IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK PAUL BANKA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 80181

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

Because this post-conviction appeal involves a conviction obtained following a plea of guilty pursuant to North Carolina v. Alford, the appeal is presumptively assigned to the Nevada Court of Appeals. See NRAP 17(b)(1).

STATEMENT OF THE ISSUE

1. Whether the district court had subject matter over Appellant.
2. Whether Appellant was entitled to withdraw his guilty plea.

STATEMENT OF THE CASE

On January 11, 2017, the State filed a criminal complaint in Henderson Justice Court charging Jack Paul Banka ("Appellant") with one (1) count of DRIVING

AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM; and two (2) counts of LEAVING THE SCENE OF AN ACCIDENT. Appellant's Appendix ("AA") at 003-004.

Between February 21, 2017, the initial arraignment, and June 28, 2018, when the preliminary hearing was conducted, the case was continued numerous times for Appellant to prepare and consider offers of resolution. Respondent's Appendix ("RA") at 00004-9.[1] On June 28, 2018, Appellant was bound up to district court following his preliminary hearing. RA 000001.

On July 6, 2018, the State filed an Information charging "Appellant" with DRIVING UNDER THE INFLUENCE RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 484C.110, 484C.430, 484C.150 – NOC 53906). AA 005-006.

On July 10, 2018, the State filed an Amended Information charging Appellant with one (1) count of DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL

[1] Cited in Respondent's Appendix because Appellant failed to include relevant filings in his Appellant's Appendix. NRAP 30(b)(2)(A).

BODILY HARM (Category B Felony- NRS 484C.110, 484C.430 – NOC 53906), and one (1) count of LEAVING THE SCENE OF AN ACCIDENT (Category B Felony – NRS 484E.010 – NOC 53743). RA 000098-101.

On April 8, 2019, after an initial continuance, Appellant's trial date was set for June 24, 2019. RA 000102.

On June 17, 2019, Appellant appeared with his counsel at calendar call and advised the district court that the matter was resolved. Appellant did not want to admit liability however, and asked if the plea could be accomplished pursuant to Alford. The State agreed, and the Calendar Call was continued to June 19, 2019. RA 000103.

On June 19, 2019, John G. Watkins and Michael Pariente attempted to substitute into the case and continue the trial. After considerable discussion, the district court ruled that they could only substitute in if they were prepared to proceed to trial on June 24, 2019. Mr. Watkins and Mr. Pariente advised the Court they could not do that, and so the Motion was denied. RA 000104-05

On June 21, 2019, John G. Watkins and Michael Pariente on behalf of Appellant filed an emergency Writ of Mandamus and Emergency Motion to Stay Trial with the Nevada Supreme Court. On June 21, 2019, the State filed its Opposition. The Supreme Court of Nevada denied the Writ and Motion. AA 023.

On June 24, 2019, pursuant to negotiations, the State filed a Second Amended Information charging Appellant with one (1) count of DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony- NRS 484C.110, 484C.430 – NOC 53906). RA 000106

On June 24, 2019, Appellant appeared with his original counsel, Thomas Boley, and entered into a Guilty Plea Agreement with the State wherein he pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970) to one (1) count of DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 484C.110, 484C.430 – NOC 53906). AA025. Both Appellant and the State stipulated to recommend a sentence of four (4) to ten (10) years incarceration in the Nevada Department of Corrections (NDOC). Id.

On July 25, 2019, Michael Pariente filed a second Motion to Substitute into the case. AA022. Mr. Pariente stated to the district court that his substitution would not result in a continued sentencing date or effort to withdraw Appellant's plea. On August 14, 2019, the Court granted the Motion. RA 000109

On October 23, 2019, at sentencing, Appellant's counsel advised the Court there was no legal cause or reason not to proceed to sentencing, and then upon the Court's adjudicating Appellant guilty, interrupted and attempted to filed a Motion in Arrest of Judgment in open court. RA000110. The sentencing date was continued to provide time to Defendant to file the motion electronically. RA 000110. On November 6, 2019, the State filed its Opposition. RA000112. On November 12, 2019, Appellant filed his Reply. RA 000133.

On November 15, 2019, Appellant filed a subsequent Motion to Withdraw Plea. RA 000143

On November 18, 2019, the Court denied Appellant's Motion to Arrest Judgment and declined to consider Appellant's Motion to Withdraw Plea. AA049.

On November 19, 2019, Appellant filed an Amended Motion to Withdraw Previously Entered Plea of Guilty. RA 000149. On November 25, 2019, the State filed its Opposition. RA 000162. On December 2, 2019, Appellant filed his Reply. RA 000199. On December 4, 2019, the district court denied Appellant's Motion. AA 052.

On December 4, 2019, Appellant was sentenced to a minimum of forty-eight (48) and maximum of one hundred and twenty (120) months in the Nevada Department of Corrections. AA 096

On December 4, 2019, Appellant filed a Notice of Appeal. AA 106.

On December 4, 2019, Appellant filed a Motion for Bond Pending Appeal. On December 6, 2019, the State filed its Opposition. On December 9, 2019, Appellant filed his Reply. On December 11, 2019, Appellant attempted to argue matters not in the pleadings. The district court continued the matter for supplemental briefing.

On January 6, 2020, Appellant filed a Supplemental Points and Authorities. On January 27, 2020, the State filed its Opposition. On January 30, 2020, Appellant filed his Reply. On February 24, 2020, the district court denied Appellant's Motion for Bond Pending Appeal. RA 000230.

STATEMENT OF THE FACTS

On December 21, 2016, Appellant was driving his vehicle in Henderson, Nevada. PSI at 4.[2] While driving, Appellant made a left turn into oncoming traffic. Id. at 5. While making the turn, Appellant struck another driver's vehicle. This accident caused one of the passengers of the other vehicle to suffer from a fractured sternum. Id. at 5. Appellant fled the scene but was pursued by a witness. Id. at 4. Appellant's vehicle eventually stopped working. Id. Appellant got out of his vehicle and began running from the location. Id.

