

Nevada Supreme Court

State of Nevada, Plaintiff

v.

Anthony Barr, Appellant

Docket Number 78295

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NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Jeannie Hua, Esq., Attorney of record for Appellant, Anthony Barr

Clark County District Attorney's Office for the State of Nevada

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Jurisdictional statement

The basis for the Supreme Court's or Court of Appeals' jurisdiction is NRS 177.015(3)

The Judgment of Conviction was filed on February 27, 2019. The Notice of Appeal was filed on March 5, 2019.

The appeal is from a jury verdict in Eighth Judicial District Court.

Routing Statement

Per NRAP 17(b)(2)(A), "appeals from a judgment of conviction based on a jury verdict that do not involve a conviction for any offenses that are category A or B felonies are presumptively assigned to Court of Appeals." Since this case involves Category B felonies, this case is not presumptively assigned to Court of Appeals.

Relevant Issues

I. Trial court violated Appellant's right to 14th Amendment Due Process rights under the United State's Constitution and Article One, Section Eight of the Nevada Constitution by proceeding with sentencing even though Presentencing Investigation Report contained inaccuracies and basing his sentencing decision from facts not on record.

II. The Trial Court erred by failed to sever the four robberies charged by the State, violating Appellant's 14th Amendment under the United State's Constitution and Article One, Section Eight of the Nevada Constitution.

III. The Trial Court erred by failing to sever the Appellant's case from Codefendant's case, violating Appellant's 14th Amendment under the United State's Constitution and Article One, Section Eight of the Nevada Constitution

IV. The trial Court erred by admitting inadmissible character evidence of bad acts, violating Appellant's 14th Amendment under the United State's Constitution and Article One, Section Eight of the Nevada Constitution.

V. Trial Court erred by violating Appellant's right to confrontation, violating Appellant's 14th Amendment under the United State's Constitution and Article One, Section Eight of the Nevada Constitution.

VI. Trial Court erred by allowing unqualified experts to testify regarding tracker and google map, violating Appellant's 14th Amendment under the United State's Constitution and Article One, Section Eight of the Nevada Constitution.

VII. The State violated Appellant's right to due process by failing to properly preserved material evidence, violating Appellant's 14th Amendment under the United States' Constitution and Article One, Section Eight of the Nevada Constitution.

VIII. Trial Court erred by allowing the State to amend information after trial started, violating Appellant's 14th Amendment under the United State's Constitution and Article One, Section Eight of the Nevada Constitution.

IX. The State failed to present sufficient evidence at trial, violating Appellant's 14th Amendment under the United States' Constitution and Article One, Section Eight of the Nevada Constitution.

X. Appellant's right to a fair trial was violated by cumulative errors, violating Appellant's 14th Amendment under the United States' Constitution and Article One, Section Eight of the Nevada Constitution.

(citations to the record where the issue was raised and resolved)

Statement of the Case

State filed an Information on October 23, 2018 including one count of Conspiracy to Commit Burglary, one count of Conspiracy to Commit Robbery, five counts of Burglary while in Possession of a Deadly Weapon, seven counts of Robbery with Use of a Deadly Weapon, three counts of Assault with Use of a Deadly Weapon, one count of Assault with a Deadly Weapon, Victim 60 Years of Age or Older, one count of Carrying Concealed Pneumatic Gun, one county of Preventing or Dissuading Witnesses or Victims from Reporting Crime or Commencing Prosecution. Jury Trial took place on December 3, 2018. Jury arrived at a verdict on December 13, 2018. Second Amended Information was filed on December 31, 2018. Appellant was sentenced on January 29, 2019. Case was back on calendar on February 4, 2019 for clarification of sentence. Notice of Appeal and Case Appeal Statement were filed on March 5, 2019.

Statement of Facts

I. Codefendant's Robbery on July 17, 2018 at U.S. Bank, 1440 Paseo Verde Parkway

On July 17th 2018 around 11:30 am, a man walked to a teller's window and handed her a note. (Day 2, p. 53, p.57, ls. 19-24). The note stated that he had a weapon, to not pull any alarms, and to give him \$4,500.00. (Day 2, p.61, ls. 4-5, p. 62, ls.9-10). She gave him all the money in her drawer. (Day 2, pp. 57-58, ls. 25-

7). The man was black, had a sweaty neck, wore big aviator glasses. (Day 2, p. 59, ls.15-18). The man took the money and left.

II. Robbery on July 23, 2018 at U.S. Bank on 10565 Eastern Avenue

Two black men on July 23, 2018 robbed a U.S. Bank branch on 10565 Eastern Ave. (Day 2, p. 92, ls. 14-25). One of the black men wore black Air Force Ones and jeans. The other one was wearing a track sweater, a doo-rag, a hat, sunglasses and a flannel styled button-up shirt (Day 2, p.120, ls.12-16). Both men were a little taller than 5'10". (Day 2, p. 133, ls.12-15).

