IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON STARR,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 71401

RESPONDENT'S ANSWERING BRIEF

Appeal From a Denial of Post-Conviction Relief
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This case is not presumptively assigned to the Nevada Court of Appeals because it is a post-conviction appeal involving a conviction for an offense that is a Category A Felony. NRAP 17(b)(1).

STATEMENT OF THE ISSUES

I. Whether the district court erred in denying Appellant's Motion to Sever.

II. Whether the district court erred in denying Appellant's Motion challenging the racial composition of the jury panel.

III. Whether the district court erred in allowing Detective Abell to make opinion identifying Appellant in surveillance videos.

IV. Whether the district court erred in denying Appellant's "inverse flight" jury instruction.

V. Whether Appellant's sentence constitutes cruel and unusual punishment.

VI. Whether there was sufficient evidence to find Appellant guilty of all crimes of which he was convicted.

VII. Whether there was cumulative error such that Appellant's conviction must be overturned.

STATEMENT OF THE CASE

On December 12, 2014, Appellant Brandon Starr (hereinafter "Appellant") was indicted on twelve charges, arising from the November 24, 2014, robbery of a Popeye's Chicken. Count 1 – Conspiracy to Commit Robbery; Count 2 – Burglary while in possession of a firearm; Count 3 – First Degree Kidnapping with Use of a Deadly Weapon; Count 4 – Robbery with Use of a Deadly Weapon; Count 5 – First Degree Kidnapping with Use of a Deadly Weapon; Count 6 – Robbery with Use of a Deadly Weapon; Count 7 – First Degree Kidnapping with Use of a Deadly Weapon; Count 8 – Robbery with Use of a Deadly Weapon; Count 9 – First Degree Kidnapping with Use of a Deadly Weapon; Count 10 – Robbery with Use of a Deadly Weapon; Count 11 – First Degree Kidnapping with Use of a Deadly Weapon; Count 12 – Robbery with Use of a Deadly Weapon. 1a Appellant's Appendix (hereinafter "AA") 1-6. Also charged were Tony Hobson (hereinafter "Defendant Hobson") and Donte Johns (hereinafter "Defendant Johns"). Id.

On February 20, 2015, a Superseding Indictment was filed containing 82 counts. 1a AA 7. Those charges included 13 counts of Burglary while in Possession

of a Deadly Weapon, 14 counts of Conspiracy to Commit Robbery, 40 counts of Robbery with Use of a Deadly Weapon, 3 Counts of Attempt Robbery with Use of a Deadly Weapon, 3 counts of Conspiracy to Commit Kidnapping, 8 counts of first Degree Kidnapping with Use of a Deadly Weapon, and 1 count of Attempt First Degree Kidnapping with Use of a Deadly Weapon. Id.

On June 2, 2015, Appellant filed a Motion to Sever. 1c AA 130. The State filed its Opposition on June 19, 2015. 1d AA 147. That Motion was heard and denied on July 6, 2015. 2a AA 262-63.

On May 4, 2016, before jury selection began, Appellant made an oral motion to strike the entire venire on the basis of racial composition, alleging that a fair cross-section of the community was not represented. 3b AA 573. Mariah Witt, the jury commissioner for Clark County, was called to testify as to how the Eighth Judicial District Court selects jurors to summon. 3b AA 576. Counsel for Appellant and Defendant Hobson questioned Ms. Witt, as did the State and the Court. 3b AA 576-588. After argument by Appellant's counsel, the Court ruled that Appellant did not make a prima facie case of discrimination, and the oral motion was denied. 3b AA 589.

A 13-day jury trial commenced on May 4, 2016. 3b AA 568. On May 23, 2016, the jury returned a verdict finding Appellant guilty on 74 counts. 2e AA 473.

Appellant was sentenced on September 8, 2016, and a Judgment of Conviction (hereinafter "JOC") was entered on September 20, 2016, in which Appellant was adjudicated guilty on counts 1, 11, 16, 22, 26, 33, 37, 44, 48, 52, 60, and 68 Burglary While In Possession Of A Deadly Weapon (Category B Felony); counts 2, 12, 17, 23, 27, 34, 38, 45, 49, 54, 61, 69 and 81 Conspiracy To Commit Robbery (Category B Felony); counts 3, 4, 5, 6, 7, 13, 14, 15, 18, 19, 20, 21, 24, 25, 28, 29, 30, 31, 32, 39, 40, 41, 42, 43, 46, 47, 50, 51, 56, 57, 58, 59, 64, 66, 72, 74, 76, 78 and 80 Robbery With Use Of A Deadly Weapon (Category B Felony); counts 35, 36, and 82 Attempt Robbery With Use Of A Deadly (Category B Felony); counts 63 and 65 Second Degree Kidnapping With Use Of A Deadly Weapon (Category B Felony); and counts 71, 73, 75, 77, and 79 False Imprisonment With Use Of A Deadly Weapon (Category B Felony)[1]. 12c AA 2859; 3a AA 532-542.

Appellant was sentenced as follows:

As to COUNT 1 - 12-84 months; as to COUNT 2 – 12-36 months; as to COUNT 3 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 4 -24-84 months; plus a CONSECUTIVE 12-60 months for use of a deadly weapon; as to COUNT 5 – 24-84 months; plus a CONSECUTIVE 12-60 months for use of a deadly weapon; as to COUNT 6 – 24-

[1] The original JOC indicated that Counts 71, 73, 75, 77, and 79 were convictions for False Imprisonment (Gross Misdemeanor). This was a clerical error that was corrected in the Amended JOC. 3b AA 556.

84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 7 – 24-84 months; plus a CONSECUTIVE term 12-60 months for use of a deadly weapon; COUNTS 1- 7 CONCURRENT with EACH OTHER. 3a AA 534-35.

As to COUNT 11 – 12-84 months; as to COUNT 12 – 12-36 months; as to COUNT 13 – 24-84 months; plus a CONSECUTIVE term of a 12-60 months for use of a deadly weapon; as to COUNT 14 – 24-84 months[2]; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon[3]; as to COUNT 15 – 24-84 months; plus a CONSECUTIVE term of 12 to 60 months for use of a deadly weapon; COUNTS 11-15 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 7. 3a AA 535.

As to COUNT 16 – 12-84 months; as to COUNT 17 – 12-36 months; as to COUNT 18 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 19 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 20 – 24-84 months; plus a CONSECUTIVE term 12-60 months for use of a deadly weapon; as to COUNT

[2] The original JOC indicated a sentence of 12-84 months for Count 14. This was a clerical error which was corrected in the Second Amended JOC. Respondent's Appendix (hereinafter "RA"), 4.

[3] The original JOC omitted the consecutive term for use of a deadly weapon for Count 14. This was a clerical error which was corrected in the Second Amended JOC. Id.

21 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; COUNTS 16-21 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 15. 3a AA 535-36.

As to COUNT 22 – 12-84 months; as to COUNT 23 – 12-36 months; as to COUNT 24 – 24-84 months; plus a CONSECUTIVE term 12-60 months for use of a deadly weapon; as to COUNT 25 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; COUNTS 22-25 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 21. 3a AA 536.

As to COUNT 26 – 12-84 months; as to COUNT 27 – 12-36 months; as to COUNT 28 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 29 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 30 - 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 31 - 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 32 - 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; COUNTS 26-32 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 25[4]. 3a AA 536-377.

