm*, 116 Nev. 290, 295 (2000) *quoting City of Boulder v. General Sales Drivers,* 101 Nev. 117, 118-19 (1985). Furthermore, "[i]t is a well-recognized tenet of statutory construction that multiple legislative provisions be construed as a whole, and where possible,

a statute should be read to give plain meaning to all of its parts. *Gaines v. State*, 116 Nev. 359, 365, 998 P.2d 166, 169–70 (2000).

In construing NRS 51.035(2)(d) and NRS 51.125 as a whole, NRS 51.035(2)(2) only gets State past the hearsay problem whereas NRS 51.125 gives procedures for introducing the prior recollection recorded. NRS 51.035(2)(d) only allows the State to admit grand jury testimony orally, as substantive evidence, but does not allow the State to introduce the document because NRS 51.125 prohibits this. NRS 51.125 only allows an adverse party to introduce the physical document.

However, no other state and the federal court have a rule like NRS 51.035(2)(d). Therefore, court should find it violates a defendant's right to a fair trial and confrontation to allow the introduction of grand jury testimony as substantive evidence.

District court's incorrect interpretation of NRS 51.035(2) 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. Keandre's right to due process and right of confrontation were violated.

C. *Richard v. State*

Richard explains the meaning of the first section of NRS 51.035(2) - "The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is..." *Id.* at 631-32 (emphasis added). The *Richard* Court interpreted this section to mean the witness must first be asked about the specific statement and cross-examined regarding the statement before it is admitted.

In *Richard,* a police detective testified to the out-of-court statements of one witness. The *Richard* Court held in order for the witness' prior inconsistent statement or statement of identification to be admitted under NRS 51.035(2)(a), 51.035(2)(c), 50.135(2), State must first ask the witness who made the statement about the specific prior statement. If a witness is not first asked then he is never cross-examined on that statement. *Id. at* 631. Thus the key to admissibility is that the witness must first be asked about the particular, specific statement before he is cross-examined.

The facts here are different but the interpretation of the first section of NRS 51.035(2) remains the same: the witness must first testify and be subjected to cross-examination prior to the specific statement being admitted.

What is different here is that the same witness who made the statements was also testifying. The witness' entire grand jury transcript was admitted while the witness was testifying on direct – except for Marvin – rather than a specific statement. The transcript is not a "statement" but a document not only containing the witness' testimony, but also the prosecutor's questions and prefatory language. The introductory language allowed the jurors to know the charges presented to the grand jury and the jury could surmise that 12 other people decided Keandre was guilty. VI:1528-29;XIV:3039. Thus, the admission of this information was highly prejudicial.

D. Due Process and the Right of Confrontation

State does not address the violation of Keandre's right to due process at trial. See AOB:35-37.

However, State contends Keandre's right of confrontation was not violated by the admission of the entire grand jury transcripts based on *Maginnis v. State*, 93 Nev. 173, 175–76 (1977) *citing California v. Green*, 399 U.S. 149, 158 (1970) and *Levi v. State*, 95 Nev. 746, 748 (1979). RAB:25-27.

Green and *Levi* tell us that a witness' prior testimony may be admitted at trial if the witness was subjected to cross-examination at the prior hearing

and at trial. In *Green*, when a witness did not remember prior statements, court allowed the prosecutor to question and read into the record the witness' prior testimony at preliminary hearing (which was subject to cross-examination). Court also allowed a police officer to testify to the witness' out-of-court inconsistent statements. In *Levi*, court admitted two witnesses' preliminary hearing testimony as substantive evidence, rather than impeachment, when they repudiated their prior in-court-testimony at trial. Here, trial court simply admitted the transcripts as exhibits based on NRS 51.035(2)(d).

Contrary to *Green* and *Levi*, *Maginnis* appears to allow the admission of an entire document of grand jury testimony (not subject to cross-examination). *Maginnis* was decided prior to *Crawford v. Washington*, 124 S. Ct. 1354, 1374 (2004) thus making the holding questionable. *Maginnis* is simply wrong.

Applying the rational of *Green* and *Levi* to the facts of this case, Keandre's right of confrontation was violated when the court admitted testimony that was not subjected to cross-examination at the time it was made. Thus, while Keandre was given an opportunity to cross-examine the witnesses at trial, he was not given an opportunity to cross-examine them at the grand jury. Moreover, the jury was allowed to have the transcripts during

deliberations thus emphasizing the admission of this testimony above all others.

