IN THE SUPREME COURT OF THE STATE OF NEVADA

RONNEKA ANN GUIDRY, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 80156

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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Appellant,	)	
	)	
vs.	)	
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THE STATE OF NEVADA,	)	
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Respondent.	)	
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ROUTING STATEMENT

Ronneka Guidry's appeal is not presumptively assigned to Court of Appeals because her convictions result from a jury verdict involving one category A felony and three category B felonies. II:413-414;II:414.

Ronneka challenges more than sentence imposed or sufficiency of evidence. NRAP 17(b)(2). As a matter of first impression, Court must interpret NRS 484E.010, review the defense of occupied vehicle, and decide if Hodges v. State, 439 P.2d 957, *2 (unpublished Nev. 2019) should be reexamined. NRAP 17(a)(11),(12).

JURISDICTIONAL STATEMENT

NRS 177.015 and NRS 178.472 give Court jurisdiction to review this appeal from jury verdict. (II:335-36). Judgment of Conviction was filed on 10/29/19. (II:415-14) and Notice of Appeal on 11/29/19. (II:415-16).

ISSUES PRESENTED FOR REVIEW

I. INACCURATE JURY INSTRUCTIONS LOWERED STATE'S BURDEN OF PROOF, EVISCERATED RONNEKA'S DEFENSE, AND ALLOWED JURY TO REACH CONVICTIONS BASED ON INCORRECT INSTRUCTIONS ON THE LAW.

II. EVIDENCE INSUFFICIENT.

III. DOUBLE JEOPARDY PROHIBITS CONVICTIONS FOR ROBBERY AND GRAND LARCENY.

IV. TRIAL COURT FAILED TO CONDUCT VOIR DIRE IN A MANNER ASSURING FOR A SELECTION OF IMPARTIAL JURORS AND VIOLATED RONNEKA'S RIGHT TO VOIR DIRE.

V. PROSECUTORIAL MISCONDUCT IN OPENING.

VI. PREJUDICIAL ERROR OCCURRED WHEN COURT ALLOWED JURY TO SEE A GRUESOME PHOTOGRAPH THAT INFLAMED THE JURY.

VII. PROSECUTORIAL MISCONDUCT IN CLOSING.

VIII. DUE PROCESS WAS VIOLATED BY STATE FAILING TO CORRECTLY ENDORSE SALISBURY AS AN EXPERT, NOT GIVING DEFENSE HIS SUPPLEMENTAL REPORT UNTIL AFTER HE TESTIFIED, AND BECAUSE SALISBURY WAS NOT QUALIFED.

IX. UNREASONABLE SEARCH AND SEIZURE.

X. CUMULATIVE ERROR.

XI. SENTENCING ERROR.

STATEMENT OF THE CASE

On 02/09/18, State filed an Indictment charging Ronneka Guidry with: (1) murder with deadly weapon (motor vehicle); (2) robbery with deadly weapon (Rolex watch/ motor vehicle); (3) grand larceny (Rolex watch); and (4) duty to stop at scene of crash involving death or personal injury occurring on 01/03/18. I:001-04;Grand Jury Hearing-III:486-561.

Ronneka appeared in District Court on 03/20/18, entered a plea of not guilty, and received a trial date. III:561-65;*Min*-II:435. Her trial was continued several times due in part to changes in attorneys.

Before trial, Ronneka filed three motions to suppress (Issue VIII), several other motions, and writ.

Six day trial began on 08/12/19, ending on 08/19/19.[1]

Jury found Ronneka guilty of: (1) second-degree murder; (2) robbery; (3) grand larceny; and (4) duty to stop. II:335-36.

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[1] **Day 1**: 08/12/19--IV:745-971;*Min*.-II:475. **Day 2**: 08/13/19--V:972-1159;*Min*.-II:476. **Day 3**: 08/14/19--V:1160-1221:VI:1222-1394;*Min*.-II:477. **Day 4**: 08/15/19--VI:1395-1471;VII:1472-1553; *Min*.-II:478-79. **Day 5**: 08/16/19--VII:1554-1685;*Min*.-II:480. **Day 6**: 08/19/19--VII:1686-1699; *Min*.-II:481-2. Ronneka waived jury penalty hearing. II:328-29.

On 10/18/19, court sentenced Ronneka to an aggregate term: life with parole possibility in 18 years. VII:1700-21;VIII:1700-21;IX:1722-32;*Min.*-II:483-84;II:414.

STATEMENT OF FACTS

Twenty-one year old Eduardo Osorio visited Las Vegas for six days, during the 2018 New Year's holiday season. V:1171;1189-95;VI:1292-93;1333-36;1347-48. On 01/02/18, Osorio drank too much, became intoxicated (two times the limit), and took a ride with a stranger, Ronneka Guidry. *Id.* Ronneka dropped Osorio off near the Westin on Flamingo, on the side of Jay's Market, and drove away. *Exhibit 105.*

While Ronneka was driving near the cross-walk at the intersection of Flamingo and Koval, she stopped when Osorio ran in front of her car. VI:1261-62;1267. Osorio jumped on the hood and smashed the windshield by repeatedly hitting it with his fists while also trying to break the driver's side window. VI:1262. Ronneka was scared. VIII:1890-92.[2] When she drove away, Osorio fell off the car, landing headfirst in the street. Ronneka left the scene. Osorio later died.

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[2] State played the video/audio of Ronneka's interrogation during the trial (Exhibit 111), but made the transcript a court exhibit. VIII:1754-1898. Yellow portions of transcript were not played. For clarity, Ronneka cites to the transcript rather than the video.

"[It was an] Accident," said Coroner Lisa Gavin when asked her opinion as to the manner of Eduardo Osorio's death. "He died of multiple blunt force injuries" from "an unforeseen or unexpected event." VI:1295;1287. Gavin came to this opinion after reading the police investigative report, reviewing the injuries to Osorio's face, hands, knees, shoulder, thigh, penis, and the back of his head; and, after reviewing the autopsy report, toxicology report, autopsy photos, and X-rays. VI:1288;1286-87;IX:1979-84. Osorio's blood alcohol was twice the legal limit at .168 and contained marijuana metabolites below therapeutic levels. VI:1292-93. Thus, she concluded the manner of death was an accidental.

Eyewitness Timothy Landale confirmed Gavin's conclusion. VI:1257-84.

Landale testified that on 01/03/18, around 2:00 a.m., he was walking east down Flamingo from the Strip when he noticed a man run out of the bushes near the gas station at Flamingo and Koval. Landale said:

> --someone ran...past me through the bushes into the street and jumped in front of a car. VI:1261.
> ...
> [He] jumped in front of a car that was coming and [he] started screaming and [he] jumped on top of the hood of the car and [he was] like screaming, I think in another language, and like furiously punching the windshield. VI:1262.
> ...
> And he just kept punching the windshield and it looked like he was trying to punch in the driver's side window... VI:1263.

...
He's [was] on his...hands and I think his knees and he's punching the windshield. VI:1269.
...
He was trying to break the windshield it looked like. VI:1270.
...
He also switched to trying to punch in the driver's side window too. VI:1271.
...
The whole time he's yelling... VI:1272.
...
And then after a short period of time, the car sped off and he held on for a few seconds and then like couldn't hold on let go or something and hit the ground, it looked like headfirst. VI:1263.
...
And he kind of...bounced almost on the pavement... VI:1274.

Landale was 5 or 10 feet from the car when he witnessed this event. VI:1262.

Landale said the car did not hit or run over the man; the man jumped in front of the moving car and the car abruptly stopped. VI:1267-68. The contact between the car and man was the man jumping on the car after it stopped at the intersection. VI:1261-62;1268. Thereafter, the car drove more than 20 feet before the man fell off. VI:1277-78. The car did not swerve but just sped up. VI:1274.

Landale ran towards the man after the car left and noticed the man's pants were off. VI:1273. Others joined him, blocking traffic and moving the man to the side of the road because he was in the middle. VI:1274.

Several witnesses called 911 at 2:20 p.m. Kelley Lovatto said she saw a man jump on top of a car and start banging on the windshield, like he wanted to get inside the car. When the car took off, the man fell and was in the street. Another person called 911, saying he saw a man running and jump on top of a car. The man was banging on the window, the car sped off, and he was now unconscious in the street. *Exhibit 110.*

Officer Michael Amburgery arrived at the scene after receiving a call of a hit and run - pedestrian hit by a car. V:1199-1212. When he arrived, multiple people were around Osorio, with one person providing medical aid; he saw a head injury. V:1202-03;1212. He took over until medical arrived and then helped control the scene.

Amburgery said someone told him that the car that left was a black car driving westbound on Flamingo. V:1203. Amburgery saw blood in the street and noted where the man landed after falling off the vehicle, and where he was pulled across the travel lanes. V:1209-11.

On 01/03/18, at 3:30 a.m., CSA Tabath Pain began processing the scene. V:1212-21;VI:1222-34. She took photographs of the area where the police believed Osorio got out of the black car, on the side of Jay's Market by the Westin, and the direction the police believed the car drove away though the Westin parking garage to Koval. IX:1931-40. She also took

pictures of Flamingo where the incident occurred in front of the gas station at Jay's Market. IX:1945-74. The photographs showed blood; markings in the street made by Sgt. McCullough: AIC, shoe scuff, body scuff, BS start, and PED F.R. VII:1575. Several diagrams of the scene were later prepared. IX:1923-30.

CSA Jennifer Strumillo went to Sunrise Hospital and took photos of Osorio's injuries and personal belongings: passport, wallet, shoes, jacket, medical marijuana card, three credit cards, braided bracelets, and one penny. VI:1241-58;IX: 1976-78;1986-88.

As part of the investigation, police contacted Westin and Jay's Market security to obtain surveillance video. Westin security provided videos showing a black vehicle backing into a parking spot next to Jay's Market at approximately 2:13:00. The vehicle kept its lights on and remained parked for 7 minutes before a silhouette of a person got out of the passenger side. The person did not appear to be doing a personal inventory while standing outside the car. The black vehicle left by driving through the Westin's parking garage.VI:1301-27;VII:1463-69; *Exhibit 105*.

Weston Security Officer Jamal Cherry explained the videos. He speculated that the car zooming across the top of the first two videos in

Exhibit 105 was the same car that had been parked next to Jay's Market and had driven through the parking garage. VI:1307-08;1310-12;1317.

Detective Kenneth Salisbury was the primary investigator and responded to the scene at 4:12 a.m. VI:1455-71;VII:1472-1642. He identified the black vehicle as a Mercedes by watching the videos. VI:1459.

Later that morning, while METRO investigated the accident, Osorio's father and one of Osorio's friends, Lucas Siomes, were looking for Osorio. Osorio's father contacted Siomes who walked to the Monte Carol to find Osorio. He learned Osorio had not returned to check out. Later, he called the hospitals and discovered Osorio may have been in the hospital. V:1181-97.

Osorio's father contacted the coroner's office. V:1169-73. When he picked up his son's belongings he noticed his son's Rolex watch was missing. V:1173-76. He provided METRO with pictures of the watch and the serial number. V:1173-76;VII:1485-88.

Police spoke to Siomes who told them that he met Osorio around 11 p.m., the evening of 01/02/18, at a bar in Caesars. They talked, drank, and then Siomes walked with Osorio to the Club Omnia. Siomes did not go into the club, instead choosing to go to his room at Caesars. V:1181-99.

Upon learning Osorio had been at Caesars, police contacted Caesars Security to obtain video surveillance. VII:1486-87.

