IN THE SUPREME COURT OF THE STATE OF NEVADA

ABEBAW KASSA, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 76870

RESPONDENT'S ANSWERING BRIEF

Appeal From Jury Trial Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(2) because it is an appeal of a judgment of conviction based on a jury verdict that involves a Category A and B felony.

STATEMENT OF THE ISSUE(S)

1. Whether the district court correctly denied Appellant Abebaw Kassa ("Kassa")'s motion to vacate his guilty verdict.
2. Whether the district court gave the jury a proper Voluntary Intoxication Instruction.

/ / /

STATEMENT OF THE CASE

Kassa was charged by way of Information on April 26, 2017 with the following crimes: Count 1, MURDER (Category A Felony - NRS 200.010, 200,030 - NOC 50000), and Count 2, FIRST DEGREE ARSON (Category B Felony - NRS 205.010 - NOC 50414). Appellant's Appendix Volume 1 ("1 AA"), at 1-4.

On December 27, 2017, Kassa filed a notice of intent to plead Not Guilty by Reason of Insanity, and to seek a verdict of Guilty but Mentally Ill to Count 1 and/or Count 2. AA 1, 5-6. On January 9, 2018, the State filed a Notice of Motion for Independent Psychological Evaluation of Defendant and Request for Discovery, which the court granted on January 23, 2018. 1 AA 7-10.[1]

Kassa's jury trial began June 12, 2018. 1 AA 12. On June 18, 2018, the jury returned a verdict finding Kassa Guilty but Mentally Ill on both counts. On June 22, 2018, Kassa filed a Motion to Vacate the Guilty Verdict and Find the Defendant Not Guilty by Reason of Insanity. 4 AA 801-804. On July 2, 2018, Kassa filed a Supplement to that motion. 4 AA 805-808. On July 5, 2018, the State filed its Opposition thereto. 4 AA 809-812. On August 16, 2018, the court heard oral argument on Kassa's Motion to Vacate and issued an Order denying Kassa's Motion on August 17, 2018. 4 AA 815-816.

[1] Kassa did not include the court minutes on January 23, 2018, wherein trial counsel did not object to the State's motion.

On August 23, 2018, Kassa was sentenced on Count 1 to Life in the Nevada Department of Corrections, with a minimum parole eligibility of twenty (20) years. 4 AA 799-800. On Count 2, Kassa was sentenced to a maximum of fifteen years in the Nevada Department of Corrections, with a minimum parole eligibility of six (6) years. 4 AA 799-800. Count 2 was run concurrent with Count 1. 4 AA 799-800. Kassa received seven hundred fifty-eight days credit for time served. 4 AA 799-800. The court also found that Kassa was mentally ill at the time of sentencing and ordered that Kassa was to receive treatment for his mental illness during the period of confinement in conformity with such treatment as is medically indicated for Kassa's mental illness. 4 AA 799-800. The Judgment of Conviction was filed August 29, 2018. 4 AA 799. Kassa filed his Notice of Appeal on August 29, 2018 and his Opening Brief on March 8, 2019. Appellant's Opening Brief ("AOB") at 4.[2] The State's Answering Brief follows.

STATEMENT OF THE FACTS

On July 27, 2016, the date of the subject crimes, Kassa lived in a group home owned by Josefina Adams ("Adams"). 2 AA 429-433. Kristopher Ramos ("Ramos") was also a resident of the group home with Mr. Kassa. He testified that, in the early

[2] Kassa failed to include numerous pleadings and records in his Appellant's Appendix, including his Notice of Appeal. However, the State agrees that Kassa's Notice of Appeal was filed August 29, 2018. Further, numerous citations to the record in the AOB are inaccurate.

morning of July 27, 2016, the smoke alarm went off in the home. 2 AA 416. Ramos exited his bedroom, then saw Kassa holding a bathroom door closed while hearing Alipio Lolita Budiao ("Lolita") screaming to let her out of that bathroom. 2 AA 418. Ramos tried twice to push Kassa from the bathroom door to free Lolita, but Kassa held the door tight, with Lolita trapped inside.[3] 2 AA 419-420. Between attempts to remove Kassa from holding the door, Ramos saw the kitchen of the group home was on fire. 4 AA 419. While Lolita was held in the bathroom, she called Adams and left a voicemail stating, "Madam Josie, Abebaw set the house on fire and locked me in the bathroom." 2 AA 436-437. After the second attempt to remove Kassa from the door, Ramos awakened the other residents and exited the home. 2 AA 420. Eventually, Lolita was freed from the bathroom; from his vantage point outside the home, Ramos saw something fall from the ceiling that landed on Lolita, which caught her on fire. 2 AA 421. Ramos then watched Lolita running into and out of the house while on fire. 2 AA 422. Ramos testified that he eventually saw Kassa being carried out of the house by firemen, and that it appeared Kassa had white foam coming from his mouth. 2 AA 425.

