IN THE SUPREME COURT OF THE STATE OF NEVADA

JEMAR DEMON MATTHEWS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 77751

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals under NRAP 17(b) because it is a direct appeal from a judgment of conviction based on a jury verdict that involves a conviction for a Category A felony.

STATEMENT OF THE ISSUES

1. Whether the district court did not err in denying Matthews' Batson challenge
2. Whether the district court did not err in allowing Overson's testimony regarding K9s
3. Whether the district court did not err in prohibiting an untimely-disclosed defense witness from testifying
4. Whether there was no prosecutorial misconduct
5. Whether there was no cumulative error

STATEMENT OF THE CASE

Matthews was tried and convicted in 2007 of 11 felony counts, including First-Degree Murder. Matthews v. Neven, 250 F.Supp.3d 751, 755 (D. Nev. 2017). A federal district court granted Matthews' Petition for Writ of Habeas Corpus, warranting a retrial. Matthews, 250 F.Supp.3d at 757-72. The case proceeded to retrial, and on September 15, 2017, the State filed an Amended Information charging Matthews with: Count 1 – Conspiracy to Commit Murder; Count 2 – Murder with Use of a Deadly Weapon; Counts 3 through 5 – Attempt Murder with Use of a Deadly Weapon; Count 6 – Possession of Short Barreled Rifle; Count 7 – Conspiracy to Commit Robbery; Counts 8 and 9 – Robbery with Use of a Deadly Weapon; and Counts 10 and 11 – Assault with a Deadly Weapon. 1 AA 14-19. Matthews' trial began on September 24, 2018. 1 AA 12. On October 3, 2018, the jury found Matthews guilty on all counts. 4 AA 902-05.

On December 5, 2018, the district court sentenced Matthews to: Count 1 – 26 to 120 months; Count 2 – life with eligibility of parole after 20 years, plus a consecutive term of life with the eligibility of parole after 20 years for the deadly weapon enhancement, running concurrently to Count 1; Count 3 – 48 to 240 months, plus a consecutive term of 48 to 240 months for the deadly weapon enhancement, running concurrently to Count 2; Count 4 – 48 to 240 months, plus a consecutive term of 48 to 240 months for the deadly weapon enhancement, running concurrently

to Count 3; Count 5 – 48 to 240 months, plus a consecutive term of 48 to 240 months for the deadly weapon enhancement, running concurrently to Count 4; Count 6 – 12 to 48 months, running concurrently to Count 5; Count 7 – 12 to 72 months, running concurrently to Count 6; Count 8 – 40 to 180 months, plus a consecutive term of 40 to 180 months for the deadly weapon enhancement, running concurrently to Count 7; Count 9 – 40 to 180 months, plus a consecutive term of 40 to 180 months for the deadly weapon enhancement, running concurrently to Count 8; Count 10 – 16 to 72 months, running concurrently to Count 9; and Count 11 – 16 to 72 months, running concurrently to Count 10. 4 AA 907-09. The Judgment of Conviction was filed on December 7, 2018. 4 AA 906-09. Matthews filed a Notice of Appeal on December 19, 2018. 4 AA 910-13.

STATEMENT OF THE FACTS

On September 30, 2006, Matthews and his co-conspirators ambushed 1271 Balzar Avenue. 1 AA 103, 110-15. Thirty-nine shots were fired. 3 AA 526, 742-43. Mersy Williams was killed. 3 AA 527.

Mersy, Michel-le Tolefree, and Myniece Cook were at their grandmother's house celebrating Mersy's upcoming birthday. 1 AA 104. Michel-le, the youngest cousin wanted to go see Maurice Hickman, who lived at 1271 Balzar Avenue. 1 AA 106-107. The four of them stood in front of Maurice's house. 1 AA 108-10. Then, Mersy noticed someone standing to the side of the house. 1 AA 110. When she asked

who it was, Maurice told them all to run. Id. Mersy froze and Myniece tried to get her to run. 1 AA 111. Myniece noticed a group of people join that person that they saw. 1 AA 113-14. Then, Mersy was shot in the head and Myniece was shot in the wrist. 1 AA 112, 115, 117. Mersy became heavy on Myniece's arm and the two of them fell to the ground. 1 AA 112, 114-15. Myniece pretended to be dead on the floor while the shots continued. 1 AA 115. When the shooting stopped, a woman opened the front door, so Myniece ran inside the house. Id. Michel-le, who ran across the street with Maurice, saw a man wearing a black top and blue shorts. 1 AA 129, 147.

Melvin Bolden lived about a block away from 1271 Balzar Avenue. 1 AA 160. Melvin, Geishe Orduno, Steve, and Betty went to the Main Street Casino Buffet on the night of the shooting. 1 AA 161. Melvin drove an '86 Lincoln Town Car. 1 AA 162. When they came back from dinner, Melvin was backing into a parking spot near his home when he heard gunshots. 1 AA 162-64, 166. Then, four men approached the car and told them all to get out. 1 AA 162-66. One man put a gun to Melvin's head and told him to get out of the car and leave the keys. 1 AA 167. Melvin described them as black young men wearing black tops and blue jeans. 1 AA 168. Two of the men had red and black gloves, including the man who approached him. 1 AA 169. Melvin saw two of the men with guns; one had a shotgun and the other had a handgun. 1 AA 169-70. Then they drove away in his car. 1 AA 173.

