IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL MCNAIR

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 78871

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Douglas Herndon, District Judge
District Court No. C-17-327395-1

APPELLANT'S OPENING BRIEF

Navid Afshar
State Bar #14465
Deputy Special Public Defender
JoNell Thomas
State Bar #4771
Special Public Defender
330 South 3rd Street
Las Vegas, NV 89155
(702) 455-6265
Attorney for McNair

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I. JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of first-degree murder with use of a deadly weapon and concealment of a firearm. 10 App. 1964. The judgment of conviction was filed on May 3, 2019. *Id.* A timely notice of appeal was filed on May 22, 2019. 10 App. 1966. This Court has jurisdiction over this appeal pursuant to NRS 177.015.

II. ROUTING STATEMENT

This is an appeal from a judgment of conviction based on a jury verdict for first degree murder and a sentence of 25 years to life. The issues in this appeal are of a constitutional dimension and present an important issue regarding improper comments made by the State related to the credibility of witnesses, in addition to other issues concerning a biased jury, and failure to properly instruct the jury. This case should be retained by the Nevada Supreme Court. NRAP 17(a)(11). This appeal is not within any of the case categories presumptively assigned to the Court of Appeals. NRAP 17(b).

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III. STATEMENT OF THE ISSUES

A. Whether the State Violated *Batson v. Kentucky* and the District Court Committed Structural Error.

B. Whether The District Court Erred by Not Striking the Venire Panel After Michael Made Specific Allegations That Established Systematic Non-Compliance With NRS 6.045.

C. Whether There is Insufficient Evidence to Support the Murder Conviction.

D. Whether Michael Was Prejudiced by The State's Comments During Closing Argument Referencing Defense Counsel and Making an Improper Analogy to Explain Premeditation.

E. Whether the District Court Abused its Discretion by Allowing an Investigator Employed by the Clark County District Attorney's Office to Testify and Attack the Credibility and Character of Witnesses.

F. Whether the District Court Abused its Discretion by Failing to Grant the Requested Voluntary Manslaughter Instruction.

G. Whether Cumulative Error Warrants a New Trial.

IV. STATEMENT OF THE CASE

On October 24, 2017, the State charged Appellant Michael McNair by way of information with one count each of Murder with Use of a Deadly Weapon, and Carrying Concealed Firearm or Other Deadly Weapon. 1 App. 159.

Trial began on February 26, 2019. 3 App. 383. The jury returned a verdict of guilty on all counts on March 7, 2019. 9 App. 1910.

Prior to trial, there were juror issues related to violations of *Batson v. Kentucky* and a venire that did not comprise a fair-cross section due to systematic exclusion. 3 App. 395; 5 App. 892. During trial, Michael requested an instruction on voluntary manslaughter, which the court denied. 8 App. 1634-35. Michael objected when an investigator for the State testified about a witness who was unavailable at trial but had their prior testimony read into the record. 1 App. 93; 8 App. 1532. During closing argument, the State made comments about Michael's counsel, which were the basis of a motion for mistrial. 9 App. 1807. The State also made an analogy comparing the mens rea element of premeditation for first degree murder to a traffic violation. 9 App. 1800-01. These issues are discussed in more detail in the relevant section below.

On May 1, 2019, the district court sentenced Michael on Count One to twenty years to life, with a consecutive term of five to twenty years for use of a deadly weapon; and on Count Two, two to five years, to run concurrently with Count One. 10 App. 1962. The total aggregate sentence was twenty five years to life. *Id.*

V. STATEMENT OF THE FACTS

On September 24, 2017, around 9:15 p.m., Michael was working his regular shift at Unified Containers, located at 1300 North Las Vegas Boulevard and Searles Ave. 5 App. 1055. Because of the events that occurred within the next 15 minutes, the State would allege that Michael shot and killed Gordon Phillips with the use of a deadly weapon. 1 App. 159.

At the intersection of Las Vegas Boulevard and Searles Ave., there are companies located next to Unified Containers: Flavors, Anderson Dairy, and Crystal Peaks. 5 App. 1044, 1049; 6 App. 1135. These companies are under the same ownership and directly adjacent to each other, allowing employees of one can company to access the others. 6 App. 1135. Michael originally started out as a bagger for Unified Containers, but it would not be unusual for him to travel through or work in areas where the other companies were located, in particular, Crystal Peaks. 6 App. 1142, 1170. Michael's supervisors noticed that he learned quickly and was a hard worker. 5 App. 1079; 6 App. 1142-43. They started training him in different areas so that he could serve in a supervisory role during the night shift. *Id*. He worked in an area with a great deal of

homeless traffic, with anywhere from 40 to 50 homeless individuals in the area. 5 5 App. 1096. It was not uncommon for the homeless in the area to carry knives to protect themselves. On the night of the shooting, Michael took his break in his company's parking lot. 6 App. 1154-56.

Argument with Gordon:

While Michael was on his break, Gordon, one of the homeless people congregating in the area, approached him, yelling at him through a fence to turn down the music from his truck. 5 App. 1013. Soon, witnesses could hear yelling and arguing, with Gordon threatening to jump over the fence that separated him from Michael. 5 App. 1015-16, 1098. During this confrontation, Gordon was seen clasping a knife behind his back. 5 App. 1016.

Michael approached Ramiro Romero, who recently started working at Unified Containers, and asked him to come assist with someone in front of the parking lot. 6 App. 1320. There was conflicting testimony as to what occurred next. Ramiro testified that while he and Michael were outside in the general dock area, Michael pointed towards the gate

entrance with a phone. 6 App. 1322.[1] Alternatively, Detective Hoffman, who narrated surveillance video for the Sate, testified that Michael had a firearm and pointed it in Gordon's general direction. 8 App. 1561. While Ramiro and Michael were in the company's parking lot area, Gordon and another person yelled at them through the fence. 6 App. 1321. Michael asked that they stop yelling because he wanted to be left alone and go back to work. 6 App. 1320-22. Despite his request, Gordon and another person continued their yelling. 6 App. 1323. Michael went to his truck, and then opened the gate for Dennis Simpson, a security guard for Unified Containers, who arrived in a white truck. 6 App. 1324, 1326. Gordon and the other individual with him walked away. 6 App. 1328; 8 App. 1564. Michael and Ramiro walked towards Gordon but stayed on their side of the street, walking up to the corner of Las Vegas Boulevard and Searles Ave. 1 App. 99; 6 App. 1331. Ramiro, Michael, and Dennis returned to work. 6 App. 1327. Ramiro testified that after the initial confrontation with Gordon, Michael tried to sell him a gun. 6 App. 1335. Ramiro asked Michael just a few days prior if he had a gun he could sell

[1] On direct examination he confirmed that at a prior hearing he testified it was a gun, not a phone. 6 App. 1323.

him. *Id*. Ramiro testified that he was so agitated as a result of the confrontation with Gordon that he was still angry several minutes later, so much so that he punched boxes in the warehouse. 6 App. 1333.

Shooting:

Ramiro went back to work and did not witness the shooting. 6 App. 1333, 1342. However, multiple other witnesses were present for the shooting, providing contradictory accounts about what happened, with one witness in close proximity to the shooting testifying that Mitchell Johnson, Michael's half-brother, was actually the shooter. 1 App. 102-03.

Mitchell was the main witness for the State regarding his proximity to the confrontation that led to the shooting. 7 App. 1409. Prior to the night of the shooting, he also worked at Unified Containers for about a year and half. 7 App. 1398. Unlike Michael, he did not excel at the job, and was terminated for tardiness and absenteeism. 6 App. 1141. On the night of the shooting, Mitchell, along with his girlfriend Bianca Redden, drove over to Michael's worksite because he needed $10 to buy marijuana. 7 App. 1309, 1400, 1432.[2] Mitchell and Bianca arrived at Michael's job in

[2] Mitchell liked smoking marijuana, so much so that he admitted to having ingested marijuana on the day of and just prior to testifying at trial. 7 App. 1431.

a white GMC suburban with a large dent in the front door. 5 App. 986; 8 App. 1566. Mitchell drove his vehicle in through the gate of Unified Containers and got out to meet Michael. 7 App. 1403. He claimed that Michael asked him to cross the street with him from the corner of Searles Ave., where Unified Containers was located, to the other side of the street, near the intersection of Las Vegas Boulevard. 7 App. 1403, 1405, 1424. Mitchell's version indicated that he was leading the way until he and Michael came across Gordon, who stood up to approach them. 6 App. 1407. He testified that he encountered Gordon, who told him to "just leave it alone" but instead Mitchell punched Gordon in the neck for being "too close." *Id.*, 7 App. 1406, 1440. Mitchell could not remember key details about Gordon, including his height and weight. 7 App. 1441.

