IN THE SUPREME COURT OF THE STATE OF NEVADA

RAMON DORADO, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 79559

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 because it relates to a conviction for a Category A and B Felonies. NRAP 17(b)(2).

STATEMENT OF THE ISSUE(S)

1. Whether the district court did not abuse its discretion by declining to grant Appellant's Motion to Dismiss Indictment.
2. Whether the district court did not lack jurisdiction because the statute of limitations had not passed.
3. Whether the State did not fail to collect and preserve evidence.
4. Whether the State did not use race-based peremptory strikes.

5. Whether the district court did not abuse its discretion by limiting the testimony of the defense expert.

6. Whether the district court did not abuse its discretion by precluding defense evidence.

7. Whether there was no prosecutorial misconduct.

8. Whether there was no cumulative error.

STATEMENT OF THE CASE

On April 27, 2017, Ramon Muril Dorado (hereinafter "Appellant") was charged by way of Indictment with three (3) counts of Sexual Assault (Category A Felony – NRS 200.364, 200.366). 1RA000001-03.[1]

On June 20, 2017, Appellant filed a Motion to Dismiss for Failure to Preserve Evidence. 1AA000001-13. The State filed its Opposition on June 29, 2017. Id. at 000014-53. Appellant filed his Reply on August 14, 2017. Id. at 000054-60. On July 6, 2017, the district court denied Appellant's motion. 2AA000142-68.

On June 30, 2017, Appellant filed a Motion to Suppress Evidence Obtained Pursuant to Search Warrant. 1RA000025-32. The State filed its Opposition on July 6, 2017. Id. at 000033-67. On July 13, 2017, the district court denied Appellant's Motion. Id. at 000068-97.

[1] Appellant, in violation of NRAP 30(b)(2)(A), did not include this document in his Appendix.

On July 17, 2017, Appellant filed a Motion to Dismiss for Destruction of Evidence. Id. at 000098-108. The State filed its Opposition on July 20, 2017. Id. at 000109-17. Appellant filed his Reply on August 14, 2017. Id. at 000118-24. On August 15, 2017, Appellant's motion was denied. 2AA000169-79. The district court filed its Order on October 10, 2017. 1RA000125-26.

On October 19, 2018, Appellant filed a Motion to Dismiss Indictment. 1AA000061-73. The State filed its Opposition on October 29, 2018. Id. at 000074-99, 2AA000100-41. On November 8, 2018, the district court heard argument on the motion and deferred ruling. 1RA000145.

On October 19, 2018, Appellant filed an additional Motion to Suppress Evidence Obtained Pursuant to Search Warrant (Evidentiary Hearing Requested). Id. at 000146-68. The State filed its Opposition on October 29, 2018. Id. at 000169-221. On November 8, 2018, the district court heard argument on the motion and deferred ruling. Id. at 000145.

On November 7, 2018, Appellant filed a Motion to Suppress DNA Evidence Due to Unreliable Testing Methods (Evidentiary Hearing Requested). 2RA000222-27. The State filed its Opposition on November 14, 2018. Id. at 000228-46. On November 20, 2018, the district court denied Appellant's Motion. Id. at 000247.

On June 12, 2019, Appellant filed a Motion in Limine. Id. at 000248-56. On June 17, 2019, the district court granted Appellant's Motion in part. Id. at 000257.

Jury trial commenced on June 17, 2019. 2AA000183. On June 20, 2019, the jury returned a verdict of guilty on all counts. 10AA000960; 2RA000311-12.[2]

On August 13, 2019, Appellant was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – Life with the possibility of parole after a minimum of ten (10) years have been served; as to Count 2 – Life with the possibility of parole after a minimum of ten (10) years have been served consecutive to Count 1; and as to Count 3 – Life with the possibility of parole after a minimum of ten (10) years have been served concurrent with Counts 1 and 2. 10AA000972-73. The Judgment of Conviction was filed on August 20, 2019. 2AA000181-82.

On September 3, 2019, Appellant filed a Notice of Appeal.[3] 2RA000313-16.

STATEMENT OF THE FACTS

In April of 1999, M.L. was living in Las Vegas in the Lighthouse Apartments. 7AA000634. M.L. had a two-year-old son at the time. Id. On April 23, 1999, M.L. had plans to go out with her friends Candy, also known as Maria Perez, and Joanna. Id. at 000635. They went to the Silver Saddle and Candy's sister-in-law, Gabby, was watching the children. 7AA000635. She got to Candy's apartment at around 10:00P.M. and the three were getting ready together. Id. at 000637.

[2] Appellant, in violation of NRAP 30(b)(2)(E), did not include this document in his Appendix.

[3] Appellant, in violation of NRAP 30(b)(2)(I), did not include this document in his Appendix.

Once they got to the Silver Saddle, the three women got a table, ordered drinks and Candy were on the dance floor. Id. at 000638. They got to the Silver Saddle around midnight on April 24th. Id. M.L. had driven her car to the Silver Saddle. Id. at 000640. At some point, Candy came and dragged Joanna and M.L. onto the dance floor. Id. at 000641. They danced for maybe ten (10) minutes or so. Id. The three went back to their table and got their drinks from the waitress. Id. at 000642. M.L. did not care for her drink and asked for a water before going to the bathroom. Id. Later that evening, Candy got a page that M.L.'s son had woken up and was asking for her. Id. M.L. left to go take care of her son at around 2:00-2:30 A.M., but the others were not ready to leave. Id. at 000642-43. M.L. checked on her son and, after a little while, went back to go pick up Candy and Joanna at around 4:30-5:00A.M. Id. at 000643-44.

When she walked back into the Silver Saddle, she saw Candy and Joanna sitting in the back of the bar with the bartender and a gentleman she knew as Ray. Id. at 000645. Candy said that Ray was in the band that had been playing. Id. M.L. had never met or spoken to Ray prior to this point. Id. M.L. identified Appellant as Ray. Id. at 000646. The group sat around talking until 6:00-6:30A.M. Id. During that time, M.L. had ordered another drink but did not finish it. Id. at 000647. M.L. testified that the bartender was about to get off work and suggested that they all go hang out at a PT's Pub. Id. at 000648. Joanna wanted to go because she was attracted

to the bartender and Candy also said she wanted to go. Id. M.L. agreed to go as long as they were back at the apartment before her son woke up. Id.

At approximately 7:00A.M., the group left the Silver Saddle together. Id. at 00064-50. Joanne went in the car with the bartender and Candy had called her boyfriend, Beto, and decided she wanted him to come pick her instead, leaving M.L. in her car with Appellant. Id. at 000650. As M.L. was driving with Appellant, he asked her if they could stop by his friend's apartment off Sunrise Boulevard to call into work. Id. at 000651. She parked her car and Appellant invited her into the apartment. Id. at 000653. Appellant said that he might be a minute or two and did not want to leave her sitting out in the parking lot. Id. M.L. agreed to go in because she did not feel safe in the neighborhood. Id.

There was another young gentleman in the apartment when they walked in. Id. at 000655. Appellant had spoken to the man in Spanish and M.L. only understood that he sent him to the store. Id. at 000656. Appellant had M.L. sit down and he went to make his phone call. Id. at 000657. After Appellant made the phone call, he came back and say down next to M.L. Id. They talked for a few minutes and then Appellant stood up and tried to get M.L. to dance with him. Id. at 000660. M.L. said "I thought we were leaving," and tried to move towards the door. Id. As she tried to move toward the door, Appellant grabbed her, picked her up and started to carry her towards the bedroom. Id. at 000660-61. At first, Appellant sort of cradled her and

then, as she started to struggle, he put her over his shoulder. Id. at 000661. M.L. was telling Appellant to put her down. Id. at 000662.

Appellant took M.L. into the bedroom, put her down on the bed and laid on top of her. Id. Appellant started to try and kiss her and M.L. tried to push him away. Id. at 000663. Appellant slammed her up against the wall and tried to take her pants and shirt off. Id. Appellant pulled her jacket and shirt over her head and somehow they ended up on the floor. Id. at 000664. M.L. was still struggling with Appellant and he pulled her pants and pantyhose off. Id. at 000665. M.L. had a safety pin to hold her pants up and she began stabbing Appellant with the pin. Id. at 000663, 000666-66. Appellant started to unbuckle his pants and put M.L.'s legs up in the air. Id. at 000666. At one point, Appellant had his mouth on M.L.'s vagina and M.L. tried to push Appellants face away with clothes. Id.

