IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY, Petitioner, v. THE STATE OF NEVADA, Respondent.	Electronically Filed Jan 21 2020 01:26 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 72829/75911

ANSWER TO PETITION FOR REVIEW

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, JONATHAN VANBOSKERCK, and submits this Answer to Petition for Review in obedience to this Court's order filed January 7, 2020, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

Dated this 21st day of January, 2020.

Respecfully submitted,

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BY */s/ Jonathan E. VanBoskerck*
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ARGUMENT

"Supreme Court review is not a matter of right but of judicial discretion." NRAP 40B(a). Pursuant to that rule, the Supreme Court considers certain factors when determining whether to review a Court of Appeals decision, including, "(1) Whether the question presented is one of first impression of general statewide significance; (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or (3) Whether the case involves fundamental issues of statewide public importance." NRAP 40B(a). Appellants bear the burden of "succinctly stat[ing] the precise basis on which [they] seek[] review by the Supreme Court." NRAP 40B(d).

Appellant raises two claims in support of Supreme Court review. First, Appellant argues that the Court of Appeals ("COA") decision regarding "material variance" conflicts with prior decisions of the Nevada Supreme Court and the United States Supreme Court. Petition for Review ("Petition") at 5. Second, Appellant argues that the COA decision regarding the district court's denial of Appellant's motions for new trial, an evidentiary hearing, and to reconstruct the record presents a matter of first impression for the Nevada Supreme Court and is contrary to a prior Nevada Supreme Court decision. <u>Id.</u> at 9.

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I. THE COURT OF APPEALS CORRECTLY DEEMED THE VARIANCE IMMATERIAL

A. Appellant failed to cogently argue "material variance" in his Opening Brief

As a preliminary matter, this Court should decline to consider Appellant's arguments regarding the potential information-evidence variance. It is the responsibility of an appellant "to cogently argue, and present relevant authority, in support of his appellate concerns." Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); see also NRAP 28(a)(10)(A); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority).

In Appellant's Opening Brief ("AOB"), Appellant simply argued that there was "[n]o evidence Alfred took miscellaneous clothing items." AOB at 12. In support of his argument, Appellant submitted that there was no evidence of "miscellaneous clothing" presented at trial and suggested that the evidence for robbery was, therefore, insufficient. Id. Appellant's entire argument was two (2)

sentences. Id. Throughout Appellant's limited argument, Appellant failed to use the legal term "material variance," much less cite to legal authority defining and interpreting the same. Id. In fact, it was not until Appellant's Reply Brief ("ARB") that Appellant even raised such an argument. ARB at 2-6.

NRAP 28(c) explains what an appellant may include in a reply brief. Specifically, that Rule *limits* the argument "to answering any new matter set forth in the opposing brief." NRAP 28(c). A review of the State's Answering Brief ("RAB") reveals that the State did not raise any argument regarding a material variance. See generally, RAB. Therefore, Appellant's failure to raise his argument in the first instance in his AOB should be fatal to Appellant's argument regarding the same.

B. Appellant's contentions regarding the COA Affirmance are belied by the record

"Bare" and "naked" allegations are not sufficient to warrant relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

Appellant suggests that the COA failed to address the sufficiency of the evidence when it rejected Appellant's variance claim. Petition at 6. However, that assertion is directly contradicted by the text of the COA Affirmance ("Affirmance"). The COA specified the standard of review, noting that because Appellant raised

issues regarding the language of the Information before trial, a "normal standard" applied. Affirmance at 5 (citing Simpson v. Eighth Judicial Dist. Court, 88 Nev. 654, 661, 503 P.2d, 1225, 1226 (1972)). The test, the COA determined, was whether Appellant was properly notified of the charged crime and the State's theory. Id. (citing Simpson). Utilizing that test, the COA concluded that the variance between the information and evidence presented at trial was immaterial. Id. at 6. Directly after concluding thus, the COA proceeded to address the final issue of Appellant's first claim, sufficiency of the evidence. Id.

