IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 72829

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 B felony.

STATEMENT OF THE ISSUES

1. Whether the jury received sufficient evidence to convict appellant of robbery beyond a reasonable doubt.
2. Whether the district court did not commit structural error in denying appellant's challenge to the venire.

3. Whether the district court did not err in limiting the scope of appellant's opening statement.
4. Whether appellant received a fair trial.
5. Whether any error in handling the jury's request for supplemental instructions was harmless beyond a reasonable doubt.
6. Whether there was no cumulative error.
7. Whether the district court did not err in assigning or denying Appellant's post-trial motions.
8. Whether any alleged error was harmless.

STATEMENT OF THE CASE

On April 1, 2016, the State filed a Criminal Complaint against Alfred Harvey (hereinafter "Appellant") charging him with Robbery with Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165). I Appellant's Appendix ("AA") 001. On April 18, 2016, the preliminary hearing was held. I AA 002. At its conclusion, the justice court found probable cause and held Appellant to answer the charge in district court. I AA 023, 028. The State filed an Information pursuant to this finding on April 19, 2016. I AA 030–32. On April 20, 2016, Appellant pled not guilty at his arraignment in district court. II AA 329. On June 10, 2016, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. I AA 059–61.

On October 19, 2016, Appellant filed a Motion to Dismiss, Or in the Alternative, for Curative Jury Instructions on the State's Failure to Gather or Preserve Material Evidence. I AA 067–74. Appellant filed an "Addendum" to this Motion on October 21, 2016. I 075–90. The State filed its Opposition on November 2, 2016. I AA 037–47. The district court heard this Motion on November 2, 2016, and continued the matter to November 8, 2016, denying the Motion after an evidentiary hearing. II AA 338–39, 340–41, 417–84. Appellant filed a Motion to Suppress Show-Up Identification and Subsequent In-Court Identification on October 21, 2016. I AA 091–112. The State filed its Opposition on October 31, 2016. I AA 113–36. On November 2, 2016, the district court granted this Motion as to the in-court identification but denied this Motion as to the show-up identification. II AA 338–39, 417–36. Appellant filed a Motion in Limine to preclude three specific pieces evidence on November 8, 2016. I AA 173–82. The district court denied this Motion as to one of the three requests and granted it as to the other two on November 8, 2016. II AA 340–41.

On November 15, 2016, Appellant's jury trial began. II AA 343. On November 16, 2018, Appellant filed Defendant's Proposed Jury Instructions and Verdict Form. I AA 186–200. On November 18, 2016, the jury found Appellant guilty of Robbery. II AA 282. On March 8, 2017, the Court sentenced Appellant to a minimum of thirty-six (36) months and a maximum of one hundred forty-four

(144) months in the Nevada Department of Corrections. II AA 322–23. The district court declined the State's request, backed by certified copies of Judgments of Conviction, to adjudicate Appellant as a habitual criminal. II AA 353–54. His Judgment of Conviction was filed on March 17, 2017. II AA 322–23.

On April 5, 2018, Appellant filed a Motion for New Trial Pursuant to NRS 176.515 Based on Grounds of Newly Discovered Evidence and Motion for Evidentiary Hearing and Decision by Trial Judge. VI AA 1022–1117. The State filed its Opposition on April 17, 2018. VI AA VI AA 1118–VII AA 1356. Appellant filed a reply on April 23, 2018. VII AA 1357–1444. Appellant filed a Supplement to his Reply on April 27, 2018. VII AA 1445–63. Also on April 5, 2018, Appellant filed a Motion to Reconstruct the Record. VIII AA 1464–1554. The State filed its Opposition on April 17, 2018. VIII AA 1555–59. Appellant filed a Reply on April 23, 2018. VIII AA 1564–1645. Appellant filed a Supplement to his Reply on April 27, 2018. VIII AA 1646–68. The State filed a second Opposition on May 2, 2018. VIII AA 1560–63. The district court heard both matters on April 16, 2018, and continued them to April 30, 2018, denying both of Appellant's Motions. VIII AA 1679–82, 1683–70.

On April 10, 2018, Appellant filed a Notice of Appeal of the Judgment of Conviction. II AA 324–27. On May 16, 2018, Appellant filed a Notice of Appeal of the district court's denial of his Motion for New Trial and Motion to Reconstruct the

Record. VIII AA 1671–73. The two matters were consolidated into the present appeal.

STATEMENT OF THE FACTS

On March 30, 2016, Defendant entered T.J. Maxx with his two children, stole various items, and left the store. IV AA 702–896. Loss prevention officer Julian Munoz testified at trial that he observed Appellant picking up items and concealing them on his person; Appellant's actions were also captured on video by the T.J. Maxx surveillance system. IV AA 702–19.

After Appellant and his two children exited the store without paying for the items, Munoz approached Appellant, identified himself, and asked for the merchandise back. IV AA 724. In response, Appellant stated that he put the merchandise back in the store. IV AA 725. Munoz responded that he specifically wanted back the wallets Appellant had taken, which were in Appellant's coat. IV AA 725. Appellant handed these over. IV AA 725. Munoz then asked Appellant to step back in the store with him. IV AA 725. Appellant refused. IV AA 727. Munoz again asked him to step inside the store. IV AA 727. Appellant then reached into his pocket and pulled out a knife. IV AA 727. He raised it above his head and stated, "[w]e're not doing anything today." IV AA 727. Once Appellant pulled out the knife, Munoz stopped, retreated back towards the store, and called the police. IV AA 729.

Appellant then got into a U-Haul with his children, and fled from the area. IV AA 729–31.

Munoz was able to maintain a visual on the U-Haul as Appellant backed out of the parking lot, and provided the police with the license plate number. IV AA 731. As Appellant was fleeing, Shaun Bramble, a fellow loss prevention officer, responded to assist Munoz. IV AA 730. Munoz immediately told Shaun that Appellant had a knife. IV AA 730.

Errol Appel was in the same shopping center that day. IV AA 814–15. He saw Munoz and Bramble outside the store, and observed Appellant and his children running toward a U-Haul van. IV 816–18. Appel approached Munoz and Bramble in his vehicle and asked what was going on. IV AA 816–17. Munoz told him that he had just been held up at knife point, indicating toward Appellant and the U-Haul van. IV AA 817. In response, Appel followed the U-Haul van. IV AA 818.

During the pursuit, Appel called the police and updated them on his location and what was happening. IV AA 819. Appel described Appellant driving "[v]ery recklessly and very disregard for a lot of people" [sic]. IV AA 820. Appel continued following Appellant until he came to a stop, a few miles away, in front of a school. IV AA 821–24. Appel observed the Appellant exit the vehicle, and run toward the school. IV AA 824. However, the front doors were locked, so Appellant ran back to the U-Haul. IV AA 824–25. At that point, the police had arrived. IV AA 825.

Officers arrested Appellant. IV AA 860. Several items were recovered from the U-Haul van. IV AA 852–53. Many of the items were merchandise that Munoz watched Appellant steal from T.J. Maxx. IV AA 852–53, 862.

Appellant's wife subsequently testified and acknowledged that she, Appellant, and her children had driven to T.J. Maxx in a U-Haul truck that day. IV AA 889–90. She stated that she stayed in the van while Appellant and her children went inside. IV AA 890. She observed loss prevention officers running after Appellant and taking photos, as he entered the van after leaving the store. IV AA 893, 896.