Officer Brian Artis ("Artis") of the Las Vegas Metropolitan Police Department ("LVMPD") testified that he was on patrol on July 27, 2016, and

[3] Kassa asserts he was "nonresponsive" when Ramos attempted to remove him from the door. AOB at 6. However, the word "nonresponsive" appears neither in Ramos' testimony nor elsewhere in the trial record.

responded to the early morning call at the group home. 2 AA 476. Upon arrival he observed firemen removing Kassa from the home. 2 AA 470. As the officers took custody of him, Kassa was described as "fighting with us" and "screaming, and yelling and hollering, and squirming around." 2 AA 470. Officer Matthew Terry ("Terry"), also with LVMPD, further testified that, as Kassa was handed over to the police by attending firemen, he broke free from their grip and began running toward officers yelling "kill me, kill me." 2 AA 479. Terry described Kassa as "resisting a lot," and "trying to pull his arms away." 2 AA 479. It took multiple officers to take him to the ground and put him in restraints. 2 AA 484. Artis also saw Lolita, who he described as "pretty bad . . . burned I'd say all over . . . her face was starting to swell . . . [h]er clothes were scorched . . . her arms were burned really bad . . . ." 2 AA 472. Leonardo Bocero ("Bocero"), a medical examiner at the Clark County Coroner's Office, testified that Lolita later died, that the cause of her death was "thermal injuries," and that the manner of her death was "[h]omicide." 3 AA 570.

Sheila Gutierrez ("Gutierrez"), a passer-by who noticed the fire from the road, testified that she approached the home and observed chairs stacked on the stove in the kitchen, where the fire was located. 2 AA 456. Andrew Lewis ("Lewis"), a member of the City of Las Vegas Arson/Bomb squad, testified that the fire was set "intentionally" and noted that there were burnt chair parts on top of the stove. 2 AA 488, 509.

Dr. Gregory Peninger Brown ("Brown"), a psychiatrist, testified regarding Mr. Kassa's history of mental illness and recorded schizophrenic episodes. 3 AA 572. Brown also testified that Kassa understood that fire burns, and that setting fire to things causes them to burn. 3 AA 624. Brown also testified that Kassa indicated he heard voices which were "controlling" him, telling him that he was already dead because of a car crash in 2013, and that he needed to "burn his body to be, quote, 'fully dead,' unquote, that's to eliminate this physical form that's not really alive so that it cannot be misused by these external forces anymore." 3 AA 609, 626.

Dr. Stephen Zuchowski, another psychiatrist, also testified that there was "some evidence that speaks both ways to around the fire incident, about whether or not he knew his actions were wrong." 4 AA 686. For example, despite Kassa's alleged delusion that voices were controlling him and making him kill himself with fire, Kassa escaped the house to avoid being burned. 4 AA 686. Zuchowski also opined it was likely that the smell of smoke could have caused a reflex to overcome his suicide plan, causing him to leave the house. 4 AA 706. Kassa also fought with officers and tried to slip out of his cuffs to avoid arrest. 4 AA 685. Pursuant to a competency evaluation, it was also determined that Kassa was "oriented to understand the proceedings and the charges that he was facing" and that he "understood the roles of the people in the Court, what the prosecution did, what the defense does, and what the Court does." 4 AA 686. Zuchowski also testified that

records from University Medical Center ("UMC") showed Kassa had reported recent and frequent use of the drug Spice, but later indicated that he had not used Spice. 4 AA 679, 690-691, 695, 734.

