

TED MICHAEL DONKO,  
  
Appellant,  
  
vs.  
  
THE STATE OF NEVADA,  
  
Respondent.

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(Appeal from Judgment of Conviction)

### Counsel for Respondent

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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TED MICHAEL DONKO,	)	NO. 81075
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

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**APPELLANT'S OPENING BRIEF**

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**APPELLANT’S OPENING BRIEF**

**JURISDICTIONAL STATEMENT**

- A. Statute granting jurisdiction to review the judgment: NRS 177.015.
- B. Judgment of Conviction filed April 28, 2020; Notice of Appeal filed April 21, 2020.
- C. This appeal is from a final judgment entered on April 28, 2020.

**ROUTING STATEMENT**

- D. This case is not presumptively assigned to the Court of Appeals under NRAP 17(b)(1) because appellant was convicted of Category B felonies.

**ISSUES PRESENTED FOR REVIEW**

- I. The court violated Donko’s federal and state due process rights under the Fifth, Sixth, and Fourteenth Amendments by admitting an unconstitutionally unreliable in-court identification.**

- II. The Court violated Donko's protections from double jeopardy by improperly increasing his sentence.**
- III. The court erred in retaining jurisdiction over restitution without legal basis.**
- IV. The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by rejecting proposed defense jury instructions.**
- V. The State committed misconduct, violating the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.**
- VI. The State failed to prove beyond a reasonable doubt that appellant committed these crimes.**
- VII. Cumulative error warrants reversal of these convictions.**

### **STATEMENT OF THE CASE**

The State filed a complaint on November 26, 2019, alleging two counts of battery with use of a deadly weapon resulting in substantial bodily harm; two counts of attempt murder with use of a deadly weapon; and one count of ownership or possession of a firearm by a prohibited person. (I 1). After a preliminary hearing on December 18, 2019, Donko was bound over to District Court. (I 7). On December 19, 2019, the State filed an Information alleging two counts of battery with use resulting in substantial

bodily harm; three counts of attempt murder with use; one count of assault with a deadly weapon; one count of discharging a firearm at or into an occupied structure; and one count of ownership or possession of a firearm by a prohibited person. (I 8). On December 20, 2019, Donko appeared in district court and entered a plea of not guilty. (I 205). On February 7, 2020, the defense filed a motion to withdraw due to conflict. (I 120). The court denied the motion. (I 208). On February 10, 2020, the State filed an Amended Information reflecting severance of the charge of ownership or possession of a firearm by a prohibited person. (I 123). On February 13, 2020, the State filed a Second Amended Information alleging the bifurcated weapon charge. (I 127). Jurors convicted on all counts after a four-day trial. The court sentenced Donko to 24-60 months on count I; 24-60 months on count II, concurrent; 36-96 months on Count III, plus a consecutive term of 36-96 months for the weapon enhancement; 36-96 months on Count IV, plus consecutive 36-96 months for the weapon enhancement, consecutive to Count III; 36-96 months on Count V, plus a consecutive term of 12-30 months for the weapon enhancement, consecutive to Count IV; 12-30 months on Count VI, concurrent to Count V; 12-30 months on Count VII, concurrent to Count VI; and 12-30 months on Count VIII, concurrent with Count VII, with 150 days credit for time served. The State filed the

judgment of conviction on April 28, 2020. Although the judgment of conviction provides for Counts I and II to run consecutively to Counts III, IV, and V, the judgment also provides for an aggregate sentence of 144-378 months. (I 194). On June 3, 2020, the State filed a motion to address the aggregate sentence calculations based on a variance between the aggregate sentence and the individual sentences. On November 24, 2020, the Court granted the State's motion and ordered that Donko's aggregate sentence reflect an increase to 168-438 months. (I 197; 217A-217B).

### **STATEMENT OF THE FACTS**

On October 1, 2019, Las Vegas resident Ted Donko lived at 299 North Linn Lane. (IV 845). He spent most of that morning at home, and went to Sonic for food and to AutoZone across the street. (IV 846). Donko is a mechanic, and often worked on several cars at a time at his house. (IV 847). After high school, Donko admitted that he got into trouble and incurred convictions for attempted grand larceny and attempted burglary. (IV 845). Donko described his neighborhood as "rough," and said it is generally not a safe area of town; Donko testified that the neighborhood sees a lot of gang activity and gang violence. (IV 848). Donko had recently heard that a man nicknamed "Shorty" had been attacked in the area in the days leading up to the subject incident. (IV 849). Donko knew a man named

DeAndre Woods from the neighborhood, and he admitted that he and Woods had occasionally smoked marijuana together. (IV 847). Donko met Woods sometime in 2017, and had bought marijuana from Woods at times. (IV 847, 849). Donko testified that on the night of September 30, 2019, he had driven around the neighborhood in an older model sedan with a friend, and testified that the friend had taken him to a dispensary at about ten p.m. (IV 855, 858).

Jonathan Sanchez-Loza (Sanchez) lived at 104 Linn Lane in Las Vegas, Nevada. (III 680). At about 11:30 a.m. on the morning of October 1, 2019, he received a phone call from his friend, Fernando Espinoza, and went to meet him at 56 North Linn Lane. (III 681). Another friend named Chuck was already there with a friend named Gilbert. DeAndre Woods was also present. Sanchez and Espinoza planned to load some items from the house into a pickup truck. (III 663; 681).

Woods testified that the previous night, on September 30, 2019, he had been at his ex-girlfriend's house at 56 Linn Lane when two men asked him if he knew someone named "Shorty." Woods testified that one man wore a black shirt and that the other wore a red shirt. Woods claimed that he did not know the men, and that he told them he didn't know Shorty. He described one man as short and Mexican, and later identified the other as

Ted Donko. (III 705-06). The men left in an older Toyota after Woods's conversation with them. (III 706; IV 708).

The next day, Woods testified that he was clearing out some things from his ex-girlfriend's house at 56 Linn Lane and loading them into the white truck in the driveway. (IV 708). Although Woods did not know Espinoza and Sanchez very well, the two were helping him move things out of the house, along with Gilbert. (IV 709-10).

