IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNON NEWSON, JR.,	)	NO. 75932
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

Statutes

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JURISDICTIONAL STATEMENT

Appellant VERNON NEWSON JR. ("Newson"), appeals from a final judgment under Nevada Rule of Appellate Procedure 4(b) and NRS 177.015. The district court filed the Judgment of Conviction on April 26, 2018. Appellant's Appendix Vol. II 313 ("AA II 313"). Newson filed his Notice of Appeal on May 21, 2018. Id. at 315.

ROUTING STATEMENT

Newson's case is presumptively assigned to the Nevada Supreme Court because Newson was convicted of one (1) category A felony and three (3) category B felonies after jury trial. Id. at 313-14. Convictions involving category A or B felonies after jury trial are not

within the original jurisdiction of the Court of Appeals. See NRAP 17(b)(2)(A).

ISSUES PRESENTED FOR REVIEW

I. The District Court's Jury Instruction Errors Violated Newson's Fundamental Right to a Fair Trial.

II. The State Violated Newson's Sixth Amendment Right to Notice of the Charges Against Him.

III. Cumulative Error Warrants Reversal.

STATEMENT OF THE CASE

On December 22, 2015, the State of Nevada filed a criminal complaint in the North Las Vegas Justice Court charging Newson with one count of Murder with Use of a Deadly Weapon and one count of Possession of Firearm by Prohibited Person. AA I 1. Newson made his first appearance in the Justice Court on January 15, 2016, at which time the Magistrate appointed the Clark County Public Defender to represent Newson and continued Newson's arraignment until January 20, 2016. Id. at 11. On January 20th Newson waived his right to a preliminary hearing within 15 days and the Magistrate scheduled Newson's preliminary hearing for February 19, 2016. Id. On

February 19th the Magistrate continued the preliminary hearing until April 16, 2016. Id. at 12.

On the April 16th preliminary hearing date the State filed an amended criminal complaint adding two counts of Child Endangerment. Id. at 13-15. Thereafter, three witnesses then testified at the hearing. Id. at 113. At the hearing's conclusion the Magistrate held Newson to answer on all charges and scheduled Newson's felony arraignment for April 11, 2016, in the district court. Id. at 13.

The State filed the Information in the district court on April 5, 2016. Id. at 97. Newson pleaded not guilty at his arraignment and waived his right to a speedy trial. AA II 319. The district court hearing master scheduled calendar call for August 18, 2016 and jury trial for August 22, 2016 in District Court Department 21. AA II 319.

At the August 18th calendar call Newson moved to continue the trial. Id. at 320. The court granted Newson's request and rescheduled calendar call for March 23, 2017 and jury trial for March 27, 2017. Id. On March 9, 2017, Newson again requested that the court continue the trial. Id. at 321. The court agreed and continued calendar call to October 19, 2017 and jury trial to October 23, 2017. Id. On October 12, 2017, Newson once again moved to continue the trial. Id. at 322.

The court granted his request and reset calendar call for February 8, 2018, and jury trial for February 12, 2018. Id.

On January 25, 2018, Newson filed the following motions: (1) a Motion to Bifurcate count 2 -- Possession of a Firearm by a Prohibited Person; (2) a Motion to Compel Discovery;[1] and (3) a Motion in Limine to exclude certain evidence at trial. AA I 153, 158, 216. At calendar call on February 8, 2018, the court granted Newson's motion to bifurcate,[2] granted Newson's discovery motion in part, and granted Newson's motion in limine. AA II 325. The court also continued the calendar call one day. Id. At the continued calendar call the court transferred Newson's case to District Court Department 3 with trial scheduled to begin on February 15, 2018. Id. at 326.

The presiding judge in Department 3 subsequently continued Newson's trial to February 22, 2018. Id. at 327. On February 21, 2018, the court conducted a deposition of Zaharia Marshall's ("Marshall") to preserve her testimony in the event she became

[1] The State filed an opposition to Newson's discovery motion on January 29, 2018. AA I 186.

[2] The State filed an amended information (AA I 234) a second amended information (AA II 259) and a third amended information (AA II 295) to reflect the court's order. After the court granted Newson's motion to bifurcate, the Child Abuse or Neglect allegations became counts 2 and 3 in the Second Amended Information. Id. at 259.

unavailable for trial. Id. at 329. Additionally, on that date Newson and the State agreed to waive any penalty phase in the event the jury convicted Newson for Murder. Id.

Newson's bifurcated trial began on February 22, 2018 and ended on February 28, 2018. Id. at 330-36. At the trial's conclusion the jury found Newson guilty of all charges. Id. at 294, 311-12.

On April 19, 2018, the court sentenced Newson on count 1 to life in prison with parole eligibility after 20 years plus a consecutive 240 months with parole eligibility after 96 months, on counts 2 and 3 to 72 months in prison with parole eligibility after 24 months with count 2 to run consecutive to count 1 and count 3 to run concurrent to count 2, and on count 4 to 72 months in prison with parole eligibility after 24 months with count 4 to run consecutive to count 2. Id. at 313-14. The Court announced Newson's total aggregate sentence as life in prison with parole eligibility after 384 months and credited Newson with 826 days against the sentence. Id. at 314. Newson timely filed his Notice of Appeal on May 21, 2018. Id. at 315.

STATEMENT OF FACTS

On December 13, 2015, around 10:30 p.m., Janei Hall ("Hall") and her husband were driving to dinner and stopped at a red light at

the I-15 and Lamb Blvd. intersection in Las Vegas, NV. AA IV 717. While waiting at the light Hall heard gunshots in rapid succession coming from the I-15 on-ramp.[3] Id. at 718. Hall looked to her right, heard a car door close, and saw a crossover or SUV speed off towards the I-15.[4] Id. at 719. As the vehicle sped away, Hall noticed a person, later identified as Anshanette McNeil ("McNeil") lying in the street on the on-ramp. Id. Hall and her husband continued on Lamb, made a U-turn, and proceeded onto the on-ramp to assist McNeil. Id. at 720. When Hall exited her vehicle she noticed McNeil's shoes were missing and a damaged cell phone lay a few feet off to McNeil's side. Id. at 721-22. Hall also noticed McNeil had a bullet wound to her neck and had trouble breathing. Id. at 720, 722. According to Hall, another bystander arrived shortly thereafter and attempted resuscitative measures on McNeil. Id. at 722.

Meanwhile, Nevada Highway Patrol Officer Nicolas Jerram ("Jerram") received a call from dispatch around 10:30 p.m. regarding a pedestrian possibly struck by a vehicle at the I-15 southbound on-ramp near Lamb Blvd. Id. at 731-32. While on route to the location

[3] According to Hall, the gunshots were without pause. AA IV 729.
[4] Hall believed she might have heard more than one door close after the she heard the gunshots. AA IV 730.

dispatch updated Jerram and advised the female victim had actually sustained a gunshot wound to her chest. Id. at 732. Upon arrival Jerram observed paramedics administering CPR to McNeil. Id. at 734. Jerram also noticed spent bullet casings, a damaged cell phone, and "dents" in the asphalt near where McNeil had been initially located. Id. at 735. Jerram notified inbound troopers to shut down the on-ramp and maintained the scene until North Las Vegas police arrived. Id. at 736-37.

August Corrales ("Corrales"), a paramedic who responded to the scene, also noticed spent bullet casing near where McNeil had been initially located. Id. at 743. According to Corrales, when he arrived on scene McNeil had faint cardiac activity and was not breathing adequately. Id. Corrales loaded McNeil into the ambulance and began administering CPR. Id. at 743-44. McNeil later died in the ambulance on the way to the hospital. Id. at 745.

