IN THE SUPREME COURT OF THE STATE OF NEVADA

TED MICHAEL DONKO, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 81075

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUE(S)

1. Whether the district court did not violate Donko's federal and state due process rights under the fifth, sixth, and fourteenth amendments by admitting the in-court identification?

2. Whether the district court did not violate Donko's protections against Double Jeopardy?

3. Whether the district court's alleged error regarding restitution is waived and/or harmless?

4. Whether the district court did not violate Donko's constitutional rights by rejecting the proposed jury instructions?

5. Whether the State did not commit prosecutorial misconduct?

6. Whether the State did not fail to prove that Donko committed the crimes in this case?

7. Whether there was no error to cumulate?

STATEMENT OF THE CASE

On December 19, 2019, TED MICHAEL DONKO (hereinafter "Donko") was charged by way of Information as follows: Counts 1 and 2 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481); Counts 3, 4, and 5 – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count 6 – Assault with a Deadly Weapon (Category B Felony - NRS 200.471 - NOC 50201); Count 7 – Discharging Firearm At or Into Occupied Structure, Vehicle, Aircraft, or Watercraft (Category B Felony – NRS 202.285); and Count 8 – Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS 202.360). I AA 8-11.

On February 10, 2020, the State filed an Amended Information whereby it severed Count 8 – Ownership or Possession of Firearm by Prohibited Person. I AA 123-25. Donko's jury trial commenced that same day. II AA 326. On February 13, 2020, the State filed a Second Amended Information that reflected the bifurcated charge of Ownership or Possession of Firearm by Prohibited Person. I AA 127-28.

On February 13, 2020, after four (4) days of trial, the jury found Donko guilty of the following: Counts 1 and 2 – Battery with Use of a Deadly Weapon; Counts 3, 4, and 5 – Attempt Murder with Use of a Deadly Weapon; Count 6 – Assault with a

Deadly Weapon; and Count 7 – Discharging Firearm At or Into Occupied Structure, Vehicle, Aircraft, Watercraft. IV AA 942-43. After reaching this verdict, the second phase of the trial, involving solely Donko's bifurcated charge Ownership or Possession of Firearm by Prohibited Person, commenced. V AA 949. The jury also found Donko guilty of such charge. V AA 958.

On April 20, 2020, the district court adjudicated Donko guilty of all charges and orally pronounced the following terms of years for his sentence to the Nevada Department of Corrections ("NDOC"): Count 1 – 24 to 60 months; Count 2 – 24 to 60 months, concurrent with Count 1; Count 3 – 36 to 96 months, consecutive to Counts 1 and 2, plus 12 to 30 months for the Use of a Deadly Weapon, consecutive to Count 3; Count 4 – 36 to 96 months, plus a consecutive term of 12 to 30 months for the Use of a Deadly Weapon, to run consecutive to Count 3; Count 5 – 36 to 96 months, plus 12 to 30 months for the Use of a Deadly Weapon, to run consecutive to Count 4; Count 6 – 12 to 30 months, to run concurrent; Count 7 – 12 to 30 months, to run concurrent; and Count 8 – 12 to 30 months, to run concurrent. V AA 973-74. The Court further clarified that the only sentences that would run consecutive were "the three Attempt Murders with Use of a Deadly Weapon," Donko would receive an aggregate sentence of 12 to 31.5 years, including the deadly weapon enhancements, the district court would retain jurisdiction over the restitution, and he would receive 150 days credit for time served. V AA 974-75. The Judgment of

Conviction was filed on April 28, 2020, provided the aforementioned sentences as well as clarified more fully that Count 3 would run consecutive to Counts 1 and 2, but listed the aggregate total sentence, including the deadly weapon enhancements, as 144 to 378 months, and the aggregate sentence, not including the deadly weapon enhancements, as 108 to 288 months. I AA 194-96.

On June 3, 2020, the State filed a Notice of Motion and Motion to Address Aggregate Sentence Calculations, wherein the State argued that the appropriate aggregate sentence, based upon the charges at sentencing, was 168 to 438 months. I AA 197-204. On November 24, 2020, the district court explained by way of Minute Order that while it made a clerical error and miscalculated the aggregate sentence on the day of sentencing, but it appropriately held that Counts 7 and 8 would run consecutive to the Attempt Murder charges, and Count 3 would run consecutive to Counts 1 and 2. I AA 217A. Accordingly, the district court found that the appropriate aggregate sentence was 168 to 438 months and ordered that an Amended Judgment of Conviction be filed. V AA 217A.

STATEMENT OF THE FACTS

On October 1, 2019, at around 12:15 PM, Las Vegas Metropolitan Police Department ("LVMPD") officers responded to a shooting at 56 North Linn Lane in Clark County, Nevada. III AA 544-45. The call to law enforcement described the shooter as a Hispanic male, about 5 foot 11, and was wearing red. III AA 545, 550.

Additionally, a gray Toyota Corolla was seen fleeing the scene of the shooting. III AA 545.

