IN THE SUPREME COURT OF THE STATE OF NEVADA

Barry Harris, Appellant	)	Supreme Court Case No.: 76774
vs.	)	**APPELLANT'S OPENING BRIEF**
The State of Nevada, Respondent,	)	

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 26 day of April, 2019.

MAYFIELD GRUBER & SHEETS
Respectfully Submitted By:

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JURISDICTIONAL STATEMENT

The Nevada Supreme Court retains jurisdiction as an appeal from a verdict in a criminal case pursuant to NRS 177.015(3). A timely notice of appeal was filed on August 21, 2018, approximately five days after the Judgment of Conviction was filed.

NRAP 17 ROUTING STATEMENT

This matter should be retained by the Nevada Supreme Court as an appeal from a jury verdict involving a Category A felony with a sentence of 15 years to life pursuant to NRAP 17(b)(2)(A).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of the Issues

1. Can Appellant be convicted of Kidnapping Resulting in Substantial Bodily Harm when the State's only theory of the offense was involving use a firearm, for which Appellant was found Not Guilty?

2. Can Appellant be convicted of Kidnapping Resulting in Substantial Bodily Harm when the substantial bodily harm was inflicted prior to the kidnapping?

3. Did the District Court commit error by admitting the victim's statements (both written and oral) as an excited utterance?

4. Did the District Court commit error by admitting a jury instruction regarding flight based on Appellant leaving the scene?

5. Did the District Court commit error by admitting, over Defense objection, a jury instruction for Kidnapping that is a partial statement of the law and likely to confuse or mislead the jury?

6. Does the doctrine of cumulative error warrant reversal in the instant case?

II. Statement of the Case

On or about August 23, 2017, Appellant was charged in the Las Vegas Justice Court with a total of nine counts:

1. Burglary with Use of a Deadly Weapon
2. Kidnapping (First Degree) with Use of a Deadly Weapon Resulting in Substantial Bodily Harm
3. Assault with a Deadly Weapon
4. Battery with Use of a Deadly Weapon
5. Domestic Battery by Strangulation
6. Domestic Battery Resulting in Substantial Bodily Harm
7. Preventing or Dissuading a Witness
8. Carrying a Concealed Weapon
9. Ownership of a Gun by Prohibited Person

Following brief competency proceedings wherein Appellant was found competent to proceed, a preliminary hearing was set on October 26, 2017 and November 3, 2017. Both times, the alleged victim, Nicole Dotson, refused to attend despite a valid subpoena. The State requested a material witness warrant, and Ms. Dotson was subsequently arrested on the warrant. Preliminary hearing took place on December 14, 2017 and January 16, 2018. Appellant was bound over to the Eighth Judicial District Court on all charges.

Appellant was arraigned in District Court on January 18, 2018, where Mr. Harris invoked his right to a speedy trial within 60 days. The matter was sent to overflow, where it was referred back to the originating department. A status check on trial date was held on March 27, 2018. Calendar Call was heard on April 2, 2018, wherein both parties announced ready on the first setting.

Jury trial took place over five days and commenced from April 9, 2018 to April 16, 2018. Mr. Harris was only convicted on *one* of the original charges as alleged, with the remainder resulting in findings of Not Guilty or Guilty of lesser included offenses:

1. Burglary with Use of a Deadly Weapon – **Not Guilty**;
2. Kidnapping (First Degree) with Use of a Deadly Weapon Resulting in Substantial Bodily Harm – **Guilty of lesser included** offense, Kidnapping Resulting in Substantial Bodily Harm;
3. Assault with a Deadly Weapon – **Guilty of lesser included** offense, misdemeanor assault;
4. Battery with Use of a Deadly Weapon – **Guilty of lesser included** offense, misdemeanor battery constituting domestic violence
5. Domestic Battery by Strangulation – **Not Guilty**
6. Domestic Battery Resulting in Substantial Bodily Harm – **Guilty**
7. Preventing or Dissuading a Witness – **Not Guilty**
8. Carrying a Concealed Weapon – **Not Guilty**
9. Ownership of a Gun by Prohibited Person – **Dismissed** by State

After continuing sentencing to discuss potential errors in his pre-sentence investigation report, Appellant was ultimately sentenced on August

14, 2018 to the following: for Kidnapping, 15 years to life; on misdemeanor assault, 6 months (concurrent); on misdemeanor battery constituting domestic violence, 6 months (concurrent); on domestic battery with substantial bodily harm, 24-60 months (concurrent). Appellant's total aggregate sentence was 15 years to life in the Nevada Department of Corrections. The Judgment of Conviction was filed August 16, 2018.

III. Statement of Facts

The victim in this case, Nicole Dotson, gave a total of three different versions of what happened on August 23, 2017, with varying degrees of consistency between them; the first, she gave to Las Vegas Metropolitan Police Department officers the night of the incident; the second, she gave on December 14, 2017 at Appellant's preliminary hearing; the third, she gave on April 10, 2018, during Appellant's jury trial. However, while the distinctions between each version carry legal significance, the generalized factual timeline remained largely consistent.

Prior to arriving home from work that evening, Ms. Dotson and Appellant Barry Harris were having an argument over the telephone regarding Barry "cheating as usual" (Appellant's Appendix, hereinafter "AA,"

31: 12). She reaffirmed this sentiment at trial, when describing the argument as stemming from "him not coming home" and Ms. Dotson "felt like he was cheating" (AA, 521: 23).

When she arrived, Ms. Dotson testified at trial that Barry was laying on the bed of the apartment, and the telephonic argument from earlier re-initiated (AA, 524: 21). She left the bedroom and went into the kitchen, and he followed her (id.). They continued to argue until Barry returned to the bedroom and laid back down on the bed; this time, Ms. Dotson followed and sat on the edge of the bed, where they continued to argue at length until tempers flared on both sides (AA, 526: 24). The argument culminated when Barry hit Ms. Dotson with a closed fist on her left eye (AA, 529: 21).

