IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNON NEWSON, JR.,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 75932

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)(A) because it is an appeal from a Judgment of Conviction based on a jury verdict that involves convictions for one Category A Felony and three Category B Felonies.

STATEMENT OF THE ISSUES

1. Whether the district court's jury instruction errors violated Appellant's fundamental right to a fair trial.
2. Whether the State violated Appellant's Sixth Amendment right to notice of the charges against him.
3. Whether the State presented sufficient evidence that Appellant committed physical or mental injury upon the victim's children, and that Appellant was responsible for the welfare of the victim's oldest son.
4. Whether cumulative error warrants reversal.
5. Whether any error is harmless.

STATEMENT OF THE CASE

On December 22, 2015, Vernon Newson Jr. ("Appellant"), was charged in North Las Vegas Justice Court by way of Criminal Complaint with one count Murder With Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165, - NOC 50001); and one count Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS 202.360, - NOC 51460). Appellant's Appendix, Volume 1 ("1AA"), at 1. On January 20, 2016, Appellant waived his right to a preliminary hearing within fifteen days and a preliminary hearing date was set for February 19, 2016. 1 AA 11. The preliminary hearing was then continued to April 16, 2016. 1 AA 12.

On April 1, 2016, The State filed an Amended Complaint charging Appellant with one count Murder With Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165, - NOC 50001); one count Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS 202.360, - NOC 51460); and two counts of Child Abuse, Neglect, or Endangerment (Category B Felony – NRS 200.5089(1) – NOC 55226). 1 AA 14-15. That same day, the case was transferred to district court and arraignment was set for April 11, 2016. 1 AA 13.

The State filed the Information in the district court on April 5, 2016. 1 AA 97. On April 11, 2016, Appellant plead not guilty to the charges, and waived his right to

a speedy trial. 2 AA 319; 341-42. After several continuances, jury trial was set for February 22, 2018. 1 AA 108-16; 2 AA 319-29; 343-71.

On January 25, 2018, Appellant made a motion to bifurcate his charge for Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS 202.360, - NOC 51460) from the other charges. 1 AA 153-57. The court granted Appellant's motion on February 8, 2018. 2 AA 325. On February 21, 2018, the case was reassigned to Department 3. 1 AA 231.

The trial began on February 22, 2018. 3 AA 417. The State filed an Amended Information charging Appellant with one count Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165, - NOC 50001); and two counts Child Abuse, Neglect or Endangerment (Category B Felony – NRS 200.5089(1) – NOC 55226). 1 AA 234-37. On February 27, 2018, the State filed a Second Amended Information containing the same charges but removing the "aiding and abetting" language from the Child Abuse charge. 2 AA 259-60.

On February 28, 2018, the State filed a Third Amended Information adding an additional charge for Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS 202.360, - NOC 51460). 2 AA 295-96. That same day, a jury found Appellant guilty of all charges. 2 AA 294; 311-12.

On April 19, 2018, the court sentenced Appellant as follows: as to count 1, life in prison with parole eligibility after twenty years served, plus a consecutive

sentence of a minimum of ninety-six months (96) and a maximum of two-hundred forty (240) months for the deadly weapon enhancement; as to count 2, a minimum of twenty-four (24) months and a maximum of seventy-two (72) months consecutive to count 1; as to count 3, a minimum of twenty-four (24) months and a maximum of seventy-two months (72) consecutive to count 2; and as to count 4, a minimum of twenty-four (24) months and a maximum of seventy-two (72) months consecutive to count 2. 2 AA 338-39. The total aggregate sentence was a term of life with eligibility of parole after three-hundred eighty-four (384) months have been served, with eight-hundred twenty-six (826) days credit for time served. Id. The Judgment of Conviction was filed on April 26, 2018. 2 AA 313-14.

On May 21, 2018, Appellant filed a Notice of Appeal and Case Appeal Statement. 2 AA 314-18; On October 25, 2018, Appellant filed the instant opening brief. The State responds herein.

STATEMENT OF THE FACTS

On December 13, 2015, Janei Hall ("Hall") was in the car with her husband heading up the ramp on I-15 and Lamb when she heard six to seven shots to the right of her. 4 AA 717-718. When Hall looked to her right she saw a crossover or SUV speed off, and a person later identified as Anshanette McNeil ("Victim") laying in the street. 4 AA 718-19. Hall then got out of her car and approached the scene, where she observed a woman with no shoes on and a damaged phone laying across from

her. 4 AA 720-21. Hall also noticed the victim had a bullet wound to her neck and had trouble breathing. 4 AA 720, 722.

Shortly thereafter, Trooper Nicholas Jerram ("Jerram") received a call to report to 1-15 and Lamb because a pedestrian had possibly been struck by a motor vehicle. 4 AA 732. While in route, the call was updated to a potential shooting where a female had a gunshot wound to her chest. Id. When he arrived to the scene, he observed paramedics administering CPR to the victim. 4 AA 734. He also observed shell casings from a gun, a cell phone with a gunshot hole in it, and dents in the asphalt where the victim had been located. 4 AA 735-36.