Appellant cites to an unpublished Georgia case, as well as to one Nevada case, for the proposition that there is some difference between a "variance/notice" issue and a "variance/sufficient evidence" issue. Petition at 6. However, Appellant fails to cite to any case or statute that reflects this distinction. Further, Appellant acknowledges that the majority in State v. Jones, 96 Nev. 71, 605 P.2d 202 (1980), examined whether the pleadings sufficiently noticed the defendant of the pending charges and the State's theory of the case.[1] Id. Regardless, whether the COA specified the correct test, it used valid legal precedent to reach its conclusion; therefore, no Supreme Court review is necessary. See, Wyatt v. State, 86 Nev. 294,

[1] Appellant argues this case presents an opportunity to "clarify" Jones. Petition at 5. However, Appellant does not argue what needs clarity – Appellant merely opines regarding the outcome of that case, without legal support. Id. at 6, n.1.

298, 468 P.2d 338, 341 (1970) ("If a judgment or order…reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed.").

Therefore, because the COA reached the right result, the State submits this Court should decline review.

C. The error in the Information was harmless

Under NRS 178.598, any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Non-constitutional trial error is reviewed for harmlessness, based on whether the error had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

A non-constitutional standard of review is applicable in this case. Appellant fails to allege that any of his substantial rights were violated. Knipes, 124 Nev. at 935, 192 P.3d at 1183. Nonetheless, under any standard, the error in the Information does not warrant reversal, because Appellant was on notice of the specific charges against him and the evidence the State intended to use in support of those charges. Indeed, from the charges listed, the evidence presented at trial, and the jury instruction, the jury was able to conclude beyond a reasonable doubt that Appellant was guilty of robbery.

Loss Prevention Officer Munoz testified he saw Appellant take three wallets, face cream and fragrance items and conceal them in his coat. Appellant's Appendix,

Volume IV ("4AA") at 696-704. The jury saw video of Appellant's actions. Id. at 709-16. Munoz then testified that he confronted Appellant outside the store, at which point Appellant threatened Munoz with a knife, then fled. Id. at 724-27. Munoz did not pursue Appellant because he was concerned for his safety. Id. The police officers who arrested Appellant recovered and impounded the items Munoz described. Id. at 852-53, 862. The COA concluded the jury had sufficient evidence to convict Appellant of robbery. Affirmance at 9.

Because the jury had sufficient evidence to convict Appellant of robbery, the State submits that the error in the Information was harmless.

D. The cases cited by Appellant do not provide grounds for Supreme Court review

In support of his argument, Appellant cites to two cases.[2] Petition at 5. However, these cases do not provide grounds for Supreme Court review.

Appellant first cites to Jedzik v. State, 121 Nev. 129, 110 P.3d 1058 (2005), arguing, "[w]hen State presents evidence that is in variance with the charges then it fails to prove the crime beyond a reasonable doubt." Petition at 7. However,

[2] Appellant also references multiple foreign cases which the State does not address here, as they are not binding on this Court. See, Custom Cabinet Factory of New York, Inc. v. Eighth Judical Dist. Court, 119 Nev. 51, 62 P.3d 741 (2003) (abrogated on other grounds by Winston Products Co. v. DeBoer, 122 Nev. 517, 134 P.3d 726 (2006)). The State submits that these cases should not influence this Court's decision, but can supplement this briefing to address those cases, if this Courts deems it necessary.

Appellant's argument lacks merit for multiple reasons. First, the Jedzik Court never mentions the idea of "variance" that Appellant argues. See generally, 121 Nev. 129, 110 P.3d 1058. Second, the facts of Jedzik are easily distinguishable from those of the instant case: In Jedzik, the Court concluded that the State had failed to support one of three counts of burglary and fraudulent credit card use because the State did not sufficiently place Jedzik at the scene at the time the alleged crime occurred. 121 Nev. at 141, 110 P.3d at 1066. Here, the COA concluded that Appellant was placed at the scene by both a witness, as well as by video evidence, and the stolen items were recovered from Appellant's possession by the arresting officers. Affirmance at 5-8.