III. Robbery on July 31, 2018 at Bank of the West on 701 North Valle Verde

On July 31, 2018, two black men robbed the Bank of the West on 701 North Valle Verde. (Day 3, p. 57, ls. 19-20, p. 58, ls. 9-11, p. 60, l. 25, p. 61, ls. 1-2). The larger one was dressed in a long dress and had long multicolored wig or hair. (Day 3, p. 61, ls. 5-8, p. 62, ls. 1-9). The second black man wearing a baseball cap and a white towel around his neck. (Day 3, p. 63, ls. 3-17).

IV. Robbery on August 6, 2018 at U.S Bank in Smith's Food and Drug on 55 South Valle Verde, Henderson

On August 6, 2018 two black men robbed the U.S. Bank at 55 South Valle Verde Drive, Henderson on August 6th, 2018. (Day 4, p. 56, ls. 21-25, p. 57, ls. 14-15). One of the men wore a maroon shirt. They were both around five foot five inches or five foot six inches in height. (Day 4, p. 72, ls. 18-24).

V. Robbery on August 9, 2018 at U.S. Bank on 801 East Charleston Boulevard

O on August 9th, 2018, two men robbed the U.S Bank on 801 East Charleston. (Day 5, p. 207, ls. 1-11). One of the man was black, tall, and skinny. (Day 5, p. 209, ls. 6-20). The man behind him had a gun. (Day 5, p. 211, ls. 1-9).

X. Appellant's sentencing and resentencing

On Appellant's sentencing on January 29, 2019, Judge Smith instead of Judge Adair, the trial judge presided over the sentencing. Appellant's trial counsel objected to sentencing on that day because Appellant just got to review it on the same date and found inaccuracies in his criminal record. (Sent. trans. P. 4, ls. 15-17). Judge Smith proceeded with sentencing. On February 22, 2019, sentencing judge made changed to Appellant's sentence. (Sent. Trans. p. 3, 20-25, p. 4, ls. 2-12).

Summary of the Argument

Trial court erred by agreeing with the State to punish the Appellant for exercising his speedy trial rights by not delaying with his sentencing and proceeding even though Presentencing Investigation Report contained inaccuracies.

Trial court erred by failing to sever the four robberies charged by the State. The robberies did not fall under any of the exceptions for inadmissible evidence of prior bad acts, the prejudice from the joinder was greater than any probative value.

The spillover effect of boot strapping the evidentiary weaker robberies to the stronger robberies prejudiced Appellant.

Trial court erred by failing to sever the Appellant's case from Codefendant's case because evidence was stronger for conviction for Codefender's charges. Also, Codefendant's defense was antagonistic to Appellants.

Trial court erred by admitting inadmissible character evidence of bad acts, that didn't fall under any exceptions for inadmissible character evidence for prior bad acts, depriving Appellant of a fair trial.

Trial court erred by violating Appellant's right to confrontation, by limiting cross examination regarding trackers and google map used in conjunction to trace Appellant's car. Appellant's right to confrontation was violated.

Trial Court erred by allowing unqualified experts to testify regarding tracker and google map. The trial court failed to hold a hearing to determine if they qualify as expert witnesses. The trial court erred by allowing lay witnesses to testify to knowledge within the realm of experts.

Trial Court erred by allowing the State to amend information after trial started. Failing to serve notice to Appellant as to the identity of the victim in count twenty two and fixing the dates when the robberies occurred. The defects in the information prejudiced Appellant since he was handicapped as to his defense from the lack of notice.

Appellant's right to a fair trial was violated by cumulative errors, from failure to continue sentencing to correct PSI, basing sentencing decision on facts not on record, to joinder of offenses and Codefendant, admitting inadmissible character evidence of Appellant's traffic offenses, to limiting cross examination regarding tracker and google map reliability and method, to allowing unqualified experts to testify regarding such technical evidence of tracker and google map, to the State failing to properly preserve material and exculpatory evidence in the form of the red or maroon Mercury Grand Marquis to allowing the State to amend the information on the seventh day of trial.

Argument

I. Trial court erred by agreeing with the State to punish the Appellant for exercising his speedy trial rights by not delaying with his sentencing and proceeding even though Presentencing Investigation Report contained inaccuracies.

A. Standard of Review

“The district court has wide discretion in its sentencing decision. *See Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476 (2000). We will not interfere with the sentence imposed by the district court “so 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.” Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159 (1976).” Holly v. State, Id. at p. 1.

B. Argument

On Appellant’s sentencing on January 29, 2019, Appellant’s trial counsel objected to sentencing proceeding on that day because Appellant just got to review it on the same date and found inaccuracies in his criminal record. (Sent. trans. P. 4, ls. 15-17). Judge Smith responded that he’s not taking Appellant’s criminal record into consideration. (Sent. Trans. p. 4, ls. 18-20). Appellant objected to the sentencing because he found social security numbers listed that weren’t his. (Sent. Trans. p. 7, ls. 9-11). Appellant also objected because there were misdemeanor convictions and fugitive charges attributed to him that should not have been. (Sent. Trans. p. 8, ls. 6-9). Appellant’s trial counsel renewed his objection for sentencing and requested a continuance to correct the Presentencing Investigation Report. (Sent. Trans. p. 8, ls. 18-25). Appellant further objected because he needed more time to review and understand the PSI since he’s only had a third grade education level. (Sent. Trans. p. 9, ls. 16-20).