Paramedic August Corrales ("Corrales") was also called to the scene for a possible auto/ pedestrian accident. 4 AA 740-41. When he approached the victim, he observed gun shell casings and gunshot wounds on the victim, informing him that this was not an automobile accident. 4 AA 742-43. He then administered CPR and transported the victim to the hospital. 4 AA 744. The victim died shortly after arrival. Id.

Moments later, North Las Vegas Officer Boris Santana ("Santana") was called to the scene in reference to a person who had been shot. 4 AA 748. When he arrived to the scene he observed a pool of blood with 4 indentations in it where the victim had been lying. 4 AA 751. He believed the indentations were from bullet strikes. Id. He also located 6 bullet casings and found a cell phone that he believed had been

shot by a bullet. 4 AA 751-52. Santana then interviewed witnesses and relayed the information to North Las Vegas detectives. 4 AA 753-54.

The victim was supposed to be meeting with her godsister, Zarharia Marshall ("Marshall") that night. 4 AA 756-57. At that time, the victim had a two year old son, and an eight month old son. 4 AA 757-58. Appellant is the father of the eight month old child. Id. Earlier that day, the victim called Marshall and asked her to babysit her youngest son, to which Marshall agreed. 4 AA 759-60. While expecting the victim to arrive, Appellant showed up to drop off the child. 4 AA 760-61.

Appellant then got out of his vehicle frantically as bullets fell from his lap, and gave the baby to Marshall along with his swing and diaper bag. 4 AA 762-63; 765. Appellant then let the victim's older son out of the car. 4 AA 763. All four went into the house, and Marshall came back outside to speak with Appellant. 4 AA 765. Appellant handed her the victim's purse, and when Marshall asked what happened, Appellant told her to just tell his son he will always love him. 4 AA 766. When she asked again Appellant said, "Just know that mother fucker's pushed me too far to where I can't take it no more." Id.

Appellant then left Marshall's home. 4 AA 768. As he drove off, Marshall noticed that he left bullets on the ground, and collected them. Id. Marshall also called the victim's mother to explain her concerns. 4 AA 769. Marshall then proceeded to change the victim's youngest son, when she noticed a red substance on

his pants and blood in the car seat. 4 AA 770. After seeing the blood, Marshall called the victim's mother who then filed a missing person's report and had the police sent to Marshall's house. Id.

North Las Vegas Detective Benjamin Owens ("Owens") went to the scene to supervise evidence collection. 5 AA 895. While working on the scene he received information that the victim matched an individual in a missing person's report. 5 AA 901. He then proceeded to Marshall's home with his partner Detective Stuckey. Id. Marshall showed them the bullets, clothing, and car seat. 5 AA 770-71.

Wendy Radke ("Radke"), a Crime Scene Analyst, also went to the scene to take photographs and collect evidence. 5 AA 847. Radke recovered bullet casings, bullet fragment, two pieces of cloth, blood, and the victim's cell phone. 5 AA 850-55; 859-60. Radke also took pictures of the indentations in the asphalt. Id. After dropping the evidence off, Radke went to Marshall's home and took pictures of the clothing, car seat, purse, and bullets she recovered. 5 AA 859-61; 864.

On December 22, 2015, Owens obtained a warrant for Appellant's arrest. 5 AA 908. That same day, Rickey Hawkins ("Hawkins") of the Claremont California Police Department responded to a call about a suspicious person who turned out to be the Appellant. 5 AA 883-84. Hawkins detained Appellant and ran a records check which showed he had a warrant for his arrest for murder. 5 AA 884-86. Upon discovery of the warrant, Hawkins arrested the Appellant and notified the Las Vegas

police department. 5 AA 885-86. A pre-booking search recovered 18 rounds of 9 mm ammo. 5 AA 887, 914. As a result, Hawkins searched the area where he found Appellant and found another 9 mm round. 5 AA 889. The next day, Owens and Stuckey traveled to California to pick up the evidence and transported it to CSI in Las Vegas. 5 AA 909-910.

In January of 2016, Winston Reece ("Reece") called the police to report a vehicle that was left unattended for about five days. 5 AA 837. He observed a male drop off the car and walk away. 5 AA 838. Some days after the car was dropped off Reece received a call from his neighbor telling him he saw what looked like a bullet hole in the trunk. 5 AA 840. When Reece went to look at the vehicle he saw three spent cartridges in the back seat and a bloody beanie hat. Id. Reece then called the police. Id.

