IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVAR ERIS KETCHUM,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 75097

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(2) because it is an appeal from a judgment of conviction based on a jury verdict that involves a conviction for an offense that is a Category A felony.

STATEMENT OF THE ISSUE(S)

1. Whether the district court did not abuse its discretion in denying the pre-trial Petition for Writ of Habeas Corpus.

2. Whether the district court did not abuse its discretion in precluding inadmissible prior bad act evidence.

3. Whether the State did not fail to disclosure inculpatory evidence.

STATEMENT OF THE CASE

On November 30, 2016, the State charged Javar Ketchum ("Appellant") by way of Indictment with one count each of Murder with a Deadly Weapon and Robbery with a Deadly Weapon. I Appellant's Appendix ("AA") 047–48. On December 30, 2016, Appellant filed a pre-trial Petition for Writ of Habeas Corpus and Motion to Dismiss. II RA 452–63. The State filed its Return on January 4, 2017. II RA 464–75. Appellant filed a Reply on January 9, 2017. II RA 476–80. The district court denied the Petition on February 17, 2017. II RA 481–82.

On March 8, 2017, Appellant filed a Motion in Limine, seeking to admit character evidence of the victim, Ezekiel Davis. I AA 050–53. On May 9, 2017, the State filed a Motion in Limine, asking that the district court preclude prior specific acts of violence by the murder victim. II Respondent's Appendix ("RA") 348–53. On May 18, 2017, the State filed a Supplement to its Motion in Limine. II RA 354–60. The district court held a Petrocelli Hearing on May 19, 2017, determining that Appellant could only bring in opinion testimony regarding the victim's character and that witnesses were not to elaborate on that opinion. II RA 361.

On May 22, 2017, Appellant's jury trial began. I AA 080. At the end of the fifth day of trial, the jury found Appellant guilty of both charges. I AA 179. Following the verdict, Appellant entered into a stipulation and order, waiving the penalty phase and agreeing to a sentence of life in prison with parole eligibility after

twenty years, with the sentences for the deadly weapon enhancement and the count of robbery with use of a deadly weapon to be argued by both parties. I AA 180–81.

On June 2, 2017, Appellant filed a Motion for New Trial pursuant to NRS 176.515 (4). II RA 363–420. The State filed its Opposition on September 9, 2017. II RA 421–33. Appellant filed a Reply on September 27, 2017 and a Supplement thereto on September 28, 2017. II RA 434–50. The district court, finding that Appellant's disagreement with the court's evidentiary rulings was not a basis for a new trial, denied the Motion on October 17, 2017. II RA 451. Appellant was adjudicated that same day. II RA 451. However, the defense requested additional time to handle sentencing matters. II RA 451.

According to the stipulation, on February 1, 2018, the district court sentenced Appellant to an aggregate of life in the Nevada Department of Corrections with minimum parole eligibility after twenty-eight (28) years, with four hundred seventy-five (475) days credit for time served. I AA 003–04. The Judgment of Conviction was filed on February 5, 2018. I AA 003–04. Appellant filed a Notice of Appeal on February 6, 2018. I AA 001–02.

STATEMENT OF THE FACTS

At 6:22 a.m. on September 25, 2016, Officers Brennan Childers and Jacqulyn Torres were dispatched to a shooting at 4230 S. Decatur Blvd, a strip mall with several businesses including a clothing store. I RA 020–23, 029–32. When police

arrived, they found a man—later identified as Ezekiel Davis ("Ezekiel" or "the victim")—upon whom another man was performing chest compressions. I RA 022–23, 032. Ezekiel was not wearing pants. I RA 032. Several other people were in the parking lot, and none of the businesses appeared opened. I RA 022–23. Ezekiel was transported to the hospital but did not survive a single gunshot wound to the abdomen. I RA 066. Trial testimony from Ezekiel's fiancé, Bianca Hicks, and from Detective Christopher Bunn revealed that missing from Ezekiel's person was a belt which had a gold "M" buckle and a gold watch. I RA 116, 221; II RA 327, 331–33.

Top Knotch, the clothing store in front of which Ezekiel was shot, doubles as an after-hours club. I RA 009. Ezekiel's friend Deshawn Byrd—the one who had given him CPR in an attempt to save his life—testified at trial that sometime after approximately 3:00 a.m., Ezekiel arrived at the club. I RA 010–11. Byrd testified there was no indication that anything had happened in the club which led to any sort of confrontation. I RA 010–14.

Detective Bunn testified at trial that the day of the murder, as detectives and crime scene analysts were documenting the scene, three individuals—later identified as Marlo Chiles, Roderick Vincent, and Samantha Cordero—exited Top Knotch. I RA 141–66. Chiles was the owner of Top Knotch, and Vincent owned a studio inside of Top Knotch. I RA 167. Vincent denied that there were any DVRs of the surveillance video for Top Knotch or the recording studio. I RA 172. Detective Bunn

had noted a camera, however. I RA 168. A subsequent search warrant on the vehicles in the parking lot located two (2) DVR's of the surveillance footage from Top Knotch and the studio in Vincent's car. I RA 157–58, 162–63.

A review of the video footage, extensive portions of which were played at trial, demonstrated that Appellant entered the club at about 2:00 a.m. I RA 190–91. At 3:25 a.m., Chiles, Vincent, Antoine Bernard, and several other people were in the back area of the business when a person in a number 3 jersey, later identified as Appellant, produced a semi-automatic handgun from his pants and showed it to the group. I RA 192–93.

