IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN TURNER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 76465

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(2) because it is an appeal from a judgment of conviction based on a jury verdict that involves convictions for offenses that are Category B felonies.

STATEMENT OF THE ISSUE(S)

1. Whether the district court did not abuse its discretion in joining Turner's and Hudson's trials.
2. Whether the district court properly admitted expert testimony.
3. Whether the district court did not err in permitting police officers to sit in the courtroom during closing arguments.
4. Whether there was no prosecutorial misconduct.
5. Whether there was no cumulative error.
6. Whether any error was harmless.

STATEMENT OF THE CASE

After the testimony of six witnesses on September 22, 2015, the Grand Jury issued an Indictment on September 23, 2015, charging Steven Turner ("Turner") and co-defendant Clemon Hudson ("Hudson") as follows: Count 1: Conspiracy to Commit Burglary; Count 2: Attempt Burglary While in Possession of Firearm or Other Deadly Weapon; Counts 3–4: Attempt Murder with Use of a Deadly Weapon; Count 5: Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm; and Count 6: Discharging a Firearm at or Into Occupied Structure. I Appellant's Appendix ("AA") 001–06, 011–13. Turner was arraigned and pled not guilty on October 5, 2015. III AA 710.

On April 14, 2016, the State filed a Notice of Witnesses and/or Expert Witnesses ("Expert Notice"), including UMC trauma doctors who would each "testify as a medical expert and to his/her observations, treatment, diagnosis and prognosis of the injuries sustained by the victim Officer Jeremy Robertson." I AA 192–202. On November 8, 2016, the State filed a Second Supplemental Expert Notice, naming Douglas Fraser and Naser Hakki as two of these UMC doctors and Anya Lester as a firearms/toolmark examiner; this Second Supplemental Expert Notice included Anya Lester's Curriculum Vitae ("CV"). II AA 261–75.

On August 28, 2017, Hudson filed a Motion to Sever, alleging the State planned to use Turner's statement to police against Hudson. XI AA 2247–52. On

September 13, 2017, Turner filed a Joinder to that Motion, alleging the inverse: that the State planned to use Hudson's statement to police against Turner. II AA 276–472. The State filed its Opposition on September 18, 2017. XI AA 2253. On October 12, 2017, the district court denied both Motion and Joinder, declining to sever the trials but ordering that the State redact both Turner's and Hudson's statements. III AA 640, 718; IV AA 780–807. Over the next two months, the State, Turner's and Hudson's counsels, and the district court proposed a series of redactions. III AA 720–21; IV AA 722–24, 808–40; XI 2363–65. On December 14, 2017, at a status check, Turner indicated he had no further challenge to the final version of Hudson's redacted statement under Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620 (1968). IV 837–40; IX AA 839; see also Court Exhibit A, transmitted to this Court via Order on February 15, 2019 ("Exhibit A").[1]

Turner's and Hudson's jury trial commenced on April 16, 2018. IV AA 730. The same day, the State filed an Amended Information, dismissing Count 6. III AA 558–62. The joint trial lasted ten (10) days. IV AA 730–39. On April 27, 2018, the jury returned a verdict of guilty on all counts. III AA 618–19; IV AA 739.

On May 4, 2018, Turner filed a Motion for New Trial, based partly on the joinder of trial and renewing the previously dropped claim that the redactions were

[1] Portions of Turner's statement to police were excluded in their entirety, as on March 29, 2018, the district court granted Turner's February 27, 2018 Motion to Suppress based on Sixth Amendment grounds. III AA 478–520, 708; IV AA 728.

insufficient. III AA 620–47. The State filed an opposition on May 8, 2018. III AA 648–57. The district court ordered supplemental briefing. IV AA 740. Turner filed his on June 14, 2018. III AA 658–75. The State filed a supplemental opposition on June 18, 2018. III AA 676–80. The district court denied the motion in open court on June 19, 2018. IV AA 741.

On June 21, 2018, Turner was sentenced to an aggregate term of a minimum of one hundred eighty (180) months to a maximum of four hundred eighty (480) months in the Nevada Department of Corrections. III AA 702–03; IV AA 742; X AA 2149–50. Turner received one thousand twenty-two (1022) days credit for time served. III AA 703. The Judgment of Conviction was filed July 2, 2018. III AA 701–03. Turner filed a Notice of Appeal on July 18, 2018. III AA 704–07.

STATEMENT OF THE FACTS

On September 4, 2015, at approximately 3:45AM, Eric Clarkson and Willoughby Grimaldi were asleep in their home when they heard suspicious noises in their backyard. VII AA 1304–06. Looking out the window, they observed two figures, later identified as Turner and Hudson, running across the backyard. VII AA 1307. Though the homeowners reported that there was potentially a third person, both Turner and Hudson indicated in their statements to police that only two people were involved. IX AA 1745–46, 1752–53, 1778. The would-be burglars were armed;

Turner had an SKS or AK-47 rifle and Hudson had a shotgun. VII AA 1311, 1338, 1449, 1456; VIII AA 1612–13; XI AA 1692–94.

Clarkson and Grimaldi called the police. VII AA 1308. Officers Jeremy Robertson and Malik Greco-Smith arrived to investigate. VII AA 1314, 1348; VIII AA 1598, 1650. Officer Greco-Smith could not see anyone before the officers decided to clear the backyard. VIII AA 1608. Officer Robertson began to open the back door—when two shots were fired from the backyard. VIII AA 1612–13, 1656–57. One of the rounds hit Officer Robertson in the upper thigh. VIII AA 1656. Hudson admitted that he fired at least one round at the officers. IX AA 1751, 1759–60. Officer Greco-Smith returned fire. VIII AA 1612–14; IX AA 1758–60, 1777.

Turner fled the scene while Hudson hid in the backyard. IX AA 1777. K9 units were dispatched to remove Hudson from the backyard, where he was laying on the ground with a rifle and a shotgun by him. VIII AA 1514, 1618. Turner was later apprehended by police, within the mile-and-a-half by mile perimeter they had set up to catch the second shooter. VIII AA 1524, 1528. Turner was bleeding from the leg, from a wound that looked like a gunshot wound. VIII AA 1529. His treating physician discovered he had bullet fragments in and stippling around the wound. IX AA 1781; X AA 1984–85.

Officer Robertson was extracted from the residence and transported to the hospital to be treated for his shattered right femur. VIII AA 1664. He was taken to

trauma and then shortly into surgery. VIII AA 1664. Muscles needed to be reattached and a titanium rod and plates needed to be inserted into his broken femur. VIII AA 1664–65. He could not walk for two months, and he is still missing the whole upper portion of that bone. VIII AA 1664–66.

In his interviews after the shooting altercation, Turner admitted to being at the house to "do a lick"—that is, commit a robbery—specifically to steal marijuana and any money he and his co-offender[2] could find. IX AA 1773, 1777, 1780–83. He admitted that it was only himself and one other person who got in the car with the guns and then entered the backyard. IX AA 1778. He also admitted that when he entered the car with his co-offender, he saw that there were shotguns in the back of the car—one of which looked like his uncle's SKS. IX AA 1774–77. He also admitted that that he "figured he got shot" when he hopped the fence to escape the scene after police had started returning fire. IX AA 1778–79.

SUMMARY OF THE ARGUMENT

First, the district court did not abuse its discretion in joining Turner's and Hudson's trials because the district court properly balanced the overwhelming preference for joint trials with the defendants' rights under the Confrontation Clause.