At around 12:15 p.m., Woods was sitting in a chair between the driveway and the truck when a Toyota pulled up in front of the house. (IV 712). Woods testified that a man got out of the car, said "Fuck Shorty," and started shooting. Woods heard multiple shots. (IV 713). Woods claimed that the shooter was the same man who had asked him about Shorty the previous night, and testified that the man was wearing a red shirt. (IV 713, 714). Woods testified that the car left and headed toward Charleston Boulevard. (IV 715).

Sanchez testified that as he was in the driveway sometime after noon, he heard someone ask, "Where's Shorty?" He looked around and saw a Toyota in the street and a man pointing a gun at him. Espinoza was behind Sanchez and behind the truck. (III 682-83). Sanchez testified that he was shot and fell to the ground in the driveway. (III 683). He heard about ten

rounds fired, and saw Espinoza also fall to the ground. (III 684). Sanchez called his uncle, and lost consciousness intermittently. He was shot in the thigh and leg. (III 684). Sanchez now walks with a cane and has a bullet permanently lodged in his leg. (III 685). Espinoza was shot in the arm and the abdomen, and spent weeks in the hospital. He underwent surgery on his right arm. (III 664). He bears a scar that runs from the middle of his hand to his wrist (III 664).

Local resident Genaro Ramos was working on his mother's car in the driveway of 5617 White Cap Street on the day of this incident. (III 693). He heard between eight and ten gunshots at around 12:15 p.m. (III 694). He testified that he subsequently saw an older, gold-colored Toyota Corolla speeding down his street a couple of minutes after he heard the gunshots. (III 695). The car stopped and a man got out of the car and began patting his waist and searching his pockets. (III 696). The man briefly returned to the car and then started walking north on Surf Lane. (III 696). Ramos described the man as a white male in his thirties who was wearing a red shirt. (III 697). Ramos identified the Toyota Corolla impounded by Metro as the car he saw speeding down his street. (III 698). Cathryn All resides at 5675 Big Sea Street. She provided video from her home's security system to Metro



officers which showed a man in a red shirt walking by her house at the approximate time of these events. (III 591-93).

On October 1, 2019, Metro police officer Alan Hennig was dispatched to the scene of a shooting at 56 North Linn Lane in Las Vegas, Nevada. The suspects had been described on the 911 call as two Hispanic men who had pulled up in a gray Toyota Corolla; the shooter was described as wearing red and about five feet, eleven inches in height; the driver was wearing black. When Hennig arrived at the scene, he found Sanchez and Espinoza lying in the driveway with gunshot wounds. One had been hit in the leg and the other through the hand and in the stomach. (III 544-45; 551). Hennig saw two bullet holes in the white truck parked in the driveway, and found eight shell casings in the street. (III 546). CSA Strumillo examined the casings and determined they were Winn 40 casings. (III 568-69). She identified three bullet holes on the white truck in the driveway, two bullet holes in the garage door, and damage to a chair in the driveway of the house. (III 572-76).

Metro Det. Jason Marin was also dispatched to the scene. (IV 806). During his interview at the scene with DeAndre Woods, Woods told Marin that the shooter was a Hispanic male adult, about five feet eleven inches, with a shaved or bald head, and wearing a red t-shirt. (IV 809). Marin

testified that the cartridges found in the Toyota matched the casings found at the scene of the shooting. (IV 812).

Metro Officer Corbett was also dispatched to the scene and assisted in locating the Corolla involved in the shooting. Officers found the car in the general area of the shooting, a few blocks away from 56 N. Linn Lane. (III 553). The Corolla was unregistered and unoccupied when located. (III 554). An unspent round was found on the passenger floor of the car. (III 555). Metro Officer Gadea was also dispatched to the scene and canvassed the area for evidence. He found a red shirt on the side of the road near Big Sea and Sea Way streets, a few blocks from Linn Lane. (III 557-58).

CSA Strumillo examined several items of clothing from the scene, including a white tank top, shorts, DeAndre Woods's sweatpants, and a blue shirt. (III 579-82). Strumillo also located several bullet fragments under the white truck, in the bed of the truck, and near the chain link fence. (III 583-84). CSA Grover examined the grey Toyota Corolla found at 5677 White Cap. (III 601). Grover impounded a Win 40 Smith & Wesson cartridge from the car. (III 605). Grover also found a license plate between the seat and the console that he processed for prints. (III 606). Grover also looked for prints on the exterior and interior of the car, and submitted prints from the car doors and the license plate for testing. (III 607; 612).

Allison Rubino, a Metro forensic analyst, testified that she obtained a mixture of two DNA profiles from the red shirt retrieved by Metro officers; she testified that Donko's DNA profile was included in 99 percent of the DNA mixture, with the remaining one percent from an unknown contributor. (III 638). Metro forensic analyst Kathryn Aoyama testified that only one of the nine fingerprints collected by investigators was of sufficient quality for submission to the national Automated Fingerprint Identification System (AFIS). She testified that the print, taken from the license plate found inside the Toyota, matched with the left middle finger of Donko. (III 656, 659).

After viewing a photo lineup, Woods identified Donko as the shooter, and testified that he was "95 percent" sure of his identification. (IV 714; 720). Woods admitted that he had previously told detectives at the scene that the shooter was Hispanic. (IV 721). Woods admitted that he told detectives that the shooter had no tattoos, although Donko has numerous tattoos on his arms, neck, and face. (IV 721, 860). Although he failed to identify Donko during his initial testimony, Genearo Ramos was permitted to retake the stand during trial over the objection of the defense. Ramos testified that during his initial examination, he recognized Donko as the man he saw exiting the Toyota on the day of the shooting. (IV 759).

At trial, Donko testified in his own defense. He denied owning a gun, and denied being involved in this shooting. (IV 845). Donko denied meeting or knowing Fernando Espinoza. Donko denied having any problems with Woods or Sanchez, both of whom he knew from the neighborhood. (IV 849). Donko testified that he had stored some of his clothing in a car for a brief period while he was homeless, and that some of his clothes had been taken in a car burglary. (IV 861). Donko steadfastly maintained his innocence in these events and testified under oath that he had no involvement in this shooting. (IV 845-46).