Officers responding to the scene eventually found Appellant approximately 1,500 feet from his vehicle. Id. Appellant appeared intoxicated. Id. Appellant further

[2] [2] The State previously filed a Motion to Transmit PSI on March 13, 2020.

failed a field sobriety test. Id. Officers then gave Appellant a preliminary breath test, which revealed that Appellant had a Blood Alcohol Content (BAC) of .146. Id. Officers also found an alcoholic beverage in Appellant's vehicle. Id. at 5.

SUMMARY OF THE ARGUMENT

A charging document is sufficient to grant the district court jurisdiction over a criminal case when that document states the date of the offense, location of the offense giving rise to the court's jurisdiction, and places the defendant on notice regarding the charges he will have to defend against. Sheriff, Clark Cty. v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979); see also Watkins v. Sheriff, Clark Cty., 87 Nev. 233, 234–35, 484 P.2d 1086, 1087 (1971).

In the instant case, the Second Amended Information was sufficient to place Appellant on notice. While the Second Amended Information contained the phrase "on a highway or on premises to which the public has access" (which is found in NRS 484C.110) instead of "on or off the highways of this state" (which is found in NRS 484C.430), such an error did not cause Appellant not to be placed on notice for the charge he was facing.

Further, the district court did not abuse its discretion in Denying Appellant's Motion to Withdraw Guilty Plea. Appellant's plea was entered voluntarily and knowingly. Further, Appellant failed to show any other reason that should have

permitted him to withdraw his plea. For these reasons, Appellant's claims should be denied.

ARGUMENT

I. THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION OVER APPELLANT.

Appellant's first claim is that the State failed to charge him with a legal offense. AOB at 9. According to Appellant, the State's Second Amended Information improperly contained the element "on a highway or on premises to which the public has access" (which is an element under NRS 484C.110) instead of the element "on or off the highway." Appellant argues that therefore the State did not charge a legal offense. As such, Appellant claims that neither the district court, nor any court had subject matter jurisdiction over this case. AOB at 9-12.

A. The Information Need Only Place Appellant on Notice

NRS 175.010 states:

> Every person, whether an inhabitant of this state, or any other state, or of a territory or district of the United States, is liable to punishment by the laws of this state for a public offense committed therein, except where it is by law cognizable exclusively in the courts of the United States.

As such, the Nevada court system has jurisdiction over any individual who commits any crime within this State's borders.

"There can be no conviction for or punishment of a crime without a formal and sufficient accusation; that, in the absence thereof, a court acquires no jurisdiction whatever, and if it assumes jurisdiction such trial and conviction would be a nullity".

Williams v. Mun. Judge of City of Las Vegas, 85 Nev. 425, 429, 456 P.2d 440, 442 (1969). Where the charging document does not claim the public offense happened in the State of Nevada, the charging document fails to establish that Nevada courts have jurisdiction. Application of Alexander, 80 Nev. 354, 358, 393 P.2d 615, 617 (1964).

However, a charging document grants jurisdiction where it makes "a definite statement of facts constituting the offense in order to adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case." Sheriff, Clark Cty. v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979); see also Watkins v. Sheriff, Clark Cty., 87 Nev. 233, 234–35, 484 P.2d 1086, 1087 (1971) (holding that a charging document can grant jurisdiction to the Court even when the language in the criminal complaint does not precisely match the language in the statute under which the defendant was charged). In this respect, Nevada is a notice pleading state. See Sanders v. Sheriff, 85 Nev. 179, 181-82, 451 P.2d 718, 720 (1969) (stating: "the criminal complaint is intended solely to put the defendant on formal written notice of the charge he must defend" when resolving whether a court had jurisdiction over a case).

Further, the charging document need not be artfully pled. In Levinson, this Court found a charging document that provided a date and location of the offense, as well as a statement that "the offense occurred while respondent was engaged in a

lawful act (driving a car), and alleges that the offense occurred because respondent was driving in an unlawful manner (in excess of 100 miles per hour)", was sufficient. Levison, 95 Nev at 437-38, 596 P.2d at 233-34.

Further, in State v. Jones, this Court stated:

> The United States Supreme Court has held that reversible error exists only where the variance between the charge and proof was such as to affect the substantial rights of the accused. Berger v. United States, 295 U.S. 78, 82, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). The reason for this is that (1) the accused must be definitely informed as to the charges against him so that he can prepare for trial and will not be surprised by evidence produced, and (2) the accused must be protected against double jeopardy another charge for the same offense. See also Russell v. United States, 369 U.S. 749, 763, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).
>
> This court is in agreement with this standard and has added that the indictment should be sufficiently definite to prevent the prosecutor from changing the theory of the case. Adler v. Sheriff, 92 Nev. 436, 440, 552 P.2d 334, 336 (1976); Simpson v. District Court, 88 Nev. 654, 660-61, 503 P.2d 1225, 1230 (1972). Also, we have looked to determine whether the challenge to the indictment was brought before trial or after trial and have said **that reduced standards apply to the sufficiency of indictments challenged after trial in contrast to pre-trial challenges.**

State v. Jones, 96 Nev. 71, 73–74, 605 P.2d 202, 204 (1980)(emphasis added). This Court concluded in Jones that:

> The sufficiency of the indictment was challenged only after all the evidence was presented at trial. Additionally, a state statute provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598. These factors indicate the application of a

> reduced standard toward the sufficiency of the indictment and, as such, we find that the variance between the crime charged and the proof adduced was immaterial. It did not affect the substantial rights of the respondent because it did not impair his ability to prepare his case and defend himself against the charge.