North Las Vegas police officer Boris Santana ("Santana") arrived after paramedics had left. Id. at 748. After speaking with Nevada Highway Patrol troopers Santana surveyed the scene and noticed four indentations in the ground within a pool of blood where McNeil had been lying. Id. at 749. Santana believed the indentations

were from bullet strikes. Id. at 751. Santana also located six spent bullet casings on the ground near where McNeil had been lying. Id. Additionally, Santana located McNeil's cell phone which appeared to have been damaged by a bullet. Id. Santana then interviewed witnesses and relayed his findings to arriving North Las Vegas detectives. Id. at 753-54.

Earlier that evening, around 9:00 p.m., Zaharia Marshall ("Marshall"), McNeil's "God sister," received a phone call from McNeil requesting Marshall babysit McNeil's two (2) year-old son Brandon[5] and McNeil and Newson's eight (8) month-old son Major. Id. at 757-59. Marshall agreed and eventually went outside to await McNeil's arrival. Id. at 761. Marshall knew McNeil and Newson were in a relationship and had previously witnessed McNeil argue with Newson and yell at him. Id. at 777. According to Marshall, McNeil would engage in verbal fights with Newson almost every day, including when driving. Id.

Eventually Newson arrived at Marshall's house without McNeil, but with both Brandon and Major, in a dark blue SUV or

[5] Newson is not Brandon's father.

crossover vehicle.[6] Id. at 760-61. As Newson exited the vehicle bullets fell from his lap onto the driveway. Id. at 765. Newson removed Major from the back seat, handed him to Marshall, and removed Major's swing and diaper bag from the trunk. Id. at 762-63. Marshall noticed Newson was "frantic," irritated, amped up, and hurried. Id. at 779. Moreover, Newson became frustrated while removing Major from the car seat. Id. at 780.

After removing Brandon from the vehicle, Newson, Marshall, and the children entered Marshall's house. Id. at 764-65. Newson kissed Major on the forehead and asked Marshall to accompany him outside. Id. at 765. Once outside, Newson picked up a bullet which had fallen onto the driveway and nervously placed it into a gun magazine. Id. at 765, 780-81. Newson handed Marshall McNeil's purse and told Marshall to tell Major that Newson will "always love him." Id. at 766. When Marshall asked Newson what happened, Newson replied, "motherfucker's pushed me too far to where I can't take it anymore." Id. at 766. Newson then entered the vehicle and left. Id. As Newson left, the vehicle's headlights illuminated the

[6] Marshall testified that Newson arrived around 10:00 pm. See AA IV 785. However, this would not have been possible given that the incident at the I-15 on-ramp occurred around 10:30 that evening.

driveway and Marshall spotted the bullets which had fallen from Newson's lap. Id. at 768. Marshall picked the bullets up, placed them in a bag, and put them on her washing machine inside her house. Id.

After Newson left, Marshall attempted to contact McNeil via telephone. Id. at 769. Marshall also unsuccessfully attempted to contact Newson. Id. Marshall was able to contact and speak with McNeil's mother, Tyra Adkins ("Adkins"). Id. Thereafter, as Marshall changed Major's diaper she noticed a red substance on Major's pants. Id. at 770. Marshall also noticed the substance on Major's car seat as well. Id. Marshall contacted Adkins again and explained she believed there was blood on Major's car seat. Id. Adkins contacted police to report McNeil missing. Id.

North Las Vegas detective Benjamin Owens ("Owens"), who had responded to the I-15 on-ramp to supervise evidence collection, received a call from North Las Vegas police dispatch regarding Adkin's missing person report. AA V 895-96, 901. Owens and his partner Detective Stuckey proceeded to Marshall's residence to speak with Adkins. Id. Upon arrival Owens and Stuckey spoke with both Marshall and Adkins. Id. at 903. Marshall showed Owens the red

substance on Major's car seat and gave Owens the bullets she had collected from the driveway. AA IV 770-71.

Meanwhile, Wendy Radke ("Radke"), a crime scene analyst with the North Las Vegas police department was at the I-15 and Lamb processing the scene and collecting evidence. AA V 845-47. Radke recovered numerous items from the scene including McNeil's cell phone,[7] bullet fragments,[8] six (6) spent bullet casings,[9] two (2) pieces for cloth from McNeil's jacket,[10] and possible blood.[11] Id. at 850-52. Radke also photographed possible bullet strikes in the asphalt near the location where McNeil had been found.[12] After processing the scene Radke dropped the collected evidence off at the evidence vault and proceeded to Marshall's house to collect additional evidence. Id. at 857-58. At Marshall's house Radke collected the bullets from the bag in the laundry room,[13] padding from Major's car seat,[14] a child's

[7] State's exhibit 16 at trial. AA V 850.
[8] State's exhibit 11 at trial. AA V 850.
[9] State's exhibits 23, 27, 29, 30, 33 at trial. AA V 852-53.
[10] State's exhibits 14 and 20 at trial. AA V 850-51.
[11] State's exhibit 40 at trial. AA V 854-55.
[12] State's exhibits 25, 35-38 at trial. AA V 852-55.
[13] State's exhibit 92 at trial. AA V 859.
[14] State's exhibit 94 at trial. AA V 860.

blanket, socks, and Major's suspected bloodstained pants.[15] Id. at 859-60.

Owens obtained a warrant for Newson's arrest on December 22, 2015. Id. at 908. That same day, around 9:07 p.m., Rickey Hawkins ("Hawkins"), a patrol officer with the Claremont California Police Department, responded to suspicious person call at a local apartment complex. Id. at 882-83. Upon arrival Hawkins detained Newson, who matched the suspicious person's physical description. Id. at 884. Hawkins ran a records check which revealed Newson had an arrest warrant out of Las Vegas, Nevada for Murder. Id. at 866. Hawkins placed Newson under arrest and transported him to the Claremont Police Department's detention facility. Id. During Newson's pre-booking search Hawkins recovered 18 rounds of 9 mm ammo from Newson's pocket. Id. at 887, 914. Hawkins also impounded Newson's wristwatch. Id. at 888. Due to finding ammunition in Newson's pocket, and given nature of the original suspicious person call, Hawkins took a K9 unit back to the apartment where he had apprehended Newson to sniff for gunpowder. Id. Hawkins then

[15] State's exhibits 95 and 97 at trial. AA V 860.

located a single 9mm round in the area where he originally made contact with Newson. Id. at 889.

Later that evening Claremont Police contacted Owens to advise it had Newson in custody. Id. at 908. The next day Owens and Stuckey travelled to Claremont, CA to retrieve the evidence recovered during Newson's arrest. Id. at 909. Owens and Stuckey then returned to Las Vegas and took the evidence to the CSI lab for re-packaging and examination. Id. at 910. Owens also noticed apparent bloodstains on Newson's impounded wristwatch. Id. at 916.

In early January 2016, Winston Reece ("Reece") contacted Las Vegas Metropolitan Police regarding an abandoned vehicle near his house on Cincinnati Ave. in Las Vegas, NV. Id. at 837. Reece called police about five (5) days after he first noticed the vehicle. Id. Reece advised that approximately five (5) days earlier, around 4:00 or 4:30 a.m., he witnessed a person park the vehicle near Reece's home, exit the vehicle, and walk away. Id. at 838. Reece described the person as a black male with an athletic build wearing a dark jacket. Id. at 838-39. Two (2) days later Reece approached the vehicle, looked inside, and noticed three (3) spent bullet casings and an apparent bloodstained

child's hat. Id. at 840. This discovery prompted Reece to contact police. Id.