### **SUMMARY OF THE ARGUMENT**

This Court should reverse these convictions based on insufficient evidence, prosecutorial misconduct, erroneous rulings during the trial and sentencing phases of this case, and the overwhelmingly prejudicial admission of an unreliable and unconstitutional in-court identification.

### **ARGUMENT**

#### **I. The court violated Donko's federal and state due process rights under the Fifth, Sixth, and Fourteenth Amendments by admitting an unconstitutionally unreliable in-court identification.**

The Due Process Clause of the United States and Nevada Constitutions "forbids a criminal prosecution to be based upon any witness's

identification that was procured under circumstances that were unnecessarily suggestive and likely to have resulted in a mistake that cannot be repaired.” *Johnson v. State*, 131 Nev. 567, 574–75, 354 P.3d 667, 672–73 (Ct. App. 2015). Whether evidence is relevant lies in the discretion of the trial court, and appellate courts will review for abuse of discretion. *Sterling v. State*, 108 Nev. 391, 395, 834 P.2d 400, 403 (1992). “The decision to deny a motion for a mistrial rests within the district court’s discretion and will not be reversed on appeal absent a clear showing of abuse.” *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006) (quoting *Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001)) (internal quotation marks omitted). “A defendant’s request for a mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial.” *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004) (footnote omitted). Appellate courts review the erroneous denial of a mistrial for harmless error. *See Parker v. State*, 109 Nev. 383, 388-89, 849 P.2d 1062, 1065-66 (1993) (holding that the erroneous denial of a mistrial was harmless because the evidence of guilt was overwhelming).

When Genaro Ramos completed his testimony, he was released from his subpoena. However, the State recalled him to the stand based on Ramos’s ex parte communication to prosecutors that Ramos had now

identified Donko as the man he saw getting out of the Toyota on the day of the shooting. (IV 755-56). Ramos testified that he had indicated to the prosecutor that he was nervous because, “The guy that I saw is the guy that I was going to point him, that that was the guy that I saw coming out of the car.” (IV 756). The defense immediately objected and the court held a bench conference. The defense objected that Ramos had failed to identify Donko when he testified, and that the admission of this additional testimony was improper and prejudicial because Ramos had been able to stare at Donko for several minutes while Donko was seated at the defense table. The defense moved to strike the identification based on the impermissibly suggestive circumstances of the identification and the prejudice to the defense. (IV 756). The defense noted that Ramos’s identification had essentially ambushed the defense in the middle of trial, noting that the State had never advised that Ramos was now able to identify Donko. The defense moved for a mistrial. (IV 758). The court denied the motion for a mistrial. (IV 758). The court rejected the defense motion to strike the testimony and permitted Ramos to continue his testimony. (IV 758-59). Ramos resumed testifying and stated that Donko was the man he saw exiting the Toyota on the day of the shooting. (IV 759). Ramos admitted that he had never previously suggested that he could identify the man he saw exiting the Toyota. (IV

764). Ramos admitted that of the three men at the defense table, only Donko resembled the man he saw on the day of the shooting. (IV 765).

This Court should reverse these convictions because Donko's substantial rights under the Nevada and U.S. Constitutions were violated by the district court's abuse of discretion in admitting Ramos's in-court identification into evidence. The circumstances of this identification were so "unnecessarily suggestive and conducive to irreparable mistaken identification" that the admission of this testimony violated due process. *Foster v. California*, 394 U.S. 440, 442 (1969) (quoting *Stovall v. Denno*, 388 U.S. 293, 302 (1967)) (overruled on other grounds, *Griffith v. Kentucky*, 479 U.S. 314 (1987)). In analyzing whether the totality of the circumstances makes an identification unconstitutionally suggestive, courts must be cognizant that, "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.'" *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (quoting *Simmons v. U.S.*, 390 U.S. 377, 384 (1948)).

Here, Ramos's initial descriptions of the man in the Toyota were not specific enough to prompt Det. Marin to show Ramos a photo lineup. Ramos described the man only as a "white male in his 30s" who was wearing a red shirt. (III 697). He did not notice any tattoos on the man. (III 702). Ramos admitted he was never shown a photo lineup, and did not identify Donko

during his initial testimony. (III 699). While Ramos was on the stand, he would have seen Donko seated next to the defense attorney who cross-examined him on the stand. Only after seeing Donko in this setting was Ramos able to muster a definite identification. Under these circumstances, this Court should find the admission of this identification an abuse of discretion on the part of the trial court. *Neil v. Biggers*, 409 U.S. 188, 197, 93 S. Ct. 375, 381, 34 L. Ed. 2d 401 (1972). This Court should find that the admission of an in-court identification by a witness who failed to make any out-of-court identifications, and failed to notice the defendant's most obvious physical characteristic during the previous confrontation, constitutes reversible error:

It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in Foster. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

*Neil v. Biggers*, 409 U.S. at 198.

Court generally consider five factors in evaluating the likelihood of misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time



between the crime and the confrontation. *Biggers* at 199-200. In analyzing the reliability of an in-court identification, the Nevada Supreme Court considers the same factors enunciated in *Biggers*. *Taylor v. State*, 132 Nev. 309, 322, 371 P.3d 1036, 1045 (2016), citing *Browning v. State*, 104 Nev. 269, 273-74, 757 P.2d 351, 353-54 (1988); *Neil v. Biggers*, 409 U.S. 188 at 199-200.

