IN THE SUPREME COURT OF THE STATE OF NEVADA

RONNEKA ANN GUIDRY, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 80156

RESPONDENT'S ANSWERING BRIEF

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

SHARON G. DICKINSON
Nevada Bar #003710
Chief Deputy Public Defender
309 South Third St., Ste. 226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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STATEMENT OF THE ISSUES

1. Whether the jury instructions were accurate.
2. Whether there was sufficient evidence.
3. Whether Double Jeopardy principles do not prohibit convictions for Robbery and Grand Larceny.
4. Whether Court did not err during voir dire.
5. Whether State did not engage in prosecutorial misconduct during its opening statement.
6. Whether Court did not err when it admitted Exhibit 41.

7. Whether State did not engage in prosecutorial misconduct in its closing argument.
8. Whether Due Process was not violated regarding Detective Salisbury.
9. Whether there was no unreasonable search and seizure.
10. Whether there was no error to cumulate.
11. Whether Court did not commit an error at sentencing.

STATEMENT OF THE CASE

State does not dispute Appellant's Statement of the Case.

STATEMENT OF THE FACTS

On January 2, 2018, Eduardo Osorio was visiting Las Vegas with his friend, Lucas Siomes.VAA1171,1183. Osorio planned to meet his father in Denver, Colorado the following day.VAA1172,1185-86.

On January 2, 2018, Osorio went to Omnia Nightclub in Caesar's Palace.VAA1183-85. The next day, Osorio's father attempted to contact him and called Lucas.VAA1185-86. Lucas learned Orsorio was at hospital.VAA1187-88.

Detective Salisbury investigated Osorio's death.VIAA1457. There was video from the Westin Hotel and Jay's Market.[1]IVAA1462-63. The videos showed a black Mercedes travel from the Westin and park near Jay's Market for seven

1 State moved to transmit the trial exhibits since Appellant did not. Appellant references these videos throughout her argument.

minutes.VIAA1457-67. Osorio exited the vehicle and after a few seconds ran towards the intersection of Koval and Flamingo.VIAA1468. Osorio jumped in front of the vehicle and dove onto the hood as he and the driver started yelling.VIAA1469. Osorio pounded the windshield and fell off as the car fled.VIAA1469, 1483.

There were marks on Osorio's shoes consistent with the marks in the roadway.VIIAA1475. Osorio slid 42 feet after the vehicle accelerated to about 21-23mph.VIIAA1480-83. The cause of Osorio's death was blunt force trauma.VIIAA1486.

Osorio's father expressed concern about Osorio's watch.VIIAA1487. Two photos depicted packaging and serial number.VIIAA1488. Osorio's belongings inventoried, but no watch found.VIIAA1485.

Caesar's Palace video confirmed Osorio was wearing the watch.VIIAA1486-89. Osorio left Omnia and met a female.VIIAA1489. They traveled to the garage.VIIAA1489. Video showed the black vehicle in the garage and Salisbury confirmed it was the black Mercedes from the Westin footage, depicting paper license place with OC Cars and Credit U.S. tag.VIIAA1489-1490.

Detectives acquired documentation from OC Cars and Credit U.S showing Appellant purchased the black Mercedes in the videos.VIIAA1490-91. Salisbury saw Appellant's driver's license picture and identified her as the individual in the

videos.VIIAA1492. Salisbury requested follow-up at Appellant's address to locate the car.VIIAA1493.

Appellant stopped for a traffic warrant around 9:00PM on January 8th.VIIAA1493. Appellant received Miranda between 10:45PM-11:00PM. VIIAA1495. Appellant admitted she was in the Caesar's video and gave Osorio a ride.VIIIAA1776-1786. She claimed she dropped him off in a parking lot.VIIIAA1778-80. Without being asked, Appellant exclaimed she didn't have anything of Osorio's.VIIIAA1797,1803-04. She alleged no knowledge of Osorio's Rolex and Osorio broke her window.VIIIAA1804-05.

While executing a search warrant at Appellant's address, officers found 31 $100 bills.VIIAA1508. Cellphone inside Appellant's vehicle in plain view.VIIAA1508. Salisbury did not see damage to the windshield, but did observe marks consistent with someone having been on the hood.VIIAA1509,1511.

Appellant's phone downloaded pursuant to search warrant.VIIAA1515. There was a picture of a FedEx receipt.VIIAA1515. Video from a FedEx store showed Appellant making a transaction.VIIAA1516. Salisbury saw pictures of the watch and learned its possible location.VIIAA1516. A January 3, 2018, 11:01AM message saying Appellant would wait until her window was fixed before sending it.VIAA1439. The chat showed a price of $4,500.VIAA1444-46. At 1:29PM January

6th, Appellant texted she got it.VIAA1449. A January 3, 2018, 2:51AM conversation telling Amber she "got an all gold."VIAA1436;IXAA2045.

Salisbury contacted police in Miami, Florida and requested follow-up at the watch's location.VIIAA1516. The watch was recovered.VIIAA1516;VIIAA1523. Appellant was captured in Mobile, Alabama.VIIAA1522.

SUMMARY OF THE ARGUMENT

Appellant incorrectly argues jury instructions were inaccurate statements of the law and/or Court should have utilized proposed instructions. There was sufficient evidence for crimes of duty to stop, robbery, grand larceny, and second-degree murder. Double Jeopardy does not prohibit convictions for robbery and grand larceny. Court acted properly during voir dire. No prosecutorial misconduct during opening and closing statements. Court properly admitted Exhibit 41. Due process not violated regarding Detective Salisbury. No unreasonable search and seizure. No cumulative error. Court did not commit sentencing.

ARGUMENT

I. JURY INSTRUCTIONS ACCURATE

Decisions settling jury instructions are reviewed for abuse of discretion.Crawford v. State,121Nev.746,748(2003). An abuse occurs if a decision is arbitrary or capricious or exceeds the bounds of law or reason. Jackson v. State,117Nev.116,120(2001). However, this Court reviews de novo "whether a

particular instruction . . . comprises a correct statement of the law."Cortinas v. State,124Nev.1013,1019(2008). Courts have "broad discretion" to settle instructions. Id. at 1019. Court may refuse to give an instruction substantially covered by another.Davis v. State,130Nev.136,145(2014). Trial court may refuse an instruction if it is less accurate than other instructions or will confuse jurors.Sanchez-Dominguez v. State, 130Nev.85,90(2014).

Though defense is entitled to theory instruction, it is not entitled to specific wording.Crawford,121Nev.at754. Instructions cannot be worded such that they are misleading, inaccurate, or duplicitous.Carter v. State,121Nev.759,765(2005).

A. Defense Property, Necessity, Self-Defense, Assault

Appellant argues Court should have permitted her instructions on necessity, self-defense, and assault.AOBat17-18. However, the crux of her argument is Court erred when it permitted Instruction No. 23, which she claims incorrectly explained defense of property and self-defense.AOBat17-22. She claims the instruction "removed [Appellant's] right of self-defense if jury believed she committed larceny."AOBat19.

Appellant proffered proposed instructions regarding assault and self-defense or legal necessity and Court entertained argument.VIIAA1537. Court explained it would defer ruling until after close of evidence, it cautioned it was not inclined to utilize the instruction because assault was not charged.VIIAA1537.

Court discussed Appellant's proposed instruction, "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."VIIAA1537-38. Appellant argued such instruction was applicable because Appellant had completed the larceny by the time Osorio jumped on her vehicle and began banging on the windshield causing damage, so she drove away in self-defense.VIIAA1538. Appellant explained Osorio was the initial aggressor at that point and assaulted Appellant by banging on her windshield. VIIAA1540-42. Appellant noted Osorio could not use force and violence to recover property.VIIAA1542. State noted that Appellant's assertions were a misstatement of the law:

> But, that being said, that misstates the law particularly since we're talking about the Leonard instruction. First of all, a person has the right to use force to resist the taking of their property. And if the defendant chooses, she says it in her own statement, if I just handed him the watch and then he continues the force, yeah, then she has the right to defend herself. But while she's holding that property – […] -- that is her resistance -- or his resistance is lawful and she cannot accelerate that vehicle and kill him.

VIIAA1539-40.

Appellant argued there was a break so Osorio acted unlawfully by attempting to forcefully retrieve property.VIIAA1546-478. State replied the instruction violated law, it was inconsistent with the stipulated robbery instruction that Appellant stipulated:

> All matters immediately antecedent to and having direct causal connection with the robbery are deemed so closely connected with it as to form in reality a part of the occurrence. Thus, although acts of violence or intimidation preceded or followed the actual taking of the property and may have been primarily intended for another purpose, -- i.e., to get out there because I'm scared of him -- it is enough to support the charge of robbery when a person takes the property by taking advantage of the terrifying situation she created.
>
> He is in the effort to resist her escape with the property and she uses force. As a matter of law –

VIIAA1548. Appellant responded State wrong since vehicle had left the scene.VIIAA1548. Court disagreed but would defer ruling.VIIAA1548.

State and Appellant submitted additional proposed instructions.VIIAA1615-16. State provided instructions on self-defense, victim's right to resist and felony murder does not provide a right to self-defense.VIIAA1613. Parties requested time to review proposed instructions.VIIAA1613-14. After reconvening, Appellant agreed with State's additional proposed instruction and it covered her assertion that Appellant "was lawfully acting in a right to speed away from the scene for fear of her safety."VIIAA1615-16. Court adopted Instructions 15-23.IAA352-360.

Appellant now complains that her proposed assault and necessity/self-defense instructions not given. Preliminarily, Appellant abandoned this issue by accepting State's proposed instructions.VIIAA1615-16. Appellant admits Court instructed on Appellant's alleged right of self-defense in Instructions 15-23, waiving this issue. AOBat19. This Court has an extensive line of authority concluding it will not address abandoned issues. Issues not raised in an opening brief are waived. Powell v. Liberty

Mut. Fire Ins. Co.,127Nev.156,162,n.3(2011). Court will not consider an issue when an appellant fails to raise it below.Davis v. State,107Nev.600,606(1991). Nor will Court consider an issue initially raised below but abandoned at argument.Buck v. Greyhound Lines, Inc.,105Nev.756,766(1989).

Court did not err by declining Appellant's assault instruction. Osorio was not the initial aggressor. Because Appellant was the original aggressor, an instruction on self-defense was foreclosed. Court has held, "right of self-defense is not available to an original aggressor, that is a person who has sought a quarrel with the design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault."Runion v. State,116Nev.1041,1051(2000). Appellant had started driving for only seconds when Osorio ran towards her vehicle and jumped on it. Because the robbery was not completed at this point, as more fully discussed *infra*, there were no facts to support an assault instruction.Davis v. State,130Nev.136,142(2014). Osorio was not assaulting Appellant, but instead was lawfully retrieving his property during the commission of the robbery. Regardless, jury was provided Instructions 15-23, which Appellant concedes served Appellant's theory of self-defense.IIAA352-60.

Appellant offers the conclusory statement the "Court informed jury that Osorio's right to defend his property was superior to Appellant's right of self-defense."IIAA352-60. A review of Appellant's citation does not factually support

the naked conclusion.Maresca v. State,103Nev.669,673(1987). Regardless, as discussed *supra*, Appellant could not create a situation and then claim self-defense as the initial aggressor.

Appellant argues Instruction 23 was an inaccurate statement of law because it removed her right of self-defense if the jury found her guilty of larceny. Notwithstanding waiver of this issue and only plain error review applying, Instruction 23 was an accurate statement of law and Appellant presents a red herring. Instruction:

> A victim of a 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.
>
> In other words, 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.

IIAA360. Appellant complains this is an inaccurate statement of law because she finished the robbery as drove away and could defend herself as Osorio resisted the taking of his property. However, as discussed more fully *infra* in Section I.G.1. and II.B. the robbery was not over when Osorio jumped on Appellant's vehicle. At the time Osorio jumped on the hood he was resisting the taking of his Rolex. Appellant's citation to NRS 193.240(2) does not change the analysis as that statute states "lawful possession." Even if Appellant wanted to say the Rolex was in her possession, this statute would still have no applicability because she would not have *lawful*

possession. This is not a situation where Appellant had possession, there was a break in time, and Osorio used force to retrieve his property.Compare Simpson v. State,126Nev.756(2010). This situation occurred in a matter of seconds, while Appellant was still on scene. Appellant cannot claim self-defense where she is the initial aggressor. The fact that Osorio damaged her car does not change this fact.

Appellant's claim jurors should have been instructed on necessity also fails. No evidence presented to require a necessity instruction. Appellant's citation to Hoagland v. State,126Nev.381,387(2010), supports why Appellant's instruction was erroneous. Court appropriately noted inapplicability of Hoagland:

> The case that you cited, Hoagland v State, 126 Nevada 381, discusses, in this instance, a necessity defense in terms of a DUI, there it discusses reasoning from foreign jurisdiction. But one of the cases that it talks about is that supporting element of a necessity defense is whether the defendant is blameless for creating the situation.

VIIAA1544.

