IN THE SUPREME COURT OF THE STATE OF NEVADA

KODY HARLAN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 80318

RESPONDENT'S ANSWERING BRIEF

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

JEAN J. SCHWARTZER, ESQ.
Nevada Bar #011223
Law Office of Jean J. Schwartzer
170 S. Green Valley Pkwy, Suite 300
Henderson, Nevada 89012
(702) 979-9941

Counsel for Appellant

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

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

Counsel for Respondent

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(1) because it is a direct appeal from a Judgment of Conviction based on a jury verdict for a Category A felony.

STATEMENT OF THE ISSUE(S)

1. Whether the district court properly denied Appellant's Motion to Sever.
2. Whether the district court gave proper jury instructions.
3. Whether there was no prosecutorial misconduct.
4. Whether the district court properly overruled Appellant's hearsay objections.

5. Whether the district court properly denied Appellant's Motion for a Mistrial and Motion for New Trial.

6. Whether there was no cumulative error.

STATEMENT OF THE CASE

On July 17, 2018, Appellant Kody Harlan ("Appellant") and co-defendant Jaiden Caruso ("Caruso") were charged with Count 1 – Murder with Use of a Deadly Weapon; Count 2 – Robbery with Use of a Deadly Weapon; and Count 3 – Accessory to Murder with Use of a Deadly Weapon. 1 Appellant's Appendix ("AA") 1-4.

On April 8, 2019, Appellant filed a Motion to Sever or in the Alternative Motion to Deem Statements of the Co-Defendant Inadmissible ("Motion to Sever"). 1AA5-17. On April 11, 2019, the State filed an Opposition to Appellant's Motion to Sever. 1AA18-30. On April 23, 2019, the district court denied Appellant's Motion to Sever. 17AA1649.

Appellant's and Caruso's jury trial began on July 29, 2019. 2AA182. On August 7, 2019, the jury found Appellant guilty of all counts. 1AA48-49.

On August 13, 2019, Appellant filed a Notice of Motion to Place on Calendar to Set Aside Guilty Verdict and to Counts One and Two; in the Alternative Motion for a New Trial and to Request Additional Time for Supplemental Briefing ("Motion for New Trial"). 1AA95-99. On August 20, 2019, the State filed an Opposition to Appellant's Motion for New Trial. 1AA100-2AA117. On September 12, 2019,

Appellant filed a Supplemental Briefing for Motion for New Trial. 2AA118-38. On September 26, 2019, the State filed a Supplemental Opposition to Motion for New Trial. 2AA139-66. On October 3, 2019, Appellant filed a Response to State's Opposition to Supplemental Briefing for Motion for New Trial. 2AA167-77. On October 10, 2019, the district court heard argument on Appellant's Motion for New Trial and scheduled a limited evidentiary hearing on the sole issue of the jury discussing improper testimony. 16AA1518-23. On November 25, 2019, the district court held an evidentiary hearing and denied Appellant's Motion for New Trial. 16AA1529-1600.

On December 10, 2019, Appellant was sentenced to Count 1 – twenty (20) years to life, plus a consecutive forty-eight (48) to one hundred twenty (120) months for the deadly weapon enhancement; Count 2 –forty-eight (48) to one hundred twenty (120) months, plus a consecutive term of forty-eight (48) to one hundred twenty (120) months for the deadly weapon enhancement, concurrent with Count 1; and Count 3 – eighteen (18) to sixty (60) months. 17AA1642. Appellant's Judgment of Conviction was filed on December 12, 2019. 2AA178-79.

STATEMENT OF THE FACTS

Alaric Oliver ("Oliver")

Alaric Oliver was invited to a residence located at 2736 Cool Lilac in Henderson, Nevada, on June 7, 2018. 9AA879-80. Oliver stayed the night, and left

early the next morning to purchase food. 9AA881. When Oliver returned to the residence, Kymani Thompson ("Thompson"), Ghunner Methvin ("Methvin"), Charleston Osurman ("Osurman"), Vince (last name unknown), and Appellant and Caruso were present. 9AA881-84. Oliver saw both Appellant and Caruso with firearms. 9AA888-89. Everyone was drinking and smoking marijuana from about noon to 2:30 PM. 9AA887.

Around 12:30 PM, Appellant and Caruso left to pick up Matthew Minkler ("Minkler"). 9AA889-91. Appellant, Caruso, and Minkler returned to the house around 1:00 PM with a bag of Xanax. 9AA891. Everyone continued smoking, drinking, and taking Xanax. 9AA891.

Throughout the next hour and a half, Caruso would take all except one bullet out of his revolver, point it at different people and locations in the house, and pull the trigger. 10AA914. At some point, Oliver saw Caruso fire his revolver into the ceiling. 9AA892.

Less than an hour later, Minkler was standing in the kitchen when Caruso walked over to Minkler, picked up the revolver, pointed it at Minkler's head, and pulled the trigger. 9AA900-10AA902. Appellant was on the couch at the time. 10AA903. Oliver panicked and ran out the back door. 10AA902-03. Appellant and Caruso remained in the house. 10AA903. Oliver did not believe the shooting was accidental. 10AA902.

Thompson

Thompson and Methvin arrived at the Cool Lilac residence for a party on June 8, 2018, around 12:30 or 1:00 PM. 11AA1010-13. Appellant and Caruso were present and drinking, smoking marijuana, and taking Xanax. 11AA1013-14. Thompson had a bad vibe and "something didn't feel right." 11AA1047. Thompson saw Appellant with a semi-automatic pistol, Caruso with a revolver, and heard them planning a "lick"—slang for robbery—to obtain money for more marijuana. 11AA1017-20. After Appellant and Caruso planned the robbery, they left to pick up Minkler. 11AA1028-29. Appellant and Caruso returned with Minkler who brought more marijuana. 11AA1021-22.

Over the next couple of hours, Caruso would take all except one bullet out of the revolver, point it, and "dry click" the trigger. 11AA1038. When Caruso shot his revolver into the ceiling, Thompson's bad feeling intensified so he and Methvin left. 11AA1022; 11AA1047. Thompson returned shortly after to retrieve his lighter because he did not want to leave a trace of being at the house. 11AA1024-25; 11AA1048. After leaving a second time, Methvin received a FaceTime call from Caruso. 11AA1026-27. Methvin handed the phone to Thompson who saw and heard Caruso state he killed Minkler. 11AA1027. When Thompson heard this, he hung up because he did not want anything to do with "that." 11AA1027.

Thompson spoke to detectives on June 13, 2018, and said he believed Appellant and Caruso planned to rob Minkler for money or marijuana, and Minkler resisted. 11AA1042-43. Thompson's theory stemmed from hearing Appellant and Caruso talking about doing a "lick," and mentioning Minkler's during that conversation. 11AA1044; 11AA51-52.

Methvin

Appellant and Caruso invited Methvin to the Cool Lilac home. 11AA1099-1100. Methvin arrived with Thompson and met Osurman, Appellant, Caruso, and Oliver who were smoking marijuana and drinking alcohol. 11AA1100-12AA1101; 12AA1104-05. Appellant and Caruso took Xanax. Id.

Methvin saw Caruso with a revolver, Appellant with a pistol, and testified that both were pointing them at people, which made him nervous. 12AA1105-06. Methvin also saw Caruso take all except one bullet out of the revolver, aim it at everyone in the house except for Appellant, and pull the trigger. 12AA1107.

While at the house, Methvin heard Caruso tell Appellant that he wanted to commit a "lick" and kill someone, and that twenty (20) minutes later, Appellant and Caruso left to pick up Minkler. 12AA1109-10; 12AA1124.

When Caruso shot his gun at the ceiling, Methvin and Thompson panicked and fled the house. 12AA1111-12. After they left, Caruso called Methvin and told him to come back to the house because the police were not coming. 12AA1113-14.

Methvin confirmed that he and Thompson returned to the house to get Thompson's lighter before leaving a second time. 12AA1112-13. Caruso FaceTimed Thompson and Methvin again, told Thompson he killed Minkler, and asked them to hang out with him. 12AA1115. Methvin and Thompson did not return to the house. Id.

Osurman

Osurman was at the Cool Lilac residence, when Appellant and Caruso arrived around 10:00 AM in a silver Mercedes. 10AA959-61. Appellant possessed a semi-automatic pistol, and Caruso possessed a 357 revolver. 10AA962-64. Osurman indicated that Appellant or Caruso invited Minkler over to the house and both drove to pick Minkler up, something they had not done for anyone else. 10AA963-66.

Osurman testified that when Caruso shot into the ceiling, he almost shot Minkler. 10AA967. Minkler grabbed the gun and told Caruso he was lucky he did not shoot someone. 10AA975-76. Within fifteen (15) minutes of Caruso shooting into the ceiling, Osurman took a Xanax and fell asleep. 10AA977-78. Shortly thereafter, Osurman awoke to another gunshot and saw Minkler on the kitchen floor and Caruso standing in the kitchen.10AA978-79. Osurman and Oliver then fled. 10AA980.