SUMMARY OF THE ARGUMENT

First, Appellant alleges there was insufficient evidence to convict him of robbery. However, the evidence demonstrates that Appellant took "miscellaneous clothing items" and that he took them from the "presence" of the store's Loss Prevention Officer by means of force or violence or fear of injury—sufficient to prove each and every element of robbery beyond a reasonable doubt. Second, Appellant complains that the district court prevented his challenge of the venire. However, the district court correctly relied on case law to support the finding that there was no evidence of systematic exclusion of any distinctive group from venire. Third, Appellant complains that the district court limited his opening statement. However, Appellant has failed to argue that NRS 175.141, which permits a

defendant to reserve his opening statement until after the State's case-in-chief, gives him any additional rights or privileges beyond those he would have had in presenting his opening statement before the State's case-in-chief. Thus, the district court properly advised Appellant that he was not to comment on the State's already-presented evidence in his opening statement and that the reserved opening statement was not to constitute a second chance at a closing argument. Fourth, Appellant complains the district court denied him a fair trial by denying certain motions regarding eyewitness identification and jury instructions. However, Appellant has not shown that his suppression motion or his motions regarding lack of photographic evidence had merit beyond the relief the district court did in fact grant. Fifth, Appellant complains that the district court abused its discretion in dealing with a jury note requesting clarification. However, the jury was not entitled to any clarification, and since no clarification was needed or given, the parties did not need to be present. Sixth, there was no cumulative error. Seventh, Appellant complains that the district court erred in not assigning his post-trial motions to the judge who heard the trial and in denying his Motion for New Trial and Motion to Reconstruct the Record. However, Appellant has not demonstrated that these motions had any merit, because the jury note he presented as "new evidence" did not entitle him to the relief he sought. Eighth, any error was harmless, given the overwhelming evidence of guilt.

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ARGUMENT

I. THE JURY RECEIVED SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF ROBBERY BEYOND A REASONABLE DOUBT

Appellant alleges there was insufficient evidence presented at trial as to robbery. Appellant's Opening Brief ("AOB") at 11–16. This argument is without merit. The evidence offered, viewed in a light most favorable to the prosecution, demonstrates that Appellant took "miscellaneous clothing items" and that he took them from the "presence" of the store's Loss Prevention Officer by means of force or violence or fear of injury. Thus, the State proved each and every element of robbery beyond a reasonable doubt.

When reviewing a sufficiency of the evidence claim, the relevant inquiry is *not* whether the court is convinced of the defendant's guilt beyond a reasonable doubt. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980). Rather, when the jury has already found the defendant guilty, the limited inquiry is "whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution." Brass v. State, 128 Nev. 748, 754, 291 P.3d 145, 149–50 (2012) (internal citations omitted) (emphasis added).

When there is substantial evidence in support, the jury's verdict will not be disturbed on appeal. Id. Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a

conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (quoting State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)) (emphasis removed) (overruled on other grounds).

"[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). It is further the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d at 313. Indeed, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

"Robbery" is defined in NRS 200.380(1):

> Robbery is the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:
>
> (a) Obtain or retain possession of the property;
> (b) Prevent or overcome resistance to the taking; or

(c) Facilitate escape.

> The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

The "personal property" at issue in this case was "miscellaneous clothing items," as charged in the Amended Information. I AA 184–85. Appellant complains that there was insufficient evidence that he took "miscellaneous clothing items." AOB at 12. However, Loss Prevention Officer Munoz testified that he watched Appellant, on a live security camera feed, take various items from T.J. Max, which is "primarily a clothing store." IV AA 696–701. Specifically, Munoz testified that Appellant took three wallets and concealed them in his coat. IV AA 703. Munoz also testified that Appellant took face cream and fragrance items. IV AA 703–04. During Munoz's direct examination, the State played the security video of Appellant concealing these items. IV AA 709–16. All of these items can be worn and are sold at "primarily clothing stores" like T.J. Maxx. IV AA 697. The jury drew the reasonable inference that these items can be classified as "miscellaneous clothing items." Jackson, 443 U.S. at 319, 99 S. Ct. at 2789.

Appellant further complains that the items were not taken from Munoz's "presence" by use of "force or violence or fear of injury" as defined under NRS 200.380(1). Appellant argues that because he stole the items while Munoz was

reviewing the security footage, they were not taken from Munoz's "presence." AOB at 13–15. However, this Court has taken a broad view of presence. Klein v. State, 105 Nev. 880, 784 P.2d 970 (1989); Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992). Moreover, Appellant himself admits that "a 'taking' by using 'force' may also occur in one's 'presence' when a shoplifter attempts to leave the store with the merchandise and uses force when confronted." AOB at 13; see also NRS 200.380(a)–(c). That is exactly what occurred here.

Appellant seems to argue that because he did not leave the scene with any stolen items, the threat against Munoz did not constitute "the type of force needed for a robbery." But this assertion is clearly belied by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Appellant admits that Munoz saw him on the security monitor taking "three wallets and lotion." AOB at 13. Indeed, Munoz testified that Appellant concealed one wallet in his coat, went into the restroom, and then concealed two other wallets in his coat. IV AA 703. Munoz also testified that Appellant concealed face cream in his coat. IV AA 703. And yet, when Munoz confronted Appellant outside of the store, Appellant only returned two of the wallets—and no other items. IV AA 724–27. This means that Appellant still had at least one wallet and the face cream in his coat when he threatened Munoz with the knife and fled the scene. And Munoz knew this, because he had watched Appellant take all the items on the security feed. IV AA 703. The jury received yet more

evidence that Appellant did in fact leave the scene with stolen items, as the police officers who arrested Appellant testified that they recovered and impounded these stolen items from the U-Haul. IV AA 852–53, 862. Thus, Appellant did not "drop the item" before he threatened Munoz with a knife, even by his own admission. AOB at 14; Martinez v. State, 114 Nev. 746, 961 P.2d 752 (1998).

Finally, Appellant complains that because the jury did not convict Appellant of Robbery with Use of a Deadly Weapon, this Court must ignore Munoz's testimony about Appellant's knife altogether—meaning that no force or violence or fear of injury was used. AOB at 15. However, it is the jury's role to weigh the evidence and witness credibility. Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380. Even if the jury did not find sufficient evidence of "Use of a Deadly Weapon," they still received evidence from Munoz that Appellant had threatened him with the knife. IV AA 724–27. The jury found this evidence sufficient to find the element of "force or violence or fear of injury" and thus convict Appellant of Robbery. NRS 200.280. Viewed in a light most favorable to the prosecution, any rational trier of fact would have found Munoz's testimony about Appellant's threatening actions as he tried to leave the store sufficient to find the force or violence or fear of injury necessary for a robbery conviction. Brass, 128 Nev. at 754, 291 P.3d at 149–50.

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II. THE DISTRICT COURT DID NOT COMMIT STRUCTURAL ERROR IN DENYING APPELLANT'S CHALLENGE TO THE VENIRE

Appellant complains that the district court prevented his challenge to the venire. AOB at 16–26. This argument is without merit. The district court correctly relied on case law to conclude that there was no evidence of systematic exclusion of any distinctive group from venire.

The Sixth and Fourteenth Amendments give criminal defendants the right to be tried by a jury made up of an impartial and representative cross section of their peers. Taylor v. Louisiana, 419 U.S. 522, 526–27, 95 S. Ct. 692, 696 (1975). However, "[t]he Sixth Amendment only requires that 'venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" Williams v. State, 121 Nev. 934, 939–40, 125 P.3d 627, 631 (2005) (quoting Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996)). This right does not "guarantee a jury or even a venire that is a perfect cross section of the community" but recognizes that, as long as the process behind selecting the jury pool is fair, "random variations that produce venires without a specific class of persons or with an abundance of that class are permissible." Id.

A defendant can only demonstrate a prima facie violation of the fair cross-section requirement by showing ***all*** of the following:

> (1) that the group alleged to be excluded is a '*distinctive' group* in the community; (2) that the *representation of this group in venires* from which juries are selected *is not fair and reasonable* in relation to the number of such persons in the community; and (3) that this underrepresentation is *due to systematic exclusion* of the group *in the jury-selection process*.