In *Foster v. California*, 394 U.S. 440 (1969), the U.S. Supreme Court noted that the lineup was impermissibly suggestive and that the witness had been unable to identify the defendant at the initial lineup and at a subsequent showup. Similarly, Ramos failed to identify Donko when he first took the stand, gave a largely generic description of the man he saw exiting the Toyota, and gave an initial description that did not match Donko (i.e., a man without noticeable tattoos). *Id.* at 441-42. Here, when viewed under a totality of the circumstances, Ramos's in-court identification violated Donko's due process rights under the *Biggers* factors: (1) Ramos briefly saw a man in a speeding car who got out of the car and walked away; (2) Ramos did not pay enough attention to notice whether the man had tattoos or to give sufficient detail to justify being shown a photo lineup, unlike Woods; (3) Ramos's description was not accurate or particularly detailed; (4) Ramos was not certain enough to suggest that he recognized Donko when he first took the

stand at trial; (5) over four months had elapsed since Ramos had seen the man in the Toyota. Thus, the in-court identification at trial carried a high risk of misidentification and the district court abused its discretion in allowing Ramos to testify regarding the identification. Although Woods also identified Donko, the admission of Ramos's identification provided the State with a stronger link between Donko and the Toyota beyond the circumstantial fingerprint evidence on the license plate. Ramos's testimony buttressed Woods's testimony which was replete with inconsistencies and variations. Accordingly, Donko's substantial rights were prejudiced and his convictions and sentence should therefore be reversed.

At minimum, the court should have granted a mistrial based on the new evidence. The decision to allow immediate admission of the new evidence decimated a defense that had centered on Woods's sole identification of Donko as the shooter. This surprise evidence had a significant impact on defense strategy; although the State was not aware of Ramos's changed opinion until after his testimony, prosecutors did not disclose the mid-trial conversation to the defense prior to recalling him to the stand. Thus, the defense was suddenly confronted with withheld, untimely, and unexpected detrimental evidence. "Trial by ambush traditionally occurs where a party withholds discoverable information and

then later presents this information at trial, *effectively ambushing* the opposing party through *gaining an advantage by the surprise attack.*” *Land Baron Inv., Inc. v. Bonnie Springs Family Ltd. P’ship*, 131 Nev. —, — n.14, 356 P.3d 511, 522 n.14 (2015) (emphasis added). “ . . . [U]nder certain circumstances the late disclosure even of inculpatory evidence could render a trial so fundamentally unfair as to violate due process.” *Lindsey v. Smith*, 820 F.2d 1137, 1151 (11th Cir. 1987). The admission of this evidence violated Donko’s substantial rights and warrants reversal; at minimum, the court should have granted a mistrial and allowed the defense additional time to adjust defense strategy to this surprise evidence.

**II. The Court violated Donko’s protections from double jeopardy by improperly increasing his sentence.**

“The Double Jeopardy Clause of the United States Constitution precludes courts from increasing a sentence when the defendant has a reasonable expectation that the sentence is final.” *Miranda v. State*, 114 Nev. 385, 386, 956 P.2d 1377, 1378 (1998), citing *United States v. DiFrancesco*, 449 U.S. 117, 135, 101 S. Ct. 426, 436 (1980). A district court lacks jurisdiction to amend a judgment of conviction when the defendant begins serving his sentence. *State v. Kinsey*, 109 Nev. 519, 523, 853 P.2d 109, 112 (1993). In Nevada, the showing of necessity required to correct an illegal sentence

without violating the Double Jeopardy Clause is “more heightened under the Nevada Constitution than its federal counterpart.” In this area of jurisprudence, “Nevada law embraces a more expansive interpretation of constitutional rights than federal law.” *Wilson v. State*, 123 Nev. 587, 595, 170 P.3d 975, 980 (2007).

Under NRS 176.555, a district court may correct an illegal sentence at any time. The Nevada Supreme Court has defined an “illegal” sentence as a sentence “at variance with the controlling sentencing statute or when ‘the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided ...’” *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996)N (internal citations omitted). At the sentencing hearing on April 20, 2020, the court sentenced Donko to 24-60 months on count 1, 24-60 months on count 2, concurrent; and 36-96 months on Count 3, plus a consecutive term of 36-96 months for the weapon enhancement. The court initially suggested that Count 3 would run consecutive to counts 1 and 2. (V 974). The court imposed 36-96 months on Count 4, plus a consecutive term of 36-96 months for the weapon enhancement, consecutive to Count 3; 36-96 months on Count 5, plus a consecutive term of 12-30 months for the weapon enhancement, consecutive to Count 4; 12-30 months on Count 6, concurrent to Count 5; 12-30 months

on Count 7, concurrent to Count 6; and 12-30 months on Count 8, concurrent with Count 7, with 150 days credit for time served. (V 974-75).

Significantly, after imposing sentence on the individual counts, the court explicitly stated: “*So the only things that will run consecutive* are the three Attempt Murders with Use of a Deadly Weapon.” (V 974) (emphasis added). Consistent with this pronouncement, the court stated: “That is an aggregate of -- it should be a minimum of 12 years, a maximum of 31.5, a minimum of 12 years, a maximum of 31.5 [sic], including the deadly weapon enhancements.” (V 974-75). The original judgment of conviction reflected an aggregate sentence of 144-378 months as specifically articulated by the court, consistent with only Counts 3, 4, and 5 running consecutive to the other sentences. (I 194-196). The State filed the judgment of conviction on April 28, 2020, also reflecting an aggregate sentence of 144-378 months. (I 194).

On June 3, 2020, the State filed a motion to address the aggregate sentence calculations, noting that the Nevada Department of Corrections sought clarification based on the position that the actual sentences imposed resulted in an aggregate sentence of 168-438 months because the judgment of conviction implied that Counts 1 and 2 were to run consecutively to Counts 3, 4, and 5 and their weapon enhancements. (I 197-199). At a hearing

on the State's motion on June 15, 2020, the defense opposed any changes to sentence, and noted that the court had clearly indicated that an aggregate sentence of 12 years to 31.5 years had been imposed. The defense noted that the court had explicitly stated an intention to run only counts 3, 4, and 5, the attempt murder counts and weapons enhancements, consecutive to each other. (V 977-78). However, on November 24, 2020, the Court granted the State's motion in a minute order and ordered that Donko's aggregate sentence reflect a change to 168-438 months. Although the court ordered the State to file an amended judgment of conviction, none has been filed as of this writing. (I 197; 217A-217B).