The police discovered the vehicle was rented to the victim. 5 AA 917. Owens observed the vehicle and found 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. 5 AA 920-22. Additionally, Owens found one bullet and six bullet casings along with bullet fragment in the vehicle's cargo area and in the backseat on the driver's side. 5 AA 926, 931-32. Crime Scene Analysts discovered that bullets travelled through from the front driver's seat into the vehicle's rear seats and stopped in the cargo area. 5 AA 939.

Kathy Geil, a Forensic Scientist, received eleven cartridge cases collected from the crime scene and found that they were all fired from the same gun; a 9mm Luger caliber. 4 AA 790-92. Allison Rubino, another Forensic Scientist, found that all of the blood collected from the scene, vehicle, car seat, clothes, and watch came from the victim. 5 AA 972-23.

On December 14, 2015, Dr. Alane Olson ("Olson") performed an autopsy of the victim. 4 AA 801. Jennifer Corneal ("Corneal") sat in to review Dr. Olson's report and testify as to her findings. 4 AA 802. Methamphetamine was found in the victim's system along with amphetamine metabolite, hydrocodone, and hydrocodone metabolites. 4 AA 803. There were also seven gunshot wounds to the victim's body. 4 AA 805. The first bullet entered the right cheek, exited the right neck, and re-entered through the right upper chest. 4 AA 806. It was recovered from the right upper back. 4 AA 808. This wound was not independently fatal. 4 AA 807. The second bullet entered the left side of the chin, exited the left jaw, and then re-entered the left side of the neck. 4 AA 809. After re-entering the neck, the projectile entered her left lung, grazed her spine and exited her back. Id. This wound was independently fatal. 4 AA 810. A third bullet entered the left side of her chest traveled through her left lung, her aorta, her right lung, and exited her right upper chest. Id. This wound was independently fatal. 4 AA 811. A fourth bullet entered the right side of her mid back, stroked her right lung, her esophagus and her aorta again,

and exited her left upper chest. 4 AA 812. This wound would have been independently fatal. Id. A fifth bullet entered the left side of her mid back stayed just under the skin, and exited the mid upper back. Id. This wound was not independently fatal. 4 AA 813. The sixth bullet entered the back of the victim's right upper arm, fractured her humerus, and fragments of the projectile were recovered from that area of the fracture in her arm. Id. A seventh bullet entered the right forearm and exited the left side a little bit farther down on the arm. 4 AA 815. The sixth and seventh bullets were not independently fatal. Id. It was also determined that the victim was shot at least once from anywhere between 6 inches and two feet in range. 4 AA 817. The cause of death was multiple gunshot wounds, and manner of death a homicide. 4 AA 816.

SUMMARY OF THE ARGUMENT

The district court's jury instructions did not violate Appellant's fundamental right to a fair trial. Although the State charged Appellant with open murder, a jury instruction on voluntary manslaughter was not required because it was unsupported by the evidence. Additionally, the court was not required to instruct the jury on Appellant's theory of voluntary manslaughter because it lacked evidentiary support and the State provided sufficient evidence that a higher charge was warranted.

The court also properly instructed the jury on flight by asking the jury to consider evidence of flight with all other evidence in making its determination. The

State still had to meet its burden of proof for the jury to find Appellant guilty. Furthermore, the court did not have to instruct the jury on the different interpretations of evidence because the court properly instructed the jury on reasonable doubt.

Second, the State did not violate Appellant's Sixth Amendment right to notice of the charges against him. The State charged Appellant with two count of child abuse, neglect, or endangerment and referenced the corresponding statute. The statute identifies five different types of abuse or neglect, and therefore, Appellant was on notice that the State was charging him under all of the theories. The State also provided sufficient evidence to support the theories it alleged. The State provided sufficient evidence that the children suffered both physical injury and mental suffering as well as negligent treatment or maltreatment. In addition, defense counsel failed to object to the instruction regarding negative treatment or maltreatment, and therefore any argument regarding the instruction is essentially waived.

Third, there is no cumulative error. Therefore, cumulative error does not warrant reversal.

Finally, if the Court happens to find error, any error aside from the negligent treatment or maltreatment instruction subject to plain error review, is harmless in light of the overwhelming evidence against Appellant.

ARGUMENT

I. THE DISTRICT COURT'S JURY INSTRUCTIONS DID NOT VIOLATE APPELLANT'S FUNDAMENTAL RIGHT TO A FAIR TRIAL

"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). This Court reviews de novo whether an instruction is an accurate statement of the law. Cortinas, 124 Nev. at 1019, 195 P.3d at 319. It is presumed that a jury follows the instructions that it is given. Newman v. State, 129 Nev. 222, 236, 298 P.3d 1171, 1182 (2013); Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006); Leonard v. State, 117 Nev. 53, 56, 17 P.3d 397, 405 (2001).

Generally, the defense has the right to have the jury instructed on a theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be. See Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991). However, the district court may refuse a jury instruction on the defendant's theory of the case which is substantially covered by other instructions. See Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995).