[2] At trial, Turner's statement had been redacted to remove any references to Hudson, using only neutral pronouns. IX AA 1768; Exhibit A. Hudson had made his own confession in his statement to police, the redacted form of which was discussed at trial. VIII AA 1734–42; IX AA 1743–54.

Joinder was not prejudicial to Turner because it was possible to redact Hudson's statement to police to remove references to Turner, following a practice set by decades of case law. Thus, the State, both defendants, and the district court worked together to generate a redacted version of both defendants' statements—to the final version of which Turner specifically stated he did not have a Bruton objection. Second, the district court did not abuse its discretion in admitting expert testimony because both experts Turner complains about met the notice and other requirements. The State's firearms expert was properly noticed and qualified to give certain foundational information about stippling. The State's medical expert was, in fact, Turner's own treating physician; thus, Turner knew about what information she would testify. Third, the district court did not err in permitting police officers to sit in the courtroom during closing arguments because a trial is a public forum, and Turner has failed to establish that the officers' mere presence was prejudicial. Fourth, there was no prosecutorial misconduct because not only did Turner fail to object to several statements during the State's closing and rebuttal arguments; he fails to establish how the State's permissible comments on the evidence and its responses to Turner's own arguments were patently prejudicial. Fifth and finally, there was no cumulative error because there are no errors to cumulate. Even if there were, any error was minor and does not undermine the confidence in the guilty verdict. This Court should affirm the Judgment of Conviction.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN JOINING TURNER'S AND HUDSON'S TRIALS

First, Turner complains the district court abused its discretion in denying his Motion to Sever his trial from co-defendant Hudson's and then in denying his Motion for New Trial, based in part on an alleged error in joinder resulting from a Bruton issue. Not only is the issue waived for lack of objection—Turner fails to establish that the use of Hudson's redacted statement violated Bruton or its progeny.

A. The Bruton issue is waived.

As an initial matter, any Bruton challenge is waived because after various redactions of his statement, Turner indicated prior to trial that he had no Bruton objections and then did not object on those grounds at trial. Dermody v. City of Reno, 113 Nev. 207, 210–11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). Indeed, months prior to trial, at the December 14, 2017 status check, Turner's counsel stated in open court that the defense had no Bruton challenge to the final redaction of Hudson's statement. IV AA 839. Turner misrepresents the record in claiming that this statement "reserved the right to re-raise the Bruton issue at a later time." AOB at 19. Counsel specifically stated that "based on [the district court's] redactions, *we have no challenge to the statements on those grounds*, at this point. *On Bruton*

grounds as opposed to – we may have some additional motion practice in the case" IV AA 839 (emphasis added). The "additional motion practice" clearly refers to other grounds—not Bruton. That final version of Hudson's redacted statement, upon which all parties agreed, was offered at trial. Exhibit A. At no time during trial did Turner object to Hudson's statement when the State introduced it—let alone on the grounds that it improperly implicated Turner in violation of the Confrontation Clause.

Turner did attempt to revive his Bruton objection—after he was convicted – in his Motion for New Trial, claiming that "the redactions as used at trial could not erase the implication of either Co-Defendant based upon the State's argument that there were only two people present." III AA 621–24. The district court found there was no Bruton or severance issue, denying Turner's Motion for New Trial, which had been based in part on other grounds. IV AA 741; X AA 2146. Regardless, by that time, Turner had already waived the Bruton issue.

Thus, if reviewable at all, the Bruton and severance issues may only be examined for plain error. Maestas v. State, 128 Nev. 124, 146, 275 P.3d 74, 89 (2012). Plain error review asks:

> "To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124

> Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan v. State, 131 Nev. __, 343 P.3d 590, 594 (2015).

B. Nevada law favors joinder.

NRS 173.135, controlling joinder of two or more defendants in a single action, states:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

NRS 174.165 provides the guidelines to be followed in the event of a prejudicial joinder:

> If it appears that a defendant or the State of Nevada is prejudiced by a:
>
> 1. joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants *or provide whatever other relief justice requires*.

(emphasis added). In ruling on a motion by a defendant for severance,

> 2. the court may order the district attorney to deliver to the court for inspection in chambers any statements or confessions made by the defendants which the State intends to introduce in evidence at the trial.

The decision to sever defendants' trials is "vested in the sound discretion of the district court and will not be reversed on appeal unless the appellant 'carries the heavy burden' of showing that the trial judge abused his discretion." Chartier v. State, 124 Nev. 760, 764, 191 P.3d 1182, 1185 (2008) (citing Buff v. State, 114 Nev. 1237, 1245, 970 P.2d 564, 569 (1998)).

This Court's decisions regarding severance consistently hold that to establish that joinder is prejudicial, a defendant must demonstrate more than just that "severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict." Chartier, 124 Nev. at 765, 191 P.3d at 1185; Marshall v. State, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002); Middleton v. State, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998). The determination of risk associated with a joint trial is to be made by the district court, based upon the individual facts of the case. Chartier, 124 Nev. at 765, 191 P.3d at 1185. This Court has also stated that severance should only be granted "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Id. This Court has acknowledged that such prejudice may occur if the defendants' defenses are antagonistic, the joinder prejudices a defendant's rights to present evidence, or the cumulative effect creates a substantial and injurious effect. Id.

However, the public policy in support of joint trials is strong. Courts have noted that "joint trials of persons charged with committing the same offense expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burdens upon citizens to sacrifice time and money to serve on juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once." U.S. v. Brady, 579 F. 2d 1121, 1128 (1978). This Court has concurred, holding that "where persons have been jointly indicted they should be tried jointly, absent compelling reasons to the contrary." Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995). While the decisive factor in any severance analysis is prejudice to the defendant, the court must also consider "the possible prejudice to the State resulting from expensive, duplicative trials." Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 379 (2002). "Joinder promotes judicial economy and efficiency as well as consistent verdicts and is preferred as long as it does not compromise a defendant's right to a fair trial." Id. A showing that severance might make acquittal more likely is not enough; rather, a defendant must demonstrate a substantial and injurious effect from the joinder. Id.

C. The district court did not abuse its discretion or commit plain error in ordering the statements redacted rather than ordering severed trials.

Turner complains his trial should have been severed from Hudson's because the State intended to use, and did in fact use, Hudson's statement to police against Turner in violation of the Confrontation Clause. AOB at 15–30. But as the district

court found below, Hudson's statement could be, and was, properly redacted to avoid Bruton issues; thus, there was no reason to sever the trials. III AA 640, 718; IV AA 741, 780–807. The district court also found this argument meritless when it denied Turner's Motion for New Trial. X AA 2146. The district court permitted joinder and denied the Motion for New Trial on alleged joinder errors because, as discussed *supra*, joinder is greatly favored under the law and because redaction solved any Bruton issue in the State's use of Hudson's statement. In short, Turner cannot meet the "heavy burden of showing" an abuse of discretion in denying severance, let alone anything amounting to an unmistakable error that prejudiced his substantial rights. Chartier, 124 Nev. at 764, 191 P.3d at 1185; Martinorellan, 131 Nev. at __, 343 P.3d at 594.