Mitchell's claim that Gordon approached him was contradicted by Joshua Brennan, a security guard working for Palm Mortuary, who claimed that Gordon never got up from the ground and was attacked while he was laying down. 6 App. 1100. Mitchell claimed that Michael was behind him when he punched Gordon and that he suddenly heard gunshots, but did not check on Gordon or Michael, opting instead to walk back to his truck and leave with Bianca. 7 App. 1447.

Mitchell's testimony was not just contradicted by other witnesses but by his own prior statements. 7 App. 1438. He previously told investigators that he never went to Unified Containers that night; only when confronted with video surveillance did he finally admit to being there. 7 App. 1421-22. He also denied walking across the street from Searles Ave., on the Unified Containers side of the street, to the side Gordon was on, and denied that he punched Gordon. 7 App. 1422. Mitchell admitted on cross-examination that he had a prior conviction for larceny, the State had not charged him for that offense, and he had an attorney present during his testimony. *Id.*

Other witnesses not only contradicted Mitchell, but each other. This included Anthony Razo, who was homeless at the time and lived in the same area as Gordon. 5 App. 1010. He told police that he saw Michael with a gun, but then retracted this statement, testifying that he did not see him with anything. 5 App. 1023. He also initially told police that there was a 15 minute delay from when he saw Michael for the last time until he heard gunshots. 5 App. 1024. However, on direct examination, he claimed that it was actually a difference of about 30 to 45 minutes. 5 App.

1024. He admitted on cross-examination that he had a prior felony for battery by a prisoner. 5 App. 1039.

Mitchell's girlfriend Bianca testified. She confirmed that she initially lied to police when she said that nothing happened or could happen, instead claiming that Mitchell received his ten dollars and left. 7 App. 1307-09.

Joshua, the security guard for Palm Mortuary, heard an argument or a scuffle. 5 App. 1092, 1098. He saw someone who matched Michael's description wearing a blue shirt, and someone matching Mitchell's description, approach Gordon. 6 App. 1099-1100. Moments later he heard gunshots. 6 App. 1100-01. He claimed that prior to the gunshots, Michael grabbed Gordon, while Mitchell hit him in the side. 6 App. 1100-02. After the gunshots, he saw a white SUV with a dent in it pull out. 6 App. 1109. Joshua acknowledged that the State had shown him a video clip of a portion of the incident prior to his testimony and that he was never asked to identify anyone in a photographic line up. 6 App. 1112-13. He confirmed on cross-examination that he never saw the shooting as his view was obstructed by trees. 6 App. 1110, 1114-16.

Another witness, who was homeless at the time of the shooting, Deanna Lopez, was in the area and was friends with Gordon. 7 App. 1253, 1280. The prosecution argued that her version of events matched Mitchell's. 9 App. 1786. On the night of the shooting, she and her boyfriend Tom, along with another homeless man, Anthony, were laying on the ground about 24 feet from Gordon. 7 App. 1256. Deanna required prescription glasses and had difficulty seeing things from far away. 7 App. 1283. In fact, she was night blind and was not wearing her glasses that night. 7 App. 1283, 1260, 1286. A short suitcase also impeded her vision. 7 App 1287. However, after reading her statement which she gave to the police, Deanna confirmed that it was actually a stroller, not a short suitcase. 7 App. 1288. Despite her impaired vision, she testified that she saw Gordon cross the street towards Searles Ave., and argue with someone in front of the Unified Containers side of the street. *Id*. The two men that Gordon argued with came back to his side of the street about five minutes later. 7 App. 1257. Michael was not wearing a blue shirt and stayed on the curb, while Mitchell approached Gordon. 7 App. 1258-59. According to her, Gordon stood up, Mitchell punched him twice, and then Michael shot Gordon about 5-6 times from the curb, not the sidewalk. 7

App. 1259. She went over and put a sheet on Gordon's wounds to stop the bleeding and her friend Anthony called 911. 7 App. 1260. She was the main witness, apart from Mitchell, to see Gordon stand up. 7 App. 1258. Furthermore, she described Michael as being 5'6-5'8, although he is 6'0-6'1, and described Mitchell as being 5'3-5'5, even though he is 5'7. 5 App. 1051; 6 App. 1099, 1100, 1114; 7 App. 1276.

Kenneth Saldana, another homeless man well acquainted with Gordon, and the closest witness to the shooting, testified at the preliminary hearing but was unavailable to testify at trial. 1 App. 93; 8 App. 1530. His testimony was read into the record during trial. 9 App. 1763. On the night of the shooting, Kenneth was homeless, lived in front of Flavors, and knew Gordon. 1 App. 94. He was about 15 to 20 feet away from Gordon when the argument first occurred and was even closer when the shooting took place. 1 App. 100, 105. His testimony contradicted Mitchell's. Specifically, he testified that Mitchell hit Gordon 5 to 10 times, and that Mitchell, not Michael, shot Gordon.[3] 1 App. 103.

[3] Kenneth did not identify Mitchell by name but identified the shorter of the two males as doing the shooting. 1 App. 103. Furthermore, his testimony describing the other actions of the individual he identified as the shooter matched other witness testimony regarding Mitchell. *See e.g.* 6 App. 1100-02; 7 App. 1259.

Lyle Galeener, Michael's supervisor and an engineer for Unified Containers and Crystal Peaks, came in the morning after the shooting. 5 App. 1073. While walking through a loft area used for storage, he climbed a ladder and found a backpack with a gun in it. 5 App. 1075, 1080. He noted that the area in which he found the backpack with the gun inside was not locked and any employee could access that area. 5 App. 1085.

Investigation:

Detective Hoffman questioned Michael, Mitchell, and Bianca. 9 App. 1732. He did not obtain a warrant for Mitchell's vehicle and noted that Michael wore a blue shirt when he first saw him, with his name on it. *Id.*, 9 App. 1737.

During trial, Detective Hoffman narrated surveillance video that showed some of the events that occurred that night. 8 App. 1561. While narrating the surveillance video, he testified that Michael came back into the warehouse and walked into the engineering and break rooms, where he changed his blue shirt for a red shirt and then put on a blue shirt again. 8 App. 1569-71.

Clark County Medical Examiner, Dr. Gavin – not the medical examiner who performed the autopsy – testified that the Gordon died

from gunshot wounds and that the manner of death was homicide. 8 App. 1466, 1485, 1487. On cross-examination, she confirmed that she could not testify as to what Gordon was doing at the time he was shot or whether the person who shot him was moving backwards or towards him at the time the shots were fired. 8 App. 1492-93. In response to juror questions, she confirmed she could not determine whether the firearm was pointed downward or from a mid-level angle. 8 App. 1496.

LMVPD DNA analyst, Tiffany Adams, examined DNA collected from Michael, Ramiro, Mitchell, and Gordon. 8 App. 1502, 1515. Michael's DNA was found on the gun along with that of another unknown male contributor. 8 App. 1516, 1524. She could not exclude the others from the gun. 8 App. 1517. She was also unable to identify any fingerprints on the magazine clip. 8 App. 1518. LMVPD crime scene analyst, Jamelle Shannon, took DNA swabs from Michael and Ramiro but could not recall if she took one from Mitchell. 6 App. 1219, 1247.

After watching the surveillance video and speaking with Michael, Detective Hoffman arrested him. 8 App. 1583.

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VI. SUMMARY OF THE ARGUMENT

Michael's constitutional rights were violated when the State gave purportedly race-neutral reasons for striking three jurors and the district court precluded Michael from traversing the State's reasons. The State's reasons were not race-neutral because jurors who gave similar answers were not excluded and the remaining reasons the State gave were insufficient to establish anything other than *Batson* violations. Michael was unable to have a jury drawn from a fair cross section of the community as he showed that there was well over fifty percent comparative disparity and underrepresentation. He established that this underrepresentation was due to systematic exclusion based on non-compliance with statutory requirements by the government entities. He was denied Due Process as the State failed to prove beyond a reasonable doubt each and every element of first degree murder because the State was not able to establish all three elements of premeditation, willfulness, and deliberation. His right to counsel was hindered by the State's negative or derogatory comments regarding his attorney's legitimate defense tactics. He was denied Due Process as the State was allowed to explain to the jury that the mes rea for premeditation was akin to

running a red traffic light. He was denied Due Process and a right to a Fair Trial because of the district court's refusal to grant a voluntary manslaughter instruction, despite sufficient evidence to do so. His right to have only relevant and admissible evidence presented against him was violated because an investigator for the State improperly attacked the credibility of a key witnesses, Kenneth, who testified that Mitchell was the shooter. While any of these issues warrants a reversal of his conviction, the cumulative error also necessitates a new trial.

VII. ARGUMENT

A. The State Violated *Batson v. Kentucky* and the District Court Committed Structural Error.

Michael's conviction and sentence must be reversed because his state and federal constitutional rights to Due Process, Equal Protection, a Fair Trial, a Fair and Impartial jury, and Right to a Jury of his Peers, were repeatedly violated during jury selection. The State violated *Batson v. Kentucky*, 476 U.S. 79, 82 (1986), and the district court committed structural error in its handling of the *Batson* challenge. U.S. Const. Amend. V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27; NRS 6.010 and NRS 175.031.