From there, the testimony diverges, and will be recounted chronologically. The statement by Ms. Dotson given to officers on that night was admitted as an excited utterance through the State's first witness, Blake Ferron. Officer Ferron is a patrol officer with the Las Vegas Metropolitan Police Department, and was the first officer to arrive at the scene (AA, 486: 25). He was dispatched to the apartment at 11:25pm, knowing only that an anonymous caller had reported a possible domestic violence (AA, 489: 8; 489: 17).

Once he arrived, Officer Ferron observed a silver vehicle leaving the apartment complex that "kind of stopped" when he entered through the gate (AA, 490: 5); Officer Ferron wrote down the license plate number of the silver vehicle, later tied to Barry, and proceeded to the apartment. He made contact with Ms. Dotson after she had already left the apartment and was on her way down the stairs (AA, 493: 12). When asked to describe her demeanor, Officer Ferron testified that she was very shaken and "seemed like she was trying to get away from the apartment or out of the area" (AA, 496: 13). Officer Ferron asked her questions regarding what occurred that night, which she answered.

According to Officer Ferron's recollection, Ms. Dotson told him that she had told Barry she no longer wanted to be with him, and he then "became increasingly agitated towards her, and then started to strangle her with two hands around her neck" (AA, 498: 14). Ms. Dotson was then able to run from the bedroom into the living room, where Barry followed (AA, 531: 2). He grabbed a handgun, put it into her mouth, and forced her at gunpoint into the bathroom (AA, 499: 17). She sat on the bathroom floor until Barry left the apartment, after which she waited before leaving the apartment herself and subsequently ran into the Metro officer at the bottom of the stairs (AA, 500: 24).

After being photographed and interviewed, Ms. Dotson refused medical treatment. Officer Ferron testified that throughout the investigation process, Ms. Dotson did not appear to calm down (AA, 498: 23). At the insistence of the officers, Ms. Dotson agreed to go to the hospital in a second ambulance that arrived on the scene (AA, 504: 12).

Ms. Dotson's testimony during the preliminary hearing was both consistent and inconsistent with her initial statement to police. She testified that she and Barry had been in a dating relationship about six years, and he had a key to the apartment (AA, 8: 1; 9: 4). She testified that she didn't remember Barry putting his hands on her neck, but did state that Barry would not let her leave the apartment when he had his gun (AA, 12: 15; 14: 24; 16: 15). She also testified that Barry struck and kicked her more than once (AA, 20: 19).

One significant distinction between Ms. Dotson's statement to officers and her preliminary hearing testimony is when Barry supposedly retrieved his gun. The incident took place in three distinct areas: the bedroom, the living room, and the bathroom. It's uncontested that Barry punched Ms. Dotson in the bedroom, where the argument first became physical, and then she ran into the living room. That night, Ms. Dotson told Officer Ferron that Barry

retrieved the gun while she was in the living room, but at preliminary hearing testified that she hadn't seen the gun until she entered the bathroom: "Q: Okay. Did you see the gun before you went to the bathroom? A: No" (AA, 17: 16)

Ms. Dotson testified that she doesn't remember him putting the gun to her head, and was adamant that he never put the gun in her mouth, contrary to what she had told officers that night (AA, 22: 22; 25: 13). She further could not describe the gun, nor could she remember how she described it to Officer Ferron (AA, 30: 10). Ms. Dotson was consistent to the officers and while testifying that when she was in the bathroom, Barry gathered her belongings while still holding his gun (AA, 75: 23). She stayed in the bathroom until she heard the deadbolt lock with a key from the outside (id.).

During trial, Ms. Dotson's version of events was still somewhat different than her previous testimony. She testified again that Barry did in fact live with her in the apartment, which is why he had a key and kept personal belongings there (AA, 516: 8; 517: 23). He stayed there about five nights per week (AA, 509: 15). After he struck her in the bedroom, she ran into the living room and began screaming for help (AA, 531: 2). Barry followed her into the living room where they "began to tussle a little bit, and then at some point he walked away

and I went into the bathroom" (AA, 532: 7). During trial, Ms. Dotson denied the use of a firearm altogether.

He walked away from the bathroom multiple times to collect his belongings, but she did not leave (AA, 532: 20). While in the bathroom, she peeked around the corner and saw him going through his pockets to remove what "at the time I thought[] was a gun" (AA, 533: 21), and afterwards returned to the bathroom and poured lemonade on her (AA, 534: 13). She remained in the bathroom for "at least like 30 minutes" while Barry left the apartment (AA, 537: 18). She testified that she was in the bathroom for about 15 minutes after Barry had left "until I knew for sure he was gone" (538: 2; 569: 9).

The distinctions between her statements primarily revolve around the alleged firearm use; she first told officers that Barry brandished the firearm after she had run into the living room, and beat her about the head with it. She next testified at preliminary hearing that Barry only used the firearm when she was in the bathroom, but that he did not strike her with it. She finally testified during trial that no firearm was used at all, and she mistakenly believed he had a gun but her vision was extremely obstructed given the swelling of her eye. On cross examination, Ms. Dotson also conceded that she

physically could not have seen Barry with a gun while he collected his belongings because there was a wall blocking the line of sight from the bathroom to the bedroom (AA, 643: 8).

Ms. Dotson also testified at trial regarding the state of her injuries, or lack thereof. Specifically, with the exception of her eye, she had *no injury* to her face, head, neck or abdomen despite telling officers that she had been strangled with two hands, kicked several times, and struck repeatedly with a firearm (AA, 542: 17). Medical examination revealed no bruises, scratches or bumps on her head; after taking several scans of her head, neck and chest area, there were also no signs of strangulation (AA, 639: 25; 648: 14). Her *only* injury was that to her eye, but she described a four-month healing process for her eye, which required surgery to remove a blood clot although the injury no longer caused her pain at that point (AA, 543: 9).