The video also showed that at about 6:14 a.m., Appellant and Ezekiel exited arm-in-arm out the front of Top Knotch. I RA 196. At that point, there was still a watch on Ezekiel's wrist. I RA 197. The two walked to the front of Bernard's black vehicle and appeared to converse for a short time, then walked by the driver's side of Bernard's vehicle, where they left camera view. I RA 198–201. At about 6:16 a.m., the people on video all appeared to have their attention drawn to the area where Appellant and Ezekiel were. I RA 198. Appellant then entered the view of the camera, removing Ezekiel's belt from his body while holding the gun in his other hand. I RA 200–01. Bernard also testified at trial that he saw Appellant take Ezekiel's belt. I RA 119. The video showed that Appellant approached Bernard's car, opened the passenger door, placed the belt on the front seat, and returned to the

area of Ezekiel's body. I RA 201. Appellant returned to Bernard's vehicle, entered the passenger seat of the vehicle and the vehicle fled the area. I RA 201.

Despite contact with several witnesses in the parking lot including Chiles and Vincent, the police had no information regarding the identity of the shooter. I RA 206. After further investigation, the shooter was identified as Appellant and a warrant for his arrest was issued. I RA 206. Appellant was apprehended at a border control station in Sierra Blanca, Texas, whereupon he was brought back to Nevada to face charges. I RA 207.

SUMMARY OF THE ARGUMENT

First, Appellant claims the district court abused its discretion in denying his pre-trial Petition for Writ of Habeas Corpus and Motion to Dismiss Indictment. However, the district court denied these pleadings because sufficient evidence was presented to the grand jury to support the Indictment and the narration of the enhanced video footage was legal evidence. Second, Appellant complains that the district court abused its discretion in excluding evidence of the murder victim's prior convictions. However, such prior bad acts may only be admitted to bolster a self-defense claim if the accused knew about them. Appellant cannot demonstrate that he ever offered proof that he personally knew of such convictions until he was on the witness stand; and even then, the defense did not specifically move to admit the victim's prior conviction. The prior convictions could not have been admitted under

the common scheme or plan exception, nor could they have been admitted through the State's rebuttal witness—who did not "open the door" to such convictions. Third, Appellant complains that the State failed to disclose inculpatory evidence in the form of a surveillance video, portions of which had been played throughout trial; Appellant alleges portions had not been disclosed to him until the State's closing argument. However, the record reveals that Appellant did not object at that point. Further, a close reading shows that Appellant was actually shown the video prior to trial, and in this Opening Brief, is only complaining of not being able to control the video when counsel viewed it at the evidence vault. Appellant—who bears the burden on appeal—has not provided any proof that he was not actually given a copy of the entire video during the discovery process. His argument also ignores the facts that he had the opportunity to play whatever portions of the video he wished during trial, and that he did actually play portions of the video during Detective Bunn's testimony. Each of Appellant's claims is without merit, and this Court should affirm the Judgment of Conviction.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE PRE-TRIAL PETITION FOR WRIT OF HABEAS CORPUS

Appellant alleges the district court erred in denying his pre-trial Petition for Writ of Habeas Corpus and Motion to Dismiss, which challenged the grand jury

proceedings on the ground that inadmissible evidence was presented. AOB at 18–25. This argument is without merit. The district court did not abuse its discretion in denying the pleadings because sufficient evidence was presented to the grand jury to support the Indictment, and the narration of the enhanced video footage was legal evidence.

This Court reviews a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion. Hill v. State, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008). However, on appeal, this Court will only dismiss an indictment where a defendant can show actual prejudice. Id.

A. The enhanced video is irrelevant to the validity of the Indictment.

First, Appellant attempts to paint Detective Bunn's narration of the enhanced[1] video as the lynchpin of the Indictment. However, Appellant ignores the legal standard. Before the grand jury, the State need only show that a crime has been committed and that the accused probably committed it. The finding of probable cause to support a criminal charge may be based on "slight, even 'marginal' evidence . . . because it does not involve a determination of the guilt or innocence of the accused." Sheriff v. Hodges, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980); see also Sheriff v. Potter, 99 Nev. 389, 391, 663 P.2d 350, 351 (1983).

[1] The only "enhancement" applied to any portion of the video was the zoom feature that is built into the Swan video player itself, which was not available for use during the Grand Jury proceedings. I AA 31–32.

"To commit an accused for trial, the State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense." Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971). Sheriff v. Miley, 99 Nev. 377, 663 P.2d 343 (1983). This Court need not consider whether the evidence presented at the grand jury may, by itself, sustain a conviction, since at the grand jury the State need not produce the quantum of proof required to establish the guilt of accused beyond a reasonable doubt. See Hodges, 96 Nev. at 186, 606 P.2d at 180; Miller v. Sheriff, 95 Nev. 255, 592 P.2d 952 (1979); McDonald v. Sheriff, 87 Nev. 361, 487 P.2d 340, (1971).

Thus, to hold Appellant to answer to the charges of open murder and robbery, the State was not required to negate all inferences which might be drawn from a certain set of facts. State v. VonBrincken, 86 Nev. 769, 476 P.2d 733, (1970); Johnson v. State, 82 Nev. 338, 418 P.2d 495 (1966). It was only required only to present enough evidence to support a reasonable inference that Appellant committed the crimes charged.

An open murder charge includes murder in the first degree and all necessarily included offenses, such as manslaughter, where less than all the elements of first degree murder are present. See Miner v. Lamb, 86 Nev. 54, 464 P.2d 451 (1970); Parsons v. State, 74 Nev. 302, 329 P.2d 1070 (1958); State v. Oschoa, 49 Nev. 194,

242 P.2d 582 (1926); NRS 175.501. First degree murder and second degree murder are not separate and distinct crimes which must be pleaded accordingly. See Thedford v. Sheriff, 86 Nev. 741, 476 P.2d 25 (1970); Howard v. Sheriff, 83 Nev. 150, 425 P.2d 596 (1967). Thus, there need not be evidence of first degree murder to support an open charge. See Wrenn v. Sheriff, 87 Nev. 85, 482 P.2d 289 (1971).