The State spoke up and pointed out that Appellant and Codefendant have invoked their speedy trial rights. While he called it a strategy, by asking the sentencing judge to not grant a continuance because both Appellant and Codefendant had exercised their right to trial and right to a speedy trial. The State

asked the sentencing court to punish the Appellant the same way the Appellant had “punished” the State by exercising his right to a speedy trial. (Sent. Trans. p. 9, ls. 21-25, p. 10, ls.1-2). The State then went into further detail about how Appellant and Codefendant exercised their right to a speedy trial. (Sent. Trans. p. 10, ls. 12-25, p. 11, 1-12). The sentencing judge responded by pressing on with the sentencing. (Sent. Trans. P. 11, ls. 15-16).

Codefendant’s counsel at sentencing argued that his client should not be penalized for exercising his right to trial because he was forced to go to trial by Appellant refusing to take the contingent offer. (Sent. Trans. p. 22, ls. 23-25, p. 23, ls 1-8). Appellant was sentenced to 364 days in the Clark County Detention Center for Count one, count 2, concurrent 12 to 48 months in department of Corrections, count 3, a concurrent 36 to 120 months, count 4, robbery with use, 36 to 120 plus 36 to 120, consecutive, concurrent to counts 1, 2, and 3, count 5, 26 to 120 months, concurrent to count 4, count 5, 36 to 120 months, concurrent to count 4, count 6, consecutive 36 to 120 plus 36 to 120 for robbery with use, count 7, 36 to 120 for robbery with use, consecutive, count 8, 36 to 120 concurrent, count 9, robbery with use, 36 to 120 months, plus 36 to 120 months, count 10, a consecutive 36 to 120 months plus 36 to 120 months, count 11 36 to 120 months concurrent to the consecutive times, count 12, 36 to 120 plus 36 to 120 for robbery with use, consecutive to the other robbery with the use, 1, 2, 3, 4, 5; count 13, robbery with

the use, 36 to 120, plus 36 to 120 consecutive to the other robberies, count 14, 36 to 120, count 15, 36 to 120, both concurrent to the consecutive time, count 16, 36 to 120 plus 36 to 120 for the robbery with the use, consecutive to the other robberies with the use, count 17, 36 to 120 plus 36 to 120 consecutive to the other robberies with the use, count 18, 12 to 48 months, count 19, 12 to 48 months concurrent, count 20, 12 to 48 months, concurrent, count 21, 12 to 48. 174 days credit for time served. Appellant was sentenced as habitual criminal and given life without the possibility of parole. (Sent. Trans. P. 26, ls. 17-25, p. 27-28). On February 22, 2019, sentencing judge sentenced Appellant on count 22 to 12-48 concurrent to all other counts. (Sent. Trans. p. 3, ls. 16-20). Also, on State's motion, sentencing court struck the sentences imposed on counts 3 and 4 because Appellant wasn't named on the information for those counts. (Sent. Trans. p. 3, 20-25). And the State further requested that as to the burglary while in possession counts, for Appellant to be adjudicated under the violent habitual criminal statute and to run concurrent with the other counts. (Sent. Trans. P. 4, ls. 2-12).

The Nevada Supreme Court in Blankenship v. State, 132 Nev.Adv.Rep. 50, 375 P.3d 407 (2016) held that trial court erred by not correcting the Presentencing Investigator Report before sentencing. The Nevada Supreme Court reasoned that by failing to correct the PSI, the PSI recommendation relied on faulty calculations,

which constituted impalpable and highly suspect evidence and remanded the case for defendant to be resentenced.

Here, Appellant had asked for a number of inaccuracies in his PSI so he could be sentenced on accurate information. Instead, the sentencing court commented that he wasn't going to rely on Appellant's criminal record and proceeded to sentence Appellant to life without the possibility of parole for being a habitual criminal. Per Blankenship, Appellant's case should be remanded back to trial court for a new sentencing hearing.

The Court in Holley v. State, 2019 Nev. App. Unpub. Lexis 269, 2019 WL 1277497 held that trial court erred when it based its sentencing on information not supported by the record. Thus, the sentence was a result of prejudice from consideration of facts supported only by impalpable or highly suspect evidence. The Court remanded defendant's case for resentencing.

Here, by commenting that he's not planning to base Appellant's sentencing on Appellant's criminal record, sentencing court admitted that he's basing his sentencing decision facts not on record and instead, on impalpable and highly suspect evidence per Blankenship. Thus, Appellant's case should be remanded for a sentencing hearing.