Las Vegas Metropolitan Police responded to Reece's call and learned the abandoned vehicle had been rented to McNeil. Id. at 917. Metro contacted Owens who arrived with CSI to search and process the vehicle. Id. at 920. Within the vehicle Owens noted apparent bloodstains in the back seat directly behind the driver's seat, on the interior driver's side door handle, and on the rear driver's-side interior door near the handle. Id. at 920-22. Owens located one unspent bullet and six spent bullet casings within the vehicle. Id. at 926. Owens also located a bullet fragment in the vehicle's cargo area and another lodged in the backseat on the driver's side. Id. at 931-32. Crime scene analysts took DNA swabs from the vehicle's interior and used trajectory rods to determine the bullets' paths. Id. at 934-36. Analyst's concluded the bullets travelled through from the front driver's seat into the vehicle's rear seats and stopped in the cargo area. Id. at 939. Owens eventually confirmed that McNeil had purchased a Ruger 9 mm handgun on February 25, 2015 and received the gun after a 72 hour hold on March 1, 2015. Id. at 943.

Kathy Geil ("Geil"), a forensic scientist with the Las Vegas Metropolitan Police Department, analyzed the spent bullet casings and bullet fragments recovered during the investigation into McNeil's death. AA IV 786-87, 794. Geil analyzed the 11 casings and determined all were 9 mm ammunition from various manufacturers and each had been fired from the same gun. Id. at 790-92. However, Geil could not determine whether the bullet fragments were fired from the same weapon. Id. at 795.

Allison Rubino ("Rubino"), another forensic scientist with the Las Vegas Metropolitan Police Department, analyzed the DNA evidence collected during the investigation into McNeil's death. AA V 955. Rubino determined the bloodstained car seat liner contained a DNA mixture with the major profile belonging to McNeil. Id. at 962, 964. Additionally, the blood from Major's car seat handle, fleece blanket, child's socks, and Major's pants all contained a single source of DNA belonging to McNeil. Id. at 967-68. The vehicle's rear view mirror swab contained Newson's DNA. Id. at 969. The vehicle's gear shift and steering wheel contained both Newson and McNeil's DNA. Id. at 970-71. The blood from Newson's wrist watch contained a

DNA mixture with the major profile belonging to McNeil. Id. at 972-73.

Elaine Olsen ("Olsen"), a medical examiner with the Clark County Coroner's Office, conducted McNeil's autopsy on December 14, 2015.[16] AA IV 801. McNeil's toxicology screen indicated she had methamphetamine, amphetamine metabolite, hydrocodone, and hydrocodone metabolites in her system the night she died.[17] Id. at 803. Olsen also located seven (7) bullet wounds to McNeil's body. Id. at 805.

According to Olsen, bullet 'A' entered McNeil's right cheek, exited her right neck, and re-entered her right upper-chest. Id. at 806. This bullet fractured McNeil's collarbone but was not independently fatal. Id. at 809. Olsen noted stippling near this wound indicating the range of fire was anywhere from 6 inches to 2 feet.[18] Id. at 817.

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[16] Olsen retired before Newson's trial. Accordingly, Medical Examiner Jennifer Corneal ("Corneal") testified at trial regarding Olsen's conclusions. AA IV 801-02.

[17] McNeil had 1,600 nanograms per gram of Methamphetamine in her liver. AA IV 821. McNeil also had 250 nanograms per gram of hydrocodone in her liver. Id. at 822. According to Corneal, methamphetamine can cause aggressive behavior, hallucinations, and irrational reactions. Id.

[18] "Stippling" occurs near when unburnt gunpowder from a firearm strikes the person's skin. AA IV 817.

Bullet 'B' entered the left side of McNeil's chin, exited her left jaw, re-entered the left side of her neck, passed through her left lung, grazed her spine, and exited her back. Id. This injury would have been independently fatal. Id. at 810.

Bullet 'C' entered McNeil's left chest, traveled through McNeil's left lung, aorta, and right lung, and exited McNeil's upper right chest. Id. at 810. This wound would have been independently fatal. Id. at 811.

Bullet 'D' entered McNeil's right mid-back passing through her right lung, aorta, esophagus, and exited her left chest. Id. at 812. This wound would have been independently fatal. Id.

Bullet 'E' entered McNeil's left mid-back and exited her mid-upper back. Id. This wound was not independently fatal. Id. at 813.

Bullet 'F' entered McNeil's upper right arm, fractured her humerus bone, and lodged in her arm. Id. at 813. Bullet 'G' entered McNeil's right forearm and exited lower on the same arm. Id. at 815. Neither arm injury would have been independently fatal. Id.

Finally, Olsen noticed a bullet graze wound to McNeil's left hand middle finger. Id. Based upon the aforementioned injuries,

Olsen concluded McNeil's died from multiple gunshot wounds. Id. at 816.

SUMMARY OF THE ARGUMENT

The district court deprived Newson of his fundamental right to a fair trial before a fully instructed jury. The State charged Newson with "open murder." Accordingly, the State essentially charged Newson with First Degree Murder as well as the lesser included offenses of Second Degree Murder and Voluntary Manslaughter. However, while the district court provided jury instructions regarding Second Degree Murder's elements, the court refused offer any instructions regarding Voluntary Manslaughter. This constituted reversible error as the jury was not instructed regarding the essential elements of a charged crime.

Alternately, if this Court disagrees with Newson's argument that the district court was required to instruct the jury regarding Voluntary Manslaughter because the State essentially charged Newson with Voluntary Manslaughter, the district court nevertheless committed reversible error when it rejected Newson's proposed Voluntary Manslaughter lesser included offense instructions which comprised Newson's theory of defense to the State's Murder allegation. The

district court rejected Newson's proposed theory of defense instructions claiming they lacked evidentiary support. However, sufficient evidence had been presented at trial to meet the minimum threshold necessary to warrant lesser included offense theory of defense instructions.

The district court also committed other instructional errors which deprived Newson of his fundamental right to a fair trial before a correctly instructed jury. First, the court provided the jury with a "flight" instruction over Newson's objection. The court's instruction contained an inaccurate legal statement which essentially advised the jury it could convict Newson for First Degree Murder based only upon his alleged flight. This erroneous instruction prejudiced Newson because it effectively lowered the State's burden of proof. Additionally, the State lacked any direct evidence that Newson killed McNeil with premeditation and deliberation but did present substantial evidence that Newson left the scene after he shot McNeil. Therefore, the jury likely used the fact that Newson fled as conclusive proof he committed First Degree Murder.

Second, the district court refused to instruct the jury that when circumstantial evidence is susceptible to two reasonable interpretations

and one interpretation supports guilt for a greater offense while another interpretation support guilt for a lesser offense the jury should resolve the conflict by adopting the interpretation which supports guilt for the lesser offense. The court arbitrarily rejected Newson's proposed instruction by noting its' judicial philosophy in favor of less instructions. Additionally, the court noted it had never given a similar instruction in the past. The court erred by rejecting the instructions however, because Newson had a statutory right to present legally accurate and pertinent instructions to the jury. The court's arbitrary and capricious justification for not providing Newson's proposed instruction harmed Newson's fair trial right and very likely contributed to the verdict because once again, the State lacked any direct evidence supporting its First Degree Murder allegation but sufficient circumstantial evidence existed which would have supported a conviction for second degree murder.

Next, the State violated Newson's fundamental 6th Amendment right to notice of the charges against him. The State alleged Newson committed two counts of Child Abuse or Neglect but did not allege what type of abuse or neglect Newson supposedly committed. This failure to provide Newson notice of what allegations he had to defend

against actually prejudiced Newson at trial because the court failed to instruct the jury on essential elements of the charged crimes. Alternately, the State presented insufficient evidence to support the only possible theories of prosecution.

Specifically, to the extent it could be argued the State alleged Child Abuse or Neglect via nonaccidental physical injury, the State failed to provide any evidence, much less evidence beyond a reasonable doubt, that the two children present when Newson shot McNeil actually suffered physical pain or mental suffering as a result of physical injury. Alternately, to the extent it could be argued the State alleged Child Abuse or Neglect via negligent treatment of maltreatment, the district court failed to provide jury instructions defining negligent treatment or maltreatment. Thus, the court failed to provide the jury with instructions defining an essential element of the charged crimes. If this Court somehow disagrees, the State nevertheless presented insufficient evidence to support Newson's conviction Child Abuse or Neglect regarding Brandon because the State failed to present any evidence whatsoever that Newson was responsible for Brandon.