The defendant's explanation for the homicide, being in the nature of a defense, whether true or false, reasonable or unreasonable, is for the trier of fact to consider at trial; and the preliminary examination is not designed as a substitute for that function. Ricci v. Sheriff, Washoe County, 503 P.2d 1222, 1223, 88 Nev. 662, 663 (1972) (quoting State v. Fuchs, 78 Nev. 63, 368 P.2d 869 (1962)); see also Hearne v. Sheriff, Clark County, 547 P.2d 322, 322, 92 Nev. 174, 175 (1976). "[T]he presence of malice is a question of fact which bears directly on the guilt or innocence of a defendant and upon the degree of the crime charged. It is not a question to be determined by the magistrate at a preliminary examination—it is a question to be determined by the trier of fact at the trial of the case." Thedford v. Sheriff, 86 Nev. 741, 476 P.2d 25 (1970) (citing State v. Acosta, 49 Nev. 184, 242 P.2d 316 (1926)). "'Neither a preliminary hearing, nor a hearing upon a petition for a writ of habeas corpus is designed as a substitute for this function (a trial).'" Id. at 28 (quoting State v. Fuchs, 78 Nev. 63, 368 P.2d 869 (1962)).

Here, Appellant simply does not explain how the video footage—raw or "enhanced"—precluded the grand jury from finding by slight or marginal evidence that a murder and a robbery were committed, and that Appellant committed them. The portion of the video Appellant complains about is that of Appellant waving his gun around in front of a crowd of onlookers. AOB at 19. Appellant complains that the Grand Jury could not actually see the gun but that Detective Bunn testified that he could see it in the enhanced video. AOB at 19–21. However, the State could have met the "slight or marginal" standard even without this portion of the video.

Appellant utterly ignores the fact that Detective Bunn offered significantly more evidence that a murder and robbery had been committed and that Appellant had committed it. He testified that Ezekiel had been killed. I AA 014. He testified that Ezekiel had a gunshot wound to the abdomen. I AA 018. He testified that he identified Appellant from surveillance footage and from later interactions. I AA 029–30.[2] He testified that, and the video the Grand Jury saw clearly showed, Appellant and Ezekiel walked out of Top Knotch, arm-in-arm, the morning of the murder I AA 034–35. And he testified, and the video the Grand Jury saw clearly showed, that Appellant was the last one to be seen with Ezekiel—and that people

[2] As Appellant was not present at the Grand Jury, and Detective Bunn had familiarity with Appellant by viewing him after arrest, Detective Bunn's identification of Appellant was proper. Burnside v. State, 131 Nev. __, 352 P.3d 627 (2015) (citing Rossana v. State, 113 Nev. 375, 380, 934 P.2d 1045, 1048 (1997)).

are running around the scene after the two walk off camera together. I AA 036–37. Detective Bunn says to the Grand jury that they "can see [Appellant] dragging a belt out of a pair of pants"—pants that had been missing from Ezekiel's body. I AA 017–18, 037. Appellant does not argue that these last three pieces of video footage were in any way enhanced or that Detective Bunn's narration thereof constituted hearsay.

Thus, there was sufficient evidence, beside that which was tied to the enhanced portion of the video where Appellant was waving his gun around, to satisfy the "slight or marginal evidence" standard at grand jury.

B. The fact that Detective Bunn narrated an "enhanced" video, but the State showed raw video footage, did not constitute illegal evidence.

NRS 172.135(2) provides that, "[t]he grand jury can receive none but legal evidence, and best evidence in degree, to the exclusion of hearsay or secondary evidence." However, "regardless of the presentation of inadmissible evidence, the indictment will be sustained if there is the slightest sufficient legal evidence." Collins v. State, 113 Nev. 1177, 1182, 946 P.2d 1055, 1059 (1997). Similarly, a grand jury proceeding may be sustained even though it relies on nothing but hearsay testimony. Costello v. United States, 350 U.S. 359, 363, 76 S. Ct. 406, 408–09 (1956).

As noted by the district court when it denied the Petition / Motion to Dismiss on February 17, 2017, Detective Bunn's narration of the zoomed-in version of the video, while the Grand Jury viewed the non-zoomed-in version, did not constitute

hearsay. II RA 481. The Detective merely testified to what he observed. II RA 481–82. Indeed, Appellant cannot now explain how Detective Bunn's testimony constitutes "hearsay." "'Hearsay' means a statement offered in evidence to prove the truth of the matter asserted unless: 1. The statement is one made by a witness while testifying at the trial or hearing." NRS 51.035. Detective Bunn clearly made these statements while testifying at the Grand Jury hearing. How they constitute hearsay is not explained.

Regardless, Detective Bunn's testimony was in no way improper. In his Opening Brief, Appellant again asserts that there are "facts that are not visible on the video that was played to the Grand Jury"—that it was not "the same video." AOB at 21. This is not true. In fact, the events are visible in the original video; the Grand Jury was just not "able to zoom in and see it clearer." I AA 032.

In other words, the original video *was* shown to the Grand Jury. What was not present was the original player for the video. I AA 025–26. That player had the capacity to zoom in on individual sections of the same video that was displayed to the grand jury. I AA 025–26.

Further, the narration of surveillance video is proper if it assists the jury in making sense of the images depicted in the video. See Burnside, 131 Nev. __, 352 P.3d at 627. And here, that is precisely what Detective Bunn did. Appellant complains that at one point, Detective Bunn testified that he zoomed in the video to

confirm that the black, metallic firearm-like object in Appellant's hand when he is removing the belt from Ezekiel's pants was in fact a firearm. I AA 031–33. The black, metallic firearm-like object is visible on the version played for the Grand Jury. Id. Only a limitation in technology precluded the zooming function from being used before the Grand Jury. I AA 025–26.