The Confrontation Clause in the Sixth Amendment of the United States Constitution guarantees the right of a criminal defendant to be confronted with the witnesses against him. U.S. CONST. AMEND. VI. The United States Supreme Court has held that since there is a substantial risk that a jury will use a facially incriminating confession of a non-testifying defendant as evidence of the guilt of his co-defendant, the admission of the confession in a joint trial violates the confrontation clause. Bruton, 391 U.S. at 126, 88 S.Ct. at 1662.

However, after Bruton, numerous Circuit Courts employed the practice of redacting references to the defendant and substituting neutral pronouns. For

example, the Ninth Circuit Court of Appeals approved the use of a counterfeiter's confession when redacted to include that he and "some others" robbed a savings and loan association. United States v. Sears, 663 F.2d 896, 902 (9th Cir. 1981), cert. denied, 455 U.S. 1027, 102 S.Ct. 1731 (1982); see also United States v. Gonzales, 749 F.2d 1329, 1344 (9th Cir. 1984) (substitution of "the other man" for defendant's name meant the use of a co-defendant's statement did not violate Bruton).

Other Circuit Courts have adopted this same procedure. See United States v. Weinrich, 586 F.2d 481 (5th Cir. 1978) (reference to co-defendant excised and replaced with pronoun "someone"); United States v. Stewart, 579 F.2d 356 (5th Cir. 1978) (admission by non-testifying co-defendant that "him and some of his buddies hit a bank" was proper); United States v. Holleman, 575 F.2d 139 (7th Cir. 1978) (non-testifying co-defendant's redacted statement which made it clear that he was assisted by two others in a robbery was proper where the accomplices were not identified by race, age, size, or any means except sex).

Later, the High Court clarified its holding in Bruton. Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987). Initially, the Court explained that Bruton is only implicated when the non-testifying co-defendant's statements "expressly implicate" the defendant or are "powerfully incriminating." Id. at 208, 107 S.Ct. at 1707. In a key distinction, the Court explained that an "inferential incrimination" is

fundamentally different than a co-defendant's statement that "expressly implicates" the defendant:

> By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony). Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence.

Id. at 208, 107 S. Ct. at 1707–08. It should be noted that this Court has held that jurors are *presumed* to follow instructions given to them. Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001).

Further, recognizing the national importance of joint trials, the Richardson Court observed, "One might say, of course, that a certain way of assuring compliance would be to try defendants separately whenever an incriminating statement of one of them is sought to be used. That is not as facile or as just a remedy as might seem. *Joint trials play a vital role in the criminal justice system*, counting for almost one third of federal criminal trials in the past five years." 481 U.S. at 208, 107 S.Ct. at 1707–08 (emphasis added).

The importance of joint trials cannot be understated. As the Richardson Court noted:

> It would impair both the efficiency and the fairness of the criminal justice system to require on all cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants

> who have the advantage of knowing the prosecution's case before hand. Joint trials generally serve the interest of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interest of justice by avoiding the scandal and equity of inconsistent verdicts. The other way of assuring compliance with an expansive Bruton rule would be to forego use of co-defendant's confessions. That price also is too high, since confessions are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.

Id. (citations omitted).

Consequently, the Richardson Court approved of the procedure redacting co-defendants' confessions, holding "that the confrontation clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction, when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." 481 U.S. at 211, 107 S.Ct. at 1709. The Court "express[ed] no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." Id.

Thereafter, various Circuit Courts approved the "neutral pronoun" approach. The Eleventh Circuit in held that a co-defendant's confession that was redacted to eliminate references to the defendant's name and substituted the word "individual" did not violate Bruton. U.S. v. Vasquez, 874 F.2d 1515, 1518 (11th Cir. 1989), cert. denied 493 U.S. 1046, 110 S.Ct 845 (1990). Likewise, the Ninth Circuit held that

the redaction of a non-testifying co-defendant's statement and inserting the word "individual's" as a substitution for the co-defendant's names did not violate Bruton. United States v. Enrique-Estrada, 999 F.2d 1355, 1359 (9th Cir. 1993). In other words, although the statement referred to defendant's existence, the court allowed it to be admitted as long as the defendant's name was not used. Id.

An argument common to confessing co-defendants is that the redacted confessions, once considered along with other evidence, clearly identifies them as the unnamed persons referred to in the confessions. Circuit Courts have rejected this "contextual inculpation" argument as an unwarranted extension of Bruton. See Holleman, 575 F.2d at 143 ("no need . . . to further cripple the use of confessions in joint trials"); United States v. Daddy, 536 F.2d 675 (6th Cir. 1976) (inference that if one defendant is guilty the co-defendants must also have been, is based not on the redacted confession but on the other independent evidence); United States vs. Trudo, 449 F.2d 649 (2nd Cir.), cert. denied, 405 U.S. 926, 92 S.Ct. 1975 (1970) (inference of defendant's guilt arose from source independent of co-defendant's redacted statement).

United States v. Fullette, 430 F.2d 1055 (2nd Cir. 1970) typifies the attitude towards contextual inculpation. There, two defendants, Biggins and Nelson, were tried jointly for bank robbery. Biggins confessed, naming "Oliver" as his accomplice and giving physical description of "Oliver." The confession stated that he and

"Oliver" were at a certain bar just prior to the robbery. Other evidence established a close resemblance between Nelson and "Oliver" and that Nelson and Biggins were often seen together at the bar named in the confession. The trial court nevertheless found there was no Bruton violation; "Biggins' statements were not clearly inculpatory because they alone did not serve to connect Nelson with the crime . . . Biggins' statements were not the type of powerfully incriminating statements to which the court had referenced in Bruton." Id. at 1058.

As noted in Trudo, "A reading of similar Bruton cases . . . reveals that the confessions, even as redacted, mentions some unidentified accomplice. The confession by its terms would lead to speculation by the jury as to whether or not a co-defendant was the other person. In none of these cases was any violation of Bruton found even though the admission itself indicated the presence of an accomplice." 449 F.2d at 652–53 890 (citations omitted).

This Court addressed the propriety of the trial court's denial of the defendant's motion to sever in Lisle v. State, 113 Nev. 679, 688 P.2d 459 (1997). Lisle's severance motion was based on the statement co-defendant Lopez made to Melcher, incriminating Lisle; specifically, Lopez told Melcher that he observed Lisle shoot the victim at the rear of the car. The district court denied Lisle's motion but ordered that Lopez's statement must be redacted to exclude any reference to Lisle.

Accordingly, when Melcher testified, he stated that Lopez said he observed "the other guy" shoot the victim. Id. at 693, 688 P.2d at 468.

Lisle cited Bruton for the proposition that Lisle's constitutional right to cross-examine the witness was violated when Lopez's hearsay statements, which inculpate Lisle, were admitted. However, Lisle failed to cite the more recent clarification of Bruton from Richardson, wherein if a statement is not incriminating on its face, but only when linked with other evidence introduced later at trial, then a limiting instruction will cure any prejudice. 481 U.S. at 211. Therefore, this Court found, a redacted version of the statement may be admitted. Lisle, 113 Nev. at 693, 688 P.2d at 468.

Later, this Court explained that when faced with the co-defendant's redacted statement, a defendant can only establish prejudice when the evidence of guilt is largely circumstantial. Ducksworth v. State, 113 Nev. 780, 794, 942 P.2d 157, 166 (1997); Ducksworth v. State, 114 Nev. 951, 966 P.2d 165 (1998) ("Ducksworth II,") denying the State's petition for rehearing). In Ducksworth II, this Court specifically analyzed the case in light of Richardson and Lisle, clarifying that the State had made the circumstantial nature of the evidence against the defendant clear when it argued that the co-defendant's statements were the strongest evidence against the defendant. Id. at 955, 966 P.2d at 167.