M.L. tried to get away but Appellant grabbed her and tossed her back on the bed and began rubbing himself up against M.L.'s vagina. Id. at 000669. Appellant was trying to stimulate himself and got half way to an erection. Id. Appellant penetrated M.L.'s vagina to some extent. Id. Appellant also put his finger inside her vagina. Id. at 000670. The whole sexual assault lasted about half an hour. Id. During the assault, Appellant was telling M.L. "You know you wanted to be here and do this." Id. at 000671. Afterwards, Appellant sat at the end of the bed and M.L. began kicking him. Id. Appellant then apologized to M.L. Id. M.L. got her clothes together

and left the house. Id. at 000672. On her way out she saw the young man Appellant sent to the store was back in the living room. Id.

M.L. got in her car and went to Candy's house. Id. at 000673. She walked into Candy's house at about 10:20A.M. Id. at 000674. M.L. told Candy what happened and they told her to go to the police. Id. M.L. went to the police station with Candy and Joanne. 7AA000674. She told the police what happened. Id. at 000675. M.L. got in the detective's car at one point and showed the police where Appellant's apartment was. Id. The police also took M.L. to UMC so that a rape kit could be performed. Id. M.L. had some bruising and a few of her nails were broken. Id. 000676. In 2016, M.L. was contacted by the Las Vegas Metropolitan Police Department ("LVMPD") regarding the testing of her rape kit and asking if she wanted to pursue the case. Id. at 000686.

Dr. Rachell Ekroos reviewed M.L.'s sexual assault examination in preparation for trial. 8AA000756. M.L. had vaginal bruising and/or abrasions. Id. at 000763-64. Vaginal swabs were also taken from M.L. Id. at 000777. Dr. Ekroos believed the injuries she viewed were consistent with the original account M.L. gave to the original nurse. Id. at 000779-80.

In 1999, LVMPD did not have the funding or the technology to test its backlog of rape kits. 9AA000852-53. LVMPD received various grants over the years which allowed the department to test the untested rape kits for DNA. Id. If DNA was

extracted from these rape kits, then the DNA would be put into CODIS to determine if it was a match to an individual within the system. Id. at 000859. Detective Lora Cody received the case in 2016 because the DNA profile was entered into CODIS and Appellant's name came back as a potential match. Id. at 00859-60. The parties stipulated to the following: M.L.'s sexual assault kit was properly preserved for DNA testing, Appellant's DNA was compared to the DNA located on the vaginal swabs of M.L.'s kit in 2016 and Appellant's DNA was located on the vaginal swabs taken from M.L.'s kit. Id. at 000826. Kimberly Dannenberger, LVMPD forensic scientist, was involved in testing M.L.'s rape kit in 2016. Id. at 000830. Per the forensic report, the DNA test from the vaginal swabs tested positive for sperm. Id. at 000833-34. Appellant was identified as the contributor of the sperm found in M.L.'s kit. Id. at 000834.

SUMMARY OF THE ARGUMENT

The district court did not err by declining to grant Appellant's Motion to Dismiss Indictment. Also, the district court did not abuse its discretion when it denied Appellant's Motion to Dismiss Indictment based on lack of jurisdiction. Further, the district court did not abuse its discretion when it denied Appellant's Motion to Dismiss based on an alleged failure to collect and preserve evidence.

The district court properly denied Appellant's Batson challenge. The district court did not abuse its discretion by limiting Rub's testimony. Additionally, the

district court properly excluded evidence pursuant to the "Rape Shield" statute. Further, there was no prosecutorial misconduct.

Finally, there was no cumulative error.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR BY DECLINING TO GRANT APPELLANT'S MOTION TO DISMISS INDICTMENT.

Appellant claims that his rights were violated because the district court never ruled on his Motion to Dismiss the Indictment. Appellant's Opening Brief ("AOB"), p. 4-14. Appellant further claims that his motion should have been granted because the State allegedly lost or destroyed evidence. Id.

Appellant has the burden to prove that the delay in bringing an indictment "was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." Wyman v. State, 125 Nev. 592, 600-01 (2009); see also United States v. Gouveia, 467 U.S. 180, 192 (1984). In Wyman, on August 10, 1974, Wyman brought her 3-year-old adopted son, J.W., to the hospital. 125 Nev. at 596. J.W. had multiple bruises throughout his body, as well as a concussion and scratch marks. Id. J.W. ceased breathing and was pronounced dead. Id. The coroner determined his death to be accidental despite the doctor's concerns. Id.

Thirty years later, defendant's adult daughter called the police and told them that defendant had murdered J.W. Id. Thirty-two years later a complaint was filed by the State. Id. Wyman filed a motion to dismiss due to the pre-indictment delay

arguing that there was no new forensic evidence in the case, and no justifiable reason for the delay. Id. The motion was denied in district court. Id. This Court concluded that the district court did not abuse its discretion by refusing to dismiss a complaint due to alleged pre-indictment delay. Id. at 575. The court noted that witnesses may have died or moved away after 32 years but that the defendant had not shown that she was 1) prejudiced by the delay and 2) that the State intentionally delayed filing the complaint to gain a tactical advantage over Wyman. Id.

Appellant argues that the State acted negligently and recklessly in processing charges against him. First, Appellant is arguing an incorrect standard under the current state of law. As discussed, supra, Appellant must show, "that the State used the delay to gain a tactical advantage or delay the indictment in bad faith." Wyman, 125 Nev. at 601. There is absolutely no showing that the State used the delay as an intentional device or that there was any tactical advantage gained. In fact, if anything, the State was prejudiced due to the delay as well. The State has the same copy of the SANE exam that was provided to the defense through the archived records, and must deal with the same witness issues, including witnesses who may have retired or moved on. The delay in the case does not serve as a tactical advantage to the State.

Appellant seems to argue that because Appellant's identity was not known for 17-years, he is now prejudiced due to the delay in filing the case. AOB7-8, 13. More

specifically, Appellant argues that his identity was known at the time because the victim and police had extremely limited information regarding Appellant's identity. Id. For example, M.L. knew Appellant, who she had only just met, as "Ray", later found out from her friends that he may have played in the band at the Silver Saddle and knew the location of his friend's apartment where she was raped. 7AA000645, 000651-53. The police learned that the individual may be "Ray" or "Raymond", the accordion player who was fired from the band at the Silver Saddle. 1AA000034. Therefore, Appellant's claim that police and M.L. knew of his identity in 1999 is patently false. Appellant's identity was not confirmed until the sexual assault kit was tested and CODIS notified the detectives that Appellant's DNA matched the DNA on the vaginal swabs taken from M.L. 9AA000859-60. Therefore, Appellant's claim that there was unnecessary pre-indictment delay is meritless.

Appellant claims he has suffered "actual prejudice" as a result of the delay in filing this case. However, Appellant fails to demonstrate actual prejudice and, thus, his claim must be denied. Wyman argued that she suffered prejudice because "witnesses are difficult to locate, and important neighbors, family members, and the coroner in 1974 are now deceased." Wyman, 125 Nev. at 597. Additionally, Wyman argued that these witnesses "may have been" able to testify as to whether they saw or heard abuse that occurred. Id. This Court found that Wyman failed to "make a

particularized showing of actual, nonspeculative prejudice resulting from the delay." Id.

Appellant in the instant case is unable to show "actual, non-speculative prejudice" due to the delay. Appellant claims that the change in police protocols since 1999 prejudiced him in the prosecution of this case. AOB9-10. However, Appellant fails to allege how he was prejudiced by a change in police protocol. Thus, his allegation is bare and naked and must be summarily denied. Hargrove v. State, 100 Nev. 498, 502 (1984). In any event, had Appellant been prosecuted in 1999 when the crime occurred, he would have been subject to the same police protocols in place at the time. His case would be unaffected by police protocols that were not yet in place. Thus, Appellant fails to demonstrate prejudice.

Appellant further claims that he was prejudiced by the pre-indictment delay because witnesses and evidence were lost and/or destroyed prior to trial. AOB7, 10, 13-14. Specifically, Appellant claims that he was prejudiced due to the fact that M.L.'s clothes and the audiotape of her interview were destroyed and the fact that the SANE nurse who performed M.L.'s sexual assault exam had died prejudiced his ability to present a defense. Id. However, the report of the original SANE nurse was presented at trial and was reviewed by Dr. Ekroos. Appellant had the opportunity to review the report and cross-examine Dr. Ekroos regarding the difference between her review of the photographs and the conclusions made by the original nurse.