This Court reviews a trial court's rulings on discriminatory intent for an abuse of discretion. *Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008). "Because the district court is in the best position to rule on a *Batson* challenge, its determination is reviewed deferentially, for clear error." *Williams v. State*, 134 Nev. 687, 690, 429 P.3d 301, 306 (2018). If an abuse occurred, it is structural error; which means prejudice is presumed and reversal is necessary. *Williams v. Woodford*, 396 F.3d 1059, 1069 (9th Cir. 2005); *Diomampo*, 124 Nev. at 423, 185 P.3d at 1037. *Batson* provides a three-step process for adjudicating a claim that a peremptory challenge was based on race: First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of based on race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008); *Diomampo*, 124 Nev. at 422, 185 P.3d at 1036.

The first step of a *Batson* challenge requires the party challenging the peremptory strike to establish a prima facie showing of purposeful

discrimination. *Batson*, 476 U.S. at 93. To establish a prima facie showing of discrimination, the defendant must do more than point out that a member of a cognizable group was struck. *Watson v. State*, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014). He must show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 94. He may make this showing by demonstrating a pattern of discriminatory strikes, but "a pattern is not necessary and is not the only means by which a defendant may raise an inference of purposeful discrimination." *Watson*, 130 Nev. at 776, 335 P.3d at 166. Other evidence the defendant may present to support a showing supporting the first prong includes "the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias." *Id.* at 776, 335 P.3d at 167; *Williams*, 429 P.3d at 306. The standard to establish a prima facie case "is not onerous and does not require the opponent of the strike to meet his or her ultimate burden of proof under Batson." *Cooper v. State*, 432 P.3d 202, 204-205 (Nev. 2018) (quoting *Watson*, 130 Nev. at 775, 335 P.3d at 166; *Batson*, 476 U.S. at 93-94)). Instead, the

strike's opponent must provide sufficient evidence to permit the trier of fact to draw an inference that discrimination occurred. *Id.* An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. *Id.* Recently, in *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019), the United States Supreme reaffirmed *Batson*'s importance and expounded on several factors to be considered by the trial court, including:

> • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
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> • evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
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> • side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
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> • a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
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> • relevant history of the State's peremptory strikes in past cases; or
>
> • other relevant circumstances that bear upon the issue of racial discrimination.

Id. Michael argued in the district court that the State's peremptory challenges were used in a discriminatory manner when the State struck

prospective Juror No. 037, Ms. Hernandez, who is Hispanic; prospective Juror No. 0050, Ms. Lyons, who is African-American; and prospective Juror No. 0068, Ms. Pool, who Michael argued was at least in part African-American. 3 App. 467; 5 App. 884, 886.

To establish the first step, Michael cited to *Cooper* to examine the percentages of the panel before and after the prosecutor's strikes. 5 App. 886. Michael referenced *Cooper* in particular for the mathematical percentages of the panel, before, and after the strike. 5 App. 885; *Cooper*, 432 P.3d at 204-205. Before the district court ruled on the first step, the prosecution provided race-neutral reasons for all three of the prospective jurors included in the *Batson* challenge. 5 App. 892-94. Defense counsel argued that under this Court's prior decisions, the first step was moot because the prosecutor offered race-neutral reasons prior to the court ruling on the first step. 5 App. 895; *Williams*, 134 Nev. at 690, 429 P.3d at 306-307. The district court agreed but concluded the third step without giving Michael a chance to proffer his argument as to why the prosecution's race neutral reasons were pretexual. 5 App. 897.

Here, just as in *Williams*, the district court committed structural error by failing to give Michael a chance to challenge the State's race-

neutral reasons. *Id.*, 134 Nev. at 690, 429 P.3d at 308. ("Williams should not have had to ask the district court to conduct step three of the *Batson* analysis. The 'sensitive inquiry' required by step three necessarily includes the district court giving the defendant the opportunity to challenge the State's proffered race-neutral explanation as pretextual.") (internal citations omitted).

Although the district court committed structural error in handling the challenge by failing to allow Michael to offer his argument on the third step, which "stymies meaningful appellate review," an examination of the record reveals that the State's proffered reasons were pretextual. *Id.*

For Ms. Hernandez, the State claimed she was shy and would go with the majority. 5 App. 892. For Ms. Lyon, the State noted that it had attempted to challenge her for cause on two occasions, but relied on her statement that she was racially profiled as the race-neutral reason to dismiss her. 5 App. 893. Finally, for Ms. Pool, the State claimed her dismissal was race neutral because she was troubled by imposing a penalty, had referenced her brother being in jail, and stated certain rehabilitative programs were preferable to prison. 5 App. 894.

The State's claim that Ms. Hernandez was shy fails when contrasted with a similarly situated juror who the State did not challenge or dismiss and who sat on the jury. Prospective juror, Juror No. 077, Mr. White, stated he was shy and even described himself as "timid." 5 App. 872. 876-77. The State did not move to dismiss him[4]. 4 App. 626. This demonstrates that the proffered race neutral reason to remove Ms. Hernandez was pre-textual. *See Conner v. State*, 130 Nev. 457, 466, 327 P.3d 503, 510 (2014) ("A race-neutral explanation that is belied by the record is evidence of purposeful discrimination.").

Regarding Ms. Lyon, the fact that she was racially profiled is in and of itself a unique racial characteristic. *People v. Ojeda,* 137M (Colo. App. 2019) (Noting that where the prosecution offered a life experience involving racial profiling as a race-neutral reason, it "perpetuates the race-based stereotypes *Batson* eschewed."). As the Colorado Court of Appeals noted in its holding, several sister jurisdictions have reached similar conclusions concerning a prosecutor's race-neutral claim that a minority juror's experiences or perception of racial profiling compromise

[4] Mr. White made the original panel for the jury, as juror No. 9. 4 App. 626. However, he was released on the first day of jury trial, after revealing mental health concerns. 5 App. 925-26.

their ability to be fair and impartial. *Id*. ("*See State v. McRae*, 494 N.W.2d 252, 257 (Minn. 1993) ('concluding that the prosecutor failed to articulate a race-neutral basis supported by the record for excluding a black prospective juror who expressed doubt about a system that disproportionately affects black men'); *People v. Mallory*, 121 A.D.3d 1566, (N.Y. App. Div. 2014) ('holding that the People failed to offer a race-neutral reason for a peremptory strike where the prosecutor explicitly referenced race in explaining his reasons for challenging one of the prospective jurors and where the prospective juror responded by stating 'that '[s]ometimes' police officers unfairly target minorities')." *See also Batson*, 476 U.S. at 97 ("[T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of defendant's race on the assumption — or his intuitive judgment — that they would be partial to the defendant because of their shared race.").

Regarding Ms. Pool, the State claimed that it was concerned that she voiced concerns about separating the guilt and penalty phase and needed clarification. 5 App. 894. Additionally, they were concerned because she had voiced support for rehabilitation. *Id*. However, the

supposed concern about her brother was irrelevant because her brother was accused of dealing drugs, which had nothing to do with the charges against Mr. McNair. 1 App. 159; 4 App. 801. Furthermore, she did not indicate she was supportive of rehabilitation over prison as the State claimed. 4 App. 894. *See Conner*, 130 Nev. at 466, 327 P.3d at 510. ("A race-neutral explanation that is belied by the record is evidence of purposeful discrimination."). Instead, she only noted that her brother had been sober for 24 years and was doing well. 4 App. 801. She also noted that her sister in Philadelphia is a trial judge. 3 App. 444. Regarding the issue of clarification on the penalty phase compared with the guilt phase, once the district court explained it to her, she noted that it was a weighty task but she was prepared and ready to do her civic duty. 4 App. 776-79. When asked if she would hold either the State or defense to a higher burden, she indicated she would not but would be fair and impartial and do her civic duty. 4 App. 805. Examining her answers during voir dire and comparing it with the State's race-neutral reasons for removing her, it becomes evident that the race-neutral reasons were pretextual. *See* 4 App. 805-810.

The record demonstrates that the reasons for all three were pretextual and as such, the peremptory challenges had a discriminatory purpose. Furthermore, the district court's error in failing to allow Michael to offer his reasons why the State's race-neutral reasons were pretextual at the actual hearing, prior to making his ruling, deprived him of a fair hearing. Because the error was structural, reversal is mandated. *Diomampo*, 124 Nev. at 423, 185 P.3d at 1037.

B. The District Court Erred by Not Striking the Venire Panel After Michael Made Specific Allegations That Established Systematic Non-Compliance With NRS 6.045.

