IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL MCNAIR,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 78871

RESPONDENT'S ANSWERING BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

SUMMARY OF THE ARGUMENT 17

ARGUMENT 18

I. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THERE WAS NO BATSON VIOLATION 18

II. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S FAIR CROSS SECTION CHALLENGE AS THERE WAS NO SYSTEMATIC EXCLUSION OF ANY DISTINCTIVE GROUP 29

III. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON 34

IV. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT 40

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE'S INVESTIGATOR TO TESTIFY 48

VI. THE DISTRICT COURT DID NOT ERR BY NOT PROVIDING A JURY INSTRUCTION ON VOLUNTARY MANSLAUGHTER 53

VII. THERE WAS NO CUMULATIVE ERROR 57

CONCLUSION 58

CERTIFICATE OF COMPLIANCE 60

CERTIFICATE OF SERVICE 61

TABLE OF AUTHORITIES

Page Number:

Cases

Allred v. State,
120 Nev. 410, 415 (2004).....45

Alotaibi v. State,
133 Nev.650, 654 (2017).....54

Ananaba v. State,
325 Ga.App. 829, 755 S.E.2d 225, 227 (2014).....25

Azbill v. Stet,
88 Nev. 240, 252 (1972).....35

Batson v. Kentucky,
476 U.S. 79 (1986) 17, 18

Battle v. State,
No 68744, 2016 WL 4445494 (Nev. Aug. 10, 2016) 30

Briano v. State,
94 Nev. 422, 425 (1978).....37

Butler v. State,
120 Nev. 879, 898 (2004).....44

Byars v. State,
130 Nev. 848, 864-65 (2014) 41

Byford v. State,
116 Nev. 215, 236 (2000).....37

Carmichael v. Chappius,
848 F.3d 536, 549 n.79 (2d Cir. 2017).....20

Chapman v. California,
386 U.S. 18, 24 (1967) 42, 44

Collins v. State,
133 Nev. 717, 727–28 (2017) 56
Collman v. State,
116 Nev. 687, 717 n. 13 (2000) 37
Conner v. State,
130 Nev. 457, 466 (2014).....23
Cooper v. State,
124 Nev. Adv. Op. 104, 432 P.3d 202, 205 (2018) 20, 23
Cortinas v. State,
124 Nev. 1013, 1019 (2008).....53
Crawford v. State,
92 Nev. 456 (1976).....36
Culverson v. State,
95 Nev. 433, 435 (1979).....35
Darden v. Wainwright,
477 U.S. 168, 181 (1986) 42
Deveroux v. State,
96 Nev. 388, 391 (1980).....36
Doyle v. State,
112 Nev. 879, 887-88 (1996) 19
Edwards v. State,
90 Nev. 255, 258-259 (1974) 35
Ennis v. State,
91 Nev. 530, 533 (1975).....57
Evans v. State,
112 Nev. 1172, 1186 (1996)..... 30, 35

Green v. State,
119 Nev. 542, 545 (2003)..... 43, 51, 53
Guy v. State,
108 Nev. at 779–80 (1992).....46
Guzman v. State,
287 Ga. 759, 762(2), 700 S.E.2d 340 (2010) 26
Hernandez v. New York,
500 U.S. 352, 364;.....19
Hernandez v. State,
118 Nev. 513, 525 (2002)..... 41, 48
Holland v. Illinois,
493 U.S. 474, 476-77 (1990).....18
Int'l Bhd. of Teamsters v. United States,
431 U.S. 324, 339, n.20 (1977) 20
Jackson v. State,
117 Nev. 116, 120 (2001).....53
Jackson v. Virginia,
443 U.S. 307, 319 (1979) 35
King v. State,
116 Nev. 349, 353 (2000).....27
Kirksey v. State,
112 Nev. 980 (1996).....30
Knight v. State,
116 Nev. 140, 144-45 (2000) 43
Koza v. State,
100 Nev. 245, 250 (1984).....35

Leonard v. State,
117 Nev. 53, 82 (2001).....42
Libby v. State,
113 Nev. 251, 255 (1997).....20
Lisby v. State,
82 Nev. 183, 188 (1966).....54
Lobato v. State,
120 Nev. 512, 518 (2004).....48
Matthews v. State,
136 Nev. Adv. Op. 38, 466 P.3d 1255, 1260 (2020) 28
McCullough v. State,
99 Nev. 72, 73 (1983).....47
Mclellan v. State,
124 Nev. 263, 267 (2008).....48
McNair v. State,
108 Nev. 53, 56 (1992).....35
Michigan v. Tucker,
417 U.S. 433 (1974) 57
Miller-El v. Cockrell,
537 U.S. 332, 339 (2003) 28
Mitchell v. State,
114 Nev. 1417, 1426 (1998).....42
Moser v. State,
91 Nev. 809, 812 (1975).....37
Mulder v. State,
116 Nev. 1, 17 (2000).....57

Newson v. State,
136 Nev. Adv. Op. 22, 462 P.3d 246, 251 (2020) 56
Origel-Candido v. State,
114 Nev. 378, 381 (1998).....35
Parker v. State,
109 Nev. 383, 388-89 (1993) 46
Payne v. State,
81 Nev. 503, 508–09 (1965)..... 38, 47
People v. Acevedo,
35 N.Y.S.3d 752, 757 (2016) 26
People v. Blacksher,
52 Cal. 4th 769, 802–03 (2011) 26
People v. Calvin,
72 Cal. Rptr. 3d 300, 307 (2008) 26
Petrocelli v. State,
101 Nev. 46, 52 (1985).....48
Powers v. Ohio,
499 U.S. 400, 415, (1991) 18
Purkett v. Elem,
514 U.S. 765, 766-67 (1995).....18
Rippo v. State,
113 Nev. 1239, 1260 (1997).....42
Rosas v. State,
122 Nev. 1258, 1265 (2006).....54
Stalley v. State,
91 Nev. 671, 676 (1975).....38

State v. Eighth Judicial Dist. Court in & for County of Clark (Baker),
134 Nev. 104 (2018).....48
State v. Hall,
54 Nev. 213 (1932).....38
Taylor v. Louisiana,
419 U.S. 522, 526-27 (1975).....29
Thomas v. State,
114 Nev. 1127, 1137 (1998)..... 19, 41
United States v. Mensah,
737 F.3d 789, 801-02 and n.11 (1st Cir. 2013).....20
United States v. Rivera,
900 F.2d 1462, 1471 (10th Cir. 1990).....58
United States v. Young,
470 U.S. 1, 11 (1985).....43
Valdez v. State,
124 Nev. 1172, 1196 (2008)..... 37, 41, 45, 51
Valentine,
135 Nev. at __, 454 P.3d at 713. ..... 32, 33
Wade v. Terhune,
202 F.3d 1190, 1198 (9th Cir. 2000).....20
Walker v. State,
113 Nev. 853, 867-68 (1997).....19
Washington v. State,
112 Nev. 1067, 1071 (1996)..... 19, 37
Watson v. State,
130 Nev. 764, 776 (2014).....20

Wegner v. State,
116 Nev. 1149, 1155–56 (2000) 54
Wilkins v. State,
96 Nev. 367 (1980).....36
Williams v. State,
134 Nev. 687, 692 (2018)..... 28, 29, 54

Statutes

NRS 6.054(3) 31
NRS 6.110(1) 30
NRS 50.085(3) 49
NRS 174.235..... 17, 52
NRS 175.211.....47
NRS 178.598.....54
NRS 193.0175.....36
NRS 193.200.....37
NRS 200.010.....36
NRS 200.020(1) 36
NRS 200.020(2) 36
NRS 200.040.....55
NRS 200.050.....54
NRS 200.060.....55

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL MCNAIR, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 78871

RESPONDENT'S ANSWERING BRIEF

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

ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(2) because it is a direct appeal from a judgment of conviction for one category A felony.

STATEMENT OF THE ISSUES

1. Whether the district court erred by finding that there was no Batson violation.
2. Whether the district court erred in denying Appellant's fair cross section challenge.
3. Whether there was sufficient evidence to support the conviction for First Degree Murder with Use of a Deadly Weapon.
4. Whether the State did not commit prosecutorial misconduct.
5. Whether the district court did not abuse its discretion by allowing the State's Investigator to testify.
6. Whether the district court erred by not providing a jury instruction on voluntary manslaughter.
7. Whether there was cumulative error.

STATEMENT OF THE CASE

On October 24, 2017, the State filed an Information charging Michael McNair, aka Michael Deangelo Mcnair, ("Appellant") with Count 1 – Murder with Use of a Deadly Weapon; and Count 2 – Carrying Concealed Firearm or Other Deadly Weapon. I Appellant's Appendix ("AA") 159-161. The preliminary hearing was held on October 23, 2017. IAA01-158. On October 25, 2017, Appellant pled not guilty and waived his right to a speedy trial. IAA162-64.

On December 14, 2017, Appellant filed a Petition for Pre-trial Writ of Habeas Corpus. IAA169-76, On December 21, 2017, the State filed a Return to the Writ of Habeas Corpus. IAA177-89. The district court denied the Petition on January 9, 2018. IAA190-98.

On February 11, 2019, Appellant filed a "Motion in Limine to Introduce Preliminary Hearing testimony of Anthony Razo and Kenneth Saldana" and "Motion to have Appointed Counsel Available for Mitchell Johnson if he is Called as a State's Witness[.]" IIAA338-43. On February 14, 2019, the State advised that it had no objection as to Kenneth Saldana; the district court granted the motion and directed the State to provide contact information for Anthony Razo to defense. XAA1994. The district court further advised that it would contact the Office of Appointed Counsel to have an attorney appear on behalf of Mitchell Johnson. Id.