Kristin Prentiss ("Prentiss")

Prentiss testified that Oliver and Osurman called her over FaceTime while at the Cool Lilac Residence. 10AA938-39. During that conversation, another man

came onto the phone, asked how to dispose of a body, and Osurman showed Prentiss Minkler's body on the floor. 10AA940-43. Prentiss said she did not know what to do about the body and hung up. 10AA940. Prentiss also testified that she knew Minkler was a drug dealer. 10AA941-42.

Traceo Meadows ("Meadows")

Meadows arrived the Cool Lilac residence after receiving a phone call that there was a body. 12AA1158-59. Inside the house, Meadows saw Minkler's body on the kitchen floor. 12AA1159. Appellant and Caruso told Meadows that Caruso shot Minkler and they needed to move the body. 12AA1161-62. Appellant removed Minkler's shoes, wallet and phone from his blood-soaked pants pockets. 12AA1165-66; 12AA111200. Appellant destroyed Minkler's phone. 13AA1201. Meadows helped Caruso move Minkler's body to the hallway closet. 12AA1162. Caruso used the kitchen sink faucet to spray water on the floor to try to clean up the blood on the floor. 12AA1172-73. Appellant spray painted "Fuck Matt" above the closet where Minkler's body was stuffed, and "RIP" on the floor. 12AA1166-67; Respondent's Appendix("RA")5-14. This all occurred within thirty (30) minutes. Exhibit 147 & 149. [1]

1 Pending before this Court is a Motion to Transmit Exhibits Under NRAP 30(d) so Respondent may reference it for both factual and argument purposes. The Motion requests that Exhibits 147 and 149 be transmitted to this Court. Exhibit 147 contains three videos taken by Caruso with Appellant present and engaged in the same activities as Caruso. Exhibit 149 is the surveillance footage of Appellant, Harlan,

Appellant, Caruso, and Meadows got into a silver Mercedes and Appellant drove them to the Galleria Mall to shop less than one (1) hour after Minkler's murder. 12AA1169. During the drive, Caruso boasted about killing Minkler. 12AA1170. After they left the mall, Meadows felt uncomfortable and asked to be dropped off because of the way Caruso was acting after just killing someone, and because Appellant was looking at him in a strange way. 12AA1171-72.

Detective Spangler

Detective Spangler conducted a forensic analysis on Appellant's, Caruso's, and Minkler's phones. 13AA1218-25. Spangler recovered three (3) videos from Caruso's phone. 13AA1249-50. The first video, taken at 12:59 PM, showed Caruso holding a revolver with one bullet in it and pointing the barrel of the revolver at the camera. Exhibit 147.

The second video, filmed at 2:44 PM, showed Caruso stating he "just caught a body," and Minkler's bloody and crumpled up body lying on the floor in a pool of blood around his head. Exhibit 147. Appellant can be seen in that video. Id.

The third video, filmed eight (8) minutes later, depicted Minkler's lifeless body with Appellant asking, "are we just gonna leave this Nig** here?" to which Caruso said he did not know whose home they were in and appeared more concerned

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and Meadows shopping roughly 30 minutes after filming the video of Minkler dead in a pool of his own blood and lying on the kitchen floor.

with the blood on his shoes. Exhibit 147. At least one (1) video was posted to Snapchat. 13AA1231-32. Caruso's phone also revealed calls to Osurman and Methvin the afternoon of June 8, 2018. 13AA1234-41.

Detective Calvano

Detective Calvano recovered video surveillance from the Galleria Mall showing Appellant, Caruso, and Meadows walking into the mall at approximately 3:23 PM. 10AA995; Exhibit 149. They entered Shoe Palace at approximately 3:30 PM and leaving at 4:35 PM. 10AA997-98. Appellant was carrying a Footlocker shopping bag, and Caruso had a Shoe Palace shopping bag. Id.

Angelina Knox ("Knox")

The night of June 8, 2018, Knox went to an apartment complex party with friends, Jacy and Patrick. 8AA779-800. Knox observed Appellant and Caruso with firearms. 8AA782-84. Knox heard Appellant tell Patrick he "caught a body." 8AA789. When police broke up the party that night, Knox and her friends obtained a ride from Appellant and Caruso. 8AA789-90. Appellant drove the silver Mercedes and Caruso sat in the front passenger seat. 8AA791. When police attempted to stop the Mercedes, Appellant fled and crashed the car into a pole. 8AA791-92. Appellant and Caruso fled from the vehicle in opposite directions. 8AA791.

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Officer Cochran

Officer Cochran testified that a silver Mercedes sped away when she activated her lights and sirens to pull it over. 8AA757-58. Cochran followed the Mercedes which sped through traffic and caused an accident. 8AA759-60. Cochran stopped to aid to any injured people, and saw Caruso flee the scene. 8AA760-61. Cochran pursued Caruso through an alleyway, over a wall, and through a restaurant until he ultimately surrendered. 8AA761-62. After Caruso was placed in handcuffs, he spontaneously said everything would wash off his record when he turned eighteen (18). 8AA773.

Officer O. Mancuso

Officer Mancuso responded to the crash and received a description of Appellant who fled. 9AA803-04. Mancuso apprehended Appellant attempting to escape on a child's bicycle approximately one (1) mile from the crash. 9AA806-12.

Detective Nichols

Detective Nichols, the lead investigator, obtained search warrants for Appellant's, Caruso's, and Minkler's Snapchat accounts. 13AA1279. Videos from Minkler's Snapchat account included a video of Minkler holding a substantial amount of cash on June 7, 2018. 13AA1285-88.

Nichols interviewed Appellant who admitted to helping clean up Minkler's murder scene. 13AA1290-91. Appellant claimed Minkler "popped up" at the house

that day and stated he was not driving the Mercedes. 13AA1293. Appellant stated Minkler was his "homey," and he would not abandon Minkler at the house. 13AA1292. Appellant stated that they were trying to help Minkler and he did not know Minkler was dead. 13AA1293. Appellant repeatedly denied possessing a firearm and claimed he was being 100% honest with police. 13AA1293-95.

Detectives recovered a wallet from the back of the Mercedes, the only thing left in it was Minkler's school identification card. 17AA1310.

CSAs Hornback, Newbold, and Proietto

Crime Scene Analyst Hornback recovered a 357 revolver, Nike shoes, a Footlocker receipt dated June 8, 2018, iPhones, a laptop, and a wallet with only Minkler's high school identification card from the Mercedes. 9AA820-30.

Crime Scene Analyst Proietto photographed Minkler's body found thrown in a closet at the Cool Lilac residence with his sweatpants pockets turned out, the words "Fuck Matt" spray painted on the closet door, "RIP" on the floor outside the closet, bullet holes, blood stains and brain fragments, and bloody rags. 9AA866; 9AA854-57; RA5-14.

Kathy Geil

Forensic Scientist Geil analyzed the revolver found in the silver Mercedes and matched it to cartridges recovered at Minkler's murder scene. 11AA1091-94.

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SUMMARY OF THE ARGUMENT

First, the court properly denied Appellant's Motion to Sever. Appellant agrees he and Caruso did not have mutually antagonistic defenses, and joinder did not compromise a specific trial right. All statements made by Caruso were properly admitted against Appellant as statements made during a conspiracy. Appellant's actions after Minkler's murder establish Appellant's participation in the conspiracy to rob Minkler.

Second, the court did not err in not *sua sponte* issuing jury instructions. Appellant was not entitled to a mere presence instruction because the crux of that instruction was substantially covered by other instructions and would not have reasonably changed the verdict. Similarly, Appellant was not entitled to an instruction that mere knowledge or approval of a crime does not make a person party to a conspiracy because all instructions required the jury to conclude that actions were taken in furtherance of the conspiracy, and reasonably could not have changed the verdict at trial.

Third, there was no prosecutorial misconduct. The State never argued that Appellant specifically said that he wanted to "hit a lick." Circumstantial evidence indicates that Appellant's and Caruso's conversation about a robbery pertained to Minkler. The State's argument was a proper inference from the evidence presented.

Fourth, the court properly overruled Appellant's hearsay objections. Knox testified that she heard Appellant say he "caught a body."

Fifth, the court properly overruled Appellant's Motion for Mistrial and Motion for New Trial. Appellant was not entitled to a mistrial based on Detective Nichols' testimony that Minkler's wallet was found in the stolen Mercedes that Appellant was driving. Detective Nichols' testimony was an inadvertent response to Appellant's challenge to the thoroughness of Detective Nichols' investigation and can in no way have prejudiced the verdict, particularly because the district court instructed the jury that Detective Nichols' testimony was incorrect. Further, Appellant was not entitled to a new trial based on jury misconduct. The record is clear that any alleged discussion during deliberations regarding Detective Nichols' testimony about the stolen Mercedes was minimal and did not influence the verdict.

Sixth, because there are no errors to cumulate, any claim of cumulative error fails.

