IN THE SUPREME COURT OF THE STATE OF NEVADA

CALVIN ELAM, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 74581

RESPONDENT'S ANSWERING BRIEF

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

THOMAS ERICSSON, ESQ.
Nevada bar #004982
RACHEL E. STEWART, ESQ.
Nevada Bar #014122
Oronoz & Ericsson, LLC
1050 Indigo, Suite 120
Las Vegas, Nevada 89145
(702) 878-2889

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

ADAM PAUL LAXALT
Nevada Attorney General
Nevada Bar #012426
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

CALVIN ELAM, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 74581

RESPONDENT'S ANSWERING BRIEF

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

ROUTING STATEMENT

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

STATEMENT OF THE ISSUES

1. Whether the District Court properly denied Appellant's challenge for cause.
2. Whether the District Court did not abuse its discretion in questioning a witness.

3. Whether the District Court allowed properly obtained statements from Appellant into evidence.
4. Whether there was no cumulative error.

STATEMENT OF THE CASE

On April 17, 2015, Calvin Elam (hereinafter "Appellant"), was charged by way of Indictment with the following: Count 1—CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony - NRS 200.310, 200.320, 199.480 - NOC 50087), Count 2—FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055), Count 3—ASSAULT WITH A DEADLY WEAPON (Category B Felony - NRS 200.471 - NOC 50201), Count 4—UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE (Category B Felony - NRS 202.357 - NOC 51508), Count 5—BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony - NRS 200.400.4 - NOC 50157), Count 6— SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.364, 200.366, 193.165 - NOC 50097), Count 7—ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.364, 200.366, 193.330, 193.165 - NOC 50121), and Count 8— OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460). 1 AA 1-5.

Appellant's jury trial started on June 19, 2017, and ended on June 27, 2017. 1 AA 7, 5 AA 1003. The jury found Defendant guilty of Count 1— CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony - NRS 200.310, 200.320, 199.480 - NOC 50087), guilty of Count 2—FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055), Count 3—ASSAULT WITH A DEADLY WEAPON (Category B Felony - NRS 200.471 - NOC 50201), and Count 5— BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony - NRS 200.400.4 - NOC 50157). 5 AA 1113-1115

The jury found Appellant not guilty of Count 4—UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE (Category B Felony - NRS 202.357 - NOC 51508), Count 6— SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.364, 200.366, 193.165 - NOC 50097), and Count 7— ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.364, 200.366, 193.330, 193.165 - NOC 50121). The State requested that the District Court conditionally dismiss Count 8— OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460). 5 AA 1109.

On October 19, 2017, Appellant was adjudged guilty and sentenced as follows: as to Count 1 a minimum of twenty-four (24) months and a maximum of

seventy-tw0 (72) months in the Nevada Department of Corrections. 5 AA 1116, 1122. As to Count 2—life with the eligibility for parole after five (5) years with a consecutive term of a minimum of sixty (60) months and a maximum of one hundred eighty (180) months for the use of a deadly weapon in the Nevada Department of Corrections to run concurrent with count 1. 5 AA 1122-1123. As to Count 3—to a minimum of twelve (12) months and a maximum of seventy-two (72) months in the Nevada Department of Corrections to run consecutive to Count 2. 5 AA 1123. As to Count 5—life with the eligibility to parole after two (2) years to run consecutive to Count 3 in the Nevada Department of Corrections. 5 AA 1123.

Appellant received nine hundred twenty-eight (928) days credit for time served. Id. Counts 4, 6, and 7 were dismissed and Count 8 was conditionally dismissed. 5 AA 1124. Additionally, the Court ordered a special sentence of lifetime supervision to commence upon release from any term of probation, parole, or imprisonment. 5 AA 1125. Further, Appellant was ordered to register as a sex offender in accordance with NRS 199D.460 within 48 hours after release. 5 AA 1125.

Appellant's Judgment of Conviction was filed on October 31, 2017. 5 AA 1126-1128. On November 13, 2017, Appellant filed a Notice of Appeal.

STATEMENT OF THE FACTS[1]

On March 10, 2015, Arrie Webster (hereinafter "Webster") visited Annie Gentile (hereinafter "Gentile") and Pamela Yancy (hereinafter "Yancy") her close friends and neighbors. 3 AA 557. Webster's friendship with Gentile was closer than with Yancy. 3 AA 557-559. When she went to visit she brought her puppy, Payton. 3 AA 558. Gentile also had a dog and Webster would take her dog to Gentile's house so the dogs could play every other day. 3 AA 558. Gentile lived off of Jones and Carmen upstairs. 3 AA 559. Webster and Gentile were out on the deck while the dogs were socializing. 3 AA 560. Webster saw Appellant and he said, "what's up" and motioned for her to come over. 3 AA 560. He was downstairs in front of his apartment when Webster saw him. Id.