Jones, 96 Nev. at 76, 605 P.2d at 205–06. While State v. Jones admittedly claims that the standard should be reduced where a defendant does not raise an issue with the Amended Information until after a jury has returned a verdict, here, Appellant did not proceed to trial. Instead, Appellant pled guilty pursuant to Alford. The State submits that Appellant's factual circumstances are analogous enough to the defendant in Jones that the same standard should be applied.

This is the same standard adopted by the Ninth Circuit. See United States v. Gordon, 641 F.2d 1281, 1284 (9th Cir. 1981) (stating: "While correct citation to the relevant statute is always desirable, both the Federal Rules and the cases interpreting them make it clear that an error or omission is not necessarily fatal."); see also United States v. Clark, 416 F.2d 63 (9th Cir. 1969) (upholding the district court's refusal to dismiss an indictment where appellant, who was accused of submitting a false travel voucher to the federal government, had been charged under 18 U.S.C. §287 instead of 18 U.S.C. § 1001, and stating: "The statutory citation is not, however, regarded as part of the indictment… We read Rule 7(c) to permit the citation of a statute on an indictment to be amended where, as here, the facts alleged will support such a charge."); Steinhart v. United States District Court for District of Nevada, 543 F.2d

69, 70 (9th Cir. 1976); United States v. Wuco, 535 F.2d 1200 (9th Cir. 1976), cert denied, 429 U.S. 978, 97 S.Ct. 488, 50 L.Ed.2d 586 (1979); United States v. Shipstead, 433 F.2d 368 (9th Cir. 1970).

It is clear then that the portion of the charging document stating the offense a defendant is alleged to have committed is sufficient to grant the court jurisdiction as long as the document places the defendant on notice of the allegations.

B. The Information Sufficiently Placed Appellant on Notice

In the instant case, Appellant pled guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). AA025. Appellant pled guilty to Driving and/or Being In Actual Physical Control of a Motor Vehicle While Under the Influence of an Intoxicating Liquor or Alcohol Resulting in Substantial Bodily Harm. AA025. A Second Amended Information was filed along with the Guilty Plea Agreement, reflecting the facts underlying the charge. AA032-34

The State's Second Amended Information listed the crime which Appellant was charged (Driving and/or Being In Actual Physical Control of a Motor Vehicle While Under the Influence of an Intoxicating Liquor or Alcohol Resulting in Substantial Bodily Harm) and the statutes under which he was culpable (NRS 484C.110, 484C.430). AA032-34. The Second Amended Information also stated the precise facts, including the date and location of the unlawful activity for which Appellant was being prosecuted. AA032-34. The Second Amended Information

further correctly indicated the following elements of the crime: (1) the Appellant was in actual physical control of a motor vehicle, (2) while under the influence of an intoxicating liquor, (3) with a concentration of alcohol of .08 or higher within two (2) hours after driving, and (4) that Appellant, while driving or in actual physical control of a vehicle, caused an accident with another vehicle and caused substantial bodily harm to another individual. AA032-34.

The only alleged deficiency in the Second Amended Information was that the Second Amended Information contained the element "on a highway or on premises to which the public has access" (the location element imposed pursuant to NRS 484C.110) instead of "on or off the highways of this state" (the location element imposed pursuant to NRS 484C.430). Such an error did not cause Appellant not to be placed on notice for the charge he was facing. As the Second Amended Information stated, Appellant was being charged with Driving and/or Being In Actual Physical Control of a Motor Vehicle While Under the Influence of an Intoxicating Liquor or Alcohol Resulting in Substantial Bodily Harm pursuant to NRS 484C.430. Even a cursory glance at the statute the Second Amended Information provided as reference would have revealed to Appellant exactly what elements the State had to prove against him.

Further, to the extent Appellant relied on the elements as described in the Second Amended Information, such reliance still put Appellant on notice of what

the State was charging him with. The phrase "on a highway or on premises to which the public has access" is a subset of "on or off the highways of this State." In other words, an individual cannot be on "a highway or premises to which the public has access" without also being "on or off the highways of this State." In fact, the only difference between these two standards is that under 484C.110, a defendant cannot be convicted of a DUI, unless some other factor is considered, while in an individual driveway, a private way, or on a farm. See NRS 484C.110; NRS 484A.095 (defining the term "highway"); NRS 484A.185 (defining the term "premise to which the public has access"). However, under NRS 484C.430, a felony conviction is permitted for driving a vehicle while impaired **anywhere** when said driving results in the substantial bodily harm of another. See NRS 484C.430; Hudson v. Warden, 117 Nev. 387, 396, 22 P.3d 1154, 1160 (2001) (finding that "on or off the highways of this state" was clear and unambiguous, and holding that an individual who was driving a vehicle at Burning Man festival in the Black Rock Desert was driving a vehicle "off the highway").[3]

However, this distinction is not even relevant to the instant case because there is no doubt (and indeed not even any controversy over) that Appellant committed this offense while on a highway. "Highway" is defined in NRS 484A.095 as "… the

[3] Hudson v. Warden dealt with language contained in NRS 484.3785, which was later superseded by NRS 484C.430. Both statutes contained the language "on or off the highways of this state."

entire width between the boundary lines of every way dedicated to a public authority when any part of the way is open to the use of the public for purposes of vehicular traffic, whether or not the public authority is maintaining the way." The facts contained in the information which Appellant pled guilty to clearly establish that Appellant was driving on a highway as defined pursuant to statute. AA012. Under the location of element of either 484C.110 or 484C.430, the facts admitted to were sufficient to establish he was guilty of violating 484C.430.

