IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Mar 17 2021 11:55 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

KODY HARLAN

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.Ct. No. 80318
D.C. No. C333318

APPELLANT'S OPENING BRIEF

JEAN J. SCHWARTZER. ESQ
Nevada Bar No. 11223
Law Office of Jean J. Schwartzer
170 S. Green Valley Pkwy
Suite 300
Henderson, Nevada 89012
(702) 979-9941
Attorney for Appellant

STEVEN B. WOLFSON, ESQ.
Nevada Bar No. 1565
Clark County District Attorney
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2500
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES & REGULATIONS	**PAGE**
Nev. Rev. Stat. § 48.025	16
Nev. Rev. Stat. § 48.035	16
Nev. Rev. Stat. § 51.065	15
Nev. Rev. Stat. § 174.165	3
Nev. Rev. Stat. § 195.040	3
Nev. Rev. Stat. § 195.030	3
Nev. Rev. Stat. § 200.010	3
Nev. Rev. Stat. § 200.030	3
Nev. Rev. Stat. §200.380	3
N.R.A.P. 17	2

IN THE SUPREME COURT OF THE STATE OF NEVADA

KODY HARLAN Appellant, vs. THE STATE OF NEVADA, Respondent.	S.Ct. No. 80318 D.C. No. C333318

STATEMENT OF JURISDICTION

This Court has appellate jurisdiction over the instant matter pursuant to Nev. Rev. Stat. § 177.015(3). The Appellant appeals from his Judgment of Conviction announced on December 12, 2019. 2 Appellant's Appendix ("AA") 178-79. A timely Notice of Appeal was filed on December 23, 2019. 2 AA 180-81.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTION TO SEVER DEFENDANTS

II. THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO SUA SPONTE GIVE PROPER INSTRUCTIONS

III. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY ARGUING FACTS NOT IN EVIDENCE

IV. THE DISTRICT COURT ABUSED ITS WHEN IT ALLOWED IMPROPER HEARSAY TESTIMONY OVER HARLAN'S OBJECTIONS

V. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED HARLAN'S MOTION FOR A MISTRIAL AND MOTION FOR NEW TRIAL

VI. CUMULATIVE ERROR

ROUTING STATEMENT

Appellant is appealing the judgment of conviction based on a jury verdict of guilty of a Category A and B felonies (Murder and Robbery) and has raised, *inter alia*, a sufficiency of the evidence argument. Therefore, pursuant to N.R.A.P. 17(b)(2)(A) and (B), this appeal is presumptively routed to the Supreme Court of Nevada.

STATEMENT OF THE CASE

On August 20, 2009, KODY HARLAN (hereinafter "Appellant") was charged via Information as follows: COUNT 1 – Murder With Use of a Deadly Weapon (Felony – NRS 200.010, 200.030; Count 2 – Robbery With Use of a Deadly Weapon (Felony – NRS 200.380); COUNTS 3 – Accessory to Murder With Use of a Deadly Weapon (Felony- NRS 195.030, 195.040, 200.010, 200.030). 1 AA 1-4.

On April 5, 2019, Appellant filed a Motion to Sever or in the Alternative Motion to Deem Statements of the Co-Defendant Inadmissible. 1 AA 5-17. On April 11, 2019, the State filed an Opposition. 1 AA 18-30. On April 23, 2019, a hearing was held wherein the district court denied Appellant's Motion 17 AA 1644-53.

On April 18, 2019, Appellant filed a Motion in Limine Regarding Bad Acts and Photo/Videographic Evidence. 1 AA 38-47. On April 25, 2019, the state filed an Opposition. 1 AA 38-47. It was agreed upon by all partied and the district court that the State would not introduce evidence of the prior bad act. 8 AA 704-706.

On July 29, 2019, Appellant's jury trial began. 6 AA 504. On August 7, 2019, trial concluded. 15 AA 1496. The jury found Appellant guilty of all counts. 2 AA 128-29.

August 13, 2019, Appellant filed a Motion to Set Aside the Verdict or in the Alternative Motion for New Trial. 1 AA 95-99. On August 20, 2019, the State filed an Opposition. 1 AA 108; 2AA 100-117. On September 12, 2019 Appellant filed a

Supplemental Brief to the Motion for New Trial. 2 AA 118-38. On September 26, 2019, the State filed a Supplemental Opposition. 2 AA 139-66. On October 3, 2019, Appellant filed a Response to the State's Opposition. 2 AA 167-77.

On October 10, 2019, a hearing was held wherein the district court ordered an evidentiary hearing on the Motion. 16 AA 1504-28. On November 25, 2019, an evidentiary hearing was held. 16 AA 1529-1600. At the end of the hearing the district court denied Appellant's Motion. Id.

On December 10, 2019, Appellant was sentenced as follows: Count 1 – LIFE with a minimum parole eligibility of twenty (20) years; plus a consecutive term of forty-eight (48) months to one hundred twenty (120) months for the deadly weapon enhancement; Count 2 – forty-eight (48) months to one hundred twenty (120) months plus a consecutive term of forty-eight (48) months to one hundred twenty (120) months for the deadly weapon enhancement; to run concurrent to Count 1; Count 3 – minimum of eighteen (18) months and a maximum of sixty (60) months; concurrent with Count 1; with five hundred and forty-nine (549) days credit for time served. 17 AA 1601-43.

The Judgment of Conviction was filed on December 12, 2019. 2 AA 178-79.

On December 23, 2019, Appellant filed a timely Notice of Appeal. 2 AA 180-81.

The instant Opening Brief follows.

STATEMENT OF FACTS

In June of 2018, a group of teenagers were hanging out at an uninhabited home in Henderson, Nevada. Harlan and Caruso arrived together. Kymani Thompson ("Thompson"), Alaric Oliver ("Oliver"), Charles Osurman ("Osruman"), Mathew Minkler ("Minkler")and Ghunnar Methvin ("Methvin") were also in attendance at various points during the party. 9 AA 879-85.