Regardless of Hogland focusing on DUI, it is inapplicable because Appellant failed to present "sufficient evidence to show that [she] did not substantially contribute to the emergency or create the situation." Id. Appellant's contention that because Hoagland found Nevada had not codified the necessity defense for DUI does not matter as the case is inapplicable. The applicability of the charge for which Appellant provides additional authority does not matter as there was no evidence presented that would warrant necessity defense.

Any error would be harmless due to the overwhelming evidence of guilt.NRS 178.598;Knipes v. State,124Nev.927,935(2008)(non-constitutional error reviewed for harmlessness based on whether it had substantial and injurious effect or influence on jury's verdict). Constitutional error is evaluated by the test laid forth in Chapman v. California,386U.S.18,24(1967). The test for constitutional error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'"Tavares v. State,117Nev.725,732,n.14(2001).

Under any standard, there was overwhelming evidence of guilt, there was copious video footage depicting the events, including Appellant and Osorio traveling together from Caesar's to the crime scene as well as evidence showing Appellant accelerating as Osorio fell from her speeding car.VIIAA1514-15,1581. Appellant admitted she gave Osorio a ride and engaged in an argument that caused him to jump on the hood and bang on the windshield.VIIIAA1776-1786,1804-05. Appellant's cellphone revealed she sold Appellant's Rolex, and she failed to return to render aid to Osorio.VAA1428-30,1436;VIIAA1515-16,1523;IXAA2045.

B. Defense of Occupied Vehicle/Rebuttable Presumptions

Appellant argues Court should have sua sponte instructed on the defense of occupied motor vehicle because she claimed she was not guilty of failing to stop.AOBat24-27.

Appellant failed to raise this claim below and therefore this Court should decline review.Dermody v. City of Reno,113Nev.207,210-11(1997);Guy v. State,108Nev.770,780(1992), cert. denied,507U.S.1009(1993);Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991).

If this Court opts to review, claim is reviewable only for plain error.Dermody, 113 Nev. at 210-11;Guy, 108 Nev. at 780;Davis,107Nev.at606. Plain error review asks:

> To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan v. State,131Nev.43,49(2015).

Under any standard, Appellant's claim is meritless. NRS 200.120 does not apply to an individual who was the original aggressor. Despite Appellant's attempts to argue Osorio was the original aggressor, as discussed *supra*, her claims fail as Appellant had not reached a safe place to end the robbery at the time Osorio jumped on her vehicle. To say that she was not at that point "engaged in conduct in furtherance of criminal activity" is completely incorrect as the robbery was still ongoing as only seconds had elapsed.

Appellant cites NRS200.130(2), which provides a rebuttable presumption regarding defense of an occupied vehicle. Appellant asserts NRS200.130(2) in combination with NRS200.120 created a "castle doctrine" for cars. However, the legislature was cautious about viewing NRS 200.130 as a "castle doctrine" and ensured that the word "occupied" was added before the terms "motor vehicle" to ensure the intent behind the statute was only to prevent the loss of human life and further distinguish it from the "stand your ground law."Nevada Senate Committee Minutes, 2015Nev.S.B.175, February 25, 2015. Regardless, Appellant would not have had the right to self-defense in her car because she was the initial aggressor and, even if she was not, she had other means of escape, such as handing over Osorio's Rolex as she admitted to detectives she would have done "if she had it."VIIIAA1802-03,1806-07. Regardless, any error would have been outweighed by the overwhelming evidence of guilt, see *supra* in Section I.A.

C. Accuracy of Self-Defense Instructions

Appellant argues Instruction 15-22 were inaccurate statements of self-defense law.AOBat27-30. Specifically, she argues because Instruction 23 took away Appellant's self-defense right, jurors could ignore 15-22.AOBat27.

Appellant abandoned this issue when she accepted State's self-defense instructions without objection.VIIAA1615-16. Court should decline review.Buck,105Nev.at766.

Appellant's argument, that Instructions 15-22 were based on law prior to 2015 making them inaccurate fails. Appellant's argument consists of the one aforementioned line of analysis.Maresca,103Nev.at673. Appellant has not even alerted this Court to what changes she believes made the instructions inaccurate.

Instructions 15-22 were accurate statements of the law as per Runion,116Nev.at1051. To the extent there are any differences in these instructions, they were tailored as Court explicitly instructed parties to do. Id.

The rest of Appellant's argument is comprised of the specific complaint that Instruction 16 and 18 were inaccurate, which is incorrect. Instruction 18:

> The right of self-defense is not generally available to an original aggressor, that is a person who has sought a quarrel with the design to force a deadly issue and thus through her fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.
>
> The original aggressor is only entitled to exercise self-defense, if she makes a good faith endeavor to decline any further struggle before the mortal blow was given.
>
> However, where a person without voluntarily seeking, provoking, inviting, or willingly engaging in a difficulty of her own free will, is attacked by an assailant, she has the right to stand her ground and need not retreat when faced with the threat of deadly force.
>
> Notwithstanding, a person who is engaged in criminal activity must retreat instead of using deadly force.

IIAA355. This instruction tracks Runion,116Nev.at1051, where this Court found such self-defense instructions accurate statements of the law.

Appellant's complaint that this instruction failed to use the language that the original aggressor must be "actively engaged in conduct in furtherance of the

criminal activity" is a distinction without a difference. The instruction stated, "engaged in criminal activity" the added adjective would not alter the analysis as whether the word actively was used or not the instruction required the jury to find that Appellant was doing a criminal activity for which the actively component is implied by the use of the word "engaged." Thus, as discussed *supra*, Appellant was engaged in the robbery at the time Osorio tried to resist her driving away and therefore Appellant had a duty to retreat from the robbery as the original aggressor.

Appellant's argument that the instruction failed to outline the three-prong no duty to retreat test outlined in the statute is meritless. While it does not appear that a verbatim recitation of NRS 200.120(2) was included, the concept was provided to jurors. The clause beginning with "however, where a person without voluntarily seeking," provided the necessary elements for a victim to be justified to stand his ground and not retreat, which is the concept NRS 200.120(2) embodies. Notably, the Runion explicitly instructed courts to "tailor instructions to the facts and circumstances of a case, rather than simply relying on 'stock' instructions," which is exactly what Instruction 18 did.

Instruction 16 was an accurate statement of law and did not lower State's burden of proof:

> A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under

> the influence of those fears alone and not in an effort to continue her felonious activity.

IIAA353.

This instruction was nearly a verbatim recitation of the accurate statements of law in Runion,116Nev.at1051. Appellant's argument that this instruction did not include the offenses in NRS 200.120(1) is another red herring. A fear of death or great bodily injury is the crux of self-defense law and is necessarily included in "a crime of violence." Such phrase did not by any means narrow what is required, but accurately stated the conduct that qualifies under the statute. To the extent Appellant complains about the difference in the last phrase, that "the person killing must act under the influence of those fears alone and not in an effort to continue her felonious activity," Appellant once again fails to disclose binding authority that explicitly requires tailoring of instructions to the facts and circumstances of the case, which is exactly what this instruction did.Runion,116Nev.at1051. It did not add elements not contained in the proper analysis of self-defense. Moreover, the spirit of the rebuttable presumption regarding exciting the fears of a reasonable person was discussed in the instruction.

The reason Appellant had difficulty presenting a self-defense case was not because there were no self-defense instructions given, as there were, it was because she was the individual that decided to commit robbery that resulted in a man's

death.Davis,130Nev.at142. Regardless, any error would have been harmless based on the overwhelming evidence of guilt described *supra* in Section I.A.

D. Larceny as a Lesser Included Offense of Robbery

Appellant argues Court should have accepted her proposed instruction, providing that larceny is a lesser included of robbery.AOBat30. She is mistaken.

Preliminarily, while Appellant proposed a lesser included instruction, she eventually agreed with State's proposed instruction on the issue and stated she did not object to the use of State's instruction.VIIAA1535-36. Appellant has abandoned this issue.Buck,105Nev.at766. Regardless, Appellant's argument is meritless.

NRS 175.501 governs lesser-included offenses: "defendant may be found guilty . . . of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." This Court has held that a defendant is entitled to instructions on lesser-included offenses "if the evidence would permit a jury to rationally find him guilty of the lesser and acquit him of the greater."Rosas v. State,122Nev.1258, 1264,(2006). Because this Court has recognized that a defendant is entitled to instructions supported by "any evidence, however slight," the relevant question then becomes whether the lesser-included offense is "necessarily included" in the charged offense. NRS 175.501.

There are important differences between lesser-included offenses and lesser-related offenses. As the U.S. Supreme Court explained in Beck v. Alabama,447U.S.625,637(1980), clarified by Hopkins v. Reeves,524U.S.88(1998), the use of lesser-included offense instructions serves a valuable purpose, namely, reducing the risk of an unwarranted conviction "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element."

Whether an offense is a lesser-included of another depends upon the elements, much like the Blockburger test that applies to double jeopardy claims. Under Blockburger, an offense is lesser-included only where the defendant, in committing the greater offense, has also committed the lesser offense.See Barton v. State,117Nev.686,692(2001),overruled on other grounds by Rosas v. State,122Nev.1258(2006). By contrast, lesser-related offenses are simply other offenses.See Smith v. State,120Nev.944,946(2004). As explained in Hopkins, there is not a workable standard for identifying lesser-related offenses given that they do not depend upon the statutory elements of an offense.524U.S.at97.

This Court has held that a lesser-included defense theory instruction is unnecessary where: (1) the evidence would not support a finding of guilt of the lesser offense or degree; (2) the defendant denies any complicity in the crime charged and thus lays no foundation for any intermediate verdict; or (3) where the elements of

the defenses differ, and some element essential to the lesser offense is either not proved or shown not to exist.Lisby v. State,82Nev.183,187(1966).

In this case, Court properly concluded that larceny was not a lesser-included of robbery. Appellant concedes this Court has not concluded that larceny is a lesser included of robbery.AOBat48. This Court has rejected Appellant's argument in Hodges v. State,unpublished,2019WL1877403,No.74515(Nev. 2019). In Hodges, Court rejected the argument that larceny is a lesser-included of robbery.Id.at*1. Specifically, Court concluded that simple larceny, petit larceny, and grand larceny statutes are not subsumed by the robbery statute:

> The value of the property stolen under NRS 205.240(1)(a)(1) and NRS 205.220(1)(a) does not simply determine whether the penalty for larceny is a misdemeanor or felony, but rather, whether the defendant is actually guilty of the offense of petit larceny or the offense of grand larceny. This value element is absent under the robbery statute, thereby removing it as a possible lesser-included offense of robbery. Additionally, Hodges ignores that fact that the penalties for the larceny offenses are contained within entirely different statutes, see NRS 205.222(1)-(3) (distinguishing between category C and B felonies depending on whether the stolen property was valued below or above $ 3,500); NRS 205.240(2) (stating that "a person who commits petit larceny is guilty of a misdemeanor"), meaning that the value element under each statute does not go solely to punishment and is instead necessary to proving the offense. Thus, we conclude that the district court did not abuse its discretion in rejecting Hodges' proposed jury instruction on this issue.

Id. Appellant's argument that value is a sentencing factor instead of an element is incorrect.

Despite Appellant's attempt to complicate the matter and argue this Court erred in its previous analysis, an elementary analysis demonstrates the differences in the crimes that goes beyond sentencing. To be convicted of Grand Larceny State must prove that an item of value equal to or greater than $650 was taken. The same value element is not required to be proven for a robbery conviction. Accordingly, the amount is not a sentencing factor but instead an element. Larceny requires that the taker have the intent to permanently deprive the owner or possessor, an element not included in robbery.Litteral v. State,97Nev.503,507-08(1981),disapproved on other grounds,Talancon v. State,102Nev.294(1986).

Larceny and robbery each require proof of an element that the other does not.Barton,117Nev.at692. Robbery requires two unique elements: the property be taken "from the person [or presence] of another" and" by means of force or violence or fear of injury." NRS 200.380(1). Larceny has the unique element of specific intent. NRS 205.220(1)(a)("Intentionally steals, takes and carries away, leads away or drives away . . . . ");see also Grant v. State,117Nev.427,435(2001) (sufficient evidence supported the larceny element that the defendant have the "intent to permanently deprive the owner of the property");cf. Truesdell v. State,129Nev.194,202-03(2013) (trespass is not a lesser-included offense of home invasion because the former contains an element of specific intent that the latter lacks),cert. denied,134S.Ct.651(2013).

Regardless, any error would have been harmless based on the overwhelming evidence of guilt as discussed *supra* in Section I.A.

E. Grand Larceny Instruction

Appellant argues Instruction 6, the Grand Larceny instruction, was incorrect because it omitted the word, "intentionally."AOBat30-31. By omitting "intentionally," State's burden of proof was lowered.AOBat30-31.

Appellant waived this issue by failing to object thus reviewable only for plain error.Dermody,113Nev.at210-11;Guy,108Nev.770;Davis,107Nev.at606; Martinorellan,131Nev.at49. However, under any standard, Court did not err.