Officer Cupp and Officer Walter were in an unmarked police car driving around the neighborhood that night. 2 AA 298, 300. They heard gunshots and drove towards them. 2 AA 300-02. When they were driving around between Lexington and Lawry, they saw a group of people arguing and then saw the Lincoln drive off. 2 AA 305-06. The officers followed the Lincoln, which was driving fast and committing traffic violations. 2 AA 308-10.

As the car began to slow down, the driver opened the door, held the door open with his left hand and foot, and held a short rifle in his right hand looking back at the officers. 2 AA 311-12. Then the driver fell out of the car and ran towards the officers' car. 2 AA 312. As the man ran closer, he rolled on the hood of the officers' car, coming face-to-face with the officers in the car. 2 AA 313-15. Officers Walter and Cupp both identified Matthews as the driver. 2 AA 313-14; 3 AA 638-39. They had seen Matthews before this incident and recognized him when this happened. 2 AA 314; 3 AA 639. Then, Officer Walter got out and started to chase Matthews on foot. 2 AA 316. Matthews ran towards Eleanor Street. 2 AA 317-18. Officer Walter saw Matthews wearing a black shirt, blue shorts, and a red glove. 2 AA 319. The officer chased Matthews, jumped over several fences, but stopped when he heard gunshots coming from the direction of where he left his car and partner. 2 AA 319-20. Other patrol officers were in the area, so Officer Walter decided to turn around and run back to where the car was in case Officer Cupp had gotten into a shooting.

2 AA 320-21. K9 officers had been on the scene and tracked Matthews to Jimmy Street. 2 AA 391-98. Matthews was then arrested. 2 AA 403.

Officer Cupp ran after one of Matthews' co-conspirators, Pierre Joshlin, as he saw him run out of the Lincoln with a gun in his hand. 3 AA 641. While running, Joshlin turned and pointed the gun at Officer Cupp, so the officer fired three shots. 3 AA 643-44. Joshlin continued to run. 3 AA 644-45. Joshlin was wearing a black shirt, blue shorts, and black or grey gloves. 3 AA 648. Joshlin was found in a dumpster nearby and arrested. 3 AA 648-49. The black gloves and gun were found in the dumpster. 2 AA 416-17; 3 AA 505.

When Officer Walter got back to the car and learned that Officer Cupp was fine, he secured the Lincoln. 2 AA 322-23. He saw a handgun in the front passenger seat. 2 AA 323. Then the officer secured the general area around the Lincoln. 2 AA 324-25. Nearby, Officer Walter found a rifle in the grass—the one that he saw Matthews holding in the driver's seat of the Lincoln. 2 AA 325. After, Officer Walter retraced the path that he chased Matthews. 2 AA 327-28. Following the path, he found a red glove on the ground. 2 AA 328.

Cartridge casings were found and recovered on the sidewalk by 1271 Balzar Avenue. 1 AA 210-14; 3 AA 742. One of those cartridge casings was linked to the handgun found in the Lincoln. 3 AA 742. Eleven of those cartridge casings were linked to the gun found with Joshlin. 3 AA 743. Twenty-five of those cartridge

casings were linked to the short-barreled rifle that the officers had seen Matthews holding. Id. The bullet that killed Mersy was consistent with the type of rifle. 3 AA 599. Gunshot residue was found on Matthews' right palm, left palm, and the back of his left hand. 2 AA 260-61. Gunshot residue was also found on the red glove recovered. 2 AA 265.

SUMMARY OF THE ARGUMENT

Matthews raises several issues on appeal. First, he argues that the district court erred in denying his Batson challenge. Second, he contends that the district court erred in allowing a K9 officer testify as to the dogs' abilities after training. Third, he alleges that the district court erred in prohibiting an untimely-disclosed defense witness to testify. Fourth, Matthews claims that the State committed prosecutorial misconduct during its closing and rebuttal arguments. Lastly, he argues cumulative error. Matthews fails to demonstrate any error, so he is not entitled to relief. This Court should affirm the Judgment of Conviction.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING MATTHEWS' BATSON CHALLENGE

Matthews argues that the district court erred in denying his Batson challenge as to prospective Juror #342. AOB at 19-30. As an initial matter, Matthews has failed to provide this Court with the full transcript of the first and second days of trial that include voir dire. While Matthews' appendix index lists that only the relevant

portions are included, the pages where the district court ruled on the Batson challenge are missing, as well as the voir dire of the jurors that he compares prospective Juror #342 to. Thus, this claim should be summarily rejected. State, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 479, 814 P.2d 80 (1991) (holding that unsupported arguments are summarily rejected on appeal); Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with portions of the record essential to determination of issues raised in appellant's appeal.").

As to the merits of this claim, the United States Supreme Court has held that the racially discriminatory use of peremptory challenges is unconstitutional under the Equal Protection clause. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986). The Supreme Court subsequently extended Batson to hold that its prohibition also applies to discrimination based on gender (J.E.B. v. Alabama, 511 U.S. 127, 114 S. Ct. 1419 (1994)), and ethnic origin (Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859 (1991)).

In Purkett v. Elem, 514 U.S.765, 766-67, 115 S. Ct. 1769, 1770-71 (1995), the United States Supreme Court pronounced a three-part test for determining whether a prospective juror has been impermissibly excluded under the principles enunciated in Batson. Specifically, the Court ruled:

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of

> racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible.