Appellant next cites to Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270 (1960), alleging that allegations and proof must match. Petition at 8. In Stirone, the prosecutor introduced evidence of eventual interference with steel shipments from a steel mill that would be built with the defendant's concrete; however, the grand jury returned an indictment for interference with the shipments of the sand for defendant's concrete itself. 321 U.S. at 217, 80 S.Ct. at 273. The Court concluded that it was improper for Stirone to be convicted of interference with interstate export of steel, when the indictment charged Stirone with interference with interstate import of sand, as Stirone had a right to be tried only for the charge presented in the indictment returned by the grand jury. Id. Appellant, however, was not convicted of

a separate robbery, or on the basis of some attenuated actions distantly related to the robbery at issue. Appellant was convicted on the basis of his actions on the date specified in the Information, and for which he was arrested. 1AA at 030-32; 2AA at 322-23. The COA concluded that Appellant was properly noticed of the charged crime and the State's theory. Affirmance at 5-6.

Because the cases cited to by Appellant are easily distinguished from the instant case, the State submits they do not provide grounds for relief.

E. Appellant's mention of double jeopardy does not warrant Supreme Court review

Appellant also briefly mentions that the error in the Information exposes him to double jeopardy because he was only convicted of taking clothing items. Petition at 9. However, Appellant fails to provide a legal basis for this claim. In fact, the State submits Appellant could not successfully do so, as Appellant was already convicted for his actions on March 30, 2016. State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997) ("When a defendant receives multiple convictions based on a single act, this court will reverse 'redundant convictions that do not comport with legislative intent.'" (quoting Albitre v. State, 103 Nev. 281, 738 P.2d 1307 (1987)).

II. THE COURT OF APPEALS CORRECTLY DEFERRED TO THE DISTRICT COURT REGARDING APPELLANT'S POST-TRIAL MOTIONS

Appellant divides his second claim into five (5) separate sections, claiming multiple issues of first impression. Petition at 9-23. However, Appellant does not

clearly raise issues in these sections, and the arguments he does make have each already been addressed by the Nevada Supreme Court.

A. Appellant does not raise any issue for this Court to consider regarding the jury note

Appellant first provides background regarding the jury note that was submitted to the district court, and was responded to without consultation with the parties. Petition at 9. Appellant then describes the motions he filed after finding the note, the denial of those motions, and the COA's findings on appeal. Id. at 10-11. However, Appellant does not raise any issues for this Court to consider.

B. District court judges' authority to hear post-trial motions has previously been interpreted

Appellant argues that "the only time a non-trial judge may make a decision on a case after verdict is if the trial judge is physically not available." Petition at 14. In so arguing, Appellant relies heavily on a statutory construction argument dealing with NRS 175.101. Id. at 11-15. Significantly absent from Appellant's argument, though, are the cases that set out the judiciary's broad powers and that reject similar attempts to limit judicial authority.

Appellant argues that, under NRS 175.101, only the trial judge, Senior Judge Bixler, had authority to consider Appellant's Motion for a New Trial. Petition at 15. However, NRS 176.515 provides the statutory basis for motions for a new trial,

giving authority to "the court" generally, rather than specifying whether the trial judge must address such motions.

The Nevada Supreme Court has also addressed a similar argument that authority over a case rests solely with the trial judge. Dieudonne v. State, 127 Nev. 1, 5, 245 P.3d 1202, 1205 (2011) (rejecting the argument that the defendant had a due process right to be sentenced by the judge who accepted his guilty plea). The COA relied upon Nevada precedent in addressing Appellant's argument, as well, explaining that "requiring the trial judge to hear post-trial motions could interfere with the district court's broad authority to administer its caseload and exacerbate difficulties that often arise from district court judges' scheduling assignments." Affirmance at 20 (citing Halverson v. Hardcastle, 123 Nev. 245, 261, 163 P.3d 428, 439-40 (2007)). Consistent with these previous Nevada Supreme Court decisions, the COA interpreted NRS 175.101 inclusively, rather than exclusively. Id. ("Stated another way, NRS 175.101 allows another judge to preside over post-trial motions if the trial judge has died, is sick, or disabled, but did not prohibit Judge Smith from hearing the post-trial motions in this specific case.").