ARGUMENT

I. THE COURT PROPERLY DENIED APPELLANT'S MOTION TO SEVER

Appellant claims the court erred in denying his Motion to Sever because Caruso's statements and actions would not have been admissible against Appellant in a separate trial. AOB15. Appellant points to Caruso's statements about wanting to rob and kill someone, and Caruso's comment that he "caught a body" after

Minkler's murder. Id. Appellant believes that because he did not make or respond to these statements, admission of Caruso's statements against Appellant was unduly prejudicial. AOB15-16. Second, Appellant believes that Caruso's actions prior to Minkler's murder unduly prejudiced Appellant at trial. AOB16-17. Appellant explains that none of this evidence would have been admissible against him in a separate trial because Appellant never responded to Caruso's statements and was "almost unconscious" when Caruso shot Minkler. AOB17. Appellant's argument fails.

"The decision to sever is left to the discretion of the trial court, and an appellant has the heavy burden of showing that the court abused its discretion." Honeycutt v. State, 118 Nev. 660, 667 (2002) overruled on other grounds by Carter v. State, 121 Nev. 759, 765 (2005) (internal quotations omitted). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120 (2001).

Moreover, "[a]n error arising from misjoinder is subject to harmless error analysis and warrants reversal only if the error had a substantial and injurious effect or influence in determining the jury's verdict." Tabish v. State, 119 Nev. 293, 302 (2003) (internal quotations omitted).

NRS 173.135 allows for co-defendants to be charged under the same information if they participated in the same criminal conduct. Joint trials are

overwhelmingly favored. Jones v. State, 111 Nev. 848, 853 (1995). "Moreover, it is well settled that where persons have been jointly indicted, they should be tried jointly, absent compelling reasons to the contrary." Id. (internal citation omitted). Nevada law favors trying multiple defendants together to promote efficiency and equitable outcomes. Id.

"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." Chartier v. State, 124 Nev. 760, 765 (2008) (quoting Marshall v. State, 118 Nev. 642, 646 (2002)); NRS 174.165. Broad allegations of prejudice are not enough to require a trial court to grant severance. United States v. Baker, 10 F.3d 1374, 1389 (9th Cir.1993), cert. denied, 513 U.S. 934 (1994), overruled on other grounds by United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000). Generally speaking, severance is proper only when: (1) the codefendants' defenses are so antagonistic that they are "mutually exclusive" and so irreconcilable with one another that the acceptance of the one codefendant's theory by the jury precludes acquittal of the other; and (2) there is "a serious risk that a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable judgment about guilt or innocence." Chartier, 124 Nev. at 765 (internal citations omitted).

Severance is not warranted or justified simply because each defendant seeks to blame the other for the crime. Marshall, 118 Nev. 642. In Marshall, each co-defendants' theories were to exclusively blame the other. In affirming Marshall's conviction, this Court specifically held that to prevail on the ground that severance was warranted, Marshall had to show that the "joint trial compromised a specific trial right or prevented the jury from making a reliable judgment about guilt or innocence." Id. at 648. The court also noted that the State's case was not dependent on either defendant's statement and did not use joinder to unfairly bolster a marginal case. Id.

Chartier, does not change this analysis. While the court reversed Chartier's conviction, the reversal was *not* based simply on the fact that the defendants blamed each other for the crime. Instead, the Court found that the joint trial precluded Chartier from introducing critical evidence supporting his theory of defense which would have been admissible had the trials been severed. Id. at 1187. The Court concluded that the jury was precluded from making a reliable judgment about Chartier's guilt because of Chartier's inability to present his full theory of the defense. Id.

Here, Appellant argued that severance was warranted because his theory was "that he had nothing to do with Minkler's death as he was laying down on the couch passed out at the time." 1AA10-11. The district court found that Appellant and

Caruso did not have mutually antagonistic defenses and blaming the other was not grounds for severance. 17AA1649. The court's decision was not an abuse of discretion.

First, Appellant concedes he and Caruso did not have antagonistic defenses. AOB15. This concession is fatal. Nevada law requires a defendant to establish both antagonistic defenses and a serious risk of unfairly compromising a specific trial right. Chartier, 124 Nev. at 765. On this basis alone, Appellant's claim should be dismissed.

Additionally, despite Appellant's claim to the contrary, Caruso's statements about wanting to "hit a lick," kill someone, and having "caught a body" would have been admissible against Appellant and was not a ground for severance. Pursuant to NRS 51.035:

> "Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless:
>
> […]
>
> 3. The statement is offered against a party and is:
>
> […]
>
> (b) A statement of which the party has manifested adoption or belief in its truth;
>
> […]
>
> (e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

A statement made by a coconspirator in the presence of another will be considered adopted by the silent coconspirator when the statement made was of such a nature that dissent would have been expected. Maginnis v. State, 93 Nev. 173, 175

(1977). A witness's testimony about conversations overheard between co-conspirators is admissible even though witness was not a co-conspirator. Fish v. State, 549 P.2d 338 (1976). Before statements made by co-conspirators may be admitted, "the existence of the conspiracy must be established by independent evidence, Fish v. State, 92 Nev. 272, 274 (1976), and the statements must have been made 'during the course and in furtherance of the conspiracy,'" Carr v. State, 96 Nev. 239 (1980). This independent evidence need only be slight. Goldsmith v. Sheriff, 85 Nev. 295, 305 (1969). Further, at the time a co-conspirator's statement is made, the defendant need not be a member of the conspiracy, and the statement may be made to induce participation in the conspiracy. Carroll v. State, 132 Nev. 269 (2016).

At trial, Thompson testified to hearing Appellant and Caruso planning a "lick." 11AA1017-20. Similarly, Methvin testified that he heard Caruso tell Appellant he wanted to commit a "lick" and kill someone. 12AA1109-10; 12AA1124. While Appellant did not make these statements, circumstantial evidence and common sense indicate that these statements were directed at Appellant and Appellant's subsequent actions indicate that he adopted those statements and acted in furtherance of their conspiracy.

Next, testimony about what Caruso was doing prior to the shooting, and testimony that Caruso shot Minkler would have been admissible against Appellant

at a separate trial. Despite Appellant's assertion that he was virtually asleep on the couch when Minkler was shot, Appellant forgets that he was charged via the felony-murder theory of liability because Minkler was shot in furtherance of Appellant's and Caruso's conspiracy to rob Minkler. Based on this, evidence that Appellant and Caruso conspired to rob Minkler, took actions with intent that the robbery be committed, and killed Minkler in the course of that robbery, would have established that Appellant was guilty of all crimes charged. Indeed, Appellant could very well have been sleeping when Caruso shot Appellant and still have been found vicariously liable for the shooting as part of the robbery.

Testimony revealed that Appellant and Caruso planned the robbery that ended in Minkler's murder. Interestingly, Appellant and Caruso invited and drove Minkler to the Cool Lilac residence after Minkler posted a video of him holding a significant amount of money. 13AA1285-88. Appellant and Caruso then discussed a robbery and invited Minkler to the Cool Lilac residence and even picked Minkler up and brought him to the residence about twenty (20) minutes to an hour after discussing a robbery. 12AA1108-10. Minkler was the only person Appellant and Caruso offered to bring to the Cool Lilac residence. 10AA963-66.

Additionally, after Caruso shot Minkler, he filmed a video of himself and Appellant bragging about having "caught a body," showing Minkler's lifeless body, bloody on the ground with Appellant in the background curious only about what

they were going to do with Minkler's body. Exhibit 147 & 149. Appellant and Caruso even video-called multiple people to brag about Minkler's murder. 11AA1027; 12AA1115. Prentiss even said he was shown Minkler's dead body on the floor. 10AA940-43.

Appellant removed Minkler's shoes and Minkler's wallet and phone from his blood-soaked pants pockets, threw Minkler's phone to the floor and destroyed it. 12AA1165-66; 12AA1200-01. After Caruso threw Minkler's body into the closet, Appellant spray-painted "Fuck Matt" above the closet and "RIP" on the floor. 12AA1166-67; RA28-41. This all occurred in a thirty (30)-minute timeframe. Exhibit 147 & 149.

After, both left the house without calling police, and instead went to the mall, purchased new shoes with cash, then went to a party and continued bragging about "catching a body." 12AA1169; 11AA1075-76; 11AA1081-82; 8AA789. I believe the surveillance video also showed Caruso had changed his shoes and was wearing a different pair on the way out, likely due to having gotten blood on them at the house. Appellant and Caruso were apprehended later fleeing from a traffic stop. 8AA757-58; 9AA806-12. Inside the Mercedes, police recovered Minkler's empty wallet from the backseat of the vehicle, which constitutes the proceeds of the robbery. 17AA1310. Interestingly, Minkler's wallet was found empty after Appellant and Caruso were seen buying new shoes less than an hour after the murder.

Accordingly, Caruso's statements were not only adopted by Appellant through Appellant's actions, but were admissible against him as statements made by a co-conspirator.