NRS 176.035(1) provides in relevant part, "For offenses committed on or after July 1, 2014, if the court imposes the sentences to run consecutively, the court must pronounce the minimum and maximum aggregate terms of imprisonment." Here, after Donko filed his Notice of Appeal and after he commenced serving his sentence, the district court improperly increased his minimum and maximum sentences in violation of Nevada's prohibition against double jeopardy. First, a district court generally lacks jurisdiction to amend a judgment of conviction once the defendant begins serving his sentence. *State v. Kimsey*, 109 Nev. 519, 523, 853 P.2d 109, 112 (1993). A defendant begins serving his sentence when the

judgment of conviction signed by the judge is entered by the clerk. *See* NRS 176.105(3); NRS 176.335(3); *Miller v. Hayes*, 95 Nev. 927, 929, 604 P.2d 117, 118 (1979). Before the written judgment of conviction is entered, the “the district judge ha[s] jurisdiction to modify or suspend his earlier decision” because the defendant has not yet begun serving his sentence. *Miller*, 95 Nev. at 929, 604 P.2d at 118. Here, Donko had commenced serving his sentence and had filed a notice of appeal when the State sought to change the sentence.

Generally, a district court retains jurisdiction to correct an illegal sentence at any time under NRS 176.555. An “illegal” sentence is “one at variance with the controlling sentencing statute” or when “the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided....” *Edwards v. State*, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996) (internal citations omitted). When the district court has jurisdiction to correct an illegal sentence, it may do so “only to the extent necessary to bring the sentence into compliance with the statute.” *Miranda v. State*, 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998) (citing *U.S. v. Fogel*, 829 F.2d 77, 88 (D.C. Cir. 1987)). In *Miranda*, the district court sentenced the defendant to 18 to 36 months in prison. *Miranda*, 114 Nev. at 386, 956 P.2d at 1377. The sentence violated

Nevada's 40% rule and was facially illegal. NRS 193.130(1). To correct the illegality, the district court subsequently increased the maximum term to 45 months. *Miranda*, 114 Nev. at 386, 956 P.2d at 1377. On appeal, the Nevada Supreme Court reversed:

. . . [t]o comply with the Double Jeopardy Clause of the Nevada Constitution, a district court may correct an illegal sentence by increasing its severity only when necessary to bring the sentence into compliance with the pertinent statute, and a correction that increases sentence severity is 'necessary' only when there is no other, less severe means of correcting the illegality.

*Id.* at 387, 956 P.2d at 1378. The Court noted that "the sentencing illegality in the present case could have been corrected by lowering the minimum terms rather than increasing the maximum terms, and, therefore, the correction imposed was not necessary to bring the sentences into compliance with the pertinent sentencing statute." *Id.*

Here, the district court articulated an aggregate term that did not match the sentences imposed in the individual counts when Counts 1 and 2 ran consecutively to Counts 3, 4, and 5. (I 194-96). Thus, the sentence was facially illegal because the individual sentences were at variance with the required aggregate sentencing calculations under the controlling sentencing statute. NRS 176.035(2)(b). However, to correct this illegality, the court impermissibly increased the minimum and maximum sentences where a less severe option was available: the court could have corrected the sentence by



instead ordering the 24-60 month sentences on Counts 1 and 2 to run concurrent with the 48-126 month sentences on Counts 3, 4, and 5, for a total legal sentence of 144-378 months, as actually intended by the court at the sentencing hearing when the court repeatedly stated an aggregate calculation of 144-378 months. This interpretation would also remain consistent with the court's statement that only Counts 3, 4, and 5 would run consecutively. (I 194; V 974-76). *Miranda*, 114 Nev. at 387, 956 P.2d at 1378.

Double jeopardy applies when a defendant has begun serving his sentence. *Dolby v. State*, 106 Nev. 63, 65, 787 P.2d 388, 389 (1990). When correcting an illegal sentence, a court may only do so to "to the extent necessary to bring the sentence into compliance with the statute." *Miranda v. State*, 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998) (citations omitted). Here, the aggregate portion of the judgment of conviction provides for a sentence of 144-378 months, and an alternate, less severe method of correcting the illegality was available where the court could have stricken the language regarding Counts 1 and 2 running consecutive to Counts 3, 4, and 5. (I 195-96; V 974-75).

The State will contend that the district court did not violate double jeopardy by re-sentencing Donko to an additional 24-60 months in prison

because the State will take the position that the Court merely corrected a “clerical error” under NRS 176.565. However, a clerical error is “... a *mistake in writing or copying*” or “[a]s more specifically applied to judgments and decrees a clerical error is a mistake or omission by a clerk, counsel, (or) judge, or printer which is not the result of the exercise of a judicial function.” *Channel 13 of Las Vegas, Inc. v. Ettlinger*, 94 Nev. 578, 580, 583 P.2d 1085, 1086 (1978) (interpreting NRCP 60(a), the civil counterpart to NRS 176.565) (emphasis added); *Robertson v. State*, 109 Nev. 1086, 1088 fn. 1, 863 P.2d 1040, 1041 fn. 1 (1993) (overruled on other grounds by *Krauss v. State*, 116 Nev. 307, 310, 998 P.2d 163, 165 (2000) (a clerical error is an error that fails to “make the record speak the truth concerning acts done”).

Here, the district court’s original sentence resulted from a miscalculation, not a “clerical error.” The miscalculation, later incorporated into the original judgment of conviction, was not due to a “mistake in writing or copying” or a “mistake or omission” by the clerk, judge, or printer, in the judgment or decree. Likewise, the miscalculation did not fail to “make the record speak the truth concerning acts done” because the original judgment of conviction accurately reflected the court’s oral pronouncement that Donko should serve a total of 144-378 months, which

was the “act done.” (V 973-975). Therefore, when the court re-sentenced Donko and increased the minimum and maximum sentences, the court violated Donko’s federal and State protections from double jeopardy. The sentencing illegality in the present case could have been corrected by deleting references to Counts 1 and 2 running consecutive to Counts 3, 4, and 5; therefore, the correction imposed was not necessary to bring the sentences into compliance with the pertinent sentencing statute. Because the sentencing correction unnecessarily increased the severity of the sentences, the correction violated the Double Jeopardy Clause of the Nevada Constitution and warrants reversal. *Miranda v. State*, 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998).