Webster did not know Appellant's name was Calvin because she called him Cuz because he was in a dating relationship with Webster's cousin, Joanique, by marriage. 3 AA 565-566. She knew Appellant only for a few months before the incident took place. 3 AA 566. When he motioned for her to come over, Webster went because she wanted to explain the situation that occurred with his pit bull puppies that went missing. 3 AA 567.

[1] Appellant was convicted of Count 1, 2, 3, and 5. Therefore, the facts pertaining to those convictions are discussed below.

Previously, while Webster was visiting her friend Edward Brown, who lived in the building next to Appellant, she discovered Appellant's girlfriend looking for the puppies. 3 AA 568. When Webster saw Appellant's girlfriend looking for the puppies she decided to help her look for them, but they could not find them and everyone went their separate ways. 3 AA 569. Webster understood that Appellant was upset and believed someone had taken his puppies so when he motioned for her to come over she wanted to explain that she had nothing to do with the missing puppies. 3 AA 570.

Webster left her dog Payton with Gentile and Yancy and went and talked with Appellant. 3 AA 570. As she walked up to the apartment, he was already in the apartment, so they started talking in the kitchen. 3 AA 570. She began to explain that she heard what had happened to the puppies and told Appellant she did not have anything to do with it. 3 AA 570. Appellant insisted that she did have something to do with it and Webster explained again that she did not. Id. Webster testified that Appellant's voice changed in the tone. 3 AA 571. Appellant began to get aggressive, loud, and scary. Id. He told her if she did not have anything to do with it, to not worry about it, but told her to turn around and get on her knees. Id. She asked him if he was serious, but could tell by his voice that he was serious so she turned around and got on her knees. Id.

Appellant then tied her up with electrical cords and tape, stuffed her mouth with fabric, covered her eyes up, and then put a pillow case over her head. 3 AA 572. Her arms were tied behind her back and to her feet. Id. Before he put the stuffing in her mouth, he placed a black shotgun in her mouth, but she closed her mouth and he lifted her chin up saying "bitch it's not a game." 3 AA 573-574. Appellant beat her with a belt multiple times, pulled her pants down, and took the broom and angled it as to stick it in her anus. 3 AA 575, 579. The entire time he was beating her, he kept saying she had something to do with the missing dogs. 3 AA 574. He then made a phone call, and within minutes there were three women and another male that came to the door. 3 AA 576-577. During the call Webster heard him saying, "I have one of them here. Come over." 3 AA 577. The individuals that came in starting videoing what was taking place. 3 AA 576. Webster started to hear laughter, and then Appellant pulled out a taser and came extremely close to her face with the taser and then tased her. 3 AA 575. There was two or three black males and one black female. 3 AA 577 579.

Webster described Appellant as a tall and lighter skinned man with a medium build. 3 AA 578. Webster believed Appellant was going to stick the broomstick in her anus, she was so distraught that she blacked out. 3 AA 580-581. The beating took place over a couple of hours. 3 AA 581. Appellant touched Webster with the broomstick on her buttocks area. 3 AA 581. While Appellant was doing this,

Webster had her chest on the floor because she had fallen from her knees. 3 AA 581. She repeatedly told Appellant she had nothing to do with the missing dogs. 3 AA 582. The broomstick touched her behind in several places and Webster testified "at one point I just braced myself for him to just do it, and then I just blanked out." 3 AA 583-583. She believed Appellant was going to stick the broomstick in her anus. 3 AA 583. If he did do it, she did not remember because she passed out. 3 AA 583.

Appellant pulled Webster's shorts and underwear down and started beating her with a leather belt. 3 AA 583-584. Webster heard Appellant and the other man say things along the lines of "[w]e're going to put the bitch in the trunk and—and it's not just going to happen to you. We're going to go over there and get everybody else because the puppies are going to come up." 3 AA 584. At one point during the beating, Webster played dead so they would stop beating and tasing her and she heard them say, "is that bitch dead?" 3 AA 605. She then heard them say "wake her up, tase her again." 3 AA 605.

Appellant made a phone call about picking kids up from school. 3 AA 585. She realized the individuals were gone because they did not respond when she said something. 3 AA 585-586. Webster was then able to roll and scoot herself to the door and somehow got to her knees. 3 AA 586. She was able to unlock the door and threw herself outside and onto the pavement. 3 AA 586. Gentile was still on her deck, saw Webster, and ran down to help her. Id.

Gentile and two men helped untie her and take the stuffing out of her mouth. 3 AA 586. One of the individuals had to use a knife to untie Webster. 3 AA 586. Webster was so afraid that she told the individuals to help her faster because she wanted to get out of there. 3 AA 587. After she was untied, within seconds, Appellant retuned in a vehicle, noticed Webster and rolled right past her. 3 AA 587. Appellant went to Tony's house. 3 AA 587. Shortly thereafter, Webster saw Appellant walking towards his house. 3 AA 589. Appellant looked directly at Webster, throwing up signs and looked like Snoop Dogg in one of his videos. 3 AA 590. Webster left the area and met up with her friend Kunta Kinte Patterson. 3 AA 590. She explained to him what just happened and he immediately called the police. 3 AA 592.