Moreover, unlike Chartier, Appellant was not precluded from arguing that he was asleep on the couch when the shooting occurred. Specifically, a joint trial did nothing to stop Appellant from arguing during closing argument that the blame was squarely on Caruso's shoulders:

> Accountability is so important in this case for Kody Harlan because only one kid pulled the trigger. Only one kid was taking the bullets out of the gun, leaving one in and pointing it at the other kids. Only one kid was bragging about what he did. Taking a video of Matt laying in his own blood deceased. Awful videos. Only one kid tried to post that on social media. Therefore only one kid in this case is responsible for the death of Matthew Minkler. And we know what his name is. It's not Kody Harlan. But since we're talking about accountability, we got to talk about Kody's.
>
> And I told you at the beginning of this case that he was no angel here. Kody did some bad stuff. He did some wrong and illegal stuff. Let's talk about what he was accountable for. I can't stand up here and look at you in the eyes and try to pretend that Kody didn't do anything wrong. He helped move the body. He lied to the police about a gun. He ditched the gun, okay? He ran from the police. He didn't call the police when he saw Matt on the floor, dead after he woke.
>
> What does he do? Yeah, he goes shopping, he goes to a pool party, all those things. He pointed the laser of the gun at people. He did all these wrong and illegal things in this case. And this is the real reason that he's sitting here in this trial with Jaiden. He made some bad and stupid mistakes. Mistakes that have severe consequences and he's willing to accept that. He's willing to be held accountable by you for that.
>
> But, you know, all these things here that he did, all of these things that Kody did wrong and illegal, they don't equal murder. The law doesn't say that if you do all these things and you just so happen to be

> friends with the kid that pulled the trigger, that you too are guilty of murder. That's not what the law says. Nor do all these things equal robbery.

15AA1466-67.

Accordingly, the district court properly denied Appellant's Motion to Sever.

II. THE COURT PROPERLY ISSUED JURY INSTRUCTIONS

Appellant argues that the court should have *sua sponte* issued jury instructions regarding mere presence and a conspiracy theory of liability. AOB19. First, Appellant believes the court had a duty to instruct the jury that mere presence at a crime scene cannot amount to guilt beyond a reasonable doubt because this would have supported Appellant's theory of the case that he was merely present when Caruso made statements about committing a robbery and murder and was merely present when Caruso shot Minkler. AOB20. Second, Appellant believes the court should have instructed the jury that finding a defendant guilty by way of a conspiracy theory of liability requires proof that the defendant engaged in some overt act in furtherance of that conspiracy. AOB22. Appellant's argument fails.

Preliminarily, Appellant never requested the above jury instructions before the district court, and instead makes this argument for the first time on appeal. As such, it is waived. Guy v. State, 108 Nev. 770, 780 (1992), cert. denied, 507, U.S. 1009 (1993). This Court has consistently reaffirmed that "[t]he failure to specifically object on the grounds urged on appeal preclude[s] appellate consideration on the

grounds not raised below." Pantano v. State, 122 Nev. 782, 795 n. 28 (2006) (quotation omitted). Appellate review requires that the district court be given a chance to rule on the legal and constitutional questions involved. Lizotte v. State, 102 Nev. 238, 239-40 (1986). As such, the issue may only be reviewed for plain error. Maestas v. State, 128 Nev. 124, 146 (2012). "Reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights." Martinorellan v. State, 131 Nev. 43, 49 (2015).

Generally, district courts' decisions settling jury instructions are reviewed for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748 (2003). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120. A district court may refuse to give a jury instruction substantially covered by another. Davis v. State, 130 Nev. 136, 145 (2014). Further, instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155-56 (2000) overruled on other grounds, Rosas v. State, 122 Nev. 1258 (2006).

Further, though a defendant is entitled to an instruction on his theory of defense if there is any evidence to support it, he is not entitled to demand a specific

wording. Crawford, 121 Nev. at 754. Importantly, a trial court may refuse to give an instruction if it is less accurate than other instructions or will confuse the jury. Sanchez-Dominguez v. State, 130 Nev. 85, 90 (2014). Indeed, instructions cannot be worded such that they are misleading, state the law inaccurately, or duplicate other instructions. Carter v. State, 121 Nev. 759, 765 (2005).

A. Appellant was not entitled to a mere presence instruction.

Appellant argues that he was entitled to an instruction that he could not be found guilty of the crimes charged simply because he was present at the murder scene. AOB20. It was not error for the court to not *sua sponte* issue that instruction. The crux of the requested instruction was substantially covered by the other instructions. Specifically, the jury was instructed that pursuant to an "aiding and abetting theory of liability," a person who acts with the intent that a crime be committed, "are regarded by the law as principals in the crime thus committed and are equally guilty thereof." 1AA63.

The jury was further instructed that under a conspiracy theory of liability, the act of one is the act of all:

> Conspiracy is an agreement or mutual understanding between two or more persons to commit a crime. To be guilty of conspiracy, a Defendant must intend to commit, or to aid in the commission of the specific crime agreed to. The crime is the agreement to do something unlawful; it does not matter whether it was successful or not. It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all

> circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence.
>
> A conspiracy to commit a crime does not end upon the completion of the crime. The conspiracy continues until the co-conspirators have successfully gotten away and concealed the crime.

1AA64.

> Whenever a conspiracy exists, and a Defendant was one of the members of the conspiracy, then the acts by any person likewise a member of the conspiracy may be considered by the jury as evidence in the case as to that Defendant found to have been a member, even though the acts may have occurred in the absence and without the knowledge of that Defendant, provided such acts were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

1AA65.

> Each member of a criminal conspiracy is liable for each act of every other member of the conspiracy if the act is in furtherance of the object of the conspiracy. The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators.
>
> However, in order to find a Defendant criminally liable for acts of another conspirator pursuant to a conspiracy to the crime of Murder with Use of a Deadly Weapon you must find that the Defendant possessed the specific intent to commit that crime.

1AA66.

Finally, the jury was instructed that to find Appellant guilty of First-Degree Murder via the felony murder theory of liability, the jury had to conclude that Minkler's murder was committed in the perpetration or attempted perpetration of a robbery, that the intent to commit the robbery arose before or during the conduct that

resulted in death, and that Appellant's intent could be inferred from him intent during and immediately after the killing. 1AA75.

Accordingly, even without Appellant's proposed jury instruction, the jury still had to conclude that Appellant was not merely present, but that Appellant conspired with Caruso to rob Minkler, took steps in furtherance of that conspiracy with the intent that the crime be committed, and that Minkler was shot during the course and perpetration of that robbery. Moreover, Appellant has failed to show that there is a reasonable probability that the verdict would have been different had the above instruction been issued. As explained *supra* I, there was overwhelming evidence that Appellant and Caruso conspired to rob Minkler prior to the shooting, and that Caruso shot and killed Minkler during that robbery.

B. The jury was properly instructed on the conspiracy theory of liability.

Appellant believes that pursuant to Garner v. State, the jury should have been instructed "that 'mere knowledge of, acquiescence in, or approval of that purpose does not make one party to a conspiracy.'" AOB22-23 (citing 116 Nev. 770, 780, (2000), overruled in part by Sharma v. State, 118 Nev. 648 (2002)). Appellant acknowledges that jury instructions 3, 14, 15, and 16 were correct statements of law but that without an instruction that the jury had to find some act in furtherance of the goals of the conspiracy in order to find Appellant guilty as a conspirator, the jury was able to hold Appellant "liable for simply being present when Caruso stated his

intent to rob someone and for being present and asleep when Caruso shot Minkler." AOB23. Appellant's argument fails.

A conspiracy is an agreement between two or more persons for an unlawful purpose. Doyle v. State, 112 Nev. 879, 886 (1996). The conspiracy agreement may be inferred by a "coordinated series of acts" in furtherance of the underlying offense. Id.; *see also*, Gaitor v. State, 106 Nev. 785, 790 n.1 (1990); *overruled on other grounds* by, Barone v. State, 109 Nev. 1168, 1171 (1993).

As an initial matter, Appellant misunderstands Garner's holding as it pertains to finding a defendant guilty by way of a conspiracy theory of liability. Specifically, Garner did not hold that there had to be proof of acts in furtherance of a conspiracy before a defendant may be found guilty:

> Conspiracy is seldom demonstrated by direct proof and is usually established by inference from the parties' conduct. Id. Evidence of a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction. Id. 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. Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996). We conclude that the evidence here was sufficient for the jury to reasonably infer that Garner had agreed to aid Randolph in committing the robbery.

116 Nev. at 780.

Garner further held that actions taken after a robbery "may be relevant to proving the commission of the crime." Id.

Here, the jury was properly instructed regarding the conspiracy theory of liability and there was no need for an instruction regarding acts taken in furtherance of the conspiracy. Specifically, the jury was instructed that a conspiracy is an agreement between two people, that the existence of said "conspiracy may be inferred from all circumstances tending to show the common intent and may be proved" by direct or circumstantial evidence, and that when a conspiracy exists, the acts of one are the acts of all. 1AA64-65. Moreover, the jury was instructed that while "each member of a criminal conspiracy is liable for each act of every other member of the conspiracy if the act is in furtherance of the object of the conspiracy, "in order to find a Defendant criminally liable for acts of another conspirator pursuant to a conspiracy to the crime of Murder with Use of a Deadly Weapon you must find that the Defendant possessed the specific intent to commit that crime." 1AA66. Accordingly, even without Appellant's proposed jury instruction, the jury still was instructed that they had to find some act in furtherance of the conspiracy.