The error was not harmless as spelled out in the Amended Brief. Even the trial court acknowledged NRS 51.035(2)(d) benefits the State and not the Defense. VII:1525. District Court's interpretation of NRS 51.035(2)(d) unfairly allowed State to introduce several witnesses' entire pre-planned grand jury transcript that was not subjected to cross-examination. During jury deliberations, jurors had the transcripts to read – transcripts without any cross-examination. The transcripts were substantive evidence. Thus, even though Keandre confronted the witnesses at trial, his rights to due process and confrontation were violated because the only transcripts the jury are given to review during deliberations are those without cross-examination and the transcripts were incorrectly admitted into evidence.

E. Omissions

State does not address many of Keandre's arguments: (1) NRS 51.035(2)(d) is unique; (2) NRS 51.035 only allows in statements after the witness testifies and is subject to cross-examination on the statement; (3) NRS 51.035(2)(d) violates Keandre's right to Due Process; and (4) error in admitting introductory language in transcripts; and (5) the prosecutor

testified at trial through the grand jury transcript. *Polk v. State*, 126 Nev. 180 (2010).

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

"The Compulsory Process Clause, which provides that the accused shall have the right 'to have compulsory process for obtaining witnesses in his favor,' together with the Due Process Clause of the Fourteenth Amendment, embodies a substantive right to present a meaningful and complete criminal defense." *Harris v. Thompson*, 698 F.3d 609, 626 (7th Cir. 2012) *citing Holmes v. South Carolina,* 547 U.S. 319, 324 (2006). Accordingly, the exclusion of defense evidence, that is material to the outcome of the trial, based on a restriction that is "'arbitrary' or 'disproportionate to the purposes' [it is] designed to serve" abridges a defendant's right to present a defense. *Id.* at 626-27.

State acknowledges the pictures Keandre offered where presented to establish evidence of third party guilt. Accordingly, they were material to his defense. But State claims any more than one picture of Bobby was irrelevant, misleading, confusing, cumulative, and unfairly prejudicial to the State. RAB:28-29. However, court rejected pictures of Bobby's profile thereby prohibiting the jury from seeing Bobby's profile.

Here, court's decision was arbitrary and disproportionate to evidentiary rules. NRS 48.015 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1).

State does not contest that the photographs were submitted by Keandre to support his theory of third party guilt. Therefore, the photographs were relevant.

Court admitted one picture of Bobby looking forward and excluded pictures showing Bobby's profile. XV:3242;3247;3251. The photographs of Bobby's profile were not cumulative of the one photo admitted. NRS 48.035.

It is unclear how the rejected photographs are unfairly prejudicial to the State, State does not explain in its brief. If State's complaint is that they originated from a booking photo, court could simply have put them on separate pages without booking information. Alternatively, court could admonish the jury to not draw any inference from the pictures that Bobby was previously arrested.

It is also unclear how 2-3 photographs could be misleading or confusing, State does not explain. The pictures were of one man Keandre believed committed the robbery. The pictures were needed for the jury to compare the physical attributes of the one man to the many pictures State introduced of Keandre – including his profile. IVX:3048-51;XV:323532393241

Keandre was prejudiced because the court allowed State to admit a side view of Keandre but not a side view of Bobby. XIV:2991;XV:3247-51. 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. State does not dispute that the side views of the two men show remarkably similar characteristics.

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 violations, notice issues, and motion for a mistrial.

State does not address the cases Keandre cited discussing whether a mistrial is needed when there are discovery violations, contending the cases are not precedent. RAB:40-41. Because Nevada does not have many cases in this area, the out-of-state cases are persuasive. See AOB:47-49.

Discovery rules serve to eliminate a trial by ambush or surprise. *White v. State*, 223 Co.3d 859, 867 (Miss.Ct.App. 2017). Because the Legislature enacted discovery rules, Keandre has specific rights to discovery and 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). Keandre also has rights to exculpatory discovery under the United States Constitution. *Brady v. Maryland*, 373 U.S. 83 (1963); *Mazzan v. Warden, Ely State Prison*, 116 Nev. 48 (2000).

When discovery violations occur, district court must adequately inquire to determine the individual and cumulative effect of prejudice to Defense. See *Wagner v. State*, 208 So. 3d 1229, 1230–31 (Fla. Dist. Ct. App. 2017). The burden is on the State 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).