After Appellant was sentenced, the State placed the matter back on calendar even though trial court no longer had jurisdiction over Appellant's case. At the

second sentencing, State asked the trial court to strike the sentences imposed for counts three and four because Appellant wasn't charged with those counts and to sentence Appellant on count 22 to 12-48 concurrent to all other counts. (Sent. Trans. p. 3, ls. 16-20). And the State further requested that as to the burglary while in possession counts, for Appellant to be adjudicated under the violent habitual criminal statute and to run concurrent with the other counts. (Sent. Trans. P. 4, ls. 2-12).

The Court in Bryant v. State, 435 P.3d 1230 (2019) held that trial court erred by resentencing defendant to a higher sentence. The State moved for sentencing reconsideration and claimed it mistakenly thought it didn't have supporting records for habitual criminal treatment at sentencing. Trial court increased the sentence to five to fifteen years. Defendant filed a motion for reconsideration, arguing that trial court lack jurisdiction. Trial court denied defendant's motion. The court ruled for defendant and reasoned that "[trial] court only had jurisdiction to modify the sentence if it was based on a mistake of fact about Bryant's criminal history that worked to his extreme detriment." *Citing to Edwards v. State, 112 Nevada 704, 708, 918 P.2d 321 (1996)*. It could not modify the sentence based on mistakes that may have worked to the State's detriment." Id. The Court remanded defendant's case for resentencing.

Here, because trial court no longer had jurisdiction over Appellant's case, it erred by giving Appellant a higher sentence. Thus, this Court should remand Appellant's case for resentencing.

When Appellant asked the court for a continuance, the State spoke up and pointed out that Appellant and Codefendant have invoked their speedy trial rights. While he called it a strategy, by asking the sentencing judge to not grant a continuance because both Appellant and Codefendant had exercised their right to trial and right to a speedy trial. The State asked the sentencing court to punish the Appellant the same way the Appellant had "punished" the State by exercising his right to a speedy trial. (Sent. Trans. p. 9, ls. 21-25, p. 10, ls.1-2). The State then went into further detail about how Appellant and Codefendant exercised their right to a speedy trial. (Sent. Trans. p. 10, ls. 12-25, p. 11, 1-12). The sentencing judge responded by pressing on with the sentencing and sentencing Appellant to life without the possibility of parole. (Sent. Trans. P. 11, ls. 15-16).

"It is well established that a sentencing court may not punish a defendant for exercising his constitutional rights and that vindictiveness must play no part in the sentencing of a defendant." *Sorter v. State*, 2016 Nev. App. Unpub. Lexis 29, 2016 WL 1615679 (2016) *citing to* *Mitchell v. State*, 114 Nev. 1417, 1428, 971 P.2d 813 (1998), *overruled on other grounds by* *Sharma v. State*, 118 Nev 648, 655, 56 P.3d 868 (2002) *and* *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690 (2005). "The

defendant has the burden to provide evidence that the district court sentenced him vindictively. *Citing to Rosky*.

During Appellant's request for a continuance because PSI had mistakes in his criminal record, trial court commented that he will not base his sentencing decision on Appellant's criminal record. After the State asked the trial court to not grant Appellant a continuance because Appellant insisted on speedy trial, the trial court denied Appellant the continuance and sentenced Appellant to life without parole as a habitual criminal. The trial court failed to state any basis for his decision other than the sentencing won't be based on Appellant's incorrect criminal record. Absent any showing on record that trial court's basis for the most extreme sentence of life without possibility of parole was based on facts on record, after denial of his motion to continue, the only conclusion is that Appellant was punished for exercising his speedy trial right. Per Sorter, Mitchell, and Rosky Appellant requests this Court to remand his case for a new sentencing hearing.

II. Trial Court erred by failing to sever the four robberies

A. Standard of Review

"Generally, a party's failure to object to or request an instruction precludes appellate review. Flanagan v. State, 112 Nev. 1409, 1423, 930 P.2d 691 (1996); Green v. State, 119 Nev. 542, 545, 80 P.3d 93 (2003) (failure to clearly object to a jury instruction generally precludes review). There is an exception to this rule,

however, if a plain and obvious error occurred that is so serious, it affected the defendant's substantial rights. Green, 119 Nev. at 545. "In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." Id. To demonstrate plain error, the appellant has the burden of demonstrating actual prejudice. Id. "A necessary antecedent to invoking the plain error doctrine is to determine whether error occurred at all." People v. Walker, 2012 IL App (2d) 110288, 982 N.E.2d 269, 273, 367 Ill. Dec. 591 (Ill. App. Ct. 2012); see also Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008 (2006)(the first step in conducting plain error analysis is to consider whether an error exists)."

B. Argument

The Court in Tabish v. State, 119 Nev. 293, 72 P.3d 584 (2003) held that trial court erred by failing to sever charges. The State charged defendant in Tabish with charges relating to three separate incidents. First was the robbery and murder of Ted Binion. Second was the removal of silver from an underground vault in Pahrump. Third was the kidnapping, beating, and extortion of Leo Casey. Jury found defendant guilty of all charges. Defendant appealed and argued that the joinder of charges was prejudicial and deprived him of a fair trial. The Court ruled for defendant and reasoned that the Binion counts and the Casey counts weren't similar enough to be admissible under common scheme or plan. The joinder wasn't

for judicial economy because codefendants from the Casey incident had their own separate trials. The two incidents weren't part of the same story because an ordinary witness can describe the act in controversy or the crime charged without referring to the other act or crime. The Court also found that the two incidents weren't cross admissible because the prejudice outweighed any probative value. For the reasons state, the Court reversed the convictions of the counts from the Binion incident because of prejudice from the joinder. However, the Court affirmed the convictions of the counts from the Casey incident because the prejudicial effect from the joinder was harmless.