When officers arrived Webster explained what happened. 3 AA 594. Webster had a bruise on her lip and injuries on her legs. 3 AA 597.

The next day or soon thereafter the incident Webster went to the UMC. 3 AA 606. Webster told the Sexual Assault Nurse Examiner that Appellant put the broom between her butt cheeks. 3 AA 608. She told Detective Ryland, a female detective, that her rectum felt sore. 3 AA 647. She also told Detective Ryland and another female detective that the broomstick went between the two butt cheeks, but she was not sure if it went into her anus. 3 AA 648. She told them she was touched anally, that is why she scooted repeatedly over and over again. 4 AA 888. She also told them she was so scared during the beating that she urinated herself. 3 AA 648.

Debra Fox (hereinafter "Fox") testified that Yancy, who lived with Gentile babysat Fox's four-year-old daughter while Fox worked. 3 AA 520-521. On March 10, 2015, Fox dropped her daughter off with Yancy in the early afternoon. 3 AA 522-523. After she dropped the baby off, Fox went downstairs and saw a tied-up lady, later identified as Webster, come running up to her yelling for help. 3 AA 524. Fox saw that Webster's arms were tied, her pants were pulled down, her legs were tied, and she had something wrapped around her mouth. 3 AA 527-528. Fox began to help her. 3 AA 529. Webster said, "please help me," and "please call the cops," in a panicked and scared voice. 3 AA 529-530.

Carl Taylor (hereinafter "Taylor"), who lived on 1204 North Jones, Apartment A lived near Gentile and Yancy. 4 AA 742. He also knew Appellant and Webster. 4 AA 743, 746. On March 10, 2015, he saw Webster hopping, jumping, trying to get away and rolling. 4 AA 746. She was rolling away from Appellant's apartment. Id. Webster was tied up and her shorts were down to her ankles. 4 AA 747. Her mouth was wrapped with tape, with pads stuffed in her mouth and a pillowcase over her head. 4 AA 747. Gentile began cutting the wires and plastic off to free Webster. 4 AA 747.

Before he saw Webster come out of the apartment, he saw a black male, who was about 5'11'' to 6', with dark skin, weighing about 250 pounds. 4 AA 748. He also saw three women come out of the apartment. 4 AA 749. He had seen the black

male before with Appellant. Id. However, he had never seen the females before. 4 AA 750. The four people left in a burgundy car with dark tinted windows. 4 AA 750. Then he saw Appellant come out of the apartment after the four people had left. Id. Appellant left in a car. 4 AA 751. He testified that he had previously seen Appellant drive in a small white four-door car. 4 AA 751. Appellant later in the day came back to the apartment complex in the white car. 4 AA 752. Appellant cleaned up the wire and the stuff that Taylor and Gentile had taken off of Webster, and Appellant threw it in the dumpster near his apartment. 4 AA 753.

Detective Elias Cardenas (hereinafter "Cardenas") was a robbery detective for the Las Vegas Metropolitan Police Department (LVMPD) on March 10, 2015. 3 AA 657. Cardenas interviewed Joanique in his vehicle at 1108 North Jones, near Appellant's apartment. 3 AA 662. Cardenas called a phone number for Appellant that he obtained. 3 AA 664. Appellant answered the phone and Cardenas asked him if he knew Webster. 3 AA 664. Appellant acknowledged knowing her. Id. Cardenas asked him to come back to the crime scene and Appellant decided not to. Id. Cardenas then participated in serving a search warrant on Appellant's apartment. 3 AA 666.

Bradley Grover, a senior crime scene analyst testified that on March 10, 2015, he took photos of Webster when he arrived on the scene. 3 AA 675-676. One of the photos depicted bruising on Webster's inner and lower lips. 3 AA 677. She had

abrasions on her knees and shins. 3 AA 678. He testified that she complained of pain in her wrists and forearms and that there may be have some redness on her wrists. 3 AA 678.

He then went to 900 North Jones. 3 AA 679. He collected what he described as a fitted bed sheet and tape. 3 AA 683-684. Then Grover went to 1108 North Jones. 3 AA 687. Grover noticed there was a dumpster in the parking lot between buildings 1108 and 1112 and he collected a dark gray hose and black twine from the dumpster. 3 AA 688. He also collected a shoe in the parking lot east of Building 112. 3 AA 688. The dumpster was in front of Appellant's apartment approximately 20-30 feet away. 3 AA 693-693. Inside the apartment, Grover found a shotgun, tape, broom, and black and brown leather belt. 3 AA 695, 698. He also found some wadded up tissue or toilet paper. 3 AA 697. He recovered a prescription pill bottle with Appellant's name on it. 3 AA 701. He also found Appellant's ID in the east dresser in the northwest bedroom. Id.

Grover then went to 6300 West Lake Mead, Building 16 at apartment 1011 where he located a Nissan Sentra. 3 AA 702-703. He recovered a blue LA hat on a shelf in the southeast bedroom. 3 AA 703. He also recovered an ID with Appellant's name on it. 3 AA 704. Grover swabbed the barrel of the shotgun and the end of the broomstick to later be tested for DNA. 3 AA 709.