Michael's conviction should be reversed because his state and federal constitutional rights to Due Process, Equal Protection, a Fair Trial, a Fair and Impartial jury, and Right to a Jury Representing a Fair-Cross Section of the community were violated. The district court erred in its denial of a challenge to strike the panel as it did not represent a fair cross section of the community and Michael established systematic exclusion. U.S. Const. Amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27; and NRS 6.010, NRS 6.045(3).

This Court "applies a de novo standard of review to constitutional challenges." *Grey v. State*, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008).

An accused "[i]s entitled to a venire selected from a fair cross section of the community under the Sixth and Fourteenth Amendments of the United States Constitution." *Williams v. State*, 121 Nev. 934, 939, 125 P.3d 627, 631 (2005). To demonstrate a prima facie case of a violation of the fair-cross section requirement, the accused must show:

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

Morgan v. State, 134 Nev. 200, 208, 416 P.3d 212, 221 (2018) (citing *Williams*, 121 Nev. at 940, 125 P.3d at 631. When a fair-cross section challenge is raised, if "the district court determines that an evidentiary hearing is warranted, it is structural error for the district court to deny the defendant's challenge before holding that hearing to determine the merits of the motion." *Id.* (quoting *Buchanan v. State*, 130 Nev. 829, 833, 335 P.3d 207, 210 (2014)).

The United States Supreme Court addressed the issue of systematic exclusion in *Duren v. Missouri*, 439 U.S. 357, 369 (1979). Specifically, it reviewed whether the state of Missouri's practice of allowing female jurors to opt out of jury duty violated the United States

Constitution's Equal Protection Clause. *Id*. Once the defendant has established a prima facie case of systematic exclusion, the burden shifts to the State to justify this "[i]nfringement by showing attainment of a fair cross-section to be incompatible with a significant state interest." *Id*., at 368. The Supreme Court did not accept the justification for the state's policy of allowing female jurors as a distinct group to opt out and reversed.

The Nevada Supreme Court first addressed this issue in *Evans v. Nev*., 112 Nev. 1172, 1187, 926 P.2d 265, 275 (1996) and has subsequently addressed it in other cases, including *Williams,* 121 Nev. at 939-940, 125 P.3d at 631; *Morgan*, 134 Nev. at 208, 416 P.3d at 221; and most recently in *Valentine v. State,* 454 P.3d 709, 714 (Nev. 2019).

Here, Michael's counsel raised a fair cross section challenge and moved to strike the venire panel based on establishing that the first three prongs had been met. 2. App. 393. Counsel argued that the first step was met because Hispanics are a distinct group, and the second prong was established because the comparative disparity was between 57-58%. 2 App. 396. The district court made a finding that the second prong was 58.4%. *Id*.

To establish the argument for the third step – that there was systematic exclusion, *Morgan*, 134 Nev. at 208, 416 P.3d at 221 – counsel argued that there was non-compliance with NRS 6.045(3). Specifically, he argued that the sources *must* be pulled from the division of unemployment training and rehabilitation. *Id*. The district court acknowledged that there had never been compliance with this statutory requirement, even two years after NRS 6.045(3) was amended. 3 App. 396-97; 402-05. Accordingly, whether it was the State of Nevada or Clark County Jury Services, the key point was that a governmental entity was not complying. 3 App. 396-98. Furthermore, Michael's counsel noted that in another proceeding, the jury commissioner indicated it would take a short amount of time to empanel a new venire. 3 App. 401-02. Accordingly, the district court had a remedy to address the constitutional violation based on systematic non-compliance. *Id*. The district court failed to address defense counsel's concerns beyond a cursory explanation that the jury services department was doing all they could and that the non-compliance was in its view, not intentional. 3 App. 402-05.

In *Valentine*, this Court reversed a conviction after holding that the district court erred in not granting an evidentiary hearing, noting that it

"makes no sense to hold an evidentiary hearing if the defendant makes only general allegations that are not sufficient to demonstrate a prima facie violation or if the defendant's specific allegations are not sufficient to demonstrate a prima facie violation as a matter of law." *Id.*, 454 P.3d at 714. However, this Court went on to hold "that an evidentiary hearing is warranted on a fair-cross-section challenge when a defendant makes specific allegations that, if true, would be sufficient to establish a prima facie violation of the fair-cross-section requirement." *Id*.

Here, just as in *Valentine*, Michael made specific allegations that if true would prove systematic exclusion. However, unlike *Valentine*, the allegations here were in fact shown to be true. *Id.*, 454 P.3d at 714-715; 3 App. 394-400. Further contrasted with *Valentine*, where this Court noted that there was no violation if the existing record in another case could address the fair cross section challenge, here, the court did not rely on an explanatory record to adequately address the issue. 3 App. 394-400. The court did not make adequate findings as to Michael's argument regarding systematic non-compliance with NRS 6.045(3), or the prejudice to Michael from the systematic non-compliance. 3 App. 396-98. The prejudice to Michael was severe, as a venire resulting from systematic

exclusion deprived him of his Sixth and Fourteenth Amendment rights. *Duren*, 439 U.S. at 358-359.

The district court's failure to strike the panel and summon a venire that did not meet the second prong mathematically resulted in an unconstitutional panel and the district court's handling of the venire challenge amounts to structural error. Therefore, reversal is mandated.

C. There is Insufficient Evidence to Support the Murder Conviction.

Michael's state and federal constitutional rights to Due Process of Law, Equal Protection, and right to be convicted only upon evidence establishing every element of the offenses beyond a reasonable doubt, were violated. There was insufficient evidence to support the conviction for first degree murder with use of a deadly weapon. U.S. Const. amend. I, V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

In reviewing an insufficiency of the evidence claim, a court must determine whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *Thompson v. State*, 125 Nev. 807, 816 221 P.3d 708, 714-15 (2009); *Newson v. State*, 462 P.3d 246, 252 (Nev. 2020). A conviction that

fails to meet this standard violates due process. *Mikes v. Borg*, 947 F.2d 353, 356 (9th Cir. 1991).

The State failed to prove beyond a reasonable doubt that Michael killed Gordon because the State did not establish a sufficient factual basis and did not establish sufficient evidence of specific intent. To demonstrate sufficient proof of first degree murder, the State must present evidence beyond a reasonable doubt that the murder was "perpetrated by means of any kind of willful, deliberate, and premeditated killing. All three elements--willfulness, deliberation, and premeditation--must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder." *Byford v. State*, 116 Nev. 215, 236, 994 P.2d 700, 713-714 (2000); *See also* NRS 200.030(1)(a). In *Byford*, this Court departed from the trend to "muddy the lines" between first and second degree murder, clearly holding that in order to prove first degree murder, the elements of premeditation, willfulness, and deliberation must all be proven beyond a reasonable doubt. *Id*. at 235, 994 P.2d at 713; *see also Valdez v. State*, 124 Nev. 1172, 1196, 196 P.3d 465, 481 (2008) (noting that a conviction of first degree murder requires the jury to find that the defendant "committed a 'willful,

deliberate and premeditated killing.' 'Willfulness is the intent to kill.' Deliberation requires a thought process and a weighing of the consequences. 'Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.'") (quoting NRS 200. 030(1)(a)).

Here, the State failed to present sufficient evidence to establish that Michael acted with premeditation, willfulness, and deliberation. *Id.* The primary evidence directly connecting Michael with the requisite intent for the shooting came from Mitchell, who, as discussed above, admitted to being high when testifying, and whose story changed multiple times from his initial statements to police. 7 App. 1431. Even assuming arguendo that his story was entirely credible, he never offered testimony that could establish Michael's intent or state of mind at the time of shooting, assuming Michael was the shooter. By his own account, he did not see the shooting but just heard shots, only after he struck Gordon multiple times because Gordon came at him, getting "too close." 7 App. 1407.

In *Valdez*, this Court held that the evidence of premeditation, willfulness, and deliberation was not overwhelming, because in part

there was contradictory testimony about the defendant's mood and emotional state. *Id*., at 1196, 196 P.3d at 481.

Here, there was not just contradictory testimony regarding intent but for the shooting itself. In particular, Mitchell's testimony was either contradicted by his own prior statements and testimony from other witnesses, or could not be corroborated on multiple points, all of which was compounded by his admittance that he was under the influence of marijuana while testifying. 7 App. 1431. As discussed *supra*, several witnesses gave contradictory accounts of what occurred. *See e.g.* Kenneth's testimony (identifying Mitchell as the shooter); 1 App. 103; Joshua's testimony (contradicting Mitchell's testimony that Gordon walked towards him); 6 App. 1100-01; *compare with* 7 App. 1407; Deanna's testimony (Describing Michael as 5'6 to 5'8 and Mitchell as 5'3 to 5'5 – Michael is 6'0 to 6'1 and Mitchell is 5'7). 6 App. 1276; *compare with* 5 App. 1051; 6 App. 1114; 7 App. 1399*;* Ramiro's testimony (contradicting Detective Hoffman's testimony that the surveillance video showed Michael pointing a firearm in Gordon's general direction)*;* 7 App. 1322; *compare with* 8 App. 1561. Mitchell's testimony alone combined

with the numerous contradictions from other witnesses could not be the basis for a conviction beyond a reasonable doubt.