Id. at 940, 125, P.3d at 631 (emphasis in original) (internal quotation removed). In Williams, the Court found that the defendant failed to show a history of discrimination and failed to show that Clark County systematically discriminates against African Americans. Id. at 941, 125 P.3d at 632. Further, the Court stated that "[e]ven in a constitutional jury selection system, it is possible to draw venires containing" 0% to 2.5% or 15% to 20% African Americans and that such variations would be normal in a county with 9.1% African Americans. Id.

A. There was no exclusion of distinctive groups.

Appellant offers absolutely no evidence that any "distinctive group" was excluded from his venire. Williams, 121 Nev. at 939–40, 125 P.3d at 631. The jury venire in Appellant's case—according to his informal observations alone, unsupported by judicial notice—was 2% African American, 4% Hispanic, 15.5% Asian, and 75.5% Caucasian; Appellant noted the ethnicity or race of the 45th venire member was "other." AOB at 16; III AA 524, 582–85. He perfunctorily claims African-Americans and Hispanics were "under-represented" and that Asians were "overrepresented"—but he does not claim that any groups were excluded. AOB at

20. He also provides no comparative data for this Court to consider. AOB 23; see Williams, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9 (conducting comparative disparity analysis). Accordingly, Appellant has failed to demonstrate that African Americans or Hispanics were not fairly and reasonably represented.

B. The cross-section was not unfair or unreasonable.

A defendant does not have a right to have an individual jury venire match, exactly, the cross-section of the community. Williams, 121 Nev. at 939–40, 125 P.3d at 631; III AA 583. Even assuming, *arguendo*, that Appellant's population proportion estimates are correct, the comparative disparity numbers paint an inherently inaccurate picture. The comparative disparity is calculated by dividing the absolute disparity by the jury-eligible population. Williams, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9. Here, Appellant claims this formula works out to (12.5% - 2.2%) / 10% = 82.4% for the African-American population and (31.3% - 4.4%) / 10% = 85.9% for the Hispanic population. AOB at 21. Although Williams discusses potential presumptions about the relative fairness of comparative disparity above 50%, the State notes that the number of jury-eligible people in each population in Clark County may be much less than the numbers Appellant has cited. Williams, 121 Nev. at 940 n.9, 125 P.3d at 631 n.9. Appellant does not offer any jury-eligible population numbers, and so an accurate analysis is impossible.

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C. There was no evidence of systematic exclusion.

As the district court found below, there was no evidence of "systematic exclusion" of any racial or ethnic group from Appellant's venire. III AA 585–86; Williams, 121 Nev. at 939–40, 125 P.3d at 631. Even if Appellant could demonstrate that there was a comparative disparity between the Clark County census and his venire, he still fails to demonstrate that the underrepresentation of African Americans or Hispanics in his jury venire was due to a systemic exclusion from the Clark County jury pool as a whole.

In reaching its decision not to permit Appellant to "question the jury commissioner," the district court noted that Clark County's generalized selection process does not provide for any kind of selection exclusion process. IV AA 586. The district court cited Nevada cases that support its decision. IV AA 582–86. The State cited a 2016 Nevada case, wherein this Court found that "the process explained by the jury commissioner provides no opportunity for systematic exclusion of specific races." Battle v. State, 2016 Nev. Unpub. LEXIS 607, 385 P.3d 32 (2016).

Contrary to Appellant's assertion, the procedural history of the other case the district court relied upon actually supports the State's position that Appellant has demonstrated no selective exclusion process in Clark County. Afzali v. State, 130 Nev. __, __, 326 P.3d 1, 3 (2014). In Afzali, the Court found that a defendant had a right to the "information relating to the racial composition of [a] grand jury so that

he may assess whether he has a viable constitutional challenge." Id. Afzali had requested the contact information for the 50 potential grand jurors so that he could conduct an independent investigation on the racial composition of the group but the district court refused to provide the information. Id. at __, 326 P.3d at 2. On remand, the Court ordered the district court to provide the contract information so that the defendant could assess the information. Id. at __, 326 P.3d at 4.

However, after remand, this Court "conclude[d] that there ha[d] not been a fair cross-section violation" because "Afzali failed to demonstrate that racial minorities were systematically excluded from the grand jury-selection process." Afzali v. State, 2016 Nev. Unpub. LEXIS 581, at *6 (July 22, 2016). In fact, supplemental briefing revealed that the grand jury selection process is utterly race-blind. Id.

Just as in Battle and the Afzali remand, Appellant can point to no systematic exclusion of any race or ethnicity from the venire selection process. It may be true that Appellant himself did not have the chance to personally question the Jury Commissioner regarding the process. AOB at 25. But Battle and other precedent reveals that in recent examinations of the venire selection process, no exclusionary practices have been found. Indeed, as of 2016, potential jurors are identified from Nevada Energy and Department of Motor Vehicles records and race is not used at

any point in the jury selection process. Baker v. State, 2016 Nev.App.Unpub. LEXIS 93, *4–5 (Nev. Ct. App. 2016).

Appellant has not set forth any facts showing that an evidentiary hearing would have been necessary to examine whether the jury commissioner's procedures systemically exclude any distinctive group, including African Americans or Hispanics. Therefore, even if there was only one African Americans and two Hispanics in the venire, it did not violate the fair cross-section requirement.

D. The district court did not pre-judge the issue.

Appellant seems to argue that by denying Appellant's request to question the Jury Commissioner regarding the process discussed supra, the district court committed structural error. However, this situation is unlike that in the cases Appellant cites. AOB at 25–26.

> This court reviews de novo whether the district court's actions constituted structural error. See Barral v. State, 131 Nev. 520, 523, 353 P.3d 1197, 1198 (2015). This court has held that "when a defendant moves the court to strike a jury venire, *and the district court determines that an evidentiary hearing is warranted*, it is structural error for the district court to deny the defendant's challenge before holding that hearing to determine the merits of the motion." Buchanan, 130 Nev. at 833, 335 P.3d at 210.

Morgan v. State, 134 Nev. __, __, 416 P.3d 212, 221 (2018) (emphasis added).

The district court never found that Appellant's challenge warranted an evidentiary hearing, unlike the cases wherein a trial court made a decision and then held the relevant evidentiary hearing. Id.; Brass, 128 Nev. at 754, 291 P.3d at 149–

50. There can be no "pre-judgment" where no hearing will be held. And Appellant has provided absolutely no authority that supports the idea that a defendant is entitled to an evidentiary hearing on every single challenge of this nature. As such, the district court did not commit structural error by denying Appellant's challenge without an evidentiary hearing.

III. THE DISTRICT COURT DID NOT ERR IN LIMITING THE SCOPE OF APPELLANT'S OPENING STATEMENT

Appellant alleges structural error in that the district court limited his opening statement. This argument is without merit. The district court merely advised Appellant that he was not to comment on the State's already-presented evidence in his opening statement and that the reserved opening statement was not to constitute a second chance at a closing argument. Appellant has failed to argue that NRS 175.141, which permits a defendant to reserve his opening statement until after the State's case-in-chief, gives him any additional rights or privileges beyond those he would have had in presenting his opening statement before the State's case-in-chief.

As an initial matter, Appellant did not object below to this proper limitation on his opening statement. III AA 876–77, 881. Thus, the issue is waived. 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). If

reviewable all, the issue may only be examined for plain error. Maestas v. State, 128 Nev. 124, 146, 275 P.3d 74, 89 (2012). 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 v. State, 131 Nev. __, 343 P.3d 590, 594 (2015).

Further, Appellant has failed to make a record of what his opening would have presented. This failure precludes appellate review. See NRAP 3C(e)(2)(C); NRAP 30(b)(1)-(4); Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); Thomas v. State, 120 Nev. 37, 43, n.4, 83 P.3d 818, 822, n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with portions of the record essential to determination of issues raised in appellant's appeal"); Prabhu v. Levine, 112 Nev. 1538, 1549–50, 930 P.2d 103, 111 (1996); Phillips v. State, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989) (Batson challenge was not preserved due to a failure to "include in the record on appeal any facts pertaining to these two peremptory challenges"); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980).