A review of all the evidence presented to the Grand Jury clearly establishes more than sufficient evidence to indict Appellant. The district court did not abuse its discretion in denying the pre-trial Petition and Motion to Dismiss.

C. Any error was harmless.

Even if there was any deficiency in the evidence presented to the Grand Jury, that any error was harmless. Any error in Grand Jury proceedings is harmless when a defendant is later found guilty beyond a reasonable doubt at trial. Lisle v. State, 114 Nev. 221, 224–25, 954 P.2d 744, 746–47 (1998) (quoting United States v. Mechanik, 475 U.S. 66, 70, 106 S. Ct. 938 (1986) (holding that because the defendants were convicted after trial beyond a reasonable doubt, probable cause undoubtedly existed to bind them over for trial; therefore, any error in the grand jury proceedings connected with the charging decision was harmless beyond a reasonable doubt)). At Appellant's trial, all of the original video—on the original Swann player and thus capable of being zoomed in on—was presented to the jury. See, e.g., I AA 163, 184–86. And the jury found Appellant guilty beyond a reasonable doubt, curing

any deficiencies in the Grand Jury. This Court should dismiss this claim and affirm the Judgment of Conviction.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING INADMISSIBLE PRIOR BAD ACT EVIDENCE

Appellant complains that the Court prevented him from presenting a defense by excluding evidence of the victim's prior bad acts to demonstrate a propensity for violence. AOB at 25–44. This argument is without merit. The district court made the correct evidentiary ruling. As extensively litigated below, Appellant: did not establish that he knew about the specific prior convictions he wished to admit; could not admit these prior bad acts under the "common scheme or plan" exception; and could not establish that the State had ever opened the door to the prior bad acts.

A. Applicable Standard

This Court reviews a district court's evidentiary rulings for an abuse of discretion. Rodriguez v. State, 128 Nev. 155, 160, 273 P.3d 845, 848 (2012). "The trial court's determination to admit or exclude evidence is given great deference and will not be reversed absent manifest error." Baltazar-Monterrosa v. State, 122 Nev. 606, 613–14, 137 P.3d 1137, 1142 (2006).

B. Litigation of the Preclusion of Evidence

On March 8, 2017, Appellant filed a Motion in Limine, seeking to admit character evidence of the victim, Ezekiel. I AA 050–52. In that Motion, Appellant declined to articulate what character evidence he sought to admit, or the basis upon

which he premised the motion. I AA 051. Appellant claims in his Opening Brief that he attached the victim's "extensive criminal record" to this Motion; however nothing of the kind is attached in his Appendix. AOB at 26; see I AA 050–53. Nor did Appellant argue in this Motion that he knew about specific prior convictions of Ezekiel's. See id. Indeed, it does not appear that Appellant attached any sort of proof regarding the murder victim's criminal record until his Motion for New Trial. II RA 363–420.

On May 9, 2017, the State filed a Motion in Limine seeking to preclude the murder victim's prior specific acts of violence. I RA 348–53. In that Motion, the State requested that Appellant not be allowed to present evidence of Ezekiel's prior convictions, at least without some proof that Appellant was aware of those events. I RA 352. At that time, there had been no evidence to suggest that Appellant had met Ezekiel before the morning he murdered him, let alone that he had personal knowledge of specific prior bad acts committed by Ezekiel. See I RA 352.

On May 18, 2017, the State filed a Supplement to its Motion in Limine. I RA 354–60. In that supplement, the State again argued that Appellant should not be allowed to introduce Ezekiel's prior convictions, given that there had been no showing that Appellant knew the victim or anything at all about his history. I RA 357–58. As the State clarified in its supplement:

> [Appellant] has made no showing he was aware of any specific act of violence. Indeed, [Appellant] has made no showing that he was

> familiar with the victim. Rather, the evidence shows that [Appellant] and the victim arrive at different times, in different cars, and with different people. [Appellant] has not demonstrated that he was aware of any specific acts of violence committed by the victim. Thus, although character evidence may be admissible, "[e]vidence of specific instances of conduct is generally not admissible because 'it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time.'"

I RA 357–58 (citing Daniel v. State, 119 Nev. 498, 514, 78 P.3d 890, 901 (2003)). In its supplement, the State also rebutted Appellant's argument at a prior hearing regarding the use of specific acts of Ezekiel's to show a common scheme or plan. I RA 358–59.

At the hearing on the Motions in Limine, held on May 19, 2017, Appellant indicated that he wanted to bring in testimony in the form of opinions about the victim. I RA 361. The Court allowed Appellant to bring in such opinion testimony, but precluded the witnesses from expanding on those opinions to introduce the specific underlying facts. I RA 361. Again, at no time did Appellant indicate that he knew of the prior acts. See I RA 361.

Even on the eve of trial, the district court was certainly not "aware that certain specific acts of violence of the deceased were known to Appellant or had been communicated to him." AOB at 26. Indeed, on the second day of trial, the parties had the following exchange:

> THE COURT: All right. Reputation evidence with the character of the victim in this type of case is admissible, if you have the proper

> witnesses. And in order for it to constitute self-defense, your client's going to have to testify he knew or --
> MR. WOOLDRIDGE [for the defense]: I understand that.
> THE COURT: -- somebody's going to have to provide evidence that he knew what the reputation was.
> MR. WOOLDRIDGE: That's correct.
> THE COURT: Specific evidence as to the specific bad acts or proving the bad acts is not admissible. You're not going to be able to put the victim on trial to prove that he had prior convictions or had prior incidences of robbing people. It's what his reputation and character was. So you're stuck with witnesses who can testify they were aware of his reputation. You can have a reputation of being violent, even if you're not.
> MR. WOOLDRIDGE: Sure.
> THE COURT: It's what people around him knew of his reputation, maybe stories he's read or someone else read, that have no basis in truth, but that's his reputation. So he's going to be allowed to put on that evidence. Be careful how you argue it on opening statements, though.