Even if the jury believed that Mitchell's testimony, or that of the other witnesses, was entirely accurate and reliable, the State still failed to show that Michael acted with the specific intent required for first degree murder. The evidence could establish that Gordon yelled at Michael (and later Ramiro) and that Michael was possibly angry. 5 App. 1015; 7 App. 1332-33. However, the State attempted to show that the killing was a result of Michael seeking out revenge against Gordon. 9 App. 1775-76, 1798. However, the several contradictory versions presented by witnesses could only establish that there was an altercation between Mitchell and Michael with Gordon, with one or the other doing the shooting. *Supra*. The argument that Ramiro and Michael had with Gordon did not adequately explain Michael's state of mind for a shooting that occurred roughly 15 minutes later. 8 App. 1568. Furthermore, the State's reliance on Michael's actions before the fight were misplaced. 9 App. 1803. Assuming arguendo Michael was the shooter, and formed the intent to shoot and kill Gordon before crossing the street, it does not explain why he would not just shoot him when he and Mitchell

encountered him. *Id*., 7 App. 1405-09. Instead, according to the State's theory, he did not shoot until Mitchell and Gordon were involved in an altercation. *Id*.

The State's argument during closing reflected the weakness of its position and demonstrated that it was attempting to have it both ways. On one hand it cited heavily to Michael's actions before the shooting, which it argued demonstrated that he was angry and sought revenge. 9 App. 1798. Yet, on the other hand it argued that he actually formed the intent to shoot Gordon with premeditation, willfulness, and deliberation in a fraction of a moment, akin to running a red light during traffic when it is yellow. 9 App. 1800-01.[5] The State's theory during closing contradicted itself because it was not supported by sufficient evidence.

Therefore, insufficient evidence was presented, such that "any rational trier of fact," even "when viewing the evidence in a light most favorable to the prosecution," could "find the essential elements of the crime beyond a reasonable doubt," specifically for *all* three elements of premeditation willfulness, and deliberation. *Jackson,* 443 U.S. at 319;

[5] Defense counsel objected to the improper analogy of running a traffic light to explain the mens rea element of premeditation. 9 App. 1800. This is discussed in more detail below.

Byford, 116 Nev. at 236, 994 P.2d at 713-714; NRS 200.030(1)(a) (emphasis added). Because there was insufficient evidence to convict him on Count 1, Michael respectfully requests that his conviction for first degree murder be vacated. 1 App. 159.

D. Michael Was Prejudiced By The State's Comments During Closing Argument Referencing Defense Counsel and Making an Improper Analogy of a Traffic Light to Explain Premeditation.

Michael's state and federal constitutional rights to Due Process of law, Equal Protection, a Fair Trial, and Confrontation were violated when the State made an analogy in closing disparaging defense counsel. He was further prejudiced by the State making an analogy to running a traffic light to explain premeditation. The district court abused its discretion by not granting a mistrial and for failing to sustain the objection regarding the traffic light analogy. U.S. Const. Amend. V, VI, XIV; Nevada Const. Art. 1, Sec. 3, 6 and 8; Art. IV, Sec. 21.

"When considering claims of prosecutorial misconduct, this court engages in a two-step analysis. First, [this court] must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, [this court] must determine whether the improper conduct warrants reversal." *Valdez*, 124 Nev. at 1188, 196 P.3d at 476 (citing

United States v. Harlow, 444 F.3d 1255, 1265 (10th Cir. 2006)). "With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. If the error is of a constitutional dimension, then [this Court applies] the *Chapman v. California*, 386 U.S. 18, 24 (1967) standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. If the error is not of constitutional dimension, [this Court] will reverse only if the error substantially affects the jury's verdict." *Id.* (citing *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001); *Harlow*, 444 F.3d at 1265.

"Determining whether a particular instance of prosecutorial misconduct is constitutional error depends on the nature of the misconduct." *Valdez*, 124 Nev. at 1189, 196 P.3d at 477. "For example, misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error." *Id.* (citing *Chapman*, 386 U.S. at 21, 24; *Bridges v. State*, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000)). "Prosecutorial misconduct may also be of

a constitutional dimension 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.* (internal quotations to *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) and *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) omitted)).

"Harmless-error review applies, however, only if the defendant preserved the error for appellate review." *Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (citing *United States v. Olano*, 507 U.S. 725, at 731-32(1993)). "Generally, 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)).

1. The State improperly referenced defense counsel during closing argument.

During closing argument, the prosecution made an analogy to explain conspiracy to commit murder. 8 App. 1792-94. Specifically, the analogy referenced defense counsel, on the premise that defense counsel was objecting too much:

> …If I decide that I'm upset at the Defense attorneys objecting during my closing argument and I say you know what after the jury leaves the room, I think I'm going to take care of this and I go and I get a gun and I shoot the defense attorney and killing him. That's me directly committing the murder. I have directly done it. But say I don't want to pull the trigger, I'm a little bit afraid of guns but I really want him dead and so I go to [2nd prosecutor] and I say look, I got this beef with Mr. Pike, I want him dead. I'm going to go help you -- I'm going to get a gun for you, can you take care of the problem for me. And then subsequently [2nd prosecutor] does the deed, pulls that trigger. That's aiding and abetting. I have promoted her, I have encouraged her to do it. And I can't later come to court and talk to a jury and say look, I'm not guilty because I didn't pull the trigger. I'm still just as guilty as [2nd prosecutor] is, even though she's the one that pulled the trigger and I didn't. And finally, a conspiracy. It's very similar. If she and I agree to commit the crime, it doesn't matter which one pulls the trigger. As long as we both intend that Mister -- that the defense attorney be murdered and that one of us does the deed and one of us pulls the trigger, we both --

Id. Defense counsel objected to the comments, indicating that they would raise a motion outside the presence of the jury, thus preserving the issue. *Id*. *Valdez*, 124 Nev. at 1190, 196 P.3d at 477. The district court sustained the objection and the prosecutor apologized to defense counsel. 8 App. 1794. Because the comments directly addressed counsel's advocacy of Michael, the comments were of a constitutional dimension. *See Browning v. State*, 124 Nev. 517, 534, 188 P.3d 60, 72 (2008) (Court applied harmless error standard to disparaging comment made towards defense

counsel). *See also Riley v. State*, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991) (same).

In *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) (overruled in part, on other grounds, by *Lisle v. State*, 131 Nev. 356, 369-370, 351 P.3d 725, 735 (2015)), this Court held that the prosecutor's comments that disparaged defense counsel were improper, noting that "such comments have 'absolutely no place in a courtroom, and clearly constitute misconduct.' And it is not only improper to disparage defense counsel personally, but also to disparage legitimate defense tactics." (quoting (*McGuire v. State*, 100 Nev. 153, 158, 677 P.2d 1060, 1063-64 (1984)).

Here, just as in *Butler*, the comments were directed at defense counsel's tactics. Specifically, the motive provided in the analogy was that defense counsel was objecting too much. 9 App. 1807. However, the record demonstrates that none of the objections were improper and the district court sustained some of the objections raised. 9 App. 1781-82, 1787. Ultimately, in *Butler,* the Court reversed based on cumulative error, citing the comments disparaging defense counsel as one of the errors. *Id.*, 120 Nev. at 898, 102 P.3d at 84.

Here, applying the test from *Valdez*, there is no question that the comments do not survive harmless error. 9 App. 1853. Although the district court gave an admonishment to the jury, defense counsel renewed its request for a mistrial after the admonishment, recognizing that no admonishment would be sufficient to cure the harm from these comments. 9 App. 1854. The State's comments did not just take issue with defense counsel but attacked counsel's advocacy on behalf of Michael. *See Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) ("[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." (internal citations and quotations omitted).

The State cannot prove beyond a reasonable doubt that this constitutional violation survives harmless error analysis. In a case with contradictory testimony from multiple witness, including from the main witness to the shooting, who was under the influence of narcotics while testifying and admitted on cross-examination that he was "involved" with the shooting, the improper comments no doubt influenced the passions of

the jury. *Supra.* 7 App. 1409; 1431. Essentially, it forced the jurors to choose between the defense and the prosecution, distracting them from the evidence in the case. *See Pantano v. State*, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006) ("In telling the jury that the crime committed is a 'parent's worst nightmare' and asking the jury to aid the parents in their suffering through conviction, the prosecution improperly appealed to juror sympathies by diverting their attention from evidence relevant to the elements necessary to sustain a conviction."). Furthermore, attacking defense counsel for objecting too much implied that defense counsel was doing something wrong. 7 App. 1807. Not only would such language harm defense counsel's credibility in the eyes of the jury but no doubt had a chilling effect on further objections, thereby directly affecting advocacy for Michael. *Id.*, *Gideon*, 372 U.S. at 343.