Additionally, 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); See also NRS 178.598.

A. The district court properly refused Appellant's voluntary manslaughter instruction.

Before the end of trial, counsel for Appellant proposed a voluntary manslaughter instruction based on the length of time of the incident, Appellant's behavior after the incident, and Appellant's statement "Just know mother fuckers took me to a point where I can't take it no more." 5 AA 946-47. In response, the State argued that there would need to be some evidence of provocation for a voluntary manslaughter instruction to be proper, and no evidence was introduced at trial to show provocation other than Appellant and the victim having argued during their relationship. Id.

The court then evaluated all the evidence in a light most favorable to Appellant, and concluded that the instruction was unnecessary because it would require the jury to speculate the surrounding circumstances with no evidentiary support. 5 AA 951-53. Specifically, the court reasoned that the evidence showed that the victim was shot inside the car while she was in the backseat with her children. 5 AA 951. The victim was then taken outside of the car and shot again. 5 AA 951-52. The victim and the defendant were in a relationship and they would argue, but there was no evidence that they physically fought. 5 AA 952. The court

was not concerned with Appellant's behavior after the shooting because it gave no inference of Appellant's state of mind right before shooting the victim. Id. The court also reasoned that Appellant's statement about being pushed too far could mean anything without any further context as to when or how he was pushed. 5 AA 952-53. To enter the instruction would be asking the jury to speculate about what happened before Appellant shot the victim. 5 AA 953.

Therefore, Appellant lacked sufficient evidence to support a voluntary manslaughter instruction, and the court properly exercised its discretion in denying the instruction.

1. Appellant was not entitled to a jury instruction on his theory of defense or on voluntary manslaughter.

A party has the right to have the jury instructed on all theories of the party's case that are supported by the evidence if the instructions are correct statements of the law. J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc., 120 Nev. 277, 284, 89 P.3d 1009, 1014 (2004).

It is permissible to simply charge murder and leave the degree to be stated by the jury. Thedford v. Sheriff, Clark County, 86 Nev. 741, 745, 476 P.2d 25, 28 (1970). *The facts alleged in the indictment and proof of trial determine degree.* Howard v. Sheriff, 83 Nev. 150, 425 P.2d 596 (1967)(emphasis added). An open murder complaint charges murder in the first degree and all necessarily included

offenses. Thedford, 86 Nev. at 745, 476 P.2d at 28 (1970), *citing* Parsons v. State, 74 Nev. 302, 329 P.2d 1070 (1958); State v. Oschoa, 49 Nev. 194, 242 P. 582 (1926).

A defendant is entitled to a jury instruction on a lesser-included offense as long as there is some evidence reasonably supporting it. Collins v. State, 405 P.3d 657, 665 (2017) *citing* Rosas v. State, 122 Nev. 1258, 1265, 147 P.3d 1101, 1106 (2006), abrogated on other grounds by Alotaibi v. State, 133 Nev. __, __,404 P.3d 761 (2017). But if the prosecution has met its burden of proof on the greater offense and there is no evidence at trial tending to reduce the greater offense, an instruction on a lesser-included offense may properly be refused. Id. (quoting Lisby v. State, 82 Nev. 183, 188, 414 P.2d 592, 595 (1966)); see Crawford, 121 Nev. at 754, 121 P.3d at 589 (holding that, for the duty to instruct the jury on the State's burden to prove the absence of heat of passion upon sufficient provocation to arise, at least "some evidence" in the murder prosecution must "implicate[] the crime of voluntary manslaughter").

Where the evidence would not support a finding of guilty of the lesser offense or degree, e.g., where a defendant denies any complicity in the crime charged and thus lays no foundation for any intermediate verdict or where the elements of the offenses differ, and some element essential to the lesser offense is either not proved or shown not to exist, the instruction on lesser included offenses is not only

unnecessary but is erroneous because it is not pertinent. Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966).

A trial court is justified in refusing to give an instruction on the crime of manslaughter if there is no evidence to support such an instruction. Graves v. State, 84 Nev. 262, 439 P.2d 476 (1968), cert. denied, 393 U.S. 919, 89 S.Ct. 250 (1968). The judicially imposed condition that there be at least some evidentiary basis for the lesser-included instruction "serves a useful purpose: preventing lesser-included instructions from being misused as invitations to juries to return compromise verdicts without evidentiary support." Rosas, 122 Nev. at 1265, 147 P.3d at 1106.

Here, Appellant argues that he was entitled to a voluntary manslaughter instruction because voluntary manslaughter is a lesser included offense of murder. See Appellant's Opening Brief ("AOB"), at 23-25. , Appellant also claims that he is entitled to a voluntary manslaughter instruction because it was his theory of defense and trial testimony met the minimum evidentiary threshold necessary to support such an instruction. AOB 25-32. Specifically, Appellant claims several aspects of trial testimony support voluntary manslaughter: (1) that the shots Hall heard were fired in rapid succession; (2) that Appellant shot the victim while driving on the freeway; (3) Appellant's behavior after the killing; (4) that Appellant and the victim argued during their relationship; and (5) that the victim had high levels of methamphetamine in her system. AOB 31.