On February 21, 2019, Appellant filed an Ex Parte Motion and Order for Inmate Phone Calls and Information Regarding Access Information. IIAA368-72. Appellant also filed a Motion Preclude the State from Using any CCDC Telephone Records in the Case in Chief or Rebuttal. IIAA372-82. On February 26, 2019, the district court granted the Motion to Preclude as to any calls that existed prior that that date. XAA1995.

On February 26, 2019, the jury trial began; it concluded on March 7, 2019 with the jury returning a verdict of guilty to First Degree Murder with Use of a Deadly Weapon and Carrying a Concealed Firearm or Other Deadly Weapon. IIAA383; IXAA1900-03. On March 7, 2019, a Stipulation and Order was filed indicating the agreement to waive the penalty hearing. IXAA1908-09.

On February 23, 2019, Appellant filed a Sentencing Memorandum and Objections to the Presentence Investigation Report. XAA1912-31. On May 1, 2019, the district court sentenced Appellant to Count 1 – Life with a minimum parole eligibility of twenty (20) years, with a consecutive two hundred forty (240) months and a minimum sixty (60) months for the Deadly Weapon enhancement, with a aggregate total of Life with a minimum parole eligibility of three hundred (300) months; and Count 2 – a maximum of sixty (60) months and a minimum of twenty-four (24) months, concurrent to Count 1, with five hundred thirty (530) days credit

for time served. XAA1932-65. The Judgment of Conviction was filed on May 3, 2019. XAA1964-65.

STATEMENT OF THE FACTS

On September 14, 2017, Appellant, an employee of Unified Containers[1], was in the parking lot of his employer as he had his music blaring from his black truck.[2] VAA1014,1056; VIIIAA1558. As an employee of Unified Containers, Appellant was wearing a blue shirt. VAA1013-14; VIAA1144; VIIAA1317.[3]

Anthony Razo ("Anthony"), a homeless individual living on Searles Street, watched an individual, who he knew was also homeless, come from North Las Vegas Boulevard, east bound, down Searles, and walk over to the fence by the Flavors parking lot. V AA 1010, 1012-13. Anthony was approximately fifty (50) to seventy-five (75) feet away. VAA1016. Gordon Phillips ("Gordon"), the homeless

[1] Douglas Coon, management at Unified Container, testified about the structure of the businesses involved. VIAA1134. Unified Container shared the same ownership as Anderson Dairy, so the two companies were adjacent to each other location-wise; overall the building had four (4) businesses which included Crystal Peaks and Flavors. VIAA1135. Said businesses are located at the corner of Searles and Las Vegas Boulevard. VIAA1135. According to Mr. Coon, Appellant did not have any reason to be inside of any other companies or parts of the building. VIAA1143.

[2] Mr. Coon knew that Appellant would drive a black truck, and that on break, he would be out in the parking lot. VIAA1156.

[3] Matthew Stedeford ("Stedeford") explained that employees for each company wore a different color shirt, and that employees of Unified Container wear light/dark blue t-shirt. VAA1044. Stedeford further explained that at the end of the shift, or when a shirt gets dirty, employees would deposit them into a laundry bag. VAA1045.

individual, was seen on surveillance video approaching the fence of the business at this time. VIIIAA1559.

According to Anthony, Gordon got into an argument with the man, who was located behind the fence, and asked the man to turn his music down because he was preventing his wife from sleeping. VAA1013,1015. Anthony knew that the African American male behind the fence was an employee from the Flavors building because he had a blue shirt on with a name patch. VAA1013-14. Anthony also noted that Appellant was between 6' and 6'2'' and was skinny[4]. VAA1025. Both individuals started yelling back and forth at each other. VAA1015. Anthony believed Gordon had a knife behind his back, but at no point did he bring the knife out. VAA1016.

Overall, the argument lasted a few minutes, until the homeless man went back up the street, westbound on Searles towards North Las Vegas Boulevard. VAA1016; VIIIAA1560. Appellant was seen on surveillance video entering his truck, and Anthony testified that Appellant then did some "donuts". VAA1017; VIIIAA1560. After doing donuts, Appellant parked his truck at an angle next to the building. VAA1018; VIIIAA1560,1583.

Video surveillance showed Appellant pointing towards the street, where Gordon was located, and then he walked into Unified Containers. VIIIAA1560-61.

[4] Stedeford testified that Appellant was approximately 6' to 6'1" and was skinny. VAA1051

As Appellant was walking, Ramiro Romero ("Romero"), another employee for Unified Container, was walking towards him; Romero was seen wearing a hair net. VIIIAA1561. While watching the surveillance video at trial, Romero noted that at one point Appellant called for him and said, "let's go handle something outside…". VIIAA1320. Surveillance video showed Appellant with a firearm in his outstretched hand. VIIIAA1561. Anthony testified that he watched as the employee disappeared for approximately fifteen (15) minutes before coming back outside with another Hispanic employee; Anthony watched as they had a conversation. VAA1018-19.

Appellant and Romero proceeded to walk over to a gate that opens up to allow vehicles in and out of the property. VIIIAA1562. The video then showed them outside in the parking lot. VIIAA1321. Romero testified that the two were looking at the gate as there were people yelling and "causing commotion". Id. Appellant was telling the individuals to step away from the gate. VIIAA1322. As the video continued to play, Romero explained that Appellant was pointing at the gate with something black in his hand; at a prior hearing, Romero had testified that Appellant was pointing a gun. VIIAA1322-23. The two then walked away from the building and towards the gate as the people were still "running their mouths". VIIAA1323. Romero testified that both him and Appellant were annoyed. Id.

The individual on the other side of the gate walked away, and Appellant went to his truck. VIIAA1324. Romero thought that Appellant was going to call security, and his intention was to follow Appellant as he was his boss. VIIAA1325.

Appellant opened the gate, and the two started walking westbound. VIIAA1326; VIIIAA1563. Then, Appellant and Romero started walking down the street. VIIAA1327. Prior to them walking, Romero saw the homeless had crossed a nearby street. VIIAA1328. Surveillance video showed Gordon return across the street to his bedroll. VIIIAA1564. Meanwhile, Anthony testified that he heard Appellant say that he needed to clock out and "take care of this" and walked down Searles Street towards North Las Vegas Boulevard, after walking through a gate, in the same direction as Gordon. VAA1021-22.

According to Romero, they followed after Gordon, with a plan for Romero to beat him up while Appellant watched. VIIAA1331. Romero testified that Gordon asked why they were following him, stated that he was not trying to cause trouble, and then jaywalked away. VIIAA1330. However, at no point did Appellant and Romero cross the boulevard to get to the other side where Gordon was. VIIAA1329; VIIIAA1564-65. Surveillance video then showed Appellant and Romero walking back to Searles towards Flavors. VIIAA1331; VIIIAA1565.

Appellant remained outside when a white Suburban vehicle with a dent[5] on the passenger side arrived. VIIAA1297; VIIIAA1566. The vehicle belonged to Mitchell Johnson ("Mitchell"), Appellant's half-brother and his girlfriend, Bianca Redden ("Bianca"). VIIAA1297,1398. Prior to their arrival Mitchell testified that in the afternoon, he had a conversation with Appellant about Appellant giving him money. VIIAA1400. Later that evening, Bianca had gotten off of work at 9:00 p.m. so Mitchell picked her up; she and Mitchell were on their way home when he received a phone call. VIIAA1296,1403. Mitchell testified that Appellant had called him and told him to go to Unified Container, his understanding was to obtain $10.00 from Appellant. VIIAA1401.

Mitchell drove to Unified Container, but in order to get on the property, Appellant had to open the gate; once they entered the property, Mitchell proceeded to get out the car. VIIAA1298,1403. Mitchell testified that as he was getting out the car, he put a black shirt on. VIIAA1403. Surveillance video showed Johnson exiting the vehicle and running towards Appellant. VIIIAA1565. At that time, Appellant was still wearing a blue shirt. VIIAA1404. Bianca testified that she could not see where Appellant and Mitchell went, as she just sat in the car and played on her

[5] Brent testified that there was a big dent in the rear right door of the vehicle. VAA986.

phone. VIIAA1299. Bianca noted that there was a signature size difference between the two as Appellant was taller and slimmer than Mitchell. VIIAA1301.[6]

Appellant, Mitchell, and a third person[7], began walking up the street. VIIIAA1567. Appellant and Mitchell crossed over North Las Vegas Boulevard to the west side where there was the sidewalk and desert landscape views. VIIIAA1568. Mitchell and Appellant walked across the street where there were individuals present; Gordon was sitting up but got to his feet and started speaking to Mitchell and Appellant. VIIAA1404-05. Mitchell testified that the man did not look as though he was homeless. VIIAA1406. As Gordon walked towards him, Mitchell hit him in his neck because Gordon got to close to him; Mitchell started backing away when he heard four (4) gunshots. VIIAA1407. Anthony testified that as he started to walk up to North Las Vegas Boulevard, towards Owen and Main, he heard gunshots. VAA1024.[8]

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[6] Mitchell also testified that while he is 5'7", his brother is approximately 6'. VIIAA1399.

[7] Detective John Hoffman testified that he believed the third person was Anthony Razo, but he was not able to 100% confirm who the person was. VIIIAA1567. Additionally, Mitchell testified that he had no idea who the third person was, but the person was not involved in the murder. VIIAA1424-25.

[8] When Anthony initially spoke with the police, he told them that he noticed that the employee had a firearm in his hand as he walked off the business property. VAA1023; VIIIAA1601. when police turned on the tape recorder, he said he did not see a gun, and stated that he changed his answer because he could not remember. VAA1023; VIIIAA1602.