[4] The original JOC indicated that Counts 26-32 should be concurrent with each other and consecutive to Count 21. This was a clerical error which was corrected in the Third Amended JOC. RA, 18.

As to COUNT 33 – 12-84 months; as to COUNT 34 – 12-36 months; as to COUNT 35 – 12-60 months; plus a CONSECUTIVE term of a MINIMUM 12-60 months for use of a deadly weapon; as to COUNT 36 – 12-60 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; COUNTS 33-36 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 32[5]. 3a AA 537-38.

As to COUNT 37 – 12-84 months; as to COUNT 38 – 12-36 months; as to COUNT 39 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 40 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 41 -24-84 months; plus a CONSECUTIVE term of 12-60 month for use of a deadly weapon; as to COUNT 42 – 24-84 months; plus a CONSECUTIVE term of a 12-60 months for use of a deadly weapon; as to COUNT 43 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; COUNTS 37-43 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 36. 3a AA 538.

As to COUNT 44 – 12-84 months; as to COUNT 45 – 12-36 months; as to COUNT 46 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 47 – 24-84 months; plus a CONSECUTIVE term

[5] The original JOC indicated that Counts 33-36 should be concurrent with each other and consecutive to Count 25. This was a clerical error which was corrected in the Third Amended JOC. RA, 19.

of 12-60 months for use of a deadly weapon; COUNTS 44-47 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 43. 3a AA 538-39.

As to COUNT 48 – 12-84 months; as to COUNT 49 – 12-36 months; as to COUNT 50 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 51 - 24-84 months; plus a CONSECUTIVE term of 12-60 month for use of a deadly weapon; COUNTS 48-51 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 47. 3a AA 539.

As to COUNT 52 – 12-84 months; as to COUNT 54 -12-36 months; as to COUNT 56 – 24-84 months; plus a CONSECUTIVE term 12-60 months for use of a deadly weapon; as to COUNT 57 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 58 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 59 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; COUNTS 52-59 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 51. 3a AA 539-40.

As to COUNT 60 – 12-84 months; as to COUNT 61 – 12-36 months; as to COUNT 63 – 24-84 months; plus a CONSECUTIVE term of a 12-60 month for use of a deadly weapon; as to COUNT 64 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 65 – 24-84 months; plus a CONSECUTIVE term of a MINIMUM of 12-60 months for use of a deadly

weapon; as to COUNT 66 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; COUNTS 60-66 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 59. 3a AA 540-41.

As to COUNT 68 - 12-84 months; as to COUNT 69 – 12-36 months; as to COUNT 71 – 12-36 months; as to COUNT 72 - to 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 73 – 12-36 months; as to COUNT 74 – 24-84 months; plus a CONSECUTIVE term of 12-60 month for use of a deadly weapon; as to COUNT 75 – 12-36 months; as to COUNT 76 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 77 – 12-36 months; as to COUNT 78 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; as to COUNT 79 – 12-36 months; as to COUNT 80 – 24-84 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; COUNTS 68-80 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 66. 3a AA 541-42.

As to COUNT 81 - 12-36 months; as to COUNT 82 – 12-60 months; plus a CONSECUTIVE term of 12-60 months for use of a deadly weapon; COUNTS 81 and 82 CONCURRENT with EACH OTHER and CONSECUTIVE to COUNT 80. 3a AA 542.

Appellant received SIX HUNDRED FIFTY-FOUR (654) DAYS credit for time served. The aggregate total sentence is 444 to 1,824 months in the Nevada Department of Corrections. Id.

Appellant filed a Notice of Appeal on September 23, 2016. He filed the instant Opening Brief (hereinafter "AOB") on June 21, 2017. The State herein responds.

STATEMENT OF THE FACTS

The following Statement of Facts outlines a series of fourteen (14) armed robbery incidents that occurred in the Las Vegas Valley on or between October 28, 2014, and November 25, 2014.

No. 1: 10/28/2014 - El Pollo Loco on 4011 East Charleston [Counts 1-7]

On the evening of October 28, 2014, Jamie Schoebel, Jennifer Hernandez, Jose Borja, Diana Mena, and David Cabalerro were working at the El Pollo Loco restaurant located at 4011 East Charleston. 5e AA 1177-82. At about 11:30 p.m., Ms. Schoebel was doing inventory in her office when one of her employees, Diana Mena, came in the office and said that they were being robbed. 5e AA 1189. Immediately thereafter, Ms. Schoebel turned around to see two men, one with a gun and one with a knife, in the store. 5e AA 1190, 1192.

The gunman entered the office, followed by the man with the knife. 5e AA 1194. When Ms. Schoebel attempted to open the safe the first time, she entered the

safe combination incorrectly and failed to open the safe. 5e AA 1195. After the safe failed to open, the man with the gun hit one of the employees, Jose Borja, in the head with the gun. Id. The man with the gun continued to hit Mr. Borja with the gun as Ms. Schoebel tried to open the safe again. 5e AA 1195. The man with the gun also held the gun to Mr. Borja's head and informed Ms. Schoebel that if she did not open the safe in time he would shoot Mr. Borja. 5e AA 1196. When the safe was finally opened, the man with the knife took the money, and he and the gunman ran out of the restaurant through the back door. 5e AA 1198. Ms. Schoebel estimated that the men took approximately $800 to $1,000 in cash. Id.

Both men were African American and were wearing red bandanas and gloves. 5e AA 1191, 1193. The gunman was taller, between 5'10" and over 6 feet, thin, and was wearing a gray sweater. 5e AA 1192; 5f AA 1229; 6a AA 1255. The man with the knife was shorter, approximately 5'7", and was wearing a black hoodie. 5e AA 1192; 5f AA 11230-31; 6a AA 1255.

Finally, Ms. Schoebel testified that her restaurant is equipped with a video surveillance system, she is familiar with system, and that the surveillance video played at trial fairly and accurately depicted the robbery that occurred on October 28, 2014. 5e AA 1199-1200.

No. 2: 10/29/2014 - 7-Eleven on 4581 East Charleston [Counts 8-10][6]

On October 29, 2014, Darnell Butler was working the graveyard shift as a clerk at the 7-Eleven at 4581 East Charleston. 6a AA 1264. At trial, Mr. Butler confirmed that the statement he gave the police on the night of the robbery indicated that two men entered the store and the first one said "it's a stick-up, give me all the money."[7] 6b AA 1274. They both wore red bandanas, red gloves, and dark pants. Id. The shorter of the men held a gun. Id. The other man had a knife. 6b AA 1280.

Mr. Butler also confirmed that the store was equipped with video surveillance which was working on the night in question, and that the video that was shown was a fair and accurate depiction of the events. 6a AA 1266, 1279.

No. 3: 11/01/2014 - Pizza Hut on 6130 West Lake Mead [Counts 11-15]

On the night of November 1, 2014, Shanon Poole, George Thimakis, and Daniel Hefner were working at the Pizza Hut located at 6130 West Lake Mead. 6b AA 1310-11, 1313. At about 11 p.m. that night, Ms. Poole went to the back of the restaurant to ask her manager a question for a customer on the phone when two men broke in and told her and her co-workers to get on the ground. 6b AA 1312-13. There was a taller, skinny man holding a gun, and a shorter, slightly thicker man

[6] Appellant was found not guilty on Counts 8-10. These facts are included here only to provide an entire overview of the case.