At the time of settling jury instructions, Kassa objected to the inclusion of a Voluntary Intoxication instruction. 4 AA 667. The State noted the instruction was necessary in relation to the insanity defense as follows:

> MS. BEVERLY: But in this case, the burden is on the defense to prove the insanity. So anything disputing the insanity is relevant for the State to argue, including voluntary intoxication because the instructions on insanity say that the - - *in order for the insanity plea to be valid, the delusion has to come from a disease or defect of the mind, meaning it has to come from the schizophrenia. So anything contrary to that is something that is, the State's position, is permissible to argue in rebuttal to their burden.* I've never been in a trial where I kind of had to argue burden shifting, but it's not really burden shifting because the law says - -
>
> THE COURT: They have the burden.
>
> MS. BEVERLY: the burden is on them. So that's why it's a unique situation, but it's certainly permissible, the same way it would be permissible if the defense was arguing voluntary intoxication to rebut the State's beyond a reasonable doubt.
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> ***
>
> THE COURT: See you (defense) put his sanity at issue. I think the State's correct. The disease or defect, the delusion I should say, has to come from a disease, not something else, not some kind of substance put into your body. It has to come from the disease, and so intoxication would negate the sanity issue, and since you put his sanity at issue, I think it's appropriate . . . .

4 AA 669-671.

Later, after more argument regarding the specific language of the voluntary intoxication instruction, Kassa objected to the inclusion of the phrase "temporary insanity" taken from State v. Fisko, 58 Nev. 65, 70 P.2d 1113, 1118 (1937), overruled in part by Fox v. State, 73 Nev. 241, 316 P.2d 924 (1957) as he believed it may be confusing to the jury. 4 AA 714-715. The State argued against Kassa's objection as follows:

> MS. BEVERLY: Well, Your Honor, I think the insanity - - this whole case is confusing in and of itself. So I don't think that the confusion is a basis not to give a correct statement of the law, which in this case is still a correct - - this is currently, because it hasn't been overruled, a correct statement of the law, and it's important. Again there's very few cases that deal with the State offering the voluntary intoxication instruction.
>
> But in this case, as we were discussing earlier, because they're claiming that he's insane, anything to rebut that, including extreme intoxication, including temporary insanity, is not a defense to finding him not guilty by reason of insanity, and so I think the State should be allowed to argue that if he's intoxicated to the point where he's temporarily insane he's not - - and I hate to use a double negative, but he's not not guilty by reason on insanity. So that is I think it's a correct statement of the law, current law. It is something that the State should be allowed to argue, and they can rebut, but the burden is on them when they plead insanity.
>
> THE COURT: Okay. I'm going to give the instruction.

4 AA 716.

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SUMMARY OF THE ARGUMENT

The district court correctly denied Kassa's motion to vacate his guilty verdicts based on the argument that Kassa was insane at the time of the offenses. It is a defendant's burden to establish the affirmative defense of insanity, a burden Kassa failed to meet here. The State presented sufficient evidence to show Kassa's state of mind before, during, and after he started the fire that resulted in the death of Lolita. Based on that evidence, the jury found that at the time Kassa set fire to the group home, he either knew or understood the nature and capacity of that act, or that he understood that his conduct was wrong. As Kassa failed to meet his burden of showing that he was insane at the time of the subject offenses, the district court correctly permitted the jury verdict to stand by denying Kassa's motion to vacate his guilty verdicts.

The district court also correctly instructed the jury on voluntary intoxication and its relation to an insanity defense. By raising the defense of insanity, Kassa put his own sanity at issue. Kassa's self-reported use of the drug Spice prior to the arson created necessary points of clarification for the jury, namely that voluntary intoxication does not constitute a severe mental disease or defect, and that Kassa could not avail himself of an insanity defense based upon his Spice usage. Based on Kassa's proffered defense and his own self-reported drug usage, the voluntary intoxication instruction was not only proper, but also necessary. Further, while the

instruction was more detailed than the statutory language alone, the additional verbiage was correct as a matter of law. The district court did not abuse its discretion by giving that instruction to the jury, and therefore this court should affirm Kassa's Judgment of Conviction.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED KASSA'S MOTION TO VACATE HIS GUILTY VERDICT

Kassa claims the district court abused its discretion by failing to reweigh the evidence and give more weight to Kassa's experts' testimony than the jury did:

> The sole conclusion offered by the only two expert witnesses called by either side was that Mr. Kassa was legally insane on July 27, 2016, pursuant to NRS 174.035. Given the law and facts presented, the defense met its burden of establishing Mr. Kassa's insanity at the time of the offense. The jury's verdict is against the great weight of the evidence . . . .