Voluntary manslaughter consists of a killing which is the result of a sudden, violent and irresistible impulse of passion; the law requires that the irresistible impulse of passion be caused by a serious and highly provoking injury, or attempted injury, sufficient to excite such passion in a reasonable person. Allen v. State, 98 Nev. 354, 356, 647 P.2d 389, 391-92 (1982). If there is an interval between the provocation and the killing sufficient for the passion to cool and the voice of reason to be heard, the killing will be punished as murder. Id.

In support of his proposal for a voluntary manslaughter instruction, Appellant relied on the length of time of the incident, Appellant's behavior after the incident, and Appellant's statement "Just know mother fuckers took me to a point where I can't take it no more." 5 AA 946-47. No evidence produced at trial supported any form of provocation that would incite Appellant. Only one witness gave testimony that the incident was brief, Appellant's behavior after the incident was irrelevant to show provocation, and his statement to Marshall gave no context as to when or how he was taken to that "point." As a result, since there was no evidence of provocation, the court was not required to include a voluntary manslaughter instruction, and the introduction of one would only confuse the jury.

Furthermore, the State was not required to instruct the jury on voluntary manslaughter because the State charged Appellant with open murder. Neither the facts alleged in the indictment or proof at trial supported voluntary manslaughter.

As to Appellant's theory of defense, none of the trial testimony identified supports a sudden impulse of passion or adequate provocation to justify a voluntary manslaughter instruction. Rapid succession of bullets does not show that Appellant was provoked; only that he continued to pull the trigger and shoot the victim. In addition, that the shooting occurred on the freeway ramp does not show provocation either. Without context, there is no evidence that he was being taunted into acting irrationally. Appellant's behavior after the shooting is also irrelevant because it is Appellant's actions *before* shooting the victim that would evidence provocation. Furthermore, that Appellant and the victim argued during their relationship is irrelevant to what transpired that night. Marshall testified that they never had a physical altercation in front of her. 4 AA 777. Finally, that the victim had meth in her system, does not mean she provoked Appellant. According to testimony, the effects of meth varies and there is no evidence that the victim exhibited aggressive behaviors or conducted herself in any way that would incite violence on behalf of Appellant as a result of the toxins in her body. 4 AA 821-22. Thus, Defendant's theory of the case was not supported by the evidence.

Nevertheless, the court essentially encompassed Appellant's theory in its twelfth instruction which states, "A cold calculated judgment and decision may be arrived at in a short period of time, *but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation* as will fix

an unlawful killing as murder of the first degree." 2 AA 273 (emphasis added). Therefore, the court did not err in refusing to instruct the jury on defense's theory of the case.

The State was not required to offer an instruction unsupported by the evidence. To the extent this Court finds that the State was required to instruct the jury on voluntary manslaughter, this Court should find any error harmless in light of the evidence against Appellant.

Therefore, the court did property refused Appellant's voluntary manslaughter instruction, and this Court should affirm the conviction.

B. The district court provided the jury with an accurate flight instruction

This Court reviews a district court's decision to give a jury instruction for an abuse of discretion. Allstate Ins. Co. v. Miller, 125 Nev. 300, 319, 212 P.3d 318, 331 (2009). However, whether a proffered instruction is an incorrect statement of the law is reviewed de novo. Id. If a jury instruction is a misstatement of the law, it only warrants reversal if it caused prejudice and but for the error, a different result may have been reached. Id. An erroneous jury instruction is evaluated on appeal for harmless error. Barnier v. State, 119 Nev. 129, 133, 67 P.3d 320, 322 (2003). Harmless error is error which does not effect a party's substantial rights. Cook v. Sunrise Hosp. & Med. Ctr., LLC., 124 Nev. 997, 1003, 194 P.3d 1214, 1217 (2008). An error does not require reversal when a review of the record indicates neither a

miscarriage of justice nor prejudice to appellant's substantial rights. Potter v. State, 96 Nev. 875, 875, 619 P.2d 1222, 1222 (1980).

Here, Appellant claims that the flight instruction was an incorrect statement of the law because it stated "if flight is proved, it is circumstantial evidence in determining guilt or innocence," instead of stating that flight should be considered with all other evidence in determining guilt or innocence. AOB 32-35.

At trial, Appellant objected to the giving of a jury instruction, but did not complain about the specific language or accuracy of the instruction. 5 AA 984. Therefore, Appellant's claim is reviewable only for plain error. See Watson v. State, 335 P.3d 157, 162 (Nev. 2014), *citing* Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) ("Generally, the failure to clearly object on the record to a jury instruction precludes appellate review absent plain error affecting the defendant's substantial rights"). To the extent this Court finds that Appellant properly preserved the claim for appeal, the district court provided an accurate flight instruction, and any error is harmless in light of the overwhelming evidence against Appellant.