During this party the kids were talking, smoking marijuana, and drinking. 9 AA 889. They were also taking xanax. 11 AA 1022. Caruso had a revolver and Harlan had a semi-automatic handgun. 11 AA 1017. The guns were being passed around between the kids. 11 AA 1018.

Several discussions were had at the party. There was a discussion of "matching," which is a term used when two people with marijuana come together and share their marijuana with one another. 11 AA 1021-22. Caruso had invited Methvin over to match, which is why Methvin and Thompsom came to the party. 11 AA 1034. Minkler's name was mentioned by Casuro as someone else who could match. 11 AA 1058.

There was also mention by several witnesses that Caruso had said something about a "lick," which is a slang term for "robbery." 11 AA 1018. Thompson initially testified that out of the six people that were there, he had no clue who mentioned the

lick. 11 AA 1018-19. Then when presented with a transcript of his statement to police, he agreed that it was Harlan and Caruso who had been talking about doing a lick. 11 AA 1028-30. When questioned further, he testified that he only remembered the work lick vaguely mentioned in the house; that he did not know who mentioned it; did not know who the target of this lick was or what was to be stolen. 11 AA 1044-45. Thompson admitted that he did not know what went on in the house or why Minkler was killed and that Minkler's name was only mentioned during the previous discussion regarding matching marijuana. 11 AA 1045. He also stated that he did not hear Harlan talk much at all because he was out of it falling asleep on the couch multiple times throughout the day. 11 AA 1044. Thompson testified that there was no hostility towards Minkler. 11 AA 1037.

Methvin had a more clear recollection of who said what regarding a lick. He specifically remembered that it was Caruso who stated that "he wanted to kill someone and or someone that day and do a lick." 12 AA 1108-9. Methvin, Oliver, Harlan, Charles Osurman, and Thomspon were all present when Caruso made this statement. 12 AA 1109. When asked by the State whether it was Caruso or Caruso and Harlan who made the statement, Methvin testified that it was only Caruso who made the comments about killing and robbing someone, and doing a lick. 12 AA 1109-10. While this was being said, Harlan was laying down on the couch. 12 AA 1124.

Minkler called Caruso three times at some point during the party. 9 AA 889. Caruso called him back. Id. Caruso and Harlan left to pick Minkler up because Minkler wanted to come to the party. 13 AA 1248. They then brought him back to the party. 9 AA 890. They all proceeded to drink, smoke marijuana and take xanax. 10 AA 911-12; 926. Minkler brought marijuana to the house and was sharing it freely. 11 AA 1044-45.

While high, Caruso was playing a type of Russian roulette and would take out the bullets from the revolver, put some back in, point the gun and pull trigger repeatedly, including when pointed at himself. 10 AA 914; 12 AA 1107. At one point, while sitting on the couch, Caruso pulled the trigger and a bullet was in the chamber. It fired from the gun and shot into the ceiling. 9 AA 892. After shot went off, Caruso acted like he was shot, then laughed and pointed to the ceiling. 12 AA 1121. Thompson and Methvin left the house at that point. 9 AA 893. Thompson and Methvin briefly returned to the house to get Thompson's lighter and then leave again. 11 AA 1024-26.

At the time the shot was fired into the ceiling, Minkler and Thompson were sitting in the kitchen and Harlan was high and barely awake/falling asleep on the couch. 10 AA 913. Harlan woke up after the shot and began flashing the laser from his gun, waiving it around, and at one point briefly had it pointed in the direction of Minkler. 10 AA 914; 9 AA 897-98. Then at some point Harlan passed out again. 10

AA 903; 912-913. **There is no testimony given of Harlan ever pulling the trigger—bullet or no bullet—of his or any other gun.** AA, *generally*; 12 AA 1120-21.

Oliver testified that about two hours after Caruso fired a bullet into the ceiling, Minkler is in the kitchen. 39 AA 899-900; 931. Caruso was holding his gun sitting on a loveseat. 9 AA 900; 10 AA 901. Minkler asked Caruso if he could look at Caruso's gun. 9 AA 900. Caruso gave Minkler the gun and after Minkler was finished looking at it, he set it down on the kitchen island counter. 10 AA 901. Caruso then stood up from the love seat and walked over to where Minkler was standing. Id. Caruso was wobbly and slurring his words. 10 AA 918. Caruso picked up the gun off the kitchen island counter and shot Minkler in the head. 10 AA 901-2. **Harlan was passed out and "not all there" on the couch while this entire interaction and shooting occurred.** 10 AA 903, 912-13. Oliver then fled the house. 10 AA 904.

Oliver did not hear any conversation about wanting to rob Matt. There was no hostility and everyone was having good time10 AA 911. Harlan was on couch falling asleep because of the Xanax. 10 AA 911-12. Caruso and Minkler also took Xanax. Harlan's face was turned away when Caruso shot Minkler. 10 AA 912.

Methvin received a FaceTime call from Caruso while in the presences of Thompson after they left the house a second time. 11 AA 1026. Thompson could hear Caruso on the other end of the call. 10 AA 977. Caruso said he had killed Minkler. 11

AA 1027; 12 AA 1125-26. **Caruso did not say "we" just killed Minkler. He said "I" just killed Minkler.** In fact, he did not mention Harlan's name at all. 11 AA 1040; 12 AA 1125-27. Caruso also posted a video on snapchat about "catching a body." 10 AA 950. Police also found a text message from Caruso to a friend saying, "popped him on accident." 13 AA 1260.