AOB at 15.

Kassa's claim here negates the role of the jury as the finder of fact; it is not the court's position to reweigh evidence. Watkins v. State, 93 Nev. 100, 102, 560 P.2d 921, 922 (1977) ("we have consistently held that we will not substitute our judgment for that of the finder of fact"); Stackiewicz v. Nissan Motor Corp. in U.S.A., 100 Nev. 443, 455, 686 P.2d 925, 932 (1984) ("[w]e may not invade the province of the fact-finder"). As set forth below, the State presented sufficient evidence to show that Kassa intended to commit arson, that he understood the nature and quality of his actions, and that he understood that those actions were wrong.

Thus, as the jury determined that such evidence weighed against a finding of insanity, the district court did not abuse its discretion when it refused to set aside the jury's factual finding that Kassa was not insane at the time of the arson.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259, 524 P.2d 328, 331 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2718, 2789 (1979).

"[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. at 381, 956 P.2d 1378, 1380 (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)); see also Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (holding that it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) (concluding that the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the

evidence will not be weighed by an Appellate Court) (cert. denied by 429 U.S. 895, 97 S.Ct. 257 (1976)). Thus, the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts" is preserved. Id at 319, 99 S.Ct. at 2789.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, the Nevada Supreme Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976)).

First degree arson, a Category B felony, is defined in NRS 205.010 as follows:

> A person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any:
>
> 1. Dwelling house or other structure or mobile home, whether occupied or vacant; or
>
> 2. Personal property which is occupied by one or more persons, whether the property of the person or of another, is guilty of arson in the first degree which is a category B felony and shall be punished by imprisonment for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $15,000.

Kassa's trial focused on his mental state at the time of the arson—whether he "willfully" set the fire—as there was no controversy as to whether he had actually started the fire that led to the death of Lolita: "[a]nd the State is correct that we' re not going to dispute that the cause of this fire was Mr. Kassa placing an item on a

stove, lighting the stove and then placing a blanket over the stove which started this whole fire." 2 AA 410. In his defense and in pursuit of a verdict of Not Guilty by Reason of Insanity, Kassa called expert psychiatric witnesses, Dr. Brown and Dr. Zuchowski. 3 AA 572, 4 AA 672.

In the instant case, the State presented overwhelming evidence that Kassa was not insane under Nevada law. As an initial matter, the burden of proving insanity rests entirely with the defendant. As noted by the instructions given to the jury in this case, a defendant is presumed sane. 5 AA 829. Additionally, merely reciting a history of mental illness does not establish insanity. Here, the State presented evidence that Kassa was living in and doing very well in a group home owned by Josefina Adams. 2 AA 426-434. On the night of the fire, the State presented evidence that Kassa intentionally set fire to the group home. 2 AA 436-437. The State also presented evidence that Kassa held Lolita in the bathroom so she could not prevent his suicide attempt. 4 AA 709. When his first suicide attempt did not succeed, he tried a "suicide by cop" attempt when officers arrived. 2 AA 479. Additionally, it was the State who introduced Kassa's medical records from the Clark County Detention Center and UMC hospital immediately after the crime which showed that Kassa reported using Spice immediately prior to setting the fire. 3 AA 589, 3 AA 634. The State also cross examined Kassa's experts, pointing out the various conflicting stories told by Kassa, the fact that Spice could not be excluded as a cause

of any potential delusions, and how Kassa never in his recorded mental health history experienced the type of delusions now reported in this case. 3 AA 629; 4 AA 680; 4 AA 679, 690-691, 695, 734.

In his AOB, Kassa argues—absent a citation to the record—that the "sole conclusion offered by the only two expert witnesses called by either side was that Mr. Kassa was legally insane on July 26, 2016, pursuant to NRS 174.035." AOB at 15. As set forth in the Respondent's Statement of the Facts, *supra*, that argument is belied by the record. Zuchowski did opine that on the day of the fire, he believed Kassa did not understand the nature and quality of his actions, and that he did not appreciate the wrongfulness of his actions. 4 AA 683-684. However, Zuchowski interviewed Kassa on May 6, 2018, nearly two years after the July 27, 2016 fire. 4 AA 676. Zuchowski also gave substantial testimony that weighed against his finding that Kassa was insane at the time of the fire, as there was "some evidence that speaks both ways to around the fire incident, about whether or not he knew his actions were wrong." 4 AA 686. For example, despite Kassa's alleged delusion that voices were controlling him and making him kill himself with fire, Kassa escaped the house to avoid being burned. 4 AA 686. Zuchowski also opined it was likely that the smell of smoke could have caused a reflex to overcome his suicide plan, causing him to leave the house; this weighs against a finding that Kassa didn't understand the nature of his act. 4 AA 706. Kassa also fought with officers and tried to slip out of his cuffs to