Appellant also had access to the arrest report, which indicated that the nurse stated that there was minimal bruising and she could not definitively conclude there was a sexual assault. 1AA000035. Further, there is always a possibility that a witness may die or otherwise become unavailable prior to trial. Thus, Appellant cannot demonstrate prejudice.

Moreover, Appellant was not prejudiced by the destruction of the audiotape of M.L.'s interview and M.L.'s clothing. M.L.'s clothing was never alleged to have any evidentiary value in Appellant's case. Appellant claims that he should have been able to challenge whether M.L.'s pantyhose were actually ripped. AOB10. However, there was plenty of other evidence to document that M.L. had struggled during the assault. She had bruising on her face and had broken fingernails. 7AA000676; 8AA000763-64. Additionally, there was a transcript of M.L.'s voluntary statement which Appellant could use for impeachment. 1AA000039-51. Appellant has failed to demonstrate how having the audio recording in addition to the transcript would have aided in his defense in any way. Therefore, Appellant has failed to demonstrate prejudice and his claim fails.

Appellant also claims that he was prejudiced because he committed more crimes between the time he sexually assaulted M.L. and the time he was convicted. AOB14. It is laughable that Appellant tries to claim that the fact that he decided to commit more felony offenses after sexually assaulting M.L. demonstrates prejudice.

The fact that Appellant was convicted of felony offenses following the sexual assault does not demonstrate prejudice and, therefore, Appellant's claim must be denied.

Appellant has failed to demonstrate that the delay was deliberate to allow the State tactical advantage and has similarly failed to demonstrate prejudice. Thus, Appellant's claim fails.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO DISMISS INDICTMENT BASED ON LACK OF JURISDICTION.

Appellant also claims that the trial court lacked jurisdiction because the statute of limitations had run. AOB15-17. However, the district court did not lack jurisdiction over Appellant's case. Appellant claims that NRS 171.085 provides for a four-year statute of limitations which is correct. AOB15. Appellant also acknowledges that NRS 171.083 exempts the crime of sexual assault from any statute of limitations if a written report is filed by law enforcement concerning the sexual assault within the time period statute of limitations, which is also correct. Id. However, Appellant claims that the provisions of NRS 171.083 do not apply to the instant case because "[t]he State cannot produce a police report from 1999." Id. This assertion is incorrect. The police report in question was contained within the PDF document titled "EV - Archived Events - LLV990424001124 - - 4846 - PEREZ - MARIA - 4_24_1999" which the State produced in discovery and Appellant acknowledged receiving on June 27, 2017. 2AA000140-41. In fact, the State even attached the police report from 1999 as Exhibit 2 to State's Opposition to

Defendant's Motion to Dismiss for Failure to Preserve Evidence, which was filed on June 29, 2017. 1AA000032-37.

Additionally, NRS 171.083 does not require the State to produce the "original" report of the sexual assault. Instead, the language of the statute merely requires that a "written report concerning the sexual assault" was filed with a law enforcement officer. NRS 171.083. Appellant's claim that this does not constitute a "written report concerning the sexual assault" as prescribed by NRS 171.083 is meritless. Detective Hnatuick's report is absolutely a written report which discusses the sexual assault Appellant committed against M.L. As the entire premise for Appellant's argument that NRS 171.083 does not apply to this case is false, his claim lacks merit and should be denied

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO DISMISS BASED ON AN ALLEGED FAILURE TO COLLECT AND PRESERVE EVIDENCE.

Appellant also claims that he was denied due process by the State's alleged failure to collect and/or preserve evidence. AOB17-29. However, Appellant previously filed a Motion to Dismiss for Failure to Preserve Evidence, which the district court denied on July 6, 2017. 1AA000001-13; 2AA000142-68. This Court reviews a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion. Hill v. State, 124 Nev. 546, 550, (2008); McNelton v. State,

115 Nev. 396, 414 (1999). The district court did not abuse its discretion by denying Appellant's Motion to Dismiss because there was no due process violation.

A. The State did not fail to preserve potentially material and/or exculpatory evidence.

States are constitutionally required to preserve evidence that "might be expected to play a significant role in the suspect's defense." California v. Trombetta, 467 U.S. 479, 488 (1984). Such evidence must: 1) "possess an exculpatory value that was apparent before the evidence was destroyed;" and 2) "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. Under these circumstances, it is Appellant's burden to show "that it could be reasonably anticipated that the evidence sought would be exculpatory and material to the defense." Sparks v. State, 104 Nev. 316, 319, (1988) (citing Boggs v. State, 95 Nev. 911 (1979)). In cases involving evidence that is only *potentially* exculpatory, "[u]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence not constitute a denial of due process. Arizona v. Youngblood, 488 U.S. 51, 58 (1988).

Appellant complains that LVMPD either lost or willfully destroyed: 1) the original audiotape of M.L.'s statement to the detective; 2) M.L.'s clothing she was wearing at the time of the sexual assault; and 3) the 911 call. AOB25.

As an initial matter, there is no indication that there ever was a 911 call in this case. In fact, the testimony at trial demonstrated that M.L. never called 911 and went

to the police station herself. 7AA000674. While the State did indicate that a detective made some statement about a 911 call, the State maintained that the victim herself said that she never called 911. 2AA000158. Therefore, Appellant has failed to demonstrate bad faith on the part of the police because no 911 call ever existed. Even if such a call did exist, Appellant has still failed to allege bad faith and instead makes conclusory statements that, because the call was not provided, the police destroyed it in bad faith. Bare and naked allegations are not sufficient to support Appellant's claims. Hargrove, 100 Nev. at 502. In any event, Appellant has failed to demonstrate that a recording of this nonexistent 911 call would have been exculpatory. Therefore, because the record indicates a 911 call was never made, any recording could not have "lost or willfully destroyed" and Appellant's claim fails.

Appellant's claim regarding the audiotape of M.L.'s statement similarly fails. there was a transcript of M.L.'s voluntary statement which Appellant could use for impeachment. 1AA000039-51. Appellant argues that the transcript was missing M.L.'s answer as to whether Appellant was wearing a condom when he sexually assaulted her. AOB24. As an initial matter, Appellant does not allege bad faith on the part of the police. Moreover, Appellant fails to demonstrate that the evidence would be exculpatory or potentially exculpatory. Whether Appellant was wearing a condom during the sexual assault is irrelevant because a condom is not indicative of consensual sex and Appellant's semen was found inside M.L. 9AA000826.

Furthermore, Appellant had the opportunity to ask whether Appellant was wearing condom during the assault while cross-examining M.L. Appellant has failed to demonstrate how having the audio recording in addition to the transcript would have aided in his defense in any way and, thus, Appellant's claim fails.

Finally, Appellant has failed to demonstrate how having M.L.'s clothing would have been exculpatory. Appellant's theory of defense was that Appellant and M.L. had consensual sex, thus, it is presumed that his DNA would have been found on M.L.'s clothing. Further, M.L.'s clothing was never alleged to have any evidentiary value in Appellant's case. Appellant claims that he should have been able to challenge whether M.L.'s pantyhose were actually ripped. AOB10. However, there was plenty of other evidence to document that M.L. had struggled during the assault. She had bruising on her face and had broken fingernails. 7AA000676; 8AA000763-64. Therefore, Appellant has failed to demonstrate how M.L.'s clothing would have been exculpatory or that LVMPD failed to preserve these items in bad faith. Thus, Appellant's claim fails and the district court did not abuse its discretion by denying Appellant's Motion to Dismiss.

B. The State did not fail to gather evidence.

Law enforcement has no duty to collect all potential evidence in an investigation. Randolph v. State, 117 Nev. 970, 987 (2001); Jackson v. State, 128 Nev. 598 (2012). Failure to gather evidence may result in sanctions, but only under

very limited circumstances. Id. First, it is a defendant's burden to show that the potential evidence at issue was material, meaning that there is a reasonable probability that the result of the proceedings would be different if the evidence was available. Randolph, 117 Nev. at 987 (citing Daniels v. State, 114 Nev. 261, 267 (1998)). Only if a defendant can meet the burden does the court need to determine whether such a failure resulted from mere negligence, gross negligence or bad faith. Id. If it is a case of mere negligence, no sanctions are imposed. If gross negligence is shown, the defense is entitled to a presumption that the evidence would have been unfavorable to the State. Finally, if bad faith is shown, dismissal may be warranted depending on the case. Id.

Appellant also claims that LVMPD failed to collect evidence such as: 1) witness interviews; and 2) photographs of the crime scene. AOB28. Appellant misapplies this Court's holding in Randolph, in an attempt to support this claim.

