IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT'S REPLY BRIEF

REPLY ARGUMENT

I. Voluntary Manslaughter Instructions Jury Instructions.

Newson made two arguments in his Opening Brief regarding the district court's refusal to provide voluntary manslaughter jury instructions. First, Newson argued when the State alleged open murder it effectively charged First Degree Murder as well as Second Degree Murder **and** Voluntary Manslaughter. See AOB 21-22. Accordingly, the district court committed reversible error when it did not instruct the jury regarding voluntary manslaughter because voluntary manslaughter was a charged offense and the court was obligated to instruct on all charged offenses.

Alternatively, Newson argued the district court committed reversible error by refusing to instruct the jury regarding voluntary manslaughter because voluntary manslaughter is a lesser included offense of First Degree Murder and comprised Newson's defense theory with sufficient evidentiary support. See Id. at 22-28. In its Answering Brief the State conflates the issues and simply argues the court did not err by refusing to instruct the jury regarding voluntary manslaughter because "Appellant lacked sufficient evidence to support a voluntary manslaughter instruction." RAB 14.

A. Voluntary Manslaughter as a charged offense.

Voluntary manslaughter is a lesser included offense of Murder. See e.g. Williams v. State, 99 Nev. 530, 531 (1983). Thus, when the State alleged open murder it essentially charged Newson with first degree murder and **all necessarily included offenses**, including voluntary manslaughter. See Thedford v. Sheriff, 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)). Accordingly, as a charged offense, the district court had an obligation to instruct the jury on voluntary manslaughter's essential elements and its failure to

do so is reversible error. See Dougherty v. State, 86 Nev. 507, 509 (1970).

In response to Newson's argument that because the State effectively **charged** him with voluntary manslaughter and the court erred by refusing to instruct the jury on voluntary manslaughter, the State claims it "...was not required to instruct the jury on voluntary manslaughter because the State charged Appellant with open murder [because] [n]either the facts alleged in the indictment or proof at trial supported voluntary manslaughter."[1] RAB 17. The State relies upon both Thedford, 86 Nev. at 745 and Howard v. Sheriff, 83 Nev. 150 (1967) in support.

Relying upon Thedford, the State claims that "[i]t is permissible to simply charge murder and leave the degree to be stated by the jury." Id. at 14 (citing Thedford, 86 Nev. at 745). Additionally, relying upon Howard, the State claims "*the facts alleged in the indictment and proof*

[1] There are two problems with the aforementioned assertion -- apart from whether Newson was entitled to jury instructions regarding voluntary manslaughter. First, the district court, and not the State, instructs the jury regarding the law governing the case. See NRS 171.161; Crawford v. State, 121 Nev. 744, 754-55 (2005) (The district court is ultimately responsible for ensuring that the jury is fully and correctly instructed regarding the law governing the case). Second, the State prosecuted Newson via criminal complaint and Information, not Indictment.

of trial determine degree." RAB 14 (citing Howard, 83 Nev. at 153 (italics in original). Unfortunately the State's reliance upon both Thedford and Howard is misplaced.

In Thedford, the State alleged the defendant committed open murder and abortion. Thedford, 86 Nev. at 742. The justice held defendant to answer for both offenses in the district court. In the district court the defendant filed a pretrial petition for writ of habeas corpus arguing the State presented insufficient evidence at the preliminary hearing to support the charged offenses, and additionally the open murder allegation failed to provide adequate notice of the exact offense charged. Id. (emphasis added). The district court denied the petition and the defendant appealed to this Court. Id.

On appeal, this Court affirmed the district court's decision to deny the petition. Regarding the defendant's notice argument, this Court -- relying upon Howard -- reiterated that open murder basically alleges first degree murder **and all lesser included offenses**. Id. at 745. Accordingly, the State is not required to charge first degree murder and second degree murder in separate counts. Id. Rather, the State can simply allege open murder and the jury can ultimately determine the degree of murder. Id. Thus, this Court held that the

Information gave the defendant adequate notice of the charges against her. Id.