Traceo Meadows ("Meadows") was at the party house initially, left prior to the shooting, and then returned after Minkler was shot. 12 AA 1156-59. He testified that when he arrived he saw Minkler's body and Caruso stated that he had killed someone. 12 AA 1161-62. Harlan did not say anything. 12 AA 1162. Caruso said that they needed to move the body so Meadows and Caruso moved Minkler's body into a closet. Id. Harlan took Minkler's shoes off and searched his pockets. 12 AA 1165. Someone spray painted "Fuck Matt" on the door. 12 AA 1167. They all left in a Mercedes to go to the Galleria Mall to shop and steal. 12 AA 1169. Harlan was driving and mentioned that Caruso accidentally killed Minkler yet Caruso was boasting about it. 12 AA 1170. Harlan was "out of it" and not talking much according to Meadows. 12 AA 1176. Meadows was sitting in the back of the Mercedes, Harlan was driving, Caruso was sitting in the passenger front seat. 12 AA 1184. Minkler's wallet was ultimately found on the right-rear passenger side floorboard. 9 AA 835.

When Meadows gave a statement to police, he never mentioned Harlan going through Minkler's pockets. 12 AA 1181. In fact, he told police that Harlan never touched any of Minkler's pockets. 12 AA 1181-82. He admitted at trial that he changed his story to assert that Harlan had been the one to remove Minkler's wallet and phone from his pockets. 13 AA 1201-02.

Meadows also initially told police that Harlan had spray paint in his hand but that he never actually saw Harlan spray paint anything. 12 AA 1195-96. On cross examination he admitted that he, Meadows, had been spray painting in the house that day. 12 AA 1179. In exchange for Meadows testifying for the State against Caruso and Harlan, the State agree to dismiss the charge of accessory to murder that had been filed against him but only after he testified. 12 AA 1164.Meadows admitted that he had been sleeping in the park at the time of the murders. 12 AA 1183.

Footage from the mall showed Harlan buying items with cash he removed from a brwn wallet, whereas Minker's wallet was blue. 11 AA 1001. No testimony was presented that the cash used by Harlan was the cash from Minkler's wallet. AA, *generally*.

After the mall, Harlan and Caruso then went to a pool party. 8 AA 782-83. The State presented evidence that at this pool party, *someone* said *something* about "catching a body." However, the State failed to establish who actually made the

comment despite attempting to do so using improper hearsay over which Harlan raised repeated objections to, which the Court repeatedly overruled. 8 AA 786-800.

After the party, Caruso and Harlan left in the black Mercedes. At some point, police attempted to pull the car over for a traffic violation and a chase ensued. 8 AA 758-60. They then got into a car accident and fled the vehicle. 8 AA 760-61. Caruso was immediately apprehended. 8 AA 770. Harlan was apprehended shortly thereafter. 9 AA 810-812. When Harlan was apprehended he told police that he knew of a kid that had been killed.13 AA 1299-1300. Harlan also gave police the password to Caruso's phone after Caruso gave police the wrong code. 14 AA 1301.

Harlan was initially withholding with police but ultimately cooperated and gave them valuable information, including taking the police to the home and telling police what happened, who shot Minkler as well as including his involvement with covering the body with a tarp and cleaning up some of the blood. 13 AA 1291.

SUMMARY OF THE ARGUMENT

The district court erred in denying Harlan's motion to sever, thereby allowing the State to present evidence of Caruso's statements and acts against Harlan, which would not be admissible in a trial against Harlan alone. This prejudiced Harlan because he was merely present when Caruso committed the crimes and voiced intent to do so.

The district court erred by failing to *sua sponte* give proper jury instructions

regarding mere presence and conspiracy liability, which was supported by the evidence presented at trial and Harlan's defense theory.

The State committed prosecutorial misconduct by arguing that Caruso and Harlan mentioned wanting to commit a robbery and that they mentioned the victim's name while talking about the robbery. The testimony from the two witnesses who heard this conversation refutes this argument and Harlan was prejudiced.

The district court erred by repeatedly allowing the State to elicit double hearsay of Harlan allegedly saying he "caught a body" over Harlan's objections. This statement was inadmissible and unreliable. This prejudice Harlan because it allowed the jury to think he admitted to killing the victim.

The district court erred in denying Harlan's motion for a mistrial due to the fact that one of the State's witnesses, a detective, intentionally testified to the prior bad act of Harlan driving a stolen Mercedes before and after the shooting. This prejudiced Harlan.

The district court erred in denying Harlan's motion for new trial based upon jury misconduct due to the fact that jury considered the fact that the vehicle was stolen when deliberating and one juror allowed it to affect her verdict. This prejudiced Harlan.

Cumulative error warrants reversal.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER

NRS 174.165(1) provides that a trial judge may sever a joint trial if "it appears that a defendant . . . is prejudiced by a joinder of . . . defendants . . . for trial together." Further, "[t]he decision to sever a joint trial is vested in the sound discretion of the district court and will not be reversed on appeal unless the appellant 'carries the heavy burden' of showing that the trial judge abused his discretion." Buff v. State,114 Nev. 1237, 1245, 970 P.2d 564, 569 (1998) *citing* Amen v. State, 106 Nev. 749, 755-56, 801 P.2d 1354, 1359 (1990).

Although this Court has long recognized that some level of prejudice exists in a joint trial, error in refusing to sever joint trials is subject to harmless-error review. Id. "To establish that joinder was prejudicial requires more than simply showing that severance made acquittal more likely; misjoinder requires reversal only if it has a substantial and injurious effect on the verdict." Marshall v. State, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002) *citing* Middleton v. State, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998). [D]istrict courts must determine the risk of prejudice from a joint trial based on the facts of each case." Id. at 648, 56 P.3d at 379. "A district court should grant a severance 'only if there is a serious risk that a joint trial would

compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'"Id. at 647, 56 P.3d at 379 *quoting* Zafiro v. United States, 506 U.S. 534, 539, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993).

Conflicting defenses may cause prejudice warranting severance if the defendant seeking severance shows that the codefendants have '"conflicting and irreconcilable defenses and there is danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.'" Id. at 646, 56 P.3d at 378 (quoting Jones v. State, 111 Nev. 848, 854, 899 P.2d 544, 547 (1995)). The district court's duty to consider the potential prejudice that may result from a joint trial does not end with the denial of a pretrial motion to sever. Rather, as this court has recognized, "the district court has 'a continuing duty at all stages of the trial to grant a severance if prejudice does appear.'" Id. at 646, 56 P.3d at 379 (quoting Neill v. State, 1992 OK CR 12, 827 P.2d 884, 890 (Okla. Crim. App. 1992)).