Moreover, Appellant has failed to show that there is a reasonable probability that the verdict would have been different had the above instruction been issued. Had the jury been instructed per Appellant's request, there was overwhelming evidence that Appellant acted in furtherance of his and Caruso's conspiracy to rob Minkler. Specifically, after Appellant and Caruso talked about robbing Minkler, they left together to pick up Minkler and brought him back to the Cool Lilac residence.

11AA1028-29. Moreover, Appellant's actions after Minkler's murder establish that he and Caruso conspired to rob Minkler and that Minkler's murder occurred in furtherance of their intent to rob him.

After Caruso shot Minkler, Appellant did not call the police and he did not flee the scene. Instead, he stayed behind with Caruso, took Minkler's wallet, destroyed Minkler's phone, attempted to help clean the crime scene, and spray-painted "Fuck Matt" on the closet door Caruso put Minkler's body in. 12AA1200-01; 12AA1166-67; RA28-41. Then, less than an hour later, Appellant and Caruso went to the mall and purchased new shoes because Minkler's blood was on theirs. Exhibit 147 & 149; 10AA997-98. Accordingly, given the evidence that Appellant acted in furtherance of a conspiracy to commit robbery and that Minkler was killed in furtherance of that conspiracy, an instruction that "mere knowledge of, acquiescence in, or approval of that purpose does not make one party to a conspiracy" would not have reasonably changed the outcome.

III. THERE WAS NO PROSECUTORIAL MISCONDUCT

Appellant argues that when the State argued that Appellant and Caruso mentioned wanting to rob someone, they committed misconduct by arguing facts not in evidence. AOB24-25. Specifically, Appellant claims that there was no explicit testimony that Appellant stated that he wanted to commit a robbery, and any argument that Appellant can be found liable for those statements because witnesses

testified to hearing Appellant and Caruso "talking" about it does not amount to putting those words into Appellant's mouth AOB25-26. Accordingly, Appellant avers that any argument that Appellant made statements about wanting to rob Minkler was prejudicial and allowed the jury to believe that Appellant intended to rob Minkler. AOB26. Appellant further alleges that this error was not harmless because the issue of Appellant's guilt was not close as Appellant was simply present when Caruso made statements about the robbery, shot and killed Minkler, and filmed Minkler's body while bragging about having murdered him. AOB26-27. Appellant's arguments fail.

As an initial matter, this issue is waived as Appellant did not challenge the State's argument at trial. Now, the issue may only be reviewed for plain error. Maestas, 128 Nev. at 146. "Reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights." Martinorellan, 131 Nev. at 49

In resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188. The standard of review for prosecutorial misconduct rests upon a defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328 (1995) (citing Libby v.

State, 109 Nev. 905, 911 (1993)). This is based on a defendant's right to have a fair trial, not a perfect one. Ross v. State, 106 Nev. 924, 927 (1990). This Court views the statements in context and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865 (2014).

Notably, "statements by a prosecutor, in argument… made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392 (1993) (quoting Collins v. State, 87 Nev. 436, 439 (1971)). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018–19 (1997), receded from on other grounds, Byford v. State, 116 Nev. 215 (2000).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188–89. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. 124 Nev. at 1189 (quoting Darden v. Wainright, 477 U.S. 168, 181 (1986)). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189.

When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

Here, Appellant's argument that the State improperly argued that Appellant commented that he wanted to commit a robbery is belied by the record. Specifically, during closing argument, when the State referenced Appellant's and Caruso's discussion about doing a "lick," the State explicitly stated that Caruso and not Appellant made that comment:

> We hear from Kymani that both Jaiden and Kody mentioned wanting to rob someone and wanting to do a lick. We hear from Kymani that they kept talking about it. That Matt's name was brought up in this idea of committing a robbery or getting more weed.
>
> We also know that Ghunnar testified that he didn't hear Kody talking about it, but he heard Jaiden talking about it; that Jaiden wanted to commit a robbery, do a lick, and he wanted to kill someone. And we know that Ghunnar indicated that Kody was sitting right there on the couch as this conversation is happening.

15AA1430.

Accordingly, any claim that the State represented that Appellant said he wanted to do a lick is belied by the record. Regardless, the State's argument was a proper deduction of the evidence presented. Namely, both Kymani and Ghunnar testified that Caruso made a comment about wanting to "do a lick" to obtain more money for marijuana when Appellant was present and listening, and that less than twenty (20) minutes later, both Appellant and Caruso left to pick up Minkler to bring him to the residence, which is not something they had done for anyone else.

12AA1109-10; 11AA1017-22. Further, while no witness specifically stated that Appellant and Caruso agreed to rob Minkler, Thompson and Methvin testified that after Appellant and Caruso discussed a "lick," they left to pick up Minkler; and Osurman testified that Appellant and or Caruso invited Minkler over. 12AA1109-10; 11AA1017-22; 10AA963-66. A reasonable person could easily make the deduction that Minkler was the targeted robbery victim. Accordingly, the State did not engage in misconduct and instead made a proper inference based on the evidence presented.

Finally, any error was harmless. As explained *supra* I and II, the evidence that Appellant conspired with Caruso to rob Minkler and that Minkler was killed in the course and in furtherance of that robbery was overwhelming.

IV. THE DISTRICT COURT PROPERLY OVERRULED APPELLANT'S HEARSAY OBJECTIONS

Appellant argues that the district court abused its discretion when allowing Knox to testify to what she told the police in regard to what her friend Patrick told her. AOB27. Specifically, Appellant claims that the district court should not have allowed Angela to testify that Patrick told her that Appellant told him that Appellant "caught a body." AOB27-28. While Appellant acknowledges that the district court sustained his objection to this testimony, Appellant still accuses the district court of error because the court allegedly allowed the State to "mislead [Angela] into stating that it was she who heard the statement without specifying which statement—the

statement from [Appellant] or the statement from Patrick." AOB28. Appellant believes that the court should not have allowed the State to mischaracterize Angela's statement because doing so elicited double hearsay statements over Appellant's objection. AOB28-29. Appellant further claims that he can show prejudice because this testimony allowed the jury to believe that he was involved in Minkler's murder when the properly admitted evidence at trial indicates that Appellant "never had any intention prior to the shooting to harm or steal from Minkler." AOB29 Appellant's argument fails.

This Court reviews the district court's admission of evidence for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370 (2006). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120 (2001).

District courts have substantial latitude to control the order and mode of the presentation of evidence to effectively pursue the ascertainment of truth and to "avoid needles consumption of time." NRS 50.115(1)(b). The United States Supreme Court has consistently recognized the vital role judges play during trials as "the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." Quercia v. U.S., 289 U.S. 466, 469 (1933). As such, trial judges must have broad power to handle and address the complexities of trial as they arise. Geders v. U.S., 425 U.S. 80, 86 (1976).

Pursuant to NRS 51.035, hearsay is defined and an out of court statement offered to prove the truth of the matter asserted. However, a statement is not hearsay if it is offered against a defendant, and it is the defendant's own statement. NRS 51.035(2)(a).

Here, the record is clear that Knox testified to a statement she directly heard from Appellant or Caruso. Specifically, Knox testified that when she and her friend Patrick were at a party mere hours after Minkler's murder, she was standing next to Patrick when Appellant told Patrick he "caught a body:"

> 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.
> MR. HELMICK: Objection, based off of hearsay.
> THE COURT: Well at this point I'll sustain the objection.
> MS. OVERLY: Okay. So I just want to --
> THE COURT: And I'll strike the last response.
> BY MS. OVERLY:
> Q I just want to clarify. That was something that you heard from Patrick after the fact, or something that you overheard at the party?
> A I think it was like kind of like during -- like during it. Like after he said it, he told me.
> Q Okay. But I'm just asking, is it something that you heard Patrick tell you or was it something that you personally overhead the Defendant saying while you --
> A Both.
> Q -- were at the party?
> A Both.
> Q Both.
> A Yeah.
> **Q Okay. So you did personally overhear that comment being made?**
> **A Yeah.**

Q Okay. And that's because you weren't personally talking to the Defendants, but you were standing by Patrick as he did?
A Yeah.

8AA788-89 (emphasis added).

While Appellant questioned Knox during cross examination about whether she directly heard Appellant state he "caught a body" or whether Patrick informed her that Appellant said as much (8AA794-96), during redirect examination, Knox made clear that while Appellant told Patrick that he "caught a body," she was near Appellant when he did so and personally heard him state those words. 8AA796-99. Accordingly, any claim that the district court admitted inadmissible hearsay is belied by the record. While Appellant extensively cross-examined Knox about this testimony and challenged her memory as to what she told the police, the simple fact remains that Knox testified that she specifically heard Appellant state that "he caught a body." It does not matter that Knox overheard this and that Appellant's statement was directed at her friend Patrick. Because Knox testified to a statement she directly heard Appellant make, the district court properly admitted that statement as an admission by a party opponent pursuant to NRS 51.035(2)(a).