Caesar's Security Officer, Michal Siffrinn, reviewed surveillance video for the evening of 01/02/18 and 01/02/18. Stiffrin saw Osorio at the bar with Siomes, and walking to Omnia nightclub. Osorio entered the nightclub at 10:58 p.m. Siffrinn saw a watch on Osorio's wrist. VI:1330-31;1338;VII:1489;IX:1907-08.

Osorio left the nightclub at 1:51 a.m. and began talking to an African-American women, with a pink purse, sitting at a bar near the exit. Osorio and the women walked through the hallways and entered the elevator to the parking garage. VI:1331-36;IX:1910-12.

Maria Lester from Ace parking management provided pictures of the black Mercedes exiting the parking garage at 2:07 a.m., with an African-American women driving with a passenger.[3] The license plate on the Mercedes was a paper tag with a telephone number and the name OC Cars and Credit US. VI:1341-58;VII:1490-93;IX:1913-22.

Salisbury traced the plate to a dealership in Costa Mesa, California, and upon meeting with the owner in California, he determined that the Mercedes had been sold to Ronneka. VII:1490-93.

---

[3] Mercedes and women had entered at 1:33 a.m. on 01/03/18. VI:1344-46.

On 01/08/18, while in California, Salisbury notified other detectives to look for Ronneka and the Mercedes. VII:1492-95.

Det. Justine Gatus assisted in the surveillance of Ronneka's home. VI:1368-80. When Ronneka left home, driving the Mercedes to go to Walgreens, Gatus claimed she was speeding and not using turn signals. After Ronneka left Walgreens, METRO stopped and arrested her for these traffic violations and for a past traffic warrant. They impounded the black Mercedes with her cell phone visible on the front seat. VI:1373-75.

Despite the arrest, METRO officers did not take Ronneka to jail. Instead, police held Ronneka at METRO headquarters until Salisbury returned from California. VII:1494-5. She was stopped after 9 p.m, and Salisbury did not arrive to talk to her until approximately 10:45 p.m. VII:1494.

The interrogation of Ronneka with Salisbury and other detectives lasted more than 3 hours, beginning at 22:55:00 hours on 01/08/18 and ending at 02:03:00 on 01/09/18. VIII:1838-98. During the interrogation, Ronneka repeatedly asked to go to the restroom - they did not take her. At the end, when they continued to question her she told them she was very sleepy. *Id.*

Ronneka denied stealing Osorio's watch. She said Osorio came up to her in the bar and needed a ride. She agreed to drive him to the Monte Carlo. She pulled into the parking spot near the Westin and told him to get out of the car because he was too aggressive with her. She did not know why he jumped on her car and smashed the windshield. VIII:1838-98. She said she slowed down, she yelled to him, "Get off my car, what are you doing?" She was scared so she drove away. VIII:1838-98.

When Salisbury's asked Ronneka for the password code to her cell phone, she said: "I'm not giving no more number on it." VIII:1873.

Salisbury did not arrest Ronneka for any crimes arising out of the 01/03/18 incident after the interrogation. Instead, Ronneka was booked for the traffic warrant and released. VII:1507;1714.

While Ronneka was being processed at the jail, Salisbury obtained a search warrant for Ronneka's home. He told Sgt McCullough that although they had Ronneka's cell phone in her car, the phone was locked. VII:1508. When McCullough and a team of vice detectives searched Ronneka's home, McCullough obtained the password to Ronneka's cell phone by bribing/offering $1.00 to the first of her children that gave him the password. VI:1406-07. During the search, officers took pictures of a purse and its

contents that they thought was similar to the pink purse Ronneka had while at Caesars. VI:1404-06.

Salsibury obtained a search warrant for the Mercedes and for Ronneka's cellphone. VII:1508;1515;VI:1402;1408;1413;VII:1508;1515.

Salisbury searched the Mercedes. He concluded there was damage to the Mercedes and no evidence that Ronneka hit anyone. VII:1511;1563;IX:1990-2000.

METRO's digital forensic examiner, James Beatty, used the password detectives obtained from Ronneka's children to open her cell phone. VI:1422. He downloaded all data on the cellphone, finding over 30,000 images, call logs, texts, SMS communications, and everything. VI:1422-25.

When reviewing the communications, Beatty saw messages from Ronneka to Mike King of Kings Jewelry in Miami Florida on 01/03/18 at 2:22:25 and also to John Fernandez. IX:2008-25. Subsequent messages indicated Ronneka wanted to sell a Rolex watch. She sent a snapshot of the watch to Fernandez and later sent the Rolex to him by FedEx. A copy of the FedEx receipt was on the phone. Fernandez agreed to pay Ronneka $4500 for the watch. VII:1429-30;1436-43;1439-49;IX:2026-36-43.

With this information, METRO located receipts and video footage of Ronneka at FedEx sending an overnight package on 01/03/18 at 12:14 p.m. to Florida. VI:1358-66;VII:1515-17.

On the cell phone, Beatty also found a picture of Ronneka's smashed windshield and information identifying the repair shop. VI:1449-50;1455;IX:1998-99.

When Salisbury contacted Miami Police, Officer Alce, retrieved the Rolex watch from King's Jewelry, verified that it matched the serial number of Osorio's watch, and impounded it as evidence. VI:1415-20. Salisbury received the watch from Miami on 01/30/18. VII:1522.

On 01/18/18, Ronneka contacted Salisbury about her Mercedes. Salisbury set up a time to meet with her on 01/19/18 but also obtained a warrrant for Ronneka's arrest. VII:1516-19. Ronneka did not show-up.

Ronneka was arrested on 02/02/18 or 02/09/18 in Mobile Alabama. VII:1522.

At trial, Salisbury discussed the diagrams prepared from the crime scene measurements. IX:1923-28. He said AIC was the area of initial contact for damage or injury – where the witness said the Mercedes was. VII:1473;1639.

Shoe scuff was the area where Osorio's shoe scuffed the road. VII:1474-75. Salisbury acknowledged Osorio wore flat shoes. VII:1557. The photo of Osorio's shoes does not show scuffs. IX:1988.

A body scuff meant the body slid on the road. VII:1475-76.

Final resting point was listed, but Salisbury acknowledge METRO had no specific evidence as to Osorio's final resting point since his body was moved. VII:1475-76.

Salisbury admitted that he did not recalculate the measurements taken by McCullough before his analysis and he did not know the exact point where events occurred, only general areas. VII:1575-76;1584-85. He did not know where the Mercedes first stopped. VII:1584-86.

Salisbury believed the damage to the windshield on the Mercedes was caused by Osorio's fist based on the type of fracturing, but said he could not prove it. VII:1591-92;1639.

When discussing the speed of the Mercedes as it left, he initially claimed Ronneka accelerated at full throttle at 59 mph and going 0 to 59 mph. in 300 feet. VII:1514-15. Later, he admitted the Mercedes was only going 23 mph. at the time Osorio fell off the car. VII:1641.

SUMMARY OF ARGUMENT

Case addresses numerous issues involving statutory interpretation of the robbery statute, self-dense, defense of property, defense of occupied vehicle, necessity, the duty to stop statute, second-degree murder, and larceny statutes. This case has a significant search issue; and, prosecutorial misconduct from opening statement, closing, discovery problems, and the presentation of an unqualified expert.

ARGUMENT

I. INACCURATE JURY INSTRUCTIONS LOWERED STATE'S BURDEN OF PROOF, EVISCERATED RONNEKA'S DEFENSE, AND ALLOWED JURY TO REACH CONVICTIONS BASED ON INCORRECT INSTRUCTIONS ON THE LAW.

A. Standard of review.

District courts are charged with accurately instructing the jury on the law. *Crawford v. State*, 121 Nev. 744, 755 (2004). "Court may either assist the parties in crafting the required instructions or may complete the instructions sua sponte." *Id.*; *Carter v. State*, 121 Nev. 759, 765 (2005).

Court generally reviews district court's decisions when settling jury instructions under an abuse of discretion or judicial error standard. *Rodriguez v. State*, 133 Nev. 905, 907 (2017). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds

the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120 (2001). Court used de novo review for instructions that are an inaccurate statement of law. *Nay v. State*, 123 Nev. 326, 330 (2007).

If error occurred and defendant objected, Court conducts harmless-error analysis. *Natko v. State*, 134 Nev. 841, 845 (Nev. App. 2018). "State bears the burden of proving that the error was harmless." *Id.* Error is harmless if State can show "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id. citing Nay at* 334.

If error occurred but defendant did not object, then "reversal is only required if the error is plain from a review of the record and affected [defendant's] substantial rights" by "actually causing prejudice or a miscarriage of justice." *Ramirez v. State*, 126 Nev. 203, 208 (2010) (reversal when "jury was not completely and accurately instructed on the necessary elements of second-degree murder"); NRS 178.062.

B. Reversible error for court to instruct jury that defense of property is superior to self-defense and to reject necessity defense.

A key factor the jury needed to decide was whether Ronneka acted in self-defense or necessity when she stopped her vehicle, and later put her foot on the accelerator, after Osorio jumped on the hood, shattered her windshield, and tried to break the driver's side window.

Ronneka argued a person may not use force to recover property and claimed Osorio was the initial aggressor, thus giving her the right to defend herself. VII:1539-49.

Ronneka submitted instructions on necessity/self-defense and assault. VII:1535-49. Ronneka's necessity/self-defense instruction said: "The defendant is not guilty of failure to stop at the scene of a crash involving death or personal injury if she acted out of legal necessity or self-defense." VII:1537-38. The assault instruction said: "Nevada law prohibits assault, assault is deliberately making another person feel that she is about to be physically harmed..." VII:1537. The instruction defined assault and listed two examples. These instructions went to the theory of Ronneka's defense - she acted in self-defense when Osorio assaulted her; and, Osario's use of force was an unlawful replevin action. VII:1536-49.

Court disagreed, finding necessity inapplicable and assault was not pled. VII:1536-49. But, court took matter under advisement.

The following day, State presented its own self-defense jury instructions and appeared to add Jury Instruction #23. VII:1613. State argued Ronneka had no right to self-defense under first degree felony-murder; and, she had no right to resist Osario's aggression. VII:1613.

Ronneka made no further objections and accepted State's proposed self-defense jury instructions. VII:1613-24.

Although court instructed jury on Ronneka's right of self-defense in Jury Instructions #15 through #23, court also informed jury that Osorio's right to defend his property was superior to her right of self-defense. II:352-60.

Jury Instruction #23 said:

> A victim of larceny has the right to use force to resist the taking, or the escape of the perpetrator with the property. A person who has taken property may not rely upon self-defense when the need to utilize the force is in response to the victim seeking to prevent the taking or escape with the property...the use of force by the person who has taken the property to escape with the property of another elevates the taking to a robbery. II:360.

Thus, Instruction #23 removed Ronneka's right of self-defense if jury believed she committed larceny.

However, Instruction #23 is legally incorrect in explaining defense of property and self-defense; and, it is contrary to Ronneka's initial arguments.

NRS 193.240 is Nevada's defense of property statute. When defending property, NRS 193.240(2) allows a person to use "resistance sufficient to...prevent an illegal attempt, by force, to take...property in his...lawful possession."

An assessment of the meaning of the words in NRS 193.240 is an issue of statutory interpretation; Court begins by looking at the statute's plain meaning. *MGM Mirage v. Nevada Ins. Guar. Ass'n*, 125 Nev. 223, 228–29 (2009).

The plain meaning of the words in NRS 193.240(2) indicate that the use of force is only justified before or during the taking of property and is not justified after the theft. Force may only be used to "prevent" a taking or attempted taking of property in the victim's possession.