In Randolph, the defendant robbed and murdered a bartender in Las Vegas. 117 Nev. at 973. A witness testified that in the early morning on May 5, 1998, defendant Randolph and Garner returned to a trailer where the two had been earlier in the evening smoking crack cocaine. 117 Nev. at 986. Upon his return, Garner changed out of a brown shirt and brown pants and put on a green shirt and green pants. Id. After Garner's arrest, the green shirt and pants were impounded at the city jail and later tested for the presence of blood. Id. The test was negative. Id. Garner's

shoes were not impounded or tested. Id. Although investigators were aware that Garner had changed out of brown clothes after the crimes, they never searched for the clothes. Id. The trunk of Garner's car contained a pile of clothing, but investigators did not look through the clothing to see if it included the brown shirt and pants. Id.

On appeal, Randolph argued that it was error for the court to reject his proposed jury instruction that stated that, because the State failed to seize and test brown clothing worn by Garner on the night of the crimes "for the existence of blood evidence, the clothing is irrefutably presumed to have contained blood evidence." Id. at 986. Randolph asserted that the State failed to gather potentially exculpatory evidence because a finding of blood on Garner's clothing or shoes would have supported Randolph's defense that Garner was the shooter. Id. at 987. This Court stated that if the evidence was material and the police acted out of gross negligence or bad faith in not preserving it, Randolph would have had a right to an instruction that ungathered evidence was presumed to be unfavorable to the State. Id. However, this Court concluded that Randolph did not show that the ungathered evidence was material. Id.

This Court further found that if testing of Garner's clothing or shoes had revealed the victim's blood, it was possible that Randolph might not have received a death sentence. Id. However, Randolph did not demonstrate a reasonable

probability that such testing would have revealed any blood. Id. This Court found that Randolph offered no evidence to corroborate his allegation that Garner was the shooter, and the possibility that testing Garner's clothing and shoes would have been favorable to his case was mere speculation. Id. This Court went on to opine that even assuming, *arguendo*, the evidence was material, the failure to collect it was "at worst" negligent. Id. at 988. First, Randolph did not show that police could have collected the brown shirt and pants, he simply assumed that a search of the trailer or the clothing in the trunk of Garner's car would have uncovered them. Id. Second, Randolph did not show that the potential evidentiary significance of Garner's shoes, which were available to police, was so obvious that it was gross negligence not to impound and test them. Id. Thus, this Court held that, even assuming the evidence was material and police were negligent in not gathering it, Randolph's remedy was to examine witnesses regarding the deficiency of the investigation, and the record showed that he did so. Id.

Similarly, in Jackson v. State, 128 Nev. 598 (2012), Jackson went to a tavern intending to rob the bar. Id. at 602. Jackson coerced employee Duffy into helping him try to disable the security cameras. Id. During the robbery, Jackson forced Duffy into the restroom and shot Duffy. Id. The two then struggled, Jackson fled, and Duffy called police. Id. the bar's surveillance manager was contacted by police and offered to provide a complete video for the evening. Id. The police declined and asked him

to prepare a composite video including only frames that showed Jackson or Duffy, which resulted in omission of twelve to fifteen hours of recordings from the surveillance cameras. Id.

On appeal, Jackson claimed that the video surveillance was erroneously admitted. Id. at 613. This Court disagreed and found that the exculpatory value of the omitted video was minimal. Id. Jackson suggested that Duffy was complicit in the robbery and that the omitted footage might somehow prove that. Id. This Court found that argument lacked merit because the State provided all video footage that featured Duffy and Jackson, including footage of their interaction before and during the robbery. Id. The surveillance manager also testified that the omitted video did not contain any relevant footage. Id. Given that the omitted footage had no apparent exculpatory value, this Court held that evidence did not affect the result of the trial, especially in light of the substantial evidence presented by the State. Id. at 614. According to this Court, the decision to compile only parts of the surveillance recordings appeared to be the product of concern for efficiency, not bad faith. Id. Thus, this Court held that the State's failure to gather the full video surveillance footage did not result in injustice and the district court did not err by denying Jackson's motion to strike the video evidence or grant a mistrial. Id.

Appellant claims that LVMPD should have interviewed witnesses described by M.L. at the time she reported the sexual assault. AOB28. Specifically, Appellant

alleges that M.L.'s friend, Candy, should have been interviewed. AOB28-29. Appellant claims that this interview would have shown Candy saying that she did not initially believe M.L. because they had had other "crazy nights" with men. Id. As demonstrated below, this information was properly precluded under the rape shield statute. See Section VI, *infra*. Further, Appellant was able to cross-examine Perez regarding other impeachment material. See id. Therefore, Appellant cannot demonstrate that Perez's statement would be material or that LVMPD's failure to interview this individual amounted to bad faith. Thus, Appellant's claim fails.

Moreover, in Appellant's original motion, he claimed that LVMPD should have interviewed the unknown male who was present at the apartment, the bartender, and two women M.L. passed as she was leaving the apartment. 1AA000001-13. First, LVMPD was unaware of the location of the rape. The victim was only able to tell them that the rape occurred at an "unknown apartment" located at 2101 Sunrise Ave. So, the only information police had was there was an unknown Hispanic male located at an unknown apartment. 1AA000034; 7AA000651-55. The fact that police did not knock on every apartment door in the apartment complex with hopes that this unknown Hispanic male was home was neither negligent nor did it rise to the level of bad faith. Furthermore, Appellant was in the best position to find and interview this unknown male because it was supposedly his friend. Id. at 000651. This male also would have presumably corroborated M.L.'s version of events. Thus,

Appellant cannot demonstrate that this unknown male's testimony would be material or that LVMPD's failure to interview this individual amounted to bad faith.

Similar to the unknown male, the only information police had regarding the women that M.L. passed as she was leaving the apartment was that they were outside in the apartment complex. 1AA000049. There was no indication that these women lived at the apartment complex and M.L. did not provide a description of them. Further, these women allegedly saw M.L. leave the apartment extremely upset and would have presumably not provided information favorable to the defense. Thus, Appellant cannot demonstrate that their testimony would be material or that LVMPD's failure to interview this individual amounted to bad faith.

Finally, any interview of the bartender regarding how much the parties had to drink would have been irrelevant. Voluntary intoxication is not a defense to sexual assault and thus, it did not matter how much Appellant had to drink. See Manning v. Warden, Nev. State Prison, 99 Nev. 82, 85 (1983). Further, how much M.L. had to drink was inconsequential. She indicated she was the designated driver and that she did not have much to drink that night and officers did not indicate that M.L. appeared intoxicated during their interviews. 1AA000041, 000050. Moreover, Perez testified that M.L. had not had a lot to drink that night. 9AA000822. Thus, Appellant cannot demonstrate that their testimony would be material or that LVMPD's failure to interview this individual amounted to bad faith.

Appellant also claims that LVMPD should have documented the crimes scene. AOB28. First, the exact apartment where these events occurred was unknown to LVMPD. Second, as demonstrated supra, even without searching and photographing the residence there was plenty of other evidence that a struggle had taken place. See Section III(A). Further, it is entirely possible that Appellant could have cleaned up the scene between the time M.L. left and the time police would have figured out which apartment the assault took place in. Appellant has failed to offer any basis for the materiality of the evidence he complains was not collected. Therefore, the district court did not abuse its discretion by denying Appellant's Motion to Dismiss Indictment and Appellant's claim fails.

IV. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S BATSON CHALLENGE

Appellant claims that the district court erred when it denied Appellant's Batson challenge. AOB29-39. In reviewing the denial of a Batson challenge, this Court should give great deference to the trial court's factual findings as to discriminatory intent. Hernandez v. New York, 500 U.S. 352, 364 (1991); Walker v. State, 113 Nev. 853, 867-68 (1997). This Court reviews those factual findings for clear error. Williams v. State, 134 Nev. 687, 687-89 (2018).

Initially, Appellant alleges that the district court used the incorrect standard of review for Appellant's Batson challenge. AOB35-39. Appellant cites Williams, 134 Nev. at 306, for the proposition that the district court must "clearly spell out its

reasoning and determinations" regarding Batson challenges, and that failure to do so changes the standard of review on appeal. This is an inaccurate statement of law.