The district court abused its discretion in not granting a mistrial, evidenced by its comment that it would not be "surprised one iota if you get your trial reversed because of this…" 7 App. 1810. Clearly the district court found the comments were improper and prejudicial. If the district court felt the comments were so prejudicial that the case could be reversed, instead of shifting the burden to this Court, it should have

granted the mistrial. Because the comments were improper, and severely prejudiced Michael, the district court abused its discretion in not granting a mistrial. Michael respectfully requests that his conviction be reversed.

2. The State made an improper analogy involving a traffic light to explain premeditation.

During closing argument, the State compared the key element of premeditation, necessary for a conviction for first degree murder, to running a red traffic light. 9 App. 1800. Michael contends that such an argument is improper as it misleads the jury about the mens rea elements of first degree murder. Specifically, the State argued:

> This is the yellow light example. Think about when you're driving your car and you're late for work or someone's late for work and that person is coming upon an intersection and about 150 feet away the light turns yellow, from green to yellow. In a fraction of a moment the driver has to make a decision, doesn't he? Am I going to push down on the accelerator or am I going to push down on the brake pad? How quickly does a person go through that process of thinking about which action to take, acceleration or braking? How quickly do they think about the consequences? If I push down on this accelerator I could blow through a red light and get a ticket, I could crash into another –."

9 App. 1800. Defense counsel objected to the comments, thus preserving the issue. *Valdez*, 124 Nev. at 1190, 196 P.3d at 477. A district court

retains authority to prevent the jury from hearing a misstatement of applicable law. *Scott v. State*, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976).

In *Byford*, 116 Nev. at, 227, 994 P.2d at 708-09, this Court clarified the elements of first degree murder upon finding that the "*Kazalyn* instruction" erroneously "blur[red] the distinction between first- and second-degree murder" by failing to adequately distinguish between the distinct elements of deliberation and premeditation required for a conviction for first-degree murder as opposed to lesser homicide offenses. *Byford*, 116 Nev. at 234-36 & n.4, 994 P.2d at 713- 14 & n.4. This Court approved a jury instruction, which was given in every homicide case, in lieu of the *Kazalyn* instruction, that expressly and specifically distinguished between the three separate elements of willfulness, deliberation and premeditation. The instruction approved in *Byford*, provided that the concept that premeditation "may be as instantaneous as successive thoughts of the mind." *Id.*, 116 Nev. at 236-37, 994 P.2d at 714-15. The *Byford* instructions further stated, however, that "[a] mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill." *Id.* The *Byford* instructions also stated: "A cold, calculated judgment and decision may be arrived at in a short period of

time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree." *Id.*

Here, the State's argument analogizing the rash decisions made while driving are contrary to the jury instructions and this Court's definitions in *Byford*. *Id.* Although premeditation may be as instantaneous as successive thoughts of the mind, deliberation requires much more. The prosecutor's traffic analogy failed to make this distinction and is contrary to *Byford*'s mandates that the State prove the killing was not the result of a mere unconsidered and rash impulse, and that it was the result of a cold, calculated judgment and decision. 9 App. 1800; *Id.*, 116 Nev. at 236-37, 994 P.2d at 714-15. Combining the State's analogy with describing premeditation as occurring within a "fraction" of a moment during closing argument would be materially misleading as it would conflate bare intent with premeditation and deliberation. *Id.*

Furthermore, this analogy was similar to a district court's statements that were condemned in *McCullough v. State*, 99 Nev. 72, 73-74, 657 P.2d 1157, 1157-58 (1983). In that case, the district court attempted to illustrate the concept of reasonable doubt with a numerical

scale. *Id.* This Court found that the concept was inherently qualitative and any attempt to quantify the standard could impermissibly lower the prosecution's burden of proof, and likely confuse the jury rather than provide clarification. *Id.*, 90 Nev. at 75, 657 P.2d at 1159. Likewise, the prosecutor's analogy comparing the mens rea elements of first-degree murder to a traffic violation improperly minimized the State's burden of proving that the defendant acted with premeditation and deliberation. *Id.*

Because the comments were improper as they run contrary to this Court's ruling in *Byford*, the issue turns to whether they "so infected the proceedings with unfairness as to result in a denial of due process." *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). In making this determination, this Court views the statements in context and will not overturn a conviction unless it is clearly demonstrated that the comments were "substantial and prejudicial." *Miller v. State*, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (internal quotation marks omitted). Furthermore, this Court will look to the strength of the evidence of guilt or innocence for its determination. *Rowland v. State*, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002).

There is no doubt that the comments were prejudicial and "so infected the proceedings with unfairness as to result in a denial of due process." *Anderson,* 121 Nev. at 516, 118 P.3d at 187. As discussed throughout, there were numerous contradictions from several witnesses and in particular, the State's key witness, Mitchell, who was high when he testified. 7 App. 1431; *supra*. As further discussed above, the State could not establish that Michael acted with premeditation, willfulness, or deliberation. The events that occurred 15 minutes prior to the shooting did not establish Michael's state of mind at the time of the shooting. 8 App. 1568. Allowing the State to argue that premeditation was akin to running a red light, hindered serious consideration of whether the State met its burden beyond a reasonable doubt. 9 App. 1800. Furthermore, this argument minimized and trivialized the importance of premeditation and deliberation. These are crucial elements of first degree murder. NRS 200.030(1). Without these elements, there is no distinction between first degree and second degree murder. *See Byford*, 116 Nev. at 235, 994 P.2d at 713. Such a distinction must be present, however, in order to avoid an unconstitutional classification of offenses based upon arbitrariness and capriciousness. Laws must provide explicit

standards for those charged with enforcing them and may not "impermissibly delegate[d] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). A "law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves . . . judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). The definitions of premeditation and deliberation must therefore provide a meaningful distinction between first and second degree murder. This Court made this distinction in *Byford* by rejecting the *Kazalyn* instruction, but here, the prosecutor's argument about traffic decisions obliterated any meaningful difference between first and second degree murder, other than the penalties. *See Byford*, 116 Nev. at 234-35, 994 P.2d at 713; *State v. Thompson*, 65 P.3d 420, 427-28 (Ariz. 2003).

Because the comments were improper, and there was insufficient evidence to support first degree murder, *supra*, Michael was severely prejudiced and the district court abused its discretion in overruling the

objection. 9 App. 1800. The judgment of conviction should therefore be reversed.

E. The District Court Abused its Discretion by Allowing an Investigator Employed by the Clark County District Attorney's Office to Testify and Attack the Credibility and Character of Witnesses.

Michael's state and federal constitutional rights to due process of law, equal protection, and the right to confront his witnesses were violated because the district court allowed the State to introduce inadmissible and irrelevant testimony by an employee of the Clark County District Attorney's Office which improperly attacked the character and credibility of witnesses. U.S. Const. amend. I, V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

A district court's decision to admit evidence is reviewed for an abuse of discretion. *Vallery v. State*, 118 Nev. 357, 371-372, 46 P.3d 66, 76 (2002). While failure to object generally precludes appellate review, *Rippo v. State*, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997), this Court retains the discretion to review an unpreserved error "if it [is] plain and affected the defendant's substantial rights." *Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) (abrogated on other grounds by *Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011)). *See Green v.*

State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (noting that in conducting plain error review, this Court will examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights) (citing NRS 178.602).

An error is plain if the error is so unmistakable that it reveals itself by a casual inspection of the record. *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). The error must be clear under current law. *Gaxiola v. State*, 121 Nev. 633, 648, 119 P.3d 1225, 1232 (2005). Normally, the defendant must show that an error was prejudicial to establish that it affected his substantial rights. *Gallego*, 117 Nev. at 365, 23 P.3d at 239. Improperly admitted testimony is examined for harmless error when the objection is preserved. *See Weber v. State*, 121 Nev. 554, 579, 119 P.3d 107, 124 (2005) (improperly admitted hearsay evidence is subject to harmless error review) (overruled on other grounds by *Farmer v. State*, 133 Nev. 693, 405 P.3d 114 (2017)).

1. The district court abused its discretion by allowing an investigator for the prosecution to testify and improperly attack the credibility of witnesses.

NRS 50.085 addresses the conduct and character of a witness:

1. Opinion evidence as to the character of a witness is admissible to attack or support the witness's credibility but subject to these limitations:

(a) Opinions are limited to truthfulness or untruthfulness; and

(b) Opinions of truthful character are admissible only after the introduction of opinion evidence of untruthfulness or other evidence impugning the witness's character for truthfulness.

2. Evidence of the reputation of a witness for truthfulness or untruthfulness is inadmissible.

3. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to an opinion of his or her character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090.

During trial, Jamie Honaker, a criminal investigator with the Clark County District Attorney's office, testified. 8 App. 1527. The prosecution stated that he was being called to testify for a "quick impeachment." 7 App. 1458.