Finally, the State charged Newson with serious crimes and upon conviction the court sentenced Newson to life in prison. Moreover, the errors in Newson's case involved fundamental constitutional rights. Indeed, due to the State's insufficient pleading it did not present sufficient evidence that Newson committed two counts of Child Abuse or Neglect. Moreover, the State did not present direct evidence supporting its First Degree Murder Allegation. Therefore, the district court's instructional errors likely compelled the jury to find Newson guilty of First Degree Murder even though the issue of his guilt for First Degree, as opposed to Second Degree or Voluntary Manslaughter was close. Accordingly, if none of the aforementioned errors independently warrants reversal, the cumulative effect of the errors absolutely warrants reversal.

ARGUMENT

I. The District Court's Jury Instruction Errors Violated Newson's Fundamental Right to a Fair Trial.

The district court is responsible for ensuring that the jury is fully and correctly instructed regarding the law governing the case. Crawford v. State, 121 Nev. 744, 754-55 (2005). On appeal, this Court generally reviews the district court's decisions regarding jury

instructions under an abuse of discretion or judicial error standard. Hoagland v. State, 126 Nev. 381, 384 (2010).

A. The district court committed reversible error when it refused to instruct the jury regarding voluntary manslaughter.

The State charged Newson in count 1 with open Murder. See AA I 1, 14, 97; AA II 259, 265. However, during trial the State argued that the court should not instruct the jury regarding Voluntary Manslaughter. AA II 945. Nevertheless, Newson proposed his own Voluntary Manslaughter instructions. See AA II 240, 248-55. The State did not contest Newson's proposed instructions' legal accuracy. Instead, the State claimed Newson had not presented sufficient evidence to warrant giving the proposed instructions. See AA V 947-50. Specifically, by focusing solely upon Newson's statement to Marshall, the State argued Newson's statement did not prove that McNeil provoked Newson before Newson shot McNeil. Id. at 947. The court agreed with the State and denied Newson's proposed instructions. Id. at 953.

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1. Newson was entitled to jury instructions on Voluntary Manslaughter because when the State charged him with open Murder it essentially charged Newson with manslaughter.

"An accurate instruction upon the basic elements **of the offense charged** is essential, and the failure to so instruct constitutes reversible error." Dougherty v. State, 86 Nev. 507, 509 (1970) (emphasis added). "An open murder complaint **charges** murder in the first degree and **all necessarily included offenses**." Thedford v. Sheriff, Clark County, 86 Nev. 741, 745 (1970) (emphasis added) (citing NRS 175.501; Parsons v. State, 74 Nev. 302 (1958); State v. Oschoa, 49 Nev. 194 (1926)). This Court has acknowledged that Voluntary Manslaughter is a lesser included offense of Murder. See e.g. Williams v. State, 99 Nev. 530, 531 (1983).

Here, the State charged Newson in count 1 with open Murder. See AA I 1, 14, 97; AA II 259, 265. Therefore, the State essentially charged Newson with First Degree Murder as well as the lesser included offenses Second Degree Murder and Voluntary Manslaughter. While the district court instructed the jury regarding the lesser included offense of Second Degree Murder, the court refused to instruct the jury regarding the lesser included offense of

Voluntary Manslaughter. The court's refusal to do so was reversible error.

When the State charged open Murder it essentially charged Newson with Manslaughter as well as Second Degree Murder and First Degree Murder. Accordingly, as a charged crime the district court had to instruct the jury regarding Manslaughter's elements irrespective of whether Newson presented evidence of provocation. See Dougherty, 86 Nev. at 509; see also Hancock v. State, 80 Nev. 581, 583 (1964) ("Here the defendant was faced with an open murder charge. The degree of the crime was not specified. Accordingly, the jury was instructed concerning the elements of first and second degree murder, and manslaughter, voluntary and involuntary."). Having failed to instruct the jury regarding the charged crime's essential elements, the district court committed reversible error. Therefore, Newson respectfully requests this Court reverse his conviction.

2. Voluntary Manslaughter comprised Newson's theory of defense.

If this Court does not agree that Newson was entitled to jury instructions on Voluntary Manslaughter because the State charged Newson with open Murder, Newson was nevertheless entitled to his proposed instructions as theory of defense instructions. This court has

held that a defendant has an absolute right to jury instructions on his or her "...theory of the case as disclosed by the evidence, **no matter how weak or incredible that evidence may be**." Vallery v. State, 118 Nev. 357, 372 (2002) (emphasis added). Indeed, "...if there is any evidence at all, **however slight**, on any reasonable theory of the case under which the defendant might be convicted of a lower degree or lesser included offense, **the court must, if requested, instruct on the lower degree or lesser included offense**." Lisby v. State, 82 Nev. 183, 188 (1966) (emphasis added) (abrogated on other grounds by Rosas v. State, 122 Nev. 1258 (2006)). If a court fails to instruct the jury on the defense theory of the case when ". . . supported by **some evidence** which, if believed, would support a corresponding jury verdict, . . . [this omission] constitutes reversible error." Williams v. State, 99 Nev. 530, 531 (1983); see also Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995) ("failure to instruct the jury on the defendant's theory of the case, where there is evidence to support such instruction, is reversible *per se* and can never be considered harmless error.").

"Manslaughter is the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation."

NRS 200.040(1). Voluntary Manslaughter occurs upon "a sudden heat of passion, caused by a provocation sufficient to make the passion irresistible." NRS 200.040(2). The "sudden hear of passion" must be "a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing." NRS 200.050(1). The "serious and highly provoking injury" can occur without physical contact. Roberts v. State, 102 Nev. 170, 174 (1986).

Here, during opening statements Newson noted that evidence would be presented at trial to show that Newson acted rashly, impulsively, and out of "passion" when he shot McNeil. Specifically, Newson noted the evidence would show McNeil had high levels of methamphetamine in her system on the night Newson killed her and Newson "reacted in the absolute worst possible way when he got into it with his girlfriend who happened to be the mother of his child, who happened to be high on methamphetamine at the time of the incident, and it all took place on a freeway on ramp." AA IV 714. Additionally, Newson noted the evidence would show his "passions were inflamed" and as proof, highlighted Newson's interactions with

Marshall shortly after the killing where Newson "still hadn't calmed down." Id. at 715. Finally, Newson advised the court would provide instructions at the trial's conclusion and explained, "[w]hen you get those jury instructions, folks, and you start reading **the different kinds of homicide and you see the lack of planning, where someone just gets hot and kills someone, please read those closely**." Id. at 176 (emphasis added).

During trial the State presented much of the aforementioned evidence Newson alluded to during opening statements. Accordingly, during discussions regarding jury instructions Newson offered proposed jury instructions regarding Voluntary Manslaughter's elements. See AA II 240, 248-55. Newson also explicitly advised that Voluntary Manslaughter was both a lesser included offense of Murder as well as his theory of defense to the Murder allegation. AA V 946. In support of his proposed instructions Newson noted the minimum evidence necessary to obtain a theory of defense instruction had been presented during trial. Notably, Newson's statement to Marshall, "Just know mother fuckers took me to a point where I can't take it no more," the fact that the gun shots occurred in rapid succession, and Newson's behavior when he arrived at Marshall's house, all evidenced

a provocation and heat of passion required for manslaughter. AA V 947.

In response, the State only focused on Newson's statement to Marshall arguing "...that statement referenced by Mr. Bashor doesn't reference any kind of – I mean, I don't know what he's talking about, and kind of provocation, and there's just no – there's just nothing." Id.