Therefore, Appellant could not have relied on this Information to his disadvantage and been prejudiced. Appellant did not raise any issue with the Second Amended Information until after he had pled guilty pursuant to Alford. Pursuant to State v. Jones, this Court should consider whether the Second Amended Information properly placed Appellant on notice under the reduced standard of whether this error affected Appellant's substantial rights. 96 Nev. at 76, 605 P.2d at 205–06. Here, any error clearly did not, as under either standard Appellant was placed sufficiently on notice regarding the crime he was charged with and pled guilty to. As such, the Second Amended Information granted subject matter jurisdiction on the district court.

C. Appellant's Arguments to the Contrary are Unpersuasive

In an attempt to circumvent this obvious conclusion Appellant poses a series of arguments detailing why the district court did not have subject matter jurisdiction.

Appellant's first argument seems to be that the State did not even charge a lawful offense. AOB at 9-13. Appellant accuses the State of comingling statutes to create some kind of Frankenstein's Monster of a charge that has no legitimacy in the Court of law.

Appellant's claim is belied by the record. Appellant was charged with violating NRS 484C.110 and 484C.430. These codified statutes clearly delineate that it is a public offense to cause substantial bodily harm to another person while driving intoxicated. The State's inclusion of the two statutes in the information is a reflection of the fact that NRS 484C.430 is actually a penalty enhancement statute (see below for analysis on this point). Further, it has long been established that where "a single offense may be committed by one or more specified means, and those means are charged alternatively, the State need only prove one of the alternative means in order to sustain a conviction." State v. Kirkpatrick, 94 Nev. 628, 630, 584 P.2d 670, 671-72 (1978). As such, the listing of multiple statutes does not create "a commingling of offenses."

The Second Amended Information admittedly contained some language from NRS 484C.110. However, Appellant seems to be under the impression that the operative difference between NRS 484C.110 and NRS 484C.430 is whether the offense is committed on "a highway or premises to which the public has access" or "on or off the highways of this state." Appellant further seems to assume NRS

484.110 is a "misdemeanor DUI statute" while NRS 484C.430 is the "felony DUI statute." This is incorrect.

First, NRS 484C.110 makes driving while intoxicated punishable by either a misdemeanor or a felony depending on a number of circumstances. NRS 484C.400. As such, it is fundamentally incorrect to refer to it as a misdemeanor statute. Second, NRS 484C.430 is a penalty enhancement statute. The title of NRS 484C.430 actually says: "Penalty if death or substantial bodily harm results…". What NRS 484C.430 proscribes then is an escalated penalty for individuals who cause substantial bodily harm to another individual while driving intoxicated. This is the operative difference between the two statutes, whether harm occurred. Further, in an attempt to curb such behavior, the legislature further expanded where such an incident would result in a chargeable offense by expanding the language of on "a highway or premises to which the public has access" to "on or off the highways of this state."

As such, the interchanging of these phrases did not create some new offense. To the contrary, if it did anything, it actually narrowed the location for which the State would have had to have proven Appellant committed the offense at trial. However, as previously discussed, this difference was immaterial in Appellant's case, as there was no dispute that he was on a highway, which renders him guilty under either standard. Therefore, this interchanging of phrases was not sufficient to mislead Appellant regarding what charges he was facing.

Appellant further argues that "notice pleading" is recognized as applying to civil cases and not criminal cases. This is disingenuous. Neither the State nor the district court has ever conflated the notice required in a criminal charging document with the notice required in a civil complaint. However, as articulated earlier, the statutory scheme and case law in this jurisdiction makes clear that the operative goal of a charging document is to place a defendant on notice of the charges he is facing. Simpson v. District Court, 88 Nev. 654, 503 P.3d 1225 (1972).

Finally, Appellant alleges that "highway or on a premises to which the public has access" and "on or off a highway" are entirely different elements and as such the State has failed to charge a valid crime. AOB at 20. As noted above, the usage of the language of the Statute, while desirable, is not even required so long as the defendant is able to determine the acts for which he is being charged and thus prepare an adequate defense. More importantly, these two elements do not establish jurisdiction or a crime. They are merely locations the State would need to prove at trial. The real Blockburger evaluation of these two statues reveals why both NRS 484C.110 and 484C.430 (the felony enhancement portion of the statute) are referenced in the charging document.

Both statutes criminalize "any act or neglect of duty imposed by law while driving or in actual physical control of any vehicle" while (a) under the influence of intoxicating liquor; (b) has a concentration of alcohol of .08 or more in his or her

blood or breath; (c) is found by measurement with two (2) hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of .08 or more in his blood or breath.

As the State argued above, NRS 484C.110 limits prosecution for these actions to behavior committed on a highway or to premises which the public has access to. This is a public policy to prevent overreach of the State to private property where the only person involved is the impaired driver. In contrast, NRS 484C.430 expands the State's ability to prosecute the charge of Driving Under the Influence "on or off the highway," if "the act or neglect of duty proximately causes the death of, or substantial bodily harm to, another person."

A review of the jurisprudence of this jurisdiction makes clear that a charging document grants subject matter jurisdiction on the court where it places the defendant on notice of the crime he is alleged to have committed within the court's jurisdiction. Here, the Second Amended Information did that, and so the district court had subject matter jurisdiction in this case. Appellant's arguments to the contrary are unpersuasive. This claim should be denied.

II. APPELLANT WAS NOT ENTITLED TO WITHDRAW HIS PLEA

NRS 176.165 permits a defendant to file a motion to withdraw his guilty plea before sentencing. The district court may grant such a motion in its discretion for any reason that is fair and just. State v. Second Judicial Dist. Court, 85 Nev. 381,

385, 455 P.2d 923, 926 (1969). "On appeal from a district court's denial of a motion to withdraw guilty plea, this court 'will presume that the lower court correctly assessed the validity of the plea, and [] will not reverse the lower court's determination absent a clear showing of abuse of discretion." Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (quoting Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)).