At the time Osorio jumped on Ronneka's vehicle and began shattering her windshield, the property was no longer in his possession and the alleged theft had occurred prior. In Nevada, "[t]he law provides a remedy to a person if his property is unlawfully detained by another, and does not justify such person in assaulting the person or persons detaining it, in order to recover it." *State v. Levigne*, 30 P. 1084, 1085 (Nev. 1883).

Public policy and other jurisdictions are in agreement with Nevada in recognizing that the defense of property does not allow a victim to use force to retrieve their property after a taking because "[t]o hold otherwise would sanction a form of vigilantism in which a property owner could employ force in pursuing a suspected thief...". *Yocum v. State*, 777 A.2d 782, 784 (Del. 2001)(analyzing Delaware's defense of property statute); *See E.g.*

People v. Scearce, 87 P.3d 228, 231 (Colo. App. 2003)("even rightful owners should not be permitted to...use force to regain their property, once it had been taken"); *Whitescarver v. State*, 962 P.2d 192, 193 (Alaska Ct. App. 1998)(defendant charged with robbery may not claim defense of property by saying he was only trying to regain his property); *State v. Miller,* 622 N.W.2d 782, 786 (Iowa Ct. App. 2000) ("[w]e align ourselves with the majority of states that do not recognize a claim-of-right defense to violent reclamations of property"). "[T]he the use of force in the protection of personal property does not extend to efforts to retrieve the property after a theft is accomplished." 6A C.J.S. Assault § 115 (2021).

Because Osorio may not use force to retrieve his property, the defense of property is not superior to self-defense. Accordingly, it was error for court to instruct jury that self-defense did not apply.

Additionally, Ronneka had the right to "lawful resist[] the commission of a public defense" - Osorio assaulting her. NRS193.230. When Osario jumped on her vehicle and shattered her windshield, she believed she was about to be injured.

Even if Court questions whether Osorio had the right to use force to retrieve his property, Court must conclude that the force Osorio used was unreasonable because he damaged the car. *See Billingsley v. Stockmen's*

Hotel, Inc., 111 Nev. 1033, 1038 (1995)(hotel proprietor may only use reasonable force to evict alleged trespasser). "A person entitled to protect property may use only as much force as is reasonably necessary to protect the property [and]... can be civilly or criminally liable for that part of the force that was excessive." 38 Am. Jur. Proof of Facts 2d 731 (1984).

Reversible error occurred because Jury Instruction #23 inaccurately stated the law and eviscerated Ronneka's self-defense theory. The failure to accurately and correctly instruct the jury on a defendant's affirmative defense of self-defense is not harmless because Due Process and the Sixth Amendment afford a defendant "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Davis v. State*, 130 Nev. 135 (2014).

Court also did not instruct jury on the defense of necessity. Although the instructions Ronneka offered may have needed amendments, court had a duty to sua sponte assist in making corrections. *Carter at* 765.

Instructions on the defense of necessity apply if defendant presents sufficient evidence to show she did not substantially contribute to the emergency or create the situation. *Hoagland v. State*, 126 Nev. 381, 387, 240 P.3d 1043, 1047 (2010). Although *Hoagland* indicated Nevada had not

codified the necessity defense, NRS 194.010(8) provides for the defense of necessity.

Necessity defense instructions are applicable for a failure to stop charge. *Carroll v. State*, 439 P.3d 956 (unpublished Nev. 2019)(defendant stuck a motorcyclist and claimed he left the scene because he was being chased); *Bedolla v. State*, 442 S.W.3d 313, 314–15 (Tex. Crim. App. 2014)(Necessity defense instructions given when defendant claimed he left the scene because the prostitute he picked up pulled out a knife, they struggled, she got out of his car, and when she leaned back into his car while he was accelerating, the open car door hit her – he did not intend to run over her).

The necessity defense also applies to murder/manslaughter charges. In *Wood v. State*, 271 S.W.3d 329, 332–33 (Tex. App. 2008), the failure to instruct the jury on the defense of necessity was reversible error in a manslaughter conviction involving the defendant driving over the father of her child as he was attacking her. When deciding if the defense of necessity is available, Court looks at the evidence from the standpoint of the defendant. *Id.*

Ronneka offered necessity/self-defense instructions to support her decision to drive away from Flamingo while Osorio was on top of her car –

she acted out of necessity and self-defense – not robbery and murder. Ronneka was scared. VIII:1890-92.

Here, the errors were not harmless because in not giving the necessity defense instruction and in directing the jury under Jury Instruction #23 that self-defense was not available, court removed Ronneka's defenses from consideration in violation of her Sixth Amendment right to present a defense. U.S. Const. amend. VI.

C. Error in not instructing jury on defense of an occupied motor vehicle or rebuttable presumptions.

Although Ronneka did not specifically ask for jury to be instructed on self-defense as it applied to defense of an occupied motor vehicle, her arguments and proposed instructions on necessity/self-defense encompassed this defense because she contended she was not guilty of failing to stop because Osorio was committing an assault on her while she was in her car. VI:1535-49.

Nevada recognizes that a person may use deadly force and has no duty to retreat to prevent a person's unlawful entry or attack on her occupied motor vehicle. NRS 200.120 states in relevant part:

> Justifiable homicide is the killing of a human being in...defense of an occupied motor vehicle...against one who manifestly intends or endeavors to commit a crime of violence or...in a violent, riotous, tumultuous or surreptitious manner, to enter

> the...occupied motor vehicle, of another for the purpose of assaulting or offering personal violence to any person...therein.

Ronneka had no duty to retreat because Osorio was the original aggressor, she had a right to be present in her car driving on Flamingo, and she was "not actively engaged in conduct in furtherance of criminal activity" when Osorio stood in front of her car, jumped on the hood, shattered her windshield, and tried to break the driver's side window. NRS 200.120(2)(no duty to retreat).

The defense of occupied motor vehicle was added by the Legislature in 2015 and it appears that Court has yet to interpret this addition to justification. The defense of occupied motor vehicle is similar to defense of habitation and self. NRS 200.120(1) specifically aligns all three defense, stating a killing in self-defense is justified "in defense of an occupied habitation, an occupied motor vehicle or a person...". "When several nouns or verbs or adjectives or adverbs...are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p. 195. Using this canon, the plain wording of NRS 200.120(1) equates the defense of an occupied vehicle the same as that of occupied habitation.

In 2015, the Legislature also added NRS 200.130(2) which states:

> There is a rebuttable presumption that the circumstances were sufficient to excite the fears of a reasonable person and that the persons killing really acted under the influence of those fears and not in a spirit of revenge if the person killing:
> (a) Knew or reasonably believed that the person who was killed was entering unlawfully and with force, or attempting to enter unlawfully and with force, the occupied...motor vehicle, of another;
> (b) Knew or reasonably believed that the person who was killed was committing or attempting to commit a crime of violence; and
> (c) Did not provoke the person who was killed.

Thus, the defense of an occupied motor vehicle in NRS 200.120 and the rebuttable presumptions listed in NRS 200.130(2) create a "castle doctrine" for motor vehicles. The castle doctrine gives a homeowner or occupant of a vehicle the presumption that they reasonably believed the use of deadly force was justified and it give them no duty to retreat. *State v. Johnson*, 948 N.W.2d 377, 386–87 (Ct. App. 2020).

In *State v. Cardenas*, 380 P.3d 866, 868–70 (N.M. Ct. App. 2016), court analyzed defense of habitation and concluded it was virtually the same as self-defense in that it contained a subjective element (how the defendant perceived the event) and objective element (how a reasonable person would act). Because defense of habitation is triggered when a person seeks to prevent a violent felony in the home, defense of an occupied vehicle would be the same and allow Ronneka to use deadly force to prevent a violent felony occurring in her vehicle. Ronneka reasonably believed Osorio

intended to kill or do great bodily harm to her when he attacked her vehicle, shattered the windshield, and tried to break the driver's window. Therefore, a defense of an occupied vehicle instruction was warranted.

Reversible error occurred because court never instructed the jury on the defense of an occupied motor or on the rebuttable presumptions for self-defense and defense of an occupied vehicle. Improper jury instructions on a defendant's right to self-defense violate the defendant's right to Due Process. *Dixon v. Williams*, 750 F.3d 1027, 1029 (9th Cir. 2014), *as amended on denial of reh'g and reh'g en banc* (June 11, 2014). An error in a self-defense jury instruction is an issue of constitutional magnitude. *Gonzalez v. State*, 131 Nev. 991, 997 (2015).

D. Inaccurate self-defense instructions.

Aside from Instruction #23, Jury Instructions #15 through #23 described self-defense. II:352-360. Because Instruction #23 took away Ronneka's right of self-defense, jury could ignore Instructions #15 through #22.

Instructions #15 through #22 appear to be based on the law prior to the 2015 changes and therefore are inaccurate.

NRS 200.120(1) states: "Justifiable homicide is the killing of a human being in necessary self-defense...". There is no duty to retreat before using deadly force under the conditions listed in NRS 200.120(2).

Rather than directing jury to look at the three-prong no duty to retreat test in NRS 200.120(2), Instruction #18 described instances wherein a defendant did not have a duty to retreat and then directed the jury that a person "engaged in criminal activity must retreat." II:355. State emphasized this wording in closing. IX:2097.

However, NRS 200.120(2) indicates the defendant must be "actively engaged in conduct in furtherance of criminal activity" not simply engaged as written in Instruction #18. As worded, Instruction #18 allowed the jury to incorrectly conclude Ronneka had a duty to retreat because she was "engaged" in prostitution or had earlier committed a theft of the watch even though the crime was complete.

Instruction #16 also substantially deviated from NRS 200.130.

NRS 200.130(1) states:

> A bare fear of any of the offense mentioned in NRS 200.120, to prevent which the homicide is alleged to have been committed is not sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person and that the person killing really acted under the influence of those fears and not in a spirit of revenge.

Instruction #16 said: "A bare fear of death or great bodily injury is not sufficient to justify a killing." II:353. However, NRS 200.130(1) states: "A bare fear of any of the offenses mentioned in NRS 200.120...". Rather than reciting the offenses listed in NRS 200.120(1), court narrowed self-defense by indicating even the fear of death or great bodily harm may be insufficient. In contrast, NRS 200.120(1) suggests a person may use force "against one who manifestly intends or endeavors to commit a crime of violence...".

Also contrary to NRS 200.130(1), Instruction #16 said: "The person killing must act under the influence of those fears alone and not in an effort to continue her felonious activity." II:353. By changing the last portion of the sentence to "fears alone...not in an effort to continue her felonious activity," court created new elements to fit State's narrative of the crime and allowed the jury to find Ronneka guilty based on elements not listed in NRS 200.130.

Finally, Instruction #16 omitted the rebuttable presumption in NRS 200.130(2) as cited in the previous section.

The errors in Instruction #16 lowered State's burden of proof by making it more difficult for Ronneka to present a self-defense case. A defendant is entitled to jury instructions on her theory of defense. *Davis v.*

State, 120 Nev. 136 (2014). To satisfy Ronneka's right to Due Process and right to present a defense, this case must be reversed because the jury instructions on self-defense were an inaccurate statement of the law. *Dixon; Gonzales*.

E. Larceny is lesser included of robbery.

Ronneka submitted a lesser included jury instruction:

> Robbery is a combination of the crime of assault with that of larceny. As a result...larceny can be a lesser included offense of robbery. If you decide that the facts do not support a conviction of robbery, you may consider the charge of larceny. VII:1535.

Court found State's proposed grand larceny Instruction #26 more appropriate, and Ronneka said, "That'll be fine." VII:1535-36.