The court gave the following flight instruction:

> *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.*

2 AA 288 (emphasis added). The court also instructed the jury on circumstantial evidence:

> Circumstantial evidence is the proof of *a chain of facts and circumstances* which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. *Therefore, all of the evidence in this case, including the circumstantial evidence, should be considered by you in arriving at your verdict.*

2 AA 283 (emphasis added). Both of these instructions worked together to illustrate that no single piece of evidence, including flight, was dispositive of Appellant's guilt or innocence. Additionally, the flight instruction expressly states that flight alone is not sufficient enough to determine guilt, and left it to the jury to decide what weight to give to flight. The flight instruction did not lessen the burden on the State to prove any of its open murder charges.

On the other hand, however, if this Court finds that the flight instruction was a misstatement of the law, any error was harmless in light of the overwhelming evidence against Appellant. For flight to be evidence of guilt, the State had to prove that it was done with the consciousness of guilt and for the purpose of avoiding apprehension or prosecution. Miles v. State, 97 Nev. 82, 85, 624 P.2d 494, 496 (1981); Potter v. State, 96 Nev. 875, 876, 619 P.2d 1222, 1222 (1980). Appellant admitted to shooting the victim, and he was found in California about a week after

the shooting. 5 AA 883-884. Additionally, the car that the Appellant and the victim were in was found unattended in Nevada. 5 AA 837-38. Thus, the jury could have reasonably concluded that Appellant left the state right after shooting the victim because he was guilty even without the flight instruction.

Therefore, this Court should affirm the Judgment of Conviction.

C. The district court appropriately rejected Newson's proposed jury instruction regarding two reasonable interpretations of evidence

The trial court's refusal to instruct the jury that, if the evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject the other which points to his guilt, is not error if the jury is properly instructed regarding reasonable doubt. Bails v. State, 92 Nev. 95, 96, 545 P.2d 1155, 1155-56 (1976).

Here, Appellant offered a similar instruction:

> 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, must accept only reasonable conclusions and reject any that are unreasonable.

2 AA 256. In support of the instruction, Appellant claimed that his interactions with Marshall after the shooting could be subject to two reasonable interpretations. 5 AA 987. In response, the State emphasized that this case was factually different as the interpretations distinguish between degrees of murder and not whether the act was criminal or not. 5 AA 988. Furthermore, it was not error to refuse to include the instruction. Id. The court agreed with the State, reasoning that a reasonable doubt instruction would be sufficient, and nothing more. The court also reasoned that this case was factually different from other cases in terms of circumstantial evidence:

> I would also say that I don't think this is the kind of circumstantial case that this was contemplated here. We're really speaking more towards what to make of a statement as opposed to a circumstantial case pointing to whether somebody is the correct perpetrator or committed a crime or didn't commit a crime. You know, my point about commenting on interpretations of that statement was because it was what it was. Without more it's open to lots of things, but there needed to be that more.
>
> Like if somebody says, you know, we were in the car and she told me she cheated on me again and I couldn't take it anymore and I lost it, that's a little different. But just saying, you know, I got pushed too far and couldn't take it anymore without more didn't speak to the when part of it, didn't speak to the what it was, didn't speak to the alleged provocation, didn't give anybody any ability to do anything other than ask the jury to speculate. And so I just don't think the statement that really plays into the state of mind or criminal intent part is really what was

> contemplated by this, in addition to the fact that just generally I don't think this kind of instruction is necessary.

5 AA 990-91. Therefore, the court rejected Appellant's instruction and included a reasonable doubt instruction. Now Appellant asks this Court to require that Defendant's be entitled to that instruction in cases involving circumstantial evidence. AOB 39.

The Nevada Supreme Court has continuously held that this instruction is unnecessary when a reasonable doubt instruction is given. See Hardin v. State, 433 P.3d 1230, 1230 (2018). Jury instruction 21 defined reasonable doubt:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such as condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

2 AA 282. Appellant cites to no Nevada law and provides no adequate justification that would require this Court to venture from well-settled law. Therefore, the court did not err in refusing the instruction, and this Court should affirm the Judgment of Conviction.

II. THE STATE DID NOT VIOLATE 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, 75 P.3d 808, 814 (2003). Nevada law requires that an indictment must contain a plain, concise and definite written statement of the essential facts constituting the offense charged. NRS 173.075(1). An inaccurate information does not prejudice a defendant's substantial rights if the defendant had notice of the State's theory of prosecution. Viray v. State, 121 Nev. 159, 162, 111 P.3d 1079, 1082 (2005).