Purkett, 514 U.S.at 766, 115 S. Ct. at 1770-1771 (internal citations omitted).

The Nevada Supreme Court adopted the Purkett three-step analysis of a Batson claim in Doyle v. State, 112 Nev. 879, 887-88, 921 P.2d 901, 907-908 (1996), and Washington v. State, 112 Nev. 1067, 1071, 922 P.2d 547, 549 (1996). Accordingly, the opposing party's exercise of its peremptory challenge is governed by a Purkett analysis.

Step one – prima facie case

In deciding whether or not the requisite showing of a prima facie case of racial discrimination has been made, the court may consider the "pattern of strikes" exercised or the questions and statements made by counsel during the voir dire examination. Batson, 476 U.S. at 96-97, 106 S. Ct. at 1723; Libby v. State, 113 Nev. 251, 255, 934 P.2d 220, 222-23 (1997); Doyle, 112 Nev. at 887-888, 921 P.2d at 907. The party bringing a Batson challenge must, "do more than point out that a member of a cognizable group was struck." Williams v. State, 134 Adv. Op. 83, 429 P.3d 301, 306 (2018) (*citing* Watson v. State, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014) ("[T]he mere fact that the State used a peremptory challenge to exclude a

member of a cognizable group is not, standing alone, sufficient to establish a prima facie case of discrimination under Batson's first step; 'something more' is required.")).

Here, Matthews raised a Batson challenge after the State used a preemptory strike against a prospective African-American juror. 1 AA 58. Matthews argued below that there was no justifiable reason to eliminate prospective Juror #342 because she said that she could be fair and impartial. 1 AA 59. Matthews also pointed out that the State had challenged another African-American prospective juror for cause and there were only two African-American prospective jurors left, who may not make it onto the jury panel. 1 AA 58. The State argued that no prima facie case had been shown as to bias. 1 AA 59. The State's challenge for cause against another prospective juror was based on her statements that she could not consider a sentence of life without parole. Id. Because the State gave an explanation for striking the juror prior to the court ruling on the first step, this step is moot. Williams, 134 Adv. Op. 83, 429 P.3d at 307.

Step two – race-neutral explanation

In step two, assuming the opposing party makes the above described prima facie showing, the burden of production then shifts to the proponent of the strike to come forward with a race-neutral explanation. Purkett, 514 U.S. at 767, 115 U.S. at 1770. "The second step of this process does not demand an explanation that is

persuasive or even plausible." Id. at 767-68, 115 U.S. at 1771. "Unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral." Id.; Doyle, 112 Nev. at 888, 921 P.2d at 908.

Here, the State argued below that the juror gave tenuous responses as to whether she could be fair and impartial. 1 AA 59. On at least two occasions, the juror rolled her eyes and hesitated. Id. The State even commented on that while questioning her. Id. The other jurors were more forceful and unequivocal in their answers, whereas prospective Juror #342 was equivocal and hesitated. 1 AA 60. Matthews concedes that this satisfies step two of the Batson inquiry. AOB at 20-21.

Step three – "sensitive inquiry"

In step three, "the district court must determine whether the explanation was a mere pretext and whether the opponent successfully proved racial discrimination." King v. State, 116 Nev. 349, 353, 998 P.2d 1172, 1175 (2000). The court should engage in a "sensitive inquiry." Williams, 134 Nev. Adv. Op. 83, 429 P.3d at 307. At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." Purkett, 514 U.S. at 768, 115 U.S. at 1771. What is meant by a legitimate race-neutral reason "is not a reason that makes sense, but a reason that does not deny equal protection." Id. at 769, 115 U.S. at 1771; Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1999).

"[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Miller-El v. Cockrell, 537 U.S. 322, 339, 123 S. Ct. 1029, 1040 (2003). Nevertheless, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768, 115 U.S. at 1771; Doyle, 112 Nev. at 889, 921 P.2d at 908.

Lastly, in reviewing the denial of a Batson challenge, the reviewing court should give great deference to the determining court. Hernandez, 500 U.S. at 364, 111 S. Ct. at 1868-1869; Doyle, 112 Nev. at 889-90, 921 P.2d at 908; Thomas, 114 Nev. at 1137, 967 P.2d at 1118; Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997). The reasoning for such a standard is the trial court is in the position to best assess whether from the "totality of the circumstances" that racial discrimination is occurring. Hernandez, 500 U.S. at 356, 111 S. Ct. at 1868; Doyle, 112 Nev. at 887-88, 921 P.2d at 907. "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." Hernandez, 500 U.S. at 367, 111 S. Ct. at 1870.

The district court denied Matthews' Batson challenge. 2 RA 488. Matthews now argues that the State's arguments below as to prospective Juror #342's

demeanor and statements were insufficient. He further argues that the comparison to other jurors supports his argument.