**III. The court erred in retaining jurisdiction over restitution without legal basis.**

NRS 176.105(1)(c) provides that a judgment of conviction must include the amount and terms of any restitution award. NRS 176.033(1)(c) requires the district court to set forth the “amount of restitution for each victim of the offense.” Despite these statutory requirements, the court in the instant case retained jurisdiction to award an uncertain amount at an uncertain time in the future. (I 195; V 972). This decision is clearly erroneous. *Witter v. State*, 135 Nev. 412, 414, 452 P.3d 406, 408 (2019),

citing *Botts v. State*, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993); *Roe v. State*, 112 Nev. 733, 736, 917 P.2d 959, 960-61 (1996); *Smith v. State*, 112 Nev. 871, 873, 920 P.2d 1002, 1003 (1996).

At sentencing, the State advised the court that the victims wanted the court to focus more on the prison sentence than on restitution. (V 972). When the court asked the State whether she should “retain jurisdiction” over the restitution issue, the State responded, “Sure.” (V 972). The court noted that the victims had incurred “very serious medical bills.” (V 972). The judgment of conviction provides that “. . . Jurisdiction retained as to any Restitution . . .” (I 195).

Nevada statutory law provides that a sentencing judge, in a criminal case, may “set an amount of restitution for each victim of the offense” NRS 176.033. The judgment of conviction must include the amount and terms of restitution. NRS 176.105(1)(c). This statute requires that the Court order a specific amount of restitution for each victim. *Roe v. State*, 112 Nev. 733, 917 P.2d 959 (1996). Any restitution award must be supported by substantial, competent evidence. *Martinez v. State*, 115 Nev. 9, 974 P.2d 133 (1999). In this case, the State was unable to provide any information regarding restitution. The court erred in ruling that an award could be made

at a later date and in retaining jurisdiction over this portion of Donko's sentence, warranting reversal.

**IV. The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by rejecting proposed defense instructions.**

In reviewing jury instructions, this Court grants district judges broad discretion and will affirm unless the district court abused that discretion. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005); *Hoagland v. State*, 240 P.3d 1043, 1045 (Nev. 2010). In general, this Court “reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error.” *Berry v. State*, 212 P.3d 1085, 1091 (Nev. 2009). Whether a jury instruction accurately states applicable law is a question subject to de novo review. *Id.* at 1091.

The defense requested substitution of the word “unless” in the reasonable doubt instruction in place of “until” in Proposed Instruction 1. (I 178; IV 779). The court rejected the proposed defense instruction. (IV 780). The Nevada Supreme Court has noted that “[t]he rule that one is innocent until proven guilty means that a defendant is entitled to not only the presumption of innocence, but also to indicia of innocence.” *Haywood v. State*, 107 Nev. 285, 288 (1991). By implying that a finding of guilt is a foregone conclusion, this instruction minimized Donko's presumption of

innocence. The United States Supreme Court recognizes the significance of the presumption of innocence instruction:

While the legal scholar may understand that the presumption of innocence and the prosecution's burden of proof are logically similar, the ordinary citizen may well draw significant additional guidance from an instruction on the presumption of innocence. Wigmore described this effect as follows:

...

'In other words, the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence*, i.e., no surmises based on the present situation of the accused. This caution is indeed particularly needed in criminal cases' Wigmore 407.

*Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). The use of the word "until," without modification by "if ever," or "and unless," suggests to jurors that the State would inevitably meet its burden to overcome the presumption of innocence.

The defense also requested Proposed Instruction 2, addressing the interpretation of evidence capable of two reasonable interpretations. (I 179; IV 780). The court rejected the proposed instruction. (IV 781). The defense instruction provided: "If the evidence in this case is susceptible to two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that

interpretation which will admit of the defendant's innocence, and reject that which points to his guilt." (I 179). Although the Nevada Supreme Court has held that this instruction is not required, the Court agrees that this instruction is permissible. *Bails v. State*, 92 Nev. 95, 97 (1976). Because this case relied in large part on unreliable witness identifications and circumstantial physical evidence, this instruction would have provided jurors with an important perspective on the interpretation of this evidence.

The court also rejected Proposed Instruction 3, addressing reasonable doubt and subjective certitude on the part of jurors. (I 180; IV 782). Admittedly, NRS 175.211 mandates the inclusion of language provided in Instruction 6. (I 136). The Nevada Supreme Court has repeatedly affirmed the constitutionality of this instruction. *Lord v. State*, 107 Nev. 28, 38, 806 P.2d 548, 554 (1991); *Buchanan v. State*, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003). However, the language proposed by the defense is an exact quote from *Randolph v. State* and offers additional guidance to jurors. The Nevada Supreme Court recognizes that "the reasonable doubt instruction should impress on the jury the need to reach a 'subjective state of near certitude' on the facts in issue." *Randolph v. State*, 117 Nev. 970, 980, 36 P.3d 424, 431 (2001), citing *McCullough v. State*, 99 Nev. 72, 75, 657 P.2d 1157, 1158 (1983) (quoting *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S. Ct.

2781, 61 L.Ed.2d 560 (1979)). Thus, because the Nevada Supreme Court has recognized that a “subjective state of near certitude” remains a requirement for meeting the State’s burden of proof, this Court should approve of offering this language in addition to the standard reasonable doubt instruction. (I 180).

The defense also offered several negatively-worded instructions under *Crawford v. State*. (I 181-185; IV 782; V 949). The court rejected the instructions and agreed with the State that these instructions were not narrowly tailored to the defense theory of the case. (IV 784; V 949). However, these instructions followed the law and generally comported with the type of inverse instructions deemed valid and necessary in *Crawford*: all of the proposed defense instructions were tailored to the facts of the case and to the defense theory of the case, and the court erred in rejecting them. “. . . [T]he defense has the right to have the jury instructed on its theory of the case, ... as disclosed by the evidence, no matter how weak or incredible that evidence may be.” *Honea v. State*, 136 Nev., Adv. Op. 32, 466 P.3d 522 (2020) (quoting *Crawford*, 121 Nev. at 751, 121 P.3d at 586). The trial judge abused her discretion in rejecting these instructions: “specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request.”