A. The State's charging document put Appellant on notice as to what type of abuse or neglect Appellant could be found guilty of.

A complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought." Hall v. SSF, Inc., 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996). Nevada is a notice pleading jurisdiction and liberally construes pleadings to place matters into issue which are fairly noticed to the adverse party. Id.

When 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, 452, 634 P.2d 455, 455 (1981) *citing* Simpson v. District Court, 88 Nev. 654, 661, 503 P.2d 1225, 1230 (1972). Where an appellant has not objected to a charging

document until after trial and without a showing of prejudice, the sufficiency of the information is tested by a reduced standard. Collura v. State, 97 Nev. 451, 452, 634 P.2d 455, 455 (1981); State v. Jones, 96 Nev. 71, 74, 605 P.2d 202, 204 (1980); Vincze v. State, 86 Nev. 546, 549, 472 P.2d 936, 938 (1970). An appellate court may look to an entire record to determine whether the accused had notice of what later transpired at trial. See Simpson v. District Court, 88 Nev. at 661, 503 P.2d at 1230; Vincze v. State, 86 Nev. at 549, 472 P.2d at 938.

Here, Appellant claims he lacked notice as to which theory of prosecution the State was pursuing because it did not allege what type of abuse or neglect Newson committed. AOB 48-49. Appellant also claims he specifically lacked notice of negligent treatment or maltreatment which prejudiced him. AOB 52-54.

The State's charging documents charged Appellant with two counts Child Abuse, Neglect or Endangerment (Category B Felony – NRS 200.508(1) – NOC 55226) for shooting the victim while her children were seated next to her:

> COUNT 2 – CHILD ABUSE, NEGELCT OR ENDANGEMENT
>
> Did willfully cause a child who is less than 18 years of age 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, the mother of MAJOR NEWSON, a child under the age of 18, while the said

> MAJOR NEWSON was seated next to an in close proximity to ANSHANETTE MCNEIL.
>
> COUNT 3 – CHILD ABUSE, NEGELCT OR ENDANGEMENT
>
> Did willfully cause a child who is less than 18 years of age 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, the mother of BRANDON BERGER-MCNEIL JR., a child under the age of 18, while the said BRANDON BERGER-MCNEIL JR. was seated next to an in close proximity to ANSHANETTE MCNEIL.

2 AA 263. 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. Given the broad description in the charging documents, Appellant was put on notice that he could be charged under any of the five theories of abuse or neglect, including negligent treatment or maltreatment.

As a result, the charging documents were not inaccurate and Appellant had notice of all theories that could be brought against him. Therefore, this Court should affirm the Judgment of Conviction.

/ / /

/ / /

B. Appellant failed to object to the jury instructions regarding negligent treatment or maltreatment.

A jury should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case. Crawford v. State, 121 Nev. 746, 754, 121 P.3d 582, __(2005). "Trial courts have broad discretion in deciding whether terms within an instruction should be further defined." Dawes v. State, 110 Nev. 1141, 1145, 881 P.2d 670, 673 (1994). "Words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions." Dawes, 110 Nev. at 1146, 881 P.2d at 673. Generally, the failure to clearly object on the record to a jury instruction precludes appellate review absent plain error affecting the defendant's substantial rights. Watson v. State, 335 P.3d 157, 162 (Nev. 2014), *citing* Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). In conducting plain error review, an appellate court must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights. Sanchez-Dominguez v. State, 318 P.3d 1068, 1073 (2014); Green, 119 Nev. at 545, 80 P.3d at 95. To demonstrate plain error, the appellant has the burden of demonstrating actual prejudice. Id.

Here, Appellant claims that the district court erred by not including a definition of negligent treatment or maltreatment in the jury instructions and by not explaining how to determine whether Appellant was responsible for the welfare of the children. AOB 54-55.

The jury was instructed on the elements of child abuse, neglect, or endangerment. 2 AA 279. The jury was also instructed that abuse or neglect meant physical or mental injury of a nonaccidental 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. 2 AA 280. Additionally, the jury was instructed that physical injury means (1) permanent or temporary disfigurement; or (2) impairment of any bodily function or organ of the body. Id. In reviewing the jury instructions, Appellant expressed no concern regarding negligent treatment or maltreatment.

Thus, this claim is precluded from review absent plain error. Appellant provides no evidence to show that he was prejudiced or that his substantial rights were affected due to the lack of an instruction defining negligent treatment or maltreatment.

Therefore, this Court should affirm the judgment of conviction.

III. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT APPELLANT COMMITTED PHYSICAL OR MENTAL INJURY UPON THE VICTIM'S CHILDREN, AND THAT APPELLANT WAS RESPONSIBLE FOR THE WELFARE OF THE VICTIM'S OLDEST SON.

When reviewing a sufficiency-of-the-evidence claim, the relevant inquiry is *not* whether the court is convinced of the Appellant'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 Appellant guilty, the limited inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686–87 (1995) (internal quotation and citation omitted).