In contrast to Thedford and Howard, Newson is not alleging the State's open murder allegation failed to provide adequate notice that he had to defend against first degree murder, second degree murder, and voluntary manslaughter. Rather, Newson asserts that when the State alleged open murder the State **charged** first degree murder, second degree murder, and **voluntary manslaughter**. Basically, Newson knew he had to potentially defend against these three separate theories. Therefore, the issue here, unlike in Thedford and Howard, is the district court's obligation to instruct the jury on all **charged** offenses. Basically, evidentiary support is immaterial to the Court's duty to instruct the jury regarding **charged** offenses.

Similarly, the State is incorrect to suggest in Newson's case "[i]t is permissible to simply charge murder and leave the degree to be stated by the jury." Here, the district court never instructed the jury on the elements of the lesser included offense of voluntary manslaughter. Therefore, how could the jury determine the degree when it had not been instructed on the elements of each potential degree?

Ultimately, the State chose to charge Newson with voluntary manslaughter via its open murder allegation. The State never amended the Information to remove the open murder allegation to instead only allege first and/or second degree murder. In fact, if voluntary manslaughter truly lacked evidentiary support then the State was obligated to amend the Information to remove the open murder allegation and instead charge the specific degrees which the State believed had evidentiary support. See Rules of Prof. Conduct 3.8(a) ("The prosecutor in a criminal case shall [] [r]efrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."). However, because the State refused to amend the Information to allege specific degree, Newson remained **charged** with voluntary manslaughter throughout the trial.

B. Voluntary Manslaughter as Newson's Theory of Defense.

Newson also argued if this Court disagrees that the district court should have instructed the jury regarding voluntary manslaughter because the State essentially charged voluntary manslaughter, the court nevertheless erred by refusing Newson's voluntary manslaughter instructions because voluntary manslaughter is a lesser included

offense of murder and comprised Newson's theory of defense. See AOB 22-28. The State responds by claiming Newson's defense theory lacked evidentiary support. See RAB 15-18. Specifically, "[n]o evidence produced at trial supported any form of provocation that would incite [Newson]." Id. at 17. Additionally, "...none of the trial testimony identified [by Newson] supports a sudden impulse of passion or adequate provocation to justify a voluntary manslaughter instruction." Id. at 18.

What the State is actually suggesting however, is that no **direct evidence** presented at trial conclusively established provocation and heat of passion. However, this Court has never held that direct evidence is required to receive theory of defense jury instructions.

1. Sufficient evidence supported Newson's defense theory.

"Circumstantial evidence is legal and competent evidence in criminal cases." State v. Boyle, 276 P. 48, 52 (Nev. 1926). The jury "is free to rely on both direct and circumstantial evidence in returning its verdict." Washington v. State, 376 P.3d 802, 807 (Nev. 2016) (citing Rose v. State, 123 Nev. 194, 202-03 (2007); Wilkins v. State, 96 Nev. 367, 374 (1980)). Accordingly, this court "has

consistently held that 'circumstantial evidence may constitute **the sole basis for a conviction**.'" Washington, 376 P.3d at 807 (quoting Canape v. State, 109 Nev. 864, 869 (1993)); see also Briano v. State, 94 Nev. 422, 425, 581 P.2d 5, 7 (1978) (recognizing that in murder cases premeditation and deliberation are seldom proven by direct evidence and therefore, may be proven by circumstantial evidence); NRS 193.200 ("Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.). Indeed, the district court instructed the Jury in Newson's case that, "[t]he law makes no distinction between the weight to be given either direct or circumstantial evidence." See AA II 283.

Here, by implying there must be **direct evidence** before a defendant can receive theory of defense jury instructions the State attempts to create a higher evidentiary burden for theory of defense instructions than it is required to meet for conviction.[2] However, this is not the law and never has been.

[2] Ironically, the State submitted a "flight" instruction, which the district court gave, that specifically advised a defendant's flight is circumstantial evidence of guilt. See AA II 288.