Ms. Dotson was confronted with her inconsistent testimony during trial. When asked why she testified differently than her preliminary hearing, she stated that while she was in custody on the material witness warrant, an officer at the correctional center told her "that if you give a statement at the preliminary hearing that different from the statement to the police, that you would be found in contempt of court and given jail time" (AA, 614: 13). As a

result, she testified as consistently as she could from her memory, but was unable to remember exactly what she had told the officers that night in many respects.

The State also tried to impeach Ms. Dotson with recorded jail calls between her and Barry prior to trial. During the calls, Ms. Dotson indicated that she wanted Barry to come home, and would say what he wanted her to say. However, when playing the tape further, Barry only repeatedly admonished Ms. Dotson to simply tell the truth:

> Q: Okay. In fact, during several of those phone calls, my client actually told you that he just wanted the truth; correct?
> A: Yeah, there were times when he did say that.
> Q: And, in fact, in one phone call he says all I want is the truth no matter what.
> A: Correct.
> Q: And – and to you, did that mean – did that mean no matter what as long as it helps me, or just no matter what good or bad?
> A: He knew it meant no matter what good or bad.
> Q: Okay. And – in another phone call, he – you were – he encouraged you to come to court; is that correct?
> A: Correct.
> Q: Because he wanted you to testify; correct?
> A: Correct.
> Q: Because he wanted the jury to hear the truth; correct?
> A: Correct.
> Q: In fact, at one point you said something along the lines of I'll do whatever you need, and he said don't – don't do as I say, do what's true, do what's the truth, and that's all I want.
> A: That's correct (AA, 616: 24)

Following Officer Ferron and Ms. Dotson, the third witness to testify at trial was Gabrielle Guerrero, a crime scene analyst with the Las Vegas Metropolitan Police Department. Ms. Guerrero interviewed Ms. Dotson to document her injuries, describing her as very upset during the process (AA, 715: 25). Ms. Guerrero also photographed the interior of the apartment, but no firearm was ever located (AA, 624: 8).

The fourth witness was Officer Nicholas Bianco, another patrol officer with the Las Vegas Metropolitan Police Department that arrived to the apartment complex after Officer Ferron. Officer Bianco conceded that prior to giving Ms. Dotson a blank voluntary statement, he specifically told her what to say and emphasize in her report, even telling her that emphasizing certain aspects of the incident was "icing on the cake" (AA, 760: 8).

The State's next witness was Detective Ken Krmpotich with the Las Vegas Metropolitan Police Department (AA, 794: 7). The Detective admitted that he simply copy/pasted the earlier officer's report when seeking a search warrant to impound Barry's vehicle, which was located more than a week after the incident (AA, 802: 22). In the vehicle, Detective Krmpotich located ammunition and a magazine in the trunk sealed inside a bag labelled "Girl Talk." Although Detective Krmpotich states that he was instructed to search

for all items that would show a possessory interest in the vehicle, he in fact ignored several documents that showed a possessory interest by people other than Barry. While no items in the vehicle were tied directly to Barry Harris, several other documents were found in the name of other individuals, including the registration and insurance card found in the vehicle:

> Q: In the vehicle, Officer, you actually found registration for the vehicle and that registration said that it was for Sheila Towns; correct?
> A: Yes.
> Q: Okay. Did you impound that in your return, sir?
> A: No, I did not.
> Q: Did you impound that insurance card [for Sheila Towns] in your return, sir?
> A: I did not.
> …
> Q: Now, you had testified earlier that your warrant instructed you to search out for any possessory interest that Mr. Harris might have in the car or the firearms; correct?
> A: Yes.
> Q: Isn't it true that the warrant actually instructs you to seek out any items of personal property which would tend to establish a possessory interest in the items seized?
> A: Yes (AA, 816: 21).
> …
> Q: And – and the only document inside the vehicle that actually linked a name in that vehicle did not have my client's name on it; correct?
> A: There were more documents in there with names on them.
> Q: Okay.
> A: But I only grabbed those two because those were the names that were on the documents.

> Q: Okay. So there were other documents with Ms. Towns' name on them, as well?
> A: There probably could have been (AA, 831: 1)

The sixth witness was Lisa Gavin, a forensic pathologist medical examiner for Clark County (AA, 849: 16). Dr. Gavin testified that after having reviewed the scans and tests performed on Ms. Dotson, she could not conclude that strangulation took place, stating only that the evidence was "inconclusive" due to the lack of injury (AA, 872: 19). The last witness for the State was Kevin Carey, a detective with the Las Vegas Metropolitan Police Department (AA, 888). Through Detective Carey, the State introduced the jail calls to the jury as described above.

Following the testimony of Detective Carey, the State rested. Only one witness testified for the defense, Sheila Towns, the registered owner of the silver vehicle allegedly used by Barry that night. Ms. Towns testified that at least five different family members routinely use the same vehicle where the ammunition was found in the trunk (AA, 975: 7). Barry exercised his constitutional right not to testify, and the Defense rested.

Jury instructions were argued on the fourth day of jury trial. Specifically, two contested jury instructions are relevant for purposes of the instant appeal. First, the State proposed an instruction regarding flight and

consciousness of guilt (AA, 1039: 24) (Jury Instruction 41). Defense objected on the grounds that no indication of flight had been presented as opposed to Mr. Harris simply leaving the scene, which was insufficient. The Court admitted the instruction, concluding that "You have him gathering up his items and clothes of a man found in the trunk. I think the State's got enough there to justify it" (AA, 1040: 13). The second contested instruction was regarding the definition of kidnapping, and whether "incidental movement" alone could support the charge. The Defense proposed a separate instruction to specifically state that incidental movement could not support a charge of kidnapping, but the Court omitted this entire portion of the proposed instruction, admitting the instructions only on finding dual convictions for both kidnapping and the associated offense of battery with incidental movement under certain circumstances (AA, 1017: 3) (Jury Instruction 18). However, what constitutes "incidental movement" was not defined.