But State contends no discovery violations occurred. Even if violations occurred, State claims Keandre was not prejudiced because he had an opportunity to cross-examine the witnesses regarding the omitted discovery. If Court accepts State's reasoning then there would be no need for discovery rules because the remedy would simply be cross-examination.

After a multitude of discovery and notice violations, Keandre motioned for a mistrial. XII:2643;2697-2717; XII:2766-84.

District court abused its discretion by failing to adequately inquire into how the violations affected Keandre's defense and when denying Keandre's motions for a mistrial because the repeated discovery and notice violations prohibited Keandre from obtaining 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.

B. NRS 174.235(1)(a) – discovery.

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..." Court ordered discovery pursuant to the statute regarding all Keandre's conversations intercepted by law enforcement. IV:893;V:929-36. Jail calls are recorded statements by a defendant.

But State claims NRS 174.235(1)(a) only requires disclosure of a defendant's recorded statements if State intends to use them in its case-in-chief or they are exculpatory. RAB:31-32. State contends it does not need

to give the Defense a copy of the defendant's jail calls if they only intend to use the statements for impeachment.

State is incorrect. The plain meaning of NRS 174.235(1)(a) requires State to reveal all of defendant's recorded statements. However, as to witnesses, State need only reveal the "written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the State." NRS 174.235(1)(a).

State twists the NRS 174.235(1)(a) rule by claiming it was introducing a statement from a witness – Chanise – for impeachment. RAB:31. Thus, even though the recorded statement was a conversation between Keandre and Chanise, initiated by Keandre, and Keandre is the defendant, by classifying it as a recorded statement from a witness State seems to contend it did not have to disclose it. State is incorrect because it is a recorded statement from the defendant that was required to be revealed under the discovery statutes.

State further claims even if evidence is discoverable, State need not disclose the evidence unless it intends to use it in its case-in-chief. In a footnote, State acknowledges that at the time of trial it had 30 jail calls that it did not turn over to the defense and that it would only turn them over after listening to them and deciding if they would use them. If they were

not going to use defendant's recorded statements then, according to State, the defendant was not entitled to it. Thus, State interpreted NRS 174.235(1)(a) as not requiring State to reveal all of a defendant's statements. However, NRS 174.235(1)(a) does not say this.

There is no record indicating State turned over all tapes of Keandre's taped conversations even though court ordered it.

As to the conversation between Keandre and Chanise taking place on 07/31/17, State claims it only became aware of the conversation on 08/02/17. RAB:31. However, State did not immediately disclose the recorded statement as State now claims. Before disclosing it, State used Keandre's recorded statement and conversation during its cross-examination of Chanise. State did not reveal Keandre's recorded conversation until Defense demanded a copy. XII:2662;2697-2717.

Yet State claims no prejudice occurred and does not address Keandre's explanation of prejudiced discussed in the Amended Opening Brief.

As previously noted, Keandre was prejudiced 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. Reviewing the questioning shows prosecutor was asking her direct questions about what Keandre said. XII:2643-45.

The giving of a limiting instruction was helpful but insufficient because State impeached her testimony, inferring she and Keandre were trying to hide something from the jury.

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." At some point, State knew Det. Majors would testify that Darrell wrote a statement that was missing.

Yet State claims there was nothing to disclose because Darrell's statement was missing or never written. RAB:32-35. However, NRS 174.235(1)(a) requires State to reveal in discovery that there was or may

have been a statement that was missing. This would enable Keandre to prepare for trial and cross-examine Darrell about the missing statements.

Moreover, the prosecutor specifically told Keandre that he did not have a form signed by Darrell. X:2248. Therefore, State had an obligation to correct its response regarding discovery.

3. DNA charts.

State claims the DNA charts were not a scientific report but a summary of its expert's methodology and demonstrative. RAB:35.

State sought to introduce the DNA charts without first revealing the charts to Keandre. X:2068-70. Keandre objected because he had never seen the exhibits. X:2068-70;Exhibits-XV:3335-42. The DNA charts were subsequently introduced as substantive evidence – as State's exhibits - and not demonstrative as State incorrectly concludes.

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. DNA charts are tangible documents and State used them. Accordingly, State violated the discovery order by not disclosing expert's charts until attempting to introduce them at trial. Keandre was prejudiced because he could not prepare in advance of trial for cross-examination of State's expert on the DNA charts because State

kept them secret. In doing so, State prohibited Keandre from hiring his own expert to review the DNA charts thereby prejudicing him from obtaining a fair trial.