The court agreed with the State and rejected Newson's proposed voluntary manslaughter instructions while disingenuously noting, "[] I mean there's no context to did this [Newson being "pushed too far" that he couldn't take it] happen at the house, did it happen in the car, did it happen three days ago." Id. at 948. Furthermore, the court noted because there was "no context to when something like that occurs" the statement would not prove "the suddenness of heat of passion." Id. at 952-53.

The district court abused its discretion and committed reversible error when it rejected Newson's proposed theory of defense Voluntary Manslaughter instructions. First, it is ludicrous to claim, as the district court did, that Newson's statement to Marshall, "[j]ust know that mother fuckers took me to a point where I can't take it no more," could have referenced some unknown incident at some unknown point

in time. Marshall testified that Newson's statement came shortly after McNeil had been killed when Newson arrived at Marshall's house. Additionally, Marshall testified, "I asked him you know, **what happened** or whatever[], and he just told me to tell his son that he always love him. And I asked him again **what happened**, and he told me that, you know, 'just know that mother fucker's pushed me too far to where I can't take it no more.'" AA IV 766, 781 (emphasis added). Marshall's question to Newson about "what happened" was in reference to his emotional state **at that time**, which was shortly after the incident which gave rise to McNeil's killing. Basically, the context of Marshall's question demonstrates Newson's response could only reference an incident which had just occurred with McNeil.

Nevertheless, assuming Newson's statement about being pushed too far could have referenced some unknown incident occurring at some unknown time, that fact does not conclusively mean his statement did not apply to an incident that directly preceded McNeil's killing. Basically, as long as Newson's statement could realistically have been in reference to an incident which directly preceded McNeil's killing, even if it also could have possibly applied to some unknown incident, then the evidence met the minimum threshold of

"some evidence no matter how weak or incredible" to justify giving Newson's theory of defense instructions. Newson was not required to irrefutably establish his statement referred to an incident immediately preceding McNeil's killing nor disprove any other possible explanation.

More importantly, although the State and the court primarily, if not solely, relied upon Newson's statement to Marshall as lacking proof of provocation, the court ignored other evidence, "no matter how weak or incredible," which supported Newson's defense theory. Specifically, witness Janei Hall heard gunshots from the I-15 on-ramp in rapid succession, which suggests an impulsive and rash action. AA IV 718. Additionally, the fact that Newson shot McNeil while driving and then on a freeway on-ramp suggests a rash, sudden, or impulsive decision. Moreover, Marshall described Newson's behavior after the killing as "frantic," "scared," "irritated," and "amped up," which suggests Newson was still experiencing the stress of the provocation and still acting in the heat of passion. Id. at 762, 779. Marshall also testified that Newson and McNeil would argue every day, oftentimes while driving, and constantly yell at each other. Id. at 777-78. Finally, McNeil had high levels of methamphetamine in her system

which is a stimulant that can cause aggressive behavior, hallucinations, and irrational reactions in persons. Id. at 821-22.

Based upon the aforementioned, the **minimum evidentiary threshold** necessary for a Voluntary Manslaughter theory of defense instruction had been met at trial. Newson only needed **any evidence whatsoever**, however slight, no matter how weak or incredible, to justify giving his proposed theory of defense instructions. See Crawford v. State, 121 Nev. 744, 754 (2005) ("[w]hen **some evidence** in a murder prosecution implicates the crime of voluntary manslaughter, **no matter how weak or incredible that evidence may be**, the defendant is entitled upon request to an instruction specifically advising the jury that the burden is on the State to prove that the defendant did not act in the heat of passion with the requisite legal provocation." (Emphasis added)). Accordingly, the district court committed reversible error by refusing to instruct the jury regarding Newson's lesser included offense defense theory.

B. The district court erred by providing the jury with an inaccurate flight instruction.

This Court reviews a district court's jury instruction decisions for an abuse of discretion. See Nay v. State, 123 Nev. 326, 330 (2007). However, an instruction's legal accuracy is reviewed *de novo*.

Id. An erroneous jury instruction is evaluated on appeal for harmless error. Barnier v. State, 119 Nev. 129, 133 (2003). An error is harmless if it does not affect substantial rights. NRS 178.598.

In Matthews v. State, 94 Nev. 179, 181 (1978), this Court approved a flight instruction which advised "the flight of a person after commission of a crime **could be considered along with other proven facts in deciding guilt or innocence**, and that the significance of such circumstance was for the jury to determine." (Emphasis added). Similarly, in Potter v. State, 96 Nev. 875 fn. 2 (1980), this Court found although a flight instruction did not apply in the case, the instruction was nevertheless harmless in part because "... the flight instruction itself stated that the jury must weigh the evidence of flight in connection with "**all the evidence introduced in this case**." (Emphasis added). Finally, in Miles v. State, 97 Nev. 82, 85 (1981), this Court approved a flight instruction which stated, "[t]he flight of a person immediately after the commission of a crime is not sufficient in itself to establish his guilt, but is a fact which, if proved, **may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence.** The weight to which such

circumstance is entitled is a matter for the jury to determine." (Emphasis added).

Here, at Newson's trial the district court provided a "flight" instruction over Newson's objection. AA II 228; AA V 984. The instruction stated:

> The flight of a person after the commission of a crime is not sufficient in itself to establish guilt; however, **if flight is proved, it is circumstantial evidence in determining guilt or innocence**.
>
> The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. The weight to which such circumstances is entitled is a matter for the jury to determine.
>
> AA II 288 (emphasis added)

The flight instruction in Newson's case did not correctly state the law. Unlike flight instructions previously approved by this Court, the instruction given in Newson's case did not inform the jury that it could only consider evidence of Newson's flight **in the light of or in connection with the other proved facts** when deciding Newson's guilt or innocence. Instead, Newson's flight instruction essentially advised flight alone is evidence that of guilt.

The incorrect flight instruction in Newson's case was not harmless. Newson had a fundamental right to have the State prove he committed First Degree Murder beyond a reasonable doubt. The State's obligation to prove First Degree Murder required it to present evidence sufficient to convince the jury beyond a reasonable doubt that Newson killed McNeil with premeditation and deliberation. However, the erroneous flight instruction effectively lessened that burden by instructing the jury it could use the fact of flight as proof that Newson committed First Degree Murder. This is not a correct statement of law and accordingly, the instruction violated Newson's fundamental right to a fair trial and this Court should reverse his conviction.

C. The district court erred by rejecting Newson's proposed jury instruction regarding two reasonable interpretations of the evidence.

Newson requested the following jury instruction at trial regarding two reasonable interpretations of circumstantial evidence:

> Before you may rely on circumstantial evidence of (*sic*) conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the State has proved each fact essential to that conclusion beyond a reasonable doubt.

> Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to a lesser degree of culpability and another to a greater degree of culpability, you must accept the one that points to a lesser degree of culpability. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.
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> AA II 256.

In support of his proposed instruction, Newson argued that when the court rejected his proposed Voluntary Manslaughter instructions the court indicated Newson's statement to Marshall, as well as Newson's behavior after the killing, were essentially subject to multiple reasonable interpretations. AA V 987. Thus, Newson's proposed instruction was relevant and pertinent in his case.

The State countered that Newson's proposed instruction only applies in cases where "there's conduct and it could be interpreted two different ways, whether criminal or not criminal, not degrees of murder or not what we have here, where someone's admitting or the defense is that, yes, he's the one responsible buts it's a lesser degree

type of offense."[19] Id. at 988. The court rejected Newson's proposed instruction indicating, "I've never given this instruction in any form." Id. at 989. Basically, the court explained its judicial philosophy is to not "over-mange juries with lots of jury instructions...kind of I favor less instructions."[20] Id. at 990. Additionally, the court indicated it did not believe "this is the kind of circumstantial case that this was contemplated here." Id.

The court's decision was arbitrary and capricious. NRS 175.161(3) states:

> Either party may present to the court any written charge, and request that it be given. If the court believes that the charge is pertinent and an accurate statement of the law, whether or not the charge has been adopted as a model jury instruction, it must be given. If the court believes that the charge is not pertinent or not an accurate statement of law, then it must be refused.