To constitute good cause for a separate trial in any case where there are not antagonistic defenses, the evidence proposed to be introduced as to one must be inadmissible as to the other, and of such a nature as to afford reasonable ground for the belief that the other will be prejudiced by a joint trial. The mere fact that evidence admissible against one is not material as to the other is not, in itself, deemed sufficient

ground for a separate trial. State v. Lewis, 50 Nev. 212, 255 P. 1002, (Nev. 1927) *citing* People v. Booth, 72 Cal. App. 160, 236 P. 987; People v. Perry, 195 Cal. 623, 234 P. 890; Commonwealth v. Borasky, 214 Mass. 313, 101 N.E. 377; Gillespie v. People, 176 Ill. 238, 52 N.E. 250.

It is an appellant's "heavy burden" to show that the trial court abused its discretion in failing to sever trial. Rodriguez v. State, 117 Nev. 800, 32 P.3d 773, 117 Nev. Adv. Rep. 66 (2001).

Harlan filed a Motion to Sever, which was denied. 1 AA 5-7; 17 AA 1644-53. Although Harlan and Caruso did not have antagonistic defenses, evidence of statements made and acts committed by Caruso were presented against Harlan at trial. If Harlan were tried separately, this evidence would not have been admissible.

At trial, evidence was presented that only Caruso made statements about robbing and killing someone and doing a lick as well as statements that he "caught a body" after Minkler was killed. Harlan never mentioned robbing or killing anyone or doing a lick. He did not even respond or participate in the conversation when Caruso made such statements. Harlan never once made any statements indicating that he had any intent to rob, shoot, hurt or kill anyone. Harlan also never mentioned that he "caught a body." Therefore, Caruso's statements about robbing or killing someone, doing a lick and "catching a body" would not have been admissible against Harlan pursuant to NRS 51.065 as hearsay because it would be deemed an out of court

statement made by someone other than Harlan offered for proof of the matter asserted, which is that Harlan intended to kill and/or rob Minkler. [1] Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979). Additionally, these statements would not have been admissible against Harlan pursuant to NRS 48.025 as irrelevant. Carroll v. State, 132 Nev. 269, 371 P.3d 1023 (2016). If deemed relevant, these statements would be inadmissible pursuant to NRS 48.035 due to the fact that their probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury. Krause Inc. v. Little, 117 Nev. 929, 34 P.3d 566 (2001). Had Harlan been the individual who shot Minkler or participated in any way in the shooting, Caruso's statements may have been relevant and probative. However, Harlan was asleep on the couch and played no role in the shooting of Minkler. As such, Caruso's statements, although admissible against Caruso, would be inadmissible against Harlan if Harlan had been tried separately pursuant to NRS 51.065, NRS 48.025 and/or NRS 48.035.

Evidence was presented that Caruso was putting bullets into a revolver, waiving the gun around and randomly firing the gun, one time firing a bullet into the ceiling. Evidence was also presented that Caruso picked up his gun off the kitchen island counter after Minkler had looked at it, aimed the gun at Minkler and pulled the trigger firing a bullet into his head, killing him. None of this evidence would have been

[1] Harlan is unaware of what hearsay exception the State will argue and will respond to such argument in his Reply.

admissible against Harlan in his own separate trial because it would be deemed irrelevant, prejudicial, confusion as to the issue, and misleading the jury. NRS 48.025 and NRS 48.035.

Evidence of the statements made by Caruso and the acts he committed would not have been admissible against Harlan if Harlan had been tried alone. Therefore, the district court abused its discretion in failing to sever Caruso and Harlan. State v. Lewis, 50 Nev. 212, 255 P. 1002, (Nev. 1927) *citing* People v. Booth, 72 Cal. App. 160, 236 P. 987; People v. Perry, 195 Cal. 623, 234 P. 890; Commonwealth v. Borasky, 214 Mass. 313, 101 N.E. 377; Gillespie v. People, 176 Ill. 238, 52 N.E. 250. This error was prejudicial in that evidence of Caruso's criminal acts and wrong doing was improperly admitted against Harlan leading to Harlan's conviction of first degree murder with use of a deadly weapon and robbery with use of a deadly weapon for the acts solely committed by Caruso while Harlan was either silent and merely present and almost unconscious when the shooting actually took place and merely present and silent when Caruso voiced his intent to commit a robbery.

II. THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO *SUA SPONTE* GIVE PROPER JURY INSTRUCTIONS

"A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or

incredible, to support it." Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (internal brackets omitted). However, [no party] is entitled to instructions that are "misleading, inaccurate or duplicitous." Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). A jury instruction should be unambiguous. See Culverson v. State, 106 Nev. 484, 488, 797 P.2d 238, 240 (1990).

"Failure to object or to request an instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act *sua sponte* to protect a defendant's right to a fair trial. Flanagan v. State, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996); McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998); see also Tavares v. State, 117 Nev. 725, 729, 30 P.3d 1128, 1131 (2001) (providing that this court may "address an error if it was plain and affected the defendant's substantial rights"). Moreover, "To amount to plain error, the error must be so unmistakable that it is apparent from a casual inspection of the record." Martinorellan v. State, 131 Nev., Adv. op. 6, 343 P.3d 590, 593 (2015) (internal quotation marks omitted).