In Williams, the court stated in *dicta* based solely on the sparse, "cold record" of Williams, "[t]his record does not allow meaningful, much less deferential review." Williams, 134 Nev. at 692. Williams does not stand for the proposition that the district court's failure to set forth a detailed, carefully-crafted decision regarding Batson challenges automatically warrants reversal. Instead, Williams serves as a reminder that when faced with a State's peremptory challenge based on race-neutral reasons for exclusion, a defendant must be permitted to challenge those reasons as potentially pretextual. Id. at 692.

Unlike Williams, Appellant was permitted to make arguments before the court rendered its ultimate decision, however, Appellant elected not to challenge the race-neutral reasons provided by the State. The only commonality between the instant case and Williams is the district court did not make express findings on why it found the State's reasons for striking each of the jurors were not pretextual. Here, the court made an inquiry into the circumstantial and direct evidence of the State's intent, and considered all relevant circumstances before ruling:

> Based upon all of the arguments here today on regard to [JUROR NO. 1084], [JUROR NO. 1180], [JUROR NO. 1257], and [JUROR NO. 1123] the request for Batson challenge is hereby denied. I do not find a systematic approach.

> We had gone through -- one, two, three, four, five, six, seven -- eight other people of Hispanic or Latin gender names -- or excuse me -- surnames and individuals -- one, two, three, four -- five that identify themselves as Hispanic in nature that were not stricken by the State. I do not see a systematic attempt to strike only individuals of Hispanic. The State has articulated a very valid basis for each and every one of their strikes. Therefore, we are going to stick with the jury we have.

6AA000589-90.

The reason for dismissing each juror is plain from the record and the district court concluded that there was not systematic exclusion by the State. Therefore, the district court did not use the incorrect standard when reviewing Appellant's Batson challenge and the factual findings must be given great deference by this Court. Hernandez, 500 U.S. at 364; Walker, 113 Nev. at 867-68.

Further, the district court properly denied Appellant's Batson challenge. The racially discriminatory use of peremptory challenges is unconstitutional under the Equal Protection clause. Batson v. Kentucky, 476 U.S. 79 (1986). When making a Batson challenge based on the State's decision to use a peremptory challenge, a defendant must show it is "more likely than not that the challenge was improperly motivated" to warrant denying the peremptory challenge. Conner v. State, 130 Nev. 457, 465 (2014) (citing Johnson v. California, 545 U.S. 162, 170 (2005)). In Purkett v. Elem, 514 U.S. 765, 766-67 (1995), the United States Supreme Court announced

a three-part test for determining whether a prospective juror has been impermissibly excluded under Batson:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step 1), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If a race-neutral explanation is tendered, the trial court must then decide (step 3) whether the opponent of the strike has proved purposeful racial discrimination.

This Court has adopted the Purkett three-step analysis. Doyle v. State, 112 Nev. 879, 887 (1996). In step one, a "defendant alleging that members of a cognizable group have been impermissibly excluded from the venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose." Batson, 476 U.S. at 94. The court may, in deciding whether or not the requisite showing of a prima facie case has been made, 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). Only after the movant has established a prima facie case of intentional discrimination is the proponent of the strike compelled to proffer a race-neutral explanation.

"The second step of this process does not demand an explanation that is persuasive or even plausible." Purkett, 514 U.S. at 768. "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. 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 v. State, 114 Nev. 1127, 1137 (1999).

Step three requires a credibility determination, as "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). This can be measured 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. 322, 324 (2003). In step three, the burden is on the opponent of the strike to develop a pretext for the explanation at the district court level. Hawkins v. State, 127 Nev. 575, 578 (2011).

Here, Appellant failed to make a prima facie showing of purposeful discrimination. Batson, 476 U.S. at 94. Appellant claims that the fact the State used four of its peremptory challenges to strike Hispanic jurors demonstrates a discriminatory purpose. AOB29. First, Appellant challenged the striking of Juror 1084. 6AA000582. The State offered its race-neutral reasoning for striking this potential juror:

> MR. SCHWARTZ: For most of my questioning, he was sitting in the back row with his head against the wall looking up at the ceiling. When I asked if everyone agrees no means no, everyone shook their head, except for him. And that's when I said, "Uh, sir, behind [JUROR NO. 7698], do you disagree and shake your head?" And then he's like, "Oh, no. Yeah, I agree."

> I felt like he wasn't paying attention, was disinterested. And also, when I was talking about the sexual assault, no means no, did not nod in the affirmative when everyone was [indiscernible].
>
> So those were my -- he was also, I guess, one of the ones · that -- I guess probably should have started with this. This is a great point. He said he would need more.
>
> THE COURT: Right.
>
> MR. SCHWARTZ: He would need more than just the victim saying something.

Id. at 000585-86. The district court noted the same potential issues and agreed with the State's assessment. Id. at 000586.

The district court also correctly noted that Juror 1084 self-identified as "other race" and so any assumption that he was Hispanic was speculative based on his appearance or surname. Id. Appellant argues that the fact that Juror 1084 self-identified as "other race" rather than Hispanic is irrelevant unless the juror identified as white. AOB32 fn. 3. However, the use of peremptory challenges to strike racial or ethnic minorities is not a per se Batson violation. See United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994) ("it is not per se unconstitutional, without more, to strike one or more Blacks from the jury."). Appellant's claim is that the State sought to strike all Hispanics from the jury and, therefore, the race and/or ethnicity of the stricken jurors was obviously relevant.[4] Thus, Appellant could not

[4] Appellant is confusing race with ethnicity. According to the 2010 United States Census, the term "Hispanic" refers to "a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin *regardless of race*."

even demonstrate a prima facie showing of discrimination because Juror 1084's race was unknown. Thus, the district court properly accepted the State's race-neutral reason for striking this potential juror.

Appellant claims that the district court erred because Juror 1111 made similar statements yet was not struck from the jury. AOB36-37. However, once Juror 1111 was explained that the law allowed the jury, if they believed the victim beyond a reasonable doubt, the find the defendant guilty, he could reluctantly follow those instructions. 4AA000336-40. Further, he confirmed that he would still like to weigh the evidence presented by both sides before deciding as to guilt. Id. at 000337-40; 6AA000549-50. However, when Juror 1084 was presented with other scenarios where there might not be a lot of evidence other than the victim's word, Juror 1084 continually distinguished those circumstances from the instant case. 4AA000343-46. Juror 1084 stated that he would be uncomfortable taking the victim's word without other evidence *even if he believed her beyond a reasonable doubt*. Id. He never agreed that the victim's word alone, if believed beyond a reasonable doubt, could sustain a conviction without other evidence. Moreover, Juror 1084 claimed he had transportation issues that would affect his ability to get to the trial on time. 5AA000419.

Sharon R. Ennis, Merarys Rios-Vargas & Nora G. Albert, U.S. Census Bureau, The Hispanic Population: 2010, 2010 Census Briefs, May 2011, at 2 (emphasis added).

These statements, coupled with Juror 1084's apparent disinterest in the case, provided a race-neutral reason to strike the juror. The lack of specific findings regarding demeanor does not preclude this Court from considering demeanor. Indeed, despite the district court's failure to make findings on demeanor in Williams, this Court reviewed the record and noted the State's reasons for the peremptory challenge were unsupported. Id. at 696, 429 P.3d at 310. Further, unlike Williams, Appellant did not dispute the State's reasons for challenging Juror 1084 based on his demeanor. 6AA000585-86. Therefore, the district court properly denied Appellant's Batson challenge as to Juror 1084.

Appellant next challenged Juror 7698. Id. at 000582. It is important to note that, while Appellant complains that the State provided a reason for striking Juror 7698 rather than Juror 1123, Appellant challenged the striking of Juror 7698 and it appears this Juror was referred to as both 7698 and 1123 throughout voir dire. 3AA000256-57; 4AA000380-81. Thus, it appears these numbers reference the same person. The State provided its race-neutral reason for striking Juror 7698 to the district court:

> MR. SCHWARTZ: Your Honor, [JUROR NO. 7698] identifies "other race."· My main issue with him was, yesterday, when we were discussing no means no, he made that comment, "Well, women who dress provocatively" -- I think the quote was, "That their butt hanging out" or "their boobs hanging out should kind of expect something to happen. And he clarified what he was talking about, which I think was -- he didn't mean what it

> came off, but the way that he said it kind of rubbed me the wrong way. So that was the reason. I didn't really like that he kind of was indicating that some women maybe had it coming, so to speak.

6AA000588-89.