That evening, Deanna Lopez ("Deanna") was with her boyfriend Tom and a man named Anthony (aka "Ant-man[9]") and was able to see Gordon lying twenty-four (24) feet from her; Deanna knew Gordon and described him as a quiet person. VIIAA1255-56. As two males approached, Gordon got up, and said that they could "handle it right here" VIIAA1257,1259. Deanna testified that one man was skinny and was wearing a blue shirt while the other man was short. VAA1258. The shorter man then hit Gordon in the face, approximately twice when the taller skinnier guy, who was standing in the street, started shooting Gordon approximately five or six times[10]; Gordon then fell to the ground. VIIAA1259-60. Deanna did not see Gordon with a weapon. VIIAA1260.

Brent Lesh ("Brent"), who was living on Las Vegas Boulevard, testified that he would stay in an area near Flavors and Catholic Charities. VAA970. He knew Gordon as they would sleep on the same street. VAA971. At no point did he ever see Gordon with a knife or find one in his belongings. VAA974, 990. On the night of Gordon's murder, Brent, and others with him, were on their cots, approximately seventy-five (75) to one hundred (100) feet from Gordon. VAA974. His attention

[9] Anthony Razo is not Ant-man. VII AA 1263

[10] At the Preliminary Hearing, Kenneth Saldana ("Kenneth") testified that the shooter was the shorter male. IAA116. Kenneth's testimony was read into the record at trial. IXAA1763. The State introduced testimony that Kenneth was known to get drunk frequently, and would become rowdy. VIIAA1262. Deanna knew Kenneth Saldana and his "crew". VIIAA1261.

was drawn to Gordon because he heard yelling; in fact, the yelling woke him up. VAA975. Near Gordon were two (2) African American males, and one was taller than the other. VAA975-76. Brent informed the police that the taller individual was approximately six (6) feet tall and was wearing a blue sweatshirt. VAA976. Brent testified that he saw what looked like punches and at one point the taller male fell to the ground. VAA981. There was arguing, and the taller male said that they would be back. VAA977.

According to Brent, when the two males came back, Gordon stayed on the sidewalk while a shorter male was in the street, and the taller male stepped up to where the victim was. VAA978-79. Brent then heard approximately four (4) or five (5) gunshots and testified that the shooter was the taller male. VAA982-83.

Joshua Brennan, a security guard at Palms Main Mortuary, testified that while he was on a hill, during his patrol, he heard shouting and yelling. VIAA1093,1095,1097-98. From his view, he could see where homeless individuals were staying. VIAA1098. Brennan reported the commotion and made his way down to a nearby fence. Id. Brennan testified that he saw an African American male, approximately 6'1", wearing a blue shirt and jeans that were cut short, and a shorter Hispanic male wearing a beige colored shirt. VIAA1099. Brennan also saw a homeless male on the ground, that the other two gentlemen had approached. Id. Brennan had seen the Hispanic man once before across the lot in the Flavors yard;

As to the African American male, he had seen him approximately three (3) times and had seen him have negative interactions with the homeless. VIAA1102. According to Brennan, it appeared as though the two males were shouting while the homeless individual was covering his face as the two males started to attack him. VIAA1100-01.

Brennan testified that a woman was next to the homeless man, and she screamed when five gunshots rang. VIAA1101-02. When Brennan arrived at the fence, he could see that the homeless male had been shot; he was rolled over to his side and was bleeding. VIAA1109. While Gordon was on the ground, Brent and Brennan testified that the two males ran across the street. VAA983; VIAA1109. Brent then watched as one of the males enter a white vehicle and leave the area. VAA983. Brennan also watched as a white SUV fled the scene. VIAA1109.

Mitchell testified that after he heard gunshots, he continued to walk away as he called Bianca to come pick him up. VIIAA1408. At the time of trial, Mitchell testified that he never saw the man fall to the ground, and that it is difficult for him to be present and testify with his brother as the defendant. Id. However, Mitchell remembered telling detectives that Appellant put the gun back down to his side and was off the curb when he shot the victim. VIIAA1419.

Surveillance video showed Appellant and Mitchell coming back east on Searles from North Las Vegas Boulevard. VIIIAA1568. Bianca testified that

Mitchell called her to pick him up outside the gate, so she moved to the driver seat, went out the gate, and picked him up on Searles. VIIAA1301. Surveillance video showed Bianca had moved from out the back seat of the vehicle into the driver seat. VIIIAA1568.

While Mitchell left, Appellant walked into the Unified Containers building. VIIIAA1568. Surveillance video showed Appellant remove a firearm from his pocket and later showed Appellant later removing a red backpack from one of the lockers. VIIIAA1569. Then, Appellant was seen on video exiting the break room, located inside Unified Containers, wearing a maroon shirt with a blue shirt in his hands. VIIIAA1570.

At one point, Appellant was seen on the surveillance video approaching Romero while Romero was in a trailer beating up a cardboard box.VIIAA1334; VIIIAA1570. In Appellant's hand was a gun and he asked Romero if he wanted to buy it. VIIAA1335. Later on, Romero testified that while he was doing his job, Appellant arrived wearing a burgundy shirt with a blue shirt in his hand. VIIAA1337-38.

Video surveillance showed Appellant walking into a break room, while wearing the maroon shirt, and later walking through the engineer room. VIIIAA1571-72. As the surveillance video continued to play, Appellant was seen walking again through the engineer room, and seen going into a locker to remove a

blue shirt. VIIIAA1573. Appellant was then seen entering the break room again, but now had a blue shirt on with the maroon shirt in his hand. Id. Stedeford testified that he ran into Appellant who was wearing a blue Unified Container shirt with a red shirt, from one of the other companies, in his hand; Stedeford watched as Appellant tossed the red shirt into the laundry bin and noted that Appellant looked nervous. VAA1050-53.

Lyle Galeener ("Lyle"), an engineer and supervisor for Unified Containers and Crystal Peaks testified that he received a call, so he went to his job. VAA1072-73. While at the scene, Lyle found a gun, inside a backpack, on a mezzanine in a back maintenance shop area. VAA1073-74,1080. According to Lyle, Appellant knew of that area and other employees knew that they have to get a ladder to get into that area. VAA1082-84.

The Investigation

Detective Paul Quinteros arrived at the scene when Gordon had already been transported. VIAA1122. Based on information received, Detective Quinteros learned that a black truck had been involved, and officers decided to freeze the premises. VIAA1125. While on scene, officers learned that Gordon had died, so the investigation became one for the Homicide unit, which was called out to take over. VIAA1126. Crime Scene Analyst ("CSA") Jamelle Shannon responded to the scene where other CSAs were present; a supervisor was also present to make sure evidence

was collected and the scene was documented. VIAA1220. CSA Shannon's role was to create a diagram of the scene and collect evidence. VIAA1222. The red backpack was located with the firearm inside. VIIIAA1590. The owner of the firearm was a family member of Appellant's wife. VIIAA1302-03; VIIIAA1596. Also inside the backpack was a magazine with Appellant's address on it. VIIIAA1591.

Detective Hoffman spoke with Appellant; Appellant told him that while he was on break, he was in the parking lot, at his truck, listening to music. VIIIAA1582. While he was listening to music, Gordon approached him and complained that the music was too loud; a verbal conversation ensued, and Appellant went back into Unified Containers. Id. Appellant continued to explain that when he came back outside, Gordon was seen at the gate; Appellant approached him and another verbal altercation ensued. Id. According to Appellant, Gordon attempted to spit on him. Id. Appellant explained that he walked back inside Unified Containers when his wife called him to tell him that there were police outside. VIIIAA1583. After additional questions, Appellant claimed that he did leave in his truck at one point to move the vehicle to another area of the property so that he could put power steering fluid in it. Id. He parked the vehicle at an angle, went inside, and the next thing he knew police were present. Id.

Forensic Scientist Glenn Davis was provided with a firearm and magazine to analyze. VIAA1190,1193. He did not note any malfunctions in the firearm.

VIAA1194. Davis was also provided six (6) cartridge cases that were recovered from the scene. VIAA1195. The cartridge cases were from the firearm that was used. VIAA1198.

DNA Forensic Scientist Tiffany Adams testified that she tested two swabs that were collected from a firearm and magazine, and the fingernail clippings of Gordon. VIIIAA1502,1515. Adams was provided DNA from Appellant, Gordon, Romero, and Mitchell. VIIIAA1515. The DNA profile was consistent with two contributors, one being male, and Appellant's DNA was included in that mixture profile. VIIIAA1516-17. As to the magazine, Adams was unable to develop a DNA profile. VIIIAA1518. As to Gordon's fingernail clippings, the clippings were consistent with Gordon's DNA. Id.

Dr. Chiara Mancini is a medical examiner for the Clark County Coroner's Office. VIIIAA1462. She was not the doctor who originally conducted the autopsy on Gordon, but because that doctor was out of the jurisdiction, she was assigned to review the case and see if she agreed with the conclusions. VIIIAA1466. Dr. Mancini noted that there were eight gunshot wounds on Gordon; each entry had a corresponding exit. VIIIAA1470-83. Gordon did not have any alcohol or drugs in his system at the time of his murder. VIIIAA1484. According to Detective Hoffman, a knife was never recovered from Gordon's person nor near his property.

VIIIAA1597. Dr. Mancini concluded that the cause of death was multiple gunshot wounds and the manner was homicide. VIIIAA1485.

SUMMARY OF THE ARGUMENT

First, the district court did not err in finding that there was no Batson v. Kentucky violation. The State presented race-neutral reasons for the three challenged strikes, and the district court conducted significant findings on the issue.

Second, the district court did not err in denying Appellant's fair cross section challenge and Appellant's request for a new panel, as Appellant failed to show that there was a systematic exclusion of Hispanics in the jury process.

Next, there was sufficient evidence to support the conviction for First Degree Murder with Use of a Deadly Weapon. Despite Appellant's contentions, the jury is tasked with assessing the weight of the evidence and determining the credibility of the witnesses.