In this case, there is no error so unmistakable and prejudicial as to warrant reversal due to the district court reminding counsel that a reserved opening statement could not "reference what's already been presumed [or presented] as evidence" and that it was not, in fact, "a second chance to get more closing argument in." IV AA 877, 881. Opening statements have long been understood to have an inherently limited scope. See United States v. Dinitz, 424 U.S. 600, 612, 96 S. Ct. 1075, 1082 (1976) (J. Burger, concurring) (noting that "[a]n opening statement has a narrow purpose and scope. It is to state what evidence *will be* presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; *it is not an occasion for argument*) (emphasis added); accord Watters v. State, 129 Nev. 886, 889–90, 313 P.3d 243, 247 (2013). Other courts have found that a trial judge does not err when appropriately limiting the scope of an opening statement. See, e.g., United States v. Burns, 298 F.3d 523, 543 (6th Cir. 2002) (holding that a federal district judge's conduct of a trial, including limitations on opening statements, is reviewed for an abuse of discretion); United States v. Doyle, 121 F.3d 1078, 1094 (7th Cir. 1997) (finding no abuse of discretion in limiting the scope of the defense's opening statement).

Indeed, in this case, the district court merely reminded Appellant that an opening statement is just that: a statement, and not argument. This reflects the language of NRS 175.141, wherein "[t]he defendant or the defendant's counsel may

[after the State's opening argument] either make the defendant's opening statement or reserve it to be made immediately prior to the presentation of evidence in the defendant's behalf." NRS 175.141 does not give a defendant the privilege of using such a reserved opening statement to argue. Nor does Appellant cite any authority whatsoever for his assertion that Appellant's right under NRS 175.141 includes "presenting . . . evidence brought out during direct." AOB at 32.

This analysis is particularly difficult, given Appellant has utterly failed to offer specifics as to what would have been presented had the district court not made these admonishments about Appellant's reserved opening statement. However, though Appellant claims that he was not allowed to discuss his own defense, theory, or the facts of the case, this is not actually what the district court required. AOB at 28. As discussed *supra*, the district court merely reminded Appellant that he could not reference the evidence already presented—just as, in any typical defense opening statement, a defendant cannot comment on what evidence has already been presented because there has been no evidence presented. NRS 175.141 does not change what the defendant is permitted to do in opening argument. It merely places it in a different position during trial.

In any event, any error due to the limitation on the opening statement 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 admonishment to restrict the opening statement to the rules of opening statements—not closing arguments. Nonetheless, under any standard, the error does not warrant reversal. Appellant was allowed to present his defense and theory of the case and comment on all evidence, including the State's, in his closing argument. V AA 953–69. Thus, Appellant cannot say he was prejudiced by not being able to present these things to the jury. Thus, any delay in presenting these would not have impacted the jury's verdict.

IV. APPELLANT RECEIVED A FAIR TRIAL

Appellant complains the district court denied him a fair trial in several respects, including with regard to eyewitness identification and jury instructions. AOB at 32–38. Each of these arguments is without merit.

A. **The district court did not abuse its discretion in only partly granting Appellant's Motion to Suppress**.

Appellant has offered absolutely no authority that requires suppression of every single subsequent identification by a witness whose out-of-court identification the district court has excluded as unnecessarily suggestive. In this case, the district court did not abuse its discretion in making the evidentiary decision to permit Munoz to identify Appellant during testimony at trial.

Indeed, this Court has consistently distinguished between in-court and out-of-court identifications. Early dicta indicates that this Court considers pre-trial identification by a robbery victim and the subsequent preliminary hearing testimony of that victim identifying the defendant as two different things. Sanchez v. State, 86 Nev. 142, 143, 466 P.2d 670, 671 (1970). Ten years later, this Court implicitly recognized the difference between an in-court and out-of-court identification, by rejecting that defendant's claim that trial identification was based upon an arguably improper photo lineup by stating, inter alia, that the witness' preliminary hearing identification was unequivocal. Lamb v. State, 96 Nev. 452, 454, 611 P.2d 206, 207 (1980). The same year, this Court again distinguished in-court identifications (at preliminary hearing or trial) from out-of-court identifications which may have been suggestive. Hicks v. State, 96 Nev. 82, 84, 605 P.2d 219, 220 (1980). Indeed, where an eyewitness makes an "independent, positive and unequivocal in-court identifications of [a defendant] at the preliminary examination and trial," such in-

court identification is "sufficient to render any possible error in the [earlier, potentially suggestive] photographic identification procedure harmless." Id. at 84, 605 P.2d at 221.

Further supporting this distinction is the court process itself, wherein an eyewitness's testimony, including identification, can always be challenged on cross-examination.

> The right to confront and cross-exam witnesses . . . does not mean that the testimony of a witness must be excluded when the witness is unable to recall the underlying basis for the testimony that is introduced. . . . In United States v. Owens, the victim's out-of-court identification of the defendant was admitted into evidence even though the victim testified at trial that he could not remember seeing his assailant. . . . [R]ules of the Confrontation Clause were met by allowing cross-examination of the witnesses. *Because the deficiencies in the reliability of the testimony could be addressed in this manner, admitting the testimony was not fundamentally unfair and did not violate the Due Process Clause*.

2 Modern Constitutional Law § 30:67 (3rd. ed. 2011) (italics and underlining added, footnotes omitted).

There is no due process violation if a defendant is afforded the opportunity to challenge the credibility of a witness through the traditional truth finding tools of the courtroom. The United States Supreme Court recently endorsed this principle:

> In our system of justice, fair trial for persons charged with criminal offenses is secured by the Sixth Amendment, which guarantees to defendants the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution. Those safe-guards apart, admission of evidence in state trials is ordinarily governed by state law, and *the reliability*

> *of relevant testimony typically falls within the province of the jury to determine*.

Perry v. New Hampshire, 565 U.S. 228, 230, 132 S.Ct. 716, 720 (2012) (emphasis added).

Perry resolved a division of opinion over whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of a suggestive eyewitness identification not arranged by the police. Perry arose out of a defendant's desire to suppress an identification as a violation of due process because factually the witness identification "amounted to a one-person showup in … [a] parking lot." Id. at 233. According to the defendant, due process was violated because it was "all but guaranteed that … [the witness] would identify him as the culprit." Id. The Supreme Court began its analysis by noting:

> The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safe-guards available to defendants to counter the State's evidence include the Sixth Amendment right to counsel … compulsory process … and confrontation plus cross-examination of witnesses ... Apart from these guarantees, we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence, and *juries are assigned the task of determining the reliability of the evidence presented at trial*.

Id. at 236 (emphasis added, citations omitted).

Perry held that due process does not require a preliminary judicial inquiry into potentially suggestive eyewitness identifications that are not arranged by law enforcement. Id. at 248. In reaching this conclusion the Court noted that "[w]e have concluded in other contexts … that the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." Id. at 245. The Court went on to explain that:

> Our unwillingness to enlarge the domain of due process … rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence. … We also take account of other safeguards built into our adversarial system that caution juries against placing undue weight on … testimony of questionable reliability. These protections include the defendant's Sixth Amendment right to confront the eyewitness. ... Another is the defendant's right to the effect assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. … [and] jury instructions[.] … The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes conviction based on dubious identification evidence.

Id. at 245–46.

The real danger inherent in Appellant's argument is that it would push the criminal justice system away from its traditional reliance upon the jury as the ultimate decision maker. Appellant assumes that the jury could not be trusted to evaluate Munoz's testimony; however, this lack of faith in the jury system is directly counter to the Supreme Court's wise "unwillingness to enlarge the domain of due

process … [because] the jury, not the judge, traditionally determines the reliability of evidence." Id. at 245.