I RA 007. Neither defense counsel nor the district court gave any indication that Appellant himself was aware of specific acts that would support a so-called reputation for violence.

During Appellant's opening statement at trial, counsel indicated that the murder victim had a reputation for sticking people up at gun-point. AOB at 5.[3] The State objected to this statement, given the Court's prior rulings. AOB at 5. During argument on this point, the Court ruled that the reputation or opinion testimony could be admissible as a reputation or opinion for violence, but not for the underlying facts.

[3] The incomplete transcripts Appellant has included in his Appendix do not include opening statements; however, he admits that this exchange occurred in his Opening Brief.

AOB at 5. Appellant indicated that although he did not want to forecast his defense, the time may come when given his testimony, the prior acts may be admissible. AOB at 5.

On the third day of the trial, Antoine Bernard testified. Bernard testified that Appellant asked him who the victim was. I RA 108–09. This obviously supported the State's position that Appellant did not know Ezekiel, had no idea about his criminal history, and thus could not have known about his specific prior bad acts.

At the end of the third day of trial, the Court held a colloquy regarding the testimony of anticipated defense witnesses. II RA 238–40. During that colloquy, the State requested that if Appellant intended to testify of knowledge of specific prior acts of his victim, that a Petrocelli hearing be held. II RA 238. However, the parties and the Court were still operating under the impression that the defense was "not going to prove the prior bad acts," and if that any specific acts were to be introduced to explain a defense witness's opinion testimony, the parties would "learn that outside the presence of the jury." II RA 238, 240.

Appellant himself testified on the fourth day of trial, May 25, 2017. II RA 259–312. Appellant testified that his first interaction with the man he would later kill was when he bumped into Ezekiel near the dancing pole. II RA 264. Appellant asked who Ezekiel was. II RA 264–65. Appellant swore that the next time he encountered Ezekiel was shortly before they all left the building, when Ezekiel

embraced him and apologized for bumping into him earlier. II RA 265. Appellant claimed that Ezekiel lured him off to the side of the parking lot, grabbed Appellant by the belt, and put a gun against his waist. II RA 266. Appellant testified that he was afraid, and that he:

> just closed my eyes, and I just was like, you no he [sic], dear God help me. I was like, God, you know, I called on him, and you know, I just got a warm feeling and the spirit just came over me like a voice of my grandmother's, it's like, you know, stand up for yourself. And so I just came out of my pocket and I shot. And when I shot, I hit him. And he rolled on the ground -- I mean, he hit the ground. He was shaking, you know, kicking at the pants and then when I seen him hit the ground, I -- I gained my composure back, and you know, I got very, very angry.

II RA 268. Appellant was specifically asked whether he recognized Ezekiel as someone he knew or knew or during their interaction earlier that night. Appellant claimed he did not, because Ezekiel's hat was too low down over his head. II RA 268.

Appellant then testified that Barry, a woman he met previously at Larry's Gentlemen's Club, had previously shown him a picture on her phone of Ezekiel. I RA 268–69. This was the first indication of *any* kind that Appellant had ever seen Ezekiel prior to the events leading to Appellant murdering him. Appellant then claimed this "Barry" told him that Ezekiel was known for robbing people, and that he had been in jail in the past. I RA 269–70. Contrary to Appellant's assertion in his Opening Brief, he did not claim at trial that he knew Ezekiel to have gone to prison

for any robberies. AOB at 26. He merely claimed Ezekiel had "been in jail – he's been to jail – in and out of jail and he's known as a jack boy."[4] II RA 269. Even at that point, Appellant did not argue that he knew Ezekiel had specifically "attempted to rob victims at gunpoint in a parking lot." AOB at 26.

Appellant reiterated that he recognized Ezekiel for the first time when face to face with him in front of the building, because Appellant's eyes were bad, and he had only ever been inside the club with Ezekiel, where he could not see Ezekiel's face. I RA 270. On cross-examination, Appellant reiterated that the first time he ever encountered Ezekiel was in the night-club, but he could not see Ezekiel's face. I RA 302.

When the Court retuned from the lunch-recess, Appellant made a record regarding the prior acts of the victim. I RA 314. At that time, Appellant argued that the prior acts should be admitted pursuant to NRS 48.045(2), as evidence of common plan or scheme or intent. I RA 314. Appellant did not argue or request to admit the prior judgments of conviction, based upon the stunning revelation that "Barry" had known of and revealed Ezekiel's past to Appellant three months prior. I RA 314. Appellant was permitted to call two witnesses, who gave their opinions that Ezekiel was a violent person. I RA 316–19.

[4] Notably, this claim by Appellant occurred after he sat through hours of argument regarding the legal standard for admissibility of specific acts of violence: i.e., that a defendant must be aware of them.

Following the last of Appellant's witnesses, the defense rested its case. I AA 136. Then, the State called a single rebuttal witness. I AA 136–37. Bianca Hicks testified that she was living with Ezekiel, and the couple had two children together. I AA 137. Hicks testified that in the three years she knew him, she had not seen Ezekiel with a gun. I AA 145. Hicks did not testify about any time periods prior to the three years she knew him. I AA 145. On cross-examination, Appellant began to ask, based on the fact that Hicks testified she had not seen Ezekiel with a gun in three years, whether she knew about one of his prior convictions. I AA 148. Despite repeated, mid-question objections from the State, Appellant literally blurted out to the witness that Ezekiel was convicted of possession of a firearm by an ex-felon. I AA 148–49. He did not allow the Court a chance to rule on the State's objection. Id. The State objected to the reference which not only implied one prior felony but two, and the Court struck the question from the record. I AA 139, 153. In fact, in striking the question, the Court cited the lengthy litigation on the issue, and the specific orders to not elicit evidence of the victim's specific priors. Id.