NRS 205.220 (2011):

> Except as otherwise provided in NRS 205.226 and 205.228, a person commits grand larceny if the person:
>
> 1. Intentionally steals, takes and carries away, leads away or drives away:
> (a) Personal goods or property, with a value of $650 or more, owned by another person[.]

Instruction 26:

> Any person who steals, takes and carries away, leads away or drives away person goods or property of another, having a value of $3500 or more, with the *specific intent* to permanently deprive the owner thereof is guilty of Grand Larceny> $3500.
>
> If the value is greater that $650 but less that $3500, the person is guilty of Grand Larceny< $3500.
>
> If the value is less than $650.00, the person is guilty of Petit Larceny.

IIAA363.

Accordingly, the word "intent" was used in the instruction.IIAA363. To the extent Appellant complains the exact full phrase of "intentionally steals, takes and carries away, leads away or drives away" was omitted, she has failed to indicate how that lowered State's burden of proof. Indeed, the way the instruction read the jury was instructed to find that Appellant had the specific intent to deprive Osorio of his watch, which could have been done by the act of stealing, taking and carrying away, leading away, or driving away the watch. The way the instruction reads, jurors could not find Appellant guilty of Grand Larceny if they only found that the watch was left in the car because the added requirement of specific intent to deprive the owner of the watch had to be proven. Regardless, any error would have been harmless due to the overwhelming evidence of guilt as discussed *supra* in Section I.A.

F. Robbery and Second-Degree Murder Instructions

1. Robbery

Appellant argues the robbery instructions were incorrect.AOBat31-34. Appellant challenges Instruction 10.

Appellant failed to object, so this issue should not be reviewed. To the extent it is reviewed, the standard is plain error. Dermody,113Nev.at210-11;Guy,108Nev.at780;Davis,107Nev.at606. Notably, if Appellant needs approximately six pages of text to explain her point to sophisticated jurists, any error simply does not jump off the page and cannot amount to plain error.

Instruction 9:

> Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. Such force or fear must be used to:
>
> 1. Obtain or retain possession of the property,
> 2. To prevent or overcome resistance to the taking of the property, or
> 3. To facilitate escape with the property.
>
> In any case the degree of force is immaterial if used to compel acquiescence to the taking of or escaping with the property. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.
>
> The value of property or money taken is not an element of the crime of Robbery, and it is only necessary that the State prove the taking of some property or money.

IIAA346.

Instruction 10:

> Robbery is not confined to a fixed locus, but may spread over considerable and varying periods of time. All matters immediately antecedent to and having direct causal connection with the robbery are deemed so closely connected with it as to form in reality a part of the occurrence. Thus, although acts of violence and intimidation preceded *or followed* the actual taking of the property and may have been primarily intended for another purpose, it is enough to support the charge of robbery when a person takes the property by taking advantage of the terrifying situation she created.

IIAA347.

The language of Instruction 10 is an accurate reflection of law. It is almost a verbatim recitation of Court's interpretation of robbery in Norman v. Sheriff, Clark

Cty.,92Nev.695,697(1976). Further, Leonard v. State,117Nev.53,77(2001), confirmed that "a robbery may be shown where a defendant simply takes advantage of the terrifying situation [he or she] created and flees with the victim's property." Footnote 7 confirmed that the statement, "[a]lthough acts of violence and intimidation preceded the actual taking of the property and may have been primarily intended for another purpose, it is enough to support the charge of robbery when a person takes the property by taking advantage of the terrifying situation he created," iss an accurate statement of law. Id. Further, State v. Fouquette,67Nev.505(1950), Payne v. State,81Nev.503(1965), and Martinez v. State,114Nev.746(1998), offer support for the instruction.

To the extent Appellant complains the addition of the clause "or followed" in the third section of the instruction, her argument fails. The force or fear element required for a robbery conviction may be found three per NRS 200.380: (1) "Obtain or retain possession of the property," (2) "prevent or overcome resistance to the taking of the property," or (3) "facilitate escape with the property." All three of the means of force of fear delineated in NRS 200.380 support a finding of force or fear after the taking, which is what occurred here. Appellant took Osorio's Rolex and used force as she facilitated her escape with the Rolex, i.e. accelerating to the point that Osorio fell from her vehicle. Indeed, within seconds of Appellant driving her

vehicle away, Osorio was chasing after her vehicle.VIAA1468. The antecedent language of the instruction also offers credence to this argument.

Appellant's argument that precedent relies on pre-1993 versions of NRS200.380 that "did not contain language allowing for a robbery if force was not used in the taking of the property" does not change the fact that the aforementioned authority is good law.AOBat32. This precedent was not abrogated by a change in statute. Force was a required element of robbery pre-1993 just as it was at the time Appellant committed this robbery. Further, the antecedent concept has not changed and Appellant's argument that the change in the statute somehow affected this case is a red herring.

Instruction 10 did not temper the use of force or fear explained in Instruction 9 because force or fear can be demonstrated at various times so long as it is in the three ways outlined in Instruction 9 and NRS200.380. Appellant's citation to Barkley v. State,114Nev.635(1998), and Martinez,114Nev.746(1998), supports State's position. In Barkley,114Nev.at637, defendant used force to retain possession of stolen property as was the case here. Further, unlike in Martinez,114 Nev.at748, where defendant abandoned the stolen property and did not have it while facilitating his escape, Appellant had possession of Osorio's watch at the time she used force. Accordingly, the instruction complied with NRS200.380.

/ / /

2. Second-Degree Murder

Appellant argues Instruction 11 failed to properly instruct on the elements of second-degree murder.AOBat34-37. Appellant's argument is meritless.

This claim is waived as Appellant failed to object. If reviewed, the standard is plain error.Dermody,113Nev.at210-11;Guy,108Nev.at780;Davis,107Nevat606.

Under any standard, Appellant's argument fails. Instruction 11:

> All murder which is not Murder of the First Degree is Murder of the Second Degree. Murder of the second degree includes:
>
> 1. A killing with malice aforethought, but not committed in the perpetration or attempted perpetration of a robbery.
> 2. 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. However, if the felony is Robbery, the crime is First Degree Murder.

IIAA348. This instruction iss an accurate statement of law.

To the extent Appellant complains this instruction failed to require a finding of implied malice without premeditation and deliberation, her argument fails. Appellant cites Desai for Desai v. State,133Nev.339(2017), but it does not advance her argument. Desai held:

> First-degree murder is a "willful, deliberate and premeditated killing." NRS 200.030(1)(a). Second-degree murder "is all other kinds of murder," NRS 200.030(2), and requires a finding of implied malice without premeditation and deliberation, see Labastida v. State, 115 Nev. 298, 307, 986 P.2d 443, 449 (1999). 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.at347. Desai defined implied malice as "implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart," which is what was required by Instruction 7. IIAA344. Moreover, Instruction 6 provided that "malice aforethought does not imply deliberation."IIAA343.

Regardless, requiring "premeditation and deliberation" language in an instruction would have confused jurors because it would have required them to find a negative. Instructing jurors on premeditation and deliberation would have likely confused them because they were not asked to find premeditation and deliberation.

Appellant's argument that jurors were incorrectly instructed on Second-Degree Felony Murder is wrong. State never pursued a Second-Degree Felony Murder theory, nor could it have because the facts would not have supported it.SeeNRS200.070. Accordingly, Appellant's citations and analysis of the various authority on the subject is inapplicable.

G. Failure to Stop and Highway

Appellant argues Instruction 29, outlining the elements required to prove Duty to Stop at Scene of Crash Involving Death or Personal Injury under 484E.010, was inaccurate.AOBat37-38. She argues the instruction was inaccurate because the word

"collision" was used in place of "crash" and the word "bodily" was used in reference to the injury element.AOBat37-38.

This issue is waived by failing to raise it below and is reviewable only for plain error.Dermody,113Nev.at210-11;Guy,108Nev.at780; Davis,107Nev.at606.

Instruction 29:

> The driver of any vehicle involved in a collision resulting in injury to any person shall immediately stop such vehicle at the scene of such collision or as close thereto as possible, and shall forthwith return to and in every way shall remain at the scene of the collision.
>
> Every such stop shall be made without obstructing traffic more than is necessary.
>
> A stop is possible, whenever a person is a safe enough distance to not fear for their own safety.
>
> Any person who knowingly fails to comply is guilty of the offense of Leaving the Scene of an Accident.

IIAA366.

Appellant's argument regarding the use of the "collision" in place of "crash" fails. While Appellant cites to Merriam Webster Dictionary to claim that "collision" and "crash" have different definitions, she fails to forthrightly disclose that even Merriam Webster Dictionary lists the two words as synonyms. "Crash," *Merriam Webster Dictionary*, https://www.merriam-webster.com/thesaurus/crash (2021). Merriam Webster Dictionary defines "synonym" as "one of two or more words or expressions of the same language that have the same or nearly the same meaning in some or all senses." Here, "collision" and "crash" have largely the same meaning. Indeed, "collision" is defined as "an act or instance of colliding" whereas "crash" is

defined as "to break violently and noisily." There is no effective difference between the terms as each requires an object to be impacted.

Appellant has provided no authority saying that "crash" must be used in a 484E.010 instruction.Maresca, 103 Nev. at 673.

Beyond Appellant's bare and naked assertion that the instruction "omits the word bodily" she provides no argument on this alleged issue.AOBat37; Hargrove,100Nev.at502. Even if she had, her claim would fail because lack of the word "bodily" does not affect the fact that injury must be proven, which was a term included in Instruction 29. Indeed, bodily injury would satisfy the term "injury."

Appellant's argument that Instruction 35 directed jurors to find that East Flamingo Road was a highway fails.AOBat38. NRS 47.130 states that facts "may be inferred" and provides:

> A judicially noticed fact must be:
> (a) Generally known within the territorial jurisdiction of the trial court; or
> (b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.

Here, the fact that East Flamingo Road is a highway was not disputed at trial and is a generally known fact within Clark County. Accordingly, it was not erroneous for Court to provide Instruction 35 and State's burden was not shifted.

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II. SUFFICENT EVIDENCE

Appellant argues there was insufficient evidence to find Appellant guilty of Duty to Stop, Robbery, and Second-Degree Murder.AOBat38-47. However, her arguments fail.

Appellant incorporates her Statement of the Facts as well as her arguments and law contained in Section I. State requests the same.

"When reviewing a criminal conviction for sufficiency of the evidence, this Court determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution."Brass v. State,128Nev.748,754(2012). When there is substantial evidence in support, the jury's verdict will not be disturbed on appeal.Id.at754. This Court will not reweigh evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact.McNair v. State,108Nev.53,56(1992). Further, circumstantial evidence alone may support a conviction.Collman v. State,116Nev.687,711(2000).

Evidence only insufficient when State "has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury."Evans v. State,112Nev.1172,1193(1996)(overruled on other grounds). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v.

State,114Nev.378,381(1998). It is the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."Jackson v. Virginia,443U.S.307,319(1979). In rendering its verdict, a jury is free to rely on circumstantial evidence.Wilkins,96Nev.at374. Indeed, "circumstantial evidence alone may support a conviction."Hernandez v. State,118Nev.513,531(2002). Further, "[t]he jury has the prerogative to make logical inferences which flow from the evidence."Adler v. State,95Nev.339,344(1979).

A. Duty to Stop

Appellant argues State did not prove the elements required under NRS 484E.010(1).AOBat40-43. Once again, State, like Appellant, elects to incorporate its argument and law contained in Section I.H. *supra*.

NRS 484E.010(1):

> 1. 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.
> 2. Every such stop must be made without obstructing traffic more than is necessary.

NRS 484E.030 in relevant part:

> 1. 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 shall:

> (c) Render to any person injured in such crash reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary, or if such carrying is requested by the injured person.

State satisfied the necessary elements for jurors to find Appellant was guilty. The jury was presented with eyewitness testimony that Osorio ran to Appellant's vehicle, dove onto the hood and that the driver and Osorio were yelling at each other before Osorio started pounding the windshield, and then the vehicle sped off, causing Osorio to fall from the vehicle.VIAA1469. The jury was presented with evidence that after Appellant accelerated to the point that Osorio fell from the vehicle and landed on the ground, Appellant fled the scene in her vehicle, never returning to assist Osorio.VIIAA1483. Applying the facts in the light most favorable for State, jurors could have reasonably concluded Appellant was guilty.Brass,128Nev.at754.

Appellant's citation to outside jurisdictions does not change the analysis. Citation to Gaulden v. State,195So.3d1123(Fla.2016), is not instructive. In that case, the defendant was charged and found guilty under Florida's hit-and-run statute.Id.at1124. The defendant had picked up the victim, was the driver while the victim was the passenger, the two began to fight while the vehicle was moving, the victim then opened up the passenger door, the vehicle sped up and swerved at which time the victim exited the vehicle, and the victim later died as a result of the injuries sustained.Id. Relying on Florida's legislative history and Court's decision that crash

means that a vehicle must collide with another "vehicle, person, or object," Court concluded that "a passenger separating from a vehicle and colliding with the pavement" was not sufficient to satisfy the statutory language of "any vehicle involved in a crash." In other words, Court found that the statutory phrase required that "a vehicle must collide with another vehicle, person, or object."Id.at1128.