[7] At trial, Mr. Butler was in custody on another case. He claimed to not remember anything, and that "[he was] not going to help [the State] do nothing." 6b AA 1272. The statement he gave police on the night of the robbery was admitted as an exhibit.

holding a knife. 6b AA 1315. The man holding the knife grabbed Ms. Poole by the wrist and told her to get down. 6b AA 1316-17. She got to her knees, and her coworkers were lying face down in the floor. 6b AA 1317.

The suspects ordered Mr. Hefner to open the safe for them. 6b AA 1317. Mr. Hefner responded that only the manager could open the safe, and the manager will be back in five minutes. Id. The suspects then ordered Mr. Hefner to open the cash register to which Mr. Hefner again responded that only the manager can open the register. 6b AA 1318. The suspects then went to the front of the restaurant. Id. After about a minute or so, Mr. Hefner walked around to the corner to see what the suspects were doing, and they were gone. 6b AA 1318. The front register was gone; the monitor, the computer, and the printer were all on the floor. Id. The suspects took approximately $160 in cash. 6b AA 1319.

Both suspects were wearing handkerchiefs over their face, hoodies, and gloves. 6b AA 1315; 6c AA 1326, 1328. Regarding the race of the armed men, they were both African American. 6b AA 1315.

At trial, Ms. Poole testified that the Pizza Hut was equipped with a video surveillance system, that she was familiar with that surveillance system, and that she had seen video footage of the robbery after it had taken place. 6c AA 1320-21. Ms. Poole then verified that the video played in court was a fair and accurate depiction of the events as she perceived them, with the exception that the surveillance video showed

a third suspect present who none of the employees realized was there on the night in question. 6c AA 1321.

No. 4: 11/03/2014 - Pizza Hut on 5105 East Sahara [Counts 16-21]

On November 3, 2014, Trevor Faraone, Thomas Bagwell, Ashley Carmichael, and Guy Brown were working at the Pizza Hut located at 5105 East Sahara. 6c AA 1337-38. At about 11 p.m., a tall man wearing all black holding a gun ran through the front door of the restaurant and told everyone to get down. 6c AA 1340-41. Mr. Faraone, Ms. Carmichael, and Mr. Bagwell were inside the restaurant when the robbery occurred, however Mr. Brown was not in the restaurant as he was out on a delivery run. 6c AA 1338. A second suspect was also present, watching over Mr. Faraone's coworkers. 6c AA 1342.

The first man then told Mr. Faraone to locate the safe while pressing a gun behind Mr. Faraone's back. 6c AA 1343. As Mr. Faraone led the gunman to the safe located under the front counter, the gunman began to pistol-whip Mr. Faraone in the head to make him move faster. 6c AA 1344. When they got to the safe, Mr. Faraone showed the suspect that the safe was time-locked, and that he could not open it. 6c AA 1343. The gunman again struck Mr. Faraone in the head with his firearm. Id. The gunman then told Mr. Faraone to open the tills, and Mr. Faraone complied. Id. The suspect struck Mr. Faraone in the head with the gun again as he removed the money from the till. 6c AA 1343-44. Mr. Faraone took the money from the tills and

put them into a garbage bag. 6c AA 1346. The suspects took approximately $200 from the tills. 6c AA 1345.

After Mr. Faraone emptied the tills, the suspects then told Mr. Faraone and his coworkers to get on the ground. 6c AA 1346. The suspects went through Mr. Faraone and his employees' pockets to look for items to take. 6c AA 1247. At this point, Mr. Brown returned to the restaurant from his delivery run. 6c AA 1347-48. The first suspect saw Mr. Brown enter the restaurant, grabbed him, pulled him to the ground, and took money from the delivery out of his hand. 6c AA 1348. The suspects also took an iPhone belonging to Ms. Carmichael. 6c AA 1347. Then the suspects exited the back door of the restaurant. 6c AA 1348.

At trial, Mr. Faraone testified that the surveillance video played fairly and accurately depicted the robbery that occurred on November 3, 2014. 6c AA 1348-49.

No. 5: 11/04/2014 - Little Caesars on 4258 East Charleston [Counts 22-25]

On the night of November 4, 2014, Idania Sacba was working at Little Caesars on 4258 East Charleston. 8d AA 1887. She normally does not work at that particular Little Caesars, but she was there that night to drop off paperwork. 8d AA 1886. A delivery driver, Jesus Dorame, was also present. 8d AA 1888.

While working on her paperwork, Ms. Sacba heard a man's voice that was not Mr. Dorame's coming from near the entrance of the store. 8d AA 1890. As Ms.

Sacba tried to get up from her chair to go outside, she was confronted by a man pointing a gun at her. 8d AA 1891-92. He was wearing a black jacket and had a mask on his face. 8d AA 1891. She described the gunman's height as over six feet tall, and his race as black. 8d AA 1891-92.

The man then pulled Ms. Sacba to the front of the restaurant while pointing a gun to her head. 8d AA 1893. On the way, he took her cellular phone. 8d AA 1895. He told Ms. Sacba to open the safe to which Ms. Sacba responded that this was not her store, and she can't open the safe because she doesn't have the code. 8d AA 1894. For a few minutes, the gunman ordered Ms. Sacba to open the safe, to no avail. Id. At this point, the gunman told an unknown individual that it wasn't Ms. Sacba's store. 8d AA 1895. The gunman then ordered Ms. Sacba to go back to the back office. 8d AA 1894.

At trial, Ms. Sacba testified that the surveillance video that was played was a fair and accurate depiction of the robbery. 8d AA 1897.

No. 6: 11/15/2014 - Popeye's on 4505 East Bonanza [Counts 26-32]

On the night of November 15, 2014, Jeronimo Urbina Ruiz, Karina Aguilar, Johana Vasquez, Angelica Pedrosa, and Juan Taingo were working at the Popeye's restaurant located at 4504 East Bonanza. 6d AA 1413-14. At about 10:45 p.m., as Mr. Ruiz was in the front of the restaurant getting ready close, he heard the sound of glass breaking. 6d AA 1416. At first, he thought one of his employees had broken

some dishes so he went to the back to check on them. 6d AA 1417. Then he heard someone shout: "He's got a gun, he's got a gun" and saw someone following one of his employees with a gun Id. Mr. Ruiz later learned that the sound of glass breaking was the suspect breaking through the glass panel on the front door of the restaurant. Id.

Mr. Ruiz saw the suspect holding a gun, which Mr. Ruiz described as a revolver. 6d AA 1419. Mr. Ruiz described the gunman as about 6'1" or 6'2" in height. 6d AA 1418. The gunman was wearing a black and gray hoodie, a black bandana on his face, red and black gloves, and black combat boots. Id.

Mr. Ruiz attempted to flee the store with Ms. Aguilar and Ms. Vazquez, but as they reached the front of the store the gunman grabbed one of the girls. 6d AA 1419. The suspect then pointed his gun at Ms. Vasquez and demanded that Mr. Ruiz take him to the safe. 6d AA 1421. At gunpoint, the suspect followed Mr. Ruiz and the two girls to the safe. Id. Mr. Ruiz opened the safe for the suspect. Id. At this point, the suspect noticed that there was a grocery bag from a Cardenas supermarket laying right next to the safe on the floor, and the suspect told Mr. Ruiz to put the money in the Cardenas bag. 6e AA 1422. Then the suspect said "let's go, let's go" to someone who was outside the back door, and the suspect left from the back door. Id. Mr. Ruiz did not see the second person. Id. About $2,000.00 was taken. Id.