1. Prospective Juror #342's demeanor

Matthews contends that the State's argument below that prospective Juror #342's demeanor suggested that she could not be fair and impartial is not supported by the record. AOB at 23-24, 29. The State argued that prospective Juror #342 rolled her eyes and sighed during questioning, suggesting that she could not be fair and impartial. 1 AA 59, 62. While the State was asking questions of the prospective panel, the following exchange occurred:

> Mr. Giordani: What about the – the entire system? Uh oh. Was that a loaded question?
>
> Prospective Juror No. 342: Yes.
>
> Mr. Giordani: All right.
>
> Prospective Juror No. 342: I thought we were going to stick to the jury trial.
>
> Mr. Giordani: Well, no. Because you gave that smirk when I did it, so now I knew I had to ask.
>
> Prospective Juror No. 342: No, I – I was just teasing. Yeah. I think it's pretty fair.

1 AA 47.

The record reflects that prospective Juror #342 had a physical, visual response to the State's questioning regarding the fairness of the criminal justice system. Given

the context of the questions, her demeanor and response suggest that she had hesitation about the fairness of the system.

2. Comparison to other jurors

Matthews argues that other jurors had similar responses to prospective Juror #342, yet were not struck. AOB at 27-29. As stated above, Matthews has failed to provide the full voir dire transcript, so this comparative analysis cannot properly be done with the current appendix. This Court should not consider this argument. Rowland, 107 Nev. 479, 814 P.3d 80 (holding that unsupported arguments are summarily rejected on appeal); Thomas, 120 Nev. at 43 n.4, 83 P.d at 822 n.4 ("Appellant has the ultimate responsibility to provide this court with portions of the record essential to determination of issues raised in appellant's appeal.").

Even if this Court addresses this claim, it fails. When the State asked prospective Juror #342 about whether a jury trial was fair, she said she thinks a jury trial is fair. 1 AA 47. When the State asked about her thoughts on the entire system, she smirked and confirmed that that was a loaded question. Id. When pressed for an answer, she said she was "teasing" and thought the system was "pretty fair." Id. When defense counsel asked her what she meant by "pretty fair," she stated that she was "shaky" about the system. 1 AA 55.

None of the jurors that Matthews points to gave similar responses as prospective Juror #342. When the State asked Juror #266 how she felt about the

criminal justice system she said that she was impartial. 1 AA 43. She also said that the system is fair for the most part. Id. This is dissimilar from prospective Juror #342's response as Juror #266 did not hesitate with her answers.

Juror #271 said that, "[i]f it's proven, it's fair." 1 AA 44. He further explained, "nobody is perfect." Id. Juror #271 also had been a defendant in another jurisdiction and said that he was treated fairly. 1 RA 166-67. This provided stronger confirmation that he could be fair and impartial than prospective Juror #342's responses and hesitation.

Juror #354 stated that, "[t]he system…is about as good as it can get, you know. It's not 100 percent, of course." 1 AA 45. This is distinguished from prospective Juror #342's response because she could not affirmatively say that the system was fair.

Juror #381 stated that the system was "kind of fair" and it depends on the situation. 1 AA 52. His main concern was with sentences that minorities receive compared to white people. 1 RA 231. He also said he could set aside his beliefs and listen to the case. 1 RA 230. Juror #382 elaborated his concern and stated that he could set those concerns aside, while prospective Juror #342 evaded the question and equivocated as to whether the system was fair.

Juror #455 stated that he had preconceived opinions about the system but being a part of the voir dire process eliminated those opinions and he know thinks

that the system is fair. 2 RA 332. Juror #455's statement that he could understand why someone would not want to engage with police officers is not the same as prospective Juror #362's equivocation about the fairness of the whole system. 1 AA 54.

Juror #401 explained that she had a bad interaction with one police officer, but she stated that she would not bring any negative inferences based on that experience. 1 AA 53; 1 RA 238. This single incident is dissimilar to prospective Juror #342's hesitation to say that the system is fair.

Juror #330 was a victim of an armed robbery and said that she was treated fairly by law enforcement. 1 RA 137. When the court noted that she seemed to hesitate, the record reflects that Juror #330 believed that the court was asking about whether she thought she was treated fairly during the robbery. 1 AA 41. The court further asked her specifically if she thought that she was treated fairly by law enforcement, and she responded yes. 1 AA 42. So, Jurors #330 and #342 are not similarly situated.

Overall, none of the jurors that Matthews points to are similar to prospective Juror #342 on their views of the system's fairness.

3. Prospective Juror #342's equivocal statements

Matthews contends that the State's argument below that prospective Juror #342 was equivocal as to the fairness of the system is belied by the record. AOB at

24-27. However, the record supports that she was equivocal. The following exchange occurred during voir dire:

> Mr. Giordani: Okay. What is your feeling, ma'am, on the system in general? You've heard all of the questions I've asked.
>
> Prospective Juror No. 342: Well yeah somebody—a jury trial, I think it's fair.
>
> Mr. Giordani: What about the – the entire system? Uh oh. Was that a loaded question?
>
> Prospective Juror No. 342: Yes.
>
> Mr. Giordani: All right.
>
> Prospective Juror No. 342: I thought we were going to stick to the jury trial.
>
> Mr. Giordani: Well, no. Because you gave that smirk when I did it, so now I knew I had to ask.
>
> Prospective Juror No. 342: No, I – I was just teasing. Yeah. I think it's pretty fair.

1 AA 47.

Further, when defense counsel questioned prospective Juror #342 about what she meant by "pretty fair" she said that she was a "little shaky" about the system. 1 AA 55. Those statements reflect that she was dubious as to the system's fairness. Thus, the record supports that prospective Juror #342 was equivocal in her responses. Overall, the district court did not err in denying Matthews' Batson challenge.