More recently, federal courts have approved the use of redacted statements that are not facially incriminatory even though additional evidence is admitted that "links up" the redacted statements to identify that person. "[T]he government may offer other independent evidence that may lead the jury to conclude that the unnamed 'individual' is in fact [the defendant], but that does not render the statement inadmissible; the Supreme Court has explicitly stated that this possibility does not render an otherwise properly redacted statement constitutionally inadmissible." United States v. Reyes, 384 F.Supp.2d 926 (E.D.Va. Aug. 29, 2005).

Here, the district court examined this case for "whether or not there's a substantial risk that the jury will use factually incriminating confession of a non-testifying defendant as evidence of guilt of his" co-defendant, and for "fundamental unfairness." IV AA 797. Eventually, the district court found that redaction would offer a "well-established, accepted way to attempt to alleviate the bias or the potential for fundamental unfairness." IV AA 798. The district court specifically stated it would not sever the trials because, assuming the parties could come to an agreement about a redacted version of the statement, such redaction would satisfy the Bruton concerns—and further, joint trials are greatly favored. IV AA 793, 798. The district court met with the parties several times in open court to address the redactions. III AA 720–21; IV AA 722–24, 808–40; XI 2363–65. In the end, Turner's attorney specifically stated that the finalized version, offered at trial as

Exhibit A, contained no Bruton issue. IV AA 839. Thus, the district court reiterated its denial of the motion to sever. IV AA 839. Then, at trial, the district court offered a limiting instruction, telling the jury that Hudson's statements "are to be considered by you as evidence against Clemon Hudson only." IX AA 1735. This limiting instruction, combined with the redactions themselves, was exactly what was required by the Confrontation Clause. Richardson 481 U.S. at 211, 107 S.Ct. at 1709.

Considering the careful redactions, the limiting instruction given at trial, and Turner's own attorney's admission that the redaction solved the Bruton issue, Turner cannot establish that the district court's denial of the motion to sever was an abuse of discretion. As discussed at length, there is extensive case-law supporting the fact that proper redaction solves Bruton issues—and such redaction is preferred, given the overwhelming preference for joint trials. Section I, *supra*.

D. The district court did not abuse its discretion or commit plain error in continuing with a joint trial because no prejudice manifested at trial.

The alleged Bruton issues Turner points to in his Opening Brief do not indicate the district court abused its discretion in continuing with the joint trial once trial itself was underway, because even a casual examination of the record reveals that the State never improperly used Hudson's statement against Turner. Thus, the district court did not violate its "continuing duty" to examine a joint trial for

prejudice.[3] Chartier v. State, 124 Nev. 760, 765, 191 P.3d 1182, 1186 (2008). Again, these issues can only be examined, if at all, for plain error, given Turner's waiver of the issue pre-trial and his lack of objection at trial. See, e.g., Dermody, 113 Nev. at 210–11, 931 P.2d at 1357; Martinorellan, 131 Nev. at __, 343 P.3d at 594.

Turner complains of specific portions of Hudson's statement that allegedly refer to Turner contained in Exhibit A, the redaction introduced at trial. AOB at 18, 20–21. However, the references to "both of us," "him," and "he" were all proper pronoun redactions as contemplated by case law. See, e.g., Sears, 663 F.2d at 902.[4] This Court should reject Turner's "contextual inculpation" argument— already rejected by several Circuit Courts; indeed, simply because a co-defendant's statement "indicate[s] the presence of an accomplice," it is not "expressly implicate" a defendant. See, e.g., Holleman, 575 F.2d at 143; Trudo, 449 F.2d at 652–53.

[3] In fact, the record makes clear that the district court was vigilant in its continuing duty. For example, when one of the defense attorneys made as if to ask a question about a redacted portion of Turner's statement, the district court held a bench conference to discuss the redactions and then required counsel to withdraw the question. IX AA 1791–95.

[4] The single reference to Turner's alleged nickname of "Chubz" was also proper. See Exhibit A. The State included a diagram in its closing argument wherein testifying Detective Craig Jex had written "Chubz fired." XI AA 2394. But Turner has not offered a single citation demonstrating that the nickname was discussed anywhere else, let alone that it had been tied to Turner. Thus, just like the pronoun "he" or "him," the nickname "Chubz" did not expressly implicate turner. See Fullette, 430 F.2d at 1058 (holding the co-defendant's "statements were not clearly inculpatory because they alone did not serve to connect [the defendant] with the crime" even where the defendant's nickname of "Oliver" had been used).

As in Richardson, Hudson's redacted statement did not "expressly implicate" Turner. 481 U.S. at 208, 107 S. Ct. at 1707–08. Therefore, the district court did not abuse its discretion in following Richardson's rationale and giving the jury a limiting instruction indicating that Hudson's statement was to be considered as evidence against Hudson, only. IX AA 1734–35. The jury is presumed to have followed that instruction. Leonard, 117 Nev. at 66, 17 P.3d at 405. Richardson noted that that presumption is even stronger in cases without "express implication,"—as was the case, here, where other evidence was required to infer that Turner was the "he" in Hudson's statement. Richardson 481 U.S. at 211, 107 S.Ct. at 1709.

Indeed, this case is exactly like Richardson. There, the co-defendant's statement did not expressly implicate the defendant; the implication arose "only when linked with evidence introduced later at trial (the defendant's own testimony)." 481 U.S. at 208, 107 S. Ct. at 1707. As Turner himself discusses in his Opening Brief, it was only when Hudson's redacted statement was presented alongside Turner's *own statement* did the implication become clear. AOB at 21–22; see X AA 2040, 2092–95. Thus, the limiting instruction performed exactly the function anticipated by Richardson.

Finally, severance was not required because the evidence against Turner was not "largely circumstantial." Ducksworth II, 114 Nev. at 951, 955, 966 P.2d at 165, 167. This case is unlike Ducksworth, where "[t]he most damaging evidence of all"

against the defendant was the testimony recounting the co-defendant's statements. Id. Rather, here, *Turner himself* gave not one but two statements to police—the first of which, under a false name—implicating himself in these crimes. IX AA 1770–90. He may have denied having a gun. IX AA 1788–90. But he admitted to being at the scene, and that "they" were there to "do a lick"—that is, commit a robbery—and that he knew there were guns in the car. IX AA 1773–77. Thus, it is hardly relevant that eyewitnesses did not identify Turner or that there was no forensic evidence of his presence. AOB at 28–29. There is no danger that Hudson's statements and Turner's mere existence as his co-defendant planted implicative seeds in the jury's minds: Turner did that himself. It cannot be said that this self-inflicted issue is the kind of "prejudice" inherent in using a co-defendant's statement in a weak case, as anticipated by Ducksworth.

In sum, the district court did not abuse its discretion when it declined to sever the trial due to the State's permissible use of Hudson's properly redacted statement, the district court's own limiting instruction, and the fact that the evidence of Turner's guilt was not "largely circumstantial."