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error. An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2005) (internal citation omitted). This Court reviews the question of

whether a jury instruction is a correct statement of the law de novo. Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

At trial, the State presented evidence of the statements made and actions of Caruso in support of the felony murder theory of liability as to Harlan in that Harlan allegedly conspired with Caruso to rob Minkler who was shot by Caruso in furtherance of that intent to rob, with Harlan completing the robbery by taking Minkler's wallet. Harlan did not pull the trigger nor did he help facilitate any shooting or robbery prior to the killing. Harlan did not make any statements about robbing or killing anyone nor did he agree with or respond to Caruso's comment about committing a robbery. The evidence presented strongly supported the defense that a) Harlan was merely present when Minkler was shot and did not participate in the killing; and b) that if there ever was a plan or intent on the part of Caruso to rob and/or kill Minkler as demonstrated by his statement announcing his desire to do so, Harlan was, again, merely present and only associated with Caruso but in no way conspired with Caruso to commit any crimes prior to the shooting. A positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased "position" or "theory" instruction. U.S. v. Manning, 618 F.2d 45 (8th Cir. 1980). The district court should have *sua sponte* given a mere presences instruction as well as a more complete conspiracy instruction.

a. The District Court Erred When it Failed to Give a Mere Presence Instruction to the Jury

The district court should have *sua sponte* given the following instruction:

> "Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant is a participant and not merely a knowing spectator."

The proposed instruction correctly states the law. Winston v. Sheriff, 92 Nev. 616, 555 P.2d 1234 (1976). Moreover, the evidence presented at trial, discussed *supra* strongly supports this instruction and is in line with Harlan's theory of the case, which was that he had no intent to rob or kill Minkler, was merely present when Caruso made statements about robbing someone and when Minkler was shot. In fact, this theory was mentioned by defense counsel numerous times during closing argument. 15 AA 1458; 1462-63; 1466-67. The evidence supporting a mere presence theory of defense was evident and strong. If there was ever a case where it was so unmistakable that a mere presence instruction was needed to protect a juvenile's right to a fair trial based upon a casual inspection of the record, it is this case. It was plain error for the district court not to act *sua sponte* and give a mere presence instruction to protect Harlan's right to a fair trial. Failure to do prejudiced Harlan because it did not give the jury a way to render a verdict consistent with Harlan's theory of defense and the evidence in support of that defense and warrants reversal. Flanagan, 112 Nev. at 1423, 930 P.2d at 700; McKenna, 114 Nev. at 1052, 968 P.2d at 745; see also Tavares, 117 Nev. at 729, 30 P.3d at 1131.

b. The District Court Erred When it Failed to Properly Instruct the Jury on Conspiracy as a Theory of Liability

"A conspiracy is an agreement between two or more persons for an unlawful purpose." Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). "A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator . . . Id. Even though "mere association is insufficient to support a charge of conspiracy," Sanders v. State, 110 Nev. 434, 436, 874 P.2d 1239, 1240 (1994), "proof of even a single overt act may be sufficient to corroborate a defendant's statement and support a conspiracy conviction," Doyle, 112 Nev. at 894, 921 P.2d at 911. "[C]onspiracy is usually established by inference from the conduct of the parties." Rowland v. State, 118 Nev. 31, 46, 39 P.3d 114, 123 (2002).

"However, absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiescence in, or approval of that purpose does not make one a party to conspiracy." Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000), overruled in part by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). Doyle, 112 Nev. at 894, 921 P.2d at 911.

The jury was instructed in Jury Instruction No. 3 that it could find Harlan was criminally liable for Murder with Use of a Deadly Weapon in two ways: 1) willful,

deliberate and premeditated; 2) committed during the perpetration or attempted perpetration of a robbery being liable under one or more of the following theories of liability: 1) by directly committing this crime; 2) by aiding an abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to the commit the crime; and /or 3) pursuant to a conspiracy to commit the crime, with the intent that this crime be committed, Defendants aiding and abetting and/or conspiring by Defendants acting in concert throughout. 1 AA 52.

The jury was also instructed in Jury Instruction No. 3 that it could find Harlan was criminally liable for Robbery with Use of a Deadly Weapon under three theories of liability: 1) by directly committing this crime; 2) by aiding an abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to the commit the crime; and /or 3) pursuant to a conspiracy to commit the crime, with the intent that this crime be committed, Defendants aiding and abetting and/or conspiring by Defendants acting in concert throughout. 1 AA 52-53.

The Jury was then instructed on conspiracy liability by Instructions No. 14, 15, and 16. 1 AA 64-66. These instructions contain no language requiring any overt act on the part of a defendant to be liable for the acts of a co-defendantAdditionally, no instruction was given regarding the fact that "mere knowledge of, acquiescence in, or

approval of that purpose does not make one a party to conspiracy." Garner, 116 Nev. at 780, 6 P.3d at 1020.

Although Instruction No. 14 is a correct statement of law pursuant to NRS 199.480, this instruction combined with Instruction Nos. 15 and 16 and no instruction regarding the need for some act in furtherance of the goals of the conspiracy a well as no instruction consistent with Garner, allowed the jury to hold Harlan liable for simply being present when Caruso stated his intent to rob someone and for being present and asleep when Caruso shot Minkler. Therefore it was plain error for the district court to fail to give proper instructions regarding conspiracy theory liability and Harlan was prejudiced. [2] Flanagan, 112 Nev. at 1423, 930 P.2d at 700; McKenna, 114 Nev. at 1052, 968 P.2d at 745; see also Tavares, 117 Nev. at 729, 30 P.3d at 1131.

III. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY ARGUING FACTS NOT IN EVIDENCE

"We analyze claims of prosecutorial misconduct in two steps: first, we determine whether the prosecutors' conduct was improper, and second, if the conduct was improper, we determine whether it warrants reversal. Valdez v. State, 124 Nev.

[2] Where, as here, a jury delivers a general verdict that could have been based on either a legally valid or legally invalid ground, the verdict may not stand because a reviewing court cannot discern the ground upon which the jury based its verdict. Stromberg v. California, 283 U.S. 359, 368, 51 S. Ct. 532, 75 L. Ed. 1117 (1931); Keating v. Hood, 191 F.3d 1053, 1062 (9th Cir. 1999), overruled on other grounds by Payton v. Woodford, 346 F.3d 1204, 1217 n.18 (9th Cir. 2003); 1 AA 48-49.