As Newson previously noted, 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, when the defendant's theory of defense is a lesser-included offense there only needs to be "**slight**" evidence supporting the theory. Lisby v. State, 82 Nev. 183, 188 (1966) (emphasis added) (abrogated on other grounds by Rosas v. State, 122 Nev. 1258 (2006)). Moreover, if there is slight, marginal, or weak evidence supporting a defense theory, "the court must, if requested, instruct on the lower degree or lesser included offense." Lisby, 82 Nev. at 188 (1966).

Sufficient circumstantial -- and direct -- evidence was presented at Newson's trial to meet the bare minimum threshold necessary to justify instructing the jury regarding voluntary manslaughter.[3] First, Newson's statement to Marshall, "just know that mother fuckers pushed me too far to where I can't take it no more" occurred almost

[3] See Crawford v. State, 121 Nev. 744, 754 (2005) ("When 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.").

immediately after McNeil's killing. This is both direct and circumstantial evidence that Newson had been provoked and acted in the heat of passion. See IV 766, 781. Similarly, Marshall's testimony that immediately after McNeil's killing Newson was "frantic," "scared," "irritated," and "amped up" is -- at minimum -- circumstantial evidence that Newson was provoked and acted under the stress of the provocation. Id. at 762, 779.

Second, Janei Hall testified she heard gunshots in rapid succession coming from the I-15 on ramp. Id. at 718. This fact is -- at minimum -- circumstantial evidence suggesting Newson's decision to shoot McNeil was sudden, rash, and impulsive. Likewise, the fact that Newson shot McNeil on a freeway on-ramp is -- at minimum -- circumstantial evidence of a rash or impulsive decision.

Third, evidence that McNeil had significant quantities of methamphetamine in her system, coupled with testimony that methamphetamine causes aggressive behavior was -- at minimum -- circumstantial evidence that McNeil acted under the influence of methamphetamine the night she died which would logically mean she acted aggressively towards Newson. Id. at 821-22.

Finally, testimony that McNeil and Newson routinely argued, and particularly while driving together, is a fact -- along with the other facts -- creating an inference that McNeil provoked Newson and Newson acted upon that provocation.

Based upon the aforementioned, both direct and circumstantial evidence had been presented at trial to meet **the extremely low** evidentiary threshold necessary to warrant a lesser-included theory of defense jury instruction. Moreover, had the jury been instructed regarding voluntary manslaughter it could have reasonably inferred based upon the aforementioned evidence that Newson acted in the heat of passion after a provocation. Accordingly, the district court's refusal to instruct on voluntary manslaughter, which was supported by at least slight, marginal, or weak evidence, warrants reversal. See Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995); McCraney v. State, 110 Nev. 250, 255 (1994).

II. The State's Inadequate Charging Document.

The Information filed in Newson's case **only** alleged Newson, "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 ASHANETTE MCNEIL, the mother of [Brandon/Major], a child under the age of 18, while the said [Brandon/Major] was seated next to and in close proximity to ASHANETTE MCNEIL. AA II 263. On appeal Newson argued the Information did not specifically allege which of the five different kinds of abuse or neglect (i.e., (1) nonaccidential physical injury; (2) nonaccidential mental injury; (3) sexual abuse; (4) sexual exploitation; or (5) negligent treatment or maltreatment) the State claimed Newson committed against Brandon and Major. See AOB 37-44.

Nevertheless, the Information used the words "placed in a situation where the child **may suffer physical pain or mental suffering** as a result of abuse or neglect." AA II 260 (emphasis added). Additionally, the district court provided jury instruction 19 which defined "physical injury." See Id. at 280. Therefore, Newson argued the Information likely only alleged child abuse, neglect, or endangerment, under a theory of nonaccidential physical injury AOB 50-51. However, if so, the State did not present sufficient evidence that either Brandon or Major actually suffered permanent or temporary disfigurement or impairment of any bodily function or organ of the

body. See Id. at 51-52; NRS 200.508(d)(1)-(2); Clay v. Eighth Jud. Dist. Ct., 129 Nev. 445, 452 (2013).