Jeri Dermanelian (hereinafter "Dermanelian"), a sexual assault nurse examiner, performed a sexual assault evaluation on Webster. 4 AA 827. Webster chose to have the fourth examination which was the full forensic sexual assault exam, including requests for the criminal investigation of a sexual assault and the medical component. 4 AA 832. She testified that Webster told her she was a victim of a sexual assault, that she had been blindfolded and hogtied. 4 AA 833. Webster indicated that there was a possibility that a broomstick was inserted into her rectum. 4 AA 838. She explained she was blindfolded. Id. Webster was unaware if there was sperm on her body. 4 AA 840. When asked if she passed out or lost consciousness during the assault, Webster stated she had. 4 AA 842. When shown a picture of the bruise on Webster's mouth, Dermanelian testified the injury was similar to other injuries she had observed where guns had been put into people's mouths. 4 AA 846. Webster did not have any marks on her wrists or ankles, but Dermanelian testified that was not abnormal considering it had been 50 hours since the incident. 4 AA 848. When shown pictures of Webster's legs that were taken right after the attack, she described there were abrasions on both patellas and kneecaps, and other marks on Webster's legs she would have been interested in looking at had those injuries been apparent when Webster came in. 4 AA 850.

Dermanelian classified the injuries she was shown in court as superficial, meaning they would not last long. 4 AA 851. During the vaginal examination she

did not find signs of blunt force trauma. 4 AA 853. She explained that because she had seen Webster two days after the assault, it was likely that any injuries had healed such that she could not observe them. 4 AA 853. During the rectal exam there were no injuries of blunt force trauma. 4 AA 853. She also testified that based on her past experience it did not appear that Webster was under the influence of a controlled substance. 4 AA 871.

Cassandra Robertson, a forensic scientist in the DNA biology section at the LVMPD lab, testified that she was asked to examine a swab from the end of a barrel of an H&R shotgun, for DNA along with three reference standards. 4 AA 781. She was asked to run the three reference standards for Webster, Gentile, and Appellant. 4 AA 782. The swab that came from the end of the shotgun barrel was consistent with Webster. 4 AA784.

SUMMARY OF THE ARGUMENT

Appellant claims the District Court improperly denied his for cause challenge to a prospective juror. However, the record shows that the prospective juror demonstrated that he could be fair and impartial. Next, Appellant argues that the District Court improperly elicited hearsay and bad act evidence from a witness. This claim is belied by the record. Moreover, Appellant's objection was sustained, therefore any error was cured. Additionally, Appellant complains the District Court erred when it allowed Appellant's statement to be presented at trial because he was

not given a proper Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630 (1966) warning. This argument is without merit because the warning Appellant received was nearly identical to a warning this Court has upheld as valid. Lastly, Appellant argues there was cumulative error. However, because there was no error, there were no errors to cumulate.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CHALLENGE FOR CAUSE

"Jury selection is 'particularly within the province of the trial judge.'" Skilling v. United States, 561 U.S. 358, 362, 130 S. Ct. 2896, 2902 (2010) (quoting Ristaino v. Ross, 424 U.S. 589, 594-595, 96 S. Ct. 1017 (1975)). "Decisions concerning the scope of voir dire and the manner in which it is conducted are reviewable only for abuse of discretion." Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987). On appeal, how a court chooses to conduct voir dire is given "considerable deference." Lamb v. State, 127 Nev. 26, 37, 251 P.3d 700, 707 (2011) (quoting Johnson v. State, 122 Nev. 1344, 1355, 148 P.3d 767, 774 (2006)). "The purpose of jury voir dire is to discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Johnson, 122 Nev. at 1354, 148 P.3d at 774 (quoting Witter v. State, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996)) (internal quotation marks omitted).

A prospective juror may be challenged for cause for any reason "which would prevent the juror from adjudicating the facts fairly." NRS 175.036. However, a juror may not be removed if the record as a whole demonstrates that the prospective juror could "lay aside his impression or opinion and render a verdict based on the evidence presented in court." Blake v. State, 121 Nev. 779, 795, 121 P.3d 567, 577 (2005). Because the district court is "better able to view a prospective juror's demeanor," the district court enjoys "broad discretion" in ruling on challenges for cause. Leonard v. State, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001).

Appellant argues that the District Court abused its discretion when it denied his demand to remove a prospective juror for cause because of an alleged bias towards law enforcement. AOB at 11. The District Court did not abuse its discretion in denying Appellant's for-cause challenges against Prospective Juror 395, Keith Doering (hereinafter "Doering"). The District Court explained Doering conveyed his ability to be fair and impartial. 3 AA 545-546. Doering was examined at great length regarding his ability to be impartial. The following is part of the dialogue that took place between the State and Doering:

> Ms. Luzaich: Okay. Fair enough. You sound like a pretty upfront, straightforward kind of guy. Are you the kind of person who thinks everything is black and white, or do you recognize any gray?
>
> PROSPECTIVE JUROR NO. 395: I have to deal with a lot of gray in my day-to-day work responsibilities, so I understand there are different shades of gray also.