The precedents of this Court and the Ninth Circuit are in accord with the holding of Perry. In Baker v. State, 88 Nev. 369, 370, 498 P.2d 1310 (1972), the defendant complained that the preliminary hearing examination deprived him of due process in violation of the Fourteenth Amendment by exposing him to identification in a prejudicially suggestive grouping, contrary to Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967 (1967). This Court rejected his argument. Baker, 88 Nev. at 371, 498 P.2d at 1311.

Baker then took his case to the federal courts. In Baker v. Hocker, 496 F.2d 615 (9th Cir. 1974), the Court of Appeals for the Ninth Circuit, found that the defendant failed "to clear even the first hurdle" of a Stovall violation. Id. at 617. In Baker, the defendant had not been identified in an earlier physical lineup, but was identified at the preliminary hearing, where he was seated between the two co-defendants who had been identified in that physical lineup. Id. The Court held that the risk of a mistaken identification at preliminary hearing becoming "fixed" and tainting trial identification "is far less present in the court proceeding because, as here, the identification can be immediately challenged by cross-examination." Id.

The Ninth Circuit reaffirmed Baker, in Johnson v. Sublett, 63 F.3d 926 (9th Cir. 1995), cert. denied, 516 U.S. 1017, 116 S.Ct. 582):

> While conceding that courtroom procedures are undoubtedly suggestive, we stress that only "unnecessary" or "impermissible" suggestion violates due process. We balanced the state's strong interest in conducting the court procedure against the dangers of misidentification, which were already mitigated by cross-examination, and held that the suggestive character of courtroom logistics was not unnecessarily suggestive.

63 F.3d at 929.

Under Hicks, Munoz's "independent, positive and unequivocal in-court identifications" of Appellant at trial was "sufficient to render any possible error in the [earlier] identification procedure harmless." 96 Nev. at 84, 605 P.2d at 221. Munoz unequivocally identified Appellant during direct examination by the State. IV AA 699. Thus, despite the district court's finding that the earlier in-person identification one hour after Appellant's crime was unnecessarily suggestive, no further suppression was necessary. II AA 429–30.

Further—and in particular because an earlier, unnecessarily suggestive identification can be cured by a later identification—the circumstances of Appellant's in-court identification itself do not require judicial trespass into the role of the jury in evaluating Munoz's credibility. As an initial matter, Munoz's opportunities to observe Appellant during the commission of the crime demonstrate that he could have given a reliable out-of-court identification, absent unnecessary suggestiveness—unlike the eyewitness in the only binding authority Appellant cites, wherein the eyewitness was unable to previously identify the defendant despite that

defendant being present in three photo-lineups. Foster v. California, 394 U.S. 440, 89 S. Ct. 1127 (1969). Munoz had ample opportunity to observe Appellant, his face, and clothing, along with interacting with him before, during, and after the robbery. VI AA 699–739. He paid particular attention to Appellant throughout the robbery. Id. And his description of Appellant was consistent with Appellant's appearance. Id. Moreover, nothing prevented Appellant from subjecting Munoz's in-court identification to cross-examination. That Appellant failed to do so does not constitute reversible error. See II AA 746–82.

Finally, any error in admitting Munoz's in-court identification was harmless. Knipes, 124 Nev. at 935, 192 P.3d at 1183; Tavares, 117 Nev. at 732 n.14, 30 P.3d at 1132 n.14. It could not have had a substantial effect on the jury's verdict because a plethora of other evidence pointed to Appellant being the one who committed this crime. Appellant was caught on video stealing the items from T.J. Maxx. IV AA 702–19. Fellow Loss Prevention Officer Bramble also observed this video and then assisted Munoz outside after Appellant had brandished the knife. IV AA 788–93. Bramble also identified Appellant in-court. IV AA 790. Appel, another eyewitness, followed Appellant after Munoz and Bramble had identified Appellant to Appel at the scene of the crime, as Appellant drove away in his U-Haul. IV AA 814–25. Officers then arrested Appellant after he parked the U-Haul, and found the stolen items in the van. IV AA 852–53, 862. Even had Munoz himself not been permitted

to make an in-court identification of Appellant, Appellant would have been identified by other eyewitnesses, regardless, rendering any error harmless.

B. The district court did not err in denying Appellant's motion to dismiss or alternative request to give a "curative" jury instruction regarding the alleged failure to gather evidence.

Generally, law enforcement officials have no duty to collect all potential evidence. Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). In order to challenge the professional discretion of law enforcement regarding the decision whether to gather evidence, a defendant must meet a two-prong test. Id. First, a defendant must show that the ungathered evidence was constitutionally "material," meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceeding would have been different. Id.; Steese v. State, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998). If the ungathered evidence is found material, this Court must then determine whether the failure to gather the evidence was the result of mere negligence, gross negligence, or bad faith. Daniels, 114 Nev. at 267, 956 P.2d at 115. Dismissal is only appropriate where the failure to gather was due to bad faith. Id.

Appellant's complaint that the district court erred in denying his motion to dismiss and/or his request for a jury instruction regarding the alleged police failure to gather photographic evidence from an eyewitness fails because he cannot even establish the first prong of the Daniels test. AOB at 35–36; 114 Nev. at 267, 956

P.2d at 115. Appellant's materiality argument regarding what the photographs on Loss Prevention Officer Bramble's phone would have shown is purely speculative. AOB at 25. At the evidentiary hearing on the underlying issue, Bramble specifically testified that he did not see the robbery itself. II AA 450. Thus, Bramble could not have seen—let alone photographed—Appellant using a knife. And it is highly unlikely that any photographs Bramble was able to capture as Appellant fled toward the U-Haul van would have revealed a knife, which Appellant could have easily hidden or even discarded. II AA 451. This is particularly true when Bramble took the photographs to capture the suspect and the van's license plate—possibly, so that the suspect could be identified, which was irrelevant once Appellant was in custody. II AA 453.

Even if these photographs could be categorized as material, testimony at the evidentiary hearing did not demonstrate that police were negligent, let alone grossly negligent or acting in bad faith, in not gathering these photographs. II AA 459–72. No photographs were brought to police attention. II AA 478. And police would have had no reason to ask for photographs or videos, given there was no indication that such "could have been taken on the night in question." II AA 478. The testimony supported the district court's finding of no gross negligence or bad faith after the evidentiary hearing. II AA 478–79. Without meeting either of the Daniels prongs, Appellant's claim is without merit and should be denied.

C. The district court did not err in denying a lesser-related jury instruction.

District courts have "broad discretion" to settle jury instructions. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). District courts' decisions settling jury instructions are reviewed for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2003). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000.

A district court may refuse to give a jury instruction which is substantially covered by another instruction. Davis v. State, 130 Nev. ___, ___, 321 P.3d 867, 874 (2014); Crawford, 121 Nev. at 754–55, 121 P.3d at 589; Runion v. State, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000). Further, though a defendant is entitled to an instruction on his theory of defense so long as there is any evidence to support it, he is not entitled to demand a specific wording of an instruction. Crawford, 121 Nev. at 754, 121 P.3d at 589. Importantly, a trial court may also refuse to given an instruction if it is less accurate than other instructions, or will confuse the jury. Sanchez-Dominguez v. State, 130 Nev. ___, ___, 318 P.3d 1068, 1072 (2014).

The district court did not abuse its discretion in not giving a petite larceny instruction because, as it noted, if the evidence showed "that there was a theft of a property but there was no force or intimidation utilized, it would amount to a petty larceny. *But he's not charged with petty larceny*." V AA 926 (emphasis added).

Thus, as the district court stated, it would have been confusing to issue such an instruction. V AA 926; Sanchez-Dominguez, 130 Nev. at___, 318 P.3d at 1072. In other words, the jury was not choosing between two crimes. Rather, had the jury not found the elements of robbery, they would have had to find Appellant not guilty. V AA 926. Appellant was not entitled to a confusing instruction to support his theory that this was merely larceny when larceny was not charged. Crawford, 121 Nev. at 754, 121 P.3d at 589.