Additionally, Jury instruction 19 also stated "'Abuse or neglect' means 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." AA II 280. Based upon this language, Newson suspected the State may argue on appeal that it also alleged Newson committed child abuse, neglect, or endangerment under a theory of negligent treatment or maltreatment. Accordingly, Newson noted if this Court bought that argument, the State's charging documents would have failed to provide him adequate notice that the State alleged child abuse, neglect, or endangerment under a theory of negligent treatment or maltreatment. See AOB 52-54.

As Newson suspected, the State acknowledges that the Information **only** alleged that Newson willfully caused 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 ASHANETTE MCNEIL, the mother of [Brandon/Major], a child under the age of 18, while the said

[Brandon/Major] was seated next to and in close proximity to ASHANETTE MCNEIL." RAB 26-27 (citing AA II 263 (emphasis added)). However, the State claims the Information contained "broad description[s]" and therefore, the State adequately noticed Newson that he had to defend against **all five (5) theories of abuse or neglect** -- "including negligent treatment or maltreatment." RAB 27.

The State's argument is preposterous. Following the State's logic, the broadly worded charging document ostensibly also alleged Newson committed child abuse, neglect, or endangerment via sexual abuse and/or sexual exploitation because sexual abuse and exploitation are two (2) of the five (5) types of abuse or neglect. However, clearly the State did not actually allege Newson committed child abuse or neglect via sexual abuse or exploitation. Indeed, there was no evidence (either slight, marginal, or beyond a reasonable doubt) gathered during police investigation suggesting Newson committed child abuse or neglect via sexual abuse or exploitation.[4] Therefore, the utter lack of evidence of sexual abuse or exploitation conclusively

[4] If the State did somehow intend to allege all five (5) types of abuse or neglect in its broadly worded charging documents -- which would include an allegation of sexual abuse or exploitation -- then the trial prosecutor violated Rules of Prof. Conduct 3.8(a) which prohibits a prosecutor from "prosecuting a charge that the prosecutor knows is not supported by probable cause."

proves the State did not "broadly" allege Newson may have committed abuse or neglect **under all five theories**. In fact, any suggestion otherwise is a desperate afterthought justification for an egregiously inept charging document.

1. Prejudice.

Newson acknowledged he failed to contest the charging document's sufficiency below. Id. at 49. When a defendant contests the charging documents adequacy for the first time on appeal he has to show the document prejudiced him. See Collura v. State, 97 Nev. 451, 453 (1981) (noting when a defendant objects to the sufficiency for the first time on appeal this Court reviews under a reduced standard unless the defendant can demonstrate prejudice). Here, Newson argued prejudice because the jury would have convicted him based upon insufficient evidence or could have convicted him under a theory of negligent treatment or maltreatment when the court failed to provide jury instructions defining negligent treatment or maltreatment and a person responsible for a child's welfare.[5] AOB 54-57.

[5] Specifically, "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.

a. Insufficient evidence of non-accidental physical injury.

For the State's possible allegation of nonaccidental physical injury Newson argued he was prejudiced by the inadequate Information because the State did not prove physical injury actually occurred even under a theory that Newson placed Brandon and Major in a situation where each "may have" suffered non-accidental physical injury. Id. at 50-52; NRS 200.508(d)(1)-(2); Clay, 129 Nev. at 452. In response, the State claims it did present sufficient evidence of nonaccidental physical injury because: (1) "Marshall stated that Brandon, the victim's two-year old child looked scared when he got out of the vehicle[;]" (2) "when Marshall spoke to Brandon he did not respond, he just looked at her and ran in the house[;]" (3) "there was blood on the car seat, and on the victim's younger son's pants[;]" (4) "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 he suffered." RAB 31 (citing AA IV 764, 770). Basically, "[t]his evidence is indicative that the children

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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." AOB 49-50.

endured a traumatic experience that harmed them before being taken to Marshall's house." RAB 31. The State's argument makes is nonsensical.[6]