The State spent a great deal of time going over Juror 7698's opinion that women who are provocatively dressed should expect to get unwanted sexual attention from men. 4AA000380-84. Juror 7698 never strayed from that opinion and Appellant never attempted to rehabilitate the Juror during voir dire. Juror 7698 also claimed that he had transportation issues. 5AA000419. Further, Appellant does not allege that the State's explanation as to Juror 7698 was pretextual and, thus, this Court should give deference to the factual findings below. Therefore, the district court properly denied Appellant's Batson challenge as to Juror 7698.

Appellant also challenged the striking of Juror 1180. 6AA000582. The State provided its race-neutral explanation to the district court:

> MS. CRAGGS: The reason that I suggested striking [JUROR NO. 1180] is because I have watched his body language when Mr. Schwartz was asking the questions about sexual assault, about the no means no, and kind of was going down the line and asking people different things. To me, he appeared disinterested -- him and [JUROR NO. 1183]. Those are two people that we struck. [JUROR NO. 1183] was not part of this challenge because I believe he identifies as "white/Caucasian." But those two individuals, throughout the entire time he was asking the other people, were disinterested. I believe they both rolled their eyes at one point. And so those are the two

> individuals that I suggested that we struck, which was why I wanted to be the one to tell the Court.
>
> THE COURT: Okay.
>
> MR. SCHWARTZ: [JUROR NO. 1180] also identifies as "other race."
>
> THE COURT: Correct.

Id. at 000587. Similar to Juror 1084, Juror 1180 also identified as "other race." This is relevant to Appellant's challenge because Juror 1180's race was unknown and the district court was correct not to assume the juror's race based on appearance or surname. Thus, Appellant cannot demonstrate a prima facie showing of purposeful discrimination.

Additionally, when discussing the "#MeToo" movement, Juror 1180 expressed a negative opinion:

> MR. SCHWARTZ: Does anybody want to jump in on this topic? I know #MeToo's very sensitive subject. Yeah. Right here. [JUROR NO. 1180].
>
> PROSPECTIVE JUROR #1180: Yeah, I think for, like, I guess lack of a better term, it probably be like buyer's remorse. You know? I think sometimes we wake up the next morning or we go about our day and we really start to think about what really happened. Did we to it -- did we go about the situation the right way and things like that. So –
>
> MR. SCHWARTZ: So as opposed to someone being forced into a situation, assaulted, some of the time, at least, it might be just regret?
>
> PROSPECTIVE JUROR #1180: Yeah. Or at the moment, in the heat of the moment, you know, it was consensual. You know, they were both in the moment and it was, you know, agreed upon. And then who knows what's behind-the-scene story you know?
>
> MR. SCHWARTZ: Sure.

> PROSPECTIVE JUROR #1180: Whether there was cheating going on, on one side, or something like that.

4AA000393-94.

Juror 1180 expressed that he believed that individuals can report sexual assault because they have regrets about having sex with someone. Here, Appellant's defense strategy was that Appellant and M.L. had consensual sex and that she was fabricating the rape allegations because of some kind of regret. Clearly, Juror 1180's opinion on the topic would make him biased as to the claims of the parties. Appellant never attempted to rehabilitate this juror during voir dire. Therefore, the district court properly denied Appellant's Batson challenge.

Finally, Appellant challenged the striking of Juror 1257. The State provided its race-neutral reasoning to the district court:

> MR. SCHWARTZ: Let me just make sure -- I don't think -- I believe she was -- identifies as "white/Caucasian," to start. But -- correct. "White/Caucasian."
>
> THE COURT: Correct.
>
> MR. SCHWARTZ: My issue with her, Your Honor, is that my understanding is that the Defense is gonna probably go with the consent route here. And she had an issue where she was consenting to a sexual assault – age issue that was later charged or addressed as a sexual assault. My concern was that, essentially, that she would be more favorable to the Defense in the sense that she was in a relationship that was consensual, but ultimately charges were filed against him.
>
> THE COURT: Okay. Basically, you had an individual who said that she consented even though, legally, she could not consent to that relationship. And she

> basically had sexual relations with a man who clearly could have been charged with a statutory rape because of her age here in Clark County.
>
> MR. SCHWARTZ: Correct.
>
> THE COURT: Okay. And she does identify herself as "white/Caucasian."

6AA000588.

The district court also noted that this juror self-identified as White and non-Hispanic. Therefore, Appellant's Batson challenge fails as to this juror because she is not even Hispanic. Powers v. Ohio, 499 U.S. 400, 406 (1991). In any event, the State provided a race-neutral reason for striking Juror 1257. Further, Appellant does not allege that the State's explanation as to Juror 1257 was pretextual and, thus, this Court should give deference to the factual findings below. Therefore, the district court properly denied Appellant's Batson challenge as to Juror 1257. Therefore, the district court did not clearly err in its findings and Appellant's claim fails

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY LIMITING RUB'S TESTIMONY.

Appellant claims that this Court abused its discretion by sustaining three (3) of the State's objections during Robert Bub's testimony, thereby limiting his testimony. AOB39-43. This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Hernandez v. State, 124 Nev. 639, 646 (2008); Mclellan v. State, 124 Nev. 263, 267 (2008).

Here, the State filed a Motion to Preclude Testimony of Defense Expert Robert Bub. 2RA000258-80. Appellant filed an Opposition to the State's Motion.

Id. at 000281-86. The district court denied the State's motion but stated that Bub's testimony would be "very limited" in that he would be allowed to testify as to proper police procedure but that he would not be permitted to speculate regarding what a different investigation could have led to. 6AA000595-97; 7AA000601. The district court further determined that it was unnecessary for Bub to talk about preservation of the crime scene because Appellant's defense was consent. 7AA000600-04.

Appellant complains that the district court sustained three of the State's objections during Bub's testimony contrary to its previous rulings. AOB39. However, the State made its objections when Appellant's counsel attempted to elicit testimony in direct violation of the district court's ruling. First, Appellant's counsel attempted to elicit what investigators could have done to improve the investigation, a topic which the district court specifically precluded:

> Q And if you recall, do you know about how long after [M.L.]'s disclosures this case was actually assigned to a detective?
> A The incident occurred on the morning, I believe, of April 24th. And the case was first reviewed by the assigned detective, I think it was May 3rd, which is approximately nine days later.
> Q In your experience, does that impede the investigation in any way, that delay of nine days, let's say?
> A Yes.
> Q And in what manner might that impede the investigation?
> A Well, there -- a number of things could have been done –
> MR. SCHWARTZ: Your Honor, can we approach?
> THE COURT: Approach.

[BENCH CONFERENCE]
THE COURT: Sustained, Counsel. Move on.

9AA000895-96.

Appellant again tried to elicit testimony from Bub which would disparage the police investigation and state how the investigation could have been conducted:

Q And from your review of the information in this case, does it appear that the Las Vegas Metropolitan Police Department followed their own policies and procedures with respect to the investigation?
A No, it did not.
Q Okay. And I take it you believe that the failure to follow Metro procedures in this investigation has caused some difficulty for Mr. Dorado in defending himself?
MR. SCHWARTZ: I'm going to object to that, Your Honor.
THE COURT: Sustained.

Id. at 000896-97.

Even after the district court sustained the objection, Appellant's counsel continued to attempt to have Bub describe how he would have conducted the investigation differently:

BY MR. MARGOLIS:
Q In your opinion, there are things you would have done differently?
MR. SCHWARTZ: Objection.
THE COURT: Sustained.

Id. at 000897.

The district court was very clear that Bub would not be allowed to speculate regarding the police investigation in the instant case. 7AA000600-04. In fact,

Appellant acknowledges that the district court's ruling precluded Bub from testifying that "[h]ad they done this, this could have happened." AOB41. Bub was permitted to testify about the general procedures police should follow when conducting a sexual assault investigation. 6AA000595-97. He was not to comment on the investigation actually performed or speculate as to how a different investigation would have been better. Id. Therefore, the district court did not abuse its discretion by sustaining the State's objections because Appellant's questions were in direct violation of the district court's order.

However, even if the district court erred in sustaining the State's objections, any error was harmless. Pursuant to 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 (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 (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 (2001).

Nonetheless, under any standard, the error does not warrant reversal. Bub's testimony regarding how he would have investigated, or how the investigators could

have performed a better investigation was not relevant and would have confused and misled the jury. NRS 48.025(1) provides "all relevant evidence is admissible." Although generally admissible, relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice, if it confuses the issues, or if it misleads the jury. NRS 48.025; NRS 48.035.