Because the COA ruled consistent with existing Nevada precedent, the State submits that this does not present an issue of first impression for this Court's review.

C. The Nevada Supreme Court has previously determined whether a district court's denial of post-trial motions was error

Appellant goes on to argue that the district court's denial of his post-trial motions was error. Petition at 16-23. However, Appellant only makes substantive arguments regarding his Motion for a New Trial. Id. Furthermore, Appellant failed to cogently argue the district court's denial of his Motion for Evidentiary Hearing and Motion to Reconstruct the Record on appeal.

As stated *supra*, NRS 176.515 provides grounds for a district court to grant a new trial. Specifically, the court can grant a new trial "if required as a matter of law or on the ground of newly discovered evidence." NRS 176.515(1). The COA described how an appellant can establish a basis for a new trial on the ground of newly discovered evidence, explaining:

> [T]he evidence must be: newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; *such as to render a different result probable upon retrial*; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence…

Affirmance at 21 (citing Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991)) (modifications and emphasis in original). A trial court's disposition on a motion for new trial is discretionary, and will only be reversed in the case of an abuse of discretion. Sanborn at 406, 812 P.2d at 1284. An appellant must demonstrate each of the Sanborn factors in order to properly plead an abuse of discretion. Affirmance at 21 (citing Sanborn at 406, 812 P.2d at 1285).

Appellant's sole ground for a new trial was discovery of the jury note. Petition at 18-23. However, Appellant failed to demonstrate that the jury note was grounds for a new trial. The district court considered Appellant's argument and determined that the jury not was not newly discovered evidence. 8AA at 1682, 1693. The jury note had no evidentiary value to Appellant's trial; in fact, the jury note demonstrated that the jury had questions about the law, not Appellant's defense theory. Finally, Appellant failed to demonstrate that the note would have rendered a different result at a new trial. 8AA at 1694. The COA agreed with the district court's analysis that Appellant failed to demonstrate the likelihood of a different result. Affirmance at 21-22. As such, the COA properly concluded that the district court did not abuse its discretion in denying Appellant's Motion for New Trial. Id. at 22.

Appellant references multiple cases in arguing that the COA was incorrect in concluding the district court's mistake regarding the jury note was harmless error. Petition at 19-22. Appellant references United States v. Martinez, 850 F.3d 1097 (2017), a Ninth Circuit Court of Appeals case, arguing "NRS 178.388(1) provides a defendant with the right to be present at every critical stage of the trial – including the discussion of jury notes." Petition at 19. However, a review of Martinez reveals that it arose out of the Southern District of California and did not address any Nevada statutes. 850 F.3d 1097. In fact, Martinez instead analyzes Federal Rule of Criminal Procedure 43(a). Id. at 1100. While the language of NRS 178.388(1) may be similar

to that of Fed. R. Civ. Pro. 43(a), Martinez is not binding on Nevada courts, and Appellant fails to allege that it has been adopted by the Nevada Supreme Court. See, Custom Cabinet Factory, 119 Nev. 51, 62 P.3d 741.

Appellant also cites to Manning v. State, 131 Nev. 206, 348 P.3d 1015 (2015) regarding an appellant's rights under NRS 178.388(1). Petition at 19. Once again, a review of Manning demonstrates that it does not address that statute. 131 Nev. 206, 348 P.3d 1015. The Manning Court did address a district court's response to a jury note without consultation and found the same was erroneous; however, Manning determined that it was unlikely that the result would have been substantively different had the parties been consulted and, therefore, concluded the error did not warrant reversal. Id. at 212-13, 348 P.3d 1019-20. Like the Manning Court, the COA here concluded that there was an unlikelihood that the result would be different and affirmed the district court's denial. Affirmance at 21.