The district court did not abuse its discretion in precluding the evidence Appellant now complains should have been admitted: specifically, prior bad acts to demonstrate a propensity for violence. AOB at 25. The district court's decision was correct based on several grounds that had been extensively litigated: the district court properly applied the law on character evidence and prior bad acts because Appellant

could not show—and did not even try to show until halfway through his trial testimony—that he knew about the priors; Appellant waived some arguments by failing to request to admit Judgments of Conviction; the victim's prior felonies were not admissible under the common scheme or plan exception; and no witness opened the door to these inadmissible acts.

C. The district court correctly excluded the victim's prior bad acts, about which Appellant did not demonstrate that he knew.

As he did below, Appellant argues that the prior bad acts should have been admitted to bolster Appellant's self-defense claim. AOB at 35–37. The State's position with regard to this evidentiary issue did not change, from the pre-trial litigation to the evidence that came in through its last rebuttal witness. In accordance with the law, absent some proof that Appellant knew about the prior events, the victim's prior bad acts were inadmissible to support Appellant's claim of self-defense. Burgeon v. State, 102 Nev. 43, 46, 714 P.2d 576, 578 (1986) ("In the present case, appellant concedes that the specific acts of violence of the victim were not previously known to him. Since appellant did not have knowledge of the acts, evidence of the victim's specific acts of violence were therefore not admissible to establish the reasonableness of appellant's fear or his state of mind."). The district court agreed with the State and ruled accordingly, deeming opinion evidence of the victim's character admissible but prohibiting specific prior bad acts of the victim's. II RA 361.

NRS 48.045(1) states, in relevant part:

> 1. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
> …
> (b) Evidence of the character or a trait of character of the victim of the crime offered by an accused, subject to the procedural requirements of NRS 48.069 where applicable, and similar evidence offered by the prosecution to rebut such evidence. . .

However, NRS 48.055 limits the method in which character evidence may be proved:

> 1. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination, inquiry may be made into specific instances of conduct.

This Court has held that a victim's propensity for violence is not an essential element of a claim of self-defense, and, therefore, NRS 48.055(1) applies. Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003). The Court has recognized a narrow exception to the rule:

> However, this court has held that evidence of specific acts showing that the victim was a violent person is admissible if a defendant seeks to establish self-defense *and was aware of those acts*. This evidence is relevant to the defendant's state of mind, i.e., whether the defendant's belief in the need to use force in self-defense was reasonable.

Id at 902 (internal footnotes omitted) (emphasis in original). As such, a specific act of which Appellant was aware would be admissible within reason:

> We also agree that the admission of evidence of a victim's specific acts, regardless of its source, is within the sound and reasonable discretion of the trial court and is limited to the purpose of establishing what the defendant believed about the character of the victim. The trial court "should exercise care that the evidence of specific violent acts of the victim not be allowed to extend to the point that it is being offered to prove that the victim acted in conformity with his violent tendencies."

Id. (internal footnotes omitted). Thus, only acts of which the Appellant was aware would be admissible at trial. See id. This is exactly what the district court ruled below, during the arguments on the Motions in Limine and throughout trial. See I RA 007. II RA 238–40, 361.

D. Appellant denied the district court the ability to rule on Appellant's knowledge of specific prior bad acts when he failed to request to admit the judgments of conviction following his testimony of alleged knowledge thereof.

During pre-trial litigation, and during trial, the State made clear that if Appellant was going to testify that he had knowledge of Ezekiel's past, the State wished to conduct an evidentiary hearing pursuant to Petrocelli v. State, 101 Nev. 46, 51–52, 692 P.2d 503, 507–08 (1985). I RA 236. During pre-trial litigation, the State specifically requested that Ezekiel's priors be excluded, absent proof that Appellant was aware of them. II RA 352. At trial, the State was not of the position that the priors were per se excluded, but instead once again requested an opportunity to examine their admissibility, if Appellant claimed knowledge thereof. II RA 238. At trial, Appellant did testify, however incredibly, about hearing that a person whose

picture he saw briefly on "Barry's" phone—whom Appellant claimed was Ezekiel—had committed robberies. II RA 269.

Even after Appellant testified, claiming to know through "Barry" about Ezekiel's past, Appellant never sought to introduce the prior Judgments of Conviction, never requested the Petrocelli hearing, and never sought the Court's permission to re-raise the issue. Instead, when Appellant requested a renewed ruling on Ezekiel' priors, he did so by arguing under NRS 48.045, and the common scheme or plan exception. II RA 314. The State would have responded differently, and requested the Petrocelli hearing, as the State did prior to trial, had Appellant attempted to admit Ezekiel's prior robbery convictions due to his knowledge thereof. Appellant precluded that from occurring, however. The district court can hardly be said to be in error over a decision that Appellant did not ask it to make.

E. Ezekiel' priors were not admissible under a common scheme or plan exception.

As he did below, Appellant again attempts to argue that two of the victim's prior bad acts should have been admissible under the common scheme or plan exception. AOB at 37–38. The district court correctly rejected that argument.

NRS 48.045 precludes the use of propensity evidence, subject to certain limited exceptions. One such exception is to prove common scheme or plan. Because Appellant could not show such a plan, the district court correctly held that he could not use the common scheme or plan exception under NRS 48.045, first during

argument on the State's Motion in Limine to exclude this evidence and then during his renewed request after Appellant testified. II RA 314, 361.