1172, 1188, 196 P.3d 465, 476 (2008). '[We] will not reverse a conviction based on prosecutorial misconduct if it was harmless error.' Id." Rimer v. State, 351 P.3d 697, 714 (2015).

"A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by doing so can it be determined whether the prosecutors conduct affected the fairness of the trial. See United States v. Young, 470 U.S. 1, 11, 84 L. Ed. 2d 1, 105 S.Ct. 1038 (1985). If the issue of guilt or innocence is close, and if the State's case is not strong, prosecutorial misconduct will probably be considered prejudicial. See Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962)." King v. State , 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

"A prosecutor may not argue facts or inference not supported by the evidence." Williams v. State, 103 Nev. 106, 110, 734 P.2d700, 703 (1987) *citing* Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985).

The State argued facts and inferences not support by the evidence and worse, argued facts and inferences directly refuted by the evidence:

> "We hear from [Thompson] that both [Casruso] and [Harlan] mentioned wanting to rob someone and wanting to do a lick. We hear from [Thompson] that they kept talking about it. That Matt's name was brought up in this idea of committing a robbery…."

15 AA 1429.

A review of Thompson's testimony will reveal that Harlan did not say these things nor was Minkler's name ever brought up by anyone in this idea of committing a robbery. Thompson testified that he did not remember who mentioned the lick. 11 AA 1018. The State then attempted to impeach Thompson with his statement to police. 11 AA 1028-29. In response Thompson agreed that he told police that it was Harlan and Caruso who were talking about doing a lick." 11 AA 1029.

Saying two people are "talking about" something can mean that both people are actively speaking about the same thing. Alternatively, it can mean that two people are present but only one of those people is talking and the other is merely present, possibly listening. It can also mean that two people are talking but say completely different things about the same topic. When pressed for more details, Thompson testified that he was not sure who brought Minkler's name up but he knew it was not Harlan because he was falling asleep on the couch. 11 AA 1036-37. Thompson later testified and confirmed, again, that Harlan said nothing about doing a lick. 11 AA 1044.

With respect to mentioning Minkler's name, there was no testimony presented at all from Thompson or any other witness that Minkler's name was "brought up in this idea of committing a robbery" as the State argued in its closing statement. 15 AA 1429. In fact, Thompson specifically testified that Minkler's name came up one time and that was during a conversation about who wanted to bring more

marijuana to the party. 11 AA 1034. Minkler's name was not brought with regard to ro robbing someone or a lick11 AA 1058.

Moreover, another more reliable witness, Methvin, definitively testified with a very clear recollection that it was Caruso and Caruso alone who made the comment about robbing someone and that Minkler's name was not brought up at this time. 12 AA 1108-10.

No one, including Thompson or Methvin, testified that Harlan made these statements. Likewise, no one testified that they heard Minkler's name mentioned in this idea of committed a robbery. The argument by the State in closing contained factual assertions and inferences that are patently untrue and were not supported by the evidence. These misrepresentations regarding who talked about doing a lick and whether Minkler's name was brought up during mention of the lick were highly prejudicial, as they allowed the jury to mistakenly believe that it had found the easy solution—Harlan had the intent to rob Minkler prior to the shooting because Harlan talked about wanting to rob someone and that Minkler's name was brought up when talking about the robbery. This conclusion was **not** supported by the evidence.

Given the fact that Harlan did nothing but be merely present, made no statements about a robbery, did not participate in the shooting in any way, was asleep on the couch when the shooting occurred, and did not film or photograph Minkler's body or brag about "catching a body" to anyone, the State's case against Harlan was

weak—the issue of guilt or innocence was close. Therefore, the statements made by the State in closing argument were improper, prejudiced Harlan and warrant reversal. Williams, 103 Nev. at 110, 734 P.2d at 703; Collier, 101 Nev. 473, 705 P.2d 1126; Garner, 78 Nev. at 374, 374 P.2d at 530; King , 116 Nev. at 356, 998 P.2d at 1176; Valdez, 124 Nev. at 1188, 196 P.3d at 476.

IV. The Court Abused Its Discretion When it Allowed Improper Hearsay Testimony Over Harlan's Objection

The State called Angelia Knox in its case-in-chief. Knox was at the party that defendants attended after the shooting. The State attempted to elicit improper hearsay statements from Knox when it asked her about statements made by Harlan at the party.

> Q: "Now, Angie, do you recall when police officers were talking to you, they asked you about the content of what Jaiden and Kody were talking about at the party? And do you remember telling police that you overheard

8 AA 786.

Harlan objected because the statement Knock gave to police demonstrates that she did not actually overhear anything. Instead, she was told by her friend Patrick. It appears from the record that the Court viewed Knox's voluntary statement at the bench. 8 AA 786-87. The Court stated that it would allow the State to ask the question

and defense could deal with it during cross-examination. 8 AA 787. The State proceeded to ask the question again:

> Q: So Angie, do you remember telling police officers that you overheard the Defendants discussing catching a body?
>
> A: Yeah, that's what Patrick told me that Kody said.

8 AA 787.

Harlan objected again and the Court sustained the objection. At that point, the state should have ceased with this line of questioning. However, the State continued question Knox on this topic and mislead her into stating that it was she who heard statement without specifying which statement—the statement from Harlan or the statement form Patrick. 8 AA 787.

Later on cross, it became apparent that Knox did **not**, in fact, hear Harlan say anything and that instead, she heard what Harlan allegedly said from Patrick, just as she said in her voluntary statement. 8 AA 795-96. The State continued to press the issue by asking additional questions and mischaracterizing Knox's testimony. 8 AA 797. Knox then said that she was not really paying attention, did not physically hear what they were saying but heard something. 8 AA 798. Then with more pressing by the State, she stated that she ***thinks*** she heard "something" and then with additional pressure from the State she was guided into saying "someone" said something about how they "caught a body." 8 AA 798. Harlan objected throughout this questioning.