avoid arrest, which speaks to the notion that Kassa was aware that starting the fire was wrong. 4 AA 685. Pursuant to a competency evaluation, it was also determined that Kassa was "oriented to understand the proceedings and the charges that he was facing" and that he "understood the roles of the people in the Court, what the prosecution did, what the defense does, and what the Court does." 4 AA 686. This also weighs against a finding that Kassa was unable to comprehend the nature of his actions, or that he was unable to tell the difference between right and wrong. Zuchowski also testified that records from University Medical Center ("UMC") showed Kassa had reported recent and frequent use of the drug Spice, but later indicated that he had not used Spice. 4 AA 679, 690-691, 695, 734. Kassa's vacillation on whether he did or did not use Spice only speaks to Kassa's ability to understand the nature and character of his actions, which would weigh against a finding of insanity.

Kassa's other expert witness, Dr. Brown, testified regarding Mr. Kassa's history of mental illness and recorded schizophrenic episodes. 3 AA 572. Brown testified that Kassa understood that fire burns, and that setting fire to things causes them to burn. 3 AA 624. Brown also testified that Kassa indicated he heard voices which were "controlling" him, telling him that he was already dead because of a car crash in 2013, and that he needed to "burn his body to be, quote, 'fully dead,' unquote, that's to eliminate this physical form that's not really alive so that it cannot

be misused by these external forces anymore." 3 AA 609, 626. Brown did opine that he believed Kassa was insane at the time of the arson. 3 AA 597. However, despite his conclusion, the jury was free to consider not only his and Zuchowski's expert opinions, but also the other testimony presented which provided a more complete picture of the events surrounding the arson.

Upon review of the totality of the evidence presented, the jury determined that Kassa had failed to meet his burden of proving that he was insane at the time of the arson, resulting in a verdict of Guilty but Mentally Ill on Count 1 and Count 2. 4 AA 799. Pursuant to the verdict, Kassa brought his Motion to Vacate Guilty Verdict and the Supplement thereto pursuant to NRS 175.381. 4 AA 803, 805. Subsection two of NRS 175.381 is of particular note:

> 2. The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty or guilty but mentally ill, set aside the verdict and enter a judgment of acquittal *if the evidence is insufficient to sustain a conviction*. The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.

(Emphasis added).

Kassa's Motion to Vacate based on NRS 175.381 is thus odd given the facts of this case. NRS 175.381(2) permits a defendant to set aside a verdict of guilty but mentally ill only if the evidence is insufficient to sustain a conviction. However, Kassa agreed that he started the fire that led to the death of Lolita; at no point during

the trial was his factual guilt legitimately in question. 2 AA 410. As set forth above, the State set forth overwhelming evidence that Kassa intended to start the fire. Indeed, Kassa's own Supplement to the Motion to Vacate includes only a single conclusory line alleging "[i]t is Kassa's contention that his guilty verdicts were unsupported by the evidence proffered by the State in this case…" 4 AA 808. Rather, Kassa's central argument in the Motion to Vacate was that the district court should have vacated Kassa's convictions despite Kassa's failure to show sufficient evidence to support his affirmative defense:

> As the court is aware, Kassa presented a defense of not guilty by reason of insanity (NGRI). *He had the burden* of presenting evidence by a preponderance of the evidence that he met the criteria for insanity when the crime was committed. (See Jury Instructions)
>
> *Kassa submits that he met his burden at trial.* First, he called not one, but two experts that both concurred with the finding that he met the elements for an NGRI defense under Nevada law. In addition, it should be noted that one of the experts called by the defense was in fact the State's expert (Dr. Steven Zuchowski). The State offered no expert testimony to rebut the defense's two expert witnesses.
>
> In addition, the defense offered voluminous medical records documenting Kassa's significant mental health history regarding schizophrenia (See Defense Exhibits A and B). These records consisted of no less than six prior schizophrenic episodes with auditory hallucinations present-precisely the same affliction that he suffered in our incident. These incidents ranged from hearing his radio talking to him in Utah to calling 911 on himself because unknown people were yelling at him and trying to hurt him to being found "swimming" in the rocks and yelling incoherently at the voices in his head.