During closing arguments, the State reiterated the basis for the Kidnapping charge: "The defendant willfully seized and/or confined Nicole Dotson with the intent to hold or detain her for the purpose of inflicting that substantial bodily harm, the continual beating, using a deadly weapon, and substantial bodily harm resulted" (AA, 1065: 9). The substantial bodily harm

that resulted, according to the State, was the injury to Ms. Dotson's eye (AA, 1064). Specifically, the State argued that "substantial bodily harm actually resulted, as well… she had pain for one month after this occurred, prolonged physical pain. It didn't heal for four months. It was a process, as she told us. She had to have a procedure remove blood clots that were a direct result of the defendant's battering her" (id.). No alternative types or theories of substantial bodily harm existed aside from Ms. Dotson's eye. Finally, the State further noted that "flight" is evident only by Barry packing his bags and leaving prior to police arrival (AA, 1070: 7).

The jury returned to deliberations, and returned a verdict the same day. Barry was found guilty of only one original charge – Battery Resulting in Substantial Bodily Harm – and then three lesser included offenses, with the remainder of the charges resulting in acquittal. Notably, *for all offenses involving a firearm*, Barry was acquitted or convicted of lesser included offenses where the only distinction between the original and lesser charges was firearm use. Specifically, the jury found that Barry did not use a firearm during the alleged offense, a fact of great significance for purposes of the instant appeal. As a result, following the verdict, the State voluntarily

dismissed the charge of Ex Felon in Possession of a Firearm, even after Defense stipulated that Barry was convicted of a felony in 2006.

This appeal follows.

IV. Summary of the Argument

In this case, there is an inconsistency as to whether Appellant brandished a gun while Ms. Dotson was in the living room, while Ms. Dotson was in the bathroom, or whether a firearm was even used at all (although the jury found the latter). The State pled only one theory of Kidnapping in the information, that Appellant restrained or confined Ms. Dotson through use of a firearm. Because he was acquitted of using a firearm, the conviction for Kidnapping based on firearm use is inherently flawed.

The finding of Kidnapping with Substantial Bodily Harm is further invalid because the only substantial bodily harm inflicted – the injury to Ms. Dotson's eye – occurred while she was in the bedroom. There is no dispute that Ms. Dotson was able to move, of her own volition, from the bedroom to the living room. Therefore, regardless of whether a firearm was used in the living room *or* in the bathroom, in either instance the Kidnapping with a firearm occurred **after** the substantial bodily harm was inflicted. Per statute,

the substantial harm must be inflicted during the kidnapping or in an attempt to escape from confinement, and the record is undisputed that the facts underlying this case do not comply with these statutory parameters.

The District Court also erred by admitting hearsay testimony regarding Ms. Dotson's statements to police officers on the night of the event. The District Court found that such statements qualified as an "excited utterance," and therefore were admissible. However, multiple individuals, including Ms. Dotson, testified that she waited for at least 15 minutes after Barry left the apartment to leave because she felt safe. Therefore, there was ample opportunity to fabricate, and motive to fabricate as a result of Barry's alleged cheating (the basis for the entire incident) was made an issue with the case as early as counsel's Opening Statements. Further, the officers testified that Ms. Dotson retained the same distressed demeanor for several hours after the incident, belying a claim that her excited mental state was a direct result of the stress of the event.

Next, the District Court erred in submitting two different jury instructions: the first erroneous instruction was flight as consciousness of guilt. In this case, the basis for the instruction was simply that Barry had packed his belongings and left the scene before officers arrived. However, the

law is clear that simply leaving the scene is insufficient to support an instruction for flight.

The second erroneous instruction was regarding Kidnapping; specifically, there is a considerable amount of text regarding whether and in what circumstances "incidental movement" can still support a conviction for Kidnapping. However, not only is this incidental movement never defined, but the instruction provided to the jury (over Defense objection) omits key language regarding the role of incidental movement for a Kidnapping conviction. Specifically, incidental movement cannot support a conviction for kidnapping alone, but it can under limited circumstances support dual convictions for kidnapping and the associated offense; the jury was instructed only as to the dual conviction portion of the law, despite the Defense's proposed instruction that was complete, accurate and supported by case law..

Lastly, the doctrine of cumulative error warrants reversal in this case. The issue of guilt is close, as indicated by multiple acquittals and lesser included offenses; the character of the error is substantial, as Appellant was convicted of a charge based on facts he was not accused of; and the severity of the charges is substantial, given that Appellant was sentenced to 15 years to life as a result of the Kidnapping, the most contested of his convictions.

ARGUMENT

A. Appellant Cannot be Simultaneously Convicted of Kidnapping based on Use of a Firearm and then Acquitted of Using a Firearm

The legal premises underlying this argument are almost mathematically concise: Appellant was charged with Kidnapping on *one* factual basis only – that he used a firearm to detain Ms. Dotson against her will. Specifically, the Information alleges:

> [Barry Harris] did willfully, unlawfully, and feloniously seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away NICOLE DOTSON, a human being, with the intent to hold or detain the said NICOLE DOTSON against her will, and without her consent, for the purpose of committing inflicting substantial bodily harm to wit: by forcing her into the bathroom and/or preventing her from leaving the apartment and/or bathroom, **with use of a deadly weapon**, to wit: a firearm, resulting in substantial bodily harm to NICOLE DOTSON (AA, 53) (emphasis added).

There are no alternative theories of Kidnapping alleged – the sole basis for the charge is Barry's use of a firearm to prevent Ms. Dotson from leaving and/or forcing her into the bathroom. The State's theory of the charge is precisely what was argued repeatedly throughout the trial, which is why the focus was primarily on Ms. Dotson's first statement to police that Barry had brandished a firearm in the living room and forced her to crawl into the

bathroom. The State did not charge alternative or lesser theories for the offense.

However, Barry was acquitted of using a firearm. He was acquitted of carrying a concealed weapon, convicted of lesser included offenses that specifically excluded a firearm as an element (i.e. convicted of simple assault rather than assault with a deadly weapon), and the State voluntarily agreed to dismiss the charge of Ex Felon in Possession of a Firearm after the Defense stipulated that Barry had a prior felony conviction. Simply put, the jury found that Barry *did not* use a firearm during the incident.