II. THE DISTRICT COURT DID NOT ERR IN ALLOWING OVERSON'S TESTIMONY REGARDING K9S

Matthews argues that Sergeant Overson improperly testified as an expert witness about K9s. AOB at 31-33. Matthews did not object to this testimony, so plain error applies. This Court reviews "a district court's decision to admit or exclude evidence for an abuse of discretion." Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). When the defendant fails to object at trial, that precludes appellate review of that issue unless there is plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Under plain error review, the asserted error must affect the appellant's substantial rights, and "the burden is on the defendant to show actual prejudice or a miscarriage of justice." Id.

Lay witnesses may offer opinion testimony if their opinions are "[r]ationally based on the[ir] perception." NRS 50.265(1). A witness's work-related experience may enable the witness to make a description of what the witness saw, but that is still related to what the witness perceived. Cf. Thompson v. State, 125 Nev. 807, 815, 221 P.3d 708, 714 (2009) (concluding that a witness testifying as to what she perceived was not an "expert" simply because her ability to perceive may have been enhanced by training she had received as an artist); see also, Crowe v. State, 84 Nev. 358, 362, 441 P.2d 90, 92 (1968) ("Lay witnesses… who are sufficiently trained and experienced, may testify at the discretion of the trial court relative to the use and influence of narcotics[.]"), modified on other grounds by Tellis v. State, 84 Nev.

587, 590, 445 P.2d 938, 940 (1968). If a witness's testimony is based on "scientific, technical or other specialized knowledge," then that witness must be qualified as an expert. NRS 50.275.

Here, Sergeant Overson did not testify as an expert witness. Overson testified as to his background as a K9 handler as well as his involvement in this case. 2 AA 387-408. The State asked Overson about how he knew when his dog was alerting and what a dog alerts to. 2 AA 394-96, 401. Overson explained that as dogs gain more experience responding to real dispatch calls (as opposed to training with other officers only), the dogs learn to differentiate between those who are emitting apocrine and those who are not. 2 AA 401. Overson explained that apocrine is emitted when a suspect, or anyone else who has gone through a traumatic experience, has an "adrenaline dump." Id. When a dog smells the apocrine, it typically acts more aggressively then it would to a person not emitting that odor. 2 AA 402. Overson testified as a lay witness in describing what he perceived while working with his dog. Overson never stated that Matthews was emitting apocrine nor if that was the reason that his dog alerted to him. The State never portrayed nor argued that Overson was an expert.

Defense counsel did not object to this testimony. Instead, defense counsel cross-examined Overson on apocrine. 2 AA 404-05. During cross-examination, Overson explained, "I'm not an expert." 2 AA 405. So, to argue that the jury may

have believed that Overson was an expert fails because he himself dispelled those beliefs. Matthews also fails to provide any caselaw holding that K9 handlers have been found to be expert witnesses.

Matthews also argues that Overson's testimony was improper opinion testimony as to the ultimate issue of guilt. AOB at 32. Overson did not state that his dog bit Matthews because Matthews smelled like a criminal as Matthews suggests. Id. Instead, Overson stated that suspects, *or anyone else who goes through a traumatic experience*, will emit this apocrine that dogs alert to. 2 AA 401. Overson explained that anyone could emit this apocrine if their adrenaline has been going. Overson never stated that he knew whether Matthews was emitting apocrine nor if that was the reason that his dog alerted to Matthews. He simply explained that his dog alerted to Matthews in the bush, ran towards him, and was aggressive. 2 AA 397-98. Further, Overson never gave an opinion as to whether Matthews was involved in the shooting at 1271 Balzar Avenue or the carjacking. Thus, Matthews' argument fails.

Lastly, Matthews argues that the jury instructions further created this error. AOB at 32-33. Matthews complains that the district court should have given a dual role instruction regarding expert and lay witnesses. Id. A dual role instruction was not required as Overson did not testify as an expert witness, as discussed above.

Matthews cites to Ninth Circuit caselaw to assert that the court should have sua sponte given this instruction and its failure to do so constitutes plain error. AOB at 32-33. First, United States v. Vera, 770 F.3d 1232, 1241-43 (9th Cir. 2014), dealt with a case agent who testified as an expert on interpreting code words regarding drug quantities and as a lay witness on his involvement in the investigation. There, the district court stated that it would give the dual role instruction, but ultimately the instruction was not given. Id. at 1243. There was no dispute that the case agent testified as an expert. Id. at 1244. The Ninth Circuit reversed in that case because the testimony relied on speculation. Id. at 1246-48.

Second, United States v. Torralba-Mendia, 784 F.3d 652, 659 (9th Cir. 2015), discussed a case agent who testified as an expert on alien smuggling organizations and as a lay witness regarding his involvement in the investigation. There was no dispute that the case agent testified as an expert. Id. at 657. While the Ninth Circuit found plain error in Torralba-Mendia, the court did not reverse his conviction because it found that the lack of an instruction did not substantially affect his rights. Id. at 659-62.

Here, Matthews has first failed to show that Overson testified as an expert witness, as discussed above. Even further, Matthews does not even attempt to show how the lack of the instruction affected his substantial rights. Thus, this claim fails.