Similarly, in Daugherty v. State,207So.3d980(Fla.Dist.Ct.App.2016), the Florida Court found that the elements of hit and run had not been satisfied when a defendant "backed his car out of a driveway in an attempt to avoid contact with the victim, the car out of the driveway in an attempt to avoid contact with the victim and, as he accelerated to leave the area, the victim (who was holding on to the vehicle through the open window) fell to the ground, sustaining a fatal head injury." Id. Court found that because State argued that the crash occurred when the victim collided with the pavement, State had not proven that the defendant's vehicle had collided with the victim. Id. at 981.

Edwards v. State,254So.3d1195(Fla.Dist.Ct.App.2018), does not assist in this Court's analysis. Appellant misleadingly proffers facts that are not contained in the opinion as there were no facts provided in such opinion.

While State here may have argued that a collision occurred when Osorio's head hit the asphalt, making such argument has not been interpreted under Nevada law to be incorrect. Regardless, this is not a case where the victim was holding onto

a window or was a passenger, the facts of this case demonstrate that Osorio fell from the vehicle. Not only was Osorio seen on the hood of the vehicle, i.e. making contact with the vehicle, but also there was evidence of damage to the hood of the vehicle consistent with Osorio being on the hood.VIAA1469;VIIAA1511. Appellant's citation to outside authority does not negate that Appellant's vehicle was involved in a crash.

To the extent Appellant argues State needed to prove that Appellant knew or should have known that she caused injury, she is mistaken. This Court has stated that "actual or constructive knowledge of injury or death is not an element of the felony offense of leaving the scene of an accident."Dettloff v. State,120Nev.588,594(2004). To the extent Appellant argues State failed to prove Appellant knew or should have known she was involved in a crash, her argument fails. There was evidence of Osorio being on the hood of Appellant's vehicle and she accelerated as he fell from her vehicle. Jurors could make the reasonable inference that Appellant knew she was involved in a crash as Osorio was no longer on her vehicle after she fled the scene.Jackson,443U.S.at319.

B. Robbery[2]

Appellant argues there was insufficient evidence presented for jurors to find Appellant guilty of robbery because there was no evidence presented of use of force

2 For organizational purposes, State has elected to respond to Appellant's "no force" and "victim jumping on vehicle" arguments in one section.

and the robbery was already completed when Osorio jumped on Appellant's vehicle.AOBat43-45. These arguments fails.

Just like Appellant, State incorporates its response under Section I.G.1., that NRS200.380 permits the use of force or fear be proven in the following three ways: (1) "[o]btain or retain possession of the property," (2) "prevent or overcome resistance to the taking of the property," or (3) "facilitate escape with the property."

As for Appellant's argument that State admitted Appellant did not use force against Osorio when she took his Rolex while he was still in the vehicle, Appellant has misconstrued the record. State never made such admission.VIIAA1660. State rightfully argued, that force was used while Appellant was attempting to "retain possession," "prevent or overcome the resistance to the taking," and "to facilitate escape with the property."VIIAA1659-61. Jurors were presented with evidence that Osorio got out of Appellant's vehicle and within seconds of Appellant pulling away, was chasing after the vehicle.VIIAA1569-70. Appellant, with the Rolex in her possession, as evidenced by her successful attempt to pawn the Rolex after Osorio's death, then accelerated her vehicle at maximum acceleration or 100 percent throttle applied over the fixed distance of 300 feet to remove Osorio from her vehicle and escape.[3]VIIAA1515. There was evidence presented to satisfy the force element

3 Appellant presents another red herring. Salisbury testified that the vehicle was going 23mph when it impacted Osorio, but it was maximum acceleration or 100 percent throttle over the fixed distance of 300 feet.VIIAA1514-15,1581.

required under NRS200.380. That jurors did not find Appellant's vehicle was a deadly weapon is another red herring because a robbery can occur without the use of a deadly weapon.

As for Appellant's argument that the robbery was completed when Osorio jumped on her vehicle, she is incorrect. The testimony and surveillance footage show that within seconds of Appellant pulling away, Osorio was chasing after the vehicle.VIIAA1569-70. The robbery was not over by the time Osorio reached Appellant's vehicle and she certainly was not at a point of "safety," which Appellant seems to concede by choosing to qualify the word "safety".AOBat45. Moreover, as discussed *supra*, Osorio acted justifiably when he jumped on Appellant's vehicle during the ongoing robbery and defenses discussed in Section I *supra* were not inaccurate statements of the law.

C. Grand Larceny

Appellant argues because the word "intentionally" was left out of the Grand Larceny instruction, State failed to prove Appellant was guilty as there was "no evidence presented as to how [Osorio's] Rolex ended up in [Appellant's] car."AOBat45-46. Her argument fails.

As per Section I.F., jurors were properly instructed that Appellant would be guilty of Grand Larceny if they found that Appellant "steals, takes and carries away, leads away or drives away person goods or property of another, having a value of

$3500 or more, with the *specific intent* to permanently deprive the owner thereof is guilty of Grand Larceny> $3500."IIAA363. Jurors had enough evidence to support a finding of guilt. They were presented with evidence that Appellant had Osorio's watch and intended to permanently deprive him of it based on: messages on Appellant's cellphone arranging to sell the watch to the pawn store in Miami where the watch was eventually recovered, the FedEx Store surveillance footage showing Appellant conducting a transaction, the FedEx receipt showing Appellant shipped the watch, as well as a text message with her friend stating that "you got an all gold."VAA1428-30,1436;VIIAA1515-16,1523;IXAA2045. Further, jurors were presented with testimony that after Osorio exited Appellant's vehicle, he chased after it, eventually jumping on the hood and banging on the windshield while screaming.VIAA1468-69. Arguably, behavior of someone trying to retrieve an item. Osorio's father testified that he purchased the watch for his son for $8,000.VAA1177. There was sufficient evidence for jurors to make a logical inference that Appellant took Osorio's Rolex with the specific intent to permanently deprive him of it.

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D. Second-Degree Murder

Appellant makes conclusory argument that State failed to prove she acted with malice.AOBat46-47.

Desai,133Nev.at347, relied on Labistida v. State,115Nev.298,307(1999), where Court found that in order to find the implied malice required for second-degree murder, there must be facts that support that the defendant "commit[ed] [an] affirmative act that harm[ed] the victim." Desai found that State had failed to prove the required implied malice element because there was no evidence that the defendant affirmatively caused the harm.

In this case, unlike Desai, there was sufficient evidence presented to support the jury finding malice as Appellant committed an affirmative action that led to Osorio's death. Jurors were presented with evidence that due to Appellant's acceleration of her vehicle, Osorio fell onto the asphalt and sustained injuries that led to his death.VIIAA1486,1515. Jurors were presented with evidence for a finding of malice and ultimately the elements for Second-Degree Murder.

As per Section I.F.2., State did not charge Second-Degree Felony Murder, so Appellant's arguments regarding the verdict on this issue are irrelevant.

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III. DOUBLE JEOPARDY PRINCIPLES DO NOT PROHIBIT CONVICTIONS FOR ROBBERY AND GRAND LARCENY

Appellant argues double jeopardy was violated when she was convicted of Robbery and Grand Larceny.AOBat41-52. As discussed in Section 1.E., Appellant's argument fails.

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Jackson v. State,128Nev.598,604(2012). This protection applies to Nevada citizens through the Fourteenth Amendment to the U.S. Constitution, Benton v. Maryland,395U.S.784,794(1969), and the Nevada Constitution, Nev. Const. art. 1, § 8.

Two offenses arising out of the same conduct are deemed not to violate the Double Jeopardy Clause if each offense requires proof of an element that the other does not.Blockburger v. U.S.,284U.S.299,304(1932);See e.g. Wright v. State,106Nev.647(1990). Under Blockburger, if each count contains an element which is not contained in the other, the counts do not charge the "same offense" for double jeopardy purposes. Id. Blockburger "inquires whether each offense contains an element not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment and successive prosecution.U.S. v. Dixon,509U.S.688,696(1993). Importantly, Blockburger emphasizes the elements needed to establish each crime, and not the facts used to prove each crime. "'If each [crime] requires proof of a fact that the other does not, the Blockburger test is

satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.'"Brown v. Ohio432 U.S.161,166(1977).

The Double Jeopardy Clause further precludes consecutive prosecutions for greater and lesser included offenses where the lesser offense requires no proof beyond that which is required for conviction of the greater.Brown v. Ohio,432U.S.at168. This Court has held that the proper test to determine whether a crime constitutes a lesser included offense of another is to determine "whether the offense charged cannot be committed without committing the lesser offense."Lisby v. State,82Nev.183,187(1966). This test is met when all the elements of the lesser offense are included in the elements of the greater offense.Id. For a crime to be considered a lesser offense, the "conviction of [the] greater crime, cannot be had without conviction of the lesser crime."Harris v. Oklahoma,433 U.S.682,683,(1977).[4]

While this Court generally reviews a Double Jeopardy violation de novo (Davidson v. State,124Nev.892,896,(2008)), Appellant abandoned this issue below.Buck,105Nev.at766. Even if Court reviewed this issue, as discussed in Section I.D., this Court has properly concluded that larceny is not a lesser-included offense of robbery and Appellant has not demonstrated a compelling argument for this Court to overrule its precedent.

4 The State incorporates the authorities from Section I.D.

IV. COURT DID NOT ERR DURING VOIR DIRE

Appellant argues Court erred when it prevented her from asking questions regarding her working as a prostitute or prostitution in general.AOBat52-57. However, his claim fails.

Jury selection is "particularly within the province of the trial judge."Skilling v. United States,561U.S.358,362(2010). "Decisions concerning the scope of voir dire and the manner in which it is conducted are reviewable only for abuse of discretion."Hogan v. State,103Nev.21,23(1987);see also Summers v. State,102Nev.195, 199(1986). On appeal, how a court chooses to conduct voir dire is given "considerable deference."Lamb v. State,127Nev.127,137(2011). "The purpose of "jury voir dire is to discover whether a juror 'will consider and decide the facts impartially and conscientiously apply the law as charged by the court."Johnson v. State,122Nev.1344,135(2006).

NRS175.031 mandates that "[t]he court shall conduct the initial examination of prospective jurors, and defendant or the defendant's attorney and the district attorney are entitled to supplement the examination by such further inquiry as court deems proper. Any supplemental examination must not be unreasonably restricted." The U.S. Supreme Court has recognized that the Constitution "does not dictate a catechism for voir dire, but only that the defendant be afforded an impartial jury."Morgan v. Illinois,504U.S.719,729(1992). Further, the point of voir dire is not

to give Appellant an opportunity to pick the most favorable jury possible, but to determine whether individual jurors will consider the facts impartially and apply the law as instructed.Harold v. D. Corwin, M. D.,846F.2d1148,1150(8thCir.1988); Whitlock v. Salmon,104 Nev.24,27(1988).

State generally questioned the venire about prostitution and potential biases:

> Okay. So I ask that question about sort of the nightlife here, it's more of a thing that people who don't live in Vegas don't really understand. But, you know, is there anybody, and I don't mean this to suggest that there's anybody who's actually engaged in the conduct, but anybody who's had an experience with somebody in one of these casinos where you thought that person might be a prostitute? Anybody? Okay.
> PROSPECTIVE JUROR NUMBER 290: Jiemyl Mendigorin, badge 290.
> MR. DIGIACOMO: 290.
> PROSPECTIVE JUROR NUMBER 290: Since I work as a bar-back in the Aria, it's, for me, I can easily spot like a prostitute or like, well, hookers, like that, in the place.
> MR. DIGIACOMO: Sure. They're fairly prevalent in the casino industry.
> PROSPECTIVE JUROR NUMBER 290: Yes, they are.
> MR. DIGIACOMO: Okay. Is there -- if there is any allegation, I'm not sure that there will be, but if there's any allegation that there may have been an act of prostitution involved here, would that affect your ability to be fair and impartial?
> PROSPECTIVE JUROR NUMBER 290: No, no, it wouldn't. MR. DIGIACOMO: No. 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 the facts? PROSPECTIVE JUROR NUMBER 290: The facts are the facts, yeah.
> MR. DIGIACOMO: Anybody else -- anybody disagree with that? Anybody have such a strong feeling about the nature of prostitution that would affect your ability to be fair and impartial here? You know, sort of like my marijuana, there's some people who have very strong feelings about prostitution, is there anybody here who has those type of feelings? Okay. Seeing no answers.

IVAA918-19. State then moved on from that subject.

> On the other hand, Appellant towards the beginning of voir dire stated:
>
> MR. MUELLER: Ms. Guidry 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 said anything. No -- so no –

VAA989.