Further, Appellant admits that it is not error for the district court to deny a lesser related jury instruction. AOB at 37–38. Appellant cannot have it both ways: either larceny is a lesser-related offense or it is not. And if larceny is "lesser vaguely related" to robbery, as Appellant admits the district court found, the court was not required to give the lesser-related instruction. AOB at 37; V AA 926. That the lower court was polite in rejecting trial counsel's argument does not undermine that precedent.

Even if there was any error regarding jury instructions, it was harmless. Instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155–56, 14 P.3d 25, 30 (2000), overruled on other grounds, Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006); see also NRS 178.598. As discussed,

the jury received more than sufficient evidence to convict Appellant of Robbery. Section I, *supra*. Further, jurors are presumed to follow instructions given to them. See Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001). Appellant cannot demonstrate that the district court gave an incorrect or otherwise misleading jury robbery instruction. Thus, even without a petite larceny instruction, this Court must presume that if the jury did not find each and every element of Robbery—including the force element that distinguishes it from larceny—they would not have convicted him of that crime. For this reason, this would not be the type of error that undermines certainty in the verdict.

V. ANY ERROR IN HANDLING THE JURY'S REQUEST FOR SUPPLEMENTAL INSTRUCTIONS WAS HARMLESS BEYOND A REASONABLE DOUBT

Appellant complains that the district court abused its discretion when, upon receiving the jury's note requesting "elaboration on the definition by means of force or violence or fear of injury" during deliberations, it responded, "[t]he Court is not at liberty to supplement the evidence," and in not securing the parties' presence while this note was discussed. AOB at 38–45; V AA 1021a; VIII AA 1481.[1] These arguments are without merit. The district court did not abuse its discretion in refusing to answer the jury's question, because the instructions as given were adequate and

[1] It should also be noted that this section of Appellant's Opening Brief is merely an attempt to re-argue his Section VII on the post-trial motions—each of which involved this same jury note.

correct. Further, any error in not securing Appellant's presence was harmless beyond a reasonable doubt because the jury was not deadlocked and Appellant has not demonstrated that the result would have been different even had the parties been informed—and even had the district court given supplemental instructions.

The abuse of discretion standard of reviewing jury instruction issues also "applies when the trial judge refuses to answer jury questions during deliberations." Jeffries v. State, 133 Nev. __, __, 397 P.3d 21, 28 (2017). This Court has long held that the trial court has wide discretion in deciding the manner in which to answer jury questions. Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968); see also Scott v. State, 92 Nev. 552, 555, 554 P.2d 735, 737 (1976). If the district court is of the opinion that the instructions already given are adequate, correctly state the law and fully advise the jury on the procedures they are to follow in their deliberation, the court's refusal to answer a question already answered in the instructions in not error. Id. The only exception to this "bright-line" rule that a district court does not abuse its discretion in refusing to answer jury questions is "where the jury's question suggests confusion or lack of understanding of a significant element of the applicable law." Gonzalez v. State, 131 Nev. __, __, 366 P.3d 680, 683 (2015)

The district court did not abuse its discretion in responding to the jury's request for elaboration on definitions already given. The jury instructions included definitions of "by means of force or violence or fear of injury." II AA 260–61. Thus,

by informing the jury that it was not at liberty to supplement, the district court used its discretion to determine that the instructions already given were adequate, correct, and fully advised the jury. Tellis, 84 Nev. at 591, 445 P.2d at 941; V AA 1021a. Further, a simple note asking for "elaboration" dose not inherently signal confusion or a lack of understanding. Gonzalez, 131 Nev. at __, 366 P.3d at 683.

The district court also did not commit structural error in not securing Appellant's presence while deciding what to do about the jury note. NRS 175.415 only gives the parties the right to be present after the jury is brought into the courtroom to receive more information. Because the district court concluded there was no need to give the jury supplemental instruction, there was no reason for the parties to be present; and Appellant had no right to be present. V AA 1021a. Further, Appellant's reliance on NRS 178.388(1) is misplaced. That title also specifically states that "[t]he defendant's presence is not required at the settling of jury instructions." NRS 178.388(5). Thus, the settling of jury instructions portion of the trial falls under the phrase "[e]xcept as otherwise provided in this title," indicating when a defendant need not be present. NRS 178.388(1).

Appellant's Sixth Amendment and due process arguments that he should have been present are premised upon Manning v. State, 131 Nev. __, __, 348 P.3d 1015, 1018 (2015). In Manning, this Court acknowledged a defendant's "right to be present when a judge communicates to the jury" and for counsel be present to "provide input

in crafting the court's response to a jury's inquiry." Id. However, Appellant's case is distinguishable. Unlike the Manning jury, which requested input when it was "deadlocked 10-2 in favor of convicting," Appellant's jury merely asked for "elaboration" of definitions. 131 Nev. at __, 348 P.3d at 1017; V AA 1021a. Also unlike the Manning trial court, which specifically responded that the jury should continue deliberating—thus implicating that defendant's constitutional right to be convicted by a unanimous jury—the district court here decided the jury's question did not warrant a response at all and informed the jury of the same. V AA 1021a. That is, using the discretion granted under Tellis and Gonzalez, the district court determined that no response was in fact warranted. Thus, neither Appellant nor counsel were required to be there to craft an answer. The policy concerns are different here than in Manning, particularly because none of Appellant's constitutional rights were implicated in the jury's mere request for a more elaborate definition.

In Manning, this Court specifically acknowledged that an error of this kind does not warrant an examination for structural error and automatic reversal—merely an examination for error that was harmless beyond a reasonable doubt. 131 Nev. at __, 348 P.3d at 1019. Appellant asks this Court to abandon Manning's requirement of a harmless error analysis on the basis of United States v. Martinez, 850 F.3d 1097, 1100 (9th Cir. 2017). AOB at 41–45. But the Court will not abandon precedent

absent a compelling reason. City of Reno v. Howard, 130 Nev. __, __, 318 P.3d 1063, 1065 (2014) (quoting Armenta-Carpio v. State, 129 Nev. __, __, 306 P.3d 395, 398 (2013)). No such compelling reason exists, here.

In Manning, this Court noted that the Ninth Circuit "never suggested that all errors regarding jury communications during deliberations were subject to automatic reversal." 348 P.3d at 1019 (quoting United States v. Mohsen, 587 F.3d 1028, 1032 (9th Cir. 2009)). Martinez itself holds that even in jurisdictions where such an error can be considered structural, that distinction "turns on both the nature of the jury's request and the need for counsel's participation in formulating a response." 850 F.3d at 1105. Appellant also fails to note that the Martinez court declined to decide whether error was structural because it was not harmless beyond a reasonable doubt—implying that a harmless error analysis must always come first, if indeed a structural error analysis is warranted at all. 850 F.3d at 1103–06. Indeed, citing Martinez, a California court has noted that no authority supports the notion that "a trial court's response to a jury question without notification to counsel amounts to structural error." Balint v. Kern, 2017 U.S. Dist. LEXIS 60562, at *4 (C.D. Cal. Apr. 20, 2017).

When reviewed for harmless error, it is clear that the district court's actions in this case do not warrant reversal. See Section III, *supra*. Any error here was not nearly as serious as the error found in Manning. Appellant's jury was not

deadlocked, and the district court's response was that it could not respond. V AA 1021a. However, as in Manning—where this Court found that "the district court's error was harmless beyond a reasonable doubt"—here, "the message that the court instructed the marshal to give to the jury was simple and did not contain any legal instructions." Manning, 131 Nev. at __, 348 P.3d at 1019. Indeed, the district court's response in Appellant's case was only that it could not give a response. V AA 1021a.