III. THE DISTRICT COURT DID NOT ERR IN PROHIBITING AN UNTIMELY-DISCLOSED DEFENSE WITNESS FROM TESTIFYING

Matthews argues that the district court erred in precluding a defense witness from testifying based on untimely disclosure. AOB at 34-39. Matthews challenges this ruling under three areas: 1) NRS 174.234(1)(a); 2) NRS 174.233(1); and 3) Nevada Supreme Court Rule 4, Section IX. This Court reviews for an abuse of discretion. Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

On the sixth day of trial, defense counsel informed the State and the district court that it may be calling a new, unnoticed defense witness, Matthews' girlfriend back in 2006. 3 AA 619-22. Defense counsel admitted that she seemed hesitant to testify as she had not responded to counsel's last two communications with her. 3 AA 621. The State raised two main issues to this new information. 3 AA 622. First, she was an unnoticed witness. Id. Second, it was the sixth day of trial, so allowing her to testify would prejudice the State. Id. Defense counsel stated that at that time, he was not asking the court to rule on allowing her to testify because he had no contact with her after the initial contact. 3 AA 623. At the end of the same day, defense counsel again raised the issue of this potential witness and requested that if defense is able to talk with Matthews' ex-girlfriend, that she should be allowed to testify the following day. 4 AA 754. Upon questioning by the court, defense counsel confirmed that he had still not heard from her that day. 4 AA 754-55.

On the seventh day of trial, defense counsel stated that he spoke with the ex-girlfriend the previous night. 4 AA 763. She stated that she is unable to physically come to Las Vegas to testify, so counsel requested that she be able to testify telephonically. Id. Then defense counsel explained how her statements would be able to come in under a hearsay exception or nonhearsay. 4 AA 763-64.

The State objected and raised three notice issues. 4 AA 764-65. First, this witness was never noticed and was raised the day before closing arguments in a murder trial. 4 AA 764. Second, there was additional notice required for witnesses who testify telephonically. Id. Third, the defense's proffer of her testimony indicated she would be a quasi-alibi witness and there had been no notice of such. 4 AA 764-65. The State also raised other concerns. One, that this case originated in 2006 and this witness was now being brought up. 4 AA 765. Two, even if the statement could be brought under a hearsay exception, it would allow the State to reach a myriad of subjects that had since been avoided at trial. 4 AA 765-66. Lastly, the State submitted that the State's case-in-chief would have been different if this quasi-alibi witness had been properly noticed because the State had noticed a witness that would have testified about what happened prior to the murder. 4 AA 766.

The court agreed that the witness would be an alibi witness based on the proffer. 4 AA 766. Ultimately, the court prohibited the witness from testifying due to lack of notice. 4 AA 768.

First, Matthews argues that the trial court abused its discretion under NRS 174.234(1)(a) in prohibiting the witness from testifying. AOB at 34-36. NRS 174.234(1)(a) states that the parties must disclose their notice of witnesses no less than five days before trial. The court shall prohibit a witness from testifying when the party acts in bad faith by not including the witness on the witness list. NRS 174.234(3)(a). Even if there is no bad faith, the court also has discretion to allow or prohibit witnesses from testifying when a party discloses a witness past this deadline. NRS 174.295(2).

Matthews contends that because the court did not find bad faith on his part, then it abused its discretion in prohibiting the witness from testifying. AOB at 34-36. This case originated in 2006, meaning Matthews had plenty of time in preparation for this second trial to find this witness. Matthews could have provided notice of this witness, even without knowing where she is, in hopes of finding her in time for trial. By defense counsel's own explanation, it only took a phone call to Matthews' mother and sister, and the sister was able to find this witness within the same day. 3 AA 619-20. Defense admitted that she seemed hesitant to testify as she did not respond to his text messages. 3 AA 621. The State argued below as to the prejudice. First, this issue was brought up on the sixth and seventh days of trial. 3 AA 619-22; 4 AA 763. Second, the State submitted that it's case-in-chief would have been different if this quasi-alibi witness had been properly noticed because the

State had noticed a witness that would have testified about what happened prior to the murder. 4 AA 766. Thus, the district court did not abuse its discretion in prohibiting this witness from testifying.

Next, Matthews argues that the trial court improperly precluded her testimony under NRS 174.233(4). AOB at 36-37. NRS 174.233(1) states that a defendant who intends to present evidence of an alibi must file a written notice no less than ten days before trial. That notice must also include the names of any witnesses who will testify to this alibi. NRS 174.233(1). Failure to comply with this statute results in the court's ability to exclude any evidence as to the alibi, except for the defendant's testimony. NRS 174.233(4).

The State argued below that this witness would be a quasi-alibi witness. 4 AA 764-65. The State pointed out that it was the defendant's statement essentially that the defense was trying to present with this witness, so the defendant could testify as to his own statement if he wished to do so. 4 AA 767. The State argued that it's case-in-chief would have been different if this quasi-alibi witness had been properly noticed because the State had noticed a witness that would have testified as to what happened prior to the murder. 4 AA 766. The court agreed that the witness would be offering an alibi. Id. While defense had revealed its theory to be that Matthews had a temporary restraining order for a house in that neighborhood where he was found,

they did not disclose this witness. Thus, the court had discretion to prohibit her testimony and did not err in doing so.