Fourth, the State did not commit prosecutorial misconduct as the State did not disparage the defense, the analogy used by the State was not improper, and any error was harmless in light of the overwhelming evidence presented.

Fifth, the State's Investigator's testimony about Kenneth and Romero was proper impeachment evidence. Moreover, testimony regarding Mitchell was proper impeachment testimony and Appellant's reliance on NRS 174.235 is misplaced.

Sixth, the district court did not err by not providing a jury instruction on voluntary manslaughter as the record was devoid of any evidence to support a charge for voluntary manslaughter. Finally, given the lack of error, there was no error to cumulate.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THERE WAS NO BATSON VIOLATION

Appellant claims that the State violated Batson v. Kentucky, and that the district court committee structural error in its handling of the Batson challenge. AOB 16-25. The United States Supreme Court has held that the racially discriminatory use of peremptory challenges is unconstitutional under the Equal Protection clause. Batson v. Kentucky, 476 U.S. 79 (1986). There is no requirement that the defendant and the excluded juror be of the same race. Powers v. Ohio, 499 U.S. 400, 415, (1991); Holland v. Illinois, 493 U.S. 474, 476-77 (1990).

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

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step

> three) whether the opponent of the strike has proved purposeful racial discrimination. The second step of this process does not demand an explanation that is persuasive, or even plausible.

Purkett, 514 U.S. at 767 (internal citations omitted).

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

In reviewing the denial of a Batson challenge, the Court should give great deference to the determining court. Hernandez v. New York, 500 U.S. 352, 364; Doyle, 112 Nev. at 889-890; Thomas v. State, 114 Nev. 1127, 1137 (1998); Walker v. State, 113 Nev. 853, 867-68 (1997). The reasoning for such a standard is the trial court is in the position to best assess whether from the totality of the circumstances that racial discrimination is occurring. Hernandez, 500 U.S. at 356; Doyle, 112 Nev. at 887-88. "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." Hernandez, 500 U.S. at 367.

A. Step one — Prima Facie Case.

In deciding whether or not the requisite showing of a prima facie case of racial discrimination has been made, the court may consider the "pattern of strikes" exercised or the questions and statements made by counsel during the voir dire

examination. Batson, 476 U.S. at 96-97; Libby v. State, 113 Nev. 251, 255 (1997); Doyle, 112 Nev. at 887-888. Striking a member of a minority group by itself is insufficient to establish a prima facie case. Watson v. State, 130 Nev. 764, 776 (2014). "Something more" is required. Id.

While percentages may be used to demonstrate a prima facie case, percentages do not necessarily always satisfy that step. Cooper v. State, 124 Nev. Adv. Op. 104, 432 P.3d 202, 205 (2018); Watson, 130 Nev. at 778-80. This Court noted in Watson that percentages can lead to inconsistent conclusions because it is unclear how many preemptory challenges amount to a prima facie case. 130 Nev. at 778. Percentages are "meaningless" without a reference point. Id. at 777-78. Further, a sample size may be so small that the statistical significance of percentages has limited value at the first step of Batson. See Wade v. Terhune, 202 F.3d 1190, 1198 (9th Cir. 2000) (finding no prima facie case under Batson where "one of three (or 33%) of the prosecutor's peremptory challenges had been exercised against an African-American, when only four of sixty-four (or 6%) of the prospective jurors in the venire were African-American," noting the small sample size); United States v. Mensah, 737 F.3d 789, 801-02 and n.11 (1st Cir. 2013) (noting that "small numbers may affect the weight of the numeric evidence [under Batson]"); Carmichael v. Chappius, 848 F.3d 536, 549 n.79 (2d Cir. 2017) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339, n.20 (1977), for the proposition that "small sample

size may […] detract from the value of [statistical] evidence" under Batson). The first step is not moot when the district court moves to the second step "in an abundance of caution." Id. at 779-80.

During voir dire, Appellant raised a Batson challenge as to the State's use of a preemptory challenge to prospective Juror Nos. 37, 50, and 68. VAA884-85. At trial, Appellant stated that Juror No. 37 (Ms. Hernandez) was Hispanic, Juror No. 50 (Ms. Lyons) was African American, and Juror No. 68 (Ms. Pool) was "part African American." VAA885-86. The defense's sole challenge to the State's strike was based on a statistical argument. As to Ms. Lyons, the defense argued that the State used 13% of their strikes, on a group that represented 5% of the venire panel in order to remove 50% of African Americans. VAA886. The district court corrected defense counsel's math to show that it was 11%, not 13%. VAA888. As to Ms. Hernandez, she was the only one who self-reported that she was Hispanic, while the court noted that there were five (5) who marked "other." VAA889. Defense counsel argued that the State used 11% of their strikes to remove 100% of Hispanics. VAA889-90. The district court noted that it was disingenuous to say that there are no other Hispanic persons on the panel, as it was possible that there could be more since some jurors marked "other". VAA890. In terms of gender, defense counsel proceeded to argue that the State used 33% of their challenges to remove women. VAA891. Upon the

conclusion of defense counsel's argument, the district court asked the State to respond. Id.

Appellant failed to demonstrate a prima facia case. First, the State used one preemptory strike that would have resulted in the removal of 50% of African Americans. VAA866,888. These facts differ from Cooper, where the prosecutor struck two of three African-Americans on the panel. 134 Nev. 862, 432 P.3d at 205. Further, as the court noted, it was disingenuous to say that there are no other Hispanic persons on the panel, as it was possible that there could be more since some Jurors marked "other". VAA890. The reliability and value of statistical evidence is undermined by the small sample size. Where there are only two minority jurors of the same race, striking just one of them will always constitute fifty percent. Lastly, the first step is not moot when the district court moves to the second step "in an abundance of caution." Watson, 130 Nev. at 779-80, 335 P.2d at 169.

B. Step two — Race-neutral Explanation.

In step two, assuming the opposing party makes the above described prima facie showing, the burden of production then shifts to the proponent of the strike to come forward with a race-neutral explanation. Purkett, 514 U.S. at 767. "The second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett, 514 U.S. at 767-681. "Unless a discriminatory intent is inherent

in the [State's] explanation, the reason offered will be deemed race neutral." Id.; Doyle, 112 Nev. at 888.

Here, unlike Cooper, where the district court erroneously rejected the argument under step one of the analysis and "the record [did] not clearly reflect the State's reasons for its peremptory strikes", the district court in this case proceeded to step 2 of the analysis, and the record does reflect what the State's reasons were. Cooper v. State, 134 Nev. 860, 864 (2018).

As to Juror No. 37, Ms. Hernandez, the State explained that their concern was the fact that Ms. Hernandez stated she was very shy, very quiet, and was not able to voice her opinions in front of a group. VAA892. The State further pointed out that it was not comfortable with having someone be a part of a panel who could not decide whether or not a person committed murder. Id. On Appeal, Appellant claims that the State's claim was belied by the record, an cites to Conner v. State, 130 Nev. 457, 466 (2014) because Juror No. 77 also stated he was shy and described himself as timid. AOB 22.

The State's question at trial was,

> Is there anybody who would feel uncomfortable though being able to voice their opinions in front of the other jurors? That they don't feel comfortable -- maybe you're shy or it's just not something you'd feel like you would be comfortable in doing, going back there and discussing your opinions with the other jurors?

IIIAA529. Juror No. 37 stated that she was shy, and when asked if she would feel more comfortable with the same group, she only stated she would feel "a little bit". IIIAA530. She further explained that she is the quietest one in a group, that she would not be comfortable with voicing her opinion, and that she would stay quiet and go with the majority. Id. When asked if she would say something if she disagreed, she could only assert that she "might" be able to. IIIAA531. In comparison, Juror No. 77 stated that he was "sort of a timid, kind of nervous, shy person[,]" but he would feel fairly comfortable in voicing his opinion in front of others. VAA876-77. Juror No. 77 was clear that he thought he would be steadfast in his thoughts. VAA877. Juror No. 77's responses are clearly distinct from Juror No. 37. Next, Appellant's reliance on Connor is misplaced as in that case, the State's reason for the strike was directly contradicted by the record. 130 Nev. 457, 466 (2014). Here, Appellant is inappropriately using Connor in this case for an entirely different situation by arguing that the State's reason is belied because there was another juror who stated they were shy. As the State has shown, the State's reasoning was firmly supported by the record.

As to Juror No. 50, Ms. Lyons, the State explained that there was concern with her accounts of being racially profiled on two occasions which resulted in her having a distrust for and negative reaction towards police. VAA892-93. Another concern was that she admitted that she would treat the testimony of officers differently.

VAA893. By her own admissions, Ms. Pool would assess the credibility of officers differently. Id. The State's reasons were clearly supported by the record and the State did not explicitly interject race into its explanation without providing any further explanation. Ms. Lyon explained that she had an issue with Henderson police, and based on that interaction she had a negative view, in general, towards law enforcement. IIIAA562-64. Before that incident, Ms. Lyon explained she had another negative interaction with law enforcement while in Michigan, and even before that incident she had a negative view of law enforcement after working in a hospital where police would bring in prisoners. IIIAA564-65. Ms. Lyons continued to assert that she would be skeptical of what law enforcement in this case had to say and gave the following analogy: "If there was a police officer in plain clothes and I didn't know he was a police officer I would trust him more than if I saw him in -- as a police officer." IIIAA567. The State did not strike Ms. Lyons because she was racially profiled. The State struck Ms. Lyons as she had a strong negative view of law enforcement as a result of her past interactions. The State highlights the fact that Ms. Lyon's first negative interaction did not stem from her own racial profiling, but from watching police officers bring prisoners into a hospital that she worked at. IIIAA565.