While Tabish Court arrived at its decision under the abuse of discretion standard and the applicable standard of review here in plain error, Tabish still applies. The five robberies weren't similar enough to be admissible under common scheme or plan or identity. The joinder was for the sake of judicial economy, however, it was outweighed by the resulting prejudicial value. The five incidents weren't part of the same story because an ordinary witness can describe the act in controversy or the crime charged without referring to the other act or crime. The Court also found that the five incidents weren't cross admissible because the prejudice outweighed any probative value. Per Binion, and under the plain error analysis, even with Appellant's failure to object, the error from the joinder of robbery charges was a plain and obvious error. The error from the joinder was so

serious, it affected Appellant's substantial due process rights. Per Tabish, Appellant requests this Court to reverse his convictions and sever the counts from each five robberies.

III. Trial Court erred by failing to sever Defendant's trial from Codefendant's

The standard of review is plain error. "NRS 174.165 provides that a defendant is entitled to a severed trial if he presents a sufficient showing of facts demonstrating that substantial prejudice would result from a joint trial. Generally, "where persons have been jointly indicted they should be tried jointly, absent compelling reasons to the contrary." The ultimate issue for a court is "whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants. Further, a court making this decision "must consider not only the possible prejudice to the defendant but also the possible prejudice to the Government resulting from two time consuming, expensive and duplicitous trials." Rowland v. State, 118 Nev. 31, 44, 39 P.3d 114 (2002).

The error was the joinder of Appellant's charges with Codefendant's. The error was plain and clear because Codefendant's defense was antagonistic to Appellant's and the jury could not compartmentalize and clearly separate the evidence against Appellant and Codefendant. Further, there was much more evidence against Codefendant versus Appellant.

Tanya Hiner testified that she is a forensic scientist with the City of Henderson Police Department. She was given prints collected from the four robberies and asked to make matches. She matched a print from the July 31, 2018, Bank of the West, 701 North Valle Verde robbery. She matched a print from the check writing counter inside of the Bank of the West location to the Codefendant. (Day 4, p. 156, ls. 9-15, p. 159, ls. 24-25, p. 160, ls. 1-2). She also matched a fingerprint taken off of the twistable crayons by CSA Randi Newbold from the robbery on August 6, 2018 at U.S. Bank located inside of Smith's Food and Drug to Codefendant's prints. (Day 4, p. 169, ls. 16-18, Day 5, p. 11, ls. 24-25, p. 12, ls. 1-3). She also matched the prints off of the bank note collected by CSA Newbold from the August 6, 2018 robbery at U.S. Bank and matched the prints to Codefendant. (Day 5, p. 17, ls. 22-24, p. 18, ls. 1-25, p. 19, ls. 1-9).

There were no fingerprint matches at any scenes of the robbery, matched to Appellant. Plus, it was Codefendant who posted a photo on facebook with the apartment where he and Appellant were found. But the most convincing evidence of prejudice suffered by Appellant is that Appellant was forced to be tried with a robbery that he wasn't charged with. So the State, by bootstrapping Appellant's counts with Codefendants was able to convict Appellant of all robbery counts by the spillover effect of prejudice from evidence against the Codefendant.

Evidence that Codefendant's defense was antagonistic included Codefendant's counsel pointing out to the sentencing judge that it was Appellant's fault they had to go to trial and invoke their speedy trial rights because Appellant was the one who didn't want to accept State's contingent offer. As a result, Appellant was sentenced to life without the possibility of parole. (Sent. Trans. p. 22, ls. 23-25, p. 23, ls 1-8). The error of joinder was plain and clear and Appellant's substantial due process rights were prejudiced by the error.

IV. Trial Court erred by allowing inadmissible character evidence entered into evidence

The standard of review is plain error.

1. First bad act

Officer Raymond Cuevas testified that he worked patrol for Downtown Area Command with the Las Vegas Metropolitan Police Department. (Day 3, p. 236, ls. 14-18). On April 25, 2018 he stopped a maroon colored Grand Marquis at Casino Center and Fremont for method of display. The car didn't have a front license plate. (Day 3, p. 237, ls. 11-25). Anthony Barr was driving the vehicle and Sabrina Henderson was in the front passenger seat. (Day 3, p. 238, ls. 11-18).

2. Second bad act

Officer Grant Okinaka testified that he worked for the Las Vegas Metropolitan Police Department on May 3, 2018. He stopped a Mercury Grand Marquis red or maroon in color on that date. The driver was Anthony Barr and the female passenger was Sabrina Henderson. (Day 3, p. 246, ls. 9-14). He stopped the car because the car either had unregistered plates or didn't have plates at all. (Day 3, p. 246, ls. 19-25).