Lastly, Matthews argues that the court improperly precluded her testimony under the Nevada Supreme Court Rules, Part IX-A(A), Rule 4. AOB at 37-38. A party intending to have a witness testify telephonically must give notice not less than 14 days prior to trial. Rule 4(a). Matthews did not disclose this witness until the sixth day of trial. 3 AA 619-22. Then, defense asked for her to appear telephonically on the seventh day of trial. 4 AA 763. This timing does not comply with the rule. Thus, the court did not abuse its discretion in prohibiting her from testifying.

Further, Matthews suffered no prejudice from this witness not being able to testify. Defense admitted that she seemed hesitant to testify as she did not respond to his text messages. 3 AA 621. Also, the temporary restraining order came in as evidence, so the jury could still consider the defense's theory without this witness. 4 AA 753.

IV. THERE WAS NO PROSECUTORIAL MISCONDUCT

Matthews argues that the State committed prosecutorial misconduct in closing and rebuttal arguments. AOB at 39-41. For claims of prosecutorial misconduct, this Court engages in a two-step analysis. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, this Court determines whether the prosecutor's conduct

was improper. Id. Second, if the conduct was improper, this Court determines whether that conduct warrants reversal. Id.

As to the first step of the analysis, prosecutors are allowed to make statements about the facts and inferences supported by the record. Thomas v. State, 120 Nev. 37, 48, 83 P.3d 818, 825 (2004). This Court views the statements in context and will not lightly find prosecutorial misconduct based upon a prosecutor's statements. Byars v. State, 130 Nev. ___, ___, 336 P.3d 939, 950–51 (2014).

As to the second step of the analysis, this Court will not reverse a conviction if the conduct was harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Harmless-error review applies only if the defendant preserved the error for appellate review. Id. at 1190, 196 P.3d at 477. To preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this "allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury." Id. (quoting Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1109 (2002)).

The harmless-error review standard depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188–89, 196 P.3d at 476. If the error is of constitutional dimension, then the Court applies the Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824 (1967) standard, which requires the State to demonstrate, beyond a reasonable doubt, that the error did not contribute to the

verdict. Id. at 1189, 196 P.3d at 476. If the error is not of constitutional dimension, this Court will reverse only if the error substantially affects the jury's verdict. Id.

There are two ways to determine if the error of constitutional dimension. One, the nature of the misconduct may control whether the error is constitutional. Id. at 1189, 196 P.3d at 477. Commenting on the exercise of a specific constitutional right is an example. Id. Two, the error may be constitutional if, in light of the proceedings as a whole, the misconduct "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. (quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464 (1986)).

Claims of prosecutorial misconduct that have not been objected to at trial will not be reviewed on appeal unless they constitute "plain error." Leonard v. State, 17 P.3d 397, 415 (2001); See Mitchell v. State, 114 Nev. 1417, 971 P.2d 813, 819 (1998); Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1030 (1997). Under this standard, plain error does not require reversal unless the defendant demonstrates that the error affected his substantial rights, by causing "actual prejudice or a miscarriage of justice." Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

Matthews argues that the State vouched for two officers in its closing and rebuttal arguments. AOB at 40-41. Matthews did not object to these arguments as to improper vouching, so plain error applies. Improper vouching is considered of non-

constitutional dimension. Valdez, 124 Nev. at 1189, n.40, 196 P.3d at 477 (*citing* United States v. Harlow, 444 F.3d 1255, 1266 (10th Cir. 2006)). Vouching occurs in two ways: 1) placing the "prestige of the government behind the witness" by providing personal assurances of credibility; or 2) arguing that information not presented at trial supports the testimony. Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997) (quoting United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980)); Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004).

Matthews first takes issue with the State discussing the officers' reliability by stating that they have, "actual training and experience chasing bad guys." AOB at 40; 4 AA 797. Putting this phrase in context, this is what the State argued:

> So, when you are considering the reliability or believability of the identification of Officers Cupp and Officer Walter, think about how different they are to just the ordinary observer. Here are two police officers…who have worked in this area command…for up to three years leading up to September 30th, 2006. These are officers who have actual training and experience chasing bad guys. It's their job to observe.

4 AA 797. The State was not vouching for these witnesses; instead, the State was arguing as to the officers' reliability or believability of their identifications based on training and experience, which both officers testified to their training and experiences. 2 AA 295-97; 3 AA 626-28. The State was not arguing that these witnesses should be believed because they were law enforcement officers. The State was neither providing personal assurances nor arguing as to evidence not presented.

Thus, Matthews has failed to show plain error and that it affected his substantial rights.

Next, Matthews takes issue with the State arguing that, "Do [the officers] strike you – you are the judges of character for credibility – do they strike you as a type of officers who want to put away the wrong person…?" AOB at 41; 4 AA 799. The State explicitly told the jurors that they are the judges of credibility. Asking this question, with that explanation, does not amount to the State's personal assurance of credibility. Thus, this comment does not rise to prosecutorial misconduct. Matthews has failed to show plain error and that it affected his substantial rights.

Third, Matthews argues that the State improperly vouched by arguing, "If those two [officers] had any doubt in their mind that it wasn't him, they'd be the first to say it. This was a big deal to them. They don't want the wrong guy going away. They want the right guy. I mean, if they had a doubt they would say it." AOB at 41; 4 AA 827. The State was responding to the defense's argument that questioned the reliability of the officers' identifications. 4 AA 812-17. Also, the State explicitly asked the officers if they had any doubt as to their identification and they said no. 2 AA 380; 3 AA 678. Thus, it was a proper comment on the evidence presented at trial.