However, as addressed in Issue III, larceny is a lesser included of robbery. The error is not harmless because Ronneka was convicted of both robbery and grand larceny and court ran the counts consecutive. III:414.

F. Grand Larceny.

Jury Instruction #26 omitted the word "intentionally" in NRS 205.220(1). II:363. State included this omission in its PowerPoint in closing. IX:2122.

Although Ronneka did not object, the error is plain because the word "intentionally" is within NRS 205.220. The omission of the word "intentionally" lowered State's burden of proof because Instruction #26

allowed the jury to convicted if jury believed the property was merely left in her car (and carried away) and the specific intent to permanently deprive was an afterthought upon finding the watch in the car.

An error that lowers State's burden of proof results in a miscarriage of justice. *Patterson v. New York*, 432 Us. 197, 215 (1977)("State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense").

G. Robbery and second-degree murder.

1. Robbery.

Ronneka had no objection to the robbery Instructions #9 and #10 II:346-7; VI:1530. Thus, court may review for plain error.

Instruction #10 appears to be legally incorrect. Jury Instruction #10 mirrors the language in *Norman v. Sheriff, Clark County*, 92 Nev. 695, 697 (1976), except for two words that State added in lines 5-6 "or followed" which allowed the jury to convict Ronneka of robbery if it determined force was used at any time after the taking of property. II:347. State emphasized this in closing. IX:2131.

The language in Instruction #10 came from cases decided prior to the 2018 version of NRS 200.280, as amended in 1993.

Prior to 1993, NRS 200.380(1) did not contain language allowing for a robbery if force was not used in the taking of property. At that time, Court concluded robbery was a crime without a fixed locus. *Norman at* 696. Because of this, "all matters '...immediately antecedent to and having a direct causal connection with (the robbery are deemed)...so closely connected with it as to form in reality a part of the occurrence.'" *Id. citing State v. Fouquette*, 67 Nev. 505, 527 (1950)(defendant beat victim and then took property in home); *Patterson v. Sheriff, Clark County*, 93 Nev. 238, 239 (1977)(defendant snatched property from victim's hands and "use[d] force or intimidation to prevent an immediate retaking...").

In 1993, Legislature added language that altered the definition of a taking of property by means of force. The Legislature defined robbery, in pertinent part, as "the unlawful taking of person property from the person of another, or in the person's presence, against his...will, by means of force or violence or fear of injury..." NRS 200.380 defined the word "taking" as occurring if a person used force or fear to: "(a) obtain or retain possession of the property; (b) Prevent or overcome resistance to the taking; or (c) Facilitate escape." NRS 200.380(1). This language was included in Jury Instruction #9. II:346. However, Instruction #10 tempered the use of force or fear as explained in Instruction #9 by allowing for force or fear to be

"spread over considerable and varying periods of time." As such, it allowed for the vigilantism that Nevada abhors as addressed in Section B.

However, statutory interpretation results in a different conclusion. In interpreting NRS 200.380, if the the plain meaning of the words in the statute are clear, the Court will not go beyond the statute to determine legislative intent. *McNeill v. State*, 132 Nev. 551, 555 (2016).

The plain meaning of NRS 200.380(1) indicates that the taking of property and the use of force or fear must be simultaneous. This is evidenced by NRS 200.380 defining a "taking" of property as having occurred "by means of force or fear if force or fear is used to..." NRS 200.380(1). Legislature did not say a robbery occurs when force is used in the three enumerated instances – they said a "taking." Thus, the use of force or fear needed for a robbery is limited to events occurring at the time of the "taking" rather than anytime thereafter. This analysis comports with decisions after 1993.

In Barkley v. State, 114 Nev. 635 (1998), the actual taking of property did not occur when a shoplifter placed an item down his pants while inside the store. Instead, the robbery and "taking" in one's presence occurred when the store employee stopped the shoplifter at the door, demanded the

property, and the shoplifter struck the store employee and ran off with the merchandise.

A different outcome occurred when a shoplifter was stopped by a store employee and then dropped the stolen goods and began fighting. In *Martinez v. State*, 114 Nev. 746 (1998) this Court found that the subsequent use of force was insufficient to elevate a larceny to a robbery because the shoplifter abandoned the property.

Moreover, robbery must be narrowly construed because a robbery may be used to convict someone of first degree felony-murder. Even the jury came to this conclusion and sent a note to the court asking: "If we find the defendant guilty of robbery, can involuntary manslaughter be the accompanying verdict? Or does by definition turn into first-degree murder?" IX:1905. Thus, in order for the State to use a robbery in felony-murder cases, the taking must be simultaneous with the force not after the theft is complete and the person leaves.

2. Second-degree murder.

Although Ronneka did not object to Instruction #11 defining second – degree murder, Court may review under plain error. Here, under plain error analysis, reversible error occurred because the jury was not accurately instructed on the elements of second-degree murder. *Ramirez.*

Instruction #11(1) failed to direct the jury to make a finding of implied malice without premeditation and deliberation, instead saying it was a killing with malice aforethought. *Desai for Desai v. State*, 133 Nev. 339, 347 (2017). Also, it did direct the jury to make a finding that the defendant committed an affirmative act that harmed the victim. *Id.*

Instruction #11 (2) discussed the felony-murder rule when indicting an unlawful act. Two elements must be satisfied when State seeks to convict for felony-murder, second-degree: (1) the predicate felony must be "inherently dangerous, where death is a foreseeable consequence of the illegal act, and (2) where there is an immediate and direct causal relationship—without the intervention of some other source or agency—between the actions of the defendant and the victim's death." *Ramirez at* 207 *citing Labastida v. State*, 115 Nev. 298, 307 (1999)(*citing Sheriff, Clark County v. Morris*, 99 Nev. 109, 118 (1983)).

Instruction #11 (2) defined second-degree felony murder without following the wording required by *Ramirez, Labastida, and Morris* as noted above. Instead, Instruction #11 allowed for a conviction based on "an unintentional killing occurring in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being or is committed in the prosecution of a felonious intent." Because Instruction #11

specifically excluded robbery, it suggested a conviction could be based on the crimes of: duty to stop or grand larceny or prostitution. II:348.

However, the application of second-degree felony-murder is limited to felonies that are inherently dangerous. The reason for this is because "[t]here can be no deterrent value in a second-degree felony murder rule unless the felony is inherently dangerous since it is necessary that a potential felon foresees the possibility of death or injury resulting from the commission of the felony." *Ramirez at* 206 (other cite omitted). In *Ramirez*, Court found defendant's substantial rights were violated when the second-degree felony-murder instructions did not specify the felony and conflicting evidence existed as to who inflicted the moral wounds in a child abuse case. *Id.* at 207.

Likewise, here, Instruction #11 did not specify the felony and only said "in the commission of an unlawful act" or "committed with felonious intent." The crimes of prostitution, duty to stop, and grand larceny are not inherently dangerous crimes and should not have been considered. Also, the evidence was conflicting as to whether Ronneka took Osorio's watch or Osorio gave it to her or he merely left it in her car or if the events involved prostitution.

Second-degree felony-murder also requires that the "death or injury is a directly foreseeable consequence of the illegal act, and...an immediate and direct causal relationship —without the intervention of some other source or agency—...between the actions of the defendant and the victim's death." *Labastida at 307.* This language is missing from Instruction #11.

State emphasized Instruction #11 in closing. IX:2106. Here, as in *Ramirez*, the errors in the definition of second-degree murder are plain and violated Ronneka's substantial rights.

H. Failure to stop and highway.

Instruction #29 is an inaccurate and incomplete statement of the law on failure to stop because it is missing the following words/elements:

> The driver of any vehicle involved in a crash [uses the word collision instead]... resulting in bodily [omits the word bodily] injury to...a person shall immediately stop his or her vehicle at the scene of the crash [uses the word collision instead] or as close thereto as possible, and shall forthwith return to and in every event shall remain at the scene of the crash [uses the word collision instead]... NRS 484E.010.

Chapter 484E is entitled: "Crashes and reports of crashes." Thus, collision is not the operative word for this crime.

A crash means another vehicle colliding with a vehicle, person, or object. *Gaulden v. State*, SC14-399, 2016 WL 4082429 (Fla. 2016). NRS 676A.075 defines a crash as having the same meaning as an accident –

"unexpected or unforeseen event happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." NRS 679A.075; II:368. A collision could include a mere bump while a crash is more violent.[4] By using the word collision rather than crash, court suggested a lesser standard of proof was needed for a violation of NRS 484E.010.

Additionally, Instruction #35 directed jury to find that Flamingo Road was a highway. II:372. However, the jury is required to decide each element of a crime. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *In re Winship*, 397 U.S. 358, 364 (1970).

Although not objected to, the errors are plain because Instruction #29 did not follow the wording of NRS 484E.010 and lowered the State's burden of proving a crash and a highway.

II. EVIDENCE INSUFFICIENT.

A. Facts.

Ronneka incorporates Statement of Facts.

B. Standard of review.

The presumption of innocence forms the structure for a criminal defendant's fundamental right to a fair trial. *Hightower v. State*, 123 Nev.

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[4] See https://www.merriam-webster.com/dictionary/collision; https://www.merriam-webster.com/dictionary/crash.

55 (2007); U.S. Const. Amend. V; Amend. XIV; Nev. Const. Art. 1 Sec. 8. "Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence[5] beyond a reasonable doubt..." NRS 175.201.

On appeal, Court decides "whether jury, acting reasonably could have been convinced to that certitude [of beyond a reasonable doubt] by the [direct and circumstantial] evidence it had a right to consider." *Wilkins v. State*, 96 Nev. 367, 374 (1980). Court only relies on *competent evidence* when assessing whether sufficient evidence was presented to prove each and "every element of a crime," and "every fact necessary to prove the crime" beyond a reasonable doubt. *Apprendi at* 476; *In re Winship*; NRS 175.191; NRS 175.201. Court considers the evidence in the light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

C. Law.

Ronneka incorporates argument and law from Issue I.

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[5] *Stephans v. State*, 262 P.3d 727 (Nev. 2011), incorrectly suggested a lower standard of review by referencing insufficiency of the evidence claims for federal habeas review rather than in NRS 175.201. *See Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012).

D. Duty to Stop.

Ronneka incorporates Issue I (H) here. For a violation of NRS 484E.010(1), State needed to prove:

> The driver of any vehicle involved in a crash on a highway or on premises to which the public has access resulting in bodily injury to or the death of a person shall immediately stop his or her vehicle at the scene of the crash or as close thereto as possible, and shall forthwith return to and in every event shall remain at the scene of the crash until the driver has fulfilled the requirements of NRS 484E.030.

I:002-03;II:366-75.

A crash has the same definition as an accident. NRS 676A.075;II:368. NRS 679A.075 defines an accident. II:368.

State failed to prove the element of "any vehicle involved in a crash."

Determining if State presented sufficient evidence under NRS 484E.030 requires Court to apply rules of statutory construction. *Coleman v. State,* 134 Nev. 218, 218 (2018). The plain meaning of the words "any vehicle involved in a crash" means a vehicle must crash into something: a person or another vehicle. *See Mangarella v. State*, 117 Nev. 130, 133 (2001)(other quote omitted)(court gives words their plain meaning and construes statute as a whole).

The words "any vehicle involved in a crash" were interpreted by the Florida Supreme Court in *Gaulden v. State,* 195 So.3d 1123 (Fla. 2016).