4. Video from EZ Pawn.

State claims any prejudice due to the missing video was cured through cross-examination. RAB:36-37. However, cross-examination only showed the video was there and now missing. It did not explain what was on the video. Because Denton testified the missing video would have captured some of the parking lot, the event involving Marvin may have been videotaped.

The video from EZPawn was important to the Defense because Marvin gave differing descriptions of the white car. Marvin said the white car was a Kia but waivered on whether it was a 2 or 4 door. VII:1571;1478;1493;1540. After accusing Keandre of the crimes, police impounded a 2016 Mazda, 4 door, without plates. VII:1549-53. Thus, the video would have clarified what type of car was involved in the Marvin incident and proven Keandre was innocent. The video would be exculpatory if it showed a white Kia rather than a Mazda.

5. SuperPawn Tickets.

NRS 174.235(1)(c) and NRS 174.295 requires that State give Defense copies of tangible objects or documents State intends to introduce in its case-in-chief. State argues it did not have to inform Keandre of the pawn tickets because it did not intend to introduce the pawn tickets in its case-in-chief. It did not discover the pawn tickets until later and introduced them on 08/02/17 during rebuttal. RAB:38.

The pawn tickets indicated Omara sold jewelry to the pawn shop on 05/26/16 at 2:40-50 pm, the same day Marvin said he was robbed. XII:2718-53;XIV:2992-99. State used this information to dispute Keandre's alibi that he was not in Las Vegas on that date. RAB:38.

NRS 174.233 requires State to notice Keandre with a list of witnesses it intends to introduce disputing his alibi. Clearly, State didn't follow NRS 174.233.

After receiving the Information State did not reveal it until calling the witness to testify. 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, XII:2729-31;2733-84. He could not prepare cross-examination for the surprise witness.

Keandre does not have access to burglary/pawn shop data bases that METRO controls thus making it impossible for him to attempt to locate stolen items on his own. Keandre cannot subpoena all the pawn shops as State suggests. The State through METRO has access to all burglary/pawn shop data bases and could easily have conducted a search before trial. State's failure to find what it could easily have obtained prior to trial violated Keandre's right to obtain a fair trial.

C. NRS 174.233 and NRS 174.234.

State claims Alma was not a rebuttal alibi witness. However, State admits it used Alma and the pawn tickets to rebut Keandre's claim that he and Omara did not arrive in Las Vegas until 05/27/16 - as testified to by Chanise. RAB:40. Alma and the pawn tickets indicated Omara was in Las Vegas on 05/26/16. Keandre arrived with Omara thus suggesting he was in Las Vegas on 05/26/16 when Marvin was robbed. Accordingly, State indirectly admits Alma was a rebuttal alibi who was never noticed. XII:2726-84.

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.

Based on the numerous violations of discovery it appears the prosecutor's withholding of the alibi information was intentional.

Yet State claims any error was harmless because the evident of guilt was overwhelming. RAB:41. In Issue IX, under the cumulative error section, Keandre explains how the evidence was not overwhelming and that because of the errors he was denied a fair trial.

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

State contends its rebuttal witnesses rebutted Keandre's case-in-chief by giving evidence to corroborate the witnesses' previous identification of Keandre as the suspect. RAB:42-44.

Marvin Bass described the items stolen, said Exh196 was not the robber, and identified Keandre. XII:2719-21;XV:3242-43. Jordan also said Exh196 was not the person who robbed him, it was Keandre. XII:2724.

However, as to Marvin, Keandre never offered any evidence as to his gold chain thus there was nothing to rebut.

The remaining rebuttal testimony regarding Marvin and Jordan only discussed identification. 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. The manner in which this occurred resulted in unreliable testimony.

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. As this Court knows, 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). Here, prosecutor intentionally used extremely suggestive identification procedures in court on rebuttal that should not have been allowed. Basically, prosecutor improperly tried to bolster the witness identification by improperly introducing prior consistent statements.

State did not address its other rebuttal witness in this section. As previously stated, rebuttal witness Alma Luevanto did not rebut Defendant's witnesses but introduced new evidence which State should have entered in its case-in-chief or asked to reopen. State began investigating pawn shops during its case-in-chief. XII:2729-31;2733-84. There is no reason why METRO could not have obtained this information prior to trial.