Contrary to Appellant's citations, other jurisdictions would support the State's decision. See Ananaba v. State, 325 Ga.App. 829, 755 S.E.2d 225, 227 (2014)

(upholding the use of peremptory challenges on three African American venire members because of their prior bad experiences with law enforcement officers was a race-neutral reason.); Guzman v. State, 287 Ga. 759, 762(2), 700 S.E.2d 340 (2010) ("A venire member's prior negative experience with law enforcement officers is a race-neutral reason supporting the exercise of a peremptory challenge."); People v. Acevedo, 35 N.Y.S.3d 752, 757 (2016); People v. Calvin, 72 Cal. Rptr. 3d 300, 307 (2008) ("skepticism about the fairness of the criminal justice system is a valid ground for excusing jurors."); People v. Blacksher, 52 Cal. 4th 769, 802–03 (2011).

Finally, as to Juror No. 68, Ms. Pool, the State noted that her race or ethnicity was unclear, but the first concern was Ms. Pool seeking clarity on the separation between the two phases of a trial. VAA894. Ms. Pool also stated that she would continue to think about the separate penalties, and that she was focused on rehabilitation as her brother was in jail. Id. As the State explained, "it seemed to me by her comments in that she believes in rehabilitation and that there aren't situations where, you know, we should put people away indefinitely. That people don't get better and we need to get them out of prison and into programs." Id. Appellant's reliance on Connor is, again, misplaced as the State's reasons in this case were not directly contradicted by the record. Connor, at 466, 327 P.3d 503, 510; See IVAA774-77,800-01,809, 855-57. Later, Ms. Pool was honest that she would have those thoughts, but that it would not affect her decision of guilt. Id. However, Ms.

Pool then asserted the following when asked if she would attribute her brother's sobriety to incarceration:

> I have mixed feelings about that, honestly. I don't know that -- the way that his story unfolded is that there was many times he tried to get straight in jail and it didn't work. It wasn't until he came out and went into a halfway house facility that he was able to hold on to any long-term sobriety.
> …But as far as him getting rehabilitated, I'm not sure that the actual jail was a huge part of that.

VAA855. Accordingly, the State was correct in its assertion and had a legitimate race neutral reason for striking this jury. For the reasons stated above, step two of the inquiry was satisfied.

C. Step three — "sensitive inquiry".

In step three, "the district court must determine whether the explanation was a mere pretext and whether the opponent successfully proved racial discrimination." King v. State, 116 Nev. 349, 353 (2000). At this point, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." Purkett, 514 U.S. at 768. What is meant by a legitimate race-neutral reason "is not a reason that makes sense, but a reason that does not deny equal protection." Purkett, 514 U.S. at 769; Thomas, 114 Nev. at 1137.

"[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the

explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." Miller-El v. Cockrell, 537 U.S. 332, 339 (2003). Nevertheless, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Purkett, 514 U.S. at 768; Doyle, 112 Nev. at 889.

As this Court recently stated in Matthews v. State, 136 Nev. Adv. Op. 38, 466 P.3d 1255, 1260 (2020),

> Because the district court's decision at step three "often turns upon the demeanor of the prosecutor exercising the strike, and the demeanor of the juror being struck—determinations that lie uniquely within the province of the district judge," Williams, 134 Nev. at 693, 429 P.3d at 308, this court has "repeatedly implored district courts to ... clearly spell out their reasoning and determinations." Id. at 689, 429 P.3d at 306 (emphasis added). When the district court fails to do so, this court may not be able to give the district court's decision the deference that it would normally receive.

In that case, "[a]fter allowing both sides to argue, with very little input from the bench, the district court simply said, 'So at this time, the objection's overruled.'" Matthews, 136 Nev. Adv. Op. 38, 466 P.3d at 1260.

As an initial matter, in Williams, the district court made an ultimate decision on the Batson challenge immediately after the State provided its race neutral reasons for excluding the juror. Williams v. State, 134 Nev. 687, 692 (2018). Consequently, the defendant had to ask the court to conduct the third step, and this Court determined that Williams should not have had to make that request. Id, at 692. However, unlike Williams, the court in that case, "never conducted the sensitive inquiry required by

step three…Instead, all the district court said was this: 'I don't find the State based it on race.'" Id, at 693. Here, the district court completed a sufficient inquiry into the Batson challenge.

Here, the district court talked about the numbers presented, and the concern with automatically assuming what Ms. Pool's ethnicity is. VAA897-98. Regardless, the district court found that there were race neutral reasons. VAA899-901. The factual findings are entitled to deference. Thus, for these reasons, the district court properly found that there was no Batson violation.

II. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S FAIR CROSS SECTION CHALLENGE AS THERE WAS NO SYSTEMATIC EXCLUSION OF ANY DISTINCTIVE GROUP

Appellant complains that the district court erred in denying his fair cross section challenge because Hispanics were underrepresented in the venire. AOB 25-27. Accordingly, Appellant claims that reversal is mandated as the district court failed to strike the panel. AOB 30.

The Sixth and Fourteenth Amendments give criminal defendants the right to be tried by a jury made up of an impartial and representative cross section of their peers. Taylor v. Louisiana, 419 U.S. 522, 526-27 (1975). However, "[t]he Sixth Amendment only requires that 'venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" Williams v. State, 121 Nev. 934, 939-40,

(quoting Evans v. State, 112 Nev. 1172, 1186 (1996)). This right does not "guarantee a jury or even a venire that is a perfect cross section of the community" but recognizes that, as long as the process behind selecting the jury pool is fair, "random variations that produce venires without a specific class of persons or with an abundance of that class are permissible." Id.

To prove a "prima facie violation of the fair-cross-section requirements" a defendant must show:

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

Id. at 940 (internal quotation and emphasis omitted). However, there is no constitutional right to a venire that perfectly reflects the community's composition. Id. at 939.

NRS 6.110(1) prescribes the process for the selection of jurors for counties with a population of more than 100,000 people. This statute directs the clerk of the court to select at least 500 names at random from the available lists and then mail those prospective jurors questionnaires. NRS 6.110(1). This Court has upheld this random process in the past. Kirksey v. State, 112 Nev. 980 (1996); see also Battle v. State, No 68744, 2016 WL 4445494 (Nev. Aug. 10, 2016) (unpublished disposition)

("We conclude that the process explained by the jury commissioner provides no opportunity for systematic exclusion of specific races.").

At trial, Appellant argued that Hispanics were a cognizable group, and that census data showed that they comprise 31.3% in Clark County. IIIAA396. Appellant asserted that the comparative disparity was between 57 and 58% while the district court determined that the percentage was 58.4%. Id. To satisfy the third prong, defense counsel claimed that there was noncompliance with NRS 6.054(3). IIIAA397; AOB 28. As a result of the noncompliance with the statute, Appellant argued the underrepresentation was due to a systematic exclusion. IIIAA401.

The district court stated that,

> The problem is the Employment Security Division isn't providing the information….There is a difference in my mind between the Jury Commissioner is not doing her job to maintain that information, whether it's intentionally or negligently --and I agree with you, Navid, it doesn't have to be intentional to be a
> systematic exclusion. But there is a difference between that and we're attempting to do our job and get that information, but an entity isn't providing it back to us.
> …
> So the Jury Commissioner, I think, has done what she can do to compile and maintain the list of jurors from information provided.

IIIAA403.

Appellant cites to Valentine and argues that he made "specific allegations that if true would prove systematic exclusion" but, "unlike Valentine, the allegations here were in fact shown to be true." AOB 29. Appellant also claims that the district court

did not "rely on an explanatory record to adequately address the issue." AOB 29. In Valentine, the defendant complained that two distinctive groups, African Americans and Hispanics, were not fairly and reasonably represented in the venire. Valentine, 135 Nev. at __, 454 P.3d at 713. Valentine challenged the jury selection system, alleging that summonses were not enforced and that the system itself excluded members from distinctive groups. Id. The district court denied the defendant's claim without an evidentiary hearing, instead relying on previous testimony from the Jury Commissioner, and recognizing that any underrepresentation was not due to systematic exclusion. Id. A panel of this Court held that the district court abused its discretion by not holding an evidentiary hearing because the defendant's specific allegations were not previously discussed in the Jury Commissioner's prior testimony. Id. at __, 454 P.3d at 714-15.

The district court noted that this issue was dealt with in a different case that he presided over. IIIAA403. As the district court explained:

> I think you all have examined her, the State's examined her, everybody knows kind of what that part of it is. And whether it's the Arenas transcripts or some of the other recent transcripts, I know some of the other judges have had them as well, I'm comfortable that everybody -- not just me but you all as well, kind of understands what they're doing in Jury Services, what the limitations are, what's available to them right now.

IIIAA400. Appellant also supplied a copy of testimony from the *Arenas* case. IIIAA394-95; XAA1974. With all the information presented, the district court did

not abuse its discretion in not holding an evidentiary hearing in this issue and finding that the third prong of the inquiry had not been met, as any underrepresentation is not due to systematic exclusion of Hispanics in the jury-selection process. See Battle, 2016 WL 4445494 (Nev. Aug. 10, 2016) (unpublished disposition) (upholding the denial of a request for a hearing with the Jury Commissioner where the district court relied on previous testimony of the Jury Commissioner to conclude that the jury selection process "provides no opportunity for systematic exclusion of specific races".). As the Valentine Court acknowledged that there are instances when a district court can rely on the Jury Commissioner's prior testimony. Valentine, at __, 454 P.3d at 714 n. 1. Accordingly, it was appropriate for the district court to rely upon the Jury Commissioner's previous testimony.