> After permitting questions, Court held a bench conference:
>
> THE COURT: All right. I will not allow for pre-trying the case with the jury. So if we're going to go into facts that are going to be introduced, I'm not going to allow that. So I allowed that question as to not to draw additional attention to it, but the form of that question was basically you're becoming a witness to the own trial and I'm not okay with that.
>
> So do you have any more questions that are along this line? MR. MUELLER: No, no.

VAA990. Appellant stated that she was a prostitute was a fact that would be revealed. State argued that while that may be the case, Appellant's framing of the question was the issue.VAA990. State argued the issue was that Appellant told the jury that Appellant was a prostitute rather than stating that there was evidence that someone involved in the case was a prostitute.VAA990. Court explained that is why it let Appellant ask the question.VAA990. Appellant then proceeded with voir dire.VAA990.

Appellant misrepresents the record. State did not contend that Appellant "could not ask questions indicating Ronneka was a prostitute," but instead attempted

to assist counsel with how to properly form his question that did not result in Appellant pre-trying her case.AOBat53. State agreed that while it was an erroneous question, it was a fact that would be adduced. Court did not prevent Appellant from asking questions regarding prostitution, but instead cautioned counsel not to pre-try the case, which was an appropriate precaution to protect the integrity of the voir dire process.Johnson,122Nev.at1354;Hogan,103Nev.at23;sealsoSummers,102Nev.at19 9. Appellant's claim is belied by the record. To the extent Appellant complains State referenced Appellant was a prostitute at trial is of no consequence because State made these references at the appropriate time: when it was trying its case.Hargrove,100Nev.at502.

In addition to the premise of Appellant's argument being incorrect, to the extent Appellant asserts any prejudice because the jurors may have been embarrassed to admit bias related to the subject of prostitution, Appellant has not provided any evidence that such happened here. Indeed, after being sworn to responding with truthful answers, members of the venire were asked about their potential biases related to the issue and no one responded to having any bias.IVAA768. Therefore, Appellant has not and cannot point to anywhere in the record that would indicate that any prospective juror violated their oath of truthfulness. Appellant's citation to authority like Walkowski v. McNally,87Nev.474(1971), is not instructive. Walkowski, involved evidence that

jurors, while initially stating they would not be influenced by prostitution facts elicited during the case, later admitted in affidavits submitted to court that the fact that prostitution was involved in the case affected their deliberations.Id.at477-78. No such evidence exists here. Due process was not violated as Appellant was not prevented from asking questions about prostitution.

V. STATE DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT DURING ITS OPENING STATEMENT[5]

Appellant argues State committed prosecutorial misconduct during its opening statement when it noted: (1) "jumped out in front of her [car] and put his hands on her hood and said, Stop, I want my watch back" and (2) narrated videos, gave personal opinion, and argued.AOBat58-62.

In resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: (1) determining whether the comments were improper and (2) deciding whether the comments were sufficient to deny the defendant a fair trial.Valdez v. State,124Nev.1172,1188(2008). This Court views the statements in context and will not lightly overturn a jury's verdict based upon a prosecutor's statements.Byars v. State,130Nev.848,865(2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights.Gallego v.

5 For organizational purposes, State has elected to respond to Appellant's various arguments in under one heading.

State,117Nev.348,365(2001),abrogated on other grounds by Nunnery v. State,127Nev.749(2011).

With respect to the second step, this Court will not reverse if the misconduct was harmless error.Valdez,124Nev.at1188. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189. When the misconduct is of constitutional dimension, this Court will reverse unless State demonstrates that the error did not contribute to the verdict.Valdez,124Nev.at1189. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

In full context, State argued:

> When you put that altogether the evidence is going to show exactly what happened. That Mr. Osorio had contact with Ms. Guidry. He thought he was going to have some sort of sexual contact with her. She lured him into his vehicle. She drove him to the Westin. And during the course of that interaction, she slipped off his watch and then got him out of the vehicle. And when he realized his watch was missing, he ran to the vehicle and tried to stop her. And when he jumped out in front of her and put his hands on her hood and said, Stop, I want my watch back.

VAA1153. Just prior to this, Court cautioned jurors that attorneys' statements were not evidence.VAA1153. While Appellant objected to State's assertion, Court

explained that State was "teetering towards argument" and instructed State to discuss what it anticipated regarding the detectives' testimonyVAA1154. State complied and then told jurors what the detectives' testimony would show. VAA1154.

State was not acting in bad faith when it made the comment regarding the phrase "stop, I want my watch back." Instead, State was using it as a turn of phrase and made a logical inference from the evidence. Regardless, the jury was instructed just before the statement was made that the attorneys' statements were not evidence.VAA1153. Jurors were again informed of this through Instruction 41.IIAA378. Jurors are presumed to have followed these instructions. Newman v. State,129Nev.222,237(2013); Allred v. State,120Nev.410,415(2004). Moreover, the fact that State did not make the statement at closing does not change the analysis. Any error would be harmless based on the overwhelming evidence of guilt as per Section I.A.

To the extent Appellant complains State provided inappropriate narration during opening statement regarding the videos, her argument is meritless. By describing what the videos depicted, State was not offering opinion, but was discussing what the evidence, i.e. the videos, would show and was not offering personal opinions. Regardless, in addition to Instruction 41, Court cautioned jurors multiple times prior to opening and during opening statements that arguments of

attorneys were not evidence.VAA1136,1144, 1153. Any error would be harmless based on the overwhelming evidence of guilt as per Section I.A.

VI. COURT DID NOT ERR BY ADMITTING EXHIBIT 41

Appellant argues Court improperly admitted Exhibit 41, a photo of Osorio in the hospital, because it was unduly graphic, not relevant, and any probative value was substantially outweighed by the danger of unfair prejudice.AOBat63-65.

This Court has consistently held that gruesome photographs are not per se inadmissible.See, e.g.,Archanian v. State,122Nev.1019,1031(2006);West v. State,119Nev.410,420(2003). Indeed, "[d]espite gruesomeness, photographic evidence has been held admissible when . . . utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction. Accordingly, gruesome photos will be admitted if they aid in ascertaining the truth." West,119 Nev.at420(emphasis added);Browne v. State,113Nev.305,314(1997). "The admissibility of gruesome photographs showing wounds 'lies within the sound discretion of Court and, absent an abuse of that discretion, the decision will not be overturned.'"Flores v. State,121Nev.706,722(2005). The role of courts is to act as gatekeepers in deciding whether to admit evidence by "assessing the need for the evidence on a case-by-case basis," including evaluating whether the benefit of such evidence is outweighed by the prejudice that may result.Harris v. State,134Nev.877,880(2018).

In Harris,134Nev.at880, this Court evaluated whether the admission of several photographs depicting the victims' injuries was proper. In concluding that Court did err, Court compared the prejudice of the photos, which it noted was "shocking" as they displayed charred limbs, burned flesh, dissected tracheas, chest cavities, and desecrated bodies, with the probative value.Id.at880. Court concluded that the probative value was minimal compared to the prejudice. Id. at 883. In reaching its decision Court explained that Court should have "more meaningfully culled the photographs or otherwise limited their use."Id.at882. Ultimately, Court reasoned that any error was harmless based on the overwhelming evidence of guilt and noted that Court "tempered" the prejudicial effect by warning jurors ahead of time and admonishing the courtroom audience not to react.Id.at883.

Appellant objected to a photo of Osorio's head and face while in the hospital.VIAA1239-40. State explained that it sought to admit the photo, as well as one additional photo of Osorio's arm, for purposes of identification and to demonstrate the victim's injuries at the hospital as it was permitted to do pursuant to Browne,113Nev.at314.VIAA1240. Court permitted State to admit only those two photos from the hospital but explained to the extent State wished to admit additional autopsy photos, it would wait to rule until State proffered.VIAA1240.

State called LVMPD Crime Scene Analyst, Jennifer Sturmillo, regarding her documentation of evidence.VIAA1241-42. During her testimony, State asked

Sturmillo if she recognized Exhibit 41, which she confirmed to be the photo she took of the victim that was used for identification purposes:

> Q So showing you State's 41, okay, and what are we looking at in State's 41?
> A That would be the identification shot and showing the injuries of the victim.
> Q Okay. And that victim is Eduardo Osorio in this case?
> A Correct, yes.
> Q Okay. In this shot it's obviously a depiction of the head, what was significant about photographing the head, based on your briefing and what you had learned about the nature of the previous incident?
> A I was told that that's – that was where the majority of the injuries were. So I noted that there's some bruising, obviously a lot of blood, that's where I took this photo.
> Q Okay. Multiple abrasions to the head; correct?
> A Correct.

VIAA1247-48.

The photo was used for identification purposes and to show the cause of death as well as the severity of the victim's wounds which are relevant permissible purposes.Browne,113Nev.at314. State is tasked with the burden to prove all criminal charges beyond a reasonable doubt and the severity of the victim's injuries serves such purpose as it contributes to the overall understanding of Appellant's intent. In addition to identification, this one picture assisted jurors in understanding Appellant's intent. This photo depicted the injuries Appellant caused when she accelerated to the point Osorio fell from her vehicle at such a speed to cause these injuries. This picture shows that despite the way Osorio looked after he hit the ground, Appellant chose to flee from the scene instead of rendering aid, which was

further indicative of her intent. This photo was highly relevant to proving the elements of the crime.

The probative value of the photo was not substantially weighed by the danger of unfair prejudice. That another hospital photo and three autopsy photos were admitted does not make the admission of Exhibit 41 prejudicial. Unlike the photos in Harris, State did not admit cumulative gruesome photographs. Exhibit 41 was taken while Osorio was in the hospital and only showed the injuries to his head and face, whereas the autopsy photos depicted what Osorio looked like at the time of the autopsy and depicted more than just the injuries to his head and face.IXAA1975-76,1979-84. The additional photo admitted from the hospital depicted the injuries to Osorio's arm.IXAA1977-78. The record is clear that Court limited the admission of photos as it only allowed these two photographs taken of the victim at the hospital and three photographs from the autopsy.

Any error would be harmless. Appellant complains any error would not have been harmless because State argued during closing that jurors should look at the autopsy and hospital photographs to determine how Osorio was injured. This was permissible argument as these photographs were evidence and in the full context shows State had two reasons to compare the two different sets of photos: (1) so jurors could discern that the victim was not cleaned up between the hospital and the Coroner's Office and (2) the cause as well as the severity of Osorio's injuries:

> Ask yourself, you can look at the photograph within the hospital too if you're worried somehow he had been cleaned up. But ask yourself, how it is the mark on the left side of his face has those little circular marks that are on there. Does that look like asphalt to you? And he has an injury right here. So when she hit the pedal, whether or not he had cracked that windshield before with that fist or not, because he doesn't have a broken hand. So, I, you know, potentially – there's no doubt he's punching the windshield or hitting the windshield. But not all of that damage is necessarily from the fist because he has that injury on his face and an injury on his shoulder consistent with hitting, then falling off, the back of his head, look at that injury, it's got this big rip on the back of his skull, and then he slides for 42 feet.
>
> And the suggestion is there's no force? There's 52 or 56,000 pounds of force that's applied to his body in an effort to escape with his property. That's a robbery.

VIIAA1680.

State asked jurors to review the evidence, which is exactly the role of the jury. That State did not ask jurors to consider the coroner's findings during its closing arguments does not negate the fact that jurors were instructed to consider all of the evidence in reaching its verdict.

VII. STATE DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

Appellant argues State committed prosecutorial misconduct when it argued the following during rebuttal closing because it was not supported by evidence: (1) when Osorio go out of her car Appellant did not wait for him to be fully out before she drove off, (2) when she drove off the curbing forced her to go the other way and the easiest way was back down Koval, (3) Appellant said she knew why Osorio was

banging on her window, (4) State inflamed the jury for making the comment regarding the hospital and autopsy photos depicting Osorio.AOBat65-67.

Appellant waived review of by failing to object .Dermody,113Nev.at210-11; Guy,108Nev.at780, cert. denied, 507U.S.1009(1993);Davis,107Nev.at606. To the extent Court entertains review, the appropriate standard is plain error.Id. However, under any standard Appellant's argument fails.

State incorporates prosecutorial misconduct law from Section V. Appellant argues State incorrectly argued that "when Osorio got out of her car she did not wait for him to be fully out of the car before she drove off."AOBat65. This was a turn of phrase. Indeed, jurors were presented with Salisbury's testimony that Osorio was seen getting out of Appellant's vehicle and within seconds of Appellant pulling away, Osorio was chasing after the vehicle.[6]VIIAA1569-70. Just before making this statement State had just finished saying that Osorio "gets out of the car and she drives off."VIIAA1678.