At trial, Mr. Ruiz acknowledged that his store was equipped with a video surveillance system, and that the surveillance video played fairly and accurately depicted the robbery that occurred on November 15, 2014. 6e AA 1425-26.

No. 7: 11/17/2014 - Burger King on 2599 South Nellis [Counts 33-36]

On the night of November 17, 2014, Jose Romero, Cornell Combs, and Sonia Soto De Mason were working at the Burger King located at 2599 South Nellis Boulevard. 7a AA 1487-88. At about 12: 42 a.m., Mr. Romero heard banging on the front entrance door of the restaurant and Mr. Combs shouts out that someone was trying to break into the restaurant. 7a AA 1490. Mr. Romero and Mr. Combs then ran to the back of the restaurant. 7a AA 1492. Ms. Soto De Mason was by the broiler in the kitchen, and she asked what was going on. Id. When Mr. Combs opened the back door, a dark-skinned man was waiting outside the door. 7a AA 1492; 7b AA 1535. He was wearing a two tone gray sweater and a red bandana over his face, and holding a gun. 7a AA 1496; 7b AA 1534. The man called out to another person Mr. Romero could not see. 7a AA 1492. Then the suspect hit Mr. Cornell, and Mr. Cornell fell to the ground. 7a AA 1492. The suspect pointed the gun at Mr. Cornell and told him he had seen Mr. Cornell's face, so if the suspect saw Mr. Cornell on the street he would recognize him. 7b AA 1534-35. Mr. Romero then ran to the front of the restaurant. 7a AA 1493. Mr. Romero ran out of the front door and dialed 911 with his cellphone. 7a AA 1494.

Meanwhile, Ms. Soto De Mason hid behind some racks in the kitchen. 7b AA 1536. A second man with a gun came and grabbed her and asked where the money was. 7b AA 1536, 1539. After Ms. Soto De Mason told him she did not know, a third man also asked her where the money was. 7b AA 1537. After Ms. Soto De Mason and Mr. Cornell both insisted they did not know where the money was, the three men left. 7b AA 1538.

At trial, Mr. Romero testified that his store was equipped with a video surveillance system, and that the surveillance video played fairly and accurately depicted the robbery that occurred on November 17, 2014. 7a AA 1495.

No. 8: 11/17/2014 - Wendy's on 990 North Nellis [Counts 37-43]

On November 17, 2014, Juan Mendoza, Janie Fannon, Jesus Lopez, and Anthony Maddaford were working at the Wendy's located at 990 North Nellis. 6e AA 1464-66. Jesus Lopez's girlfriend, Noemy Marroquin, was also at the restaurant. 6d AA 1376. At approximately 1 a.m., Mr. Mendoza saw two men with a gun holding Ms. Marroquin as hostage walking up to him. 6e AA 1469. The suspects had entered the restaurant by breaking one of the side entrance doors. 6e AA 1467. At one point, the suspects hit Mr. Mendoza on the head with a gun. 6e AA 1471.

One suspect was wearing a red bandana and holding a gun to Ms. Marroquin. 6e AA 1469. The other suspect was wearing a blue bandana and holding a gun to

Mr. Mendoza. Id. Both men were wearing blue gloves and were dark skinned. 7a AA 1478, 1477.

The suspects then had Mr. Mendoza open the safe. 6e AA 1470. The suspects took the money and put the money into a blue bag, which was not a plastic bag but some other material. 6e AA 1471; 6f AA 1473. The suspects took anywhere from $200 to $800 in cash. 6f AA 1476.

At trial, Mr. Mendoza testified that the surveillance video played at trial fairly and accurately depicted the robbery that occurred on November 17, 2014. 7a AA 1480.

No. 9: 11/21/2014 - Wendy's on West Lake Mead [Counts 44-47]

On November 21, 2014, Jessica Hubbard, Jorge Morales, Daniel, and Adrianna were working at the Wendy's on 7150 West Lake Mead. 7a AA 1511-12. Ms. Hubbard was in her office doing some paperwork when she heard glass shattering. 7a AA 1517-18. She thought one of her crew had broken a coffee pot, and she got up. 7a AA 1518. Then she saw two men coming from around the corner, one of whom had a gun pointed at her. Id. The gunman pointed the firearm at Ms. Hubbard while the second man rounded up the other employees and brought them to the office. 7a AA 1520. With his gun pointed at Ms. Hubbard's head, the gunman told Ms. Hubbard to open the safe. 7a AA 1520; 7b AA 1523. The suspects took a little under $200 in rolled-up and loose change and put it in a cardboard box. 7a AA

1521. They also took Ms. Hubbard's cellphone, a white Samsung Galaxy S4. 7b AA 1524.

The gunman was a black male, about 6 feet in height, wearing all black, a white surgical mask over his face, and gloves. 7a AA 1518-19. The suspect without a gun was also a black male, shorter than the gunman by a few inches, also wearing all black and a white surgical mask. Id.

At trial, Ms. Hubbard testified that the surveillance video played at trial fairly and accurately depicted the robbery that occurred on November 21, 2014. 7b AA 1525.

No. 10: 11/22/2014 - Popeye's on 60 Stephanie Street [Counts 77-81]

On the night of November 22, 2014, Alejandra Uribe, Skyler Cox, Maria Lucia, Gamaliel Zavala, Guillermo Ramirez, and Silvia were working at the Popeye's located at 60 Stephanie Street. 7b AA 1545, 1548-49. At about 11:15 p.m., someone through a rock through the main entrance window, breaking it, and entered through the hole. 7b AA 1553-55. The man was dark-skinned, and was wearing a dark hoodie, a surgical mask, and dark pants, and was carrying a gun. 7b AA 1754-55. A second dark-skinned man also broke into the restaurant, entering through the drive-thru window; he was armed with a knife. 7b AA 1559; 7c AA 1575.

The gunman demanded that everyone get on the ground. 7b AA 1555. Then, while holding them at gunpoint, ordered Ms. Uribe and Mr. Cox to the safe and ordered them to open it. 7b AA 1556; 7c AA 1576. The two suspects then ordered the victims to put the money from the safe into a grocery bag and a blue cloth bag, the color of Walmart blue, to contain the money. 7b AA 1559-60; 7c AA 1576. The suspects also took a cellular phone belonging to Guillermo Ramirez. 7b AA 1563. After the suspects took the money and the phone, they left through the drive-thru window. 7b AA 1562.

At trial, Ms. Uribe and Mr. Cox testified that the surveillance video played at trial fairly and accurately depicted the robbery that occurred on November 22, 2014. 7b AA 1564-65; 7c AA 1582-91.

No. 11: 11/23/2014 - El Pollo Loco on 7380 West Cheyenne [Counts 48-55]

On the night of November 23, 2014, Yanais Silva, Laura Lopez, Luis Lopes, and Sergio Bautista were working at the El Pollo Loco at 7380 West Cheyenne. 6b AA 1286087.