His testimony included his attempts to locate witnesses and discussions he had with witnesses. This inquiry included witness

Kenneth, who testified at the preliminary hearing but was unavailable to testify at trial. 8 App. 1530. He specifically testified as to his encounters with Kenneth, Mitchell, and Ramiro. 8 App. 1531. The State did not allege that Kenneth's lack of presence was due in any way to wrongdoing on Michael's part. 8 App. 1527.

However, the testimony of the prosecutor's investigator primarily served to discredit Kenneth and Ramiro, while bolstering the credibility of Mitchell. Regarding Kenneth, he testified that because Kenneth was homeless he could not locate him for trial. 8 App. 1529. This was unnecessary testimony since Kenneth's testimony had already been read into the record with neither party objecting. 9 App. 1763. Furthermore, Jamie did not impeach Kenneth's actual testimony but attacked his character by noting that in his interactions with him he was inebriated and angry. 8 App. 1530. However, he did not testify that Kenneth was inebriated when he testified or provide any other evidence regarding Kenneth's actual testimony. 8 App. 1530. During closing argument, the prosecution cited its investigator's testimony about Kenneth to argue that Kenneth might be an alcoholic. 9 App. 1785

Similarly with Ramiro, the prosecution investigator noted that he was "rude, non-cooperative, minimally cooperative, and just not an easy person at all to deal with." 8 App. 1531. None of this had any relevance to Ramiro's testimony, which was the purported reason for calling the investigator. 7 App. 1458.

Because Michael did not object to this testimony regarding Ramiro or Kenneth, the plain error standard applies. *Green*, 119 Nev. at 545, 80 P.3d at 95. However, even applying this standard, the error was so great that it warrants reversal. *Id.*

The State claimed the impeachment exception to introduce its investigator's testimony but the evidence introduced impeached witnesses' character, not his testimony. 7 App. 1458. The impeachment exception would be covered by NRS 50.085(3), which does not allow extrinsic evidence to prove "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility…"

The investigator testified to specific examples of Kenneth and Ramiro being inebriated, angry, and non-cooperative. 8 App. 1530. As such, this was inadmissible extrinsic evidence, offered only to attack the

witnesses' credibility. The prejudice from this was severe. Kenneth testified that he saw Mitchell do the shooting. 1 App. 103. Furthermore, he testified that Mitchell struck Gordon 5-10 times, which contradicted Mitchell's account; Kenneth's version was supported by Joshua's testimony, who saw something similar to what Kenneth described. *Id*. 6 App. 1101-02; 7 App. 1407. Discrediting Kenneth would have the presumed effect of discrediting his testimony, which would only harm Michael. This is especially true when considering that Kenneth's testimony pointed to Mitchell—the State's star witness—as the shooter. It is evident the State attempted to discredit Kenneth by attacking his character and credibility by claiming during closing that he might be an alcoholic. 9 App. 1785.

Furthermore, Ramiro testified that Gordon yelled at him and Michael; Gordon would not stop bothering them and that Michael requested that he leave them alone. 7 App. 1322. He also indicated that he was so angry from the encounter that for several minutes after he was still angry. 7 App. 1333. Since he and Michael were both yelled at by Gordon, his testimony would serve to provide the jury a glimpse into Michael's state of mind just prior to the shooting. *Id*.

Finally, there was additional prejudice from Kenneth's testimony. By testifying that Kenneth was angry and inebriated, and that Ramiro was angry, the State's witness was essentially grouping Kenneth in with Ramiro. 8 App. 1530-31. This was problematic because, while Ramiro's testimony and prior statements contained contradictions, the prosecution failed to produce a single piece of evidence that Kenneth's prior statements contained any contradictions. During Ramiro's testimony, the jury could see he was agitated, and the multiple instances of his prior inconsistent statements were brought up. 7 App. 1350. By describing Kenneth to the jury using the same terms as with Ramiro, it would again, only serve to discredit a witness who contradicted Mitchell's testimony and identified Mitchell as the shooter. 1 App. 103.

2. The testimony regarding Mitchell was not properly noticed to defense counsel and was inadmissible hearsay and not proper impeachment.

NRS 174.235, which governs disclosure by the prosecuting attorneys of evidence relating to prosecution, states in part:

> 1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the request of a defendant, the prosecuting attorney shall permit the defendant to inspect and to copy or photograph any:

> (a) Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the state, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney

Regarding the investigator's testimony concerning Mitchell, defense counsel objected, noting that there was no pretrial report, or any kind of notice given regarding contradictory statements or inconsistent statements given by Mitchell. 8 App. 1530-34. Furthermore, defense counsel objected to potential testimony regarding what Mitchell saw. *Id.* The district court overruled the objection and allowed the prosecutor's investigator to testify that Mitchell told him that when he turned around, he saw Michael holding the gun. 8 App. 1535. This was improper hearsay. Earlier when Mitchell had testified, the State attempted to impeach him with a statement that supposedly said that he turned around and saw Michael with the gun. 7 App. 1412-15. However, the district court noted at that time that it was not impeachment because he never once said anything about turning around. 7 App. 1412. The State was not able to get the statement in then but was allowed to admit it through their investigator. 7 App. 1411-13; 8 App. 1535. As the district court noted

earlier, the investigator's testimony did not contradict anything Mitchell said. 7 App. 1412. It simply added testimony on behalf of Mitchell, and was therefore improper hearsay.

Finally, the State did not give defense counsel any pre-trial conference notes or evidence of inconsistent statements that it alleged were being offered through its investigator. 8 App. 1532. Although this was not a recorded or written statement, this violates the spirit of NRS 174.235, and was therefore improperly introduced. *See also Kendrick* v. *State,* Unpublished, Lexis No. 546, Westlaw No. 2575745, 462 P.3d 1233 (2020) (Where the State failed to turn over jail house calls containing inculpatory statements used in sur-rebuttal and after defense had rested, Court held that in "[a]ddition, NRS 174.295 imposes an obligation on the State to promptly notify the defense as to the existence of additional material encompassed by NRS 174.235. *See* NRS 174.295(1).")). Here, defense counsel objected to its admission. 8 App. 1532. *See Weber*, 121 Nev. at 579, 119 P.3d at 124.

As discussed above, the State cannot establish that this violation survives harmless error analysis beyond a reasonable doubt because of the extreme prejudice to Michael of bolstering the testimony of a witness

with multiple credibility issues. Furthermore, the State did not just bolster Mitchell's testimony but actually added to it. If defense counsel was aware of this, they could have moved to prohibit the investigator's testimony, since it was not in fact, as the prosecutor claimed, introduced for purposes of "quick impeachment," and would have allowed defense counsel an opportunity to prepare for Mitchell and the investigator's testimony. 7 App. 1458; *See United States v. Nobles,* 422 U.S. 225, 248 (1975) (Supreme Court noted that it was difficult to articulate a reason as to why "statements on the same subject matter as a witness' testimony should not be turned over to an adversary after the witness has testified. The statement will either be consistent with the witness' testimony, in which case it will be useless and disclosure will be harmless; or it will be inconsistent and of unquestioned value to the jury." Further noting that "[a]ny claim that disclosure of such a statement would lead the trial into collateral and confusing issues was rejected by this Court in *Jencks v. United States*, 353 U.S. 657 (1957), and by Congress in the legislation which followed.").

Because Jamie's testimony was inadmissible hearsay, not properly noticed to defense counsel, and improperly attacked the credibility and

character of witnesses using extrinsic evidence, resulting in severe prejudice to Michael, the only remedy is reversal of his conviction.

F. The District Court Abused Its Discretion by Failing to Grant the Requested Voluntary Manslaughter Instruction.

Michael's state and federal constitutional rights to due process of law, equal protection, and a fair trial were violated when the district court denied his request to instruct the jury on a charge of voluntary manslaughter. U.S. Const. Amend. I, V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This Court has held that district courts have "broad discretion to settle jury instructions" and will review their decision for an "abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). *See also Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (Omitting an instruction requires a showing the error so infected the entire trial that the resulting conviction violated due process) (internal citations and quotation omitted).

Voluntary manslaughter is a lesser-included offense of a charge of murder. *Collins v. State*, 133 Nev. 717, 726, 405 P.3d 657, 666 (2017) (citing *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983)). A defendant who requests a jury instruction on a lesser-included offense is entitled to that instruction so "[l]ong as there is some evidence reasonably supporting it." *Rosas v. State*, 122 Nev. 1258, 1265, 147 P.3d 1101, 1106 (2006) (abrogated on other grounds by *Alotaibi v. State*, 133 Nev. 650, 404 P.3d 761 (2017)). In regards to a voluntary manslaughter instruction request, this Court has held that "[w]hen some evidence in a murder prosecution implicates the crime of voluntary manslaughter, no matter how weak or incredible that evidence may be, the defendant is entitled upon request to an instruction specifically advising the jury that the burden is on the State to prove that the defendant did not act in the heat of passion with the requisite legal provocation." *Crawford v. State*, 121 Nev. 746, 754, 121 P.3d 582, 589 (2005).