A plea of guilty is presumptively valid, particularly where it is entered into on the advice on counsel. Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). The defendant has the burden of proving that the plea was not entered knowingly or voluntarily. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Wynn v. State, 96 Nev. 673, 615 P.2d 946 (1980); Housewright v. Powell, 101 Nev. 147, 710 P.2d 73 (1985).

In determining whether a guilty plea is knowingly and voluntarily entered, the court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. At 271, 721 P.2d at 367. The proper standard set forth in Bryant requires the trial court to personally address the defendant at the time he enters his plea in order to determine whether he understands the nature of the charges to which he is pleading. Id. At 271; State v. Freeze, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). The guidelines for voluntariness of pleas "do not require the articulation of talismanic phrases." Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404

(1973). It requires only "that the record affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." Brady v. United States, 397 U.S. 742, 747-48, 90 S.Ct. 1463, 1470 (1970); United States v. Sherman, 474 F.2d 303 (9th Cir. 1973).

Specifically, the record must affirmatively show the following: 1) the defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; 2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; 3) the defendant understood the consequences of his plea and the range of punishment; and 4) the defendant understood the nature of the charge, i.e., the elements of the crime. Higby v. Sheriff, 86 Nev. 774, 781, 476 P.2d 950, 963 (1970). Consequently, in applying the "totality of circumstances" test, the most significant factors for review include the plea canvass and the written guilty plea agreement. See Hudson v. Warden, 117 Nev. 387, 399, 22 P.3d 1154, 1162 (2001).

The Nevada Supreme Court decided Stevenson v. State, 354 P.3d 1277, 131 Nev. Adv. Rep. 61 (2015), holding that the statement in Crawford v. State, 117 Nev. 718, 30 P.3d 1123 (2001), which focuses the "fair and just" analysis solely upon whether the plea was knowing, voluntary, and intelligent is more narrow than contemplated by NRS 176.165. The Nevada Supreme Court therefore disavowed Crawford's exclusive focus on the validity of the plea and affirmed that the district

court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just. However, the Court also held that appellant had failed to present a fair and just reason favoring withdrawal of his plea and therefore affirmed his judgment of conviction. Stevenson, 354 P.3d 1277, 1281, 131 Nev. Adv. Rep. 61 (2015).

In Stevenson, the Nevada Supreme Court found that none of the reasons presented warranted the withdrawal of Stevenson's guilty plea, including allegations that the members of his defense team lied about the existence of the video in order to induce him to plead guilty. Id. The Court found similarly unconvincing Stevenson's contention that he was coerced into pleading guilty based on the compounded pressures of the district court's evidentiary ruling, standby counsel's pressure to negotiate a plea, and time constraints. Id. As the Court noted, undue coercion occurs when a defendant is induced by promises or threats which deprive the plea of the nature of a voluntary act. Id., quoting Doe v. Woodford, 508 F. 3d 563, 570 (9th Cir. 2007).

The Nevada Supreme Court also rejected Stevenson's implied contention that withdrawal was warranted because he made an impulsive decision to plead guilty without knowing definitively whether the video could be viewed. Id. Stevenson did not move to withdraw his plea for several months. Id. The Court made clear that one of the goals of the fair and just analysis is to allow a hastily entered plea made with

unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty. Id. at 1281-82, quoting United States v. Alexander, 948 F.2d 1002, 1004 (6th Cir. 1991). The Court found that considering the totality of the circumstances, there was no difficulty in concluding that Stevenson failed to present a sufficient reason to permit withdrawal of his plea. Id. at 1282. Permitting him to withdraw his plea under the circumstances would allow the solemn entry of a guilty plea to become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim, which the Court cannot allow. Id., 354 P.3d at 1282, quoting United States v. Barker, 514 F. 2d 208, 222 (D.C. Cir. 1975).

Although it is, and was below, Appellant's burden to prove he was entitled to withdraw his guilty plea, Appellant has failed to meet that burden. Each of the arguments Appellant raises regarding why he was entitled to withdraw his plea is unpersuasive. See Sections II(A)-(E). Further, a review of the record shows that Appellant clearly entered into his Guilty Plea Agreement knowingly and voluntarily. See Section II(F).

A. Appellant Understood the Elements of the Offense For Which He Was Charged

First, Appellant alleges that he did not understand the elements of the offense. As the State argued extensively above, the interchanging of the phrase "on a highway

or on premises to which the public has access" instead of "on or off the highways of this state" did not change the elements of the offense sufficient to change Appellant's level of culpability. Regardless of the standard, Appellant was made aware through the Second Amended Information that he could be found guilty if he substantially injured another person while driving intoxicated on a highway in Nevada. These are precisely the facts the State claimed it would have proven at trial. AA042-43. As such, it is disingenuous for Appellant to now claim that he did not understand the elements of the offense for which he was charged prior to entering his plea.

The State would further note that Appellant waived any defects in the pleadings. AA039. Appellant specifically waived defects in the Second Amended Information. AA039. A defendant who waives defects should not be permitted to manipulate the justice system by relitigating the very defects he waived. See Breault v. State, 116 Nev. 311, 314, 996 P.2d 888, 889 (2000).

The State would also note that when Appellant signed his Guilty Plea Agreement on June 24, 2019, he thereby affirmed the following statement:

> I have discussed the elements of the original charge(s) with my attorney and I understand the nature of the charge(s) against me.
> …
> All the foregoing elements, consequences, rights, and waiver of rights have been explained to me by my attorney.

AA029. Further, Appellant's counsel at the time of his entry of plea (Thomas Boley) affirmed that he had "fully explained to the Defendant the allegations contained in the charge(s) to which Alford pleas are being entered." AA031.

As such, Appellant understood the elements of the offense for which he was being charged and he discussed the elements with his attorney. Therefore, any current claim that he did not understand the elements of the offense to which he pled is belied by the record.