At approximately 11 p.m., Ms. Silva was getting ready to leave the restaurant by exiting the back door. 6b AA 1290. She heard a crashing sound from the front of the store, caused by someone throwing a rock through the front door. 6b AA 1291. Ms. Silva opened the back door to try and run, and she saw a man with a revolver outside the door. 6b AA 1293. The man was wearing a surgical mask covering his

face, dark pants, and black gloves. 6b AA 1293. The man pointed the gun at Ms. Silva and told her to get back inside. 6b AA 1294.

The first suspect then gathered all the employees and took them to the front of the restaurant. Id. When they got to the front Ms. Silva saw another suspect who was near the front counter. 6b AA 1295. The second suspect was also carrying a gun and wearing a surgical mask over his face. 6b AA 1296. Ms. Silva described both suspects to be African American. 6b AA 1301.

The suspects told the employees to kneel down and asked who the manger was. 6b AA 1296. Ms. Lopez then identified herself as the manager and was taken to the office to open the safe by one of the suspects. 6b AA 1296-97. The other suspect stayed with Ms. Silva and the other two employees. 6b AA 1297. The suspects took coins and currency from the safe and put them in a blue Walmart reusable bag. 6b AA 1297, 1300. They also took Ms. Lopez's iPhone. 6b AA 1300. Both men then exited the back door of the restaurant. 6b AA 1300.

No. 12: 11/23/2014 - Taco Bell on 9480 Lake Mead [Counts 56-63]

On the night of November 23, 2014, Vanessa Gonzalez-Aparicio, Holly Hadeed, and Jamie Ward were working at the Taco Bell at 9480 Lake Mead. 7d AA 1662-64. Ms. Gonzalez-Aparicio heard a crash, and went into the lobby to find a broken window and a man with a gun entering the restaurant. 7d AA 1665-66. The three women ran to the back door and when they opened it there was a second man

waiting with a gun. 7d AA 1667. Ms. Ward slipped past him, but he pulled Ms. Hadeed and Ms. Gonzalez-Aparicio back into the store. 7d AA 1667-68. Once inside the store, the gunman directed Ms. Hadeed and Ms. Gonzalez-Aparicio at gunpoint to go to the office and open the safe. 7d AA 1669-70. While in the office, the gunman stole Ms. Gonzalez-Aparicio's cellular phone. 7d AA 1670. Ms. Gonzalez-Aparicio was unable to open the safe, and eventually the men left after stealing only her phone. 7d AA 1671.

At trial, Ms. Gonzalez-Aparicio described the suspects. 7d AA 1672. One was quite tall, and the other was around 5'6". Id. They were both African American, had their faces covered, and were wearing gloves and black and gray jackets. 7e AA 1673. Additionally, Ms. Gonzalez-Aparicio testified that the surveillance video played at trial fairly and accurately depicted the robbery that occurred on November 23, 2014. 7e AA 1680-87.

No. 13: 11/24/2014 - Popeye's on 6121 Vegas Drive [Counts 64-76]

On the night of November 24, 2014, Alma Gomez, Angelica Abrego, Gabriela Oyoque, Rafael Velazquez, and Jose Esponoza were working at Popeye's located at 6121 Vegas Drive. 7d AA 1628, 1630. That night, as Ms. Gomez was standing in the front counter of the Popeye's restaurant, she saw someone break the lobby glass door with a hatchet. 7d AA 1635-36. Ms. Gomez described the person as a black male, dressed in black attire including a black hoodie, and wore a mask over his face.

7d AA 1637. She also testified that the man was holding a hatchet and a gun. 7d AA 1637.

After seeing the man coming into the restaurant, Ms. Gomez ran to the back of the restaurant to find her co-workers who were cleaning. 7d AA 1638. Ms. Gomez then tried to open the back exit door, but she couldn't push the door open because there was someone on the other side of the door who was holding it closed. 7d AA 1638-39. Ms. Gomez and Mr. Velazquez then pushed the door together. 7d AA 1638. When they finally pushed the back door open, a second man came into the restaurant from that door. 7d AA 1639. Ms. Gomez described the man as also dressed in black attire including a black hoodie, and wearing a mask over his face. 7d AA 1639-40. The second man was also holding a gun. 7d AA 1640.

The first man asked who the manager was, and Ms. Gomez identified herself. 7d AA 1640-41. The first man then gave Ms. Gomez a blue canvass bag and told her to put the money in the safe inside the bag. 7d AA 1641. Ms. Gomez and the first man then went to the office where the safe was located. 7d AA 1642. The first man ordered Ms. Gomez to empty the cash in the safe into the blue bag. 7d AA 1641. At gunpoint, she did so. 7d AA 1644-45. The men also took Ms. Gomez's cellphone, a white Galaxy S4, which was on the desk in the office. 7d AA 1646. The receipts Popeye's employees print out when they empty cash from the cash registers to the safe were also put into the blue bag along with the cash. 7d AA 1658-60.

While Ms. Gomez was putting money in the blue canvass bag, the second suspect stayed outside the office to watch over the other three employees who were ordered to lie face down on the ground. 7d AA 1645-46. After Ms. Gomez put the money in the blue bag she was ordered to join her coworkers and lie face down on the ground. 7d AA 1646. The two men then left through the back door of the restaurant. Id.

At trial, Ms. Gomez testified that the surveillance video played at trial fairly and accurately depicted the robbery that occurred on November 24, 2014. 7d AA 1647-48.

No. 14: 11/25/2014 - Taco Bell on 3264 South Nellis [Counts 82-83]

At trial, Detective Theodore Weirauch of the LVMPD robbery section testified that he was aware of the "windbreaker" series of robberies which occurred throughout November, 2014. 8a AA 1754-55. He was also aware that the suspect vehicle was a gray Dodge Charger. 8a AA 1755. On November 25, 2014, Detective Weirauch was looking for the suspect vehicle in the area of Nellis Boulevard and Flamingo Road. 8a AA 1759.

Detective Weirauch saw the suspect vehicle heading northbound on Nellis Boulevard. 8a AA 1760. Detective Weirauch then followed the Dodge Charger into a Taco Bell parking lot at 3264 South Nellis Boulevard. Id. Detective Weirauch

parked his unmarked vehicle approximately 75 feet from the Dodge Charger. 8a AA 1761.

Detective Weirauch observed the vehicle for five minutes before making a call to dispatch that he had spotted the robbery suspect vehicle. 8a AA 1764-65. About 30 minutes after the Dodge Charger parked, Detective Weirauch observed someone exiting the passenger rear door of the Dodge Charger. 8a AA 1764; 8b AA 1807. The person was wearing a black windbreaker and a surgical mask. 8a AA 1764. He observed the person exiting the vehicle go to the trunk of the car and rummage through it as if he was going to get something out of it. 8b AA 1767-68. Detective Weirauch noted that there were at least two other people sitting inside the Dodge Charger, one in the driver's seat and the other in the front passenger seat. 8a AA 1763. At this point, Detective Weirauch notified dispatch and asked for two patrol units that were already staged nearby for assistance in conducting a felony stop on the suspects. 8b AA 1767.

Detective Weirauch approached the Dodge Charger with the additional patrol units in tow. 8b AA 1767. As they shouted commands at the masked suspect standing at the trunk of the car, the suspect leaned into the trunk of the Dodge Charger and came out with his mask removed. 8b AA 1768-68. All three subjects were taken into custody. 8b AA 1774.