When officers arrived at the crime scene, they saw the two male shooting victims lying on the ground next to a truck. III AA 545. One of the men, Jonathan Sanchez-Loza, had been shot in the leg, while the other, Fernando Espinoza, had been shot in the abdomen and the hand. III AA 545, 662, 684. Officers also observed bullet impacts on the truck and the garage bay door of the residence as well as eight shell casings in the street. III AA 546.

Sanchez-Lopez testified that on the day of the shooting, he received a call at around 11:30 AM from Espinoza. III AA 681. Eventually, he met up with Espinoza, a man named Gilbert, a man named DeAndre Woods, and the owner of the home to the address of the crime scene to remove trash to the dump. III AA 681. Ultimately, however, he helped moved furniture into the white truck that was at the scene. III AA 682. At about 12:00 PM he recalled someone saying "Hey, where's Shorty?" III AA 682. Sanchez-Loza then looked over in the direction of the voice and saw the passenger of a Toyota, with the passenger door open, pointing a firearm at him. III AA 682, 687. Sanchez-Loza was then shot and dropped to the ground. III AA 682-83. While lying on the ground, he recalled seeing Espinoza fall into the back of the truck and, while in and out of consciousness, he called his uncle who lived up the street. III AA 684. Sanchez-Lopez heard about ten gunshots total. III AA 684.

The next thing Sanchez-Lopez remembered was waking up in the hospital. III AA 684. He had been shot in the right thigh and left thigh. III AA 684. As of the day of his trial testimony, he still had a bullet lodged in his left leg and had to walk with a cane. III AA 685. Sanchez-Lopez further testified that he had undergone surgery in his leg, still had pain, and had scars from the injuries. III AA 685.

Espinoza confirmed that he too was at the residence moving furniture using his brother's vehicle. III AA 663. However, Espinoza testified that while he was facing the street at the time of the shooting, he did not know from where the shots originated. III AA 671. That being said, Espinoza also testified that he almost did not come to court because he did not want to testify at the trial and only participated because he was under subpoena. III AA 666-67. However, LVMPD Detective Jason Marin testified that when he interviewed Espinoza at UMC the day after the shooting, Espinoza told him that while Espinoza was at the address of the shooting on October 1, 2019, an older model Toyota pulled up to the residence. IV AA 818. He further explained to Detective Marin that he saw a passenger get out of the vehicle and had either asked about Shorty or said "Fuck Shorty." IV AA 818. However, Espinoza stated he did not get a good look at the shooter. IV AA 818.

The day before the shooting, on September 30, 2019, Woods recalled sitting on a chair at his ex-girlfriend's house when two young men pulled up in an older Toyota. III AA 704-05; IV AA 707-08. The two men, one wearing a black shirt and

the other wearing a red shirt, came up to Woods and asked if he knew someone named Shorty. III AA 704-05. Woods responded to the men that he did not know who Shorty was and the men left. III AA 705.

At the time of the shooting on the following day, Woods testified that he was sitting on a chair while the other men were moving furniture to the truck. IV AA 708. While sitting, Woods saw the same Toyota pull up. IV AA 712. Woods then saw the same white male wearing a red shirt that had asked him who Shorty was on the previous day, and that he later identified as Donko, exit the vehicle and point a gun at the person in front of Woods. IV AA 713-14. Donko then said "Fuck Shorty" and started shooting. IV AA 713. The Toyota subsequently fled from the scene. IV AA 714. Woods, appearing scared, later described the shooter to responding officers. IV AA 809. He described the shooter as a Hispanic male, about 5 foot 11, 200 pounds, had nearly bald hair, and was wearing a red t-shirt. IV AA 809.

Genaro Ramos, who was down the street working on his mother's vehicle at her home, heard about eight to ten gunshots. III AA 694-95. A couple of minutes later, he noticed a vehicle driving quickly down the street. III AA 694-95. Ramos recalled that the vehicle he saw speeding was an older model, gold, sand colored, Toyota Corolla. III AA 695. After the Toyota sped by, he saw the vehicle stop, and then saw a person, wearing a red shirt, exit the vehicle, look around suspiciously, and search his pockets. III AA 696. The person then tried to go back to the vehicle,

but then started running or walking down the street. III AA 696. Ramos described this person as a white male in his 30s. III AA 697. Although Ramos did not initially identify Donko as the individual he saw at trial, after he was excused and the State explained he was free to leave, Ramos indicated to the State that he was nervous. IV AA 755-56. When the State asked why that was, Ramos stated it was his first time testifying and that the man he saw in court was the man he saw exiting the Toyota on the day of the shooting. IV AA 756. Based on this new information, the State recalled Ramos who nervously identified Donko as the man he saw wearing a red shirt, parking the Toyota Corolla, and walking up the street on the day of the shooting. IV AA 759-760.

After LVMPD officers responded to the crime scene, they canvassed the surrounding streets for evidence. III AA 557-58. Eventually, officers found a vehicle matching the description provided, an unregistered, gray or silver, four-door Toyota Corolla, in the same neighborhood as the shooting. III AA 553; IV AA 811, 813. When officers brought Ramos to view the Toyota Corolla, he told them it was the same vehicle he saw speed by after he heard the gunshots. III AA 698. After locating the vehicle, investigators processed the vehicle for fingerprints and recovered a license plate, a .40 caliber cartridge, as well as a bullet that had a head stamp that matched the casings found at the scene. IV AA 812. The latent prints that were

removed from the license plate that was recovered were later determined to be a match to Donko's left middle finger. IV AA 818-19.