Newson's instruction is based upon Bails v. State, 92 Nev. 95, 96-97 (1976). In Bails, this Court held, "that it is not error to refuse to give the instruction if the jury is properly instructed regarding reasonable

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[19] The State also advised that this Court has previously found it is not error to refuse an instruction similar to Newson's proposed instruction. AA V 988.

[20] Curiously, the court's philosophy regarding over-instructing juries did not apply when the State proposed a needless flight instruction.

doubt." Id. at 97. However, this Court also noted that that it would also be "permissible to give the instruction in such a case."[21] Id. Notably, and contrary to the State's assertion at trial, while this Court said it is permissible to give an instruction like the one Newson proposed, the Court never said the instruction only applies in cases involving guilt or innocence rather than guilt of a lesser degree.

Here, the district court provided the jury with a reasonable doubt instruction based upon NRS 175.211(1). See AA II 282. Nevertheless, Newson's proposed instruction correctly stated the law and was pertinent to his case. After the court refused to give Newson's theory of defense instructions regarding Voluntary Manslaughter Newson's only defense was that he committed Second Degree Murder.[22] Here, there was evidence supporting Second Degree

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[21] If Newson's proposed instruction did not specifically track Bails, the district court had an obligation to help correct the proposed instruction. See Carter v. State, 121 Nev. 759, 765 (quoting Honeycutt v. State, 118 Nev. 660, 667-68 (2002) (Rose, J., dissenting) ("If [a] proposed [defense] instruction is poorly drafted, a district court has an affirmative obligation to cooperate with the defendant to correct the proposed instruction or to incorporate the substance of such an instruction in one drafted by the court.").

[22] The district court put Newson in an impossible position when it rejected his theory of defense instructions. Newson had earlier explained during opening statements that the evidence which would be presented would support Voluntary Manslaughter. More importantly, the jury would be instructed regarding manslaughter at the trial's

Murder. First, there was no evidence of premeditation or deliberation because there were no percipient witnesses to McNeil's killing who could conclusively establish Newson premeditated or deliberated before he shot McNeil.[23] Moreover, Newson never confessed that he premeditated or deliberated before he shot McNeil. Thus, the State's First Degree Murder allegation and Newson's Second Degree Murder defense both rested upon circumstantial evidence. Therefore, Newson's proposed instruction was pertinent in his case.

Although this Court has not required lower court's to offer an instruction similar to Newson's in cases involving circumstantial evidence, this Court should take this opportunity to formally recognize that in cases where the State lacks direct evidence proving the charged crime, defendants should be entitled to an instruction similar to the one Newson offered at trial. Indeed, other jurisdictions require the instruction when warranted.

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conclusion. Thus, when the court refused to give Newson's theory of defense instructions, Newson likely lost credibility in the eyes of the jurors.

[23] Brandon and Major were technically witnesses. However, neither Brandon nor Major testified at trial for obvious reasons. Given their respective ages, it is likely neither Brandon nor Major could remember or articulate what happened in the car.

For example, Newson's proposed instruction comes from CALCRIM 224 which has been approved for use in California criminal cases. See People v. Anderson, 152 Cal.App.4th 919, 931, 61 Cal.Rptr.3rd 903, 912-13 (2007). Additionally, Indiana has noted that an instruction concerning the jury's obligation to reconcile conflicting evidence by adopting the interpretation which points to a defendant's innocence must be given in criminal cases. See Robey v. State, 454 N.E.2nd 1221, 1222 (Ind. 1983).[24] Finally, Virginia allows defendants to instruct juries, "When facts are equally susceptible to more than one interpretation, one of which is consistent with the innocence of the accused, the trier of fact cannot arbitrarily adopt an inculpatory interpretation." Case v. Commonwealth, 63 Va.App. 14, 23, 753 S.E.2d 860, 864 (Va.Ct.App. 2014). Thus, Newson would urge this Court to follow the aforementioned jurisdictions which require giving a similar instruction when warranted and requested.

Finally, the court's refusal to provide Newson's requested instruction was not harmless. As noted the State did not present any

[24] Indiana later modified Robey slightly, but still requires trial courts to instruct the jury must "attempt to fit the evidence to the presumption that the Defendant is innocent." See Simpson v. State, 915 N.E.2d 511, 518 (Ind.Ct. App. 2010); Smith v. State, 981 N.E.2d 1262, 1268 (Ind.Ct.App. 2013).

direct evidence that Newson killed McNeil with premeditation and deliberation. Accordingly, when the jury convicted Newson of First Degree Murder it did so based solely upon circumstantial evidence. However, other circumstantial evidence presented at trial also suggested Newson did not premeditate and deliberate before killing McNeil. While the court instructed the jury regarding reasonable doubt generally, and what circumstantial evidence is, the court did not instruct the jury on how it should resolve circumstantial evidence that supported guilt for a First Degree Murder as well as guilt for Second Degree Murder. Accordingly, the court's failure to provide Newson's requested instruction is reversible error.

II. The State Violated Newson's Sixth Amendment Right to Notice of the Charges Against Him.

"Under the Sixth Amendment to the United States Constitution, the State is required to inform the defendant of the nature and cause of the accusation against the defendant." West v. State, 119 Nev. 410, 419. Accordingly, "[t]he indictment or the information must be a plain, concise and definite written statement of the essential facts constituting the offense charged." 173.075(1). Essentially, "[a]n indictment, standing alone, must contain: (1) each and every element of the crime charged and (2) the facts showing how the defendant

allegedly committed each element of the crime charged." State v. Hancock, 114 Nev. 161, 164 (1998). This requirement is necessary to "adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case." Sheriff, Clark County v. Levinson, 95 Nev. 436, 437 (1979).

A. The State's charging document failed to allege what abuse or neglect Newson allegedly committed.

In Clay v. Eighth Jud. Dist. Ct., 129 Nev. 445 (2013), this Court noted that NRS 200.508(1) essentially criminalizes five different kinds of abuse or neglect: (1) nonaccidental physical injury; (2) nonaccidental mental injury; (3) sexual abuse; (4) sexual exploitation; and (5) negligent treatment or maltreatment. Id. at 452 (citing NRS 200.508(4)(a)). Additionally, this Court noted a person can commit child abuse or neglect by willfully causing a child **to suffer** physical pain or mental suffering as a result of abuse or neglect or by willfully placing a child in a situation where the child **may suffer** physical pain or mental suffering as a result of abuse or neglect. Id. at 451-52. Under either theory, "abuse or neglect," as defined in NRS 200.508(4)(a), is an element of the crime. Id. at 452.

In Clay, the grand jury returned an Indictment charging the defendant with two counts of Child Abuse or Neglect for slapping and hitting his 16 year-old girlfriend on two separate occasions. Id. at 448. In the district court the defendant filed a pre-trial Petition for Writ of Habeas Corpus challenging the State's indictment on two grounds. Id. First, the defendant alleged the State failed to present any evidence to the grand jury that the alleged victim actually suffered a physical or mental suffering and therefore the State failed to prove child abuse or neglect actually occurred. Id. Second, the State failed to instruct the grand jury regarding "physical injury" as defined in NRS 200.508(4)(d). Id. In response, the State failed to address the defendant's second argument. However, regarding the defendant's first argument, the State countered that "the 'showing of physical or mental injury is not a requirement' of the child-abuse-and-neglect statute; rather, the mere possibility of physical or mental injury is sufficient." Id. at 449.

The district court denied the defendant's petition. Id. After the district court denied the petition the defendant filed a Petition for a Writ of Mandamus or Prohibition in this Court challenging the district

court's refusal to grant his Habeas Corpus petition. Id. This Court exercised its discretion to consider the defendant's petition. Id. at 450.