As for the second statement, "when she drove off the curbing forced her to go the other way and the easiest way was to back down Koval," Appellant's argument is meritless. This statement was not inaccurate. Salisbury testified that when exiting the Westin Parking Lot, Appellant would not have been able to make a left, *unless*

6 Appellant cites to Trial Exhibit 105, which she did not provide for this Court's review. State has filed a Motion to Transmit the relevant videos for this Court's review.

she drove left of center and that she would have had to make a right turn to go south towards the intersection.VIIAA1537. Later, Salisbury testified that individuals could make a left turn out of the Westin Parking Lot.VIIAA1565. A close inspection of State's argument in its full context shows that State did admit that Appellant could take a left on Koval, but instead drove right.VIIAA1679. Regardless, Appellant had options in the direction she drove and the curbing may have guided those options, which State could argue was the easiest direction to return to Koval. Accordingly, this was not a misstatement.

Appellant complains State argued, "[Appellant] said she knew why Osorio was banging on her window." That was not a misstatement when read in its full context:

> But she does tell you that she knows exactly why he's banging on her window. She says it before the detective even says it. She says, If a guy's acting like that, I would have given him back the property if I had the property.

VIIAA1681.

> During her voluntary statement Appellant stated:
>
> to say if I really would have had his watch how he was beatin' my window I would have reached and gave it to him. It's not that serious. (Unintelligible) no Paradise and, wherever, Koval. It's not that serious. I'm gonna give him back the watch. I don't care. I'm not - my life is way more valuable than - than a stupid ass watch.

VIIIAA1811.

Accordingly, without flat out admitting that she stole Osorio's watch Appellant was explaining that if she had, she would have given it to him if he were banging on her window. State was arguing that Appellant was providing a description of what occurred that night without admitting fault. This was not a misstatement.

State was not seeking to inflame jurors by referring to the hospital and autopsy photographs. Instead, read in its full context State was asking jurors to look at the photographs to determine whether Osorio was not cleaned up and that the injuries depicted in those photographs were the injuries he sustained.VIIAA1680. State used photographs to explain that not all of the injuries Osorio sustained appeared to be from his contact with the asphalt.VIIAA1680.

Regardless, jurors were instructed that argument of counsel is not evidence and they are presumed to follow that instruction. IIAA378; Newman,129Nev.at237;Allred,120Nev.at415. Any error would be harmless based on the overwhelming evidence of guilt, per Section I.A.

VIII. DUE PROCESS WAS NOT VIOLATED REGARDING DETECTIVE SALISBURY

Appellant argues her due process rights were violated by State failing to endorse Detective Salisbury as an expert witness, failing to provide Appellant with his Supplemental Report until after he testified, and Detective Salisbury was not

qualified.AOBat67-70. As a preliminary matter, as Appellant incorporates Statement of Facts, State does as well.

> NRS 174.234 states, in relevant part:
>
> 2. If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the state or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who
> intends to call that witness shall file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing:
>
> (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony;
> (b) A copy of the curriculum vitae of the expert witness; and
> (c) A copy of all reports made by or at the direction of the expert witness.
>
> 3. After complying with the provisions of subsections 1 and 2, each party has a continuing duty to file and serve upon the opposing party:
> (a) Written notice of the names and last known addresses of any additional witnesses that the party intends to call during the case in chief of the State or during the case in chief of the defendant. A party shall file and serve written notice pursuant to this paragraph as soon as practicable after the party determines that the party intends to call an additional witness during the case in chief of the State or during the case in chief of the defendant. The court shall prohibit an additional witness from testifying if the court determines that the party acted in bad faith by not including the witness on the written notice required pursuant to subsection 1.

This Court has held that "there is a strong presumption to allow the testimony of even late-disclosed witnesses, and evidence should be admitted when it goes to the heart of the case."Sampson v. State,121Nev.820(2005).

In this case, State filed several Notices of Witnesses and/or Expert Witnesses prior to trial.IAA10-39;IRA1-10;IAA187-190;IIAA288-293;IIAA311-14. In State's Notice of Witnesses And/or Expert Witnesses filed on April 17, 2018, State described Detective Salisbury as follows:

> This witness is a detective employed by LVMPD. He is an expert in accident reconstruction. He is expected to testify to methodologies generally used in accident reconstruction. He is expected to testify as to the details and conclusions of the accident reconstruction done in this case.

IAA12. This same description was used in State's Supplemental Notice of Expert Witnesses filed on July 3, 2019.IIAA290. Accordingly, State provided "a brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony."NRS 174.234.

To the extent Appellant complains State failed to provide Detective Salisbury's curriculum vitae and a copy of his report, he cannot demonstrate bad faith on State's part. Bad faith requires an intent to act for an improper purpose. See, Fink v. Gomez,239F.3d989,992(9thCir.2001). And in this case, bad faith is belied by the record.Hargrove v. State,100Nev.at502(allegations belied and repelled by the record are insufficient to warrant relief). Indeed, while Appellant's counsel was questioning Detective Salisbury he told Court that he did not receive Detective Salisbury's report.VIIAA1590. State represented that it had a receipt of copy showing that the Supplemental Report was sent to Appellant's counsel.VIIAA1590.

Court explained that the parties would continue the discussion outside the presence of the jury.VIIAA1591. Once outside of the presence of the jury, State represented to Court that State had a return of copy for the discovery discs that were sent to Appellant's counsel, but that it was possible he was missing a disc.VIIAA1610. State then combed through a 750-page PDF document to see if the Supplemental Report was contained in the PDF.VIIAA1610. Appellant's counsel later represented that State provided Detective Salisbury's Supplemental Report over the lunch hour and explained that he was not complaining about not getting the document in discovery because he has almost everything contained in the report and nothing has changed about the trial, but what he was concerned about was the conclusions regarding the speed of Appellant's vehicle that Detective Salisbury made.VIIAA1625-26.

State responded as follows:

> MR. DIGIACOMO: Yeah, I don't have an -- when I went back at lunch my discovery person wasn't there so I grabbed a copy of the report. I gave it to him.
>
> I will tell the Court that this detective was noticed as an expert in reconstruction from Mr. Mueller saying he didn't have the speed calculations for somebody that was noticed as an expert.
>
> I will tell you two days ago he said, hey, what were the numbers on the speed calculation?
>
> And I said to him, it's in the main officer's report.
>
> Which is what that is, the main officer's report associated with this particular case. I heard nothing about it.
>
> Yesterday, the detective did not testify that the victim fell off the car at 59 miles an hour. Mr. Mueller keeps saying that. But the detective testified the victim fell off the car when the car was going 23 miles an hour; that the car was going 59 miles an hour when it left the screen on the videotape.

> And to the extent that Mr. Mueller is saying that he needs till tomorrow to start -- or till Monday to start his case in order to have somebody review that, I have no objection to that happening with him. But to suggest that somehow he's prejudiced in a situation where the expert was noticed, and if he didn't have the underlying data to the expert's opinion, he should have told us sometime before right now.

VIIAA1628.

Appellant's counsel then requested a curative instruction related to the speed of the vehicle leaving the scene.VIIAA1628. Eventually, Court noted that State filed the two aforementioned witness notices that described Detective Salisbury's testimony.VIIAA1630. Accordingly, Court found that Appellant was on notice that State was going to call Detective Salisbury as an expert witness.VIIAA1632. Court then noted that Appellant included Detective Salisbury in his Notice of Witness List Pursuant to NRS 174.234 filed on August 9, 2019. Thereafter, Court asked Appellant if she wanted to recall Detective Salisbury for additional cross-examination, to which counsel stated: "I accept. That's a good cure. I'll do that."VIIAA1634. Appellant then called Detective Salisbury to the stand for further questioning and questioned him about his concerns regarding the speed of Appellant's vehicle among other related topics.VIIAA1637-42.

Accordingly, Appellant has failed to demonstrate, let alone claim, that State acted in bad faith by failing to provide the Supplemental Report as State demonstrated it did not act in bad faith. Any possible prejudice was alleviated by Court permitting Appellant to recall Detective Salisbury and question him.

Appellant had been notified multiple times that Detective Salisbury would be called as a witness and even noticed him as a defense witness.IAA12;IRA3,13-15;IIAA290,311-14;Sampson,121Nev.at820.

The absence of Detective Salisbury's curriculum vitae would not have resulted in any difference in what was presented to the jury, especially because Appellant argued at trial that he was not challenging Detective Salisbury's qualifications:

> MR. MUELLER: […] My complaint is not that he's not qualified or that he's not entitled to have his opinion. My complaint is only I found about his speed estimate and calculation on the witness stand.

VIIAA1630.

With that admission in mind, Appellant's newfound argument on appeal that Detective Salisbury was not qualified in accident reconstruction or speed calculations was abandoned at trial as Appellant was complicit in creating a situation where there would be an insufficient record for review on appeal.Buck,105Nev.at766. To the extent Court finds that the issue was not abandoned by Appellant agreeing that Detective Salisbury was qualified, this issue is still waived for failing to raise this issue at trial and would be subject to only plain error should this Court elect to review this claim.Dermody,113Nev.at210-11;Guy, 108Nev.at780;Davis,107Nev.at606.

Under any standard of review, Detective Salisbury was qualified as an expert in accident reconstruction and speed calculations. NRS 50.275 governs testimony by experts and states:

> If scientific, technical or other special knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

Further, NRS 50.285 states:

> 1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.
> 2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Expert testimony is admissible if it meets three requirements, described as the qualification, assistance, and limited scope requirements: (1) the expert must be qualified in an area of scientific, technical or other specialized knowledge; (2) his or her specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue; and (3) his or her testimony must be limited to matters within the scope of his or her specialized knowledge.Perez v. State,129Nev.850(2013).

The threshold test for admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand evidence or determine a fact in issue. The goal is to provide the trier of fact with a

resource for ascertaining the truth in relevant matters outside the ken of ordinary laity. The probative value of such testimony must also exceed its prejudicial effect.SeeNRS 48.035 and 50.275;Townsend v. State,103Nev.113(1987).

This Court has found that expert testimony need not be confined solely to areas of inquiry governed explicitly by the laws of science.See Yamaha Motor Co. v. Arnoult,114Nev.233(1998). Rather, the goal of allowing expert testimony "is to provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity."In re Mosely,120Nev.908,921(2004). In determining whether a person qualifies as an expert in a given area, court may consider the person's employment experience, practical experience, and specialized training among other factors.Hallmark v. Eldridge,124Nev.429,499(2008).

Court has wide discretion to determine the admissibility of expert testimony on a case-by-case basis.Brant v. State,130Nev.980(2014). Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert is within Court's discretion, and this court will not disturb the decision absent a clear abuse of discretion.Smith v. State,100Nev.570,572(1984);Childers v. State,100Nev.280,283(1984).

In this case, Detective Salisbury testified at trial that he was an LVMPD officer for fifteen years, he was a part of the fatal detail of the LVMPD traffic bureau since May of 2012, and he completed an additional 600 hours of training in order

reconstruct traffic collisions.VIAA1456. Detective Salisbury testified that his 600 additional hours of training comprised of the sciences involved when conducting collision reconstruction, including psychology, physics, mathematics, and dynamics.VIAA1456-57. Moreover, Detective Salisbury explained that he testified regarding accident reconstruction or collision reconstruction approximately three or four times prior to Appellant's trial.VIAA1457. Accordingly, Appellant's claim that Appellant was only qualified to testify as an accident investigator as opposed rather than accident reconstructionist is belied by the record.Hargrove,100Nev.at502.

To the extent Appellant claims there is no evidence of these qualifications, such qualifications were provided under oath and Appellant has provided no evidence that Detective Salisbury lied about his qualifications. It also bears noting that while Appellant claims there is no evidence that Detective Salisbury received training from "Northwesterm\n [sic] or any other renowned institution," this does not prove that Detective Salisbury is not qualified.AOBat69. Moreover, beyond Appellant's conclusory assertion, she has done nothing to demonstrate that Detective Salisbury's conclusions were unreliable. Regardless, any error would be harmless based on the overwhelming evidence of guilt as discussed supra in Section I.A.

IX. THERE WAS NO UNREASONABLE SEARCH AND SEIZURE

Appellant argues Court erroneously denied Appellant's three pretrial motions to suppress, request for an evidentiary hearing, and motion for return of property, i.e. Appellant's vehicle.AOBat70-79.

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. Amend. IV. The Fourth Amendment states that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."U.S. Const. Amend. IV;Draper v. United States,358U.S.307(1959). "'Probable cause' requires that law enforcement officials have trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are: seizable and will be found in the place to be searched."Keesee v. State,110Nev.997,1002(1994).

"Suppression issues present mixed questions of law and fact."Johnson v. State,118Nev.787,794(2002),overruled on other grounds by Nunnery v. State,127Nev.749,771(2011). This Court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that this Court reviews de novo.Cortes v. State,127Nev.505,509(2011);State v. Lisenbee,11 Nev.1124,1127(2000). The reasonableness of a seizure is a matter of law reviewed de novo.Id.;United States v. Campbell,549F.3d364,370(6thCir.2008). When the factual findings depend largely on credibility determinations, an appellate court will defer to the district court.Spain v. Rushen,883F.2d712,717(9thCir.1989),cert. denied,110S.Ct.1937(1990).