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXPERT TESTIMONY

Second, Turner complains the district court improperly admitted expert testimony on "stippling" by Anya Lester and Dr. Amy Urban. AOB at 30–50. NRS 174.234(2) requires that initial expert disclosures, including the "subject matter on

which the expert is expected to testify," "the substance of the testimony," and the expert's CV and any of their reports, must be provided "not less than 21 days before trial." Supplemental disclosures must be provided "as soon as practicable." NRS 174.234(3). This Court reviews a district court's decision regarding expert testimony for an abuse of discretion. Mulder v. State, 116 Nev. 1, 12–13, 992 P.2d 845, 852 (2000); see also Brown v. Capanna, 105 Nev. 665, 671, 7782 P.2d 1299, 1303 (1989).

A. Anya Lester: Firearms Expert

i. Relevant Facts

The State's November 8, 2016 Expert Notice listed Lester as a forensic scientist in the field of firearms and toolmarks. II AA 261–75. In accordance with NRS 174.234(2), this Expert Notice was filed well before the 21-day limit—over a year before trial—and included Lester's CV. Id.; IV AA 730. Thus, Turner had notice of one of the general areas about which Lester would testify: firearms. Then, at trial, Lester answered several of the State's questions about stippling before Turner's counsel objected. IX AA 1866–67. After a bench conference, voir dire, and an extensive hearing outside the presence of the jury, the district court overruled Turner's objections and permitted Lester to testify as to stippling as part of her expertise in firearms. IX AA 1902. Per the district court limitations on this

testimony, Lester testified only to what stippling is and the general distance at which one might expect to see stippling. IX AA 1910.

ii. *The State's Expert Notice was sufficient.*

Turner cannot demonstrate the district court abused its discretion in deeming these general aspects of stippling a part of Lester's firearms expertise that did not require additional disclosure by the State. As the district court found, the State could ask Lester "more general, foundational type of questions" about stippling: not greatly in-depth questions about the specifics of the stippling pattern in this particular case or anything else that would have been included in an expert report. IX AA 1888. As the district court found, stippling can be classified as a form of gunshot residue and is thus included in the types of trainings firearms experts—including Lester—receive. IX AA 1878, 1882, 1886.

Turner has cited no cases suggesting that special disclosure is required in these circumstances. Even the four, *non-binding* cases he cites do not stand for the proposition that a specific expert notice about stippling is required, as opposed to the required expert notice about the expert's general area of specialized knowledge, such as medicine or firearms. Rather, the cited cases require only that testimony about stippling come from an expert. AOB at 43; see, e.g., People v. Huddleston, 176 Ill. App. 3d 18, 30, 530 N.E.2d 1015, 1023 (1988) (affirming that a police officer did not qualify as an expert and thus could not testify about stippling); People v.

Mayfield, 14 Cal. 4th 668, 765, 928 P.2d 485 (1997) (affirming that stippling was subject matter appropriate for an expert witness and that the autopsy surgeon was qualified to give expert testimony thereupon). In fact, Mayfield suggests that on a blended subject like stippling—combining gunshot residue and injury—a medical expert has sufficient expertise to testify on matters that touch on firearm expertise. This supports the idea that the inverse is true: that a firearms expert has sufficient expertise to testify on matters that touch on medical expertise. Such knowledge is covered under a generalized expert notice on firearms, like the one provided here. II AA 261–75.

iii. Lester's testimony about stippling basics and distances was permissible.

Turner cannot establish the district court abused its discretion in permitting Lester to testify as an expert regarding two generalized aspects of stippling: what it is, and typical distances at which it might be seen. IX AA 1910. When the defense conducted voir dire outside the presence of the jury, Lester testified that she received training on stippling during her firearms training in 2009 and during her training in firearms' distances in 2011. IX AA 1871, 1875–76, 1878, 1881. Again, as a form of gunshot residue, stippling is included in gun residue training. IX AA 1878, 1882, 1886.

The district court's concern was not with whether stippling in general falls under the purview of firearms expertise, but rather Lester's admittedly limited

experience with stippling. IX AA 1867, 1869, 1901–02. Ultimately, however, the district court found that Lester "has testified that she has a certification in gunshot residue," and "does have sufficient qualifications to testify as an expert in a particular area of expertise." IX AA 1885. Specifically regarding what the State wanted to ask Lester, the district court found that Lester had "made determinations as to the pattern of stippling for purposes of determining -- distance determination of gunshot residue," and that therefore Lester could testify to stippling "under her umbrella as regarding gunshot residue." IX AA 1886. In other words, Lester's testimony during voir dire put the district court's concerns about Lester's expertise to rest. And given that voir dire testimony, the district court properly limited the scope of what, exactly, Lester would be allowed to testify: that is, what stippling is, and general distance ranges at which it can be seen. IX AA 1885–86. Even after additional argument by counsel, the district court retained these limitations. IX AA 1899–1900, 1903–06. And this was what Lester testified to. IX AA 1910. This was no abuse of discretion.

iv. The State did not ask leading questions about stippling distances.

Turner's complaint that the State asked a "leading question" with Lester is irrelevant. AOB at 45. The State asked Lester, "In your experience, have you seen stippling from a distance greater than 3 feet?" IX AA 1941. Although this was a yes-or-no question—not a leading question that suggests the answer—the district court

sustained Turner's objection. IX AA 1941–45. Thus, there is no prejudice to Turner, and the handling of the question does not support his argument that the district court in any way abused its discretion. Indeed, when discussing how the State would rephrase the question, the district court again discussed that this was the very type of general distance question that would be permitted based on Lester's expertise. See IX AA 1899–1900, 1903–06. In the end, just as the district court explained it could, the State merely asked, "Based upon your experience with stippling, what is the shortest and furthest distances you have seen yourself?" IX AA 1946. Permitting this question, given the extensive discussion detailed *supra*, there was no abuse of discretion in the district court's handling of Lester as an expert witness.

B. Dr. Amy Urban: Medical Expert

As an initial matter, Turner's argument that there was insufficient notice regarding Dr. Urban is waived because the defense never objected to her being called. See, e.g., Dermody, 113 Nev. at 210–11, 931 P.2d at 1357. In fact, Turner's attorney invited the state to call a medical expert to rebut their proffered "dictionary definition" of stippling, stating:

> [W]hen we're speaking of the evidence that's been presented in the case, we're obviously speaking about the expert [Lester] who testified, who testified to specifically stippling in the firearms context. We provided a medical definition. *Obviously, the State is able to bring their medical expert if they want to* today, right -- I mean, if they -- they called her.

X AA 1964–65 (emphasis added). When the State said, "if this is going to be an issue, then we'll call our doctor," Turner's attorney replied, "Okay. They should call their doctor." X AA 1967.

Here, Turner's attorney was referencing either the State's noticed medical doctors, who had been included from the initial Expert Notice, or Dr. Urban, Turner's treating physician who the Sate reached out to only after the defense proposed jury instructions on stippling. I AA 192–202; X AA 1964. The argument concerned the definition of stippling—about which the district court had already decided the State could present evidence. See Section II(B), *supra*. And the State noted that its evidence as to stippling would be rebuttal of the defense's proffered definition. X AA 1969. Thus, the district court did not err in permitting Dr. Urban to testify about stippling. Nor could the State have acted in bad faith. Given that the State was invited by the defense to present this expert *for this purpose of medically defining stippling*, Turner's "bad faith" argument falls flat. See Mitchell v. State, 124 Nev. 807, 819 n.24, 192 P.3d 721, 729 n.24 (2008) (holding that when the defendant is aware of what the expert will testify about at trial, there is no bad faith or prejudice to the defendant, even when the State fails to provide the NRS 174.234(2) expert witness disclosures); Jones v. State, 113 Nev. 454, 473, 937 P.2d 55, 67 (1997).