The three suspects were identified as follows: the masked suspect who exited the vehicle from the right rear door of the Dodge Charger was identified to be Brandon Starr. 8b AA 1771. The driver of the Dodge Charger was identified to be Donte Johns. 8b AA 1772. The front right passenger was identified to be Anthony Hobson. 8b AA 1771. Detective Weirauch also ran a vehicle registration check on the Dodge Charger, and it was registered to Donte Johns. 8b AA 1769.

Inside the open trunk, Detective Weirauch was able to see the white surgical mask in the bottom right corner of the trunk. 8b AA 1774. Also located in the trunk was a hatchet/axe with an orange handle as well as silver over black semi-automatic handgun. 8b AA 1772, 1774. All three Defendants were taken back to headquarters to be interviewed. 8b AA 1775.

SUMMARY OF THE ARGUMENT

Each of Appellant's contentions in this Appeal are ultimately without merit and Appellant has failed to demonstrate that he is entitled to relief. Appellant was properly joined with Defendant Hobson at trial. The only co-defendant statement used was made by Defendant Johns *as he testified at trial*. Because Appellant had the opportunity to cross-examine Defendant Johns, Appellant's Sixth Amendment rights were not violated. Additionally, Appellant failed to prove that the racial composition of the jury panel systematically excluded African Americans. He was unable to do so at the evidentiary hearing in district court, and he has failed to do so

now. Further, the testimony and evidence presented at trial was proper. Detective Abell did not testify as to the identity of the individuals on the surveillance videos, but rather to his perceptions based on the videos and how that guided his investigation. Moreover, the district court has broad discretion regarding jury instructions, and the court here did not abuse that discretion by refusing to offer an instruction which has no basis in law. Similarly, the district court has discretion to sentence offenders concurrently or consecutively, and the court here did not abuse that discretion by judiciously sentencing Appellant consecutively on groups of counts constituting individual robberies. Further, there was sufficient evidence to convict Appellant. The State presented testimony from 32 witnesses, as well as surveillance video from each crime, and DNA evidence. In addition, the co-defendants were caught as they attempted to commit a 14th robbery. Finally, Appellant has not shown any errors requiring reversal, much less enough errors to be considered cumulative.

For these reasons, the State respectfully asks that this Court order Appellant's Judgment of Conviction be AFFIRMED.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SEVER.

NRS 173.135 provides for the joinder of defendants by stating:

> **Two or more defendants may be charged in the same indictment or information if they are alleged to have**

> **participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses**. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

(Emphasis added). Additionally, case law in Nevada has held that persons who have been jointly indicted should be tried jointly, absent compelling reasons to the contrary. See e.g., Jones v. State, 111 Nev. 848, 853, 899 P.2d 544 (1995).

NRS 174.165 provides that "[i]f it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information . . . the court may . . . grant a severance of defendants or provide what other relief justice requires." In order to obtain a severance, a defendant must demonstrate that substantial prejudice would result from a joint trial. The decision to sever is left to the discretion of the trial court and such decision will not be reversed absent an abuse of discretion. Amen v. State, 106 Nev. 749, 801 P.2d 1354 (1990). Broad allegations of prejudice are not enough to require a trial court to grant severance. United States v. Baker, 10 F.3d 1374, 1389 (9th Cir. 1993), cert. denied, 513 U.S. 934, 115 S. Ct. 330 (1994) (overruled on other grounds by United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000)). Finally, even if prejudice is shown, the trial court is not required to sever; rather, it must grant relief tailored to alleviate the prejudice. See e.g., Zafiro v. United States, 506 U.S. 534, 540-41, 113 S. Ct. 933 (1993).

The Ninth Circuit Court of Appeals has stated that the presumption is heavily in favor of joint trials. "[C]o-defendants jointly charged, are, prima facie, to be jointly tried." United States v. Gay, 567 F.2d 916, 919 (9th Cir.), cert. denied, 435 U.S. 999, 98 S. Ct. 1655 (1978); United States v. Silla, 555 F.2d 703, 707 (9th Cir. 1977) ("compelling circumstances" are generally necessary to show need for separate trials). The trial court has the broad discretion to join or sever trials and severance is not required unless a joint trial would be manifestly prejudicial. See Gay, 567 F.2d at 919. Federal appellate courts review a denial of a motion to sever for abuse of discretion and "[t]o satisfy this heavy burden, an appellant must show that the joint trial was so prejudicial as to require the exercise of the district judge's discretion in only one way: by ordering a separate trial." United States v. Ford, 632 F.2d 1354, 1373 (9th Cir. 1980), cert. denied, 450 U.S. 934, 101 S. Ct. 1399 (1981) (overruled on other grounds, United States v. DeBright, 730 F.2d 1263 (9th Cir. 1984)).

In both the state and federal system, the general rule favoring joinder has evolved for a specific reason—there is a substantial public interest in joint trials of persons charged together because of judicial economy. Jones, 111 Nev. at 854, 899 P.2d at 547. Joint trials of persons charged with committing the same offense expedites the administration of justice, relieves trial docket congestion, conserves judicial time, lessens the burden on citizens called to sacrifice time and money while

serving as jurors, and avoids the necessity of calling witnesses more than one time. Id. at 853-54, 899 P.2d at 547; see also United States v. Brady, 579 F.2d 1121 (9th Cir. 1978), cert. denied, 439 U.S. 1074, 99 S. Ct. 849 (1979). Therefore, the legal presumption is in favor of a joint trial among co-defendants.

With regard to statements made by Donte Johns, severance is required when the statement of one **non-testifying** defendant to be admitted at trial directly inculpates a co-defendant. See Bruton v. United States, 391 U.S. 123, 137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (emphasis added). This is so because admitting such a statement violates the co-defendant's Sixth Amendment right to confront and cross examine the non-testifying declarant. Id. at 126, 88 S.Ct. 1622. While Bruton made clear that "facially incriminatory" statements must be excluded, it left open whether and what kind of redactions of a statement might avoid a Sixth Amendment violation. Thus, the Supreme Court revisited Bruton on two (2) later occasions to determine the scope of the rule announced in that case with regard to redactions.

In Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), the Supreme Court clarified that only statements that expressly implicate the defendant, and that are powerfully incriminating implicate Bruton's proposition that a limiting instruction will not sufficiently protect a defendant's Confrontation Clause rights. Id. at 207. It further clarified that a limiting instruction adequately protects a defendant's Confrontation Clause rights when a co-defendant's confession "is

redacted to eliminate not only the co-defendant's name, but any reference to his or her existence" and that confession only becomes incriminating when linked with other evidence introduced in the case. See Id. at 208-211, 107 S.Ct. 1702. However, the Marsh Court expressed no opinion on the admissibility of a confession in which the co-defendant's name is replaced with a neutral pronoun, such as "person," "individual," or "associate," or a symbol. See Marsh, 481 U.S. at 210, n. 5, 107 S.Ct. 1702.

A similar issue was addressed in Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151 (1998). There, the Supreme Court concluded that it is not enough to replace the co-defendant's name "with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted," such that it is nonetheless "facially incriminatory" and "directly accusatory." Such a redacted statement still falls within the Bruton rule and is inadmissible. Id. at 193-95, 88 S.Ct. at 1620. Gray still did not address whether redactions that replace the co-defendant's name with a neutral pronoun, instead of a deletion or blank space, might, in some circumstances, be constitutionally permissible where other independent evidence might permit the jury to conclude that the co-defendant is the person referenced in the redacted statement. Yet, the Court seemed to imply that such redactions would be acceptable. Id. at 196.