The district court's evidentiary ruling was in accordance with the law. As stated above, NRS 48.045 prohibits the use of propensity evidence in the vast majority of instances. Relevant to this argument, the law states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

NRS 48.045(2). In order to make otherwise inadmissible evidence admissible as proof of a common scheme or plan, certain things are required. First and foremost, there must be a plan—not just any plan, but a plan which was conceived before the first of the acts to be introduced, and which encompasses all of the acts to be introduced. Rosky v. State, 121 Nev. 184, 196, 111 P.3d 690, 698 (2005). There, this Court was explicit in its requirement for the common scheme or plan, holding:

> The common scheme or plan exception of NRS 48.045(2) is applicable when both the prior act evidence and the crime charged constitute an "integral part of an overarching plan explicitly conceived and executed by the defendant." "The test is not whether the other offense has certain elements in common with the crime charged, but whether it tends to establish a preconceived plan which resulted in the commission of that crime."

Id. (emphasis in original) (quoting Richmond v. State, 118 Nev. 924, 933, 59 P.3d 1249, 1255 (2002) and Nester v. State, 75 Nev. 41, 47, 334 P.2d 524, 527 (1959)).

This Court reaffirmed this requirement in Ledbetter v. State, 122 Nev. 252, 260–61, 129 P.3d 671, 677–78 (2006).

In Rosky, this Court held that two acts, eight years apart, were not part of one common scheme or plan, when it appeared that each act was a crime of opportunity. Rosky, 121 Nev. at 196, 111 P.3d at 698. Because the crimes could not have been planned in advance, and simply occurred when the defendant got close enough to the victims, the Court ruled that they could not belong to one overarching plan. Id. Similarly, in Richmond, this Court held that where a defendant "appeared simply to drift from one location to another, taking advantage of whichever potential victims came his way," he could not use the common scheme or plan exception. 118 Nev. at 934, 59 P.3d at 1259 Rather, the defendant's "crimes were not part of a single overarching plan, but independent crimes, which [he] did not plan until each victim was within reach." Id.

All of the evidence in this case proved that Appellant's murder of Ezekiel was a crime of opportunity conceived of, and executed all within a few hours on September 25, 2016. The district court correctly found that Appellant could not, and did not show that Ezekiel's robberies, which occurred seven or eight years earlier, were part of a singular overarching scheme, which somehow encompassed both those acts and a confrontation with Appellant. II RA 314, 361.

Appellant did nothing but attempt to point out to the district court the "similarities" between the events, equating two instances years prior where Ezekiel used a firearm to rob people in isolated parking lots away from anyone else to the event leading to his murder: an alleged brazen robbery in broad daylight with dozens of people milling around. However, as the district court correctly noted, "[t]he test is not whether the other offense has certain elements in common with the crime charged, but whether it tends to establish a preconceived plan which resulted in the commission of that crime." Rosky, 121 Nev. at 196, 111 P.3d at 698. Without proving a common plan or scheme which lasted nearly a decade, the district court did not abuse its discretion in finding that Ezekiel's priors were inadmissible under this exception. II RA 314, 361.

F. Hicks's testimony did not open the door to inadmissible acts that defendant later referenced.

Finally, Appellant claims that the State somehow opened the door to questioning Ezekiel's fiancée, Hicks, about his prior convictions. AOB at 30–32, 38–40. The district court correctly rejected this argument, too. II RA 336.

The first flaw in Appellant's argument is that Hicks did not testify to any character traits of Ezekiel. Instead, Hicks testified that she met Ezekiel three years prior to his death at Appellant's hands. II RA 323. She then testified to a simple fact—that in the three years he knew him, she did not see him with a gun. II RA 324. Such a statement is not evidence of an individual's character. Ezekiel's prior felony

conviction for possession of a firearm as a prohibited person resulted in a Judgment of Conviction filed in 2010. This is far more remote than the three year time that Hicks knew Ezekiel.

This scenario is entirely distinct from that presented in Jezdik v. State, 121 Nev. 129, 110 P.3d 1058 (2005). In Jezdik, the defendant claimed "he had never been 'accused of anything prior to these current charges.'" 121 Nev. at 136, 110 P.3d at 1063. Such a statement is a blanket statement with no temporal component, and is an attempt to establish a good character. Id. Here, however, all that was testified to was that for the last three years, Hicks had not seen Ezekiel with a gun. II RA 331. Such testimony is not an attempt to establish character, and thus cannot allow for rebuttal in the form of contradictory evidence. It is also worth noting, that Appellant cannot demonstrate that Hicks was incorrect. There was no showing that Ezekiel was found with a gun in the prior three years, and the only person to claim to see Ezekiel with a gun on the last morning of his life was Appellant—*not* the dozen or so witnesses to his cold-blooded murder. Hicks's testimony by no means "opened the door" to the prior convictions.

G. Any error was harmless given the overwhelming evidence contradicting Appellant's theory.

Even if the Court erred in its rulings, that error was harmless. See NRS 178.598 (Any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"); 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).

A nonconstitutional standard of review is applicable in light of the district court's exclusion of the prior convictions pursuant to evidentiary rules. Nonetheless, under any standard, the error does not warrant reversal. First, Appellant was permitted to support his self-defense claim in several ways. Appellant offered two witnesses to speak about Ezekiel's character for violence. II RA 316–20. Then, while cross-examining the State's rebuttal witness, Appellant directly contravened the district court's order and asked the witness a question about a specific prior bad act of the victim's—the 2010 conviction for firearm possession. II RA 334–35. The district court even decided that, due to Appellant's violation of its order, the best thing to do to avoid jury confusion would be to have the parties stipulate to the jury that Ezekiel had in fact been convicted of ex-felon in possession of a firearm in 2010. II RA 335–36. To claim that the district court denied Appellant the opportunity to

present support for his self-defense claim is belied by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (noting that "bare" and "naked" allegations are not sufficient for relief, nor are those belied and repelled by the record).