*Crawford*, 121 Nev. at 753, 121 P.3d at 588. If the district court disagreed with the precise language of these instructions, the court should have “assist[ed] the parties in crafting the required instructions or ... complete[d] the instructions *sua sponte*.” *Crawford*, 121 Nev. at 754-55, 121 P.3d at 589.

A “district court *may not refuse* to give a proposed defense instruction simply because it is substantially covered by the other instructions given.” *Guitron v. State*, 131 Nev. 215, 229, 350 P.3d 93, 102 (Ct. App. 2015) (emphasis added); *Crawford*, 121 Nev. at 753-54, 121 P.3d at 588. “A criminal defendant is entitled to jury instructions on the theory of his case. If the defense theory is supported by at least some evidence which, if reasonably believed, would support an alternate jury verdict, the failure to instruct on that theory constitutes reversible error.” *Honeycutt v. State*, 118 Nev. 660, 56 P.3d 362, 368 (2002), *rev'd in part on other grounds*, *Carter v. State*, 121 P.3d 592 (2005).

Finally, the defense requested that “not guilty” appear first on the verdict form. The court rejected the request. (IV 785-86). As noted by trial counsel, the appearance of ‘guilty’ as the first option on the verdict form undermines the presumption of innocence and suggests that guilt is the first option a jury should consider. Essentially, the placement of “guilty” before “not guilty” requires jurors to decide whether Donko committed a crime

before considering whether he was innocent. The presence of “guilty” before “not guilty” on a document provided by the judge also implies that the court may have a preference for the first option over the second. Although subsequently rejecting arguments that this placement constitutes reversible error, the Georgia Supreme Court noted in dicta the potential implications of ordering verdict forms in this fashion: “While there is no such evidence in this case, some other jury might perceive the antecedence of the word ‘guilty’ over the words ‘not guilty’ to be expressive of the view of the court.” *Smith v. State*, 249 Ga. 228, 232, 290 S.E.2d 43, 47 (1982).

The Nevada Supreme Court has emphasized that trial courts should exercise diligence in ensuring that jury instructions fit the facts of the case: “[j]urors . . . should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case.” *Crawford v. State*, 121 Nev. 744, 754, 121 P.3d 582, 588 (2005) (emphasis added). The proposed defense instructions would have defined relevant and necessary legal terminology and would have assisted jurors in their deliberations. *Honeycutt v. State*, 118 Nev. 660, 56 P.3d 362, 368 (2002), *rev'd in part on other grounds*, *Carter v. State*, 121 P.3d 592 (2005). Because the court improperly rejected appropriate defense instructions and provided instructions that improperly favored the State and

minimized the burden of proof, this Court must reverse these convictions. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). When an erroneous instruction infects the entire trial, the resulting conviction violates due process. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970). Because the jury instructions improperly favored the State and minimized the burden of proof, this Court must reverse these convictions.

**V. The State committed misconduct, violating the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.**

In determining whether prosecutorial misconduct deprived a defendant of a fair trial, appellate courts first determine whether “the prosecutor's conduct was improper.” Then, “if the conduct was improper, we must determine whether the improper conduct warrants reversal.” *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). The Nevada Supreme Court generally examines “whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process.” *Rudin v. State*, 86 P.3d 572, 582 (2004); *Valdez*, 124 Nev. at 1189; *Truesdell*

v. *State*, 129 Nev. 194, 203, 304 P.3d 396, 402 (2013). Here, the State engaged in misconduct that warrants reversal.

During rebuttal argument, the State engaged in impermissible burden-shifting by stating that Donko had failed to sufficiently explain the condition of the red shirt found by Metro investigators: “*Red shirt. Gives no viable explanation of a red shirt.* Oh, broken out of my car. Okay, what day, sir? Uh, uh, uh. Yeah. And it just so happens it’s neatly placed there. No tire marks, not wet, nothing else. Found minutes after the shooting.” (IV 924) (emphasis added). The court rejected the defense objection to this burden-shifting. (IV 924). The State continued to shift the burden of proof by arguing that Donko had also failed to explain the presence of his fingerprint on the license plate: “And then the fingerprint, same thing. *No viable explanation.*” (IV 924).

These comments suggest that the accused, rather than the State, bears the burden of disproving the crime. Such a suggestion is clearly impermissible. This Court should not countenance this type of burden shifting because “[i]t suggests to the jury that it was the defendant's burden to produce proof by explaining the absence of witnesses or evidence. This implication is clearly inaccurate.” *Barron v. State*, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989). Advising jurors that Donko

had failed to offer explanations regarding particular pieces of evidence warrants reversal:

It is a fundamental principle of criminal law that the State has the burden of proving the defendant guilty beyond a reasonable doubt.... The tactic of stating that the defendant can produce certain evidence or testify on his or her own behalf is an attempt to shift the burden of proof and is improper.

*Barron*, 105 Nev. at 778, 783 P.2d at 451. These types of comments can play a significant role during jury deliberations: “[i]t is quite probable that the jury took into account in its deliberating process the prosecutor's suggestions that appellant was responsible for gaps in the evidence, had the burden of proving or disproving the crime, and was hiding the truth.” *Harkness v. State*, 107 Nev. 800, 804-805, 820 P.2d 759, 761-762 (1991). “It is error *even to intimate* to the jury that any burden of persuasion rests upon the defendant on the trial of the general issue (guilt or innocence).” *Phillips v. State*, 86 Nev. 720, 722, 475 P.2d 671, 672 (1970) (citations omitted) (emphasis added). Here, the State improperly and explicitly advised jurors that Donko had failed to adequately explain certain items of evidence, implying that he had the burden to disprove that he had committed these crimes. These comments constitute clear misconduct and warrant reversal.

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**VI. The State failed to prove beyond a reasonable doubt that appellant committed these crimes, and convictions based on insufficient evidence violate federal and state due process guarantees.**

The standard of review when analyzing the sufficiency of evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Grey v. State*, 178 P.3d 154, 161 (Nev. 2008) (emphasis in original). Here, the State failed to prove the elements of these crimes beyond a reasonable doubt, warranting reversal of Donko's convictions.