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).

Here, Appellant claims that the State provided insufficient evidence as proof that the victim's children suffered physical or mental injury. AOB 50-52. Appellant also claims that he could not be guilty of negligent treatment or maltreatment with respect to the victim's older son Brandon because the State did not present any evidence that Newson was responsible for Brandon's welfare as required by NRS 432B.130 which states:

> A person is responsible for a child's welfare if the person 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.

AOB 56. These claims lack merit. Marshall stated that Brandon, the victim's two year old child looked scared when he got out of the vehicle. 4 AA 764. Furthermore, when Marshall spoke to Brandon he did not respond, he just looked at her and ran in the house. Id. There was blood on the car seat, and on the victim's younger son's pants. 4 AA 770. Major, the victim's younger son, was eight months old at the time. He may not have been able to actually communicate how he felt, but that does not negate that fact that he suffered. This evidence is indicative that the children endured a traumatic experience that harmed them before being taken to Marshall's house.

As to proof that Appellant was responsible for Brandon's welfare, NRS 432B.130 bears no relevance to the charge against Appellant. Appellant was charged with Child Abuse, Neglect or Endangerment under NRS 200.508(1). This required that State to prove that (1) a person willfully caused; (2) a child who is less than eighteen years of age; (3) to suffer unjustifiable physical pain or mental suffering (4) as a result of abuse or neglect. Clay v. Eighth Jusicial Dist. Court of State, 129 Nev. 445, 452, 305 P.3d 898, 902 (2013).

To the extent this Court finds that the State was required to prove that Appellant was a person responsible for the welfare of the child as defined in NRS 432B.130 by alleging negligent treatment or maltreatment, the State presented sufficient evidence at trial that Appellant was responsible for the welfare of the victim's older son.

Appellant and the victim were in a relationship for three years. 4 AA 776. They would always arrive together to Marshall's house. 4 AA 778. Marshall would usually babysit the victim's youngest son, but sometimes she would babysit the victim's older son as well. 4 AA 759, 776-77. This is at least indicative that Vernon was around the victim's older son regularly. Additionally, Appellant became responsible for the welfare of the victim's older son when he left her to die leaving the kids in the backseat of the car with no one else to depend on at that moment.

The State provided sufficient evidence that the victim's children suffered physical or mental injury, and that Appellant was responsible for Brandon's welfare. Therefore, this court should affirm the Judgment of Conviction.

IV. CUMULATIVE ERROR DOES NOT WARRANT REVERSAL

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

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). Although Appellant has been convicted of a grave crime, see Valdez v. State, 124 Nev. 1172, 1198, 196 P.3d 465, 482 (2008) (stating crimes of first degree murder is a very grave crime), there was more than sufficient evidence to support his multiple convictions and, therefore, the issue of guilt is not close. At trial, the jury received substantial evidence proving Appellant's

guilt, including the fact that Appellant shot the victim while driving up the highway and again once she was outside the vehicle. Additionally, he committed this act in front of the victim's children, and instead of calling for help he dropped them off and left town.

Therefore, Appellant' claim of cumulative error has no merit and his convictions should be affirmed.

V. ANY ERROR WAS HARMLESS

Aside from Appellant's claims regarding the negligent treat or maltreatment instruction that is only reviewable for plain error, this Court should find any error harmless in light of the overwhelming evidence against Appellant.

Pursuant to NRS 178.598, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (noting that non-constitutional 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).

As to first degree murder the State showed ill will by proving Appellant shot the victim in her face between six inches and two feet in range. 4 AA 817. In addition, after shooting the victim six more times, he dropped her children off with their godmother and left town instead of trying to help the victim. 4 AA 762-63. Willfulness was demonstrated by the fact that Appellant shot the victim in the face. 4 AA 817. To prove deliberation, the State evaluated the steps Appellant took to kill the victim. Appellant made the choice to grab a gun as he was driving, put the gun over his shoulder, and shoot the victim as she was sitting in the back seat of the car with her children. He then took her out of the car and continued to shoot her although she was already injured from being shot in the car. From the indentations in the asphalt, he shot her again while she was laying on the ground. Premeditation was evidenced by Appellant's decision to shoot the victim.

As to the two counts of child abuse, neglect, or endangerment, the State showed that the victim was sitting in close proximity to her children and in an enclosed space when she was shot. The children witnessed their mother's murder, and they had blood on their clothing and car seat. The bullets were likely loud and frightening. Furthermore, the victim's older son appeared afraid and would not speak after the incident.

Therefore, there is sufficient evidence for a rational jury to conclude that Appellant is guilty of all charges, and this Court should affirm the Judgment of Conviction.

CONCLUSION

WHEREFORE, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

Dated this 26th day of November, 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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,667 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 26th day of November, 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 November 26, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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