Lastly, Matthews contends that the State improperly vouched by arguing, "[i]f Mr. Matthews had gotten away and they were trying to find him then I can assure

you Officer Cupp and Officer Walter would have said I know where he is." AOB at 41; 4 AA 831. To put this statement in context, the State was arguing as to why the officers gave a description of Matthews in an interview but did not state in that interview that they knew him from previous interactions. The State was rebutting the defense's argument that the officers' identifications were not credible because they had not stated in the interviews that they knew him. 4 AA 812-17. The following is the beginning of the State's argument as to that specific comment:

> The purpose of an interview such as this is to make a historical record of events. When they are asked – and you saw Officer Cupp or Sergeant Cupp a little stiff or professional, right, he referred to Mr. Matthews as the suspect repeatedly while he was on the stand. That's just how he talks and how they talk. When they're asking them in an interview with the detective what did the suspect look like or describe the suspect, the response is going to be black shirt, dark pants, red gloves, whatever it may be, a description, not dark shirt, blah, blah, blah, oh, and it's this guy that I recognize, I've met him before. That's not what was asked. There was no need – this was not a outstanding suspect that they're trying to find. That's different. If Mr. Matthews had gotten away and they were trying to find him then I can assure you Officer Cupp and Officer Walters would have said I know where he is.

4 AA 831.

This was not a personal assurance of credibility. Both officers gave testimony that they would have mentioned that they knew him if it was relevant. 2 AA 373, 382; 3 AA 679. Thus, this statement did not constitute vouching. Overall, Matthews has failed to show that there was any prosecutorial misconduct.

V. THERE WAS NO CUMULATIVE ERROR

In considering a cumulative error claim, relevant factors include "(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, 116 Nev. at 17, 992 P.2d at 855 (*citing* Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998)).

As to the first factor, the issue of guilt is not close. Mersy was shot and killed at 1271 Balzar Avenue. 3 AA 527. Her cousin Myniece was shot in the wrist. 1 AA 117. Michel-le saw a black man wearing a black top and blue shorts. 1 AA 129, 147. She later saw four to five people standing where she had seen that man. 1 AA 133. Myniece also saw more men join the one man that she originally saw. 1 AA 113-14.

Melvin lived about a block away from 1271 Balzar Avenue. 1 AA 160. He and three others came back from dinner on the night of the shooting, and when he was backing into a parking spot near his home, he heard gunshots. 1 AA 162-64, 166. Then, four men approached the car and told them all to get out. 1 AA 162-66. One man put a gun to Melvin's head and told him to get out of the car and leave the keys. 1 AA 167. Melvin described them as black young men wearing black tops and blue jeans. 1 AA 168. Two of the men had red and black gloves, including the man who approached him. 1 AA 169. Melvin saw two of the men with guns; one had a shotgun and the other had a handgun. 1 AA 169-70. Then they drove away in his car. 1 AA 173.

Officers were driving in the neighborhood that night, heard gunshots in the area, and shortly after, drove up on four men forcefully taking a Lincoln a block away from 1271 Balzar Avenue. 2 AA 298, 300-02, 305-06. Then the officers followed that car until the driver leaned out with a rifle and eventually ran towards their car. 2 AA 308-12. Both officers recognized the driver as Matthews. 2 AA 313-14; 3 AA 638-39. Officer Walter saw Matthews wearing a black top, blue shorts, and a red glove. 2 AA 319. The officer followed Matthews up towards Eleanor Street, where he later found a red glove. 2 AA 319-20, 328. Matthews and his co-conspirator, Joshlin, who was also chased from the Lincoln and arrested that night, were friends. 3 AA 652.

Three weapons were recovered in connection with this murder. A rifle was found in the grass near the Lincoln. 2 AA 325. A handgun was found in the front passenger seat floorboard of the Lincoln. 2 AA 323. Another handgun was found on Joshlin when he was arrested. 3 AA 505, 648. All three weapons were linked to 1271 Balzar Avenue. Cartridge casings were found and recovered on the sidewalk by that home. 1 AA 210-14; 3 AA 742. One of those cartridge casings was linked to the handgun found in the Lincoln. 3 AA 742. Eleven of those cartridge casings were linked to the gun found with Joshlin. 3 AA 743. Twenty-five of those cartridge casings were linked to the short-barreled rifle that the officers had seen Matthews holding. Id. The bullet that killed Mersy was consistent with the type of rifle. 3 AA

599. There were two cartridges found on the path from 1271 Balzar Avenue to where the group carjacked the Lincoln. 3 AA 526.

Gunshot residue was found on Matthews' right palm, left palm, and the back of his left hand. 2 AA 260-61. Gunshot residue was also found on the red glove recovered. 2 AA 265. Thus, the issue of guilt was not close, so this factor does not weigh in Matthews' favor.

As to the second factor, Matthews has failed to establish any error. This factor does not weigh in Matthews' favor. As to the last factor, murder is a severe crime, if not the most severe.

CONCLUSION

Based on the foregoing, the State respectfully requests that the Judgment of Conviction be affirmed.

Dated this 27th day of August, 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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,398 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 27th day of August, 2019.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 27, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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