> MS. LUZAICH: Okay. Would you consider yourself to be a fair and open-minded person?
>
> PROSPECTIVE JUROR NO. 395: I am.
>
> MS. LUZAICH: Would you be a good juror?
>
> PROSPECTIVE JUROR NO. 395: I can sit here and say I hope to be.
>
> MS. LUZAICH: Do you believe that you have the qualities that it would take to be a good juror?
>
> PROSPECTIVE JUROR NO. 395: Definitely.

2 AA 447.

Appellant points to the following exchange as the reasoning for why Doering should have been struck for cause:

> MR. ERICSSON: Okay. Do you feel that you would be able to evaluate the testimony of police officers like you would any other type of person testifying in this case?
>
> PROSPECTIVE JUROR NO. 395: You know, and I've heard this before, I would think and I would expect that Metro would have a little higher integrity than the normal common person that walks the streets. So again, I would start out with that in mind, and if there was some reason to lower that in my mind from things they say or, you know, things that have been proven, then that would be lower. But it's higher than normal in my opinion.
>
> MR. ERICSSON: Okay. And that's a fair, fair answer. So is it accurate to say then, that a police officer would, in your mind, start with a higher level of credibility than somebody off the street?

> PROSPECTIVE JUROR NO. 395: Correct.
>
> MR. ERICSSON: Okay. So if all things being equal from two witnesses, if everything else that they said you matched up and it seemed similar but one was a police officer and one was not, you would believe the police officer over the other witness?
>
> PROSPECTIVE JUROR NO 395: I would unless something made me change my mind.

2 AA 453-454.

Defense counsel explained that Doering should have been struck for cause because the "bias he has towards the testimony of law enforcement would make him an inappropriate juror for this type of case."3 AA 545. The Court and the State then had the following exchange:

> MS. LUZAICH: All he said was that—the question was if all else was equal and one police officer and one nonpolice officer testified, would you believe the police officer, and he said, yes, unless there was—unless there was something different or whatever. So he qualified that, and pretty much anybody on the planet, except for potentially a defendant, would say the same thing. So I don't think that it rises to a challenge for cause.
>
> THE COURT: Yeah, that's how I heard it. That if everything else was equal between the witnesses, he would favor the police officer if everything else was equal, but if there was a reason that—not to believe the police officer, he wouldn't. So I—you know, that would be things like inconsistencies and ability to perceive, whatever. So I don't think it rose to the level of a for-cause challenge.

3 AA 545-546. Thus, Doering's answers, were nonetheless sufficient to assure the District Court that he would be able be fair and impartial in the case.

Additionally, Appellant argues that the Court committed reversible error in denying the challenge for cause because it forced him to use a peremptory challenge to remove Doering. AOB at 14. As explained by this Court, "[a] district court's erroneous denial of a challenge for cause is reversible error only if it results in an unfair empaneled jury." Preciado v. State, 130 Nev.__,__, 318 P.3d 176, 178 (2014) (citing Blake, 121 Nev. at 796, 121 P.3d at 578). Appellant does not argue that the jury actually seated in his case was biased or otherwise impartial. Accordingly, Appellant was not denied his right to an impartial jury. Blake, 121 Nev. at 796, 121 P.3d at 578 ("If the jury actually seated is impartial, the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury.").

As to Appellant's contention that he had to use a peremptory challenge to remove Doering, he fails to explain how exactly he has been prejudiced by this. Specifically, Appellant does not explain who he would have wanted to remove by way of a peremptory challenge and was precluded from doing so because he "was forced to waste" a peremptory challenge on Doering. Therefore, the District Court did not abuse its discretion.

/ / /

II. THE COURT DID NOT ABUSE ITS DISCRETION IN QUESTIONING A WITNESS

This Court reviews the trial court's decision to admit or exclude evidence for an abuse of discretion. Holmes v. State, 129 Nev. ___, ___, 306 P.3d 415, 418 (2013). District courts have "considerable" discretion in determining the admissibility of evidence. Id. Further, this Court will only overturn the trial court's decision if it is "manifestly wrong." Id. If this Court determines that admission was error, it reviews for whether the error was harmless. Weber v. State, 121 Nev. 554, 579, 119 P.3d 107, 124 (2005); see Lincoln v. State, 115 Nev. 317, 321, 988 P.2d 305, 307 (1999). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. NRS 51.035.

Appellant contends that the Court elicited inadmissible and prejudicial hearsay evidence from Webster. AOB at 14. The following exchange took place between the Court and Webster:

> THE COURT: All right. We have some juror questions up here, in no particular order. How did you know the defendant suspected you of taking his dogs?
>
> THE WITNESS: He paid a visit to a friend which was Edward Brown, the neighbor that stayed a building—well, the next building to him—
>
> THE COURT: Okay.
>
> THE WITNESS: --and he went over there and kicked the door in.
>
> THE COURT: And did—

MS. LUZAICH: Um—

THE COURT:--did then Mr. Brown tell you that the defendant suspected you of taking the dogs?