3. Third bad act

Detective Frank Rycraft testified that he was working as an officer on June 8, 2018. He stopped a red Mercury Grand Marquis for unregistered vehicle with no plates. (Day 3, p. 252, l. 11-14, p. 253, ls. 16-23). Sabrina Henderson was the driver and Anthony Barr was in the back seat. (Day 3, p. 254, ls. 2-17).

4. Fourth bad act

Officer Benjamin Baldassarre testified that on June 12, 2018, he stopped a Mercury Grand Marquis, red or maroon in color. (Day 4, p. 6, ls. 13-21). Anthony Barr was the driver and Sabrina Henderson was the passenger. (Day 4, p. 7, ls. 18-24). He issued a citation for unregistered vehicle, no driver's license and no proof of insurance. (Day 4, p. 9, ls. 3-8).

5. Fifth bad act

Officer Timothy Mcateer testified that on Jun 12, 2018, he assisted Officer Baldassarre on a stop. (Day 4, p. 11, ls. 18-24). The stop was performed upon a red

or maroon Mercury Grand Marquis with Anthony Barr as the driver and Sabrina Henderson as the passenger. (Day 4, p. 12, ls. 13-25).

B. Argument

Trial court erred by not conducting a Petrocelli hearing to determine if these bad acts are admissible. Even though Appellant did not object to the admission of these bad acts, the error of admitting them was plain error. Appellant suffered prejudice as a result of these error. The bad acts did not fall under any of the exceptions to inadmissible character evidence. Even if the State argued they are relevant as to identity, the trial court failed to determine whether the probative value was outweighed by prejudicial value. The State had in court identifications of Appellant, lessening the evidentiary value of these bad acts and increasing the prejudice.

In Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002), the Court held that trial court erred by admitting uncharged alleged victim's testimony of sexual molestation was not admissible character evidence under motive, common scheme or plan, or relevant and not harmless error. In Taylor v. State, 109 Nev. 849, 858 P.2d 843 (1993), the Court held that witness testimony that a unrelated child had sat on the defendant's lap was inadmissible character evidence because it did not tend to increase or decrease the probability of the existence of any fact necessary to prove that defendant committed the act of lewdness on the victim. In Meek v.

State, 112 Nev. 1288, this Court remanded because trial court failed to conduct a Petrocelli hearing. In Hubbard v. State, 134 Nev.Adv.Rep. 54, 422 P.3d 1260 (2018), this Court held that Defendant's burglary conviction was inadmissible character evidence because intent was not at issue.

In the cases cited above, because trial court erred by admitting prejudicial prior bad acts, the convictions were reversed and remanded for a new trial except for Meeks where the remand was to hold a Petrocelli hearing. Per authorities cites, Appellant's case should be remanded for a Petrocelli hearing and/or a new trial. The error of admission of all these prior bad acts were plain and clear and Appellant suffered prejudiced from the errors.

V. Trial Court erred by violating Appellant's right to confrontation

The standard of review is plain error. Christopher Gutierrez testified that he works for the City of Henderson Police Department as a detective. On August 8, 2018, he was assigned to place a tracking device on the Mercury Grand Marquis in question with Detective Stier. (Day 5, p. 123, ls. 21-25, p. 124, ls. 3-15).

Codefendant's and Appellant's counsels were unable to cross examine Detective Gutierrez about the device and the steps taken to install the device onto the car. (Day 5, p. 127, ls. 22-25, p. 128, ls. 1-18).

Detective Lippisch testified that he worked for the Henderson Police Department. As part of his investigation, he used the tracker and google map to

track the red or maroon Mercury Grand Marquis. When asked if Google map is always right, Detective Lippisch answered that when he used it, it had always been accurate. However, he can't testify if it's always going to be right or not. (Day 5, p. 147, ls. 4-7).

On cross examination, Codefendant's counsel attempted to question Detective Lippisch regarding the tracker. When the State objected, the trial court called counsel to the bench and the questioning regarding the tracker stopped. (Day 5, p. 168, ls. 16-21). On cross examination by Appellant's trial counsel, Detective Lippisch explained that the tracker worked by satellite but he's not an expert on the actual mechanics of the device. (Day 5, p. 175, ls. 11-14).

The trial court placed on record outside the presence of the jury that Appellant's trial counsel had wanted to cross examine regarding the location of the tracker device. The State objected because they didn't want criminals to learn how trackers are used by the police. (Day 5, p. 268, ls. 8-25).

"Under Crawford v. Washington, 541 U.S. 36, 124 S.Ct.1354 (2004), the testimonial statement of an otherwise unavailable witness is inadmissible "unless the defendant had an opportunity to previously cross examine the witness regarding the witness's statement." Medina v. State, 122 Nev. 346, 353, 143 P.3d 471 (2006).