V. THE DISTRICT COURT PROPERLY OVERRULED APPELLANT'S MOTION FOR MISTRIAL AND MOTION FOR NEW TRIAL[2]

2 In affirming Caruso's Judgment of Conviction, this Court specifically rejected Caruso's claim that the district court erred in denying the same Motion for Mistrial and Motion for New Trial. Caruso v. State, Order of Affirmance, Docket No. 80361 (filed May 14, 2021).

Appellant claims the district court erred in denying Appellant's Motion for Mistrial based on the admission of prior bad act evidence and erred in denying Appellant's Motion for New Trial. AOB29-35. First, Appellant claims that after Detective Nichols testified that Appellant and Caruso were stopped driving a stolen Mercedes, the district court should have granted Appellant's Motion for Mistrial. AOB 29-32. Appellant further contends that a mistrial was warranted because Detective Nichols appears to have intentionally mentioned the fact that Appellant and Caruso were stopped in a stolen car. AOB32. Second, Appellant claims that a new trial based on juror misconduct was warranted because at least one (1) juror testified after Appellant was found guilty of all crimes charged, that the jury discussed Detective Nichols' testimony and used it to reach a verdict. AOB34.

A. Appellant was not entitled to a mistrial based on Detective Nichols' testimony.

Appellant argues that the District Court erred in denying his oral motion for a mistrial based on Nichols' testimony that Minkler's wallet was found in a stolen Mercedes. AOB31. Appellant claims that the district court's attempt to issue a curative instruction was not successful because juror Esparza testified that the evidence was used and considered when the jury found Appellant and Caruso guilty of all charges. Id. Appellant's claim fails.

First, Appellant cannot rely on Esparza's claim that during deliberations, the jury considered evidence that the Mercedes was stolen to argue that the court erred

in denying Appellant's Motion for Mistrial. That information was not known to any party at the time the Motion for Mistrial was made—because deliberations had not started—and was therefore irrelevant to the court's decision. Courts cannot be held to err for failing to consider information that does not exist at the time a decision is made. As such, to the extent Appellant claims the court erred in denying the Motion for Mistrial because he did not consider Esparza's claim that the evidence was referenced during deliberations, the State incorporates the arguments made *infra* V.B.

The decision to grant or deny a motion for a mistrial rests within the sound discretion of the trial court, and its judgment will not be overturned absent an abuse of discretion. Rudin v. State, 120 Nev. 121, 142 (2004); Parker v. State, 109 Nev. 383, 388-89 (1993). A defendant's motion for a mistrial must demonstrate prejudice that prevents the defendant from receiving a fair trial. Rudin, 120 Nev. at 144. "A defendant is not entitled to a perfect trial, only a fair trial." Id.

This Court has held that inadvertent references to other criminal activity not solicited by the prosecution, which are blurted out by a witness can be cured by the trial court's immediate admonishment to the jury to disregard the statement. Sterling v. State, 108 Nev. 391, 394 (1992) (citing Allen v. State, 91 Nev. 78, 83 (1975)). In Allen, the witness's testimony that he and the defendant had a conversation about the defendant's having written some "hot checks" did not constitute reversible error,

where the hint of criminal activity was no more than inadvertent, the testimony was not solicited by the prosecution but rather was blurted out by the witness, and the jury was immediately admonished to disregard the witness' statement. 91 Nev. at 83.

In Thomas v. State, the witness, defendant's aunt, "testified that she had asked Thomas, 'have you done something that would put you back in jail?"' prompting the defense to move for a mistrial outside the presence of the jury. 114 Nev. 1127, 1141 (1998). According to Thomas, the comment could result in an inference that he had a criminal record. Id. at 1142. The State and the witness confirmed that the witness had been instructed to not mention Thomas's record, but the comment inadvertently slipped out. Id. The trial court denied defendant's motion for a mistrial and offered to admonish the jury, which defense counsel declined. Id.

On appeal, this Court stated that, "[t]he test for determining whether a statement refers to prior criminal history is whether the jury could reasonably infer from the facts presented that the accused had engaged in prior criminal activity." Id.; Rice v. State, 108 Nev. 43, 44 (1992). The Court held that while the comment could be perceived to indicate that Thomas had been involved in some criminal activity, it could not determine whether he was convicted of a serious crime. 114 Nev. at 1142. Finally, while the comment constituted error, said error was harmless, "because the evidence against Thomas was overwhelming, the comment was unsolicited by the

prosecutor and inadvertently made, and Thomas declined the court's offer to admonish the jury." Id. Therefore, the trial court did not abuse its discretion. Id.

In Lamb, this Court found it was harmless error when a witness testified that the murder victim had previously obtained a restraining order against the defendant. 251 P.3d 700 (See People v. Warren, 45 Cal.3d 471, (1988) ("A prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement.")). This Court found that the restraining order appears to have been blurted out by a nervous witness, rather than solicited by the State, and the court's corrective instruction, such as it was, followed immediately. This Court concluded that the restraining order's passing and immediately qualified mention was harmless. Lamb, 251 P.3d at 708-709.

Here, the district court properly denied Appellant's Motion for Mistrial. During Nichols' cross examination, Appellant attacked the credibility and thoroughness of the investigation by asking why Nichols did not test Minkler's wallet for DNA:

> Q Okay. And the wallet was found in the back of the Mercedes Bens, the back right seat of the car, right?
> A Yes, sir.
> Q Okay. The wallet was important to your investigation, right?
> A It was.

Q Because the only thing that was in the wallet was the ID Matthew Minkler, right?
A Yes, sir.
Q And you presumably assumed that there was some cash in there, right?
A I would.
Q Sure, I mean, most people don't just carry wallet with just an ID in it, right?
A I would agree.
Q Okay. And so you never tested -- you never sent the wallet out for testing for fingerprints or DNA, isn't that right?
A That's right.
Q Okay. It would have been very important though for us to be able to figure out whose fingerprints were on that wallet besides Matthew's obviously, right?
A It would have been an extra layer to the investigation; I don't know that it would have been crucial.
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 that 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 that wallet was located to begin with.
Q Sure.
A Which was in the stolen Mercedes in the back seat.

14AA1311.

After a bench conference and pause in the proceedings, the district court issued the following admonishment to the jury:

> Okay. Before we move on, I need to correct something. When Detective Nichols was testifying before we took our lunch break, he made mistake and said something that was inaccurate in reference to vehicle in this case being stolen. As I said, that was an error, that was inaccurate, that is not the evidence in the case, and I want you to disregard any alleged allegation he made about that okay?

14AA1330-31.

Like Thomas, Detective Nichols' comment here was inadvertent and did not indicate that Appellant or Caruso were convicted of a different crime. Nichols' testimony—which occurred after multiple witnesses testified to hearing Appellant and Caruso plan a robbery, pick up Minkler, and seeing Caruso shoot Minkler—that Minkler's wallet was found in the stolen Mercedes was not testimony elicited during the State's direct examination. Instead, it was spontaneously uttered while Appellant's counsel challenged the thoroughness of Nichols' investigation and insinuated that he should have analyzed Minkler's wallet for fingerprints. 14AA1310-11. In response to counsel's goading, Nichols explained that there was no point in looking for fingerprints on the wallet because it would not have shown who took the wallet out of Minkler's pocket. Id. While Appellant insinuates that Nichols intentionally made this comment because he was an experienced detective, the record is clear that Nichols referenced the stolen car because counsel was pressuring him into agreeing that testing Minkler's wallet for fingerprints was crucial, and Nichols was explaining why he disagreed with that sentiment. Id.

Additionally, Nichols' testimony was not that Appellant and Caruso stole the Mercedes. It was only that the Mercedes was stolen. Id. Therefore, the testimony was an inadvertent reference to criminal activity and could be cured by an admonishment to the jury. In instructing the jury, the Court went beyond the usual "disregard that testimony" instruction and told the jury that Nichols' testimony about

the silver Mercedes was an incorrect statement and the Mercedes was not stolen. 14AA1330-31. Not only did this cure any potential error, but it cast doubt on Nichols' credibility which could only have benefitted Appellant.

Finally, any error was harmless because of the overwhelming evidence of guilt. There was sufficient witness testimony and videos that Appellant and Caruso planned a robbery, drove Minkler to the Cool Lilac home in furtherance of that robbery, shot Minkler in furtherance of that robbery, took his wallet, and went on a shopping spree. There was no evidence that Appellant or Caruso showed any kind of remorse or did not realize what they had done. As such, a mention of a stolen vehicle after all the witnesses testified was harmless error, at best, and the district court correctly denied Appellant's Motion for Mistrial.