In resolving the defendant's Mandamus/Prohibition petition this Court noted a person can commit child abuse or neglect by willfully causing a child **to suffer** physical pain or mental suffering as a result of abuse or neglect **or** by willfully placing a child in a situation where the child **may suffer** physical pain or mental suffering as a result of abuse or neglect. Id. at 451-52. Importantly however, under either theory (suffer or may suffer) "abuse or neglect," as defined in NRS 200.508(4)(a), is an element of the crime. Id. at 452. Additionally, as mentioned previously, this Court also held that NRS 200.508(1) criminalizes five different kinds of abuse or neglect: (1) nonaccidental physical injury; (2) nonaccidental mental injury; (3) sexual abuse; (4) sexual exploitation; and (5) negligent treatment or maltreatment. Id. at 452 (citing NRS 200.508(4)(a)).

In Clay's case, the State alleged the defendant committed abuse or neglect by nonaccidental physical injury. Id. at 452. Thus, the defendant argued NRS 200.508(1) required the State to prove a physical injury actually occurred regardless of whether the State alleged the defendant actually **caused** the victim to suffer physical

pain or mental suffering or **may have caused** the victim to suffer physical pain or mental suffering. Id. Basically, because the State alleged the defendant committed abuse or neglect via nonaccidental physical injury, the State had to prove physical injury -- as defined in NRS 200.508(4)(d) -- actually occurred to the victim. Id. NRS 200.508(4)(d) defined physical injury as "[p]ermanent or temporary disfigurement" or "[i]mpairment of any bodily function or organ of the body."

The State countered because it alleged the defendant committed child abuse or neglect under a theory that he placed the victim in a situation where she only **may** have suffered physical pain, it did not have to prove the victim actually suffered a physical injury, i.e. permanent or temporary disfigurement or impairment of any bodily function or organ of the body. Id. In resolving the petition this Court held, "...NRS 200.508(1) unambiguously requires the State to prove that 'abuse or neglect,' as defined by NRS 200.508(4)(a), occurred regardless of the theory under which the offense is prosecuted[,]" i.e., the theory the victim actually suffered or the theory the victim may have suffered. Id. at 454. In Clay's case, because the State alleged nonaccidental physical injury as the abuse and neglect it therefore had

present sufficient evidence to the grand jury that the victim actually suffered "physical injury," i.e., permanent or temporary disfigurement or impairment of any bodily function or organ of the body. Id. at 454.

Here, the State did not charge Newson with Child Abuse or Neglect in the initial criminal complaint. See AA I 1-2. Instead, the State first charged Newson with Child Endangerment in the amended criminal complaint filed just before Newson's preliminary hearing in the justice court. See Id. at 13-15. In the amended criminal complaint the State alleged in counts 3 and 4 that Newson committed Child Endangerment by willfully causing both Brandon and Major to be placed in a situation where each "may suffer physical pain or mental suffering as a result of abuse or neglect, by shooting at or into the body of ANSHANETTE MCNEIL," while the children were "seated next to and in close proximity to ANSHANETTE MCNEIL; the defendant being liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime." See AA I 15.

Following the preliminary hearing the State filed the Information in the district court charging Newson with two (2) counts of Child Abuse, Neglect, or Endangerment. Id. at 98-99. Like the amended criminal complaint the State alleged Newson willfully caused both Brandon and Major to be placed in a situation where each "may suffer physical pain or mental suffering as a result of abuse or neglect, by shooting at or into the body of ANSHANETTE MCNEIL," while the children were "seated next to and in close proximity to ANSHANETTE MCNEIL; the defendant being liable under one or more of the following principles of criminal liability, to-wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime." Id.

The State's Amended Information filed on February 22, 2018 was identical to the Information with respect to the Child Abuse, Neglect, or Endangerment allegations. Id. at 235-36. Finally, the Second Amended Information filed on February 27, 2018, removed the aiding and abetting language and simply alleged Newson committed Child Abuse, Neglect, or Endangerment by willfully

causing Brandon and Major to "be placed in a situation where the child may suffer physical pain or mental suffering as a result of abuse or neglect, by shooting at or into the body of ANSHANETTE MCNEIL" while the two children were "seated next to and in close proximity to ANSHANETTE MCNEIL." AA II 260.

Based upon the various aforementioned charging documents, while the State alleged Newson caused Brandon and Major to be placed in a situation where Brandon and Major may suffer physical pain or mental suffering as a result of abuse or neglect, the State did not allege which type of abuse or neglect Newson allegedly committed, i.e., nonaccidental physical injury, nonaccidental mental injury, sexual abuse, sexual exploitation, or negligent treatment or maltreatment. However, at trial the district court provided jury instruction 19 which explained, "'Abuse or neglect' means **physical injury of a non-accidental nature** or **negligent treatment or maltreatment** of a child under the age of 18 years, under circumstances which indicate that the child's health or welfare is harmed or threatened with harm." AA II 280 (emphasis added). Instruction 19 further explained that physical injury means either

permanent or temporary disfigurement; or impairment of any bodily function or organ of the body. Id.

Newson did not object to the charging documents' sufficiency prior to trial. "[W]hen the accused proceeds to trial without challenging the sufficiency of the information or indictment an element of waiver is involved." Collura v. State, 97 Nev. 451, 453 (1981) (citing Simpson v. District Court, 88 Nev. 654, 661 (1972)). When the defendant objects to the charging document for the first time on appeal, unless he can show prejudice, this Court will analyze the issue under a reduced standard. Collura, 97 Nev. at 453. Under the reduced standard, the Court "may look to the entire record to determine whether the accused had notice of what later transpired at trial." Id.

Notwithstanding Newson's failure to challenge the Information's sufficiency below, a review of the entire record demonstrates Newson lacked notice regarding which theory of prosecution the State was pursuing. Additionally, the State's failure to allege what abuse or neglect Newson allegedly committed prejudiced Newson because given the Information's deficiency the district court failed to adequately instruct the jury regarding essential elements of

the charged crimes. Moreover, the Information's failure to specify the State's theory of prosecution prejudiced Newson because it effectively allowed the jury to convict Newson based upon insufficient evidence.

1. The State presented insufficient evidence that Newson committed physical injury or mental injury upon Brandon and Major.

"The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Carl v. State, 100 Nev. 164, 165 (1984); Oriegel-Candido v. State, 114 Nev. 378, 382 (1998). "The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." LaPierre v. State, 108 Nev. 528, 529 (1992).

Here, as noted, the State did not allege which theory of abuse or neglect Newson supposedly committed. Nevertheless, the State may have alleged nonaccidental physical injury based upon the jury instruction which explained that child abuse consists of nonaccidental physical injury and defined physical injury as permanent or temporary disfigurement; or impairment of any bodily function or organ of the

body. AA II 280. Furthermore, the prosecutor argued during closing arguments:

> Those bullets would've been loud and frightening to those children. Seeing their mother injured **would've caused mental suffering**. And they also would've been afraid for their own safety in that setting. Certainly shooting those kids in that – or shooting the mother of those kids in that confined space **is something that amounts to a – an act that inflicts mental suffering on those two very small children**.
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> AA V 1016 (emphasis added).

Thus, in line with Clay, the State appears to have alleged abuse and neglect via nonaccidental physical injury due to the jury instructions and the State's closing argument. Accordingly, although the State alleged Newson caused Brandon and Major to be placed in a situation where each may have suffered physical pain or mental suffering, the State nevertheless had to prove beyond a reasonable doubt that Newson committed a nonaccidental physical injury, i.e., permanent or temporary disfigurement or impairment of any bodily function or organ of the body, upon each child, which then caused physical pain or mental suffering. See Clay, 129 Nev. at 452.