In Melendez Diaz v. Massachusette, 557 U.S. 305, 129 S.Ct. 2527 (2009), the United States Supreme Court concluded that the admission of a forensic analysts' affidavits that reported that a seized substance was cocaine, without the analysts themselves being subject to cross examination, violated the defendant's right to confrontation. The government's claim that the analysts' affidavits should not be subject to the confrontation clause because they represent "neutral and scientific testing," the Court concluded that confrontation of the analysts would be beneficial to "test the analysts' honesty, proficiency and methodology – the features that are commonly the focus in the cross examination of experts." Id. The threshold question in evaluating a confrontation right under Crawford and Melendez Diaz is whether the statement was testimonial in nature. A statement is testimonial if it "would lead an objective witness" to reasonably believe "that the statement would be available for use at a later trial." Medina, 122 Nev. at 354, 143 P.3d at 476 (quoting Flores v. State, 121 Nev. 706, 719, 120 P.3d 1170 (2005)(quoting Crawford, 541 U.S. at 52). Vega v. State, 126 Nev. 332, 236 P.3d 632 (2010) (doctor testifying about a nursed sexual abuse examination report violated defendant's right to confrontation because defendant did not get the opportunity to cross examine her).

In Ramlez v. State 114 Nev. 550, 958 P.2d 724 (1998), this Court held that trial court erred by admitting investigating officer's testimony regarding the factual

conclusions of an examining of a nontestifying physician's medical report, not in evidence, that defendant sexually assaulted the victim was testimonial and a violation of defendant's right to confrontation.

While the cases cited above involved the testimonial statements of nonavailable witnesses, the violation to confrontation is the same as the one suffered by Appellant. By not being allowed to ask about the mechanics and science behind how the tracker worked, Appellant was not able to test and challenge the reliability of such devices. The State's interest in not letting "criminals" know what trackers look like, how they're installed, and how they work is not based on law or any legal precedence. Their interest in secrecy is outweighed by Appellant's constitutional right to confront witnesses testifying against him and the inability of Appellant's trial counsel to ask questions regarding the tracker is akin to unavailability of the witnesses as to evidence on the tracker. While the cases cited above are under the abuse of discretion standard, those cases still apply. The error was trial court not allowing Appellant's counsel to question and challenge the reliability of the tracker as well as google map. The error was plain and clear from the record because the trial court made a record of its decision. Appellant suffered substantial prejudice from the violation of his confrontation rights because it was the tracker in conjunction with google map that allowed law enforcement to track down Appellant and Codefendant after the

robbery on August 9, 2018. Per authorities cited above, this Court should remand Appellant's case to trial court for a retrial.

VI. Trial Court erred by allowing unqualified experts to testify regarding tracker and google map

The standard of review is plain error. "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge." NRS 50.275.

The use of tracker in conjunction with google map qualifies as scientific and technical evidence. What they are, how it works, and whether they are reliable are facts that the jury needed to determine facts in issue in this trial. Trial court erred by allow the State to offer the testimonies of the detectives without qualifying them as expert witnesses.

"Clearly, before a witness may testify as to his or her expert opinion, the district court must first determine that the witness is indeed a qualified expert. See e.g., Fernandez v. Admirand, 108 Nev. 963, 969, 843 P.2d 354 (1992) (stating that once a witness is qualified as an expert, he or she may testify to all matters within his or her experience or training); Houston Exploration v. Meredith, 102 Nev. 510, 513, 728 P.2d 437 (1986) (indicating that the proffered expert testimony may be

admitted only after the witness is qualified as an expert). The Court in Mulder v. State, 116 Nev 1, 992 P.2d 845 (2000) found that proposed defense's expert witness was not qualified to testify as a fingerprint expert. Most of his experience was with document examination. Court found that admission of defense expert's testimony was error, but since it favored the defense, the error was harmless.

But the error was not harmless here. The detectives testimonies about the use of trackers in conjunction with google map lead them to Appellant's red or maroon Mercury Grand Marquis and to his eventual arrest. The error of allowing unqualified detectives to testify as experts was plain and clear on the record. The prejudice Appellant suffered as a result was substantial.

"Furthermore, the facts on which an expert opinion is based must permit of reasonably certain deductions as distinguished from mere conjectures. Notwithstanding a tendency toward the extension of the field of admissibility of expert testimony which is based upon established or generally recognized scientific principles or discoveries, it is essential that the principle or discovery from which a deduction is to be made shall have been sufficiently established to have gained general acceptance in its particular field of science." Beasley v. State, 81 Nev. 431, 437, 404 P.2d 911 (1965). In Beasley, this Court held that trial court erred by permitting an expert to testify as to the time that defendant's fingerprints were left

on the victim's automobile because the expert had not performed a control test to determine the time the prints were left.

Here, no control tests were conducted as to the reliability of the tracker and the accuracy of the tracker and google map. Per Beasely, this Court should remand Appellant's case back to trial court for a retrial because the plain and clear error substantially prejudiced Appellant.