Appellant was not contesting the fact that he had been in the apartment with M.L. or that they had sexual contact in that apartment. 7AA000601. Further, the parties stipulated that Appellant's sperm was found on the vaginal swabs taken during M.L.'s rape kit. 9AA000826. Therefore, one would expect that M.L.'s and Appellant's DNA would have been found in areas like M.L.'s car and the apartment where the sexual assault took place. M.L.'s friend, Candy, went with her to the sexual assault examination and aided investigators. 1AA000035. Thus, there was no purpose for Bub's testimony regarding the police investigation other than to disparage and discredit the work of the police. This was not relevant to Appellant's defense that the sexual contact between he and M.L. was consensual. Therefore, this information would have been objectionable regardless of the district court's prior ruling and any alleged error from precluding such testimony was harmless. Thus, the district court did not abuse its discretion by limiting Bub's testimony and Appellant's claim must be denied.

/ / /

VI. THE DISTRICT COURT PROPERLY EXCLUDED EVIDENCE PURSUANT TO THE "RAPE SHIELD" STATUTE

Appellant claims the district court abused its discretion in excluding evidence pursuant to NRS 50.090, Nevada's "rape shield" statute. AOB44-51. This Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Hernandez, 124 Nev. at 646; Mclellan, 124 Nev. at 267. "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." United States v. Scheffer, 523 U.S. 303, 308 (1998). Exclusion of evidence only violates a defendant's right to present a defense when the exclusion is "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Id.

NRS 50.090 states the following:

> In any prosecution for sexual assault or statutory sexual seduction or for attempt to commit or conspiracy to commit either crime, the accused may not present evidence of any previous sexual conduct of the victim of the crime to challenge the victim's credibility as a witness unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct, in which case the scope of the accused's cross-examination of the victim or rebuttal must be limited to the evidence presented by the prosecution or victim.

"The trial court has sound discretion to admit or exclude evidence of a victim's prior false allegations or prior sexual experiences." Abbott v. State, 122 Nev. 715, 732 (2006). "In the exercise of its sound discretion, the trial court should be mindful of the important policy considerations underlying the rape-shield statute, and accordingly should limit the admission of evidence of specific instances of the complainant's sexual conduct . . . without unduly infringing upon the defendant's

constitutional right to confrontation." Summit v. State, 101 Nev. 159, 164 (1985) (quoting State v. Howard, 426 A.2d 457, 462 (1981)).

In Summitt, this Court explained that general use of a female's reputation for morality and chastity would be inadmissible to infer consent or to attack credibility. This Court also explained that the law is designed to protect rape victims from degrading and embarrassing disclosure of intimate details of their private lives and to encourage rape victims to disclose crimes, while being free from unnecessary indignities and needless probing into their sexual histories. Id.

This Court has delineated two exceptions to this general rule. In Miller v. State, 105 Nev. 497, 501 (1989), this Court held that in a sexual assault case, NRS 50.090 does not bar the cross-examination of a complaining witness about prior *false* accusations. Further, in Summit, 101 Nev. at 163-64, this Court held that prior sexual experiences of a child victim may be admissible to demonstrate that the child's prior sexual experiences could explain the source of the child's knowledge of the charged sexual activity and, in turn, demonstrate the child's ability to contrive a charge against the defendant. Prior to admitting such evidence, however, "the trial court must undertake to balance the probative value of the evidence against its prejudicial effect." Id.; See also NRS 48.035(1). "[T]he inquiry should particularly focus upon 'potential prejudice to the truthfinding process itself,' i.e., 'whether the introduction of the victim's past sexual conduct may confuse the issues, mislead the jury, or cause

the jury to decide the case on an improper or emotional basis.'" Summit 101 Nev. at 163 (internal citation omitted).

This Court has defined unfair prejudice "as an appeal to 'the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence.'" State v. Eighth Judicial Dist. Court of Nev., 127 Nev. 927, 933 (2011) (quoting Krause Inc. v. Little, 117 Nev. 929, 935 (2001)). This Court has further explained that "[a]lthough unfair prejudice commonly refers to decisions based on emotion, it is not so limited." Id. (citing Fed. R. Evid. 403 advisory committee's note). Thus, any time that considerations extraneous to the merits are introduced into trial, there is a risk of unfair prejudice. See People v. Greenlee, 200 P.3d 363, 367 (Colo. 2009) (noting that "[e]vidence is unfairly prejudicial where it introduces into the trial considerations extraneous to the merits, such as bias, sympathy, anger, or shock").

Appellant claims that the district court abused its discretion when it precluded testimony regarding the fact that Candy allegedly doubted whether M.L. had been raped because they had had other "crazy nights" in which M.L. had sexual relations with men. AOB45. Appellant allegedly sought to use this information to impeach M.L.'s testimony that this was the first time she had left her son alone since his birth and dispute that the injuries M.L. sustained had been caused by Appellant. Id.

As an initial matter, Appellant cites Summitt as well as Johnson v. State, 113 Nev. 772 (1997), as supporting his position. AOB44-45. However, Appellant's case is absolutely distinguishable from both Summitt and Johnson. In Summitt, the defendant was tried and convicted of counts of sexual assault involving cunnilingus and fellatio on a six-year-old child. At trial, he sought to introduce testimony of prior sexual assaults, which involved similar conduct, to show that his young victim had prior independent knowledge of similar acts which constituted the basis for his charge. Id. at 160. This Court reversed and remanded on the ground that evidence of the prior sexual assault should have been admitted because it was sufficiently similar. Id. Here, there was no question as to whether M.L. had prior sexual knowledge. M.L. testified that she had a two-year-old son at the time of the sexual assault. 7AA000634. It was obvious that M.L. had prior sexual knowledge and that fact was presented to the jury. Therefore, Appellant's reliance on Summitt is misguided.

In Johnson, the defendant was tried and convicted of sexual assault and attempt sexual assault. 113 Nev. at 775. On appeal, defendant argued that the district court improperly excluded testimony regarding the victim's prior sexual experiences. Id. At trial, the victim had testified that she had never had sexual intercourse prior to the incident and that she was not previously sexually abused by male relatives. Id. This Court quickly dismissed defendant's claim regarding the

alleged previous sexual abuse because defendant failed to preserve the issue for appeal. Id. at 776. This Court further held that, once the victim testified that she was a virgin, the defense had the right to cross-examine her on the subject to show that she was not a virgin. Id. at 777. However, counsel elected not to cross-examine the victim on the subject and, thus, this Court determined defendant's claims were without merit. Id. Here, M.L. never testified that she was a virgin or that she had not had sexual intercourse since the birth of her son. Appellant seemingly attempts to equate the fact that she said she had not been out since the birth of her son with M.L. saying that she had been celibate. AOB45. This is simply not the case. Because M.L. did not testify as to her own sexual experience, there was no reason for Appellant to address it on cross-examination and Appellant's reliance on Johnson is similarly misguided.

The district court properly excluded evidence regarding M.L.'s prior sexual encounters with other men. The fact that M.L. may have had sex with other men prior to Appellant sexually assaulting her is irrelevant. Appellant's theory of defense was that he and M.L. had consensual sex and his semen was found inside the victim's vagina. There was no indication that other DNA was found on the victim's vaginal swabs nor was there any accusation that someone else raped her on the night of the incident. Any information regarding the fact that M.L. had sex with other men in the weeks prior to the incident would not be remotely probative as to whether she had

consensual sex with Appellant on the night in question. Therefore, any admission of this evidence would be more prejudicial than probative, as it would only be introduced to paint M.L. as a promiscuous woman and have the jury become biased against her based on her prior sexual conduct. Thus, the district court did not abuse its discretion in limiting Perez's testimony in this respect.

Appellant claims that the district court's limitation of Maria Perez's testimony violated his rights under the Confrontation Clause. AOB44. The Confrontation Clause of the Sixth Amendment "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Chavez v. State, 125 Nev. 328, 338 (2009). The United States Supreme Court "has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes." Nevada v. Jackson, 569 U.S. 505, 512 (2013) (emphasis added). The Confrontation Clause is "generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination[.]" Delaware v. Fensterer, 474 U.S. 15, 22 (1985).