The aforementioned facts are not proof that both Brandon and Major suffered permanent or temporary disfigurement or impairment of any bodily function or organ of the body. See NRS 200.508(4)(d)(1)-(2). Yet, if the State actually charged Newson under a theory of nonaccidental physical injury then the State was **required** to present sufficient evidence Brandon and Major **actually** suffered permanent or temporary disfigurement or impairment of any bodily function or organ of the body. See Clay, 129 Nev. at 453. Thus, whether Brandon or Major may have endured a traumatic experience is completely immaterial under a theory of non-accidental physical injury. Clay, 129 Nev. at 453. Accordingly, to the extent the State charged Newson under a theory of nonaccidental physical injury the State failed to present any evidence at trial that physical injury

[6] At trial the State never attempted to prove nonaccidental physical injury, i.e. "permanent or temporary disfigurement or impairment of any bodily function or organ of the body." Rather, the State merely argued to the jury that Brandon and Major "may" have suffered mental suffering when Newson shot McNeil. See AA V 1016.

actually occurred and therefore, Newson is entitled to reversal of his Child Abuse, Neglect, or Endangerment convictions.

b. Insufficient evidence of mental suffering

The Information alleged Newson placed Brandon and Major in situation where the child "may suffer physical pain or mental suffering as a result of abuse or neglect[.]" AA II 263. Although the State now claims it alleged all five types of abuse or neglect, during closing arguments at trial the State only addressed the child abuse, neglect, and endangerment allegations in passing. The following is the State's entire argument concerning its abuse, neglect, or endangerment allegation:

> Those bullets would have been loud and frightening to those children. Seeing their mother injured would've caused mental suffering. And they also would have 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.
>
> AA V 1016.

On appeal the State claims it presented sufficient evidence of nonaccidental physical injury or mental suffering[7] because: (1) "Marshall stated that Brandon, the victim's two-year old child looked scared when he got out of the vehicle[;]" (2) "when Marshall spoke to Brandon he did not respond, he just looked at her and ran in the house[;]" (3) "there was blood on the car seat, and on the victim's younger son's pants[;]" (4) "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 he suffered." RAB 31 (citing AA IV 764, 770).

Problematically, when the State alleges abuse via nonaccidental mental suffering, under either a theory of "did suffer" or "may suffer," the State has to prove mental suffering actually occurred. See Clay, 129 Nev. at 453-54. Nonaccidental mental suffering results from "an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior." See NRS 200.508(4)(a) (noting "mental

[7] Although unclear from reading the State's Answering brief, it appears the State relies upon the same facts to argue it presented sufficient evidence of both nonaccidental physical injury and nonaccidental mental suffering. See RAB 29-31.

injury" as used in NRS 200.508(4)(a) is defined in NRS 200.508(4)(e) and also NRS 432B.070[8]).

Here, to the extent the State now argues that Newson committed child abuse, neglect, or endangerment under a theory of nonaccidental mental suffering, Newson would first note the district court failed to provide an instruction defining "mental suffering" or "substantial mental harm" or "mental injury" as defined in NRS 432B.070. See NRS 200.508(4)(a). More importantly, even if shooting McNeil "may" have resulted in an observable and substantial impairment to both Brandon and Major's intellectual or psychological capacity or emotional condition, the State presented no evidence that this **actually occurred** to Brandon and Major. See Clay, 129 Nev. at 453-54. Having failed to do so, Newson is entitled to reversal of his convictions.

c. Negligent treatment or maltreatment

The State claims the Information broadly alleged all five types of abuse or neglect, which would ostensibly include negligent

[8] NRS 432B.070 defines "mental injury" as "an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within a normal range of performance or behavior."

treatment and maltreatment. However, the district court did not provide jury instructions regarding negligent treatment or maltreatment. Yet, under the State's logic, if the Information adequately noticed Newson that the State alleged he committed Child Abuse, Neglect, or Endangerment **via negligent treatment or maltreatment**, then negligent treatment or maltreatment was an element of the charged crime.