The State failed to present any evidence whatsoever at trial to prove Newson caused physical injury to either Brandon or Major. No

witnesses testified that Brandon or Major became disfigured when Newson shot McNeil. Similarly, no witness testified that Brandon or Major suffered impairment of any bodily functions when Newson shot McNeil. Accordingly, because the State failed to present any evidence that a nonaccidental physical injury occurred to Brandon and Major, and therefore, that Brandon or Major suffered physical pain or mental suffering, the inadequate charging document allowed the jury to convict Newson based upon insufficient evidence. Accordingly, this Court should reverse Newson's Child Abuse or Neglect convictions.

2. Assuming the State somehow alleged Newson committed abuse or neglect due to negligent treatment or maltreatment, the charging documents' failure to allege this abuse or neglect prejudiced Newson.

As noted *supra*, in Clay this Court explained when the State alleges abuse or neglect as nonaccidental physical injury, regardless of whether the State alleges the child **suffered** physical pain or mental suffering or **may suffered** physical pain or mental suffering, the State must prove that physical injury occurred. Clay, 129 Nev. at 453. However, this Court also explained if the State alleges one of the other types of abuse or neglect, i.e., sexual abuse, sexual exploitation, or negligent or maltreatment, the State need only demonstrate the child

may suffer physical pain or mental suffering as a result of the sexual abuse, sexual exploitation, or negligent or maltreatment. Id. at 453-54. Specifically, the Court explained:

> A good example is abuse or neglect based on negligent treatment or maltreatment of a child. [N]egligent treatment or maltreatment of a child occurs if a child is without proper care, control and supervision. The definition of this kind of abuse or neglect encompasses conduct that does not necessarily result in actual physical pain or mental suffering. If there is no physical pain or mental suffering as a result of the negligent treatment or maltreatment, then the defendant cannot be charged under the first theory of liability in NRS 200.508(1).[25] But criminal liability will still attach in that scenario under the second theory in subsection 1 if the defendant placed the child in a situation where the child *may* suffer physical pain or mental suffering as the result of the negligent treatment or maltreatment.
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> Id. at 454 (internal citations omitted).

Here, although the State's charging documents failed to allege what kind of abuse or neglect the State believed Newson committed, the charging documents did allege that Newson placed Brandon and Major in a situation where his unspecified abuse or neglect may have caused Brandon and Major physical pain or mental suffering.

[25] The "first theory" being the defendant caused physical pain or mental suffering as a result of abuse or neglect.

Additionally, the court instructed the jury that, "[a]buse or neglect means physical injury of a non-accidental nature or negligent treatment or maltreatment of a child under the age of 18 years, under circumstances which indicate that the child's health or welfare is harmed or threatened with harm." AA II 280 (emphasis added). Thus, based upon the aforementioned, it is possible that the State alleged Newson committed Child Abuse or Neglect due to negligent or maltreatment. However, even if this is possible, the failure to specifically allege negligent or maltreatment in the charging documents nevertheless prejudiced Newson.

a. The district court committed reversible error by failing to instruct the jury regarding negligent or maltreatment.

The district court is responsible for ensuring that the jury is fully and correctly instructed regarding the law governing the case. Crawford, 121 Nev. at 754-55. "An accurate instruction upon the basic elements of the offense charged is essential, **and the failure to so instruct constitutes reversible error.**" Dougherty, 86 Nev. at 509 (emphasis added).

Assuming the State somehow alleged Newson committed child abuse or neglect based upon negligent or maltreatment, negligent

treatment or maltreatment were elements of the charged crimes. Therefore, the district court had to instruct the jury on the definition of negligent or maltreatment and the State had to prove beyond a reasonable doubt that both Brandon and Major had "been subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic" or had been abandoned, [were] without proper care, control or supervision or lacked "the subsistence, education, shelter, medical care or other care necessary for the well-being of the child **because of the faults or habits of the person responsible for the welfare of the child** or the neglect or refusal of the person to provide them when able to do so." See NRS 432B.140 (emphasis added). However, the district court did not provide any jury instructions defining negligent treatment or maltreatment or explain how the jury should determine whether Newson was responsible for Brandon and Major's welfare. Accordingly, the court failed to instruct on essential elements of the crime charged and this Court should reverse Newson's Child Abuse or Neglect convictions.

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b. The State failed to present any evidence that Newson was responsible for Brandon's welfare.

Assuming the court's failure to instruct the jury regarding negligent or maltreatment is somehow not reversible error, Newson could not be guilty of negligent or maltreatment with respect to Brandon because the State failed to present any evidence whatsoever that Newson was responsible for Brandon's welfare as required by NRS 432B.140. A person responsible for a child's welfare is "the child's parent, guardian, a stepparent with whom the child lives, an adult person continually or regularly found in the same household as the child, a public or private home, institution or facility where the child actually resides or is receiving care outside of the home for all or a portion of the day, or a person directly responsible or serving as a volunteer for or employed by such a home, institution or facility." NRS 432B.130.

Here, Brandon is not Newson's child. Additionally, Newson was not Brandon's stepparent because Newson and McNeil were not married and the State did not present any evidence that Newson was Brandon's guardian. Furthermore, the State did not present any evidence Newson and McNeil lived together or that Newson

continually or regularly was found in the same household as Brandon. Likewise, the State did not present any evidence that Newson was continually or regularly found in a public or private home, institution or facility where Brandon received care outside the home for all or a portion of the day. Finally, the State did not present any evidence that Newson was serving as a volunteer or employed by an institution where Brandon received care. Therefore, assuming the State alleged Newson committed Child Abuse or Neglect due to negligent treatment or maltreatment, the State failed to present any evidence to support Newson's conviction regarding Brandon. Accordingly, this Court should – at minimum – reverse Newson's Child Abuse or Neglect conviction related to Brandon.

III. Cumulative Error Warrants Reversal.

"Although individual errors may be harmless, the cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial." Byford v. State, 116 Nev. 215, 241-42 (2000). "When evaluating a claim of cumulative error, [this Court] consider[s] the following factors: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez v. State, 124 Nev. 1172, 1195 (2008).

Here, the State charged Newson with one (1) count of open Murder, which includes First Degree Murder, and two (2) counts of Child Abuse or Neglect. These are crimes which subjected Newson to the possibility of life in prison. Thus, the State charged Newson with grave crimes.

Next, the district court and the State individually and collectively committed errors which impacted Johnson's fundamental right to a fair trial. First, the State's inadequate charging documents failed to satisfy Newson's 6th Amendment right to fair notice of the allegations against him. Resultantly, the district court failed to provide the jury with instructions concerning essential elements of the charged crimes and therefore, the State convicted Newson based upon insufficient evidence. More importantly, regarding Newson's Murder conviction, the district court's instructional errors violated Newson's fundamental right to have a properly instructed jury determine his guilt or innocence of any lesser included offense.

Finally, the issue of Newson's guilt was close. As discussed *supra*, the State inadequate charging documents prohibited the jury from being properly instructed on the essential elements of Child Abuse or Neglect. This error allowed the State to convict Newson

based upon no evidence whatsoever and instead the mere supposition that Brandon and Major may have suffered physical injury under circumstances not present in Newson's case. Additionally, the issue of Newson's guilt for First Degree Murder was close. The State lacked any direct evidence proving Newson killed McNeil with premeditation and deliberation. While circumstantial evidence may have supported that allegation, other circumstantial evidence presented at trial supported a conviction for either Second Degree Murder or Voluntary Manslaughter. Voluntary Manslaughter was a lesser included charged offense and also comprised Newson's theory of defense. Thus, despite meeting the minimum evidentiary threshold necessary to mandate instructing the jury regarding Voluntary Manslaughter, the district court's refusal to provide these instructions totally removed the defense from the jury's consideration. Accordingly, due to the cumulative effect of these aforementioned errors this Court should reverse Newson's convictions.

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CONCLUSION

Based upon the foregoing arguments, Newson respectfully requests this Court reverse his convictions.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

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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 24 day of October, 2018.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 24 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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