B. The Admonishment of Rights Did Not Negatively Impact Appellant's Understanding of the Charge He Was Facing.

Appellant further argues that he should have been allowed to withdraw his plea because the admonishment of rights form he signed referenced NRS 484.379 (now NRS 484C.110) instead of NRS 484C.430. According to Appellant, this form made it unclear what charges he was facing. Such an argument lacks merit. The admonishment of rights provided to Appellant at his entry of plea is to inform him that under NRS 484C.110 & NRS 484C.400, subsequent convictions for a DUI within a certain amount of time will carry an escalated penalty pursuant to statute. Further, under NRS 484C.410, Appellant pleading guilty to a violation of 484C.430 meant that the next time he violated either NRS 484C.110 or NRS 484C.120, Appellant would be facing a Category B Felony charge. NRS 484C.410. While the admonishment of rights form did not include that Appellant was specifically being charged with NRS 484C.430, this is immaterial. The admonishment of rights is not

a charging document; it is a document intended to inform Appellant of some of the ramifications of a DUI conviction. Further, even if this error had occurred in the charging document, NRS 173.075(3) states: "…Error in the citation or its omission is not a ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice."

In addition, any claim that Appellant did not understand the charge he was facing is belied by the record. As the State illustrated in Section II(A), Appellant has previously affirmed that he was fully aware of and understood (and had discussed with his attorney) all the charges to which he pled, as well as their elements. AA029-31.

C. The Term "However Slight" Did Not Mislead Appellant

Appellant further argues that he understood the term "however slight" in the Second Amended Information to mean that the prosecution was only required to prove slight impairment to support a conviction. AOB at 28. Such an argument is belied by the record. The relevant portion of the Second Amended Information Appellant now references stated:

> …Defendant being responsible under one or more theories of criminal liability, to wit: 1) while under the influence of intoxicating liquor to any degree, however slight, which rendered him incapable of safely driving and/or exercising actual physical control of the vehicle, 2) while he had a concentration of alcohol of .08 or more in his blood sample

> which was taken within two (2) hours after driving and/or being in actual physical control of the vehicle…

This portion of the Second Amended Information merely articulates that there are multiple theories of criminal liability under which Appellant's culpability could be proven. However, as the State articulated during the plea canvas, it would have shown beyond a reasonable doubt that Appellant's blood alcohol concentration was .193, in clear excess of the legal limit imposed by statute. It is absurd for Appellant to now argue that he believed he was facing a potential conviction for driving a vehicle under "however slight" a degree of intoxication when Appellant was fully aware that he was driving with such a high blood alcohol concentration.

Further, Appellant's reading of the Second Amended Information is not even correct. The Second Amended Information does not state that a DUI conviction can be sustained under any degree of intoxication. The Second Amended Information clearly states that any degree of intoxication under .08 must have "rendered him incapable of safely driving or experiencing physical control of the vehicle." AA033.

Therefore, to the extent Appellant allegedly believed he could be convicted based on any degree of intoxication, such a belief would have been formed independently of the Information, allegations, facts of the underlying case, or representations by the State. Further, the notion that Appellant experienced such a belief is belied by the record. As the State articulated earlier, the record demonstrates

that Appellant affirmed that he understood the charges against him, and all the elements of that charge. See Section II(A); AA029-31.

D. Appellant Was Aware of the Statutory Fine

Appellant claims he was unaware that his entry into this Guilty Plea Agreement would result in a $2,000 - $5,000 fine. Appellant's claim is belied by the record. Appellant's Guilty Plea Agreement stated that he understood that he "may be fined up to $5,000. AA026. The district court correctly noted that the "may" should actually have been a "must," and informed Appellant during his plea canvass that he **must** be fined up to $5,000 pursuant to the statute. AA40-41. Appellant further acknowledged during his plea canvas that he understood that restitution would be ordered if requested. AA041 As such, Appellant was aware of the consequences of his plea deal, including those of a financial nature.

E. Appellant's Counsel Was Not Ineffective

Appellant alleges that he was entitled to withdraw his plea because his counsel was ineffective. AOB at 30.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel."

Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of

attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

When a conviction is the result of a guilty plea, a defendant must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).

In the instant case, Appellant alleges that his counsel was ineffective for failing to file the following three (3) motions: (1) A motion in limine pursuant to State v. Dist. Ct. (Armstrong), 127 Nev. 927, 267 P.3d 777 (2011); (2) A motion to suppress the blood test for a violation of the implied consent law; and (3) A motion to suppress the Preliminary Breath Test (PBT) pursuant to State v. Sample, 134 Nev. 169, 414 P.3d 814 (2018). AOB at 30. Appellant is incorrect for the following reasons

1. Armstrong Was Inapplicable to the Instant Case

It is unclear why Appellant believes his counsel should have filed a motion in limine pursuant to Armstrong. In Armstrong, this Court held that where a single blood draw was taken outside of two (2) hours of the alleged incident, evidence of retrograde extrapolation was contingent on a number of factors showing that the retrograde analysis would be valid.

However, in the instant case, the car crash occurred at 6:10 PM, and Appellant's blood was drawn at 7:17 PM. Therefore, unlike in Armstrong, the blood draw was taken within the two (2) hours timeframe established by NRS 484.430(c). As such, retrograde extrapolation would not have been an element of this case, and Armstrong was inapplicable. Such a motion would therefore have been frivolous. Given that counsel has no obligation to file frivolous motions pursuant to Ennis, counsel was not ineffective.

2. There Were No Grounds to Have Appellant's Preliminary Breath Test Suppressed

Appellant relies on the case State v. Sample, 134 Nev. 169 (2018) for the proposition that his counsel should have filed a motion to suppress the preliminary breath test. AOB at 31. In Sample, this Court found that it is an unconstitutional search if law enforcement forces an individual to take a preliminary breath test without that individual's consent or a warrant. Id. At 171. Nevada law permits the use of a consensual preliminary breath test. See NRS 484C.150(1).