The Florida statute in *Gaulden* is similar to NRS 484E.010(1). Fla. Stat. Ann. § 316.062 (1) states: "The driver of any vehicle involved in a crash resulting in injury to or death of any person or damage to any vehicle or other property which is driven or attended by any person..." NRS 484E.010(1) does not include the wording a crash resulting in damage to a vehicle or property.

In *Gaulden*, the defendant was convicted of leaving the scene of a crash, involving death. Defendant picked up a passenger, drove away, but then returned after they began arguing inside the vehicle and the defendant stopped his truck in the roadway. While they were arguing, the passenger opened the passenger door. At this point, the truck accelerated and swerved and the passenger door slammed shut. Defendant drove away. Thereafter, the passenger's body was found adjacent to the road, with evidence of road rash, and other injuries to include a fractured skill and contusions. Court found there was insufficient proof that the vehicle had crashed or collided with a person, car, or object.

A similar result occurred in *Daugherty v. State*, 207 So.3d 980 (Fla.Ct.App. 2016). In *Daugherty*, defendant and the victim were arguing while the defendant was seated in a parked car. When he accelerated to leave, the victim was holding on to the window and fell to the ground. Court

reversed Daugherty's conviction for leaving the scene of a crash, concluding State failed to prove a crash occurred between defendant's car and the victim.

Likewise, in *Edwards v. State*, 254 So.3d 1195 (Fla.Ct.App. 2018), the court reversed a conviction for leaving the scene of a crash, finding the car did not crash into the victim because the victim fell while climbing out of a window of the car and collided with the pavement.

The same result should occur here. Ronneka's vehicle did not crash into anything. Landale said when Osorio jumped in front of Ronneka's moving car, she abruptly stopped, and she did not hit or run over Osorio. VI:1267-68. He testified that the only contact between the vehicle and Osorio was Osorio jumping on the car after it stopped at the intersection of Flamingo and Koval. VI:1261-62;1268. When Ronneka drove away, Osorio remained on the car for more than 20 feet before falling off. VI:1277-78. The car did not swerve but just sped up. VI:1274. Therefore, Ronneka's vehicle was not involved in a crash with a person, an object, or another vehicle and her conviction must be reversed.

Also, for a conviction under NRS 484E.101, State needed to prove Ronneka knew or should have known she was involved in crash. *Clancy v. State*, 129 Nev. 840, 846–47 (2013); II:371. It was Osorio, not Ronneka,

who jumped on her car, shattered the windshield to the point it would have been hard for Ronneka to see, and tried to break the driver's side window. Thus, Ronneka's vehicle did not crash into Osorio and it is reasonable to believe she did not know what occurred was a crash or know he was injured. Moreover, had the jury been properly instructed on self-defense, necessity, and defense of an occupied motor vehicle, it is likely they would not have found Ronneka guilty of this crime. Accordingly, Ronneka's conviction for failure to stop must be reversed.

E. Robbery.

1. No force.

Ronneka was accused of robbery with a deadly weapon by:

> ...willfully, unlawfully, and feloniously tak[ing] personal property, to wit: A Rolex watch from the person of Eduardo Osorio, or in his presence, by mean of force or violence, or fear of injury to, and without the consent and against the will of Eduardo Osorio, with use of a deadly weapon, to wit: a motor vehicle, Defendant using force or fear to obtain or retain possession of the property, to prevent or overcome resistance to the taking of the property, and/or to facilitate escape.

I:002; Instructions-II:339;346-47. Jury returned a verdict for robbery. II:336.

If a defendant takes property without the use of force or violence or fear of injury, the evidence is insufficient to support a robbery conviction. *Martinez* (defendant shoplifted a roast and dropped it when stopped outside

the store); *Ibarra v. State*, 134 Nev. 582 (2018)(after victim gave the defendant her phone to use, defendant ran away with phone).

As noted in Issue I, subsection G(1), and incorporated here, a taking as defined in NRS 200.380(1) requires the defendant use force simultaneously with the taking.

There is no evidence as to how the Rolex watch ended up in Ronneka's vehicle. In closing, State admitted Ronneka did not use force against Osorio to take the Rolex while he was in her vehicle. VII:1660. The Defense argued the watch could have fallen off or was given to Ronneka as payment for prostitution. VII:1663-65.

In closing, State argued the force or violence for a robbery occurred when Osorio jumped in front of her car, jumped on the hood, and then banged and shattered her windshield. VII:1658-59. The only force State attributed to Ronneka was driving away at open throttle. VII:1660. However, Salisbury admitted that the car was not going full throttle at the time Osorio fell but was going 23 m.p.h.VII:1641.

Here, because jury rejected State's theory that Ronneka used her vehicle as a deadly weapon and State pled no other theory for the use of force, Court must find the evidence was insufficient to prove robbery.

2. Victim jumping on vehicle was not an ongoing robbery.

As explained in Issue I (G)(1) and incorporated here, force must be used simultaneous with the taking. Here, an alleged robbery was not ongoing because Ronneka did not use force or violence to take Osorio's watch or push him out of her car. She left. There was a break between Osorio leaving her car and jumping on her vehicle in the middle of the street – it was not an immediate attempt to retake property. The taking and the force must be one continuous transaction. See *Patterson v. Sheriff, Clark County*, 93 Nev. 238, 239–40(1977).

Furthermore, as explained in Issue I (B), defense of property did not allow Osorio to jump on her car and break the windshield and try to attack her. Ronneka had reached a point of relative safety prior to Osorio jumping on her car.

Finally, a rational jury would have decided Ronneka was not guilty of robbery based on the available defenses, discussed in Issue I, if jury had been correctly instructed on the defenses and law.

F . Grand Larceny

Grand larceny, NRS 205.220(1)(a) required a finding that the defendant acted "intentionally" when taking property with the intent to permanently deprive the owner. II:364; see Issue I (F). State failed to prove

the crime because there was no evidence as to how the Rolex ended up in Ronneka's car.

G. Second-degree murder.

State pled second-degree murder with malice or felony-murder.

NRS 200.2020 defines malice as:

> 1. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof.
> 2. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

II:344.

Second-degree murder "requires a finding of implied malice without premeditation and deliberation." *Desai at* 347.

> Implied malice is demonstrated when the defendant "commit[s] an[ ] affirmative act that harm[s] [the victim]." *Id.*; *see also* NRS 193.190 (requiring unity of act and intent to constitute the crime charged); NRS 200.020(2) ("Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.").

Id.

State presented no evidence that Ronneka acted with malice.

Furthermore, as to second-degree felony-murder, if jury returned a verdict based on prostitution, grand larceny, or duty to stop, then it erred under the law as discussed in Issue I (G)(2) and incorporated here.

III. DOUBLE JEOPARDY PROHIBITS CONVICTIONS FOR ROBBERY AND GRAND LARCENY.

Ronneka was convicted of robbery and grand larceny for taking the same "Rolex watch" at the same time, in the same incident. I:002;II:339.

The United States and Nevada Constitution protect a person from being twice put in jeopardy for the "same offense." US Const. amend. V, XIV; Nev. Const. Art 1, Sec.8(1). Under constitutional jurisprudence, courts presume "where two statutory provisions proscribe the same offense" a legislature does not intend to impose two punishments. *Whalen v. United States*, 445 U.S. 684, 692 (1980).

To determine if two different criminal statutes penalize the same offense under the federal constitution, Court first reviews the statutory construction of the two provisions and uses an analysis, with a constitutional overlay, as proscribed by *Blockburger v. United States,* 284 U.S. 299 (1932) and discussed in *Jackson v. State*, 128 Nev. 598, 603–04 (2012).

Beginning with statutory construction principles, statutes must be given their plain meaning and construed as a whole so "not be read in a way that would render words or phrases superfluous or make a provision

nugatory." *Mangarella at* 133 (other cite omitted). Court presumes legislature enacts a statute "with full knowledge of existing statutes relating to the same subject.'" *DeStefano v. Berkus*, 121 Nev. 627, 631 (2005). Under the whole-text canon, court views law as a whole, considering its structure and the relationship of the parts to the whole. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (Thomas/West 2012).

"[U]nder *Blockburger*, if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses. " *Jackson* at 1278, *citing Barton v. State*, 117 Nev. 686, 692 (2001), *overruled on other grounds in Rosas v. State*, 122 Nev. 1258 (2006). Court only needs to conclude that "the elements of only one of the alternative means...[to commit the crime are] included in the greater, charged offense..." *Alotaibi v. State*, 133 Nev. 650, 651 (2017).

Court has identified a robbery as a larceny with the use of force. *Martinez v. State*, 114 Nev. 746, 748 (1998). However, Court has not explicitly concluded, in a published decision, that larceny is a lesser offense of robbery under Double Jeopardy principles.

Robbery is defined, in pertinent part, as an: "...unlawful taking of personal property from the person of another, or in the person's presence, against his will, by means of force or violence or fear of injury, immediate or future, to his...person or property..." NRS 200.380.

Larceny is defined in relevant part as occurring when a person: "Intentionally...takes...[p]ersonal... property..." NRS 205.220(1); NRS 205.240(1).

Accordingly, the plain meaning of the words used by the Legislature in defining these two crimes shows the elements for larceny mirror the elements of "unlawful taking of personal property" in robbery.

Yet in the unpublished decision of Hodges v. State, 439 P.2d 957, *2 (Nev. 2019), Court found petit and grand larceny were not lesser included offenses of robbery because each contained an element not included in robbery – value.

In *Cleveland v. State*, 85 Nev. 635, 636 (1969), Court held that the value of stolen property is "a material allegation that the state must prove in the prosecution of grand larceny as a felony." Yet in *Grant v. State*, 117 Nev. 427, 434 (2001), when State failed to present sufficient evidence at the preliminary hearing to establish the value alleged for the degree of grand larceny pled, district court amended the Information rather than strike the

count. Thus, district court treated it as a sentencing factor rather than an element.

In accord with the outcome in *Grant*, in *Alotaibi at* 650, 650–51, Court held that "a statutory element that serves only to determine the appropriate sentence for the offense but has no bearing as to guilt for the offense is [not] an element of the offense for purposes of the lesser-included-offense analysis." Whether value is a sentencing factor or a material element of larceny is important for Double Jeopardy purposes because robbery does not contain a value element. *Williams v. State*, 93 Nev. 405, 407–08 (1977).

The Hodges Court found the value of stolen property was an element of larceny, rather than a sentencing factor, because the Legislature put grand larceny, NRS 205.220(1)(a)), and petit larceny, NRS 205.240(1)(a)(1), in separate statutes. However, Hodges reached this conclusion by incorrectly evaluating the statutory construction of the larceny statutes and *Alotaibi.*

In Chapter 205, the Legislature devoted an entire section on larceny. The definition of property (NRS 205.2195) and the test for the determination of values (NRS 205.251) apply to grand and petit larceny, as well as to the other larceny crimes.

At the time of the alleged crimes, in 2018, NRS 205.240(1)(a)(1) and NRS 205.220(1) contained the same definition for larceny but included

different value amounts for the property taken. NRS 205.240(1), petit larceny, defined the value as "less than $650" and subsection (2) listed the penalty - misdemeanor. NRS 205.220(1)(a), grand larceny, listed the value amount as $650 or more. A review of the structure of the two statutes indicates the value amounts listed in NRS 205.220(1)(a) for grand larceny and in NRS 205.240(1)(a)(1) for petit larceny were meant to distinguish between the crimes. Otherwise, each larceny read the same.