Statements of defendants can be introduced in multiple defendant cases if properly redacted. Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987). Nothing about proper redactions would "facially incriminate" the defendant. The Nevada Supreme Court has specifically embraced the rule of Bruton to permit the introduction of redacted statements that do not "facially incriminate" a co-defendant. Lisle v. State, 113 Nev. 679, 692-93 (1997)(redacted statement of co-defendant which replaced Lisle's name with "the other guy" was not facially incriminating and did not offend Bruton); Richardson v. Marsh, 481 U.S. 200, 208, 107 S.Ct. 1702 (1987); United States v. Enriquez-Estrada, 999 F.2d 1355, 1359 (9th Cir. 1993).

In this case, the district court was properly satisfied that the State could and would appropriately redact Defendant Johns' statement.[8] Because properly redacted statements are permissible, the district court did not abuse its discretion by denying Appellant's Motion to Sever. Moreover, Bruton and its progeny serve to protect defendants' Sixth Amendment right to confrontation. In this case, Defendant Johns testified at trial and was subject to cross-examination and a Bruton analysis is unnecessary in this instance. Therefore, Appellant's Judgment of Conviction should be affirmed.

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[8] Although Appellant claims Defendant Hobson made a confession, he did not. Certainly, no such confession was introduced at trial. AOB, 13.

II. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION CHALLENGING THE RACIAL COMPOSITION OF THE JURY PANEL.

The Sixth Amendment entitles a defendant to a jury venire selected from a fair cross section of the community. Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996) (overruled on other grounds by Nika v. State, 124 Nev. 1272, 198 P.3d 839 (2008)); Williams v. State, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005). However, this does not mean that defendants are entitled to "a perfect cross section of the community." Williams, 121 Nev. at 939, 125 P.3d at 631. Indeed "the Sixth Amendment only requires that 'venires from which juries are drawn must not systemically exclude distinctive groups in the community…'" Id. at 939-40, 125 P.3d at 631 (quoting Evans, 112 Nev. at 1186, 926 P.2d at 274). To show a prima facie violation of this requirement, the defendant must show:

> "(1) that the group alleged to be excluded is a '*distinctive' group* in the community; (2) that the *representation of this group in venires* from which juries are selected *is not fair and reasonable* in relation to the number of such persons in the community; and (3) that this underrepresentation is *due to systematic exclusion* of the group *in the jury-selection process.*"

Id. at 940, 125 P.3d at 631 (quoting Evans, 112 Nev. at 1186, 926 P.2d at 274) (emphasis in original). In Williams, this Court found African Americans comprise a distinctive group and that one out of forty venire members was not fair and reasonable in relation to its representation. Id. at 940, 125 P.3d at 631. However, like Appellant here, the defendant in Williams failed to show that Clark

County systematically excludes African Americans from the jury selection process. Id.

In this case, Appellant made an oral motion to strike the entire venire based on lack of racial diversity. 3b AA 573. As a result of that motion, jury commissioner Mariah Witt was called for an evidentiary hearing. 3b AA 576. Her testimony provided insight into how jury pools are selected, as well as how the racial composition of those pools is calculated. Notably, the race information is based on answers to a questionnaire that pool members receive before reporting. 3b AA 578. Although Appellant asserts that only 4% of his jury pool was African American, it is far more correct to say that *at least* 4% was African American. Of the 1,001 individuals summoned on that day, 474 of them did not respond to the questionnaire and therefore, their races are unknown. 3b AA 586. Of the 527 that did respond to the questionnaire, 41 were African American – 7.8%. While this is still not the 10% representation of the total population, it is evidence that the total percentage of African Americans summoned is actually much higher; and therefore, there is no systematic exclusion. Rather, only 12 of the 41 persons who identified as African America were legally qualified to sit as jurors. 3b AA 586. Of those 12, two (2) were in a pool, two (2) were excused and eight (8) asked to postpone their jury service. 3b AA 587.

Moreover, Appellant argues that using a list of customers from Nevada Energy may under represent African American jurors because people on public assistance or sharing an apartment would not have an energy bill. AOB, 19. However, Ms. Witt did not testify that people on public assistance would not have an account with Nevada Energy. Indeed, she testified that she did not know whether they would or not, but in the event they did not, they would still be included on the DMV list. 3b AA 582, 584. Further, the DMV list is sourced not only from those who have driver's licenses, but also those who have ID cards, vehicle registration, or any other record with the DMV. 3b AA 585. Finally, Appellant offers no proof that African Americans are more likely to be on public assistance or sharing an apartment than any other racial group.

Appellant argues that because "the jury commissioner had obviously done nothing significant since Williams…," then reversal is in order. APB, 21-22. However, not only does Appellant fail to prove that the commissioner has not made any changes since Williams, he fails to prove that changes were needed. Indeed, this Court in Williams did *not* hold that there was systematic exclusion which needed to be corrected. This Court held that the defendant in that case did not meet his burden of proving whether there was systematic exclusion or not. Likewise, Appellant here has failed to meet this burden. He argues that Ms. Witt's answers were unsatisfactory and so he is entitled to a reversal, but he had every opportunity to

question Ms. Witt about the process of jury selection, what if any changes were made since Williams, whether there truly was a disparity between the number of African Americans in the jury pool and the percentage of African Americans in Clark County, and, if so, why. Instead, he chose to focus on whether individuals on public assistance would be on *one* of the lists utilized. 3b AA 582-83. Appellant failed to show a prima facie violation of the fair-cross-section requirement, and the district court properly so ruled. Last, Clark County's jury selection system has been upheld on appeal by the Nevada Supreme Court. See Battle v. State, No. 68744, 2016 Nev. Unpub. LEXIS 607 (Aug. 10, 2016). Nothing in the County's method for pulling potential jurors from the lists compiled by the Department of Motor Vehicles and Nevada Energy encourages, or allows, the jury commissioner to systematically exclude potential jurors on the basis of race. Therefore, Hobson's argument is without merit and his Judgment of Conviction should be affirmed.

III. THE DISTRICT COURT DID NOT ERR IN ALLOWING DETECTIVE ABELL TO MAKE OPINION IDENTIFYING APPELLANT IN SURVEILLANCE VIDEOS.

NRS 50.265 guides the testimony of lay witnesses and states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
> 1. Rationally based on the perception of the witness; and
> 2. Helpful to a clear understanding of his testimony or the determination of a fact in issue.

The statute specifically allows for the lay testimony sought to be excluded and does not limit certain testimony to only "expert opinions." Neither the statute nor the case law specifically precludes the testimony of lay witness.

Here, Detective Abell's testimony was based on his own perception and was given to help explain the reasons behind his investigative choices. Appellant's argument that Detective Abell testified as to the ultimate issue that Appellant and his co-defendant in this case were the people on the surveillance videos is incorrect. The Detective testified that he watched the surveillance videos many times and came to the conclusion that the same individuals were committing each robbery. 10e AA 2436. He later testified that he made an arrest of people he believed to be involved in the robbery series, and identified Appellant, Defendant Hobson, and Defendant Johns as those he arrested. 10e AA 2437-38. Explaining his investigatory decision to look for one set of suspects based on his perception of the videos is a far cry from opining that the defendants in this case were the ones on the video. Likewise, confirming that he made an arrest, and those individuals arrested were the ones on trial, is not the same as testifying that they were the ones in the video. Rather, it simply lets the jury know that the people who have been charged are the same people who were arrested.