Under NRS 171.123(1) and Terry v. Ohio,392U.S.1(1968), police officers may temporarily detain a suspect when officers have reasonable articulable suspicion that the suspect "has committed, is committing or is about to commit a crime."Somee v. State,124Nev.434,442(2008). It is reasonable for the officer to search "the arrestee's person and the area within his immediate control – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."Michigan v. Long,463U.S.1032,1048-49(1983). Further, "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within the area into which an arrestee might reach in order to grab a weapon . . . ."Id.

A. Vehicle Impounded

Appellant argues for the first time on appeal, that LVMPD's impound of her vehicle was unreasonable because officers created a "caretaking" issue by waiting until Appellant drove out of the Walgreens parking lot to conduct a traffic stop.AOBat72-73.

As a preliminary matter, while Appellant motioned Court to retrieve her vehicle from LVMPD, she did not raise this specific issue below. Accordingly, this specific issue is waived as Appellant failed to raise this issue below and this Court should decline review.AOBat74; Dermody,113Nev.at210-11;Guy,108Nev.at780;

Davis,107Nev.at606. To the extent this Court elects to review this claim, the appropriate standard of review would be plain error.Martinorellan,131Nev.at49.

Under any standard of review, this argument is meritless. The U.S. Supreme Court has concluded that an inventory search is per se reasonable, and accordingly constitutional, when it complies with police department policies.Diomampo v. State,124Nev.414,432(2008). This Court has adopted this jurisprudence and explained that "police officers need not comply with the Fourth Amendment's probable cause and warrant requirements when they are conducting an inventory search of an automobile in order to further some legitimate caretaking function."Weintraub v. State,110Nev.287,288(1994). "In addition, in Nevada, under certain circumstances, police officers may actually have an obligation to conduct an inventory search."Id. However, "[t]he inventory search must be carried out pursuant to standardized official department procedures and must be administered in good faith in order to pass constitutional muster.Id.at288. Further, the inventory search must not "be a ruse for general rummaging in order to discover incriminating evidence."Id.

In Diomampo,124Nev.at432, Court determined that an inventory search of the defendant's vehicle was proper because it complied with LVMPD policy that provides cause to impound a vehicle "[w]hen ownership and rightful possession by the driver is in doubt" or "[w]hen an abandoned vehicle causes an immediate threat

to other motorists by its location or cargo, immediately after citing the vehicle." Specifically, Court found that the inventory search was reasonable due to the defendant's vehicle being "parked in an unsecured location, obstructing traffic."Id.at433.

Diomampo is directly applicable to this case. Indeed, officers testified at Appellant's trial that they conducted a traffic stop of Appellant's vehicle as a result of Appellant committing various traffic offenses and having an active traffic warrant for her arrest.VIAA1376;VIIAA1493. Prior to the stop, the officers had been following Appellant's vehicle, lost track of it, then found it again parked an unoccupied at a nearby pharmacy.VIAA1371. The officers waited until the vehicle was occupied again to conduct the stop, which they did as Appellant attempted to drive away.VIAA1371-72. Appellant was then placed into custody for her active traffic warrant, and her vehicle would have been left in the street.VIAA1372. However, in compliance with LVMPD policy the vehicle was sealed and towed to LVMPD.VIIAA1508. Accordingly, LVMPD complied with the policy outlined in Diamampo and did not create a "caretaking issue" as the officers conducted the stop where Appellant had driven the vehicle.

To the extent Appellant attempts to argue this is not LVMPD's current policy, she has failed to provide this Court with this policy and it is not a part of the record as this is the first time the issue is being raised. As such, the record is presented to

support the outcome below.Prabhu v. Levine,112Nev.1538,1549(1996) (concluding "a silent record is presumed to support the actions of the court below."). Moreover, she has provided no indication that LVMPD's policy would have permitted the officers to leave Appellant's vehicle unattended in the pharmacy parking lot if they had conducted the stop there.Maresca,103Nev.at673. To the extent Appellant complains this led to the ultimate seizure of the items in the vehicle, her argument fails as the item that she seems to be most concerned about in other parts of the brief, i.e. Appellant's cellphone, would have been inevitably been seized via the search warrant discussed *infra*.

B. Warrants

Appellant argues State's warrants for the searches of Appellant's home as well as cellphone and the arrest warrant for Appellant did not establish probable cause and one statement or more in the affidavits attached to such warrants were incorrect.AOBat73-79.

NRS 179.045 provides the requirements for a search warrant. While the information contained in every warrant must be truthful, this "does not mean 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily."Franks v.

Delaware,438U.S.154,165(1978). Further, in U.S. v. Rettig,589F.2d418(9thCir. 1979), Court held:

> Where factual inaccuracy of the affidavit is alleged, a warrant is invalidated only if it is established that the affiant was guilty of deliberate falsehood or reckless disregard for the truth, and if with the affidavit's false material set to one side, the information remaining in the affidavit is inadequate to support probable cause. Id. at 422[…]

1. Home

Appellant argues photographs taken at Appellant's home at the time of the execution of the search warrant at her home, should have been excluded because such photographs were not listed on the return.AOBat74-75.

As a preliminary matter, and as Appellant concedes, this specific issue is waived as Appellant failed to raise this issue below and this Court should decline review.AOBat74;Dermody,113Nev.at21011;Guy,108Nev.at780;Davis,107Nev.at606. To the extent this Court elects to review this claim, the appropriate standard of review would be plain error. Martinorellan,131Nev.at49.

Under any standard of review, Appellant's argument is meritless. On January 9, 2018, Detective David Freeman applied telephonically for a search warrant to search Appellant's residence.IAA127. In that warrant, he relayed what he had been told from the initial responders who had seen the video:

> Officers Jennifer Cruz and Philip Adkins made contact with Security Officer Jamal Cherry at The Westin Hotel and reviewed video surveillance recordings that showed a view of the parking lot on the west side of Jay's Market Convenience Store at 190 East Flamingo

> Road. The surveillance recordings revealed that a black vehicle pulled into a parking space on the west side of the building and after approximately seven minutes a man (believed to be Eduardo Gaiolli De Sanchez Osorio) exited the vehicle from the front passenger door and stands outside the door. The black vehicle pulls away and turns to the right as the man appears to do a personal inventory and then turns to the southeast and begins running. The man catches up to the vehicle on Koval Lane north of Flamingo Road and appears to be banging on the windshield and hood at the front left corner of the vehicle. The vehicle turns westbound on Flamingo Road and the man can be seen clinging to the side of the vehicle and then falling to the ground as the vehicle speeds away.

IAA124.

Appellant's residence of 5086 Echo Shire Avenue was searched for the watch.VIIIAA1402-03. While searching the residence, a red or pink woman's purse was located in the master bedroom closet of the residence.VIIIAA1403-04. The purse was similar in appearance to the purse that was seen in the elevator video surveillance footage from the Caesar's the night of the incident.VIIIAA1333. Within the purse was 31 $100 dollar bills.VIIAA1508.

Appellant argues the photographs taken at the residence of her red purse with 31 $100 bills should have been excluded because the Warrant Return stated that no property was seized pursuant to the warrant.AOBat74;IAA131. Appellant then, with a bare citation to NRS 179.015 and nothing else, offers a one-line conclusory argument that "photographs taken during a search are a tangible object, an image, amounting to the seizure of property."AOBat74. NRS 179.015 does not state that photographs are tangible property, but instead provides: "[a]s used in NRS 179.015

to 179.115, inclusive, the term 'property' includes documents, books, papers and any other tangible objects." Appellant provides no authority that suggests photographs taken of tangible objects somehow transforms the photographs themselves into a "tangible object."

Regardless, the photographs depicted items that were in plain view or were covered by the warrant itself. Indeed, the warrant stated:

> A) A Rolex wristwatch, with a silver band, bearing the serial number 6KE22544.
> B) Paperwork such as rent receipts, utility bills, and addressed letters showing the name(s) of persons residing at the premises to include but not limited to: personal identification, photographs, utility company receipts, rental receipts and addressed envelopes.
> C) Cellular phone(s) belonging to Ronneka Ann Guidry.
> D) Paperwork such as proof of insurance and/or DMV registration showing the name(s) of persons owning or responsible for a 2014 Mercedes-Benz CLA250 4-door sedan bearing vin# WDDSJ4EBXEN054168.

IAA129.

Accordingly, the record reveals that the purse was found while executing the search warrant and was found in a closet which could have contained any of the aforementioned items. Thus, the purse itself was in plain view. The 31 $100 bills found inside of the purse were also found based on the plain view doctrine as the inside of the purse could have contained the items explicitly listed in the search warrant. It just so happened that the purse that could have contained such items also had 31 $100 bills inside within plain view.Wyatt v. State,8Nev. 294,301(1970)

("[w]hen, during the course of a bona fide search, objects indicative of the commission of other crimes are found, they may be seized.");Coolidge v. New Hampshire,403U.S.443,466(1971),holding modified by Horton v. California, 496U.S.128(1990)("the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object.").

Appellant's further argument that the pictures should have been excluded because they were not listed on the return equally fails. In addition to failing to provide any support to support her argument, the purse and the currency were not taken from Appellant's residence.Maresca,103Nev.at673;VIIAA1508. Only photographs were taken of the purse, the purse itself was not impounded, so the fact that the Search Warrant Return stated no items were taken for inventory is accurate and would not have provided a basis for exclusion.

Regardless, any error would have been harmless based on the overwhelming evidence of guilt in this case. Indeed, even if the photographs of the purse and the currency were excluded, there was other compelling evidence that connected Appellant to the charged crimes, including Appellant's admission that she was with the victim the night of his murder, the surveillance footage depicting her with him throughout the night, and the contents of her cellphone which contained evidence of the sale of the victim's Rolex.VAA1428-30,1436;VIIAA1515-16,1523;IXAA2045.

2. Car

Appellant appears to challenge whether she voluntarily left her cellphone in her vehicle, and while LVMPD impounded her vehicle on January 9, 2018, they did not obtain a search warrant until January 11, 2018.AOBat75.

Because Appellant is not attacking the search warrant for Appellant's vehicle in this section, it is unclear what Appellant is arguing.Maresca,103Nev.at673. To the extent Appellant complains of the delay in the search warrant, she has provided no authority that demonstrates a three-day delay somehow makes the search warrant invalid. Id. Moreover, in an attempt to respond to Appellant's unclear argument, Appellant's phone was left in her vehicle at the time she was placed under arrest for a vehicle warrant and traffic offenses. Whether she left her phone in the vehicle or on her person makes no difference because by being placed under arrest all of her belongings would be taken for inventory and safekeeping. Accordingly, State is stumped as to Appellant's argument regarding Appellant's assertion that Appellant did not leave her cellphone in her car. Regardless, as discussed *infra*, the cellphone would have been searched based on the doctrine of inevitable discovery.

3. Cellphone

Appellant begins her argument by stating that she previously claimed the officers illegally obtained Appellant's password to her cellphone and that the cellphone had been opened by officers prior to obtaining a warrant.AOBat75. After

providing these bare assertions, Appellant spends the rest of her argument in this section complaining that the search warrant for the cellphone contained the following errors: (1) the affidavit was misleading because it did not inform Court how the passcode for the cellphone was obtained, (2) the warrant was overbroad and not specific in its request, and (3) LVMPD obtained the warrant through "outrageous government conduct."AOBat77-78.

As a preliminary matter, to the extent Appellant is raising specific issues that were not raised below, her arguments are waived and, even if they are reviewed, are subject to only a review under plain error.Dermody,113Nev.at210-11; Guy,108Nev.at780;Davis,107Nev.at606; Martinorellan,131Nev.at49. However, under any standard of review, her claims fail.

On January 8, 2018, Appellant was taken into custody after she was stopped for traffic infractions and an active warrant.VIAA1411. At the time Appellant was taken into custody, her cellphone was located inside of the vehicle in plain view.VIAA1373,1411. After Appellant was taken into custody, her vehicle was sealed and then towed to the LVMPD crime lab.VIAA1373. Knowing that Appellant's cellphone was inside of Appellant's vehicle, that was sealed and towed to LVMPD, Detective McCullough learned of the passcode to Appellant's cellphone from her children the following day, on January 9, 2018, while he was executing the search warrant of Appellant's residence.VIAA1411. A search warrant for

Appellant's vehicle as well as the separate search warrant for Appellant's digitally stored information contained in her cellphone were signed January 11, 2018.IAA143,145-151. On January 17, 2018, the information contained on Appellant's cellphone was downloaded.VIAA1425. In August 2019, LVMPD conducted another download of Appellant's phone based on a new search warrant that was executed.VIAA1425-26. The basis for that search warrant was to determine whether the phone was utilized while in police custodyVIAA1425-26. Based on that analysis, the LVMPD digital forensics examiner determined that the cellphone had not been unlocked until he conducted the first download when executing the first search warrant and the correspondence alleged to have come from LVMPD via Appellant's cellphone could not have happened.VIAA1425-26.