As stated in the Amended Opening Brief, Keandre prefaced section of his argument as prosecutorial misconduct and a 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). State does not address this her, but does discuss it in part within another issue.

Reversal is warranted because by presenting withheld alibi evidence, State gave itself an unfair advantage. It violated statutorily and constitutional guidelines as addressed in the previous issue. Moreover, the evidence was not overwhelming as State suggests. RAB:41-42; See Issue IX discusses further why the evidence was not overwhelming.

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

State claims no prejudice occurred by the jury knowing Keandre was in jail because they knew he was arrested. RAB:45-46. The calls were recorded on 5/28/16 and 5/29/19. XIV:3052-63.

In a slightly different context, Court has prohibited evidence reminding the jury of a defendant's custodial status because it is prejudicial. For instance, a defendant does not wear jail garb at trial and he may not be

shackled except under specific circumstances. See *McGervey v. State*, 114 Nev. 460, 462–63 (1998). The reason for this is to protect the presumption of innocence. The same holds true by reminding the jury the defendant is in custody.

Jury was doubly reminded of Keandre's custody by the tapes being played in court and the jury given a copy of the transcript. Thus, the presumption of innocence was undercut by the jury being reminded repeatedly that he was in jail. The evidence was also cumulative, unfairly emphasizing Keandre's statement by introducing them by transcript and tape. NRS 48.035.

As to the doctrine of completeness, State contends court may overrule the doctrine of completeness by finding the additional portions of the document or recording irrelevant or otherwise inadmissible under evidentiary rules. RAB:46-47. State's argument is similar to the one made in *Holmes* wherein the court ruled on the admissibility of a defendant's evidence of third-party guilty and precluded it. Where the court's ruling on an evidentiary matter denies a defendant the ability to present a full and complete defense, the court has abused its discretion.

Here, Keandre argued the redactions for 5/29/16 were incomplete and gave a false impression. X:2025-37. He explained at the time of the 5/29/16

jail call, Keandre had been in jail for one day and misspoke when saying: "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.

State does not address this argument, merely contending the court found it irrational and inconsistent and not supported by the Doctrine of Completeness. However, it serves to explain Keandre's misconception of time and should have been added as allowed by NRS 47.120(1).

State does not address *Domingues v. State*, 112 Nev. 683, 693–94 (1996). In *Domingues,* 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. Offered/rejected instructions.

1. Two reasonable interpretations.

State argues that trial court's decision to reject Keandre's proposed instruction on evidence supporting two reasonable interpretations is not erroneous because the giving of this instruction is discretionary. RAB:48-49. However, this was an identification or misidentification case thereby making the instruction necessary. NRS 175.161, *Bails v. State*, 92 Nev. 95 (1976).

2. Missing Evidence.

Cross-examination is not a remedy for missing evidence as State suggests. RAB:49-50. Here there were two pieces of missing evidence: video (XVI:3130) and identification form filled out by Darrell (XV:3131).

As previously noted, the missing video was critical to the defense of the Marvin incident because Marvin's identification of the vehicle was different than that of the car recovered. Also, the missing identification form could have supported Keandre's claim of misidentification by Darrell. In that sense, the evidence was material to his defense and potentially exculpatory. *Daniel v. State*, 119 Nev. 498 (2003); *Sanborn v. State*, 107 Nev. 399 (1991).

3. Accessory after the crime.

State does not address or contest Keandre's argument regarding *Peck v. State*, 116 Nev. 840 (2000) *overruled by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). RAB:51. State merely argues the instruction on a lesser related was confusing or inconsistent. RAB:51. However, State does not point to any wording in the offered instruction that it believes was confusing for the jury or inconsistent with the evidence.

At trial, State acknowledged it knew Keandre's theory of defense was he was only an accessory after the fact – Bobby committed the robberies. XIII:2828-37. State acknowledged this was Keandre's argument in Opening. XIII:2828. Because State knew, State was not sandbagged and the rational in excluding lesser related instruction in *Peck* did not apply here. State's failure to address this argument is a concession that it is accurate. *Polk.*

IX. PROSECUTORIAL MISCONDUCT.

In closing argument, prosecutor used the charts to suggest the jury could make their own conclusion regarding the DNA found in by comparing it to Keandre's DNA: "[t]ake a look at it. See what you think. Make your own determination." XIII:2870.