On re-cross Knox admitted that she never told police she heard any statements herself and that what she did not know who made the comment about catching a body. 8 AA 799-800.

For whatever unknown reason, the State did not call Patrick to testify. Instead, they called Knox and repeatedly elicited improper double hearsay statements over numerous objections by Harlan. NRS 51.065; NRS 51.067; Deutscher, 95 Nev. 669, 601 P.2d 407. It was an abuse of discretion for the district court to continuously allow the State to elicit this hearsay. It prejudiced Harlan because it caused the jury to think that it was Harlan who stated that he caught a body, indicating that he was a participant in the murder, when the reliable and admissible evidence presented at trial indicates that Harlan never had any intention prior to the shooting to harm or steal from Minkler, never mentioned himself committing a robbery or lick prior to or after the shooting. Therefore, Harlan's conviction should be reversed.

V. THE DISTRICT COURT COMMITTED ERROR WHEN IT DENIED APPELLANT'S MOTIONS FOR MISTRIAL AND NEW TRIAL

a. Prior Bad Act

NRS 48.045(2) provides that evidence of other crimes is admissible, not to prove character, but for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity or absence of mistake or accident. The decision to admit or exclude evidence lies in the sound discretion of the district court and such

a decision will not be overturned absent manifest error. Petrocelli v, State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985); Tillema v. State, 112 Nev. 266, 269-70, 914 P.2d 605, 607 (1996). In cases of joined charges, the district court may admit the evidence if it satisfies one of the requirements of NRS 48.045(2) as to one of the charges as long as the overall prejudicial effect is outweighed by the probative value. *See* NRS 48.035(1).

Harlan filed a Motion in Limine regarding the stolen Mercedes that defendants were driving when the police attempted to pull them over. 1 AA 31-37. It was agreed by all parties and the district court that it would be prejudicial to admit this evidence and the witnesses would be admonished as such. 8 AA 704-706. While Harlan has no doubt that the State properly warned its witnesses to not mention the fact that the Mercedes the defendants were driving was stolen, the State's witness, Detective Nichols, volunteered this information in response to a question asked on cross-examination that did not call for such an answer:

> Q: But it would have been crucial for you—I mean wouldn't you agree it would have been a relevant and important fact for you to figure out who took the wallet out of his pants?
>
> A: I don't know that I would agree with that. You're saying that would assume who took it from the pant. I'm looking at the totality to include where the wallet was located to begin with.

Q: Sure.

A: Which was in the stolen Mercedes in the back seat.

14 AA 1311.

The parties approached and a discussion ensued. 14 AA 1311-1313. Later, outside the presence of the jury, argument was heard. Harlan moved for a mistrial. 14 AA 1317-27. The district court denied the motion but informed the jury once it returned that Detective Nichols' testimony about the vehicle being stolen was inaccurate, there was no evidence of a stolen vehicle, and to disregard the statement. 14 AA 1330-31. However, the bell could not be un-rung and during deliberations the stolen car was discussed and impacted at least one juror's, possibly others, verdict.

Juror, Shayra Esparaza, testified at a the evidentiary hearing on the motion for new trial that during deliberations, she mentioned that the car was stolen; three or four people talked about it; the stolen car was talked about for a minute and a half; **and that the fact the car was stolen made it more likely in her mind that the robbery was planned.** 16 AA 1529-600 She also believed it affected other jurors' verdict as well. Id. Other jurors also testified that the stolen car was mentioned and discussed during deliberations. Id.

The inference for the jurors was that if Caruso and Harlan would steal a Mercedes, they would certainly plan to rob another kid. The evidentiary implication is unduly prejudicial and was devastating to the defense. According to Esparanza, this

inadmissible bad act was considered by all jurors, discussed by a few, and had a prejudicial effect on Harlan in that it caused at least one juror, possibly more, to believe that Harlan had planned on robbing Minkler, giving rise to conspiracy and felony murder liability, possibly even premeditated liability, for first degree murder. Despite the fact that it was made clear to the district court that the jury deliberations had been affected by this inadmissible prior bad act evidence being admitted, it nevertheless denied, in error, Harlan's motion for a mistrial.

What is more troubling is the fact that this appears to have been done intentionally. Detective Nichols was an experienced detective on the homicide unit; he was admonished by the State not to mention the stolen car; and given his experience, he presumably understood the importance of not making a statement about the stolen car. All of that being said, it appears he went out of his way to do so anyway in response to a question that did not call for him to mention the fact that the vehicle was stolen. While Harlan is not arguing that the prosecutors did anything to elicit this testimony or failed in any way to admonish Detective Nichols not to mention the stolen car, it is clear that this was done intentionally on the part of Detective Nichols. As law enforcement and the State's witness, he is an arm of the State. Therefore, this makes the error and prejudice that much more egregious.

The jury in Harlan's trial heard inadmissible bad act evidence at the intentional hands of a law enforcement witness for the State, which, without a doubt, tainted the

jury deliberations and caused one juror, possibly more, to believe that Harlan had the intent to rob Minkler prior to the shooting. Therefore, it was error for the district court to deny Harlan's motion for mistrial, Harlan was prejudiced by this error, and his conviction should be reversed. Petrocelli, 101 Nev. at 52, 692 P.2d at 508; Tillema, 112 Nev. at 269-70, 914 P.2d at 607.

b. Juror Misconduct

This Court divides juror misconduct into two distinct categories: (1) conduct by jurors contrary to their instructions and/or oath; and (2) attempts by third parties to influence the jury process. Meyer v. State of Nevada, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003). Although not every instance of misconduct warrants a new trial, "each case turns on its won facts, and on the degree and pervasiveness of the prejudicial influence possibly resulting." Id. at 562 *quoting* U.S. v. Paneras, 222 F.3d 406, 411 (7th Cir.).

For a claim for new trial based upon intrinsic juror misconduct to prevail, a movant or appellant must show misconduct that it readily ascertainable from objective factors and overt conduct without regard to the state of mind and mental processes of any juror. Id. at 563. Furthermore, the misconduct must cause prejudice, meaning that there is a reasonable probability or likelihood that the juror misconduct affected the verdict. Id.