However, a preliminary breath test is only admissible to repudiate that there were not reasonable grounds for an arrest. NRS 484C.150(3). As such, the only reason the State would have sought its introduction would be if there was otherwise insufficient evidence to establish probable cause that Appellant was intoxicated. However, there was substantial other evidence of Appellant's intoxication. First, Appellant failed all three (3) field sobriety tests which the arresting officer had him perform. RA 000082-83. Second, Appellant's eyes were both glassy and watery. Id. Third, Appellant's speech was low and slower than the arresting officer would expect from a sober individual. Id. Fourth, Appellant had a stiff gait when he walked. Id. Fifth, Appellant had spilled a drink all over his vehicle that smelled strongly of alcohol. Id. Sixth, Appellant had a "moderate odor of alcohol on his breath." PSI at 4. Finally, Appellant admitted that he had been involved in the traffic accident to which the officer was responding. RA 000086.

Given this evidence, there would never have been a need to introduce the results of the preliminary breath test. Such a reality makes counsel's decision not to have it suppressed a reasonable one. Further, the failure to file a motion could not possibly have prejudiced Appellant, as the evidence would not have needed to be admitted regardless of whether it was suppressed. Therefore, counsel cannot be found to be ineffective on this ground.

/ / /

3. There Were No Grounds To Suppress the Evidentiary BAC Reading

Finally, Appellant alleges that his counsel should have filed a motion to suppress the evidentiary BAC reading obtained as a result of a blood draw. AOB at 31. Appellant claims that such a motion was appropriate because the officer did not give Appellant "the choice of submitting to a breath test in lieu of blood." Id.

NRS 484C.160(5)(a) states: "Except as otherwise provided in this section, the person may refuse to submit to a blood test if means are reasonably available to perform a blood test." Further, this Court has held that "once a suspect chooses a testing method they must either undergo that test, or affirmatively request an alternative one." State, Dep't of Motor Vehicles & Pub. Safety v. Kinkade, 107 Nev. 257, 259, 810 P.2d 1201, 1203 (1991).

In the instant case, Appellant consented to a blood draw after the arresting officer explained the informed consent laws to him. RA000087-88. Pursuant to Kincaid, if Appellant wanted to take a breath test in lieu of the blood test, it was his responsibility to so request one. Appellant has attached no evidence that he made such a request. Nor has Appellant even alleged that such a request occurred. As such, any motion filed to this effect would have been frivolous. Given that counsel cannot be found ineffective for failing to file a frivolous motion, counsel cannot be found ineffective on this ground.

Since all of the motions Appellant alleges his counsel should have filed would have been frivolous or inconsequential, Appellant has not met his burden of showing that his counsel was ineffective. Further, Appellant's other arguments regarding why he should have been entitled to withdraw his guilty plea are similarly meritless. The district court noted as much during the hearing on Appellant's Motion to Withdraw Guilty Plea. AA069, AA088 (refuting Appellant's claim that the language of the Second Amended Information granted Appellant cause to withdraw his plea); AA081-84 (finding that Appellant knew about the fine); AA088 (finding the prior counsel was not ineffective for filing the motions Appellant here complains about); AA091 (where the district court expressly disagreed with many of the same arguments Appellant raises in his Opening Brief).

As such, the district court did not abuse its discretion in denying Appellant's Motion to Withdraw Guilty Plea.

F. Appellant Freely and Voluntarily Entered Into His Guilty Plea Agreement

The previous five subsections demonstrate that all of Appellant's claims regarding why he was entitled to withdraw his guilty plea must fail. Further, the State would note that Appellant entered into his guilty plea knowingly, voluntarily, and with the assistance of counsel.

A guilty plea is knowing and voluntary if the defendant "has full understanding of both the nature of the charges and the direct consequences arising

from a plea of guilty." Rubio v. State, 194 P.3d 1224, 1228 (Nev. 2008). To determine the validity of the guilty plea, the Nevada Supreme Court requires district court to look beyond the plea canvass to the entire record and the totality of the circumstances. Id. "A defendant may generally not repudiate [his] assertions, made in open court, that the plea is voluntary.

In the instant case, the record clearly demonstrates that Appellant's plea was knowing and voluntary. First, Appellant was aware of the direct consequences of his plea. In signing his Guilty Plea Agreement, Appellant affirmed the following:

> I understand that as a consequence of my plea of guilty by way of the Alford decision the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum of term of not less than two (2) year and a maximum term of not more than twenty (20) years. The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment, I understand that I may also be fined up to $5,000.00

AA026. The following exchange also occurred during Appellant's plea canvas:

> THE COURT: …All right. So this -- the stipulated sentence, so you understand
> that this -- this guilty plea agreement is a contract between you and the
> State of Nevada and I'm not a party to the contract?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And so I just have to sentence you within the legal sentencing perimeters that's set by the legislature for this particular crime; you understand that?
>
> THE DEFENDANT: Yes.

THE COURT: And that -- that range is a minimum of two years and a maximum of twenty years, the minimum may not exceed 40 percent of the maximum –

THE DEFENDANT: Yes.
THE COURT: -- the sentence that I impose? And also I have to fine you, it's a requirement. I have to fine you up to -- actually, it says may here. I thought it was a mandatory.

MR. GILES: It's mandatory, Your Honor. It is –

THE COURT: A mandatory fine of up to five thousand?

MR. GILES: Yes.

THE COURT: Okay. So -- and it says I may also be fined, but you understand that it's a mandatory fine?

THE DEFENDANT: Yes.