B. Appellant was not entitled to a new trial based on alleged jury misconduct.

Appellant argues that the district court abused its discretion in concluding Appellant was not entitled to a new trial based on Nichols' statement that Minkler's wallet was found in the stolen silver Mercedes Appellant and Caruso were stopped in.[3] AOB33-35. Appellant claims the jury discussed that information and used it to

3 Appellant also notes in a footnote that "the jurors also researched the tagging found in home and discussed other aspects of the crime scene." AOB36, fn. 3. However, Appellant does not allege that the district court abused its discretion in denying Appellant's Motion for New Trial on this basis, and in fact makes no legal argument with respect to this claim. This Court need not consider issues that are not cogently argued. Maresca v. State, 103 Nev. 669, 673, (1987). Any unsupported arguments

conclude that Appellant intended to rob Minkler prior to the shooting. AOB35. Appellant's argument fails.

This Court reviews a district court's decision regarding a motion for a new trial for an abuse of discretion. Sanborn v. State, 107 Nev. 399, 406 (1991). An abuse of discretion occurs if the district court's decision is arbitrary or capricious, or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120 (2001).

Not every incidence of juror misconduct requires the granting of a motion for new trial and each case turns on its own facts. Meyer v. State, 119 Nev. 554, 562 (2002). "To prevail on a motion for a new trial alleging juror misconduct, 'the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial.'" Lamb v. State, 251 P.3d 700 (2011) (quoting Meyer, 119 Nev. at 563-64. The district court need not address both prongs in order—it can assume misconduct and deny the motion for a new trial if it does not find that the alleged misconduct influenced the verdict. Bowman v. State, 132 Nev. 757, 764 (2016). Even when juror misconduct is established, no new trial is necessary if "it appears

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are summarily rejected on appeal. Thomas v. State, 120 Nev. 37, 50 (2004). As such, the State does not believe it is necessary to assess whether the district court's ruling regarding this claim was proper because Appellant has not properly presented this claim for appellate review.

beyond a reasonable doubt that no prejudice occurred…." Id. at 205 (quoting Hernandez v. State, 118 Nev. 513, 522 (2002)).

This Court has explained that the first category of juror misconduct includes activities such as conducting independent research or investigations. Id. Jury misconduct can be both extrinsic, such as accessing media reports about the case; or intrinsic, such as a juror making a decision based on unadmitted evidence. Meyer, 119 Nev. at 561. Any claim that jurors have been exposed and influenced by media reports or extrinsic information must be supported with reliable evidence. Echavarria v. State, 108 Nev. 734, 741 (1992). Evidence of extrinsic misconduct can be proven with juror affidavits or testimony stating that the jury received outside information. Meyer. 119 Nev. at 562. However, "juror affidavits that delve into a juror's thought process cannot be used to impeach a jury verdict and must be stricken." Id.

The general rule at common law is that jurors may not impeach their own verdict with intrinsic information, which includes improper discussions among jurors, intimidation or harassment of one juror by another. Meyer, 119 Nev. at 562. The Nevada Legislature codified the common-law rules regarding admission of jury testimony to impeach a verdict in NRS 50.065. Id. at 563. NRS 50.065(2) prohibits consideration of affidavits or testimony of jurors concerning their mental processes or state of mind in reaching the verdict. See Pappas v. State, Dep't Transp., 104 Nev. 572, 575 (1988), and Barker v. State, 95 Nev. 309, 312 (1979). In interpreting NRS

50.065, this Court has stated that a motion for a new trial may only be premised upon juror misconduct where such misconduct is readily ascertainable from objective facts and overt conduct without regard to the state of mind and mental processes of any juror. Meyer, 119 Nev. at 563 (citing Government of Virgin Islands v. Gereau, 523 F.2d 140, 148-49 (3rd Cir. 1975)); NRS 50.065.

Because intrinsic misconduct can rarely be proven without resort to inadmissible juror affidavits that delve into the jury's deliberative process, only in *extreme circumstances* will intrinsic misconduct justify a new trial. Meyer, 119 Nev. at 565. Defendants may only prove misconduct using objective facts and not the "state of mind or deliberative process of the jury." Valdez v. State, 124 Nev. 1172, 1186–87 (2008). The Echavarria court confirmed this position when it affirmed the trial court's exclusion of a juror's statement that she only voted for the death penalty because she believed the verdict would be overturned on appeal because such statements about mental processes could not be considered. 108 Nev. at 741–42.

Even if a defendant can establish juror misconduct, admissible evidence is necessary to establish prejudice. Meyer, 119 Nev. at 565. "Prejudice is shown wherever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Id.; Lamb, 251 P.3d 700; Zana v. State, 125 Nev. 541 (2009). Prejudice is only presumed in the most egregious types of extraneous influence, such as jury tampering. Meyer, 119 Nev. at 564.

Juror misconduct based on allegations of extrinsic influence is not automatically prejudicial. Meyer, 119 Nev. at 564. Extrinsic materials such as media reports from television or newspapers, or intrinsic jury misconduct, do not raise a presumption of prejudice and instead must be analyzed on a case-by-case basis in context with an entire trial. Id. at 565. When prejudice is not presumed, a defendant bears the burden to show "a reasonable probability or likelihood that the juror misconduct affected the verdict." Bowman, 132 Nev. at 762 (citing Meyer, 119 Nev. at 564, 80 P.3d at 455). "The district court is required to objectively evaluate the effect the extrinsic material had on the jury and determine whether it would have influenced the average, hypothetical juror." Zana, 125 Nev. at 548 (quoting Meyer, 119 Nev. at 566). Factors relevant to this determination include:

> "How the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.)."

Meyer, 119 Nev. at 566.

Both the Nevada Supreme Court and United States Supreme Court presume that jurors follow instructions as given. Collman v. State, 115 Nev. 687, 722 (2000) (citing Yates v. Evatt, 500 U.S. 391, 404 (1991)).

Here, after conducting an evidentiary hearing and taking testimony from Esparza and several other jurors, the district court denied Appellant's Motion for New Trial. The district court did not abuse its discretion in ruling as much. When applying an objective standard to the consideration of the mention of the stolen vehicle, it is improbable to conclude that reference to the stolen car during cross-examination by defense counsel required a new trial or prevented the jury from adequately applying the evidence. Moreover, any claim to the contrary is belied by the juror testimonies at the evidentiary hearing. Jurors confirmed that while the stolen Mercedes was mentioned, it was never discussed and had nothing to do with their conclusion that Appellant was guilty.

However, Esparza claimed in her affidavit attached to Appellant's Motion for New Trial, that Detective Nichols' comment that Minkler's wallet was found in a stolen Mercedes was discussed during deliberations and influenced the jury's verdict, despite the court's instructions not to consider this evidence. 2AA119-24. Specifically, Esparza's affidavit states:

> In regard to the stolen car fact that the lead detective in the case talked about in the trial and the judge ruled as well as admonished the jury not to talk about also came into the deliberation room and played major role Hector Martinez and I both discussed and asked questions about whose car was the Mercedes Benz since it was possibly stolen. Additionally, Ronald Ferianeek (another juror) mentioned the fact of the stolen car in the deliberations. The idea that some of these people had, was that if Mr. Harlan and Mr. Caruso were out stealing cars then they probably robbed Matthew Minkler too. And if the robbery was believed then the Felony Murder Rule would apply.

2AA123.

Any discussion regarding the stolen vehicle was intrinsic evidence and the standard of review is abuse of discretion. Further, Esparza's affidavit could only be considered when ascertaining the objective facts about the statements and any portions relating to the mental processes or state of mind of jurors could not be considered.

After hearing argument on the issue, the district court scheduled an evidentiary hearing. 16AA1518. Esparza's testimony at the evidentiary hearing did not match her affidavit. Esparza's affidavit claimed that she and other jurors discussed the vehicle in terms of whether the murder was premediated. 2AA123. However, at the evidentiary hearing, Esparza testified she was the lone holdout during deliberations on whether there was premeditation to murder, and that she mentioned the car to refute the jurors' attempts to convince her that the murder was premeditated. 16AA1552. It was at this point that Esparza said she did not understand why Appellant and Caruso would run from the accident if it was not a stolen car. 16AA1552-53. That question is entirely irrelevant to the issue of premeditation. Esparza further testified that the issue was only briefly discussed. 16AA1553. Esparza acknowledged that the district court told the jury not to consider that information. 16AA1557. Finally, Esparza confirmed that no other juror said they used that information to come to a verdict:

A I remember it was a short-lived conversation.
Q Okay. So, it -- when you describe it as a short-lived conversation --
A Mm-hmm.
Q -- what does that mean?
A A minute, a minute and a half, at most.
Q Okay. So it was a minute and a half and then the car being stolen was no longer part of the deliberation process?
A No.
[…]
Q But, as far as the other jurors, no other jurors in the deliberation actually said to you, well hey, it's a murder because the car was stolen?
A No, nobody said that to me.
Q All right. It's a murder because there was this car that was stolen which shows that they steal things, so they must have stolen money from the victim?
A Nobody said that to me, no.
Q So, nobody was discussing this concept of a stolen car or using that as a basis to come to a verdict?
A A possibility of a stolen car was brought up, that was the extent of it.
Q That was the extent of it, right?
A Basically, yeah.
Q That's their point, right, right? They didn't use that to say Ms. Esparza, they – they're guilty –
A No.
Q Because of this fact?
A No.
Q Okay. So, it was something that was on your mind, if I'm understanding correctly?
A Correct.
Q But, nobody else used that on your mind?
A It was discussed. I can't say if they used that on my mind.
Q Well, I guess what I'm trying to say is if I've heard you correctly, you said it was discussed for about a minute and a half, right?
A Uh-huh.
Q That after that minute and a half it never came up again?
A No.