The Jury Commissioner was complying with the statute to the best of her ability, and the fact that an entity is not providing a list does not mean the Jury Commissioner is at fault. Although, according to defense counsel, the jury commissioner testified in a previous hearing that it would take five (5) minutes to have a new panel, the district court noted that since the problem is the Department of Employment not providing this information, the criminal justice system could not be halted, and trials not conducted, until that entity complied. IIIAA401-03.

Appellant failed to show that the alleged underrepresentation of Hispanics in Appellant's jury venire was due to systematic exclusion in the jury-selection process

from the Clark County jury pool as a whole. This Court has recognized that a defendant is not entitled to a new jury venire merely because random variation causes one specific group to be over or underrepresented in his particular jury panel. Williams, 121 Nev. at 939-40. In Williams, the Court found that the defendant failed to show a history of discrimination and failed to show that Clark County systematically discriminates against African Americans. Id. at 941. Further, the Court stated that "[e]ven in a constitutional jury selection system, it is possible to draw venires containing" 0% to 2.5% or 15% to 20% African Americans and that such variations would be normal in a county with 9.1% African Americans. Id.

Absent evidence that the jury rolls in all of Clark County systematically exclude Hispanics, Appellant's challenge to the make-up of his particular venire cannot support a prima facie showing of systematic underrepresentation as required by Williams. Therefore, Appellant cannot demonstrate that the selection process in Clark County systematically excludes Hispanics and, thus, his claim fails. For these reasons, the district court did not err.

III. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR FIRST DEGREE MURDER WITH USE OF A DEADLY WEAPON

Appellant claims that the State failed to establish "a sufficient factual basis and did not establish sufficient evidence of specific intent." AOB 31. Appellant's

argument is solely regarding the First Degree Murder with Use of a Deadly Weapon and not the conviction for Count 2. See AOB 36.

The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Edwards v. State, 90 Nev. 255, 258-259 (1974). In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381 (1998) (quoting Koza v. State, 100 Nev. 245, 250 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979). Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193 (1996) (emphasis removed).

Moreover, "[i]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. at 381 (quoting McNair v. State, 108 Nev. 53, 56 (1992)); see also Culverson v. State, 95 Nev. 433, 435 (1979); Azbill v. Stet, 88 Nev. 240, 252 (1972) (concluding that the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the

evidence will not be weighed by an appellate court) (cert. denied, 429 U.S. 895 (1976)). Thus, the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts" is preserved. Jackson, 443 U.S. at 319.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367 (1980). This Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391 (1980) (citing Crawford v. State, 92 Nev. 456 (1976).

The State alleged that Appellant committed Murder by either directly committing the crime, aiding or abetting in the commission of the crime, or pursuant to a conspiracy. IAA159-60. Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. NRS 200.010. Express malice is defined as the "deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." NRS 200.020(1). While "[m]alice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." NRS 200.020(2). "Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty." NRS 193.0175. "Malice aforethought may be inferred from the intentional

use of a deadly weapon in a deadly and dangerous manner." Moser v. State, 91 Nev. 809, 812 (1975), modified on other grounds by Collman v. State, 116 Nev. 687, 717 n. 13 (2000).

"Willfulness is the intent to kill." Valdez v. State, 124 Nev. 1172, 1196 (2008), quoting Byford v. State, 116 Nev. 215, 236 (2000). Deliberation requires a thought process and a weighing of the consequences. Id. "Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing." Valdez, at 1196; quoting Byford, at 237. "Evidence of premeditation and deliberation is seldom direct." Washington v. State, 132 Nev. 655, 662 (2016); quoting, Briano v. State, 94 Nev. 422, 425 (1978). Intent "is manifested by the circumstances connected with the perpetration of the offense." NRS 193.200; see also Valdez, 124 Nev. at 1197 ("[I]ntent can rarely be proven by direct evidence of a defendant's state of mind, but instead is inferred by the jury from the individualized, external circumstances of the crime." (internal quotation marks omitted)). "[T]he intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of the use, and the attendant circumstances characterizing the act." Moser, 91 Nev. at 812.

The intent to kill does not have to be formed long before the actual killing in order to show premeditation and deliberation. See Payne v. State, 81 Nev. 503, 508–

09 (1965) ("To make a killing deliberate as well as premeditated, it is unnecessary that the intention to kill shall have been entertained for any considerable length of time. It is enough if there is time for the mind to think upon or consider the act, and then determine to do it.") "If, therefore, the killing is not the instant effect of impulse—if there is hesitation or doubt to be overcome, a choice made as the result of thought, however short the struggle between the intention and the act—it is sufficient to characterize the crime as deliberate and premediated murder." Payne, 81 Nev. at 509. "In other words, one may be guilty of murder in the first degree although the intent to commit such a homicide is formed 'at the very moment the fatal shot [is] fired.'" Id.; quoting State v. Hall, 54 Nev. 213 (1932). Finally, a firearm is a deadly weapon and proof of its deadly capabilities is not required. Stalley v. State, 91 Nev. 671, 676 (1975).

Here, the evidence produced at trial showed that Appellant was the shooter, Appellant had the motive to commit the crime, and the opportunity to commit this murder. Appellant's motive was disclosed by the fact that while blaring his music, Gordon, a homeless man, confronted him. VAA1014,1056; VIIIAA1558,1582. Appellant had prior negative reactions with the homeless. VAA1004; VIAA1102. After the initial confrontation with Gordon, Appellant arguably attempted to blow off some steam by completing donuts in the parking lot. VAA1017; VIIIAA1560. Appellant later recruited Romero to go outside in order to follow Gordon and engage

in a fight. VIIAA1320, 1331. Appellant was also seen pointing a firearm at Gordon. VIIIAA1561. Romero had no motive, and Appellant only engaged him so that a fight could ensue.

Later, Appellant returned to Gordon's resting place a second time with Mitchell. VIIAA1404-05. Multiple witnesses stated that the shooter was the taller of the two men and was wearing a blue shirt; testimony established that Appellant was taller than Mitchell. VAA976, 978-79, 982-83;VIIAA1259-60,1301.

Appellant weighed the possible consequences of killing Gordon and had time to do so. When Appellant pulled the trigger eight times, he meant for Gordon to die. VIIIAA1470. After Appellant murdered Gordon, the video shows him returning to Unified Container. VIIIAA1568. Appellant's actions after the murder also support his involvement, as, at one point, he changes to a red/maroon shirt. VIIIAA1570-72. Furthermore, Appellant's red backpack, with the firearm inside, was found at the scene and was identified to have been involved in the shooting. VAA1073-74,1080;VIIIAA1569,1590. Additionally, the gun was owned by Appellant's wife's cousin; with that relationship, the jury infer could how Appellant received the firearm. VIIAA1303. Moreover, Appellant's DNA was found on the firearm. VIIIAA1515-17.

Now, Appellant focuses on Mitchell's testimony, and points out that his "story changed multiple times from his initial statements to police" and that he was under

the influence of marijuana. AOB 32. Appellant further asserts that there was contradictory accounts given, which undermines the State's case. AOB 33. Appellant's attempts to undermine the sufficient evidence that was presented to the jury is meritless. First, while Kenneth testified at the preliminary hearing that Mitchell was the shooter, there was testimony introduced at trial regarding that he was known to be intoxicated regularly. VIIAA1262. Next, Deanna's description of Appellant and Mitchell's heights does not undermine the fact that multiple witnesses testified that Appellant was the taller individual; the exact height, down to inches, is of no significance. Further while Romero initially testified at trial that it was a phone in Appellant's hand, he admitted that he previously testified that it was a firearm which is consistent with Detective Hoffman's testimony.[11] Regardless, as to all of Appellant's assertions, it is the jury's function to determine the credibility of witnesses. Origel-Candido, 114 Nev. 378, 381 (1998). For these reasons, there was sufficient evidence to support Appellant's conviction.

IV. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT

[11] The State notes that Appellant's citation to the State's traffic analogy is misleading as said analogy was given to explain premeditation and deliberation. IX AA 1800-01; See AOB 35. Accordingly, the State was not contradicting itself.

Appellant claims the State committed prosecutorial misconduct by 1) disparaging defense counsel through an analogy used to explain conspiracy, and 2) for the State's use of an analogy to explain premeditation. AOB 36.

For claims of prosecutorial misconduct, this Court engages in a two-step analysis. Valdez v. State, 124 Nev. 1172, 1188 (2008). First, this Court determines whether the prosecutor's conduct was improper. Id. Second, if the conduct was improper, this Court determines whether that conduct warrants reversal. Id.

As to the first step of the analysis, prosecutors are allowed to make statements about the facts and inferences supported by the record. Thomas v. State, 120 Nev. 37, 48 (2004). This Court views the statements in context, and will not lightly find prosecutorial misconduct based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 864-65 (2014).

As to the second step of the analysis, this Court will not reverse a conviction if the conduct was harmless error. Valdez, 124 Nev. at 1188. Harmless-error review applies only if the defendant preserved the error for appellate review. Id. at 1190. 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 (2002)).

The harmless-error review standard depends on whether the prosecutorial misconduct is of a constitutional dimension. Valdez, at 1188–89. If the error is of constitutional dimension, then the Court applies the Chapman v. California, 386 U.S. 18, 24 (1967) standard, which requires the State to demonstrate, beyond a reasonable doubt, that the error did not contribute to the verdict. Id. at 1189. If the error is not of constitutional dimension, this Court will reverse only if the error substantially affects the jury's verdict. Id.

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

Claims of prosecutorial misconduct that have not been objected to at trial will not be reviewed on appeal unless they constitute "plain error." Leonard v. State, 117 Nev. 53, 82 (2001); See Mitchell v. State, 114 Nev. 1417, 1426 (1998); Rippo v. State, 113 Nev. 1239, 1260 (1997). Under this standard, plain error does not require reversal unless the defendant demonstrates that the error affected his substantial

rights, by causing "actual prejudice or a miscarriage of justice." Valdez, 124 Nev. at 1190 (quoting Green v. State, 119 Nev. 542, 545 (2003)).