Finally, Turner's lack-of-notice claim fails because he and his defense team had access to *Turner's own medical records*, all along. XI AA 2317–58. Dr. Urban is noted as his treating physician throughout those records. See, e.g., XI AA 2337–46, 2348–50, 2352, 2355–56. In fact, Turner stipulated to the admission of his medical records, listed as State's Exhibit 401, during trial—a tacit admission that the "stippling" Dr. Urban speaks of in her medical reports was an appropriate subject for presentation to the jury. IX AA 1798–99; X AA 1984–85, 1978, 1989–90. Thus, the claim that the defense was not on notice as to what Dr. Urban would testify to is utterly nonsensical.

There is no plain error in this expert being permitted to testify, let alone one so prejudicial to Turner's substantial rights as to require reversal.

C. The State's Rebuttal Argument

Turner complains that the district court's decision to admit the testimony of these two experts somehow created error in the State's closing argument. AOB at 40–41. However, it is well-settled that the State may offer deductions and conclusions based upon the evidence. Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068. Each instance Turner cites was merely the State's permissible comment on the evidence from Lester and Dr. Urban—evidence that had been properly admitted by the district court.

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D. Testimony About Bullet Trajectory

Finally, in support of his "bad faith" argument, Turner complains that the State noticed Stephanie Fletcher and Robbie Dahn, Crime Scene Analysts, as lay witnesses rather than expert witnesses. AOB at 33, 47. However, Fletcher and Dahn were both notified in the first Expert Notice. II AA 263–64. Moreover, it was clarified upon Turner's objection that the State did not seek to have Dahn testify as an expert, that Dahn was "not going to be able to do the trajectory analysis," and that various objects in the photos Dahn used to testify "are not to -- the trajectory -- merely a way to identify the hole in the walls." VI AA 1408, 1470, 1472, 1483–84. It was exactly the same with Fletcher. VIII AA 1543–46, 1559. In fact, when the district court clarified that it would only permit Fletcher to "give her measurements and testify as to the . . . photographs," Turner's counsel stated that she had "no objection to that." VIII AA 1546. It is disingenuous to characterize such noticed, lay testimony as unnoticed expert testimony to force an argument of bad faith.

There was no error in permitting either expert witness to testify, and Turner has utterly failed to establish bad faith on the part of the State. This Court should reject this claim and affirm the Judgment of Conviction.

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III. THE DISTRICT COURT DID NOT ERR IN PERMITTING POLICE OFFICERS TO SIT IN THE COURTROOM DURING CLOSING ARGUMENTS

Third, Turner complains that the district court should have excluded the uniformed police officers who came to observe the trial's closing arguments. AOB at 50–52. However, as the district court found below, there was no basis for the district court to exclude officers from the courtroom or require them to appear in plainclothes—particularly in a case where one of their own had been shot and seriously injured. X AA 2017.

"Whenever a courtroom arrangement is challenged as inherently prejudicial," the key question is whether "an unacceptable risk is presented of impermissible factors coming into play." Holbrook v. Flynn, 475 U.S. 560, 570, 106 S. Ct. 1340, 1346–47 (1986). Appellant attempts to misrepresent the United States Supreme Court's considerations on the issue of uniformed officers in the courtroom. AOB at 52. While the Court does "not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial," the Court denied relief on those grounds in the very case Appellant cites. Id. at 570–71, 106 S. Ct. at 1347. Indeed, the Court stated, "we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section." Id. That is, the High Court looks to the context of uniformed officers' presence when analyzing potential prejudice.

Turner has not indicated any factor, other than the officers' very presence, that could have prejudiced him. He does not indicate that, as in Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991), there was hostile media attention in combination with officers' presence at trial. He does not allege the officers attempted to draw attention to themselves, as with those trial observers who have worn buttons or jackets encouraging a particular verdict. See, e.g., Norris v. Risley, 918 F.2d 828 (9th Cir. 1990). He does not allege the officers were disruptive. He does not allege the jury took any special notice of them. He does not even indicate how many officers were present. Indeed, without any indication that the situation was entirely unlike four uniformed officers sitting quietly in the front row of a courtroom, there is no indication that the district court erred in declining to exclude them—and there is no indication Turner suffered any prejudice.

As Turner's attorney herself admitted, a courtroom is a public area. X AA 2015. The district court offered to provide a curative instruction to the jury, given that the court's key concern was that "the jury is going to think that this is a security issue." X AA 2016. Both defense attorneys declined that instruction. X AA 2016–17. The district court concluded by stating, "a trial . . . is a public forum that can be attended by the public. We have transparency regarding trials. So if the parties aren't concerned about the security issue, I'm going to allow it." X AA 2017. Turner cannot demonstrate the district court erred in its decision, as he has not established that there

was any "unacceptable risk" of prejudice. Holbrook, 475 U.S. at 570, 106 S. Ct. at 1346–47. This Court should deny this claim and affirm the Judgment of Conviction.

IV. THERE WAS NO PROSECUTORIAL MISCONDUCT

Fourth, Turner complains that the State committed prosecutorial misconduct during closing argument and rebuttal. AOB at 53–61. This argument is without merit, as the State is permitted to comment on the evidence and to respond to a defendant's arguments. Further, any alleged error was harmless, because there was more than sufficient evidence to convict Turner.

As an initial matter, as with several issues discussed *supra*, Appellant did not object to several of the prosecutor's statements below. Thus, those issues are waived. See, e.g., Dermody, 113 Nev. at 210–11, 931 P.2d at 1357. If reviewable at all, they may only be examined for plain error. Maestas, 128 Nev. at 146, 275 P.3d at 89; Martinorellan, 131 Nev. at __, 343 P.3d at 594; Leonard, 117 Nev. at 66, 17 P.3d at 415; Mitchell v. State, 114 Nev. 1417, 971 P.2d 813, 819 (1998); Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1030 (1997).

In resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were enough to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476. The standard of review for prosecutorial misconduct rests upon a defendant showing "that the remarks made by

the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). This Court views the statements in context and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. ___, ___, 336 P.3d 939, 950–51 (2014). Notably, "statements by a prosecutor, in argument… made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker, 109 Nev. at 392, 849 P.2d at 1068 (quoting Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018–19, 945 P.2d 438, 444–45 (1997), receded from on other grounds, Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188–89, 196 P.3d at 476. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d 476–77 (quoting

Wainright, 477 U.S. at 181, 106 S.Ct. at 2471). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d 476–77. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

Turner alleges four instances of prosecutorial misconduct.

A. Alleged Inflaming Passions of the Jury

Turner alleges the State attempted to inflame the passions of the jury by arguing that if the story of Turner's and Hudson's crimes were told over a drink, anyone would say, "Good, I'm glad you caught the two guys who shot the cops." AOB at 54–55; X AA 2086–87. Again, Turner did not object to this statement, and so the issue is waived unless this Court deigns to analyze the issue for plain error. See, e.g., Maestas, 128 Nev. at 146, 275 P.3d at 89.