Also as in Manning, even if "the court should have reconvened the proceedings and, on the record, discussed the jury's note and conferred with counsel in developing a response," Appellant has not effectively demonstrated that "the result here would have been substantively different had it done so." 131 Nev. at __, 348 P.3d at 1019. Again, the district court had already used its discretion to determine that the jury instructions were correct and adequate as given. Tellis, 84 Nev. at 591, 445 P.2d at 941. And, earlier in Appellant's trial, the district court had already rejected Appellant's request for a larceny or other clarifying instruction. II AA 277, 280. Appellant cannot demonstrate that the jury's mere request for an "elaboration" would have swayed the district court to believe that supplemental instruction would have been necessary or even appropriate. Even if the district court had offered such supplemental instruction, the jury received sufficient evidence that Appellant threatened Loss Prevention Officer Munoz with a knife—satisfying the

element of force or threat of force necessary to convict Appellant of Robbery. See Section I, *supra*. Thus, any error was harmless beyond a reasonable doubt.

VI. THERE WAS NO CUMULATIVE ERROR

Appellant alleges that the cumulative effect of error deprived him of his right to a fair trial. AOB at 45. 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, 854–55 (2000). Appellant must 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)).

First, 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, as discussed *supra* in Section I, there was more than sufficient evidence to support Appellant's conviction and, therefore, the issue of guilt is not close. Finally, Appellant was not convicted of grave crimes. See Valdez, 124 Nev. at 1198, 196 P.3d at 482 (2008) (stating crimes of first degree murder and attempt murder are very grave crimes). In this case, Appellant was convicted of a much lesser offense.

The third factor does not weigh in Appellant's favor. Therefore, Appellant's claim of cumulative error has no merit. This Court should affirm his conviction.

VII. THE DISTRICT COURT DID NOT ERR IN ASSIGNING OR DENYING APPELLANT'S POST-TRIAL MOTIONS

Appellant complains that the district court erred in not assigning his post-trial motions to the judge who heard the trial and by denying his Motion for New Trial and Motion to Reconstruct the Record. Each of these arguments is without merit.

A. **The district court did not err in assigning these motions**.

As the district court pointed out below, this case was originally assigned to the Honorable Judge Miley, who had heard and decided most of the motions in the case. VIII AA 1679–80. Though the Honorable Judge Bixler presided over the trial itself, because the case was sent to overflow, Judge Miley indicated on the record on April 16, 2018, that Judge Bixler did not remember this case. VIII AA 1679–80, 1692. Thus, "by reason of absence from the judicial district, death, sickness or other disability[,] the judge before whom the defendant has been tried [wa]s unable to perform the duties to be performed by the court after a verdict or finding of guilty." NRS 175.101. There is no logic in asserting that Judge Bixler should have heard these motions as "the one who is most familiar with the facts and circumstances of the underlying issues." VIII AA 1680–81. He could not have provided any more first-hand familiarity with a case he did not remember than could the judge who actually decided the motion. Thus, Judge Bixler's inability to perform the duties of

hearing a motion for a new trial under NRS 176.515 and of clarify differences in the record under Nevada Rules of Appellate Procedure ("NRAP") Rule 10(c) was clear: by reason of "other disability"—that is, his lack of memory of a case that was tried almost a year and a half prior—he could not hear the motions. II AA 343, VIII AA 1679. The district court in no way erred in permitting these motions to be heard by the assigned judge.

Further, Appellant's reliance upon NRS 175.101 is questionable at best. NRS 175.101 is not relevant since it is limited to circumstances where a trial judge becomes unavailable. Judge Bixler was not unavailable; he just did not remember the case. VIII AA 1679–80. More importantly, NRS 176.515 is the statutory basis for requesting a new trial and it is silent on whether the judge who presided over the trial must decide a motion for new trial. NRS 176.515 merely refers to "the court." Importantly, this Court has already rejected similar attempts to tie judicial actions to a particular person instead of a judicial office. Dieudonne v. State, 127 Nev. 1, 5–8, 245 P.3d 1202, 1205-07 (Nev. 2011) (no due process right to be sentenced by the same judge who accepted a defendant's guilty plea).

B. **The district court did not abuse its discretion in denying Appellant's Motion for New Trial**.

Under NRS 176.515(1), a district court may grant a new trial "if required as a matter of law or on the ground of newly discovered evidence." These are the only two circumstances in which a defendant may file a motion for a new trial. This Court

will not reverse the district court's decision to deny a motion for new trial absent abuse of discretion. Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284–85 (1991) (citing McCabe v. State, 98 Nev. 604, 655 P.2d 536 (1982)). An abuse of discretion is "any unreasonable, unconscionable and arbitrary action taken without proper consideration of facts and law." *Abuse of Discretion,* Black's Law Dictionary (Abridged 6th Ed. 1991). An abuse of discretion thus occurs if the district court's decision is arbitrary or capricious, or if it exceeds the bounds of law or reason.

The Nevada Supreme Court has explained that:

> Newly-discovered evidence [under NRS 176.515] must be (1) newly discovered, (2) material to movant's defense, (3) such that it could not with reasonable diligence have been discovered and produced for the trial, (4) not cumulative, and (5) such as to render a different result probable upon retrial. To which we add (6) that it does not attempt only to contradict a former witness or to impeach or discredit him, unless [the] witness impeached is so important that a different result must follow, Whise v. Whise, 36 Nev. 16, 131 P. 967 (1913); and (7) that these facts be shown by the best evidence the case admits.

Oliver v. State, 85 Nev. 418, 424, 456 P.2d 431, 435 (1969).

Appellant requested a new trial due to the jury note discussed in Section VI, *supra*. AOB at 55–62. However, below and on appeal, Appellant fails to demonstrate that this note meets the requirements for such a motion as set forth by this Court. As the district court found below, this note was not newly discovered evidence. VIII AA 1682, 1693. Indeed, though Appellant argues that evidence of juror or bailiff

misconduct may constitute new evidence meeting this requirement, Appellant has not demonstrated that there is any indication of such misconduct in *this* case. He has merely offered evidence that the district court did not consult with the parties before issuing its non-response to the jury—which, as discussed, if error at all was harmless beyond a reasonable doubt and thus does not warrant a new trial. Section VI, *supra*. Even when this Court discussed that such conduct by a district court may constitute error, it never suggested that such conduct might be the basis for a Motion for New Trial before that same district court. See Gonzalez, 131 Nev. at __, 366 P.3d at 683. Manning, 131 Nev. at __, 348 P.3d at 1017.

The note in question also has nothing to do with the actual evidence presented at trial—which included (1) the video surveillance showing Appellant stealing merchandise inside T.J. Maxx, (2) the victim identifying Appellant as stealing property inside the store, leaving without paying, then pulling out and raising a knife at him, (3) the witness who followed Appellant as he fled in a U-Haul van, and (4) the officers who apprehended Appellant in the U-Haul and recovered T.J. Maxx merchandise from inside. IV AA 702–896. The note was also not material to Appellant's defense, as all the appropriate evidence and arguments were presented at the time of trial. VIII AA 1682. The jury note merely showed that the jury may have had questions about the law—not Appellant's defense, itself.

Most importantly, as the district court found below, Appellant fails to show that this note would render a different result probable upon retrial. VIII AA 1682. Appellant merely claims that it is probable that he would have been found not guilty because defense counsel would have requested numerous additional instructions be given to the jury. However, as discussed *supra*, a district court court has wide discretion in responding to questions from the jury. In this case, the district court properly instructed the jury that it "is not at liberty to supplement the evidence." Section VI, *supra*. Indeed, in its reasoning in denying the motion, the district court stated:

> [I]f we were in trial and that question came up, then what happens is, normally, the judge calls the attorneys and both attorneys agree that the Court is not at liberty to supplement the jury instructions and would send the jury back that letter. That's exactly what is on that paper. I've reviewed this with a few other judges and they all agree that this should be denied.

VIII AA 1687. The district court continued:

> It could have been a mistake. But even if the mistake was made, it wouldn't have changed because that is exactly what the answer would have been had he brought everybody in and said this question was asked. Everybody would have said -- defense and prosecution -- Judge, you're not at liberty to supplement the evidence.