Further, "[t]he context of the prosecutor's comment must be taken into account in determining whether a defendant should be afforded relief." Bridges, 6 P.3d at 1009. "A prosecutor's comments should be viewed in context, and 'criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone…'" Knight v. State, 116 Nev. 140, 144-45 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

A. The State Did Not Disparage the Defense.

Appellant first mentions the State's analogy to explain conspiracy. AOB 38-39; IXAA1792-94. At trial, defense counsel objected under the grounds that it disparaged the defense, and that the State was interjecting the parties into the case. IXAA1793-94. The district court stated that it did not think the State intended to disparage counsel, but it would admonish the jury. IXAA1794. The State confirmed that their intent was not to disparage. Id. During defense counsel's Motion for a Mistrial, the State again explained that it did not intend to disparage counsel and that it was just a "spur of the moment example[.]" IXAA1809. The district court then denied the Motion for Mistrial and asked for input from defense counsel on what the admonishment would say. IXAA1810. The district court subsequently admonished the jury. IXAA1811.

The State's comments were not improper because the State was not disparaging defense counsel. The prosecutor did not even say that defense counsel was objecting too much, but merely described a hypothetical scenario in order to explain conspiracy to commit murder. In fact, the State only said, "[i]f I decide that I'm upset at the Defense attorneys objecting during my closing argument" which does not automatically result in a conclusion that the State was claiming that there were too many objections. See IXAA1792-93. Unlike Butler, where the prosecution "used many adjectives and analogies" to imply that "Butler's counsel acted unethically in his defense[,]" the prosecution in this case was not asserting that defense counsel was acting unethically or commenting on legitimate defense tactics. Cf. Butler v. State, 120 Nev. 879, 898 (2004). There was no implication that defense counsel was "objecting too much".[12] Nor was the State attempting to attack defense counsel's advocacy.

To the extent that any of the State's arguments in closing were improper, any error was harmless. If the error is of constitutional dimension, then the Court applies the Chapman v. California, standard, which requires the State to demonstrate, beyond a reasonable doubt, that the error did not contribute to the verdict. Valdez at 1189. If the error is not of constitutional dimension, this Court will reverse only if

[12] Appellant claims that the objections raised prior to the State's analogy were not improper, but does admit that only some of the objections were sustained by the district court. AOB 40.

the error substantially affects the jury's verdict. Id. Although Appellant's assertion that this is a constitutional violation, which it is not, under either standard, any error was harmless. First, the district court gave a lengthy admonishment to the jury. IXAA1811. Moreover, as the court sustained the objection, Appellant cannot demonstrate prejudice as a result of this testimony. See Valdez v. State, 124 Nev. 1172, 1193-94 (2008) (No prejudice resulting from prosecutorial misconduct where objection sustained), Allred v. State, 120 Nev. 410, 415 (2004) (The Nevada Supreme Court presumes the jury follows the district court's orders and instructions).

Further, it is highly unlikely that these remarks substantially affected the verdict, given the substantial evidence introduced at trial to prove Appellant's guilt. The events leading up to Gordon's murder establish Appellant's motive and opportunity for killing him. Gordon first approached Appellant to ask him to turn his music down so he could sleep, which led to a confrontation. VAA1013,1015-16;VIIIAA1582. After this confrontation, Appellant sought Romero's help to fight Gordon. VAA1013, 1015-16; VIIAA1320. Appellant was seen pointing a firearm in Gordon's direction. VIIIAA1561. Later, Appellant and Mitchell walked over to where Gordon was resting when Appellant shot Gordon eight times. VAA982-83, 1024; VIAA1101-02, 1109; VIIAA1407, 1419; VIIIAA1470. Appellant's contentions focus on credibility, but it is the jury's function to determine the credibility of witnesses. Origel-Candido, 114 Nev. 378, 381.

Finally, Appellant claims that the district court abused its discretion in denying the mistrial. AOB 42. A "denial of a motion for a mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal in the absence of a clear showing of abuse." Parker v. State, 109 Nev. 383, 388-89 (1993). Appellant citation to the record neglects the additional findings that although it was a "bad analogy", the court felt as though an admonishment was sufficient compared to granting a mistrial. IXAA1809-10. When the actual objection was made, the district court stated that the court did not believe the intent was to disparage counsel, which said remark was made before the jury. IXAA1794. For these reasons, the district court did not err in denying the Motion for Mistrial, and the State did not commit prosecutorial misconduct; if this Court was to find that there was misconduct, any error was harmless.

B. The State's Analogy in Reference to a Traffic Light was to Explain Premeditation and Deliberation.

As an initial matter, Appellant's actual objection to the State's analogy was, "You don't get a red -- ticket for going through a yellow light. This is a facetious argument because it would… be a red light." See AOB 43; IXAA1800. Now on appeal, Appellant asserts that the analogy was improper because that State did not properly explain premeditation. Id. According this Court should decline to consider the argument on appeal. Guy v. State, 108 Nev. at 779–80 (1992).

Regardless, the State's comment was not improper, because the State was explaining the concepts of premeditation and deliberation and the fact that said concepts are not about the time, but whether a suspect formed the intent. Said analogy is supported by Nevada case law. See Payne v. State, 81 Nev. 503, 508–09 ("one may be guilty of murder in the first degree although the intent to commit such a homicide is formed 'at the very moment the fatal shot [is] fired."). As this Court stated in Byford, "[a] deliberate determination may be arrived at in a short period of time." 116 Nev. 215, 236 (2000).

Furthermore, Appellant's reliance on McCullough is misplaced as that case handled a different concept, the reasonable doubt standard, and the conduct was by the trial court. See McCullough v. State, 99 Nev. 72, 73 (1983). The case law surrounding the reasonable doubt standard is clear that no other definition can be given. See NRS 175.211. For these reasons, the State's analogy was not improper.

If there was any error, it was harmless based upon the overwhelming evidence as stated *supra*. The State emphasizes the fact that there was overwhelming evidence to support the argument that Appellant had the intent to kill after engaging in a confrontation with Gordon and later shooting him eight times. VAA982-83,1013,1015-16,1024;VIAA1101-02,1109;VIIAA1320,1407,1419;VIIIAA1470. Moreover, the jury was instructed as to the relevant definitions of premeditation and

deliberation. IXAA1882. For these reasons, the State did not commit prosecutorial misconduct, and if there was any error, the error was harmless.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE'S INVESTIGATOR TO TESTIFY

Appellant claims the district court abused its discretion by allowing the State's investigator to testify and "attack the credibility and character of witnesses." AOB 49. Appellant's claim is that the State's Investigator's testimony was provided to "discredit Kenneth and Ramiro, while bolstering the credibility of Mitchell." AOB 52.

This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Hernandez v. State, 124 Nev. 639 (2008) (abrogated on other grounds by State v. Eighth Judicial Dist. Court in & for County of Clark (Baker), 134 Nev. 104 (2018); see, e.g., Mclellan v. State, 124 Nev. 263, 267 (2008). The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong. Petrocelli v. State, 101 Nev. 46, 52 (1985).

According to Lobato v. State, 120 Nev. 512, 518 (2004) (internal citation omitted) there are nine modes of impeachment:

> The first four involve attacks upon the competence of a witness to testify, i.e., attacks based upon defects of perception, memory, communication and ability to understand the oath to testify truthfully. The second four modes of impeachment involve the use of evidence of prior convictions, prior inconsistent statements, specific incidents of

> conduct and ulterior motives for testifying. The ninth mode of impeachment, not pertinent to this appeal, permits attack upon a witness's reputation for truthfulness and necessarily involves the use of extrinsic evidence.

"Impeachment by use of extrinsic evidence is prohibited when collateral to the proceedings. Collateral facts are by nature 'outside the controversy, or are not directly connected with the principal matter or issue in dispute.'" Id. (internal citation omitted). However, this rule is limited only to issue involving specific instances of conduct. Id.

> For example, extrinsic evidence that is relevant to any of the first four modes of impeachment is never collateral and thus is always admissible for impeachment purposes…And extrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias, interest, corruption or prejudice, is never collateral to the controversy and not subject to the limitations contained in NRS 50.085(3).

Id. at 518–19. "NRS 50.085(3) limits the admissibility of extrinsic evidence for the purpose of attacking credibility based upon specific instances of conduct attributable to the witness. Unless in some way related to the case and admissible on other grounds, extrinsic prior bad act evidence is always collateral and therefore inadmissible to attack credibility." Id. at 519.

A. Testimony Regarding Kenneth and Romero was Proper.

First, Appellant claims that Investigator Honaker's testimony was unnecessary since Kenneth's testimony had been read into the record. AOB 52. Appellant further complains that the investigator did not impeach Kenneth's actual

testimony, but attacked his character based on prior interactions. Id. Contrary to Appellant's assertions, Investigator Honaker testified before Kenneth's testimony was read into the record by defense counsel. IXAA1761-62; AOB 52. Accordingly, the testimony informed the jury why Kenneth would not be present for trial.

Regardless, the State offered permissible impeachment testimony. Investigator Honaker testified that it was not easy to have Kenneth appear for the preliminary hearing as he was "minimally cooperative," resistant, and "not easy to deal with." VIIIAA1529-30. During multiple contacts, Kenneth was inebriated and angry; after Kenneth testified for that hearing, Investigator Honaker was unable to procure him for the trial. VIIIAA1530. This testimony was permissible impeachment testimony as introduced to attack Kenneth's perception and memory of the events. Deanna even testified that she had observed Kenneth become drunk and rowdy on a consistent basis. VIIAA1262-63. Therefore, the testimony was proper.