Oddly, in response to Newson's argument that the district court's failure to instruct on this essential element prejudiced him, the State claims the argument "is precluded from review absent plain error[,]" because "[Newson] 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*." RAB 29 (emphasis added). The State's argument is misguided however, because if the State alleged Newson committed child abuse, neglect, or endangerment under a theory of negligent treatment or maltreatment then plain error would not apply.

(i) Plain error.

The sole case the State cites in support of its argument is Watson v. State, 335 P.3d 157, 162 (Nev. 2014). RAB 28. In Watson

this Court considered, "whether the district court plainly erred in instructing the jury that mitigating circumstances are those circumstances which 'reduc[e] the degree of the Defendant's moral culpability.'" Id. Essentially, the Watson Court simply reviewed the legal accuracy of an instruction **actually given**, but which was not objected to by the defendant at trial. This is not the same situation in Newson's case. Unlike Watson, here, there was no instruction to which Newson failed to object.[9]

Indeed, the district court is **required** to charge the jury and in doing so "**shall** state to them all such matters of law the judge thinks necessary for their information in giving their verdict." NRS 175.161(1)-(2) (emphasis added). Moreover, although NRS 175.161(3) states, "[e]ither party may present to the court any written charge, and request that it be given[,]" this should not be interpreted to obligate a defendant to offer jury instructions defining the elements of any potential charges the State may have pleaded. See Carter v. State,

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[9] The State notes that Watson cites to Green v. State, 119 Nev. 542, 545 (2003) for support. However, in Green this Court merely explained that the failure to object to a jury instruction actually given "precludes appellate review except in circumstances amounting to plain error under NRS 178.602." Green did not involve a defendant's failure to propose an instruction defining the supposed elements of a charged offense which is within the district court's sole purview.

121 Nev. 759, 765 (2005) ("...a defendant is not required to proffer both the defense's and the State's theories of the case to have proffered instruction given **or to preserve error in connection with the proffer for appellate review**[.]") (emphasis added).

While, this Court has applied plain error in cases where a defendant's failed to object to instructions regarding elements of the charged crimes, in those cases the charged crimes were adequately pleaded. Flanagan v. State, 112 Nev. 1409, 1422 (1996) (burglary, robbery, escape, and attempt); Rossana, 113 Nev. at 382 (aggravated stalking); Valdez v. State, 124 Nev. 1172, 1183 (2008) (lack of a bifurcation instruction regarding guilt and penalty proceedings in a murder case); Ramirez v. State, 126 Nev. 203, 206 (2010) (second-degree felony murder); Wilkerson v. State, 87 Nev. 123, 125 (1971) (assault with intent to kill and assault with a deadly weapon with intent to commit bodily injury). Here, Newson contends the State did not adequately plead its supposed theory of negligent treatment or maltreatment and therefore, plain error is not applicable.

Finally, even if this Court somehow finds that the State sufficiently apprised Newson that he committed child abuse, neglect, or endangerment, under a theory negligent treatment or maltreatment,

plain error would again not apply because the district court had a *sua sponte* obligation to assure the jury was given accurate jury instructions on that theory even if Newson failed to either object to the lack of an instruction or request a specific instruction. See Wilkerson, 87 Nev. at 126; Mears v. State, 83 Nev. 3, 10-11 (1967) (criticized on other grounds by Franklin v. Eighth Judicial Dist. Ct., 85 Nev. 401 (1969)) ("The failure to so request normally waives the right to complain on appeal, unless the instruction **is so necessary to the case** that the court, *sua sponte*, must be sure that it is given.")(emphasis added); Rossana, 113 Nev. at 383 (because "...an essential element ... was erroneously omitted from the jury instruction ... we conclude that Rossana's due process rights have been compromised such that reversal of his conviction on this count is warranted."); Flanagan, 112 Nev. at 1423 ("Failure to object or to request an instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act *sua sponte* to protect a defendant's right to a fair trial."); Valdez, 124 Nev. at 1182 fn. 5 ("...we would reach the same result if we reviewed for plain error because failure to give the bifurcation instruction was patently prejudicial and the district court had a *sua sponte* duty to protect the defendant's right to a fair trial.").