There is another difference between NRS 205.240(1)(a)(1) and NRS 205.220(1) that indicates value is a sentencing factor. Until 1997, NRS 205.220(1)(a) included the definition of grand larceny, the value amount of the property taken, and the penalty in the same statute – just as it did in NRS 205.240 for petit larceny. However, in 1997, the Legislature enacted NRS 205.222, a separate grand larceny statute with several different sentencing options for different penalties based on value. Thus, at this point, by enacting NRS 205.222, the Legislature made it clear that value was a sentencing factor.

It is not uncommon for the Legislature to enhance a crime or to put sentencing for a crime in a separate statute or in a separate section of the same statue as in *Alotaibi. E.g.,* NRS 200.481; NRS 200.366; NRS 193.165. Accordingly, based on the layout of the larceny section and the different

sentencing possibilities dependent on the value of the items taken, value is a sentencing factor and not an element of the crime.

If value is a sentencing factor for grand and petit larceny, then Ronneka cannot be convicted of grand larceny and robbery because larceny is the lesser included of robbery. *U.S. v. Belt,* 516 F.2d 873, 875 (8th Cir.1975); *see E.g, State v. Jaynes*, 342 N.C. 249, 275 (1995); *State v. Carter*, 249 Ariz. 312, 317 (2020); *Clayton Motors v. Commonwealth*, 14 Va.App 470 (1992); *Jackson v. State*, 587 So. 2d 1168, 1169 (Fla. Dist. Ct. App. 1991); *Com. v. Norman*, 406 Mass. 1001 (1989); *Rutkowski v. United States*, 149 F.2d 481, 482 (6th Cir. 1945).

As an issue of constitutional magnitude, the protections of Double Jeopardy may be raised for the first time on appeal. *Murray v. State*, 113 Nev. 11, 17 (1997); *See NRS 178.602* (plain error review). This Court uses de novo review to decide issues of a constitutional proportion such as double jeopardy. *Davidson v. State*, 123 Nev. 892, 896 (2008).

IV. TRIAL COURT FAILED TO CONDUCT VOIR DIRE IN A MANNER ASSURING FOR A SELECTION OF IMPARTIAL JURORS AND VIOLATED RONNEKA'S RIGHT TO VOIR DIRE.

During voir dire, State asked four questions about prostitution.

Initially, State asked if any juror had an experience with someone in a casino they thought was a prostitute. IV:915 When Juror #290 responded yes, prosecutor asked him:

- If prostitutes were "fairly prevalent in the casino industry." IV:918.
- "If there is any allegation that there may have been an act of prostitution involved here, would that affect your ability to be fair and impartial?" IV:918.
- "If the victim, from both the victim and/or the defendant's side, that shouldn't matter one way or the other, the facts are facts?" IV:918-919.

Then State asked entire panel: "Anybody have such a strong feeling about the nature of prostitution that would affect your ability to be fair and impartial here?" IV:919. No one responded in the affirmative.

Defense Counsel began voir dire, he saying:

> "Ms. Guirdy is a prostitute, that's going to come out in the case; it's a fact of this case. Is there anybody who's going to be prejudiced by that fact and not be able to look past that and give her a fair trial? Nobody..." V:989.

Court asked Defense Counsel to approach the bench and accused him of "pre-trying the case with the jury," claiming the form of the question allowed him to be a witness. V:990. She cautioned Defense Counsel.

Although Defense Counsel said he had no more questions like that, he responded: "....it is an essential fact of the case and it will come out in opening statements either way." V:990. However, State contended he could not ask questions indicating Ronneka was a prostitute. V:990.

Thereafter, in opening statements, State said Osorio may not even know that he was engaged in prosecution that night with Ronneka. V:1142. State said vice-detectives became involved because "there is a phenomenon in this town called a trick-roll, in which somebody, either a prostitute or someone acting like a prostitute...suggest[s] they want to have some sort of sexual liaison with someone...in order to steal their property." V:1149. Osorio "thought he was going to have some sort of sexual contact with [Ronneka]." V:1153.

At four points during the trial, State brought up prostitution. Detective Gatus discussed a "trick-roll" and explained how it was associated with prostitution and theft. VI:1370. Salisbury inferred Ronneka was a prostitute when discussing Caesar's video, mentioning Osorio came into contact with her outside the club and shortly thereafter he was walking arm and arm with her to her car. VII:1489-90.

In the video/transcript of Ronneka's interrogation that was played for the jury, Detective Wright told Ronneka he was in Vice, he was a vice expert, and he had done his homework thereby inferring Ronneka was a prostitute. IX:1827-28;1898. And during the interrogation Ronneka made several comments referencing prostitution. She said: "I didn't have sex...Yes, yes, I do-yes, you know – yes, I was in the lifestyle..." IX:1842-3.

And the detective indicated he felt she was lying about not have sex with Osorio. IX:1843. Ronneka said she never asked Osorio for anything and he did not give her anything – "It wasn't even that type of a party." IX:1893;1851.

In closing, Ronneka admitted that on occasion she has worked as a prostitute. VIII:1663.

In rebuttal, State said Ronneka admitted she was a prostitute when interrogated and argued that in the Caesar's video Ronneka looked like a prostitute coming onto a john when walking up to a man in a suit. VIII:1675;1677. State called her a pro. VIII:1677.

The right to a fair and impartial jury includes the need for adequate voir dire to help recognize and exclude unqualified jurors. U.S.Const. amend. VI, XIV; *McNally v. Walkowski*, 85 Nev. 696, 701 (1969). "The purpose of voir dire examination is to determine whether a prospective juror can and will render a fair and impartial verdict on the evidence presented and apply the facts...to the given law." NRCP 17(2). Questions should be geared towards uncovering direct, implied, and inferred bias. NRS 16.050; NRS 175.036; NRCP 17 (2); NRCP 17 (6)(N), (O).

Nevada recognizes that jurors may have a bias against prostitution. In *McNally,* the parties were involved in a car accident after visiting a house of

prostitution. During voir dire, jurors were asked if anyone would be influenced in their deliberations or prejudiced in anyway by the fact that the parties had been at a house of ill repute prior to the car accident. Although jurors apparently responded in the negative, McNally later learned that when deliberations commenced several jurors said McNally was wrong in taking Walkowski to a house of prostitution and therefore McNally should not be permitted to recover damages in the accident. The jury verdict was reversed on appeal. *Also see Walkowski v. McNally*, 87 Nev. 474 (1971).

Prostitution is a touchy subject. Some jurors may be too embarrassed to admit they have used the services of a prostitute in the past, or may have strong religious beliefs against prostitution, or they may equate prostitution with drugs, corruption, and crime. § 12:30.Illustrative voir dire—When the charge is prostitution, Jury Selection: The Law, Art and Science of Selecting a Jury § 12:30 (2021). More often than not, a juror may not indicate they have a bias but further questioning will expose it. Therefore, for the court to contend that it was impermissible for Ronneka to ask questions involving the fact that she was a prostitute or questions about prostitution was an abuse of discretion. *See Thomas v. Hardwick*, 126 Nev. 142 (2010)(Court uses an abuse of discretion standard when determining if trial court erred in allowing jurors to be questioned about medical malpractice).

Because a central factor in this case involved allegations of prostitution, court's decision to prohibit any further questioning regarding Ronneka being a prostitute or prostitution is reversible error. *See People v. Strain*, 194 Ill. 2d 467, 481 (2000)(conviction reversed when an integral part of trial involved evidence of gang-related activity and trial court's voir dire did not adequately guarantee that jurors did not harbor prejudice or bias against street gangs). Accordingly, Ronneka was denied Due Process which requires a voir dire process that allows for an informed and intelligent basis for asserting challenges for-cause and peremptory challenges.

V. PROSECUTORIAL MISCONDUCT IN OPENING.

A. Prosecutorial misconduct and standard of review.

A prosecutor is a "representative of a sovereignty whose interest in a criminal case is not that it shall win, but that justice shall be done." *Lay v. Nevada*, 116 Nev. 1185, 1194 (2000) *citing Berger v. United States*, 295 U.S. 78, 88 (1935) *overruled on other grounds by Stirone v. United States*, 361 U.S. 212 (1960). A prosecutor must act fairly and follow the rules. *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993).

When determining if a prosecutor acted improperly, Court first decides if the conduct was improper and then if reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1192 (2008).

For errors that were objected to, Court applies a harmless error standard unless the misconduct is of a constitutional nature, and then, Court will reverse unless State demonstrates, beyond a reasonable doubt, the error did not contribute to the verdict. *Id.*

B. Opening Statement .

A prosecutor's opening statement must be confined to the nature of the case, "issues in the case[,] and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible." *Watters v. State*, 129 Nev. 886, 890 (2013) *citing* ABA *Standards for Criminal Justice: Prosecution Function and Defense Function,* Standard 3–5.5 (3d ed.1993).

In an opening statement, a prosecutor outlines the facts he intends to present to prove the charges. *Garner v. State*, 78 Nev. 366, 371 (1962)(prosecutor made improper references to defendant's criminal history). He has an ethical "duty to state such facts fairly, and to refrain from stating facts which he will not be permitted to prove." *Id.* However, '[e]ven if the prosecutor overstates in his opening statement what he is later able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith.' *Rice v. State,* 113 Nev. 1300, 1312–13 (1997), *abrogated on other grounds by Rosas v. State,* 122 Nev. 1258, 1265 (2006).

1. Bad faith - "Stop, I want my watch back."

In his opening statement, the prosecutor acted in bad faith when telling the jury that Osorio: "...jumped out in front of her [car] and put his hands on her hood and said, Stop, I want my watch back." V:1153 (emphasis added).

The prosecutor knew this statement was false because, prior to trial, he presented two eye-witnesses at the Grand Jury and they testified they could not hear what Osorio was saying. III:494;500-02. At trial, State presented one eyewitness who said Osorio was yelling in "another language" and the witness did not identify any words said. VI:1261;1268. Thus, prosecutor acted in bad faith because he did not have a reasonable belief that he was going to present evidence at trial that Osorio was yelling "Stop, I want my watch back." V:1153.

Upon hearing the prosecutor make this comment, Ronneka objected: "Objection, speculation, not in evidence...inappropriate." V:1153.

Rather than admitting his error, the prosecutor doubled down on the untrue facts by telling the court and the jury: "This is all—what the evidence is going to show." V:1153. Yet he knew no one knew what Osorio said. Thus the prosecutor's statement to the court and jury was made in bad faith.

The court seemed to believe that the prosecutor meant a detective who was not at the scene would make a hearsay representation as to what Osorio yelled. V:153-54. Court told prosecutor: "[W]e want to talk about...what you anticipate the detectives testify to..." V:1153. With that, the prosecutor moved on. V:1154.

In closing, the prosecutor never claimed Osorio jumped on the hood of Ronneka's car and yelled: "Stop, I want my watch back." He knew it was not true.

It is unethical for an attorney "in trial, [to] allude to any matter that the lawyer does not reasonably believe... will not be supported by admissible evidence,..." *Every trial Criminal Defense Resource Book* § 56:1 *citing* ABA Model Rules of Professional Conduct, Rule 3.4(e); *Riley v. State.* 107 Nev. 205, 212 (1991)("'In general, the district attorney has a duty to refrain from stating facts in his opening statement that he cannot prove at trial'"). "[I]t is his duty to state such facts fairly, and to refrain from stating facts which he will not be permitted to prove." *Garner at* 371; Nevada Rules of Profession Conduct, Rule 3.4.

The prosecutor's claim that Osorio was yelling "Stop, I want my watch back" was not harmless. V:1153. The prosecutor knew no one could testify as to what Osorio was yelling and he needed the jury to believe

Osario made this statement in order to convict Ronneka of robbery and felony-murder since State had no direct evidence as to how Osorio's watch ended up in Ronneka's possession. He needed the jury to believe that Osorio was trying to get his watch back when he jumped on her hood. So, he told them a fact that was inaccurate in order to prosecute this theory.