"Under NRS 174.234(1)(a), both defense counsel and the prosecution must submit to each other, at least five days prior to trial, written notice of all witnesses they intend to call. Further, under NRS 174.234(2), written notice of expert witnesses must be filed and served upon the opposition at least twenty one days before trial. Pursuant to NRS 174. 295(2), the remedy for a violation of the discovery provisions of NRS 174.234 is that the district court "may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances. When addressing discovery violations, the district court must be cognizant that defendants have the constitutional right to discredit their accuser, and this right "can be but limitedly circumscribed." Therefore, to protect this constitutional right, there is a strong presumption to allow the testimony of even late disclosed witnesses, and evidence should be admitted when it goes to the heart of the case.

However, the district court must also balance this right against “not only the waste of judicial time factor, but must take particular care not to permit annoying, harassing, humiliating and purely prejudicial attacks unrelated to credibility.” Sampson v. State, 121 Nev 820, 827, 122 P.3d 1255 (2005).

Here, the State failed to file written notice of expert witnesses for any of the detectives that testified regarding the use of the tracker in conjunction with google map. Trial court erred by still allowing their unnoticed unqualified expert testimony. The error was plain and clear on record and prejudiced Appellant by their admission. Per Sampson, this Court should remand Appellant’s case for retrial.

VII. There was insufficient evidence for deadly weapon enhancements

A. Standard of Review

Whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution. A reviewing court will not disturb a verdict on appeal if it is supported by substantial evidence

Domingues v. State, 112 Nev. 683, 917 P.2d 1364 (1996).

B. Argument

In Dozier v. State, 2012 Nev.Unpub.Lexis 110, Nevada Supreme Court found that while defendant admitted he used a gun to two witnesses, the lack of credibility of the witnesses could not lead any rational trier of fact to find the

essential elements of deadly weapon enhancement because it is not supported by substantial evidence. While *Dozier* was an unpublished opinion prior to 2014, Appellant suggests that the case offers some amount of guidance and persuasion. Here, no deadly weapon was seen by witnesses nor found at the scene of the robberies of July 21, 2018, July 23, 2018, July 31, 2018, and August 6, 2018. Thus, under *Dozier*, Appellant respectfully requests this Court to find there was insufficient evidence to sustain deadly weapon enhancements for charges related to the enumerated robberies recited above.

VIII. Cumulative errors

A. Standard of Review

“When evaluating a claim of cumulative error, we consider the following factors (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.” *Valdez*, 124 Nev. at 1195, 196 P.3d at 481.”

B. Argument

This Court should reverse Appellant’s convictions because of the following cumulative errors. Trial court erred by proceeding with sentencing even though Presentencing Investigation Report contained inaccuracies. Trial court erred by basing his sentencing decision from facts not on record. Trial court erred by failing to sever the four robberies charged by the State. Trial court erred by failing to

sever the Appellant's case from Codefendant's case. Trial court erred by admitting inadmissible character evidence of bad acts of Appellant's traffic offenses. Trial Court erred by violating Appellant's right to confrontation when limiting Appellant's trial counsel's ability to cross examine anything about the tracker and google map. Trial Court erred by allowing unqualified experts to testify regarding tracker and google map. The State, by leaving the windows opened in the red or maroon Mercury Grand Marquis, failed to properly preserve material evidence. Trial Court erred by allowing the State to amend information after trial started. State failed to present sufficient evidence at trial.

In Avila-Granados v. State, 2019 Nev. Upub. Lexis 820, the Court reversed and remanded defendant's case because of cumulative errors including detective's testimony regarding his experience with sexual assault victims' behavior, refusing defendant's proposed jury instruction on consent, and the prosecutor using the word "rape" and commenting on defendant's lack of respect for women.

In Morales v. State 122 Nev 966, 972, 143 P.3d 463 (2006), the Court reversed and remand for new trial because several improper statements by prosecutor during closing arguments were cumulative errors. In Siposas v. State 102 Nev 119, 122-125, 716 P.2d 231 (1986), the Court held that improper admission of photograph per NR 50.125(1)(d) not used to refresh recollection and prosecutor's improper comment regarding a defense witness were cumulative error

and required reversal and remand for a new trial. Pursuant to the authorities cited above, Appellant should have his convictions reversed and case remanded for new trial because the errors committed by trial court and the State amounted to cumulative errors.

Conclusion

Appellant respectfully request this Court to consider reversing his convictions and remanding the case back to trial court for retrial or resentencing.

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 2008 for Mac, version 12.3.6 (130206) in 14 point Times New Roman style;
2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☐ Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

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☒ Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5th day of November, 2019.

/s/ Jeannie N. Hua, Esq.
Nevada Bar No. 5672
Law Office of Jeannie N. Hua, Inc.
5550 Painted Mirage Road, Suite 320
Las Vegas, NV 89149
(702) 239-5715

CERTIFICATE OF SERVICE

I certify that on the 5th day of November, 2019, pursuant to NRAP 25(a)(2)(A)(vi), I electronically transmitted to the court's electronic filing system consistent with NRFCR 8 to

District Attorney's Office
200 S. Lewis Ave.
LV, NV 89101

Dated this 5th day of November, 2019