MR. ERICSSON: Objection, Your Honor. Her response, and that would be hearsay from Mr. Brown.

THE COURT: Well, based on something Mr. Brown told you, is that why you went to explain the dogs to— It's not being offered for hearsay purpose, counsel.

THE WITNESS: Well, I went to a friend's house, and they was like, Calvin—

THE COURT: Oh—

THE WITNESS: --came over here and kicked the door in, put a – put the shotgun—

THE COURT: Okay. Well, wait a minute. Did you—let me—

MR. ERICSSON: Your Honor, if we may—

THE COURT: --move on. That is hearsay. So it's sustained.

3 AA 649-650.

Before this question was asked by the Court, the parties approached for a bench conference to determine whether or not the questions could be read. 3 AA 649. The Court was appropriately asking a question from a juror. When the Court determined that the information was inadmissible hearsay, the Court ended the inquiry and sustained the objection. Therefore, the Court did not abuse its discretion.

However, even if this Court finds there was error, it was harmless. Pursuant to NRS 178.598, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001). The statement made by Webster did not have a substantial and injurious effect or influence in determining the jury's verdict due to the overwhelming evidence against Appellant. Webster testified in detail about the assault and beatings. 3 AA 572, 575, 581, 583-584. Furthermore, Gentile and Taylor corroborated the condition Webster was in when she came out of Appellant's apartment tied up and gagged. 3 AA 537-538; 4 AA 746-747. Webster's DNA was found on the barrel of the shotgun. 4 AA784. Grover documented the injuries on Webster's lips and legs. 3 AA 677-678. He found the pillowcase and tape used on Webster's face. 3 AA 684. He also collected the dark gray hose and black twine from the dumpster and Webster's missing shoe. 3 AA 688. Further, he found the shotgun, tape, broom, and

black and brown leather belt in Appellant's apartment. 3 AA 695, 698. Therefore, any error that occurred was harmless because the evidence against Appellant was overwhelming.

Next Appellant argues that this testimony constituted inadmissible bad act evidence. AOB at 15, 17. However, Appellant failed to make an objection regarding impermissible bad act evidence below, and only objected to the fact that the testimony constituted hearsay. 2 AA 650. Therefore, Appellant makes this argument for the first time on appeal without giving the District Court the opportunity to rule on the legal issue. Thus, Appellant waived all but plain error. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. __, __, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Plain error review asks:

> To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.' Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

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

Evidence is not a prior bad act unless the evidence elicited speaks to chargeable collateral offenses. See Salgado v. State, 114 Nev. 1038, 1042-43, 968 P.2d 324, 326-27 (1998) (explaining that cases in which the evidence does not implicate prior bad acts or collateral offense on the defendant's part, a hearing is not required); Colon v. State, 113 Nev. 484, 494, 938 P.2d 714, 720 (1997) (hearing not required when State elicited testimony that defendant knew where marijuana was grown in her building, associated with drug dealers and bailed known drug user out of jail).

The Court read a juror question asking, "[h]ow did you know the defendant suspected you of taking his dogs?" Webster responded with the following:

> THE COURT:--did then Mr. Brown tell you that the defendant suspected you of taking the dogs?
>
> MR. ERICSSON: Objection, Your Honor. Her response, and that would be hearsay from Mr. Brown.
>
> THE COURT: Well, based on something Mr. Brown told you, is that why you went to explain the dogs to— It's not being offered for hearsay purpose, counsel.
>
> THE WITNESS: Well, I went to a friend's house, and they was like, Calvin—
>
> THE COURT: Oh—
>
> THE WITNESS: --came over here and kicked the door in, put a – put the shotgun—

> THE COURT: Okay. Well, wait a minute. Did you—let me—
>
> MR. ERICSSON: Your Honor, if we may—
>
> THE COURT: --move on. That is hearsay. So it's sustained.

3 AA 650.

This testimony did not constitute prior bad act evidence and was not elicited by the state. Therefore, a Petrocelli v. State, 110 Nev. 46, 692 P.2d 503 (1985) hearing was unnecessary. Arguably, this information was admissible as res gestae evidence. NRS 38.035(3); Dutton v. State, 94. Nev. 461, 464, 581 P.2d 856, 858 (1978). Further, the Court was of the belief that Webster's statement was not going to be coming in for hearsay purposes, but to show the effect it had on the listener, being Webster, and what she did thereafter, without any regard for whether the statement was true. The Court did not attempt to illicit bad act evidence from the witness. Moreover, the witness did not even finish her statements before the Court determined the testimony was inadmissible, and sustained defense counsel's objection. Therefore, the sustained objection cured any error. Further, the jury received instructions at the end of trial that any testimony where an objection was made and then sustained, is not to be considered. 5 AA 1093. Therefore, the District Court did not abuse its discretion and Appellant has failed to meet his burden that

this unpreserved claim rises to the level of plain error or affected his substantial rights.