Defendant's right to a fair trial is denied if the prosecutor takes actions to undercut the presumption of innocence in opening statements. *Watters* (conviction reversed when prosecutor used a computerized slideshow presentation in opening with a slide showing defendant's booking photo with the word "GUILTY" superimposed over defendant's face). While a prosecutor "may strike hard blows, he is not is not at liberty to strike foul ones." *Berger v. United States,* 295 U.S. 78, 88 (1935).

2. Prosecutor narrated videos, gave personal opinion, and argued.

Throughout most of his opening statement, the prosecutor gave a narrative which included his opinion as to what was on the several different videos without mentioning any witnesses. V:1142-54. Other than mentioning "the police" or "vice detectives," he specifically mentioned Lucas Siomes, Osorio's father, and Ronneka.

Ronneka objected several times. When prosecutor said, "That appears to be a figure that's on the hood of the vehicle up by the driver's side

window of that vehicle," court told him to move on. V:1147. When prosecutor repeatedly and continually argued, Ronneka said: "[he is] not even talking about what the evidence is going to show." V:115053. Court told the jury he made a misstatement and reminded the jury what an attorney says is not evidence. V:1153.

Then, prosecutor summed up what he thought the evidence would prove by telling the jury Osorio thought he was going to have sexual contact with Ronneka, she lured him into her vehicle, and during the interaction, slipped off his watch, and he tried to stop her by jumping on the car and was yelling, "Stop I want my watch back." He did not have facts to prove all of these assertions – this was simply argument. Court told him he was teetering on argument." But prosecutor was not teetering, he was arguing.

It is inappropriate for the prosecutor to express personal opinions or to present argument. Nevada Rules of Profession Conduct, Rule 3.4. A prosecutor should not "inject his personal opinion or beliefs into the proceedings or attempt to inflame the jury's fears or passions in the pursuit of a conviction." *Valdez at* 1192. These errors were not harmless because his unfair comments tainted the jury's perception of the evidence and undercut the presumption of innocence.

VI. PREJUDICIAL ERROR OCCURRED WHEN COURT ALLOWED JURY TO SEE A GRUESOME PHOTOGRAPH THAT INFLAMED THE JURY.

Ronneka objected to jury seeing a picture of Osorio in a hospital bed with blood covering his face and body (Exhibit 41), because the picture was unduly graphic, did not add any additional information, and showed "a man's head was smashed on the highway and everyone knows that." VI:1239; IX:1976.

State contended Exhibit 41 was necessary to show the condition of Osoria's injuries. State also admitted another hospital photo and several autopsy photographs. VI:1239-41;1279-82.

Trial court allowed jury to see Exhibit 41, suggesting it was relevant because intent was not part of the crime. VI:1239.

Thereafter, CSA Strumillo, a witness without any medical background, testified that as part of her investigation she took pictures of Osorio at the hospital to show his injuries. VI:1241-48. State presented no medical expert to testify to Exhibit 41.

Court reviews trial court's decision under an abuse of discretion standard. *Sipsas v. State*, 102 Nev. 119, 122–24 (1986).

District court acts "as a gatekeeper by accessing the need for the [photographic] evidence...and excluding it when the benefit it adds is

substantially outweighed by the unfair harm it might cause." *Harris v. State*, 134 Nev. 877, 880 (2018). Court's ruling that Exhibit 41 was relevant because intent was not part of the crime suggests the photograph was irrelevant rather than relevant.

A photograph is relevant, if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015; NRS 48.025. State never claimed the admission of Exhibit 41 served to prove any elements of the crimes. State said it was being used to show how Osorio looked. VI:1239-38. Ronneka did not contest that Osorio's head was smashed or that he was bleeding. Exhibit 41 did not make any fact more or less probable and should have been omitted. Moreover, State had other photos, several autopsy photographs, and another hospital picture, thereby having no need for Exhibit 41. IX:1976.

However, even if relevant, Exhibit 41 was not admissible because its probative value was substantially outweighed by unfair prejudice. NRS 48.053. "Photographic evidence is admissible unless the photographs are so gruesome as to shock and inflame the jury." *Wesley v. State*, 112 Nev. 503, 513 (1996)(autopsy photographs explained injuries and coroner's findings); *McNeal v. State,* 551 So.2d 151, 159-60 (Miss. 1989)(photographs of

victim's decomposed, maggot-infested skull found so gruesome as to constitute reversible error). Where photographs are "gruesome or unduly prejudicial" they should be excluded.

A witness observed Osorio fall head first off Ronneka's vehicle. The coroner's testimony and autopsy pictures also indicated Osorio's major injuries were to his head. IX:1980-84. Therefore, Exhibit 41 served no purpose except to inflame the jury.

The error was not harmless because, in closing, State asked the jury to look at the autopsy photos and photos of Osorio in the hospital to decide how he was injured. VII:1680. In closing, State never asked the jury to consider the coroner or her findings of injury and conclusion. VII:1650-61;1674-84.

VII. PROSECUTORIAL MISCONDUCT IN CLOSING.

In rebuttal closing, prosecutor made several incorrect factual statements not supported by evidence:

- when Osorio got out of her car she did not wait for him to be fully out of the car before she drove off. VIII:1678-*See Exhibit 105.*
- when she drove off the curbing forced her to go the other way and the easiest way was to back down Koval. VIII:1679- *See* VII:1513;1565-66.

- Ronneka said she knew why Osorio was banging on her window. VII:1681-*See* VIII:1800-04;1807.

These statements were inaccurate and contradicted Ronneka's defense that she did not steal Osorio's watch, she was the victim of Osorio assaulting her by jumping on her car, and by driving back down Koval towards Flamingo she was not trying to hide. VIII:1663-64;1669;1670-71. When prosecutor's misstatements in closing, though presumably unintentional, directly contravene the defendant's defense reversal is warranted. *Anthony v. United States*, 935 A.2d 275 (D.C. 2007).

Also, as discussed in Issue V, prosecutor sought to inflame the jury by telling them to look at the hospital and autopsy phots "where Mr. Osorio is laying on that slab, that slab that she put him on..." VII:1680. Misconduct occurs when a prosecutor employs arguments intended to inflame the passions or emotions of the jury or diverts the jury's attention away from the elements of the crime by making inflammatory appeals to the jury's passion and fears. *United States v. Young*, 470 U.S. 1, 9 n.7 (1985); *People v. Moore*, 356 Ill.App.3d 117, 120 (2005); *ABA Standards for Criminal Justice* 4-58; *Valdez.*.

The errors are plain and prejudicial because the facts presented at trial did not support the prosecutor's statements. "'[I]mproper prosecutorial

comments are looked upon with special disfavor when they appear in rebuttal because at that point the defense counsel has no opportunity to contest or clarify what the prosecutor has said.'" *Anthony citing Hall v. United States*, 540 A.2d 442, 448 (D.C. 1988).

VIII. DUE PROCESS WAS VIOLATED BY STATE FAILING TO CORRECTLY ENDORSE SALISBURY AS AN EXPERT, NOT GIVING DEFENSE HIS SUPPLEMENTAL REPORT UNTIL AFTER HE TESTIFIED, AND BECAUSE SALISBURY WAS NOT QUALIFED.

Ronneka incorporates Statement of Facts.

Salisbury testified at the grand jury as a lay witness – primary investigator. III:505-33. After filing the Indictment, State noticed Salisbury as a lay witness (I:187-90;II:311-140) and as a possible expert witness (or designee)(I:010-39;II:288-93). In State's last supplemental witness notice filed on 08/05/19, Salisbury was listed as a lay witness. II:311-14. Because State failed to attached documentation showing Salisbury was a qualified expert in accident reconstruction, Ronneka was surprised by some of his testimony and surprised she was not given Salisbury supplemental report. VI:180-81;1597-99. By not correctly noticing Salisbury, State violated NRS 174.234(2).

Ronneka objected when Salisbury gave an opinion on the use of force applied to Osorio and on vehicle speed acceleration VII:1480-81;1513. Later, during cross-examination, when Salisbury talked about the speed calculations he put in his supplemental report that he had given to the prosecutor, Ronneka said she never received the report. VII:1589-90. The prosecutor then told the jury "Mr. Mueller has that supplemental report." VII:1590. In front of the jury, court ordered Defense Counsel to find the report.

Mr. Mueller verified he never received the report and prosecutor never found an ROC. Thereafter, Ronneka was given a 63 page report. Ronneka objected to not having been given the information on speed calculations but not to Salisbury's qualifications. Court remedied the matter by allowing Salisbury to be recalled but never told the jury Ronneka had not been given the report. VII:1591;1597-99;1610-37.

Although Ronneka did not lodge an objection, the record indicates Salisbury was not qualified in accident reconstruction or speed calculations. The investigation was complex and it was not a typical car crash. VII:1486.

An expert must be qualified in the field of their testimony. NRS 50.275. If qualified in a particular area, the expert may give an opinion on

that subject. NRS 50.285; *Mathews v. State*, 134 Nev. 512, 514 (2018) *citing Hallmark v. Eldridge*, 124 Nev. 492, 498 (2008).

Salisbury said he had been in the fatal detail since 2012 (6 years) and as part of his job he reconstructed traffic collisions. VI:1456. His training in reconstruction consisted of 600 additional hours '[i]n the sciences involved in doing a collision reconstruction, psychology, physics, mathematics, dynamics." VI:1456-7. He testified 3 or 4 times prior. VI:1457. However, there was no evidence that Salisbury previously testified as an expert in accident reconstruction, or had received any specific training from Northwesterm\n or any other renowned institution. *see* https://sps.northwestern.edu/center-for-public-safety/crash/.

Court may review under plain error because the record does not support Salisbury's being qualified as an expert in accident reconstruction or in determining speed. *See Lombard v. Dobson*, 230 N.Y.S.2d 47 (1962)(consulting engineer who took a few months of training in accident reconstruction was not qualified to voice an opinion on the speed of the car); *Abdulla v. Volungis*, 439 P.3d 955 (unpublished Nev. 2019)(expert was qualified to give an opinion because based on his investigative experience in handling over 20,000 accidents, and upon his education and training). While Salisbury's background qualified him to testify as an accident investigator

who documents what occurred, he was not qualified as an accident re-constructionist who recreates the accident.

Ronneka's right to Due Process was violated by State presenting an unqualified expert who gave an unreliable opinion as to how the accident occurred and the speed of the Mercedes; and, State used this opinion to argue the speed at which she accelerated was force for a robbery. *See Jinro America Inc. v. Secure Investments, Inc.,* 266 F.3d 993 (9th Cir. 2001)(verdict reversed based on unqualified expert's opinion). Additionally, Ronneka did not receive Salisbury's report until after he had testified and then needed to be recalled.

IX. UNREASONABLE SEARCH AND SEIZURE.

A. Motions and standards.

Ronneka filed 3 motions to suppress (I:106-110)(I:182-86)(I:193-250;II:251-288), and sought an evidentiary hearing. She also filed a motion for return of property (car). (I:156-59). State opposed. (I:111-54;156-650;II:294-309).

On 12/05/18 court denied Ronneka's first motion and request for an evidentiary hearing, saying the warrants were good. III:647-660.

After Ronneka's second motion, Court issued a minute order on 03/14/19, ruling State obtained "legal and proper search warrant[s]" to

search the vehicle where the phone was located and to search the phone. II:463. Court found no impropriety in police questioning Ronneka's children because they were home alone when search occurred and the subsequent warrant for the search of her cellphone did not involve information obtained from the children. II:463.