As to Romero, Appellant claims that the testimony about that witness was not relevant. AOB 53. Investigator Honaker testified that Romero was "rude, non-cooperative, minimally cooperative," and not easy to deal with. VIIIAA1530-31. As Appellant acknowledges, Romero had prior inconsistent statements, and Appellant went so far to describe Romero as agitated while on the stand. AOB 55. Even during the cross-examination of Honaker, defense counsel noted that Romero was not cooperative with his investigators. VIIIAA1548. Accordingly, this testimony was

proper. Moreover, the testimony impeached Romero's perception and memory of the events. Therefore, the testimony was permissible.

Finally, even if there was any error in allowing the investigator to testify, the plain error standard would apply. See Valdez v. State, 124 Nev. 1172, 1190 (2008) ("[w]hen an error has not been preserved, this court employs plain-error review."); Green v. State, 119 Nev. 542, 545 (2003). "[A]n error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing "actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. 1172, 1190.

Here, Appellant cannot show that any error affected his substantial rights. The State was permitted to attack the credibility of witnesses, just as defense counsel attempted to do so at trial. Moreover, Appellant admits that Romero was a problematic witness. Furthermore, as Kenneth's testimony was read into the record, there was testimony that he was not inebriated on the night of the murder. IAA121. Defense counsel even argued during closing arguments that Mitchell was the one who shot Gordon, and highlighted Kenneth's prior testimony that he was not intoxicated on the night of the murder. IXAA1818. Appellant's additional argument that the State was grouping Kenneth and Romero is illogical. The State was pointing out the potential for error in Kenneth's perception of events due to possible

inebriation. Finally, it is the jury's function to determine the credibility of witnesses. Origel-Candido, 114 Nev. 378, 381.

B. Testimony Regarding Mitchell was Proper.

Appellant claims that Investigator Honaker's testimony regarding Mitchell was not properly noticed to defense counsel, was inadmissible hearsay, and not proper impeachment evidence. AOB 55.

First, Appellant's reliance on NRS 174.235 is misplaced, as that statute did not bar the testimony about Mitchell. As Appellant admits, there was no written or recorded statement; accordingly, the "spirit" of NRS 174.235 was not violated. See AOB 57. Moreover, Appellant citation to the unpublished Kenderick case is misplaced and inapplicable as the issue involved a jail house call, which is clearly a recorded statement. See Id.

Second, Appellant claims that there was improper hearsay when Investigator Honaker testified that during the pretrial conference a question posed to Mitchell was did he turn around after the gunshots. VIIIAA1534-35. Investigator Honaker responded that he remembered that question, and the response from Michell was that he saw Gordon fall and his brother had a gun in his hand. VIIIAA1535. Prior to this testimony, Mitchell had testified that when he turned around, he did not see Gordon fall to the ground. Accordingly, the testimony by Investigator Honaker was permissible as there was an inconsistent statement. Although the impeachment

testimony was not permitted when Mitchell testified, the State properly had Investigator Honaker testify regarding this issue. Moreover, Appellant's citation to the record involves the statement provided to the Detective, that the State was attempting to use, which is not the issue Appellant raised. VIIAA1411-12.

To the extent that this Court finds that there was error, then plain error review would apply. Valdez, 124 Nev. at 1190; Green v. State, 119 Nev. 542, 545. Alternatively, to the extent that this Court finds that harmless error review applied, then Appellant is entitled to reversal only if the error substantially affected the jury's verdict. Valdez at 1189. Here, as stated *supra*, there was overwhelming evidence of Appellant's guilt. VAA976,978-79, 982-83,1014,1017,1056,1073-74,1080; VIIAA1259-60,1301; VIIIAA1470,1515-17,1558, 1560 61,1569,1582,1590. Moreover, the jury heard Mitchell's testimony that he did not see the victim fall to the ground and he did not see his brother with a firearm in his hand. VIIAA1408. For these reasons, there was no plain error; alternatively, any error was harmless.

VI. THE DISTRICT COURT DID NOT ERR BY NOT PROVIDING A JURY INSTRUCTION ON VOLUNTARY MANSLAUGHTER

Appellant claims the district court erred by not instructing the jury on voluntary manslaughter. AOB 59. District courts have "broad discretion" to settle jury instructions. Cortinas v. State, 124 Nev. 1013, 1019 (2008). 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 (2001).

The failure to instruct the jury on a defendant's theory of the case that is supported by the evidence warrants reversal unless the error was harmless. See Cortinas, 124 Nev. 1013, 1023-25 (discussing when instructional error may be reviewed for harmlessness). Instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155–56 (2000); See also NRS 178.598.

A defendant "is entitled to a jury instruction on a lesser-included offense as long as there is some evidence reasonably supporting it." Rosas v. State, 122 Nev. 1258, 1265 (2006), abrogated on other grounds by Alotaibi v. State, 133 Nev.650, 654 (2017). However, "[i]f the prosecution has met its burden of proof on the greater offense and there is no evidence at trial tending to reduce the greater offense, an instruction on a lesser-included offense may properly be refused." Id. (quoting Lisby v. State, 82 Nev. 183, 188 (1966)).

Voluntary manslaughter is a lesser-included offense of Murder. Williams v. State, 99 Nev. 530, 531 (1983). For voluntary manslaughter "there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing," NRS 200.050. Moreover,

> The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for, if there should appear to have been an

> interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder.

NRS 200.060; see NRS 200.040 (manslaughter is a voluntary killing "upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible").

Here, Appellant was not entitled to an instruction on voluntary manslaughter. Appellant had the opportunity to argue before the district court as to what evidence there was to support the court's decision in giving said instruction, but Appellant's argument failed. VIIIAA1634- 38. In fact, Appellant's claim was that Mitchell was the shooter, and defense counsel's arguments mirrored something more akin to self-defense. Id. Although the State firmly supports Appellant's assertion that the jury believed Appellant was the shooter, there is also the possibility that the jury believed Appellant was guilty under alternative theories of liability as alleged. See AOB 62. Regardless, Appellant cannot avail himself of the benefit of hindsight, as his argument at trial was Mitchell was the shooter. VIIIAA1634.

Appellant's argument fails to appreciate the facts leading up to Gordon's murder. Contrary to Appellant's assertions, the instant case is more similar to Collins than Newson as nothing in the record indicates that a highly provoking injury or irresistible passion preceded the murder. This Court in Newson determined that there was "abundant circumstantial evidence suggesting the killing was not planned and

instead occurred in a sudden heat of passion" and that there was "sufficient provocation." Newson v. State, 136 Nev. Adv. Op. 22, 462 P.3d 246, 251 (2020).

Evidence introduced at trial shows that Gordon initially approached Appellant and asked him to turn his music down which resulted in an argument between the two. VIIIAA1582. When the confrontation ended, Appellant got into his vehicle and drove around in the parking lot before parking his vehicle again. VAA1016-17;VIIAA1560. Appellant is later seen with a gun, while talking to Romero, and was pointing the firearm in Gordon's direction. VIIAA1322-23. There was additional testimony that Appellant planned on having Romero fight Gordon; however, this did not occur and as Romero went back to work, Appellant waited for his brother to arrive at Flavors. With his brother with him, Appellant walked over, and across the street, to where Gordon was resting. VIIAA1404-05;VIIIAA1567. Some accounts state that there was a fight between Gordon and Mitchell, but Appellant, who was standing in the street, was the one who fired eight rounds into Gordon, resulting in his death. VAA978-79;VIIAA1259-60;VIIIAA1470. Therefore, the district court did not err in refusing to give this instruction as the record was devoid of any evidence to support a charge for voluntary manslaughter. See Collins v. State, 133 Nev. 717, 727–28 (2017) (finding no error in district court's refusal to instruct on voluntary manslaughter due to record being "devoid of evidence suggesting the

irresistible heat of passion or extreme provocation required for voluntary manslaughter.").

Finally, if there was any error, it was harmless. As stated *supra*, there was overwhelming evidence of Appellant's guilt. VAA976,978-79,982-83,1014,1017,1056,1073-74,1080; VIIAA1259-60,1301; VIIIAA1470,1515-17,1558, 1560-61,1569,1582,1590. Moreover, Appellant's theory of defense was that Appellant was not the shooter. During opening statements defense counsel commented on Kenneth's prior testimony. VAA960-61. Further, during closing arguments, defense counsel argued that Mitchell was the one who shot Gordon, and there was no evidence that Appellant even agreed to Mitchell striking Gordon. IXAA1818. For these reasons, if there was any error it was harmless.

VII. THERE WAS NO CUMULATIVE ERROR

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

First, Appellant has not asserted any meritorious claims of error. Thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir.

1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors") (emphasis added).

Second, the issue of guilt was not close. Evidence introduced at trial showed that Appellant murdered Gordon and had the requisite intent to kill. After the initial confrontation with Gordon, Appellant sought the help of Romero to engage in a fight with Gordon, who had already left the scene. VAA1013, 1015-16; VIIAA1320. Appellant was seen pointing a firearm in Gordon's direction. VIIIAA1561. Appellant later returned with Mitchell, and was described as calm; Appellant then shot Gordon eight (8) times, showing that Appellant had the opportunity to murder Gordon. VAA982-83,1024;VIAA1101-02,1109;VIIAA1407,1419;VIIIAA1470. The evidence further showed that Appellant's DNA was on the firearm. VIIIAA1516-17. After shooting Gordon, Appellant's actions of changing his shirt and hiding his backpack that contained the firearm, supports the conclusion that he murdered Gordon. VAA1073-74,1080; VIII AA1569-73,1590. Therefore, the issue of guilt was not close; for these reasons, there was no cumulative error.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the Judgment of Conviction.

/ / /

/ / /

Dated this 14th day of January, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,788 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of January, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 14, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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