III. THE DISTRICT COURT ALLOWED PROPERLY OBTAINED STATEMENTS FROM APPELLANT INTO EVIDENCE

The Fifth Amendment of the United States Constitution affords an individual the right to be informed, prior to custodial interrogation, that:

> [H]e has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed to him prior to any questioning if he so desires.

Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630 (1966). Miranda's procedural safeguards are only prophylactic in nature, designed to advise suspects of their rights, and "not themselves rights protected by the Constitution." Michigan v. Tucker, 417 U.S. 433, 444, 94 S. Ct. 2357, 2364 (1974). However, the United States Supreme Court has held that Miranda does not require some "talismanic incantation." California v. Prysock, 453 U.S. 355, 360, 101 S. Ct. 2806, 2809 (1981) (per curiam). Rather, the warning need only "reasonably convey to a suspect his rights as required by Miranda." Florida v. Powell, 559 U.S. 50, 60, 130 S. Ct. 1195, 1204 (2010) (internal quotations omitted). Thus, the Supreme Court has instructed reviewing courts that they need not examine the warning rigidly "as if construing a will or defining the terms of an easement." Duckworth v. Eagan, 492 U.S. 195, 203, 109 S. Ct. 2875, 2880 (1989).

Appellant argues that the Court allowed statements from Appellant into evidence when the police did not properly Mirandize him. AOB at 18. Specifically, Appellant claims that police did not advise him he had a right to consult with an attorney *before* questioning. AOB at 18. Further, they did not advise him that he had the right to cease questioning at any time until he spoke with a lawyer. AOB at 19.

The following exchange happened with Detective Weirauch on the witness stand during a hearing outside the presence of the jury:

> THE COURT: Was the card the standard-issue card that was carried by Metro officers at that time?
>
> THE WITNESS: Yes, it was.
>
> THE COURT: Okay. And now they've given you another different card. Is that what's happened?
>
> THE WITNESS: Yes.
>
> THE COURT: Okay.
>
> CROSS-EXAMINATION
>
> BY MR. ERICSSON:
>
> Q: And Detective—and you are a detective, correct?
>
> A: Yes, I am.
>
> Q: What is the difference with the card that you now carry compared to the one you had back in March of 2015?
>
> A: I believe they added one more line for us to read off of.
>
> Q: And can you pull out the card that you currently carry.

A: Yeah.

Q: Do you have that there?

A: Yes.

Q: For the record, can you just read the card that you currently carry.

A: You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to consult with an attorney before questioning. You have the right to the presence of an attorney during questioning. If you cannot afford an attorney, one will be appointed to you before questioning. Do you understand these rights.

Q: Thank you. And what is the additional line to your belief that has been added to the card now compared to the one you carried in March of 2015?

MS. LUZAICH: Objection. Relevance.

THE COURT: Overruled.

THE WITNESS: It's—I'm assuming it's all worded the same. It's one of these two lines right here, the third or fourth line.

MR. ERICSSON: And, Your Honor, may I approach and—

THE COURT: Sure.

THE WITNESS: I think it's—I think it's this one they added right here. You have the right to consult with an attorney before questioning as opposed to before it might have just been you have the right to the presence of an

attorney during questioning. I don't think they added that one.

BY MR. ERICSSON:

Q: Okay. So to your knowledge, the new line on this card is the line that reads—

A: Go ahead. It's this third one right here I believe is the one that they added is you have the right to consult with an attorney before questioning.

THE COURT: I think that's right.

THE WITNESS: I think.

BY MR. ERICSSON:

Q: Okay. So to your knowledge, you did not provide Mr. Elam with that sentence when you gave him a Miranda warning back in—

A: No, I wouldn't have. I would've read it just verbatim off the card of the day.

MR. ERICSSON: Thank you. Your Honor, I've been doing a fair amount of litigation in federal court on that issue. I would move to prevent to [sic] the statement being introduced in this trial. I think that that is a necessary warning for it to be an effective Miranda warning, and since that was not given—

THE COURT: Ms. Luzaich.

MS. LUZAICH: The United States Supreme Court disagrees with that. It was one bad ruling in federal court that I believe may have either since been overruled or something like that, but the United States Supreme Court doesn't agree, and neither does the Nevada Supreme Court.

> THE COURT: Anything else, Mr. Ericsson?
>
> MR. ERICSSON: No. And this is—obviously I'm first time learning that he's got a different card. So, you know, whatever your ruling is now I—I may—
>
> THE COURT: Well, yeah—
>
> MR. ERICSSON: --may supplement tomorrow.
>
> THE COURT:--it's denied. I mean, I think the reason they have the new card is to address that issue to the extent some judges may be granting those motions or what have you. That doesn't mean that it was wrong before. I think they just changed the cards because various opinions. So the request is denied.