To determine whether such likelihood exists, this court has indicated that the following factors may be considered:

> (1) How the material was introduced to the jury (third party contact, media source, independent research, etc.); (2) the length of time it was discussed by the jury; (3) whether the information was ambiguous, vague, or specific in context; (4) whether it was cumulative of other evidence adduced at trial; (5) whether it involved a material or collateral issue; or (6) whether it was involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.)
>
> Id. at 556.

Because a juror's subjective beliefs may not be considered, juror misconduct exists where the average and hypothetical juror would be influenced by said contact. Id.

NRS 176.515 provides that a court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence. "A denial of a motion for new trial based upon juror misconduct will be upheld absent abuse of discretion buy the district court." Meyer, 119 Nev. at 561. "A new trial must be granted unless it appears beyond a reasonable doubt, that no prejudice has resulted from the misconduct." Id. (internal quotations omitted). Valdez v. State, 124 Nev. 1172, 1186087, 196 P.2d 465, 475 (2008).

Here, the jurors considered and discussed the stolen car. This is juror misconduct in that the district court specifically instructed them not to do so yet they

did so anyway. Meyer, 119 Nev. at 561, 80 P.3d at 453. The stolen car information was introduced to the jury by an arm of the State. It was discussed for a couple of minutes, long enough to have entered every juror's mind and be considered. The information was specific and not cumulative of any other evidence presented a trial. Although being in possession of the stolen vehicle was not related to any charges, it involved theft, which is in the same vein as the robbery charge. The information involved an inadmissible and prejudicial prior bad act that all parties and the district court previously agreed was inadmissible and prejudicial and would not be testified to. All of these factors lean heavily in favor of the conclusion that this information was prejudicial. Meyer, 119 Nev. at 556.

In this particular case, the district court had direct evidence that this information was, in fact, prejudicial to Harlan in that at least one juror used the information to come to the conclusion that Harlan had intended to rob Minkler prior to the shooting, which in turn affected her verdict. As such, is *not* beyond a reasonable doubt that this juror misconduct resulted in prejudice to Harlan. In fact, it is certain that this misconduct did result in prejudice to Harlan. Therefore, the district court abused its discretion in denying Harlan's Motion for New Trial based upon jury misconduct as for denying him the opportunity to delve into the other allegations of juror misconduct

raised in his motion during the evidentiary hearing. [3] This error was not harmless given the prejudicial nature the jury misconduct

VI. CUMULATIVE ERROR

The relevant factors to consider in determining whether cumulative error is present include whether (1) the issue of innocence or guilt is close, (2) the quantity and character of the errors (3) and the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). As argued throughout the instant brief, the issue of Harlan's guilt with respect to first degree murder with use of a deadly weapon and robbery with use of a deadly weapon is extremely close. Harlan did not possess the gun used to shoot Minkler; he did not shoot Minkler; he was asleep when Caruso shot Minkler; he did not talk about committing a lick or a robbery nor did he mention Minkler's name; he did not brag about "catching a body" afterwards or send photos/videos of Minkler's dead body to anyone; **Harlan was merely present for all crimes committed by Caruso and merely listening to statements made by Caruso indicating his intent prior to the shooting and statements of guilt made after the shooting.**

The errors committed in this case are many and of such nature that these errors created an inaccurate and legally inadmissible narrative for the jury to base its

[3] The jurors also researched the tagging found in home and discussed other aspects of the crime scene.

decision on with inaccurate/incomplete jury instructions as guidance. The jury heard that Harlan was speaking about doing a lick, mentioned Minkler in this conversation, then talked about catching a body after the shooting after driving a stolen vehicle. The jury was then given instructions that did not give the jurors the option to find him not guilty because he was merely present for the shooting or merely listening when Caruso announced his desire to commit a robbery. Moreover, it was made clear that the juror considered and discussed this inadmissible and prejudicial piece of evidence and that at least one juror used said evidence to come to her verdict of guilty. Additionally, multiple jurors committed other misconduct that prejudiced Harlan. Finally, murder with use of a deadly weapon while in the commission of robbery with use of a deadly weapon is the gravest of crimes.

Therefore, the Mulder factors weigh in favor of finding there is cumulative and prejudicial error warranting reversal of Harlan's conviction.

///

///

///

///

///

///

///

CONCLUSION

Based upon the arguments herein, *supra*, KODY HARLAN'S convictions should be REVERSED.

Dated this 17th day of March, 2021.

Respectfully submitted,

/s/ Jean Schwartzer

JEAN J. SCHWARTZER, ESQ
Nevada State Bar No. 11223
Law Office of Jean J. Schwartzer
170 S. Green Valley Parkway #300
Henderson, Nevada 89012
(702) 979-9941
Jean.schwartzer@gmail.com
Counsel for Appellant

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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Edition in Times New Roman 14 point font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. This brief exceeds the 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:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 8,884 words; or

[ ] Monospaced, has ____ or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed 30 pages.

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 17th day of March, 2021.

/s/ Jean Schwartzer

JEAN J. SCHWARTZER, ESQ
Nevada State Bar No. 11223
Law Office of Jean J. Schwartzer
170 S. Green Valley Parkway #300
Henderson, Nevada 89012
(702) 979-9941
Jean.schwartzer@gmail.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on the 17th of March, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD, ESQ.
Nevada Attorney General

ALEXANDER G. CHEN, ESQ.
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

Kody Harlan
Inmate No: 1226941
Ely State Prison
P.O. Box 650
Indian Springs, Nevada 89070-0650

/s/ Jean J. Schwartzer
JEAN J. SCHWARTZER, ESQ
Nevada State Bar No. 11223
Law Office of Jean J. Schwartzer
170 S. Green Valley Parkway #300
Henderson, Nevada 89012
(702) 979-9941
Jean.schwartzer@gmail.com
Counsel for Appellant