"Although a criminal defendant has a due process right to 'introduce into evidence any testimony or documentation which would tend to prove the defendant's theory of the case,' Vipperman v. State, 96 Nev. 592, 596 (1980), that right is subject to the rules of evidence[.]" Rose v. State, 123 Nev. 194, 205 n.18 (2007). The right

is limited by the rule of relevance and 'does not require that the defendant be permitted to present every piece of evidence he wishes.'" Kaczmarek v. State, 120 Nev. 314, 336 (2004) (quoting Brown v. State, 107 Nev. 164, 167 (1991)) (internal citations omitted). "In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

Appellant's rights under the Confrontation Clause were not violated because Appellant was permitted to cross-examine Perez about whether or not they had gone out on other occasions and consumed alcohol. 8AA000798-99; 9AA000800-02. While Appellant was not permitted to present every piece of evidence he wanted, he was not precluded from impeaching the victim nor was he precluded from presenting his theory of defense. Further, as demonstrated above, evidence regarding M.L.'s prior sexual experiences was both irrelevant and more prejudicial than probative. Therefore, Appellant's rights were not violated and the district court did not abuse its discretion by limiting Perez's testimony.

Finally, Appellant claims that the testimony regarding M.L.'s prior sexual encounters could have been used to demonstrate that her injuries were caused by someone other than Appellant. AOB45. Appellant did not make this argument below

and, thus, it is waived for appellate review. Therefore, the district court did not abuse its discretion by limiting Perez's testimony and Appellant's claim fails.

VII. THERE WAS NO PROSECUTORIAL MISCONDUCT.

Appellant claims that the State committed prosecutorial misconduct by burden shifting during closing argument. AOB51-54.

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 sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188 (2008). 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. 848, 865 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89. 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 (quoting Darden v. Wainright, 477 U.S. 168, 181 (1986)). 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. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

Appellant claims the State shifted the burden of proof by suggesting that there was no evidence as to Appellant's size or his ability to lift anyone at the time of the incident. AOB51-52.

As an initial matter, a defendant's failure to object to an issue at trial generally precludes appellate review of that issue unless there is plain error. Green v. State, 119 Nev. 542, 545 (2003). Under plain error review, the asserted error must affect the petitioner's substantial rights, and "the burden is on the defendant to show actual prejudice or a miscarriage of justice." Id. 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. 43, 49 (2015). Appellant did not object to the State's closing argument at trial and, therefore, plain error review is appropriate.

Commenting on the lack of evidence supporting a defense theory does not amount to burden shifting. "[A]s long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented." Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001) (citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992)). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1019 (1997). This includes commenting on a defendant's failure to substantiate his theory. Colley v. State, 98 Nev. 14, 16 (1982). See also Bridges v. State, 116 Nev. 752, 762 (2000) (citing State v. Green, 81 Nev. 173, 176 (1965) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows.")). Further, if the defendant presents a theory of defense, but fails to present evidence thereon, the State may comment upon the failure to support the supposed theory. See Evans, 117 Nev. at 630-31 (2001); McNelton v. State, 115 Nev. 396, 408–09 (1999) (emphasis added).

The record here does not demonstrate plain error. Here, Appellant acknowledges that, in an attempt to impeach M.L., the defense tried to establish that Appellant and M.L. were similar sizes and that he could not have lifted her in the

manner she described. AOB51. Appellant emphasized that point in his closing argument. 9AA000931-32. In fact, Appellant's counsel had Appellant stand up to demonstrate how difficult it would have been for Appellant to carry M.L.:

> And she said, "Oh, he cradled me." Cradled her. Okay. Now, I'm not exactly sure how much [M.L.] weighed in those days. Said she was lighter. I mean, I know I was lighter 20 years ago. But I want to make this one point.
> Stand up, Ramon. Stand up.
> Okay. I'm about 5-7. He's about maybe 5-6. She said she was about 5-6 or 5-7. Let's say they're around the same weight. And from what she said was, he cradled her. And she didn't want him to do that so she was struggling. But he cradled her and then he threw her over shoulder like a sack of potatoes and walked to the next room.
> So I was having a hard time visualizing this. So I thought I would do this. This is a 50-pound sack of potatoes. This is 50 pounds. I weigh almost 200. This is one quarter of my body weight. And carried it this far and then swung it over the shoulder.
> I mean, this thing is tough. This is only one quarter of my body weight. There is no way that Ramon could do that. He just couldn't do it. It's physically impossible. Maybe he was a body builder or someone like that, a weight lifter, but he's not.
> …
> In the jury instructions it'll say, don't leave your common sense at the door. And you shouldn't. And common sense tells you that this individual, even at the weight he is now, but they're both going to be lighter, and just for a [indiscernible] purposes I -- we'll say they're both the same size. One could be bigger than the other a little bit more, but no one is going to be able to lift their own body weight and then throw it over the shoulder while that person is struggling. It's strains the credulity. It just doesn't make sense. Who could do that? I don't know.

Id.

In response to Appellant's argument, the State pointed out that there had been nothing admitted into evidence which demonstrated the Appellant's size at the time of the incident or how much weight he could lift:

> Which brings us to the comment about her weight. And fact that he wouldn't be able to pick her up. And I won't try to pick up the sack of potatoes. But we don't have any evidence as to what Mr. Dorado, the Defendant, weighed at that time. We don't know anything about that. No evidence has been brought in to talk about his weight or his size or his ability to lift anybody or what he looks like at that time.
> So Mr. Yampolsky's discussion of how this isn't possible, there's no evidence of that anywhere. We do know that [M.L.] said -- and I think it actually might show somewhere what her weight is. Around 160. And that they were about the same height. And she said that he was able to pick her up and move her from one area to another a short distance.
> I would submit to you, ladies and gentlemen, that doesn't make her story not credible. The defense is essentially saying that she was -- weighed too much for this to actually happen. But we don't have any evidence of what the Defendant actually weighed or was capable of doing at the time.

Id. at 000952-53.

The State properly rebutted argument presented by Appellant. The State was not arguing that the Appellant had to provide evidence to rebut the elements of the charge against him. Instead the State was merely commenting on Appellant's failure to substantiate his own theories, which is entirely permissible. Evans, 117 Nev. at 630–31; McNelton, 115 Nev. at 408-409; Colley, 98 Nev. at 16.

To the extent the State inadvertently crossed the line, a point the State does not concede, any such error does not warrant reversal under plain error. To determine whether misconduct was prejudicial, this Court examines whether the statements so infected the proceedings with unfairness as to result in a denial of due process and must consider such statements in context, as a criminal conviction is not to be lightly overturned. Thomas v. State, 120 Nev. 37, 47 (2004). When evidence of guilt is overwhelming, even a constitutional error can be insignificant. Haywood v. State, 107 Nev. 285, 288 (1991); State v. Carroll, 109 Nev. 975, 977 (1993). Here, Appellant's DNA was found on the vaginal swabs from M.L.'s rape kit, the victim disclosed the rape immediately after the fact, M.L. sustained injuries consistent with a struggle and her story remained consistent for almost twenty (20) years. 7AA000674, 000676, 8AA000763-64, 000779-80; 9AA000826, 000834. Therefore, any statement by the prosecution, which did not amount to misconduct, was harmless.

Pointing out that Appellant failed to substantiate his defense theories was permissible and did not amount to burden shifting. The statements Appellant complains about were offered in direct response to his defense theories. Moreover, Jury Instruction Number 4 specifically instructed the jury that the State has the burden of proof. 2RA000290. As such, the State's comments, even if held to be in

error, did not prejudice Appellant and were harmless. Therefore, Appellant's claim fails.

VIII. THERE WAS NO CUMULATIVE ERROR

Finally, Appellant alleges that the cumulative effect of error deprived him of his right to a fair trial. AOB54-56. 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, 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 Appellant's conviction. Appellant's DNA was found on the vaginal swabs from M.L.'s rape kit, the victim disclosed the rape immediately after the fact, M.L. sustained injuries consistent with a struggle and her story remained consistent for almost twenty (20) years. 7AA000674, 000676, 8AA000763-64, 000779-80; 9AA000826, 000834.

"There is no requirement that the testimony of a victim of sexual offenses be corroborated, and [her] testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty." Gaxiola v. State, 121 Nev. 638, 647 (2005). The testimony of the victim provided sufficient evidence for the jury to find Appellant guilty beyond a reasonable doubt. Therefore, there was sufficient evidence presented at trial to sustain all convictions.

Finally, the only factor that weights in Appellant's favor is that he was convicted of grave crimes. See Valdez, 124 Nev. at 1198 (stating crimes of first degree murder and attempt murder are very grave crimes). However, given the substantial weight supporting the first two factors, Appellant's claim of cumulative error has no merit. This Court should affirm Appellant's conviction.

CONCLUSION

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

Dated this 13th day of April, 2020.

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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 13,796 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 13th day of April, 2020.

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 13th day of April, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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