THE COURT: I could -- because of the language of up to five thousand, I could do something much less than that obviously, but I have to fine him -- impose a fine. Okay. And you also understand that -- you understand that I have to impose restitution obviously if there are damages that are outstanding in order to make the victim whole and this –

THE DEFENDANT: Yes.

THE COURT: -- is required by statute and now a constitutional amendment; you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you also understand you're not eligible for probation on this particular charge –

THE DEFENDANT: Yes.

> THE COURT: -- for which you're entering the plea? All right.

AA039-40.

Second, Appellant had a full understanding of the nature of the charges. In signing his Guilty Plea Agreement, Appellant affirmed the following statements:

> I have discussed the elements of the original charge(s) with my attorney and I understand the nature of the charge(s) against me.
>
> I understand the State would have to prove each element of the charge(s) against me at trial.
>
> I have discussed with my attorney all possible defenses, defense strategies and circumstances which might be in my favor.
>
> All the foregoing elements, consequences, rights, and waiver of rights have been explained to me by my attorney.

AA029. The following exchange also occurred during Appellant's plea canvas:

> THE COURT: All right. So, attached as Exhibit 1 is the second amended information charging you in fact with driving and/or being in actual physical control of a motor vehicle while under the influence of an intoxicating liquor or alcohol resulting in substantial bodily harm, category B felony; did you read Exhibit 1?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And to that charge, how do you plead?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: By way of the Alford decision?
>
> THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. So let's review what that means and see that you're understanding that it is the same as mine and the law, okay. And so basically that means that you're agreeing to plead guilty to this charge, but you're not admitting your guilt and you're doing that pursuant to this, you know, a case that is the Alford decision, Alford versus North Carolina. And the reason for that is you don't want to put yourself at risk for being convicted on the original charges and facing a harsher penalty that might be required or given than you would by entering this plea; is that your understanding as well?

THE DEFENDANT: Yes, it is.

THE COURT: Okay. If the State went to trial, what would it prove?

MR. GILES: Your Honor, if we had gone to trial, the State would have proven that on December 1st, 2016, the Defendant was driving a Mercedes Benz on Anthem Parkway at Atchley Drive and he turned left in front of oncoming traffic failing to surrender the roadway to those with the right of way causing a two-car crash involving an elderly couple, Maxine and Martin Luber. In the crash, Ms. -- Ms. Luber suffered ten broken ribs, a fractured sternum and several other injuries including a large laceration, abrasion to her leg which required substantial medical care and recovery time. Mr. Luber suffered injuries that were not substantial, but were fairly graded in and of themselves. The Defendant then drove away from the scene. He was later caught. And the State would further prove that within two hours of the driving behavior, his blood was drawn and when it was tested, it came back at .193 BAC approximately two and half times the legal limit.

AA041-43.

Further, Appellant's plea was voluntarily entered. He was under no threat, duress, or coercion, nor was he acting under any promises of leniency. When Appellant signed his Guilty Plea Agreement, he thereby affirmed the following statements:

> I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.
>
> I am not under the effect of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of plea.

AA029. The following exchange also occurred during Appellant's plea canvas:

> THE COURT: Okay. Now, has anyone forced or coerced you into entering your plea?
>
> THE DEFENDANT: No.
>
> THE COURT: Has -- am I ever going to hear from you that somehow because of all -- everything that occurred before this plea was entered, that now you really didn't want to enter the plea and you're being forced and you want to go to trial?
>
> THE DEFENDANT: No.
>
> THE COURT: Are you sure because I don't want to see that later in some kind of petition that I forced you into this because obviously you can go to trial this afternoon?
>
> THE DEFENDANT: I made a mistake on -- on Wednesday and I just -- it feels like every time I open my mouth I get worse and worse, so I just -- I don't -- I –

> THE COURT: So you don't -- so you feel like you're being forced today?
>
> THE DEFENDANT: No.
> THE COURT: I don't want to coerce you into anything.
>
> THE DEFENDANT: No.
>
> THE COURT: How about promises; has anyone made you any promise in order to induce you to plead guilty today, something I don't know anything about, it's not in this guilty plea agreement?
>
> THE DEFENDANT: No.
>
> THE COURT: You understand that you're waiving very valuable constitutional rights by entering into this guilty plea agreement?
>
> THE DEFENDANT: Yes.

AA043-44.

During the hearing on Appellant's Motion to Withdraw Guilty Plea, the district court further noted that Appellant "was adamant once the State indicated they were willing to allow him to plead guilty pursuant to *Alford versus North Carolina*, and he was adamant that he wanted to plea." AA086. The district court further noted that Appellant took this plea on the day trial was supposed to start. AA086. The district court also stated that when Appellant entered his plea, he did not want to run the risk of being convicted on the original and more serious charges. AA086; see also AA042 (the portion of Appellant's Guilty Plea canvas where he indicated as much). The district court further noted during Appellant's hearing on his bond

pending appeal that any argument Appellant had made regarding insufficient evidence surrounding the charges was clearly belied by the available evidence. RA 000245. The district court then reaffirmed her prior ruling that under the totality of the circumstances, there was no reason to allow Appellant to withdraw his guilty plea. RA 000245.

Given the record, there is no question that Appellant understood the charge he was facing, the consequences of his plea, and entered into his Guilty Plea Agreement knowingly and voluntarily. Since the record demonstrate Appellant's plea was entered into knowingly and voluntarily, and none of Appellant's other claims seeking to invalidate his plea have any merit, the district court did not abuse its discretion in denying Appellant's Motion to Withdraw Guilty Plea. Therefore, this claim should be denied.

CONCLUSION

For the foregoing reasons, Appellant's Judgment of Conviction should be AFFIRMED.

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/ / /

Dated this 8th day of April, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 9,674 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 8th day of April, 2020.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 8th day of April, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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