The State offered inconsistent and unreliable testimony from multiple witnesses. The State's key witness was DeAndre Woods, a man who gave several different versions of events and wildly varying descriptions of the shooter. DeAndre Woods testified about the alleged conversation he had the night before the shooting, and described the Mexican man he spoke with on September 30, 2019, as five feet eight inches, or five feet eleven inches. (IV 707). He also described the second man, whom he claimed was Donko, as five feet eight inches, or five feet eleven inches. (IV 707). He denied seeing any tattoos on the man he claimed was Donko during the conversation the night before the shooting. (IV 707). At trial, Woods did not recall noticing

whether the second man had facial hair or what color the facial hair might have been. (IV 728).

Significantly, Woods's initial description of the shooter bore no resemblance to Ted Donko. Woods admitted that he had described the shooter as "a Mexican guy" when police interviewed him. (IV 722). He admitted that he thought the shooter looked like Espinoza and Sanchez on the day of the events. (IV 722). Woods admitted that he had told police that the shooter had a shaved face and no facial hair. (IV 729). He admitted that he told police the shooter had no tattoos. (IV 730). Woods had described the shooter as bald, with a shaved head. (IV 736). Woods admitted that Donko has an arm full of tattoos. Woods admitted that the red shirt the shooter was wearing had short sleeves; thus, Woods would have seen Donko's tattoos had Donko actually been involved in the shooting. (IV 734; 752). Woods claimed that he was focused solely on the shooter's eyes, but admitted that he did not notice any tattoos around the shooter's eyes or on his face. (IV 738). Woods also admitted that he was not one hundred percent sure when he picked Donko out of the photo lineup. (IV 734). Woods had told Detective Marin that the shooter looked a little like the detective. (IV 739). Woods had never told police that the shooter was Caucasian. (IV 754).

Det. Marin testified regarding his interview with Woods, and Marin admitted that Woods told him both suspects in the shooting were Mexican or Hispanic. Marin confirmed that Woods told him that the shooter had no facial hair or tattoos and was bald. (IV 826-27). Marin admitted that neither victim could describe the shooter. (IV 828). Marin admitted that no eyewitness described the shooter as Caucasian. (IV 832). Although Woods picked Donko out of a photo lineup, Det. Marin admitted that the photo lineup he showed Woods included no Hispanic men. It also included no bald men. (IV 834). Although Woods denied knowing Donko, Donko testified that he knew Woods from the neighborhood and had bought marijuana from him. (IV 847, 849). Thus, it is entirely possible that Donko looked familiar to Woods from seeing him around the neighborhood and not from the shooting.

No other witness identified Donko as the shooter. Espinoza did not see his assailant, and did not remember any details from the shooting. He could not remember his conversation with Metro detectives on the date of the incident. He could not remember seeing a Toyota pull up to the Linn Lane house, and he could not remember whether anyone said anything to him prior to the shooting. He did not see the person who shot him. (III 666). He did not remember where the shots came from (III 671). Espinoza testified



that he does not know Jonathan Sanchez, and claimed that the first time he saw Donko was at a court hearing. (III 667-68).

Similarly, Sanchez could not remember many details of the events giving rise to this case. He testified that he saw an older model Toyota, but he couldn't see the shooter. He believed he was shot by the passenger because he saw the passenger door open, but he could not identify anyone. (III 686-87) He did not get a good look at the shooter, and could not remember what the shooter was wearing. (III 688, 689). Sanchez contradicted Espinoza's testimony that the two did not know each other, and Sanchez described Espinoza as a friend who had called him on the day of these events; thus, Sanchez and Espinoza gave completely conflicting accounts of their friendship. (III 688). Sanchez testified that he had never seen Donko in his life. (III 689).

Although Ramos changed his version of events and claimed that Donko was the man who exited the Toyota on the day of the shooting, Ramos did not testify that the man he saw had tattoos, Donko's most distinctive physical characteristic. Significantly, Ramos was not able to identify Donko until he saw him sitting at the defense table during Ramos's trial testimony. (III 702-03; IV 759).

Although forensic analyst Rubino testified that Donko's DNA was found on a red shirt in the neighborhood, Rubino admitted that the remaining DNA on the red shirt could have been from a Hispanic male. (III 644). Although Metro analyst Aoyama testified that Donko's fingerprint was found on a license plate in the Toyota, Aoyama admitted that she did not know who might have left the other fingerprints on the Toyota. (III 658).

"The Due Process Clause of the United States Constitution 'protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'"

*Bryant v. State*, 114 Nev. 626, 629 (1998) (quoting *Carl v. State*, 100 Nev. 164, 165 (1984) (further internal citations omitted)). The relevant inquiry in reviewing the evidence supporting a jury's verdict is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Bolden v. State*, 124 P.3d 191, 194 (Nev. 2005) (internal citations omitted). Because the evidence revealed that the State's witnesses were inconsistent and unreliable, and because the State's key witness admitted to meaningful and substantive inaccuracies in his identification of the shooter, this Court should reverse for insufficient evidence. *Batin v. State*, 118 Nev. 61, 65, 38 P.3d 880, 883 (2002). Further,

either Sanchez or Espinoza lied under oath about their relationship. False and inaccurate testimony violates a defendant's Fourteenth Amendment due process rights and convictions must be set aside " . . . if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *U.S. v. Agurs*, 427U.S. 97, 103 (1976); *Giglio v. U.S.*, 405 U.S. 150, 154 (1972). Because the State failed to prove these convictions beyond a reasonable doubt, reversal is warranted.

**VII. Cumulative error warrants reversal of these convictions under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.**

Where cumulative error at trial denies a defendant his right to a fair trial, this Court must reverse the conviction. *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). In evaluating cumulative error, this Court must consider whether "the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id.* Viewed as a whole, the combination of errors in this case warrants reversal of these convictions.

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## **CONCLUSION**

Based on the foregoing argument, this Court should reverse these convictions and dismiss the charges for insufficient evidence, or remand this case for a new trial.

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## **CERTIFICATE OF COMPLIANCE**

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DATED this 9 day of December, 2020.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 9 day of December, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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