Moreover, at trial, there was overwhelming evidence to contradict Appellant's self-defense theory. The evidence showed that throughout the night, Appellant and Ezekiel had multiple interactions. The two were even seen on video walking through the club arm-in-arm mere minutes before Appellant murdered and robbed Ezekiel—with his claim that he had not recognized Ezekiel until mere moments before he shot Ezekiel. I RA 196. The robbery was literally caught on camera. I AA 116, 199–201. Appellant could be seen very clearly ripping the expensive belt from the victim while Ezekiel lay dying. Id. The victim's property—including his watch—was also missing from his body. I RA 116, 221; II RA 327, 331–33. Any so-called error in not admitting Ezekiel's years-old convictions was harmless in light of the evidence Appellant was allowed to present and the evidence directly contradicting his self-defense theory.

The district court did not abuse its discretion in not admitting the prior bad acts of the murder victim because Appellant could not establish that they were admissible. Even if there was an error, it was harmless in light of the self-defense

evidence Appellant was permitted to introduce. This Court should affirm the Judgment of Conviction.

III. THE STATE DID NOT FAIL TO DISCLOSURE INCULPATORY EVIDENCE

Finally, Appellant complains that during the State's closing argument, he was ambushed with inculpatory video evidence that he had not seen before and that undermined his defense. AOB at 16, 45–48. First, it must be noted that Appellant has utterly failed to cite anything in the record supporting this claim. Thus, any argument relying on this so-called incident should be ignored as a bare and naked statement and as a violation of NRAP 28(10). Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, there was no such error—because the State did provide the entire video to Appellant during the discovery process.

NRAP 28 provides, in pertinent part:

> **(10)** the argument, which *must* contain:
> **(A)** appellant's contentions and the reasons for them, *with citations to the authorities and parts of the record on which the appellant relies*.

NRAP 28 (emphasis added). This Court previously ruled that it is an appellant's responsibility to provide relevant authority and cogent argument, and when appellant fails to adequately brief the issue, it will not be addressed by this court. Maresca v. State, 103 Nev. 669, 672–73, 748 P.2d 3, 6 (1987). The appellate court *cannot* consider matters not properly appearing in the record on appeal. Tabish v. State, 119

Nev. 293, 296, 72 P.3d 584, 586 (2003). See also Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court need not consider claims that are not cogently argued or supported by relevant authority); Byford v. State, 116 Nev. 215, 225, 994 P.2d 700, 707 (2000) (issue unsupported by cogent argument warrants no relief); Campos v. Hernandez, No. 69163, 2017 Nev. Unpub. LEXIS 298, at *5 (Apr. 26, 2017).

Without a record of the closing argument—which Appellant has not included in his Appendix—the proper standard of review for this issue would remain a mystery. However, in Respondent's Appendix, the record becomes clear that Appellant failed to object to the playing of any so-called undisclosed portions of the video during closing argument. III RA 483–531. Thus, the claim is waived and is reviewable, if at all, only for plain error.[5] Dermody v. City of Reno, 113 Nev. 207, 210–11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991); 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.

[5] Appellant seems to have raised this issue, obliquely and for the first time, in his Supplement to Motion for New Trial—filed months after the verdict. II RA 447–48. Appellant's initial Reply had mainly addressed the district court's proper evidentiary ruling not to permit specific prior bad acts of the victim's. II 436–40.

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.

In the event this Court chooses to entertain Appellant's unsupported claim, the complaint is in effect similar to a claim of prosecutorial misconduct. But even under that framework, the record is clear that there was no error. In resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476. This Court views the statements in context, and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. ___, ___, 336 P.3d 939, 950–51 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

This Court need not analyze this issue past the first step, because Appellant's claim of improper conduct on the part of the State is bare and naked if not utterly belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. It is important to note that Appellant does not claim that he never had access to the video. Rather, he simply complains that at one specific point in time—the evidence vault viewing—he did not control the video. Indeed, Appellant admits that defense counsel viewed the surveillance footage in the evidence vault during the discovery process. AOB at 46. But it does not matter that during that viewing, he did not personally control the video. Id. He could have asked to see the entirety of the video. And, most importantly, this evidence vault viewing was not the only opportunity Appellant had to view the video.

Appellant—who bears the burden on appeal—has not offered any proof that during discovery, the State did not provide Appellant a copy of the entire surveillance video. Given that the evidence vault viewing occurred on February 16, 2017, more than three full months before trial, any claim that he did not receive a copy of it or request to view it in its entirety beggars belief. AOB at 15. For example, there is no indication in the record that Appellant—who clearly knew about the video—complained to the Court that the State was withholding it during discovery. Had Appellant been given a copy, or requested a copy, he would have had complete

access to every single frame of the video—including the portions that were later played during the State's rebuttal during closing arguments.

Appellant even had a chance to view the video during trial. The State had brought the Swan player; Appellant could have accessed any portion of it at any time. See, e.g., I RA 163, 184–86. Indeed, during Detective Bunn's testimony on cross-examination, Appellant actually directed which portions were played or replayed for the jury. I RA 209–10. There is no indication whatsoever that the State or the Court precluded Appellant from seeing any portion of the video.

The State did disclose the evidence of which Appellant complains. Appellant did not object at trial to its being played. And he cannot claim now that he was "ambushed" during the State's closing. This Court should affirm the Judgment of Conviction.

CONCLUSION

For the foregoing reasons, this Court should deny each of Appellant's claims and affirm the Judgment of Conviction.

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Dated this 29th day of October, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 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 9,552 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 29th day of October, 2018.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 29th day of October, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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