State correctly points out that the prosecutor argued Keandra's DNA matched the 12 and[2] 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;RAB:52-53. Thus, contrary to his own expert who found the DNA analysis inconclusive, the prosecutor said the similarities in the DNA allele were sufficient for the jury to conclude it was a match.

But State claims the argument only went to the weight of the evidence. However, it is impossible to give DNA evidence that the State agrees was "unreliable" any weight. State's own expert made no conclusions. X:2067. Thus, it is impossible to give weight to no conclusion.

The manner in which the prosecutor argued was contrary to the evidence presented. Prosecutorial misconduct involving the mishandling of

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[2] Defense accidently wrote "of" instead of "and."

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).

All agree the DNA evidence was unreliable and inconclusive. The error was not harmless because Keandre's defense was misidentification. DNA evidence is identification testimony. Prejudicial error occurred because prosecutor's argument along with court's decision that jury could consider the weight of the DNA evidence allowed the jury to incorrectly draw an inference that Keandre's DNA was found on the gun – he was identified. Because the DNA evidence was not competent, Keandre's right to due process was violated because the prosecutor presented a false, highly suggestive inference based on unreliable evidence.

Unlike other many other errors, prosecutorial misconduct is grounds for reversal *unless* the error is harmless beyond a reasonable doubt. *Brown v. United States,* 951 F.2d 1011, 1014 (9th Cir. 1991) *citing Chapman v. California*, 386 U.S. 18, 24 (1967).

The error here was an impermissible comment on the evidence which so affected Keandre's right to present a defense of misidentification and third party guilty that it infected the trial with unfairness resulting in a violation of due process. See *Valdez v. State*, 124 Nev. 1172. 1189–90 (2008). Thus it was of a constitutional nature and not harmless. 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).

State does not dispute that 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).

X. CUMULATIVE ERROR.

Court analyzes collective error if it finds no singular issue sufficient for reversal. *Big Pond v. State*, 101 Nev. 1, 3 (1985)(cumulative error found in the admission of a defendant's statement in violation of *Miranda*, misconduct by juror and court bailiff, and evidence not overwhelming); *Dechant v. State*, 116 Nev. 918, 927-28 (2000)(court found cumulative error due to improper comment on a defendant's truthfulness by witness, court's failure to provide defense with discovery involving the investigator's notes,

the evidence circumstantial, and the crimes grave); *Valdez v. State*, 124 Nev. 1172, 1195-98 (2008)(finding instruction error coupled with jury and prosecutor misconduct amounted to cumulative error).

A defendant's constitutional right to a fair trial may be denied by the effect of cumulative errors. Miranda-Cruz v. State, 7090, WL 6921227 (Nev. 12/28/19).

Here, the issue of guilt was close. Keandre argued this was a case of misidentification and that the robberies were perpetrated by Bobby. Keandre and Bobby had similar features – both black males, both have a slight Adams apple, remarkably similar profiles, same shape of face, and a similar haircut.

Furthermore, the fact that none of the money was found on Keandre or in the apartment supported Keandre's theory of defense of third party guilt - Bobby committed the crimes and took off with the money, leaving the credit cards behind. The show-up identifications wherein the victims identified Keandre at the apartment were highly suggestive and subsequent in-court identifications equally suggestive. As such, the evidence was not overwhelming.

The quantity and character of the errors was significant. Numerous errors deprived Keandre of his ability to present or prepare his defense:

- Court refused to admit all pictures of Bobby (Issue IV).
- Court improperly admitted grand jury transcripts of several witnesses (Issue III).
- Court denied Keandre's motion for a mistrial when he realized State repeatedly violated discovery rules (Issue V).
- Court allowed prosecutor to misstate DNA evidence in closing. (Issue IX).
- Court denied Keandre a *Sanborn* jury instruction after State lost evidence (Issue VIII).
- Court allowing State to admit portions of jail calls (Issue VII).
- State presented improper rebuttal evidence (Issue VI).

Furthermore, the overwhelming violations of discovery and State's failure to provide notice of an alibi witness further infringed on Keandre's ability to obtain a fair trial. (Issue V).

The crimes Keandre was convicted of are grave serious crime. Thus, reversal is warranted.

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

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 Times New Roman in 14 size font.

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DATED this 7 day of January, 2019

PHILIP J. KOHN
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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7 day of January, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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