4 AA 807.

The State may not retry a defendant after failing to meet its burden of proving beyond a reasonable doubt that a defendant committed a crime. Washington v. State, 98 Nev. 601, 604, 655 P.2d 531, 532 (1982) (double jeopardy bars retrial after the State's failure to meet its evidentiary burden). Similarly, after failing to meet his burden of proving by a preponderance of the evidence that he was insane at the time of the fire, Kassa may not use NRS 175.381 as a vehicle to have the trial court rule that he met his evidentiary burden after a jury concluded he had not. Upon review of the overwhelming evidence presented at trial that Kassa started the fire, as well as the overwhelming evidence presented that Kassa intended not only to set the fire, but also to add fuel to that fire, and then prevented Lolita from extinguishing the fire by holding her captive in a bathroom, the jury concluded by virtue of its guilty verdicts that Kassa was not insane and was therefore guilty of first-degree arson. The district court's refusal to re-weigh the evidence and find that Kassa had met his evidentiary burden when a jury found he had not was therefore not an abuse of discretion. Azbill, 88 Nev. at 252, 495 P.2d 1072. The district court's denial of Kassa's Motion to Vacate should not be reversed, and this court should affirm Kassa's Judgment of Conviction on Counts 1 and 2.

II. THE DISTRICT COURT GAVE THE JURY A PROPER VOLUNTARY INTOXICATION INSTRUCTION

District courts have "broad discretion" to settle jury instructions. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). District courts' decisions

settling jury instructions are reviewed for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2003). This Court reviews whether an instruction is an accurate statement of the law de novo. Cortinas, 124 Nev. at 1019, 195 P.3d at 319. Further, instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155–56, 14 P.3d 25, 30 (2000) overruled on other grounds, Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). See also, NRS 178.598. A trial court may also refuse to give an instruction if it is less accurate than other instructions, or will confuse the jury. Sanchez-Dominguez v. State, 130 Nev. 85, 90, 318 P.3d 1068, 1072 (2014).

To negate the "willfulness" element of first-degree arson, Kassa argued the affirmative defense of insanity, alleging that Kassa's insanity prevented him from appreciating the wrongfulness of his actions, and preventing him from understanding the nature of those actions. 2 AA 412. This defense opened the door for the State to rebut Kassa's assertion that he was insane and therefore unable to possess the intent necessary to commit first degree arson. 4 AA 669. At the time of settling jury instructions, Kassa objected to the inclusion of a Voluntary Intoxication instruction. 4 AA 667. The standard voluntary intoxication instruction set forth in NRS 193.220 is as follows:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person s intoxication may be taken into consideration in determining the purpose, motive or intent.

The jury instruction given at trial added the following language as follows:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition. *This is so even when the intoxication is so extreme as to make the person unconscious of what he is doing or to create a temporary insanity*. But whenever the actual existence of any particular purpose, motive or intent is a necessary clement to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive or intent.

5 AA 837 (emphasis added).

The State noted the additional language in the instruction was necessary in relation to the insanity defense as follows:

> MS. BEVERLY: But in this case, the burden is on the defense to prove the insanity. So anything disputing the insanity is relevant for the State to argue, including voluntary intoxication because the instructions on insanity say that the - - *in order for the insanity plea to be valid, the delusion has to come from a disease or defect of the mind, meaning it has to come from the schizophrenia. So anything contrary to that is something that is, the State's position, is permissible to argue in rebuttal to their burden.* I've never been in a trial where I kind of had to argue burden shifting, but it's not really burden shifting because the law says - -
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> THE COURT: They have the burden.

> MS. BEVERLY: the burden is on them. So that's why it's a unique situation, but it's certainly permissible, the same way it would be permissible if the defense was arguing voluntary intoxication to rebut the State's beyond a reasonable doubt.
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> THE COURT: See you (defense) put his sanity at issue. I think the State's correct. The disease or defect, the delusion I should say, has to come from a disease, not something else, not some kind of substance put into your body. It has to come from the disease, and so intoxication would negate the sanity issue, and since you put his sanity at issue, I think it's appropriate . . . .