VIII AA 1694. Thus, as discussed *supra*, the response to the jury would have been the same regardless of whether the parties consulted with the court before a response was sent. Section VI, *supra*. There is no probability of a different result.

Nor does the marshal's alleged conversation with the jury when he delivered that note constitute new evidence rendering a different result probable. AOB at 51–52. First, it is debatable that Appellant's Motion for New Trial below appropriately argued that such communications would constitute new evidence warranting a new trial. See VI AA 1022–1117; VII AA 1357–1444; VII AA 1445–63; VIII AA 1679–82, 1683–70. Appellant requested an evidentiary hearing that would include the bailiff's testimony regarding his Motion to Reconstruct the Record, specifically, "to determine how the jury note was made part of the district court file." VII AA 1365. But Appellant never argued, and does not argue now, that there was any indication of improper communications between the marshal and jury. See, e.g., Lamb v. State, 127 Nev. 26, 43–46, 251 P.3d 700, 711–12 (2011) (holding that a bailiff who does not inform the judge or the parties about a jury note and takes it upon himself to respond by telling the jury to read the jury instructions were in direct violation of statutes and required a new trial). In fact, Appellant admits in his Supplement to Reply to State's Opposition to Appellant's Motion to Reconstruct the Record that the juror affidavits revealed only that the marshal had indicated that if anyone had a procedural issue, the judge would like to speak to them; however, no juror indicated they had such an issue. VIII AA 1646, 1648; AOB at 47–48. This does not suggest any improper, ex parte communications between bailiff and juror—but rather, an attempt to avoid the same. The mere fact that the marshal may have been able to

testify as to "how the jury received the information" regarding the jury note is irrelevant. Without any indication of any improper communications, nothing Appellant alleges occurred regarding the jury note warrants a new trial. AOB at 52.

Moreover, Defendant fails to show a probability of a different result at a retrial because, as the district court found below, the note itself—and any alleged discussions the marshal may have had with the jury based upon it—simply does not constitute new evidence that would be presented at a new trial. VIII AA 1695. The mere fact that defense counsel would have requested supplemental jury instructions at a retrial does not make a different result probable.

C. **The district court did not abuse its discretion in denying Appellant's Motion to Reconstruct the Record**.

Appellant's Motion to Reconstruct the Record was in fact an attempt to "clarify" the record through misusing NRAP 10(c). The Motion was improper, and the district court properly denied it, because the rule simply does not stretch that far. NRAP 10(c) is meant to ensure that the record accurately reflects what transpired below, not to add information that was never placed in the record.

"The trial court record consists of the papers and exhibits filed in the district court, the transcripts of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk." NRAP 10(a). To be appropriately included in the record on appeal "[a]ll documents … shall bear the file-stamp of the

district court clerk, clearly showing the date the document was filed in the proceeding below." NRAP 30(c)(1).

The purpose of NRAP 10(c) is to settle disputes about whether the record accurately reflects what happened below, not to allow a party to add new information to the record. See U.S. v. Elizalde-Adame, 262 F.3d 637, 640 (7th Cir. 2001) (motion to supplement record "with letters exchanged between her attorney and the attorney for the government during plea negotiations which discussed the preservation of her right to appeal the suppression motion" properly denied because "[t]he purpose of Rule 10(e) is to ensure that the record on appeal accurately reflects the proceedings in the trial court"); United States v. Walker, 601 F.2d 1051, 1054 (9th Cir. 1979) (federal rule equivalent of NRAP 10(c) "cannot be used to add to or enlarge the record on appeal to include material which was not before the district court" as such the government could not enlarge the record to show that a particular individual had "been returned to custody").

This Court has addressed that only in limited situations is it appropriate to reconstruct or modify the record. For instance, when the trial proceedings are not preserved or recorded, reconstruction may be appropriate. Lopez v. State, 105 Nev. 68, 85, 769 P.2d 1276, 1287 (1989); Phillips v. State, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989). Additionally, correcting and modifying a trial record may be

necessary if it appears that the record includes an inaccurate translations. Ouanbengboune v. State, 125 Nev. 763, 770–71, 220 P.3d 1122, 1126–27 (2009).

Finally, appellate courts may not consider matters outside the record. Carson Ready Mix, Inc. v. First National Bank of Nevada, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) ("We have no power to look outside of the record of a case. We have consistently recognized this limitation.") (quotation marks and internal citations omitted).

Appellant's Motion to Reconstruct the Record was an improper attempt to change and add to the record—not to ensure that it conforms to the reality of the trial. Elizalde-Adame, 262 F.3d at 640. Appellant requested that this Court order a reconstruction of the record regarding the jury note. VIII AA 1464. However, this would have been inappropriate. There was no proceedings to reconstruct, as the jury note led to no hearing. Lopez, 105 Nev. at 85, 769 P.2d at 1287; Phillips, 105 Nev. at 634, 782 P.2d at 383. There is nothing inaccurate that needs to be modified or corrected—nor does Appellant even argue that there is. Ouanbengboune, 125 Nev. at 770–71, 220 P.3d at 1126–27.

Most importantly, as the district court found below, while Appellant was free to file a reconstruction of the record, it would have been inappropriate to include in it affidavits or declarations from the jurors regarding how the note ended up in the district court's evidence vault. VIII AA 1682. The jury note itself was made part of

the record. But the juror affidavits were never presented at trial nor accepted by the district court as an exhibit, as the juror note itself was. Thus, any added juror affidavit or declaration would change, not correct, the record. Further, the juror affidavits are likely an impermissible attempt to invade the thought process of the jury. NRS 50.065(2); Maestas v. State, 128 Nev. Adv. Op. 12, 20, 275 P.3d 74, 84 (2012). Thus, the district court did not err in denying the Motion to Reconstruct the Record.

D. **The district court did not err in denying an evidentiary hearing on these motions**.

Appellant claims that "what occurred behind closed doors in the judge's chambers" and "how the jury received the information" in the jury note were required for the district court to decide these motions. AOB at 51– 52. However, as Sections A through C, *supra*, demonstrate, an evidentiary hearing was unnecessary.

This Court has held that if a matter can be resolved without expanding the record, then no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). A defendant is entitled to an evidentiary hearing only if his pleading is supported by specific factual allegations, which, if true, would entitle him to relief. Marshall, 110 Nev. at 1331, 885 P.2d at 605.

As discussed at length, the distirct court below found that the so-called "new evidence" did not warrant a new tiral because the tiral court did not err in its return note to the jury. VIII AA 1687, 1694. Further analysis reveals that even if there was

any error, it was harmless beyond a reasonable doubt. Section VI, *supra*. The legal analysis regarding Appellant's two motions, both of which centered on the jury note, simply did not require an expanded record, including testimony about alleged communications between the jury and the marshal. Mann, 118 Nev. at 356, 46 P.3d at 1231. This is particularly true when there is no indication that any such communications were improper—and thus, no factual allegations that, if true, would have entiteld Appellant to relief. Marshall, 110 Nev. at 1331, 885 P.2d at 605. Furthermore, Appellant's counsel offered through affidavit her rationale and explanations as to what she would have done had the district court informed the parties about the note. VI AA 1046–47. None of these actions, including asking for supplemental jury insturctions, would have required an evidentiary hearing to explain. Thus, the distirct court did not abuse its discretion in denying Appellant's request for an evidentiary hearing.

VIII. ANY ALLEGED ERROR 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, 124 Nev. at 935, 192 P.3d at 1183 (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, 386 U.S. at 24, 87 S. Ct. at 828. 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, 117 Nev. at 732 n.14, 30 P.3d at 1132 n. 14. Under any standard, any alleged error in this case was harmless, particularly in light of the overwhelming evidence of Appellant's. See Section I, *supra*.

CONCLUSION

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

Dated this 24th day of December, 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 13,394 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 24th day of December, 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 24th day of December, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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