During trial, Michael's counsel filed a request that a voluntary manslaughter instruction be given to the jury. 9 App. 1769. During the settling of jury instructions, defense counsel again requested the instruction. *Id.* The district court denied the instruction. 8 App. 1647. As

part of its argument, defense counsel noted that the circumstances surrounding the shooting were such that the requisite heat of passion necessary for voluntary manslaughter existed, based in part, on Mitchell's testimony. 8 App. 1636. Furthermore, the Court seemed to focus its finding based on defense counsel's position that Michael was not the shooter. *Id.* Other jurisdictions have addressed the issue of denying an instruction because it contradicts the defendant's theory of the case. *State v. Barnett*, 577 S.W.3d 124, 127, (2019 Mo.) (Holding that there is no justification to deny a defendant of his "freedom without first allowing him to defend himself on every theory supported by the evidence." Further holding that "[t]he only relevant inquiry when a defendant requests an instruction on a theory of defense is whether, after viewing all the evidence and drawing all reasonable inferences in favor of the theory propounded by the defendant, *Cole*, 377 S.W.2d at 307-08, there was substantial evidence to support the requested instruction.") *State v. Corneau*, 781 P.2d 1159, 1167 (N.M. Ct. App. 1989) (Holding that "[e]ven if the requested instruction is contrary to the defendant's initial case theory at trial, the requested instruction must be given if supported by the evidence.*")*.

Here, the verdict reflects that the jury believed that Michael was the shooter. 9 App. 1910. In that case, a verdict of voluntary manslaughter was appropriate. If the jury believed Michael was the shooter, then the argument that occurred just minutes prior to the fight with Gordon was very much relevant to Michael's state of mind at the time of the shooting. 5 App. 1016. Furthermore, defense counsel noted that based on Mitchell's testimony, there was evidence that Gordon approached Mitchell, which could have produced the necessary provocation for voluntary manslaughter. 8 App. 1635. Mitchell testified that the reason he hit Gordon was because he walked towards him and "got too close." 7 App. 1407. The district court seemed to find that even if Gordon came at Mitchell or Michael, with or without a knife, this would be an argument of self-defense not voluntary manslaughter. 8 App. 1637. However, the jury could have reasonably found that Gordon lunging or attacking either Mitchell or Michael created the provocation necessary to warrant a verdict of voluntary manslaughter. NRS 200.050.

In *Newson*, 462 P.3d at 247, this Court reversed a conviction, finding that the district court erred and prejudiced the defendant by its refusal to grant a voluntary manslaughter instruction. Addressing the

prejudicial impact, this Court noted that "[t]he State was not prohibited from arguing circumstantial evidence as a whole showed first-degree murder. Yet, Newson's counsel was prohibited from arguing Newson's theory regarding what crime the evidence showed." *Id.*

Similarly here, the basis for the State's argument that Michael shot Gordon with premeditation was based on the sequence of events that started just 15 minutes prior to the shooting; a sequence of events that center on Michael and Gordon allegedly arguing with each other. 9 App. 1803. There was a great deal of circumstantial evidence presented that Michael was angry with Gordon, which the State used in its closing to argue premeditation. 9 App. 1801-04. Similarly, Michael could have argued to the jury that even if they believed Michael was the shooter, the fact that he was angry and had been in an argument with Gordon, could explain the shooting itself. *Supra.* This was further supported by testimony from Michael's coworker, Ramiro. He also argued with and was yelled at by Gordon. 7 App. 1332-33. He was so angered by the confrontation that even several minutes later he was still angry, to the point that he was punching boxes. *Id.* It was logical for the jury to infer then that Michael was also still angry. Once again, the State was able to

reference this in their closing as circumstantial evidence to support their theory but Michael was not. 9 App. 1798, 1802-03; *Newson*, 462 P.3d at 251.

Defense counsel could have made an assuming arguendo point in closing that if the jury did believe Michael was the shooter, then the argument between the two, and that Gordon had possibly fought with Mitchell, was enough to create the sufficient provocation necessary for voluntary manslaughter. The fact that the shooting happened suddenly and just moments after Mitchell and Gordon were in a fight, or Gordon was struck by Mitchell, is evidence, no matter how weak or incredible, which would have allowed the jury to consider a verdict of voluntary manslaughter. *Crawford*, 121 Nev. at 751, 121 P.3d at 586-87. Ultimately, evidence was presented to the jury, no matter how "weak and incredible," which entitled Michael to an instruction of voluntary manslaughter. *Crawford*, 121 at 746, 121 P.3d at 585. The instruction was also appropriate as a lesser included offense of second degree murder. *See Collins*, 133 Nev. at 724, 405 P.3d at 664. The district court's refusal to provide this instruction deprived Michael of an opportunity to

be convicted on a lesser charge. As such he was prejudiced on his right to a fair trial and denied due process. 8 App. 1635.

There was sufficient evidence to support a voluntary manslaughter instruction. The district court's clear abuse of discretion prejudiced Michael by denying him this instruction. The conviction should therefore be reversed and this case remanded for a new trial.

G. Cumulative Error Warrants a New Trial.

Michael's state and federal constitutional rights to Due Process, Equal Protection, and Right to a Fair Trial were violated because of cumulative error. *U.S. Const. Amend. I, V, VI, VIII, XIV*; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Butler*, 120 Nev. at 900, 102 P.3d at 85 (2004); *United States. v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal"). This Court will reverse a conviction "[i]f the cumulative effect of these errors

deprived appellant of his right to a fair trial." *Gonzalez,* 131 Nev. 991, 1003, 366 P.3d 680, 688 (2015) (internal citation and quotation omitted).

"The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Parle*, 505 F.3d at 927 (citing *Chambers*, 410 U.S. at 290); *Gonzalez*, 366 P.3d at 688. The record here establishes cumulative error. *See DeChant v. State*, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000). ("[I]f the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction."). "Relevant factors to consider in deciding whether error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id.* (internal quotations omitted).

Here, the errors directly affected Michael's conviction for first degree murder, with use of a deadly weapon, and carrying concealed firearm. They prevented him from having a fair and impartial jury, free from racial discrimination, and denied him the right to have a jury that was not underrepresented due to systematic exclusion. He was denied due process because the State failed to prove each and every element against him beyond a reasonable doubt. He was denied the right to counsel because disparaging comments were made about legitimate defense tactics, and the jury was allowed to consider that the mens rea of premeditation for first degree murder was akin to running a red light. He was prevented from confronting witnesses and having only relevant evidence admitted against him by a prosecution investigator testifying about inadmissible hearsay, and improperly attacking the credibility and character of witnesses. The errors prevented him from presenting his theory of the case on voluntary manslaughter, which based on the evidence, he was entitled to do so. Furthermore, the crimes he was convicted of were grave. Therefore, the cumulative effect of all these errors denied him a fair trial.

Whether or not any individual error requires the vacation of the judgment, the totality of these errors and omissions resulted in substantial prejudice. The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless. The totality of these violations substantially affected the fairness of the proceedings and prejudiced Michael. He requests that this Court vacate his judgment and remand for a new trial.

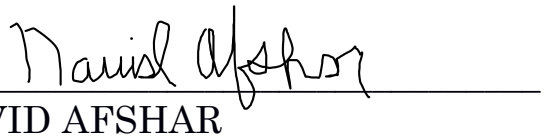
VIII. CONCLUSION

Michael respectfully submits for the reasons stated herein, that his judgment of conviction be reversed based upon insufficient evidence, or that in the alternative, this case be remanded for a new trial.

DATED this 16TH day of November, 2020.

Respectfully submitted,

/s/ ***NAVID AFSHAR***

By: 

NAVID AFSHAR
Nevada Bar No. 14465

CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).

2. I hereby certify that this brief does comply with 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 in 14 point font of the Century Schoolbook style.

3. I hereby certify that this brief does comply with the word limitation requirement of NRAP 32(a)(7)(A)(ii). The relevant portions of the brief are 13,961.

4. 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 of the transcript or appendix where the matter relied on is to be found. I understand that I may

be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16TH day of November, 2020.

/s/ NAVID AFSHAR

Navid Afshar
Nevada Bar No. 14465
330 S. Third Street Ste. 800
Las Vegas NV 89155

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 16TH day of November, 2020, a copy of the foregoing Opening Brief (and Appendix) was served as follows:

BY ELECTRONIC FILING TO

District Attorney's Office
200 Lewis Ave., 3rd Floor
Las Vegas, NV 89155

Nevada Attorney General
100 N. Carson St.
Carson City NV 89701

/s/ NAVID AFSHAR

NAVID AFSHAR