Therefore, because the State only pled one theory of Kidnapping that was based exclusively on use of a firearm, the jury returned a verdict that relies on a factual premise of which he was acquitted.

"NRS 173.075 provides that a charging document 'must be a plain, concise and definite written statement of the essential facts constituting the offense charged.' To satisfy this requirement, 'the [charging document] standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense.'" *Hidalgo v. Eighth Judicial Dist. Court*, 124 Nev. 330, 338-39, 184 P.3d 369, 375-76 (2008);

Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669 (1970); *Sheriff v. Levinson*, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979) "[T]he prosecution is required to make a definite statement of facts constituting the offense in order to adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case").

"To provide a defendant with an opportunity to prepare an adequate defense, a charging instrument must provide adequate notice to the accused of the prosecution's theories by stating the essential facts constituting the offense in ordinary and concise language." *Buford v. State*, No. 66147, 2016 Nev. Unpub. LEXIS 50 (Jan. 15, 2016); *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081-82 (2005).

The charging document in this case contained only one factual basis to assert Kidnapping, that Appellant used a firearm to prevent Ms. Dotson from leaving and/or force her into the bathroom. The State had an unbridled opportunity to also charge Appellant was simple Kidnapping or another offense that was unrelated to firearm use, but instead charged only for a firearms-based Kidnapping. However, as noted previously, it is undisputed that Barry was acquitted of using a firearm during this event. Therefore, the only possible outcome is that the jury found Barry guilty of Kidnapping using

a factual basis that was not alleged in the charging document. As a result, such a conviction is not legally justified because the Defense was not put on notice of any other factual basis to support the charge as alleged by the State.

Summarily, the State only alleged one factual basis for Kidnapping, that being use of a firearm, and Appellant was acquitted of that factual basis. Therefore, his conviction is legally invalid or based on an *unalleged* factual premise, both of which must mandate reversal.

B. Appellant May Not be Convicted of Kidnapping with Substantial Bodily Harm when the Harm was Inflicted Prior to the Kidnapping

There was considerable debate throughout the litigation of this case as to whether Barry used a firearm in the living room, in the bathroom, or not at all. As noted previously, the jury found that Barry did not use a firearm, but notwithstanding that finding, the final conviction of Kidnapping with Substantial Bodily Harm may not stand when the bodily harm was inflicted *before* the kidnapping took place.

Interestingly, it doesn't matter which version of events is correct, because in all three scenarios, the substantial bodily harm was inflicted before a kidnapping occurred. The incident began in the bedroom, when it was initially verbal but turned physical when Barry struck Ms. Dotson in the eye.

The eye injury is the *sole basis* for substantial bodily harm, as it was the only injury that resulted from the event. The State concedes during their closing arguments that the eye injury is the basis for the jury to find substantial bodily harm.

The fight then moves from the bedroom where the harm was inflicted out to the living room. However, for purposes of argument and disregarding the jury verdict to the contrary, we can assume that Barry brandished a gun while in the living room. This was the earliest point in the argument that a gun was mentioned being used, and this is what Ms. Dotson told Metro officers when they confronted her at the apartment that night. It can further be assumed, for purposes of argument, that Barry did exactly what the State alleged – he used the gun to force her to crawl into the bathroom. However, even under this factual scenario most favorable to the state, it *still* does not fit within the statutory guidelines for the charge.

Barry was charged with First Degree Kidnapping Resulting in Substantial Bodily Harm under NRS 200.320. The statute states, in pertinent part,

> 1. Where the kidnapped person suffers substantial bodily harm **during the act of kidnapping or the subsequent detention** and confinement **or in attempted escape** or escape therefrom, by imprisonment in the state prison:

> (a) For life without the possibility of parole;
> (b) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 15 years has been served; or
> (c) For a definite term of 40 years, with eligibility for parole beginning when a minimum of 15 years has been served.

The statute sets forth a clear and unambiguous timing requirement: the substantial bodily harm *must be inflicted* "during the act of kidnapping," "[during] the subsequent detection and confinement," or "in an attempted escape" from that confinement. Every possible factual scenario presented by the State alleged that Barry struck Ms. Dotson and inflicted the substantial bodily harm in the bedroom – *before* the act of kidnapping took place.

Unsurprisingly, the focus on the case was primarily directed to what occurred *after* Ms. Dotson left the bedroom and entered the living room; for example, whether Barry had a firearm at that point, or whether he blocked her exit from the living room. However, the record is clear that Ms. Dotson went from the bedroom to the living room on her own accord.

Detective Carey testified that on the night of the event, Ms. Dotson told him the only time she tried to escape was initially in the living room (AA, 72: 2). Officer Ferron similarly testified that Ms. Dotson told him that Barry pulled out a gun while she was in the living room and "pointed the handgun at her

and forced her to – or told her to go into the bathroom" (AA, 499: 24). During her trial, Ms. Dotson herself testified that after Barry punched her, "I got up and ran to the living room, and that's when I screamed help me" (AA, 531: 2). In fact, Ms. Dotson specifically told officers that she was able to freely go to the living room:

> Q: Do you recall telling the officer that at one point you were able to get into the living room, but the defendant followed you into the living room?
> A: I may have said that, yeah (AA, 564: 19).

From there, the discussion devolved into her inconsistent statements as to whether she saw a gun for the first time in the living room or in the bathroom. However, the record is clear from all parties involved that no kidnapping took place until, at the very earliest, Ms. Dotson was in the living room. Even the State's charging document specifies that the Kidnapping was forcing Ms. Dotson from the living room to the bathroom.

Simply put, even taking the facts in a light most favorable to the State, the injury resulting in substantial bodily harm was inflicted before any kidnapping or confinement took place. The kidnapping has a very distinct point for where it began, and that is *after* the injury was inflicted. The injury was inflicted in the bedroom, but any alleged kidnapping took palce after she had moved into the living room. Therefore, the facts and conviction does not

fall within the statutory requirement that substantial bodily harm be inflicted "during" the kidnapping or in an attempt to escape confinement.