This was not a "patently prejudicial" statement. Riker, 111 Nev. at 1328, 905 P.2d at 713. In fact, in context, the statement was made in rebuttal to the defense's closing argument and refers specifically to catching the "two guys" who shot the officers—evidenced by the prosecutor's very next statement that "[t]here is a whole lot of detail that went into the defense in this case trying to create alternate suspects where there are none." X AA 2087. The comment was about the apprehension of both Turner and Hudson—a direct rebuttal of the defense's closing argument that

there were three potential suspects. See, e.g., X AA 2050. Because the State is always permitted to respond to defense theories and arguments, Turner cannot establish prosecutorial misconduct. Williams, 113 Nev. at 1018–19, 945 P.2d at 444–45.

Turner argues that this was an attempt to make the jurors "feel good" about convicting based on the co-defendants' "identity" rather than the evidence. AOB at 55. This is simply not the case. The State did not bring identity into the argument at all—just the facts as shown by the evidence. That the facts are bad for Turner does not mean that the State was not permitted to comment upon them—particularly when the comment is intended to address concerns brought up in the defense's own closing argument. Williams, 113 Nev. at 1018–19, 945 P.2d at 444–45. Even if the comment were somehow improper, Turner has not established that it made his trial fundamentally unfair. Valdez, 124 Nev. at 1188, 196 P.3d at 476.

B. Alleged Invocation of Prosecutorial Authority

Next, Turner alleges the State improperly invoked prosecutorial authority by stating that they could have charged Turner and Hudson with four counts of attempt murder instead of two and then, when the objection to that statement was sustained, by discussing with the jurors that it did not matter that the co-defendants may not have known who they were trying to kill: just that they tried to kill the two people in the doorway. AOB at 56–57. However, there is a difference between the State

saying, "The State would not have charged the co-defendants if the prosecutors did not think they were guilty"—the kind of improper "prosecutorial authority" statements discussed in Turner's cited cases—and an admission that "the State did not charge the co-defendants with multiple counts because the prosecutors did not think they could prove it." The latter is what the State was saying, here. Though there were four potential victims in the house—Eric Clarkson, Willoughby Grimaldi, and Officers Robertson and Greco-Smith—the evidence showed that the co-defendants had the specific intent to kill two people.

Specifically, the evidence adduced at trial indicated that the doorway in which the gunfire was exchanged was dark, and that it appeared from the evidence that the Turner and Hudson saw two bodies standing in the doorway and opened fire. VII AA 1314–18; VIII AA 1606; X AA 2098–99. This deduction was supported by the evidence that the officers made a "tactical approach" without lights and sirens, parked down the street before approaching on foot, and did not announce themselves as police before entering the backyard. VIII AA 1595–96, 1601; X AA 2098–99. In its argument, the State was attempting to explain that Turner and Hudson opened fire on two human beings, and that the identities of those two human beings did not need to be known to Turner and Hudson when they did so. X AA 2099. In other words, the State was commenting upon the fact that the evidence did not show that the co-defendants were attempting to kill everyone in the house: just the two people

in the doorway, regardless of their identity. Attempt murder being a specific intent crime, this distinction was critical for the jury to grasp. See III AA 579, 582.

Nowhere did the State argue that it would not have charged Turner with the two Attempt Murder counts if he was not guilty. AOB at 57. That argument would obviously be improper, and that was not the argument that was made here. Thus, Turner cannot establish that there was any improper statement, let alone one that so infected his trial with unfairness as to justify relief. Valdez, 124 Nev. at 1188, 196 P.3d at 476.

C. Alleged Disparagement of the Defense

Next, Turner alleges the State improperly disparaged the defense. AOB at 57–59. The statement that "the only way that idea [of a third person involved] came into anyone's head, including the defense attorney's," was likely going to be a fair comment on the evidence presented. X AA 2091–92. Regardless, the district court noted the defense's objection to the comment—which the State was not permitted to complete—and issued a curative instruction for the jury to "[d]isregard that last comment." X AA 2091–92. The jury is presumed to have followed that instruction. Leonard, 117 Nev. at 66, 17 P.3d at 405. Thus, Turner cannot establish that even if the single statement was improper, it in any way denied him a fair trial. Valdez, 124 Nev. at 1188, 196 P.3d at 476.

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D. Alleged Misstatement of the Evidence and the Law

Finally, Turner alleges the State made several comments unsupported by the law or the facts in evidence. AOB at 58–61. However, each statement is more properly characterized as a fair comment on the evidence presented and the law the jury was to consider.

Though the district court sustained Turner's objection to the statement that Turner "knew [Clarkson] didn't have a gun in his home," on the basis that there was no evidence that Turner had that specific knowledge, it was a fair comment on the evidence to suggest that the co-defendants knew "those victims were helpless." X AA 2093. Indeed, they were helpless: they were sleeping, and their home was being invaded by two men armed with a rifle and a shotgun. VII AA 1304–06, 1311, 1338, 1449, 1456; VIII AA 1612–13; XI AA 1692–94. More importantly, evidence was presented that Turner himself had been to the home on many occasions in the past, due to his former "friendship" with Clarkson, and the fair deduction from that evidence was that Turner knew Clarkson did not have weapons in his home.[5] VII AA 1300–01. This was a permissible "deduction or conclusion from the evidence introduced in the trial." Parker, 109 Nev. at 392, 849 P.2d at 1068.

[5] The reality of the situation was that Clarkson and Turner had an admitted sexual relationship for an extended period of time. VII AA 1274–75. However, based upon the defense's concern that the homosexual nature of the relationship could potentially prejudice Turner, the State agreed to refer to the relationship as a "friendship," and leave it at that. VII AA 1273, 1296.

Similarly, Turner takes the prosecutors' comments about stippling out of context. The State's rebuttal argument about stippling was as follows:

> Now, you obviously picked up on the fact that that's a big deal and that stippling's a big deal. It is.
>
> You see that stack of Officer Robertson's medical records? Pretty big. And you saw earlier the little stack of Mr. Turner's records? It's, like, this big. Stippling's referenced four times in there and not once in there. That's because the muscle was far enough away, more than 36 inches, to not leave stippling on Robertson.
>
> Now, it was closer to Turner, because he was shooting it. When he fired into that chair and that piece of shrapnel that looks just like all the other shrapnel in that chair hit him in the leg. And that soot, the same way the shrapnel bounced off that chair, the soot ended up on his leg. And there are two medical doctors who concurred in that opinion in those medical records.
>
> Now, I believe [Turner's attorney] questioned Dr. Urban -- I can't recall exactly what she said about her, but unless those two officers are lying, that guy's up on that patio and firing that SKS. That's where the stippling comes from. It does not -- does not -- come from the rounds that struck the back wall that came out of Officer Greco-Smith's weapon. Common sense dictates that. Common sense tells you that the gunpowder only goes 36 inches. It can deflect off a surface just like the shrapnel can.

X AA 2101–02. The State's argument included proper comments on the evidence elicited from expert witness Lester on stippling, when she testified that "based upon [her] experience with stippling," "the shorter and furthest distances" she had seen stippling were "from a near-contact shot out to approximately 36 inches." IX AA 1946; X AA 2102. This argument also included a proper common-sense deduction that there was stippling on Turner, and not on Officer Robertson, because Turner

was within 36 inches from the shots fired and Officer Robertson was not. X AA 2101–02. The jury was specifically instructed that it could use its common sense in considering the evidence—and that the arguments of counsel are not evidence. III AA 610, 613. As the district court found, the State's comments and reasonable inferences were permissible because they were made in argument. X AA 2102.