(ii) Insufficient evidence that Newson was responsible for Brandon's welfare.

Because the State failed to present any evidence whatsoever that Brandon or Major actually suffered physical pain or mental suffering Newson anticipated that the State might suggest on appeal that it actually charged Newson under a theory of negligent treatment or maltreatment in order to argue it merely needed to demonstrate Brandon and Major "may" have suffered physical pain or mental suffering. See AOB 52-57. However, rather than accept Newson's invitation, the State instead expressly disclaims that it charged Newson under this theory. See RAB 32. Rather, the State argues, "As to proof that [Newson] was responsible for Brandon's welfare, NRS 432B.130 bears no relevance to the charge against [Newson]" because "[Newson] was charged with Child Abuse, Neglect or Endangerment under 200.508(1)). RAB 32 (citing Clay, 129 Nev. at 452).

Nevertheless, the State argues alternatively that it indeed presented sufficient evidence that Newson was responsible for Brandon's welfare. Specifically:

> [Newson] and the victim were in a relationship for three years. They would always arrive together to Marshall's house.

> Marshall would usually babysit the victim's youngest son, but sometimes she would babysit the victim's older son as well. This is at least indicative that Vernon was around the victim regularly.
>
> RAB 32 (citing AA IV 759, 776-78).

Additionally, "[Newson] 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." RAB 32.

The State's argument is unavailing. Negligent treatment or maltreatment occurs if a child "has been subjected to harmful behavior that is terrorizing, degrading, painful or emotionally traumatic" or has been abandoned, [was] 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). Thus, when the State alleges a defendant committed child abuse, neglect, or endangerment under a theory of negligent treatment or maltreatment it must principally establish the defendant is a person responsible for the child's welfare.

According to NRS 432B.130, a person is responsible for a child's welfare if he/she "...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, the State failed to present any evidence that Newson was Brandon's parent, step-parent with whom the Brandon lives, or Brandon's guardian. Additionally, the State failed to present any evidence that Newson was regularly found in the same household as Brandon, or a public or private home, institution or facility where Brandon resided or received care outside of the home, or was a volunteer at a home, institution or facility where Brandon resided. Rather, on appeal, the State creates an entirely new class of persons responsible for a child's welfare. Included in this new, non-statutory, class of persons is any person with whom the child's parent is in a dating relationship, regardless of the person's living situation, so long as that person is "around the [child] regularly." Additionally, this new

class of persons includes any adult who commits a crime upon the child's parent(s) if the crime incapacitates the parent(s) and there is no other responsible adult around. Essentially, the State suggests a non-statutory "assumption of responsibility" via criminal acts not directed at the child. It should not need to be said, but obviously the State cannot create a class of persons responsible for a child's welfare -- and thus liable for child abuse, neglect, or endangerment under a theory of negligent treatment or maltreatment -- when the Nevada Legislature has clearly delineated the members of that class.

Here, assuming the State did allege negligent treatment or maltreatment, had the court correctly instructed the jury on the definitions within NRS 432B.130, 432B.140, there is no possible way the jury would have convicted Newson for child abuse, neglect, or endangerment as to Brandon. Thus, without the proper instructions the jury likely did what the State does on appeal, which is to just assume, as a general matter, that it is negligent to fire a handgun in close proximity to children. While doing so may be unwise, it is not criminal child abuse, neglect, or endangerment, via negligent treatment or maltreatment unless the person doing so is a statutorily defined person responsible for the child's welfare.

Without proper jury instructions explaining the aforementioned, the jury convicted Newson based solely upon his actions and not his relationship to Brandon. However, Newson's relationship to Brandon is essential to the allegation of negligent treatment or maltreatment under NRS 200.508. Accordingly, because the State presented no evidence whatsoever that Newson was a person responsible for Brandon's welfare, as a matter of law Newson could not be convicted for Child Abuse, Neglect, or Endangerment under a theory of negligent treatment or maltreatment regarding Brandon.

CONCLUSION

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

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:

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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

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DATED this 25 day of January, 2019.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 25 day of January, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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