Further, the State cannot argue that the statute should be interpreted to include the infliction of harm prior to the act of kidnapping. The legislature set forth two very discrete temporal parameters for when the harm must be inflicted, which is why the underlying charge is Kidnapping *resulting in* substantial bodily harm, requiring a causal nexus between the act of kidnapping and the harm inflicted.

"[O]missions of subject matters from statutory provisions are presumed to have been intentional." *Dep't of Taxation v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005); see also *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967); *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, Ltd. Liab. Co*., 373 P.3d 66, 71 (Nev. 2016) ("The maxim expressio unius est exclusio alterius . . . instructs that, where a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions").

Because the statute is limited as to when the harm can be inflicted, it would be improper to expand the statute to include an additional time frame

that was not already included. When a statute includes a list or definitive terms, those terms are presumed to be exhaustive and intentional.

Simply put, the record from any and all angles is clear that Barry inflicted the substantial bodily harm before any kidnapping took place. Therefore, by definition, Barry cannot be convicted of Kidnapping Resulting in Substantial Bodily Harm. Even if Barry were to be found guilty of simple Kidnapping, a new sentencing would be required given the 10-year difference in sentencing ranges between the charges.

C. The District Court Improperly Admitted Ms. Dotson's Statements as an Excited Utterance

During the initial direct examination of the State's first witness, Officer Ferron, the State sought to introduce what Ms. Dotson had told him about the event on the night it occurred. There hadn't yet been an inconsistency in her statements, because Ms. Dotson had not yet testified at this point in the trial. Further, there was both consistent and inconsistent statements between her voluntary statement to officers and her preliminary hearing testimony. Therefore, because it would have been improper to admit Ms. Dotson's statements as a prior inconsistent statement at that time, the State asked to admit her hearsay statements to Officer Ferron as an exited utterance.

An excited utterance is a well-recognized exception to the hearsay rule, and has been codified in Nevada Revised Statute § 51.095: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule" (emphasis added). The excited utterance exception is typically utilized to introduce 9-1-1 calls that are made contemporaneously with or very shortly after an event has occurred.

However, the longer the time between the event and the statement, the less likely it is that the statement qualifies as an excited utterance. See, e.g. *Browne v. State*, 113 Nev. 305, 313, 933 P.2d 187, 192 (1997) ("[T]iming is often the determining factor for an excited utterance"); *Medina v. State*, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006) (the elapsed time between the event and statement is considered "in determining whether the declarant was under the stress of the startling event when he or she made the statement").

An excited utterance is typically admissible when made during or "moments" after a startling event. As the time between the event and statement grows longer, a greater showing of the declarant's stress is necessary for admissibility. For example, a statement made 45 minutes after a murder was admissible because the declarant "was agitated after the event;

[Declarant] had attacked an officer and he had to be restrained; and [Declarant] was crying, mumbling, and acting very irrational." *Rowland v. State*, 118 Nev. 31, 43, 39 P.3d 114, 121 (2002). In another case, statements made several minutes after the startling event were admitted because they "were made while the victim was crying, very upset, shaken up, shivering, [and] very nervous." *Valentin v. State*, No. 62820, 2014 WL 495498 (Nev. Jan. 15, 2014). Furthermore, statements made longer after the events took place require a great degree of trustworthiness to be found admissible. See, *Felix v. State*, 109 Nev. 151, 849 P.2d 220 (1993) (superseded on other grounds by statute).

As noted above, typically an excited utterance is made contemporaneously with the startling event or very shortly thereafter. When a substantial amount of time has elapsed, a greater need of visible stress and trustworthiness is required. In this case, there is neither.

From the outset, there is the passage of a significant amount of time between the incident with Barry and when Ms. Dotson gave her statement to arriving Metro officers. By her own testimony, Ms. Dotson waited at least fifteen minutes *after* she heard Barry leave the apartment by locking it from the outside. She waited until "she felt safe" before exiting the apartment. By

her own admission, then, the statements she gave to officers are not likely made "under the stress of excitement caused by the event" because Ms. Dotson had already decided she felt safe enough to leave the premises.

Here, the State will likely cite to Ms. Dotson's shaken and excited demeanor when interacting with Officers; however, there is also ample testimony from the State's witnesses that Ms. Dotson retained this same demeanor *hours* after the event took place. She was excited when speaking to the first officer, she was excited when filling out her voluntary statement, and she was even still excited when being photographed by the State's crime scene analyst, Gabrielle Guerrero. Ms. Dotson's continuous stream of excitement would facially bely any claim that her demeanor is specifically related to the events that occurred, or at least that they were caused by the events to the degree necessary to qualify as a hearsay exception. Yet, all of her statements to virtually anyone who was on the scene that night was admitted as an excited utterance.

Given the substantial lapse of time between the event and her statements, case law would require a greater showing of trustworthiness in her statements to be deemed admissible. That is not present here. Not only did Ms. Dotson have a substantial amount of time to create a fabrication

before the arrival of Metro officers, but the record would indicate that she did in fact fabricate (or at least substantially embellish) many aspects of her statements to officers. For example, Ms. Dotson told officers that she had been strangled with two hands, kicked repeatedly, and beat about the head with a firearm. Yet, photographs and medical testing *immediately* after the event revealed no injuries corresponding to her claims. Further, Ms. Dotson has an ample motive to fabricate – the very basis for the argument that initiated the incident was due to her anger of Barry "cheating as usual."