Detective Abell also testified that there were similarities between the videos and other items he discovered during the course of his investigation. For example,

he testified that the Pittsburgh Pirates baseball hat he found in the apartment was also seen in the surveillance video of the Pizza Hut robbery on West Lake Mead. 10e AA 2451. Appellant also cites to A.A.02452. AOB, 23. Although nothing on that page of the transcript discusses the surveillance video, the Detective did testify that in the apartment he also found coin rolls and receipts which matched those taken in the robberies. 10e AA 2452. Detective Abell further testified that, when arrested, the defendants in this case were wearing clothing that the Detective had seen on the surveillance video. 10e AA 2455; 11a AA 2456. He also viewed still photographs from the videos and testified as to items of clothing he perceived as relevant, and as to in which hand he saw the suspects holding the gun or knife. 11a AA 2463. Defendant Hobsons's attorney lodged an objection to the Detective testifying as to his observations, but the court properly found that the officer was "testifying as to what was of concern or of issue for him in his investigation." 11a AA 2465-66. Indeed, that is what Detective Abell was doing. He testified as to his perceptions, and as to why certain pieces of evidence were relevant to him, and how those pieces of evidence led him to arrest and hold the defendants in this case. Testimony from an officer regarding the progression of their investigation is appropriate lay testimony, and the district court properly so ruled. Therefore, Appellant's Judgment of Conviction should be affirmed.

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IV. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S "INVERSE FLIGHT" JURY INSTRUCTION.

A district court has broad discretion with respect to jury instructions, and absent an abuse of discretion or judicial error, this Court will uphold a district court's decision regarding jury instruction decisions. Brooks v. State, 124 Nev. 203, 204, 180 P.3d 657 (2008). Further, the district court only abuses its discretion with regard to jury instructions when the court's "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Id. "While the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, the defendant is not entitled to an instruction which incorrectly states the law…" Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

As admitted by Defendant Hobson at trial, there is no legal basis for providing an inverse flight instruction. 11e AA 2700. See Frazier v. State, 2016 Nev. Unpub. Lexis 603 (noting that an inverse flight instruction was an incorrect statement of the law). Further, as argued by the State, it would have been disingenuous to give such an instruction after Appellant and his co-defendant fled after committing the prior 13 robberies. 11e AA 2701. Following argument, the district court properly ruled that it would not give the inverse flight instruction. To not give a jury instruction which has no basis in law is not an abuse of discretion, and does not entitle Appellant to relief. Therefore, his Judgment of Conviction should be affirmed.

V. APPELLANT'S SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibits the imposition of cruel and unusual punishment. The Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120 Nev. 410, 92 P.2d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

Additionally, the Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, and these are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (*citing* Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)). As long as the sentence is within the limits set by the legislature, a sentence will

normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 871 P.2d 950 (1994).

NRS 176.035(1) permits the district court to run counts consecutive to one another. "Except as otherwise provided in subsection 3, whenever a person is convicted of two or more offenses, and sentence has been pronounced for one offense, the court in imposing any subsequent sentence may provide that the sentences subsequently pronounced run either concurrently or consecutively with the sentence first imposed."

Here, the sentence imposed is within the limits set by the legislature. Appellant cites to Weems v. United States, 217 U. S. 349, 30 S. Ct. 544 (1910) to show that some statutorily approved sentences are unconstitutional. Weems involved a potential sentence of 12 years of hard labor in chains. Id. at 364. There, the statute fixing the punishment would be unconstitutional. Here, there is no allegation that the statute itself is unconstitutional, just that the district court should have used its discretion to run Appellant's convictions concurrent to one another. Pursuant to NRS 176.035, the court has discretion to run offenses either concurrently or consecutively. It is not an abuse of discretion to utilize the discretion granted by the legislature.

Moreover, the sentencing in this case was not arbitrary. When offenses were a part of the same robbery, the court grouped them together and ran them

concurrently. Offenses arising out of a separate robbery were run consecutively. Appellant seems to argue that because he chose to commit 13 robberies within a short amount of time he is entitled to a lesser sentence than he would receive if he spread his robberies out. He provides no legal authority for why his choice to commit 74 offenses within a month's span entitles him to relief. The district court did not abuse its discretion when sentencing Appellant, and Appellant's Judgment of Conviction should be affirmed.

VI. THERE WAS SUFFICIENT EVIDENCE TO FIND APPELLANT GUILTY OF ALL CRIMES OF WHICH HE WAS CONVICTED.

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-Candid 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. 2781, 2789 (1979). "Where there is substantial evidence to support a jury verdict, it [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97

Nev. 71, 73, 624 P.2d 20, 20 (1981).

Moreover, "it 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. 378, 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) (Court held it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972) (In all criminal proceedings, 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, 429 U.S. 895, 97 S.Ct. 257 (1976). This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20, 99 S.Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 895, 87 S.Ct. 483, 486 (1966)). This standard thus preserves 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." 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).

Moreover, this Court is not required to address generalized claims of error unsupported by any specific factual assertions. State, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

In this case, Appellant has not alleged any specific facts to support his claim that the State produced insufficient evidence. Indeed, his entire analysis is summed up in one sentence – "The Defendant submits under the rigorous standard outlined by the Supreme Court in *Jackson v. Virginia*, the State did not meet its burden of proof on all of the counts." AOB 32. Appellant does not allege which counts he believes were not supported by sufficient proof, nor which elements of those counts. As such, the State cannot properly respond to this allegation.

To the extent this Court is inclined to consider this bare allegation, the State notes that there was significant evidence provided to the jury. Over 12 days the jury heard from 32 witnesses, including Detective Ted Weirauch who caught Appellant and his co-defendants just as they were about to commit their 14th robbery, saw surveillance video and photographs from each crime scene, and learned of the

forensic evidence available. Given the magnitude of the evidence before the jury, it is eminently clear that a reasonable jury could have been convinced of Appellant's guilt beyond a reasonable doubt. As such, he is not entitled to relief and his Judgment of Conviction should be affirmed.

VII. THERE WAS NOT CUMULATIVE ERROR SUCH THAT APPELLANT'S CONVICTION MUST BE OVERTURNED.

Appellant lastly alleges that the cumulative effect of error deprived him of his right to a fair trial. However, Appellant has not asserted any meritorious claims of error and thus there is no error to cumulate.

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

Here, as discussed supra, the issue of guilt was never a close question. There was a significant amount of evidence to convict Appellant on the 74 counts for which he was found guilty. Regarding the quantity and quality of error issue, Appellant fails to demonstrate any error, let alone cumulative error sufficient to warrant relief. Last, regarding the gravity of the crimes charged, Defendant committed over 70

violent crimes while armed with weapons, and in the processed victimized more than 30 people. Those actions are extremely grave. Thus, the third cumulative error factor does not weigh in his favor. Therefore, Appellant's claim of cumulative has no merit and his Judgment of Conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

Dated this 19th day of October, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 11,862 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 19, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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