On 07/10/19, court denied her third motion/requests. III:712-21. In her third motion, Ronneka added additional factual claims: METRO accessed her phone before obtaining a warrant and police were in the home prior to the warrant issuing.

Suppression issues involved questions of law and fact thereby requiring district court to make clear factual findings. *State v. Beckman*, 129 Nev. 481 (2012). This Court uses de novo review to examine the reasonableness of searchs or seizures. *Id.*

Constitution issues may be raised for the first time on appeal. *Somee v. State*, 124 Nev. 434, 443 (2008). The *Somee* Court reversed and remanded his case to district court for an evidentiary hearing, directing court to make specific factual findings in determining if the evidence used against the defendant at trial was the product of an illegal search. *also see State v. Ruscette*, 123 Nev. 299, 304 (2007); *State v. Rincon*, 122 Nev. 1170, 1176 (2006).

B. Constitutional issues.

The Fourth Amendment and Nevada's Constitution safeguard a person's right "to be secure in their persons, houses, and effects" and forbid "unreasonable searches and seizures;" and, "no warrant shall issue but on the probable cause, supported by Oath or Affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized." U.S. Const. amend. IV.; Nev. Const. art. . I, § 18.

Fourth Amendment protections extend to an individual's reasonable expectation of privacy. *Carpenter v. United States*, 138 S.Ct. 2206, 2213 (2018)(finding a person had a legitimate expectation of privacy in CSLI phone records of his physical movement as gathered through cell towers).

C. Vehicle impounded.

"The impoundment of an automobile is a seizure within the meaning of the Fourth Amendment." *United States v. Torres*, 828 F.3d 113, 1118 (9th Cir. 2016)(other cite omitted).

Gatus impounded Ronneka's car after stopping her for speeding, not using turn signal, and having a traffic warrant. VI:1376. "Under the 'community caretaking' doctrine, police may, without a warrant, impound and search a motor vehicle so long as they do so in conformance with the standardized procedures of the local police department and in furtherance of

a community caretaking purpose, such as promoting public safety or the efficient flow of traffic." *Torres at* 1118. However, an officer must first explore alternatives to impoundment because the practice of impounding vehicles for mere traffic violations may be illegal or lead to pretextual stops. *State v. Slockbower*, 79 N.J. 1 (1979).

If police had stopped Ronneka at the Walgreens parking lot, the vehicle could have remained on the lot until Ronneka was booked and released on the traffic warrant. Instead, police created a possible "caretaking" issue by waiting until she left Walgreens and was driving on the road. Police should not benefit from the ruse. Moreover, Gatus did not say she offered Ronneka options for someone else to pick-up her car.

If Court concludes the impound was unreasonable then all evidence found inside the car should be excluded.

D. Warrants.

Ronneka argued affidavits did not establish probable cause and one statement or more in the affidavits was incorrect.

Search warrants will only issue upon probable cause established by oath and the scope of the authorized scope must be set out with particularity. *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011); *Groh v. Ramirez*, 124 S. Ct. 1284, 1289–90 (2004).

NRS 179.035 allows courts to issue a warrant for evidence that shows a crime has been committed. NRS 179.045 outlines the requirements for the issuance of a search warrant.

1. Home.

Warrant issued on 01/09/18 at 4:03 a.m., allowing METRO to search for a Rolex watch, and paperwork showing who lived in the home/responsible for Mercedes. I:127-29. Search warrant return indicated no property was seized. I:131.

However, police seized Ronneka's password for her cellphone(as addressed below) and took a digital picture of a red purse in a closet with 31 $100 bills. VI:1404. Photographs taken during a search are a tangible object, an image, amounting to the seizure of property. NRS 179.015.

Ronneka objected to the admission of the photographs based on relevance but now raises a Fourth Amendment claim. VI:1383-86. At trial, court ruled that the pictures showed proceeds from the sale of the watch. VI:1385-86.

However, the pictures should have been excluded because they were not listed on the return.

2. Car.

Although police impounded Ronneka's vehicle on 01/09/18 around 9:15 p.m., they did not obtain a search warrant until 01/11/18. I:133-43;151-53. It does not appear that an inventory search was conducted.

Most people when stopped by the police will not exit their car with their purse and cellphone in hand because that movement could get a person shot. Ronneka expressed concern with leaving her cellphone in the Mercedes and wanted to be able to get her car back. VIII:1765. Thus, it appears that she did not voluntarily leave her cellphone in her car. An evidentiary hearing would clarify how the cellphone remained in the car.

3. Cellphone.

Ronneka argued officers bribed, lied, tricked, and illegally obtained her password from her underage children and then used it to obtain information against her. Also, she alleged the cellphone had been opened by the police prior to obtaining a warrant.

A person has a reasonable expectation of privacy as to digital data on their cellphone. *Riley v. California,* 573 U.S. 373 (2014).

As in *Riley*, police stopped Ronneka for a traffic violation and confiscated her cellphone when they impounded her car. During her interrogation, Ronneka refused to give police the passcode for her cellphone.

VIII:1873. Thereafter, METRO obtained a warrant on 01/09/18 at 4:03 a.m., entered her home while her 3 young children were inside and bribed/tricked/lied to the children and one child then reveal the password. I:127.

Det. McCullough testified when they entered the home they were looking for cellphones and passwords. VI:1406. However, the warrant did not authorize police to search for passwords. I:129. "A search or seizure pursuant to an otherwise valid warrant is unreasonable under the Fourth Amendment to the extent it exceeds the scope of that warrant." *United States v. Ramirez*, 976 F.3d 946, 952 (9th Cir. 2020).

When McCullough was sitting with the children inside the house, he took a $1.00 bill out of his pocket, snapped it in the air and said: "First kid that can tell me mom's unlock code to your phone gets a dollar bill." VI:1406-07. One child jumped in the air, raised her hand, and gave him the code.

The code was important to McCullough and Salisbury because at that time METRO did not have the technology to open a cellphone without a code. VI:1422-22. However, the warrant did not authorize METRO to look for passcodes.

There were several problems with the warrant. Police did not inform the court how METRO obtained the code, instead, in the affidavit, METRO sought permission to circumvent the password and conduct an off-site search; thus, the affidavit was misleading. I:150. If police make false or reckless statements in an affidavit, a defendant is entitled to an evidentiary hearing upon a preliminary showing that the statements were false or a reckless disregard to the truth and the statement was necessary for probable cause. *Franks v. Delaware*, 438 U.S. 154 (1978).

Second, the warrant was overbroad and not specific in its request. I:145. METRO indicated they are looking for information before, during, and immediately after the offense without any giving any specifics. I:145. But the warrant allowed METRO to download everything on the phone – more than 30,000 images, call logs, location services – everything. VI:1423-25. In the opening statement, prosecutor bragged about all the information METRO recovered on Ronneka's cell phone. "[T]hey download that cell phone. And as all of you can probably imagine, your entire life is in that cell phone, and if ever want to know ...all you have to do is get their cell phone and look..." V:1151.

The affidavit in this case is similar to one in *Commonwealth v. Johnson*, 240 A.3d 575 (Penn. 2020) where the court found error because the

affidavit did not explain a nexus between the cellphone and the crimes. Merely having a phone and being a suspect in a crime is insufficient to establish probable cause. *Id. at* 587-88.

Finally, METRO obtained the code through outrageous government conduct in tricking Ronneka's child to give them the password after Ronneka said "No."

The warrant did not allow for METRO to search for passcodes. *Ramirez.*

E. Person.

A seizure occurs when police restrain the liberty of an individual or unlawfully confiscate an individual's property or verbal evidence. *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968).

Police may or may not have had reason to arrest Ronneka on a traffic warrant or for alleged traffic violations. However, holding her for 4 hours at METRO headquarters while depriving her of sleep and not allowing her to go to the restroom during a 3 hours interrogation is not part of usual arrest procedures for a misdemeanor traffic offense/warrant. Beyond issuing a traffic ticket or walking a person through a booking process for a misdemeanor warrant, a stop that is legal may turn into an illegal stop if police exceed the time needed for handling the matter for which the stop was

made. *See Rodriquez v. United States*, 575 U.S. 348, 350 (2015). An evidentiary hearing would better clarify what occurred.

X. CUMULATIVE ERROR.

If Court determines issues presented are not singularly sufficient for reversal, Court then analyzes the collective effect of other errors. *Valdez v. State*, 124 Nev. 1172, 1195-98 (2008). Here, reversal is warranted because evidence was not overwhelming and there was a pattern of governmental misconduct, beginning with the police and continuing with the prosecutor, and most of the jury instructions were incorrect.

XI. SENTENCING ERROR.

Judge may "consider any reliable and relevant evidence at the time of sentencing." NRS 176.015. Although given wide discretion in imposing a sentence, "if the judge relies upon prejudicial matters, such reliance constitutes an abuse of discretion that necessitates a resentencing hearing before a different judge." *Brake v. State*, 113 Nev. 579 (1997), *citing Castillo v. State,* 110 Nev. 535, 545 (1994).

"Basing a sentencing decision on a defendant's lack of remorse or failure to take responsibility for a crime is fundamental error because a defendant has a Fifth Amendment right to remain silent" that carries through sentencing if defendant goes to trial. *Blake at* 584-85.

State gave court 4 recorded jail calls made by Ronneka to her children and other family members after her trial. X:2141-66. During the calls, Ronneka discussed her upcoming sentencing, told her children to be strong, but also blamed her 9 year old daughter for giving out the password to her cellphone. The 9 year old told Ronneka she gave police the password because they told her it would help her mom get out. X:2154-56. Someone else indicated the child gave the password for the money. X:2149. Ronneka was upset and blamed the disclosure for the serious convictions she now faced.

Ronneka objected to court considering the calls, arguing State submitted the calls to inflame the court. VII:1702-4;1731.

State contended the calls showed Ronneka was shifting blame to her children and not taking responsibility. VII:1707-08.

Court overruled Ronneka's objection.

Court clearly was inflamed by the 4 jail calls. VIII:1725-28. Court said, "[I]t is very troubling to the Court that you blame your daughter for what happened to you." VIII:1725. When your daughter got on the phone in one call you said to her, "See what you did...by giving out...my fucking code..." VII:1725. Court recited several comments Ronneka made during the calls, using Ronneka's exact words, including "fuck" and "fucking."

VIII:1725-26. Court contrasted Ronneka's children with Osorio's mother facing the death of her child. VIII:1727-28.. Court said, "I implore you not to talk to your children like that ever again..." VIII:1727.

Court's comments show she relied on the jail calls when determining the sentence and decided to go with the harsher sentence suggested by the State.

Ronneka asked court to sentence her to the minimum which was what the PSI recommended: 10 to 25 years. VII:1171-12.

State disagreed with PSI recommendation and gave specific recommendations for each crime, asking for a life sentence with parole eligibility in 18 years. VII:1704-08.

Court followed State's recommendations.

Court abused its discretion, while also violating Ronneka's right to Due Process and her Fifth Amendment rights, by relying on the jail calls to give Ronneka a harsher sentence. The 4 jail calls between Ronneka and her family were post-trial conversations at a time when she was upset about her convictions. The calls offered no relevancy for sentencing except to paint her as a bad mother.

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CONCLUSION

Reversal warranted.

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 Times New Roman in 14 size font.

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Proportionately spaced, has a typeface of 14 points or more and contains 16,634 words which exceeds the 14,000 word limit and the appropriate motion for leave has been filed.

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 23rd day of March, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 23rd day of March, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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