Finally, her statements were improperly admitted as an excited utterance because they were not "utterances" at all, but rather direct answers to questions solicited by law enforcement. The law requires a degree of spontaneity in the statements in order to be considered an "utterance." One of the earliest court decisions regarding the admissibility of an excited utterance, from the year 1915, is directly on point in this regard:

> Undoubtedly such statements should be received with great caution, and only when they are made so recently after the injury is received, and under such circumstances as to place it beyond all doubt that they are not made from design or for the purpose of manufacturing evidence. …
>
> The case of *State v. Daugherty*, 17 Nev. 376, 30 P. 1074, was reversed because of the admission by the trial court of a statement made by the person assaulted seven or eight

> minutes after the assault was made; the court, after quoting from several authorities, saying:
>
> "The evidence was the narration of a past occurrence, and was incompetent."
> ...
> Professor Jones lays down the rule to be:
> "Hence, if there is reason to suppose that the declarations are not the natural and spontaneous utterance of the declarant, but that they are premeditated or designed for a purpose, they are inadmissible." (2 Jones on Evidence, sec. 351.)
>
> "The utterance, it is commonly said, must be 'spontaneous,' 'natural,' 'impulsive,' 'instinctive,' generated by an excited feeling which extends without let or breakdown from the moment of the event they illustrate." (3 Wigmore on Evidence, sec. 1749.)
>
> The same learned author, at paragraph (b) of section 1750, says:
>
> "The utterance must have been before there has been time to contrive and misrepresent, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. This limitation is in practice the subject of most of the rulings." *State v. Pappas*, 39 Nev. 40, 44-45, 152 P. 571, 572 (1915).

Here, there was "time to contrive and misrepresent," a motive to do so, and the statements given were a direct response to solicited questions rather than a "spontaneous, natural, impulative, [or] instinctive" utterance. Further, the credibility of Ms. Dotson was a central issue given her varying levels of

consistency throughout the progress of the case. The excited utterance exception to the hearsay rule was the basis to admit the *entirety* of her statements made to officers that night, whether they were consistent, inconsistent, or had never previously been mentioned in testimony. It essentially provided the admission of Ms. Dotson's testimony without Ms. Dotson, followed by the State's plea to the jury to adhere to this first statement as the most trustworthy version of events.

Given the amount of time that had passed, Ms. Dotson's continuous excited demeanor hours after the event, and her opportunity and motive to fabricate, it was improper to introduce the entirety of her statement of officers that night when several components of that statement would have otherwise been inadmissible. Further, the State's reliance on this first statement as the most trustworthy version of events in the face of a partial recantation places the admission of this statement at the front and center of the case. For these reasons, the error committed was not harmless, and Appellant is entitled to a new trial.

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D. *It was Improper to Instruct the Jury on Flight as Consciousness of Guilt Based on Appellant Leaving the Scene*

The law is abundantly clear that leaving the scene of a crime is not in and of itself sufficient to support a jury instruction for flight as consciousness of guilt. "Flight is more than merely leaving the scene of the crime. It embodies the idea of going away with a consciousness of guilt and for the purpose of avoiding arrest." *Potter v. State*, 96 Nev. 875, 875-76, 619 P.2d 1222, 1222 (1980); *Theriault v. State*, 92 Nev. 185, 547 P.2d 668 (1976); see e.g., *Shults v. State*, 96 Nev. 742, 616 P.2d 388 (1980) (escape from custody).

In this case, the State's argument on the jury instruction for flight as well as the District Court's justification for the admission of the flight instruction confirms that it is based solely on Barry leaving the apartment. The jury instruction for flight was provided to the jury as Jury Instruction No. 41. When the Defense objected to the admission of this instruction, the Court found it to be justified because "you have him gathering up his items and clothes of a man found in the trunk. I think the State's got enough there to justify it" (AA, 1040: 13). As noted previously, the fact that Barry gathered his belongings after a fight and left the apartment is not in and of itself sufficient to support an instruction for flight; there is no indication that Barry did it to

avoid apprehension or to "flee" the scene. In fact, Ms. Dotson testified that Barry took his time to lock the deadbolt from the outside with his key, which directly refutes the notion that Barry was fleeing the scene. Additionally, he was arrested approximate a week later while at work – again, not indicative of an attempt to avoid arrest or prosecution.

The State's basis for the instruction is equally improper; as argued during closing arguments, "he heard the sirens, he grabbed his stuff, and he fled the scene" (AA, 1070: 7). However, there is *zero evidence* in the record that sirens were heard or that they played any role whatsoever in Barry's decision to collect his belongings while Ms. Dotson was in the bathroom. In fact, there was no reason for Barry to even know that police were called, as the 9-1-1 call was made by an anonymous neighbor. Lastly, Barry had already collected his belongings and left the apartment *before* the police arrived, which is the only way his vehicle met Officer Ferron's police vehicle while Barry was already on his way out of the apartment complex; Barry would have had to already be in his car and driving *out* of the complex in order for Officer Ferron to see him while driving *into* the complex. Thus, the record supports only that Barry had gathered his personal belongings and left the apartment before any indication that police were en route.

Given that there was no evidence of flight or any attempt to avoid arrest or prosecution, admission of the flight instruction based solely on Barry gathering his belongings and leaving the scene was improper. Although case law holds that an improper flight instruction is not alone enough for reversal, it must be considered with reference to the other errors committed and other confusing or misleading jury instructions.

E. The Admitted Kidnapping Instruction was Incomplete and Confusing with Regards to Incidental Movement

Jury instructions that are confusing or misleading are often grounds for reversal in criminal cases as legally erroneous. *Zelavin v. Tonopah Belmont*, 39 Nev. 1, 7-11, 149 P. 188, 189-91 (1915). "The errors assigned all relate to instructions given to the jury by the trial court. Many separate points are raised in an effort to show that certain instructions do not properly state the law or might tend to mislead or confuse the jury." *Pfister v. Shelton*, 69 Nev. 309, 310, 250 P.2d 239, 239 (1952). Jury instructions can be erroneous because they partially state the law, state the law in a vague or misleading manner, or misstate the law entirely.

In this case, the Defense's position is the final jury instruction for Kidnapping only partially stated the law, and did so in a confusing manner.