Though without proper citation, Appellant cites to Jeffries v. State, 133 Nev. 331, 397 P.3d 21 (2017), arguing that the jury note demonstrated confusion among the jury and a need for further clarification. Petition at 20. In Jeffries, the jury submitted two notes requesting clarification. 133 Nev. at 338, 397 P.3d at 28. After consulting the parties, neither of which offered a supplemental instruction, the district court in Jeffries declined to substantively answer the jury's questions. Id. The Nevada Supreme Court determined that the district court did not abuse its discretion

by declining to give a supplemental jury instruction. Id. Like the Jeffries Court, the COA here determined "the district court refused to answer a question that was already answered by the instructions, and therefore, the district court did not abuse its discretion." Affirmance at 18.

Appellant finally cites to Gonzalez v. State, 131 Nev. 991, 366 P.3d 680 (2015), regarding a trial court's duty to give instructions to clarify jury doubt or confusion. Petition at 20. Worth noting, however, is that the Jeffries Court declined to extend Gonzalez's application, finding that Gonzalez did not apply to Jeffries. 133 Nev. at 338, 397 P.3d at 28. Furthermore, contrary to Appellant's assertion, the COA did not, in fact, cite to Gonzalez when it concluded that the jury note was sufficiently answered by the jury instructions. See, Petition at 21; see also, Affirmance at 18 (citing Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968)). The Gonzalez Court determined that the district court abused its discretion when declined to give multiple clarifying or substantive instructions when the jury made it clear it lacked understanding, and the cumulative error thereof denied Gonzalez of his right to a fair trial. 131 Nev. at 1003, 366 P.3d at 688. The COA distinguished the instant case from Gonzalez, finding that the facts more closely resembled Tellis, and ruling that the district court did not abuse its discretion. Affirmance at 18. Because the COA cited Gonzalez simply to distinguish the instant case, and explain that the instant case did not fall within the scope of Gonzalez, the COA did not rule in conflict with

Nevada precedent. Id.; see, 131 Nev. at 996, 366 P.3d at 683-84 (differentiating between Tellis and the "exception" instituted in Gonzalez).

Therefore, contrary to Appellant's assertions, the COA ruled consistent with the cases cited to in Appellant's Petition and in the Order of Affirmance. The result of those consistent rulings was that the district court did not abuse its discretion and the district court's rulings merited deference on appeal. Affirmance at 22.

Appellant also submits that the COA did not address whether the district court's rulings on the evidentiary hearing motion and request to reconstruct the record were erroneous, alleging "[b]y ignoring this step in the process, the COA failed to understand the importance of an evidentiary hearing and reconstruction of the record." Id. at 17. However, the COA did address Appellant's allegations regarding these two motions, noting:

> Harvey also argues that the district court erred by denying his motion to reconstruct the record and by failing to hold an evidentiary hearing on to his post-trial motions. We have reviewed these arguments and conclude that the have not been cogently argued because they are unsupported by relevant authority.

Affirmance at 22, n.9 (citing Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987)). Because Appellant failed to cogently argue these claims before the COA, any error in the COA's determination of those issues must be attributed to Appellant's poor briefing, or lack thereof. Appellant's failure to cogently argue these claims to the COA is fatal to his demand for Supreme Court review.

Because Appellant fails to demonstrate that the COA ruled in conflict with Nevada precedent, the State submits that Appellant has failed to demonstrate the need for Supreme Court review.

CONCLUSION

Based upon the foregoing and the record before this Court, the State respectfully submits that Appellant's Petition for Review should be denied.

Dated this 21st day of January, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for review or answer 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 it 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 petition complies with the type-volume limitations of NRAP 40, 40A and 40B because it is proportionately spaced, has a typeface of 14 points and contains 3,654 words.

Dated this 21st day of January, 2020.

Respecfully 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 January 21, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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