> Q All right. So, all that time, except that minute and a half, it had nothing to do with the decision?
> A With my decision, it did.
> Q But, with everybody else talking?
> A I can't say… they never said this is why I'm making this decision.
> Q Okay. That's what we're trying to get to is that – […] – that concept as a means of arguing, or deliberating, with others – […] – saying, they're murdered because they stole some car?

16AA1558-60. Accordingly, Esparza's testimony contradicted her affidavit and her inconsistent claims belied her credibility.

Additionally, while Esparza could not remember specific details about how the car was discussed, the foreperson, Rice, did. Rice explained that when she saw a media report that there was a claim of juror misconduct in this case, she reached out to the District Court Department because she knew there was no misconduct. 16AA1566. At the evidentiary hearing, Rice explained the reference to the stolen Mercedes made during deliberations:

> Q Okay. And, do you recall what it was that was brought up, specifically?
> A They said did you guys hear that the car was stolen, or something to that nature.
> Q And, you heard that?
> A Yes.
> Q And, based off of you hearing that, what did you do?
> A I said that that was stricken and we couldn't talk about it.
> Q And, did -- when you indicated that that was stricken and you couldn't discuss it, did people agree with that?
> A Yes. Well, one person made a comment about he thought -- he said it wasn't stolen.
> Q Who was that?
> A Chris.

Q Chris Young?
A Yes.
Q So, after you said that you couldn't consider it, Chris Young indicated that he believed the car was in fact not stolen?
A Correct.
Q Okay. And, after that, did other people in the jury deliberation room agree that you couldn't discuss it?
A Yes.
Q So how long would you estimate this conversation went on for with regards to the stolen vehicle?
A Maybe one or two minutes. I mean, there was only those maybe four comments about it.
Q Okay. So, would those four comments be from four different people?
A Two of the comments were from me. I said that we can't talk about it because it was stricken; I said that twice.
Q Okay. And, after that comment was made, and Chris made the comment that he thought the vehicle was in fact not stolen, did you discuss it any further?
A No. I just said we couldn't talk about it and we moved on.
Q So was the stolen vehicle ever brought up again?
A No.

16AA1568-69.

Testimony from the other jurors at the evidentiary hearing corroborated Rice's rendition of events, and contradicted Esparza's and Appellant's assertion that discussion of the stolen car prejudiced Appellant. First, Martinez testified that while a juror referenced the stolen Mercedes, it was not discussed because the jury was not focused on it and because the district court told the jury not to consider it. 16AA1536-37; 16AA1542. Martinez further confirmed that the fact was irrelevant to his determination of Appellant's and Caruso's guilt. 16AA1537.

Second, Young's testimony confirmed that he remembered the district court's instruction not to consider the stolen car, and that when someone referenced the car, the foreperson "shut it down" because it was irrelevant. 16AA1549. Young further confirmed that it was not even a little part of his thought process and that most of the deliberations were about the law. 16AA1548-49. Young also explained that the general consensus amongst the jurors was that the car was irrelevant. 16AA1550.

Third, Steve Libauskas testified that he remembered the district court instructing them not to consider the car, that when it was mentioned, the foreperson ended any discussion about the car, and it was not discussed again. 16AA1574-75. Finally, Theresa Huston corroborated all other testimony. She remembered the Court telling the jurors not to consider the car, and that they did not consider the stolen car when deciding Appellant's guilt. 16AA1578. She further elaborated that when a juror tried to bring it up, she said that whether the car was stolen was irrelevant because they had to determine whether there was an intent to commit robbery, and it never came up during deliberations again. 16AA1579. Houston explained that during deliberations, they were talking mostly as a group and there was little discussions amongst individual jurors. 16AA1580.

In denying Appellant's motion, the court explained that the mere fact that the car was brought up does not constitute misconduct because there had to be a showing of a reasonable probability that it affected the verdict. 16AA1592. The court

concluded that there was not a sufficient showing that the mention of the stolen car influenced the verdict because multiple jurors confirmed that the fact was irrelevant to their verdict, and there was a question as to whether the car was really stolen. Id. The court specifically noted that even Esparza confirmed she said the car might have been stolen, but did not confirm that she believed it was stolen, did not claim that the mention of the car is why she reached the verdict she did. Id. The court further noted that Young testified that he told the jury that he thought it was not stolen when Esparza mentioned the car. 16AA1596. Based on the jurors' testimonies, the court was satisfied that "there is absolutely zero evidence that anybody else was affected by anything or had any discussion about the stolen car in a way that would constitute misconduct or render, you know, any kind of prejudice to either Defendant in the jury deliberations." 16AA1592.

The district court further found at best, Esparza's affidavit and complaint went to her state of mind during the deliberation process, which was irrelevant to whether misconduct occurred. 16AA1593. What mattered was whether improper evidence was discussed and if that affected the verdict. 16AA1588. The court explained that according to statutes and case law, the purpose of the evidentiary hearing was to flesh out what Esparza meant in her affidavit when she said the car was "mentioned," "discussed," and "talked about;" but that it was improper to explore why a jury reached a particular verdict:

> You know, the role of the juror is to go into the room with their fellow jurors, take the evidence, evaluate the evidence, evaluate the law, have discussions, have disagreements, have agreements, you know, work towards problem -- you know, problem solving, address each other's issues, find common ground, and if possible return a verdict together. Going in beyond that is -- and saying, wait, tell us why you reached your particular verdict, not only is it excluded by 50.065 and case law, Echavarria being the one that we referenced earlier, but it's just patently unfair to the parties, as well as, fellow jurors, to have a juror singularly later on saying, wait a minute, you know, now that I think about it, or this is what I was really thinking and the time that I returned the verdict. There's no way for anybody else to know that. They -- each juror is assuming that each juror is deliberating based on the evidence and the law that they've been given, following the directions of the Court, which is why the case law exists and our statutes that tell us we don't go into the deliberative process of jurors.

16AA1593.

The court went on to explain that it was clear that Esparza felt remorse over her guilty verdict and her affidavit was not entirely credible. 16AA1594-95. The court stated that when Esparza's affidavit claimed she was in tears and the verdict and threw her hands up in exasperation, the Court reviewed the video recording of the verdict and saw nothing of the kind. Id. Based on the totality of the circumstances, the district court denied the Motion for New Trial. 16AA1598.

In comparing the juror conduct with the factors outlined in Meyer, it is clear that Appellant did not meet his burden in demonstrating prejudice. Nichols made a single statement during cross-examination that the Mercedes Appellant and Caruso were in was stolen. 14AA1311. Nichols did not claim Appellant or Caruso stole the Mercedes. Id. There was no testimony regarding the theft of the vehicle, a punched

ignition, or any other indications the vehicle was stolen. Moreover, the comment was after multiple witnesses already testified, and towards the conclusion of the State's case-in-chief. After the material was introduced, the court further instructed the jury not to consider the evidence because Nichols' testimony was inaccurate. 14AA1330-01. The record is clear that any reference to the stolen Mercedes was mentioned for no more than two (2) minutes during deliberations and it was not clear whether the jurors believed the car was actually stolen.

Further, the fact that Appellant and Caruso were in a stolen vehicle was not a material issue in the case and could not have reasonably resulted in prejudice because the evidence of Appellant's guilt was overwhelming. As explained *supra* I and *supra* II, there was sufficient evidence that Appellant was guilty of First-Degree Murder under a felony-murder theory of liability and any testimony about how Appellant and Caruso were in a stolen car can hardly be deemed sufficient to prejudice Appellant or call the reliability of the verdict into question. Accordingly, Appellant failed to establish that the district court erred in denying Appellant's Motion for New Trial.

VI. THERE WAS NO CUMULATIVE ERROR

Appellant alleges that the cumulative effect of the alleged errors deprived him of his right to a fair trial. AOB36. This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the

quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17 (2000). Appellant must present all three elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533 (1975) (citing Michigan v. Tucker, 417 U.S. 433 (1974)).

While the crimes charged were grave, Appellant has failed to demonstrate the cumulative error warrants reversal. The issue of guilt was not close as there was overwhelming evidence of guilt as discussed *supra*, and all of the alleged errors are either meritless or belied by the record.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm Appellant's Judgment of Conviction.

Dated this 15th day of July, 2021.

Respectfully submitted,

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

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 13,991 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 15th day of July, 2021.

Respectfully submitted

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

BY */s/ Taleen Pandukht*

TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 15th day of July, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

JEAN J. SCHWARTZER, ESQ.
Counsel for Appellant

TALEEN PANDUKHT
Chief Deputy District Attorney

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

TP/Julia Barker/jg