3 AA 716-720.

The jury was brought back in and Appellant's statement was then played for the jury and the transcription of Appellant's voluntary statement, State's Exhibit #71, was projected for the jury so they could read along as the audio was played. 3 AA 733-734. State's Exhibit #71 was Weirauch and Appellant speaking on March 10, 2015, at 2300 hours:

> Q: Okay. Okay, Calvin. I'm going to read you something. Okay?
>
> A: Yes sir.
>
> Q: Calvin, you have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to the presence of an attorney. If you cannot afford an attorney, one will be appointed to you before questioning. Do you understand these rights?

A: Yes sir.

Respondent's Appendix (hereinafter "RA") 2.[2]

Appellant argues that because the old card used to say that one could have an attorney *present during* questioning, and the new card states there is a right to have an attorney present *prior to* questioning, this did not constitute an adequate Miranda warning. AOB at 19. However, Detective Weirauch never qualified whether it was during or before when he stated "you have the right to the presence of an attorney." RA 2. Although, Weirauch testified that there was a difference between the old standard-issued Miranda card, and the new Miranda card, with the change of during to before, what he actually said to Appellant when he interviewed him did not make such qualification. RA 2. He simply said, "[y]ou have the right to the presence of an attorney." RA 2. Furthermore, his next statement was "[i]f you cannot afford an attorney, one will be appointed to you *before* questioning." RA 2 (emphasis added). Therefore, Appellant's argument that police did not advise him of his right to consult with an attorney before questioning is belied by the record. Hargrove v. State, 100 Nev. 498, 502 686 P.2d 222, 225 (1984).

[2] Appellant fails to cite to this transcript in his brief. Therefore, this Court should presume that the Miranda warning did adequately inform Appellant of his rights to an attorney, and Appellant waived his rights knowingly and voluntarily. See Sasser v. State, 324 P.3d 1221, 1225 (2014) (citing Riggins v. State, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (concluding that if materials are not included in the record, the missing materials "are presumed to support the district court's decision.")

Although not discussed or cited by Appellant, this Court has recently rejected his very claim in a published opinion. In Stewart v. State, 133 Nev. __, ___, 393 P.3d 685, 686 (2017), this Court was presented with the same issue. Part of the Miranda warning read to Stewart stated: "You have the right to have the presence of an attorney during questioning. If you cannot afford an attorney one will be appointed before questioning." Id. This Court held:

> Given a commonsense reading, these two clauses provide a constitutionally adequate warning—the warning informed Stewart he had the right to counsel before and during questioning, as specifically required by Miranda. Although the warnings were perhaps not the clearest possible formulation of Miranda's right-to-counsel advisement, they were constitutionally sufficient. Id. Thus, we conclude Stewart's first Miranda argument fails.

Id. (internal citations omitted).

"To be constitutionally adequate, Miranda warnings must be sufficiently comprehensive and comprehensible when given a commonsense reading." Florida v. Powell, 559 U.S. 50, 59-60, 130 S. Ct. 1195, (2010). Here, Appellant was told "[y]ou have the right to the presence of an attorney. If you cannot afford an attorney, one will be appointed to you before questioning." RA 2. This is almost identical to the statement that was read in Stewart. However, it can be argued that this version was even clearer because there was no qualification of when the right to an attorney attached in the first sentence. RA 2. Therefore, this is also a correct statement of

Appellant's Miranda rights. "To be found inadequate, an ambiguous warning must not readily permit an inference of the appropriate warning." Doody v. Schriro, 548 F.3d 847, 863 (9th Cir. 2008), aff'd on remand by Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011) (en banc). Not only is the warning Appellant received unambiguous, but it readily permits an inference of the appropriate warning. Therefore, the Court did not abuse its discretion.

IV. THERE WAS NO CUMULATIVE ERROR

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

Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*.") (emphasis added). Second, the evidence of guilt is not close. Webster testified in detail about the assault and beatings. 3 AA 572, 575, 581, 583-584. Furthermore, Gentile and Taylor

corroborated the condition Webster was in when she came out of Appellant's apartment tied up and gagged. 3 AA 537-538; 4 AA 746-747. Webster's DNA was found on the barrel of the shotgun. 4 AA784. Grover documented the injuries on Webster's lips and legs. 3 AA 677-678. He found the pillowcase and tape used on Webster's face. 3 AA 684. He also collected the dark gray hose and black twine from the dumpster and Webster's missing shoe. 3 AA 688. Further, he found the shotgun, tape, broom, and black and brown leather belt in Appellant's apartment. 3 AA 695, 698. Therefore, Appellant's claim of cumulative error has no merit and his conviction should be affirmed.

CONCLUSION

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

Dated this 31st day of July, 2018.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 8,033 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of July, 2018.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 31st day of July, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT
Nevada Attorney General

THOMAS ERICSSON, ESQ.
RACHEL E. STEWART, ESQ.

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ J. Garcia
Employee, Clark County
District Attorney's Office

JEV/Madilyn Cole/jg