Likewise, common sense supported the State's comment on the evidence of which gun—the officer's handgun or one of the high-powered weapons carried by Turner and Hudson—the bullet fragment from Turner's leg came from. X AA 2103–06. Indeed, Lester had testified about the various types of bullets fired the night of the burglary and differences in their appearances once fired. IX AA 1911–31. Th State made inferences from that evidence and appealed to the jury's common-sense. The State's comment was also a proper rebuttal of Turner's story that the bullet fragment came from Officer Greco-Smith's gun and not from the shotgun Turner shot. X AA 2053–55. As the State argued, such an explanation did not make sense. X AA 2104–06. Again, the State is permitted to comment on the evidence and to rebut the defense's arguments. Parker, 109 Nev. at 392, 849 P.2d at 1068; Williams, 113 Nev. at 1018–19, 945 P.2d at 444–45. Turner cannot establish there was any misconduct in any of these statements.

Nor did the State misstate any law. AOB at 59–61. The authority Turner cites does not support his argument that there was not a valid theory for Turner's

conviction for Attempt Burglary While in Possession of Firearm or Other Deadly Weapon. First, Turner ignores the fact that the State charged three theories: 1) direct liability—that is, Turner had a deadly weapon himself; 2) aiding/abetting—that is, Turner aided, promoted, encouraged, or instigated the Burglary while in Possession with the intent that it be committed; 3) or conspiracy—that is, there was a conspiracy and Turner was thus liable for all crimes committed in furtherance of that conspiracy until the crime was successfully completed and concealed, including the use of any deadly weapon involved. III AA 571, 573, 577. Under either vicarious liability theory, Turner did not, as he claims, have to "furnish the deadly weapon to Hudson" or be "vicariously liable for Hudson's act of possession." AOB at 60. There was no particular act Turner had to have done to be held liable under either. Rather, under aiding and abetting, he simply had to aid, promote, encourage, or instigate the crime with intent that it be committed; under conspiracy, he simply had to be a co-conspirator. III AA 571, 573, 577, 581. In fact, the jury was specifically instructed:

> If more than one person commits a crime, and one of them uses a deadly weapon in the commission of that crime, each may be convicted of using the deadly weapon even though he did not personally himself use the weapon if you find that he aided and abetted or conspired to commit the offense.
>
> An unarmed offender "uses" a deadly weapon when the unarmed offender is liable for the offense under aiding and abetting or conspirator liability, another person liable for the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon.

III AA 591.

Indeed, in the very case Appellant cites indicates, this Court held that the aiding/abetting statute, "NRS 195.020 to have *expansive application* across the criminal code." State v. Plunkett, 134 Nev. Adv. Op. 88, 429 P.3d 936, 938 (2018) (emphasis added). Turner has not explained why the aiding/abetting theory did not apply to him—particularly when, in his own statement to police, he admitted he was present at the scene, knew that there were guns in the car as he and his co-conspirator drove toward the house they planned to rob, and was physically present in the backyard when shots were fired. IX AA 1776–77. Thus, he satisfied all the necessary conditions for "use" of a deadly weapon even if he was, himself, unarmed. III AA 591. There was no misconduct in the State's comments on the theories under which Turner was charged.

Finally, the State's comment that the "only result that comes from shooting a weapon like this is death" was not error but rather a fair comment on the evidence—considering the two co-defendants shot at two human beings standing in the doorway of a home from just a few feet away with a high-powered assault rifle and a high-powered shotgun. Parker, 109 Nev. at 392, 849 P.2d at 1068; VII AA 1314; VIII 1606; X AA 2098–99. However, even if the statement was improper, Turner cannot establish that it infected his trial with such unfairness as to require relief, given the district court sustained his objection to it. X AA 2099.

Turner has not established there was any misconduct, let alone any conduct that caused such unfairness as to deny him due process. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Any instances of error were either immediately corrected by the district court or were so minor that Turn simply cannot meet his burden of establishing due process denial. This Court should deny this claim and affirm the Judgment of Conviction.

V. THERE WAS NO CUMULATIVE ERROR

Finally, Turner alleges that the cumulative effect of error deprived him of his right to a fair trial. AOB at 61–63. 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, 992 P.2d 845, 854–55 (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, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974).

First, Turner has not asserted any meritorious claims of error, and, 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, there was more than sufficient evidence to support each of Appellant's convictions. Though Turner claims there was "no direct evidence" he pulled the trigger, none was required. AOB at 62. As discussed *supra*, Turner was charged under two vicarious liability theories. Thus, the State did not have to "place the SKS rifle squarely in his hand." AOB at 62. Indeed, the fact that the jury found Turner guilty of Conspiracy to Commit Burglary means he was liable under that conspiracy for all acts committed in furtherance thereof, until the crime was concealed. III AA 571, 573, 577, 618–19; IV AA 739. Turner conceded at trial that he was guilty of Conspiracy to Commit Burglary and of Attempt Burglary. VII AA 1268. Again, on appeal, he admits that he is not challenging his conviction for Conspiracy or Attempt Burglary. AOB at 14. In effect, Turner's entire Opening Brief is a pointless argument. Turner does not once attempt to argue why the jury could not have held him liable as a co-conspirator for the Attempt Murders and the other crimes committed that night, given that they were completed in furtherance of the Conspiracy to which he admitted at trial, of which the jury found him guilty, and which he does not challenge on appeal.

Regardless, there was sufficient evidence that Turner himself shot at Officers Robertson and Greco-Smith. Turner admitted to being at the crime scene in his statement to police. IX AA 1773–83. He admitted there was only himself and one other person in that backyard. IX AA 1778. He admitted he knew there were guns.

IX AA 1774–77. He was found near the crime scene with fresh shrapnel in his leg, having admitted that he "figured he got shot" when he hopped the fence once shots started ringing out. IX AA 1778–79. And the stippling found on him suggested he was mere feet away when the trigger was pulled. IX AA 1902–10. This evidence supported each of Turner's convictions. Therefore, the issue of guilt was not close.

Finally, the only factor that weighs in Turner's favor is that he was convicted of grave crimes. See Valdez, 124 Nev. at 1198, 196 P.3d at 482 (2008) (stating that attempt murder is a very grave crime). However, given the substantial weight supporting the first two factors, Turner's claim of cumulative error has no merit. He was fairly and properly convicted of those "grave crimes," and this Court should affirm Turner's convictions.

VI. ANY ERROR WAS HARMLESS

Under NRS 178.598, any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the

defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001).

Under any standard, none of the alleged errors Turner has raised warrant reversal. Again, Turner was charged with and convicted of Conspiracy to Commit Burglary. I AA 001–06. This indicates the jury believed there was a conspiracy between Turner and Hudson. Again, Turner conceded at trial that he was guilty of the Conspiracy and, on appeal, does not challenge his Conspiracy and Attempt Burglary convictions. AOB at 14. And under a theory of conspiracy—or aiding and abetting, a theory under which Turner was also charged—it does not matter who actually shot Officer Robertson; both co-defendants are liable for that action and all other actions done in furtherance of the conspiracy. III AA 571, 573.

CONCLUSION

For the foregoing reasons, the State respectfully asks that this Court AFFIRM the Judgment of Conviction.

Dated this 3rd day of April, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 12,386 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 3rd day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 3, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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