4 AA 669-671.

Later, after more argument regarding the specific language of the voluntary intoxication instruction, Kassa objected to the inclusion of the phrase "temporary insanity" taken from State v. Fisko, 58 Nev. 65, 70 P.2d 1113, 1118 (1937), overruled in part by Fox v. State, 73 Nev. 241, 316 P.2d 924 (1957) as he believed it may be confusing to the jury. 4 AA 714-715. The "temporary insanity" referred to a state of mind achieved after a person voluntarily ingests an amount of drugs or alcohol "so extreme as to make the person unconscious of what he is doing . . . ." Fisko, 58 Nev. at 70, 70 P.2d at 1118. This "temporary insanity" caused by voluntary intoxication, however, "furnishes no excuse for crime committed under its influence." Id.

At trial, evidence was introduced indicating Kassa may have been voluntarily intoxicated at the time of the fire due to his ingestion of Spice. 4 AA 679, 690-691,

695, 698, 734. Further, the jury could have inferred that Kassa was on drugs due to his foaming at the mouth while firefighters were carrying him from the burning building. 2 AA 425. Dr. Brown testified that Spice was a synthetic drug, but that its ingredients and effects were unpredictable and constantly changing:

> Spice is basically a synthetic form of marijuana. It's available in smoke shops. It has chemical properties that are difficult to predict because they continue to change the formula. Every time one version of Spice is made illegal, they have another one released that is not yet illegal, and it's sometimes referred to as bath salts you'll hear on the news or Spice, and sometimes it's also called potpourri. Again, these substances are available in the smoke shop. They can have widely differing effects on individuals who take them depending on the batch you happen to buy when you're there.

3 AA 618.

The State wished to include the "temporary insanity" language from Fisko to ensure the jury understood that Kassa's voluntary Spice use could not render him "insane" for the purposes of his insanity defense:

> MS. BEVERLY: In order to be insane your delusional mental state must be derived from the mental defect, here schizophrenia. It cannot be derived from the ingestion of alcohol and narcotics. Now, you could be absolutely insane and use drugs and alcohol, and that is still a legal defense for legal insanity, but the cause, where the conduct and the delusional state comes from must come from the mental illness and not from the Spice.

4 AA 754.

After Kassa objected to the additional "voluntary intoxication" language, the State argued against Kassa's objection as follows:

> MS. BEVERLY: Well, Your Honor, I think the insanity - - this whole case is confusing in and of itself. So I don't think that the confusion is a basis not to give a correct statement of the law, which in this case is still a correct - - this is currently, because it hasn't been overruled, a correct statement of the law, and it's important. Again there's very few cases that deal with the State offering the voluntary intoxication instruction.
>
> But in this case, as we were discussing earlier, because they're claiming that he's insane, anything to rebut that, including extreme intoxication, including temporary insanity, is not a defense to finding him not guilty by reason of insanity, and so I think *the State should be allowed to argue that if he's intoxicated to the point where he's temporarily insane he's not - - and I hate to use a double negative, but he's not not guilty by reason on insanity*. So that is I think it's a correct statement of the law, current law. It is something that the State should be allowed to argue, and they can rebut, but the burden is on them when they plead insanity.
>
> THE COURT: Okay. I'm going to give the instruction.

4 AA 716 (emphasis added).

Thus, while Kassa's potential intoxication due to his voluntary Spice usage could have rendered him "temporarily insane" under Fisko, it was important to inform the jury of the legal difference between actual insanity, which negates the intent element of first-degree arson, and drug-induced "temporary insanity," which does not. Kassa cites Garcia v. State, 121 Nev. 327, 340, 113 P.3d 836, 844 (2005), holding modified by Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006) for the proposition that "an instruction which goes beyond statutorily set language is impermissible." AOB at 24. Kassa misapprehends Garcia. Garcia does not address jury instructions broadly, holding that all jury instructions must follow the relevant

statutes verbatim; instead, Garcia narrowly addresses *only* the reasonable doubt instruction, stating "[h]owever, in Nevada, the definition of reasonable doubt is specified by statute and, under NRS 175.211(2), no other jury instruction on reasonable doubt is permitted." Kassa's interpretation of Garcia is simply inaccurate.