Appellant's bare assertion, that she previously claimed the officers illegally obtained Appellant's password to her cellphone and that the cellphone had been opened by officers prior to obtaining a warrant, is her attempt to re-raise issues that Court properly rejected. Indeed, Court appropriately rejected Appellant's argument that the cellphone passcode was illegally obtained from Appellant's children when the search warrant of the home was executed and found:

> (1) the phone in question was located during a vehicle search which was conducted only after a legal and proper search warrant was obtained, (2) thereafter, the phone that was located was searched only after a separate legal and proper search warrant was obtained for the phone and (3) arguably, there was no impropriety in the officers contacting and speaking with Defendant s children since they were

> home alone when the home search occurred and the probable cause that existed in each warrant did not involve any information gleaned from any children so any contact the officers had with the Defendant's children was irrelevant to the search warrants.

IRA11-12;seeIIIAA648-664.

Indeed, it does not matter how Detective McCullough retrieved the passcode to Appellant's cellphone because the phone was not accessed until there was a search warrant. Moreover, despite Appellant's disingenuous assertion that LVMPD had no other way to gain access to the contents of the phone, the LVMPD digital forensics examiner that testified at trial stated that officers could have sent the phone to a company called Cellebrite Advanced Services to unlock the phone if they did not have the code.1422;AOBat76. Accordingly, with or without the passcode LVMPD would have gained access to the contents of the cellphone making such evidence an inevitable discovery, which is generally an exception for warrantless searches.Camacho v. State,119Nev.395,402(2003) (stating that "[t]he inevitable discovery rule provides that evidence obtained in violation of the Constitution [can] still be admitted at trial if the government [can] prove by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means."). In this case, there was a valid search warrant, despite Appellant's arguments, as discussed below. Regardless, just as below, Appellant has cited to no

authority indicating that Detective McCullough's actions to obtain the passcode were illegal.Maresca,103Nev.at673.

As for Appellant's complaint that the search warrant contained several problems, her argument is waived because it was not raised below and thus, should Court review the claim, it is subject to plain error review. Dermody,113Nev.at210-11;Guy,108Nev.at780, cert. denied,507U.S.1009(1993);Davis,107Nev.at606; Martinorellan,131Nev.at49.

Under any standard of review, Appellant's challenges to the search warrant are meritless. Appellant complains the search warrant affidavit to search Appellant's cellphone was misleading because officers obtained the passcode to "circumvent the password and conduct an off-site search."AOBat77. This statement was not misleading as officers may have needed to send the cellphone to Cellebrite, a process described *supra*, to gain access to the cellphone if the passcode Detective McCullough received did not unlock the cellphone. In other words, until LVMPD officers utilized the password given to them by Appellant's daughter, there would have been no way of knowing whether the password would have worked. Accordingly, Appellant has not and cannot demonstrate that the officer was "guilty of deliberate falsehood or reckless disregard for the truth, and if with the affidavit's false material set to one side, the information remaining in the affidavit is inadequate to support probable cause."Rettig,589F.2dat422(9thCir.1979). Moreover, Appellant

has not and cannot demonstrate that the other information contained in the Affidavit would have been inadequate to form probable cause. Accordingly, a Franks hearing, if one were requested below on this specific issue, would not have affected the admissibility of the information retrieved from the cellphone.

Appellant cites to a Pennsylvania case, Commonwealth v. Johnson,240A.3d575(Penn.2020), to support her proposition that the search warrant was overbroad and not specific.AOBat77-78. However, this case does not even provide persuasive support because it is completely distinguishable. In Johnson, the warrant affidavit to search the defendant's cellphone provided "little more than the bare fact that appellant was present in a place where illegal contraband happened to be found," which was not sufficient to establish probable cause for the search.Johnson,24A.3dat588. Here, there was more than just information that Appellant was present at the scene of the crime, the affidavit provided three pages of detailed information regarding why the information inside of the cellphone was necessary, including the surveillance footage discussed *supra*, Appellant's admission that she was with the victim around the time of his death, the missing Rolex, as well as the fact that officers found a pink purse containing $3,100 in cash.IAA147-149.

To the extent Appellant argues the search warrant was overbroad and not specific, her claim is belied by the plain reading of the search warrant. Indeed,

LVMPD provided a specific list of the data is sought to retrieve from Appellant's cellphone and included 4 pages detailing why such information between January 3, 2018, the day of the crime, and January 9, 2018, the day after Appellant was arrested, was necessary. The incriminating information that LVMPD was looking for could have been in all areas outlined by LVMPD in its search warrant application and the information was outlined specifically enough for the person conducting the search of the cellphone to know which information was authorized to be seized.See, United States v. Spilotro800F.2d959,963(9thCir.1986) (explaining that while the descriptions must be specific enough to allow the person conducting the search to reasonably identify the things authorized to be seized, a search warrant that describes generic categories of items will not be deemed invalid if a more specific description of an item is not possible). Appellant has offered no indication of how LVMPD could have been more specific.

Finally, LVMPD officers did not engage in "outrageous conduct" when they retrieved the passcode to Appellant's cellphone. Just as Appellant failed to do below, Appellant has not cited any authority to support the proposition that the officers engaged in misconduct through their actions.Maresca,103Nev.at673. However, even if the conduct was erroneous, the conduct would not have affected the probable cause for the search warrant, as discussed *supra*.

/ / /

4. Person

Appellant argues LVMPD violated her rights when police questioned her after she had been arrested for an outstanding traffic warrant.AOBat78-79.

As a preliminary matter, Appellant failed to raise this issue below, so it is waived.Dermody,113Nev.at210-11;Guy,108Nev.at780;Davis,107Nev.at606.If Court entertains review, it is subject to plain error. Id.

Appellant's assertion that she was not given the opportunity to use the restroom during her voluntary statement with police is wrong. Even a cursory reading of the Voluntary Statement Transcript demonstrates that Appellant's need to use the restroom was accommodated shortly after her statement began.VIIIAA1754-60.

Detective Salisbury testified to the following:

> Q Based upon the fact that they had a warrant, did you ask them to hold her and do anything with Ms. Guidry?
> A I asked that they would meet me down at headquarters. We were still driving back from California and -- but we were getting closer. So I asked them to transport her to headquarters to an interview room so I could speak with her.
> Q Approximately what date and time was this?
> A This is January 8th. I got information just after 9:00 p.m. that they located the vehicle and pulled it over and she was placed under arrest for the warrant. And I believe it was around 10:45, 11:00 p.m. that same night that I'm coming into town and meeting her at -- meeting them at headquarters.

VIIAA1494.

Accordingly, while Appellant was held at headquarters there is no indication in the record how long it took Appellant to be processed on her traffic warrant, let alone whether LVMPD exceeded the time needed for handling the matter. Thus, Appellant's failure to create a record below precludes State from adequately responding and this Court from properly reviewing this claim that should have been developed below.See, Righetti v. Eighth Judicial Dist. Ct.,133Nev.42,47(2017) (noting that a party should "squarely present his untested legal position to the district court"). Indeed, counsel strategically challenged other warrants in this case and likely did not challenge Appellant's arrest for strategic reasons, i.e. because doing so would have been futile, which further demonstrates the lack of merit in Appellant's claim. Regardless, Appellant was read her Miranda rights and voluntarily participated in her interview with the detectives and any error would have been harmless based on the overwhelming evidence of guilt in this case discussed *supra*.

X. THERE WAS NO ERROR TO CUMULATE

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime chargedMulder v. State,116Nev.1,17(2000). Appellant must present all three elements to succeed on appeal. Id. at 17. Moreover,

an appellant "is not entitled to a perfect trial, but only a fair trial."Ennis v. State,91Nev.530,533(1975).

As discussed *supra* in Section I.A., there was more than sufficient evidence to support Appellant's convictions and, therefore, the issue of guilt is not close. Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate.United States v. Rivera,900F.2d1462,1471(10thCir.1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*"). Even if there were errors, they were harmless, and do not collectively warrant reversal. The only factor that weighs in Appellant's favor is that she was charged with grave crimes.See Valdez,124Nev.at1198(2008) (stating murder with use of a deadly weapon is a grave crime). However, because the evidence was more than sufficient and there was no error, it should not weigh heavily in this Court's analysis. Therefore, Appellant's claim of cumulative error has no merit and this Court should affirm the Judgment of Conviction.

XI. COURT DID NOT COMMIT AN ERROR AT SENTENCING

A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, court's determination will not be disturbed on appeal.Randell v. State,109Nev.5,8(1993). This Court has granted courts "wide discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the

record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."Allred v. State,120Nev.410,413(2004). Instead, Court will only reverse sentences "supported solely by impalpable and highly suspect evidence." Silks,92Nev.at94(1976).

A sentencing judge may consider a variety of information to ensure "the punishment fits not only the crime, but also the individual defendant.Martinez v. State,114Nev.735,738(1998). If there is a sufficient factual basis for the information considered in sentencing a defendant, a court may rely on that information.Gomez v. State,130Nev.404,406(2014). A court may consider information that would be inadmissible at trial as well as information extraneous to a PSI.See Silks,92Nev.at93-94;Denson v. State,112Nev.489,492(1996). Further, a court "may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence."U.S. v. Watts,519U.S.148,156(1997). This Court has stated that "[a] sentence within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience."Allred,120Nev.at420,92P.3dat1253.

Court held Appellant's sentencing hearing on October 18, 2019.VIIIAA1730-31. State explained that it had four jail phone calls, which it had previously disclosed

to Appellant, with transcripts that it requested Court review.VIIAA1702. Appellant objected to the exhibits arguing that they were "completely superfluous and after the fact and they're inappropriate for argument."VIIAA1702-03. Court overruled Appellant's objection on that basis but did grant Appellant a recess to review the exhibits.VIIAA1703. After listening to the exhibits, Appellant renewed his objection and explained that there was nothing of evidentiary value on the phone calls and appeared to be used by State to inflame the passions of Court.VII1703-04. Court overruled the objection once again because it found the calls relevant information to consider as it shed light on Appellant's acceptance of responsibility and thereby permitted the exhibits.VIIAA1704.

State, Appellant's counsel, Appellant, and Osorio's mother spoke before Court rendered its decision.VIIAA1704-1721;VIIIAA1722-23. Court also mentioned that it read the letters submitted on behalf of Appellant as well as the letters submitted on behalf of the victims.VIIIAA1723.

As an initial matter, to say that "the calls offered no relevancy for sentencing except to paint [Appellant] as a bad mother" is a complete misinterpretation of what the information in the jail calls represented.AOBat81. State offered the jail calls not to paint Appellant as a bad mother, but instead offered them to demonstrate Appellant's failure to accept responsibility for her actions:

> The last thing I would say -- and I'm not going to speak to the pain that it has caused this family. I'm sure Isabel will explain that to

> the Court -- that these phone calls, I do not want the Court to sentence Ms. Guidry for her behavior as a mother in speaking to her children. That wasn't the purpose I sent this to the Court. That's something she has to deal with on her own and somebody else should judge her for that conduct.
>
> But the statements made in those recordings, things, like, I wouldn't have even gotten caught if my ten year old daughter hadn't given -- opened up her mouth, that the ten year old daughter deserves to get punched in the face for giving up that number, that Derrontae, you should have stopped her.
>
> Her suggestion is, is basically this wouldn't have been any big deal but for my daughter. And so she's shifting responsibility for where she is right now, and what she's about to face in front of this Court, to her children because she's unwilling and unable to accept the responsibility.

VIIAA1707-08. Court explained that the jail phone calls represented just this: Appellant's failure to accept responsibility for the crimes she committed.VIIIAA1725-26.

Even if reliance on these exhibits was erroneous, a point State does not concede, under any standard of harmless error, any error would have been harmless as Court did not just rely on the calls to render the sentence that it did. Indeed, Court spent six pages of the sentencing hearing transcript explaining the reason for its sentenceVIII1723-29. Court explained that in addition to the phone calls being an example of Appellant's failure to accept responsibility, her criminal history, including repeated theft offenses, showed that Appellant had chosen a life of crime.VIIAA1724-25. Court also explained that the seriousness of the offense and the fact that the victim's life was taken played a role in the sentence it

rendered.VIIAA1727-28. Accordingly, Court appropriately rendered an appropriate sentence that although was not the maximum aggregate sentence, was an appropriate sentence within what is permitted under statute based on the aforementioned factors. Martinez114Nev.at738;NRS200.010;NRS200.030.5;NRS193.165;NRS205.220.1; NRS 205.222.3;NRS 484E.010. Regardless, as discussed *supra* in Section I.A., the evidence of guilt was overwhelming in this case and warranted the sentence Appellant received. Accordingly, the worthiness of the sentence precludes any finding of prejudice sufficient to warrant reversal.

CONCLUSION

Based on the foregoing, this Court should affirm Appellant's Judgment of Conviction.

Dated this 27th day of July, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 19,799 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of July, 2021.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 27th day of July, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ARRON D. FORD
Nevada Attorney General

SHARON G. DICKINSON
Chief Deputy Public Defender

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ J. Garcia
Employee, Clark County
District Attorney's Office

JEV/Brittni Griffith/jg