The following jury instruction was proposed by the Defense; the entirety of the underlined provision was omitted completely from the final instruction submitted to the jury as Jury Instruction No. 18:

> With regards to movement, it is the fact, not the distance, or forcible movement of the victim that constitutes kidnapping. However, when a Defendant is accused of First Degree Kidnapping with the specific intent to commit an unlawful act and is also accused of the unlawful act itself, the defendant may not be convicted of the kidnapping if the movement and/or confinement of the victim was merely incidental to the unlawful act.
>
> In this case, whether the movement and/or confinement of the victim is incidental to the offense of Battery or whether the risk of harm to the victim was increased thereby is a question for you to determine after considering all the facts and circumstances in this case.
>
> In order for you to find the defendant guilty of both First Degree Kidnapping and an associated offense of Battery, you must also find beyond a reasonable doubt either:
>
> (1) That any movement of the victim was not incidental to the Battery;
>
> (2) That any incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the Battery;
>
> (3) That any incidental movement of the victim substantially exceeded that required to complete the Battery;
>
> (4) That the victim was physically restrained and such restraint substantially increased the risk of harm to the victim; or

(5) The movement or restraint had an independent purpose or significance.

"Physically restrained" includes but is not limited to tying, binding, or taping.

The law is well settled that the defense is entitled to jury instructions in their theory of the case when the instruction is supported by the record, no matter how strong or weak. "It is well established in our state that a defendant in a criminal case is entitled to have the jury instructed on his theory of the case as disclosed by the evidence, no matter how weak or incredible the evidence appears to be." *Margetts v. State*, 107 Nev. 616, 621, 818 P.2d 392, 396 (1991); *Brooks v. State*, 103 Nev. 611, 613, 747 P.2d 893, 894 (1987); *Adler v. State*, 95 Nev. 339, 594 P.2d 725 (1979).

In this case, it remained a substantive defense theory that any movement by Ms. Dotson around the apartment was incidental to the battery when she was struck in the eye; the incidental movement, which would preclude a finding of Kidnapping, is of particular import given the jury acquitted Barry of using a firearm.

The instruction that was provided to the jury excludes the first two paragraphs, and as a result only contained the subsequent list of additional requirements. However, this portion is limited in relevance only under the

premise of finding Barry guilty of **both** Kidnapping and the associated offense of Battery, whereas the language proffered by the Defense would preclude a conviction of Kidnapping standing alone if the movement were incidental to the battery. As the instructions address different factual scenarios, one being a requirement for Kidnapping and the other a requirement to find dual convictions for both Kidnapping and Battery, the instruction offered by the defense and that provided to the jury are substantively and legally distinct. Furthermore, the final jury instruction is confusing and misleading in the sense that the jury would infer that incidental movement is not a basis to find a conviction for *both* Kidnapping and Battery, without guidance as to whether incidental movement can support Kidnapping alone.

Both portions of the proposed jury instruction, including that which was omitted from the final instruction, are supported by case law:

> We now clarify that movement or restraint incidental to an underlying offense where restraint or movement is inherent, as a general matter, will not expose the defendant to dual criminal liability under either the first- or second-degree kidnapping statutes. However, where the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense, i.e., robbery, extortion, battery resulting in substantial bodily harm or sexual assault, or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime

> charged, dual convictions under the kidnapping and robbery statutes are proper. *Mendoza v. State*, 122 Nev. 267, 274-75, 130 P.3d 176, 180 (2006).

As stated previously, case law recognizes the distinction regarding incidental movement: it will *not* result in criminal liability for Kidnapping, but it may result in criminal liability for *both* Kidnapping and Battery "where the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense" or "where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged."

The Defense proposed instruction was complete, applicable and legally accurate. The final instruction submitted to the jury was incomplete and misleading regarding the role of incidental movement. It is not duplicative, as it provided distinct legal information that was not covered by any other proposed or submitted jury instructions. Therefore, the District Court's decision to omit the language of the Defense instruction was erroneous and warrants reversal.

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F. *Cumulative Error Warrants Reversal*

In this case, the multiple errors as noted above warrant reversal in aggregate, even if the errors are not sufficient to mandate reversal standing alone. "Cumulative error can violate a defendant's constitutional right to a fair trial. This court considers the following factors for a cumulative error claim: (1) if the issue of guilt is close, (2) the errors' size and character, and (3) the severity of the charged crime." *Smith v. State*, No. 54397, 2011 Nev. Unpub. LEXIS 1132, at 7-8 (Jan. 31, 2011); *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008).

In this case, there is little doubt the issue of guilt is close – Barry was convicted on only *one* of his original nine charges, with *four* Not Guilty, three Guilty of lesser included offenses, and one voluntary dismissal by the State. The errors' size and character is also prominent given that three of the five substantive errors alleged in the instant appeal directly relate to the conviction for First Degree Kidnapping; the State alleged a single factual basis that Barry was acquitted of, the record in support of the verdict does not facially comply with Nevada statute, and the jury received incomplete and misleading instructions regarding the Kidnapping charge. In conjunction, the improper admission of Ms. Dotson's *entire* statement to the Officers and an

improper instruction regarding flight compound the errors. Lastly, the severity of the charged crime is high, as Barry was alleged and ultimately convicted of an offense that carries a maximum of life in prison.

For these reasons, the cumulative effect of the five substantive errors outlined above warrant reversal.

CONCLUSION

For these reasons, Appellant respectfully requests the convictions be vacated, and the matter remanded for a new trial and/or sentencing hearing.

VERIFICATION OF KELSEY BERNSTEIN, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Appellant.
3. The factual contentions contained within the Opening Brief are true and correct to the best of my knowledge.

Dated this 26 day of April, 2019.

MAYFIELD GRUBER & SHEETS.
Respectfully Submitted By:

KELSEY BERNSTEIN, ESQ.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I 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 2007 with 14 point, double spaced Cambria font.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 10,095 words.

3. 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(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matte relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26 day of April, 2019.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 26 day of April, 2019, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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Employee of Mayfield Gruber & Sheets