Kassa also cites Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985) for the proposition that a voluntary intoxication instruction is improper if the State produced no evidence of a defendant's intoxication and the resultant effect on the defendant's mental state. AOB at 20. The State disagrees with Kassa's assessment of Nevius. In Nevius, the defendant—not the State—requested the voluntary intoxication instruction in an attempt to negate his specific intent. Nevius, 101 Nev. at 249, 699 P.2d at 1060. The district court noted that Nevius did not show that he was actually intoxicated at the time of the crime and refused a voluntary intoxication instruction; this Court held it was correct to refuse a voluntary jury instruction based on Nevius' failure to show he was entitled to such. Id. Nevius does not apply when the State is requesting a voluntary intoxication instruction to clarify that a defendant cannot avail himself on an insanity defense based on drug or alcohol usage. However, even if Nevius did apply, the State met both elements under Nevius to warrant such an instruction. First, the State introduced evidence that Kassa consumed the intoxicant Spice based on his own admission that he had snorted such; second, that the substance affected his mental state:

> Patient reports he had recently been snorting Spice. Reports it was a powder-like substance and that he had a history of using this in the past as well. Then he reports feeling disturbed and unable to sleep after snorting it, the substance he refers to as Spice.

4 AA 734.

The UMC records also indicated that Kassa's delusional behavior could have been explained by his Spice usage. 4 AA 696. Dr. Zuchowski also could not rule out Kassa's Spice usage. 4 AA 698. Dr. Brown also opined that Spice can make people hear voices or see things that aren't there, or cause hallucinations. 3 AA 619. Kassa's statements that "voices" were telling him to kill himself with fire certainly fit the possible symptoms of Spice usage, and the jury could have easily inferred intoxication based on Kassa's admitted Spice use coupled with his behavior. 3 AA 609, 626. Unlike intoxication from alcohol, there is no accepted test for all Spice variants, therefore the State could not show definitively that Kassa was intoxicated on Spice at the time of the incident. 3 AA 618 (testimony of Dr. Brown stating "Well, it would be almost impossible to test someone for Spice."). However, the jury is free to rely on both direct and circumstantial evidence. Wilkins, 96 Nev. 367, 609 P.2d 309. The jury could have determined that Kassa's Spice usage rendered him "temporarily insane" based on his behavior at the time of the fire, then determined that such intoxication did not render him legally "insane" for the purposes of his

affirmative defense. It's equally likely the jury simply found that Kassa failed to meet his burden that he was legally "insane" regardless of his Spice usage.

Regardless of how the jury determined Kassa failed to meet his burden of showing that he was insane by a preponderance of the evidence, the district court's decision to give a voluntary intoxication instruction was not an abuse of discretion. District courts have "broad discretion" to settle jury instructions. Cortinas, 124 Nev. at 1019, 195 P.3d at 319. Here, based on the facts and defenses presented at trial, the district court added the "temporary insanity" language from Fisko—which is still good law on this issue—to the statutory language of the voluntary intoxication instruction to aid the jury in understanding how Kassa's drug use affected his insanity defense. Instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner, 116 Nev. at 1155–56, 14 P.3d at 30. Here, had the court not instructed the jury on the interplay between voluntary intoxication and the insanity defense, the jury could have determined that Kassa's Spice usage rendered him legally insane. Such a verdict would have been incorrect as a matter of law pursuant to Fisko. Just as a trial court may refuse to give an instruction if it will confuse the jury, the court must also ensure that jury instructions correctly explain the law. Sanchez-Dominguez, 130 Nev. at 90, 318 P.3d at 1072 (2014); Vallery v. State, 118 Nev.

357, 372, 46 P.3d 66, 77 (2002) ("a district court must not instruct a jury on theories that misstate the applicable law.") As the voluntary intoxication instruction was necessary based on Kassa's insanity defense and the evidence submitted at trial, as well as it being an accurate representation of the law pursuant to NRS 193.220 and Fisko, the district court did not abuse its discretion by submitting such to the jury.

CONCLUSION

For the reasons set forth above, the district court did not err in denying Kassa's Motion to Vacate Verdict, nor did it err by instructing the jury on voluntary intoxication. Kassa's judgment of conviction should therefore be affirmed.

Dated this 8th day of April, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 7,146 words and 27 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 8th day of April, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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