Officers also found a red shirt which appeared to have been laid on the side of the road in the same neighborhood as the crime scene. III AA 557-58; IV AA 814. The DNA buccal swab that was later obtained from Donko matched the DNA that was swabbed from the red shirt. IV AA 823. Officers also recovered surveillance video from a resident that depicted an individual matching the description of the shooting suspect who was wearing a red shirt and had nearly bald hair in the video. IV AA 814-15. The suspect in the video was seen walking in the direction the red shirt was eventually found. IV AA 815.

In later days, officers conducted a photo lineup with Woods. IV AA 819. They showed Woods six photos, including one of Donko. IV AA 819. Complying with routine practice, all of the men in the photos met the same description as Donko as far as height, weight, skin tone, and hair style. IV AA 819. LVMPD Detective Jason Marin, who had conducted the photo lineup, provided the directions to Donko and after Donko signed the form stating he understood the instructions for the photo lineup, Woods wrote down that the man in photo number five was the shooter and he was 95% sure. IV AA 821. Donko was photo number five. IV AA 821. Woods testified that the reason he was 95% sure as opposed to 100% was because when he had previously seen the shooter his hair was shorter which made him only 95% sure.

IV AA 720. Further, when asked whether learning later on that Donko was white instead of Hispanic changed his mind on his identification, he stated no. IV AA 721. Moreover, seeing that Donko did not have tattoos did not change Woods' mind about Donko being the shooter because Woods was not focused on the tattoos when he was trying to get out of the crossfire on the day of the shooting. IV AA 721.

Detective Marin testified at trial that it did not change the officers' investigation when Woods originally described the shooter as a Hispanic male because he could have interpreted it differently since he had such a brief interaction with the shooter. IV AA 820. In fact, a race mix up is common. IV AA 820. Notably, Detective Marin also testified that after Donko was apprehended the first time, he only noticed Donko's tattoos was when he was sitting two feet from him because Donko's tattoos were not immediately apparent. IV AA 822.

When Detective Marin later interviewed Donko, Donko stated that he knew Shorty, but there was no evidence that Donko and Woods knew each other. IV AA 877. When Detective Marin asked Donko about his fingerprint in the vehicle, Donko said he was the passenger in the vehicle, which he described as an older model sedan, the night before the shooting. IV AA 878. Donko, ignoring counsel's advice, also testified at trial and stated that he met Woods in the past and hung out with him. IV AA 794, 844-847.

/ / /

SUMMARY OF THE ARGUMENT

First, the district court did not violate Donko's federal and state due process rights under the Fifth, Sixth, and Fourteenth Amendments by admitting Genaro Ramos' in-court identification. Not only is his "trial by ambush" argument irrelevant because both parties were surprised by Ramos' late disclosure, but also Donko's cross-examination of Ramos was effective and there is no such occurrence as an ex parte communication between a witness and prosecutors. Second, the district court did not violate Donko's protections against Double Jeopardy. The district court appropriately corrected a clerical error when it amended Donko's aggregate sentence. Third, the district court's alleged error regarding restitution is waived and/or harmless. In this case, the State respectfully argues that the appropriate remedy is to remand the case to the district court to rectify the restitution amount. Moreover, the underlying policy concerns of Witter do not apply in the instant case where Donko is raising this issue for the first time in a timely direct appeal. Further, if the Court were to apply Witter to the instant case, Donko may have effectively waived this issue because he treated the Judgment of Conviction as final when he responded to the State's Motion to Dismiss Appeal and urged this Court to proceed with the appeal. Additionally, if the Court is to apply Witter, Donko would be limited to raising only this issue on appeal because it is the only information that was altered in the amended judgment of conviction. Regardless, any error would have been

harmless. Fourth, the district court did not violate Donko's constitutional rights by rejecting certain proposed jury instructions. Fifth, the State did not commit prosecutorial misconduct during its rebuttal argument and any error would have been harmless due to the overwhelming evidence of guilt. Sixth, the State did not fail to prove that Donko committed the crimes in this case. Seventh, there was no error to cumulate. Accordingly, the State respectfully requests that the Judgment of Conviction be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT VIOLATE DONKO'S FEDERAL AND STATE DUE PROCESS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS BY ADMITTING THE IN-COURT IDENTIFICATION

Donko argues that eyewitness Genaro Ramos' in-court identification violated Donko's rights, and his motion to strike as well as motion for mistrial should have been granted. AOB at 11-18. Specifically, he claims that the circumstances of the in-court identification were suggestive, created a high risk of misidentification, and amounted to a "trial by ambush." AOB at 11-18.

The denial of a motion for mistrial is within the district court's sound discretion and Nevada appellate courts will not disturb such decisions unless there is a clear showing of abuse of discretion. Ledbetter v. State, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006); Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993). A mistrial may only be granted where "prejudice occurs that prevents the

defendant from receiving a fair trial." Rudin v. State, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004).

Prior to trial, Ramos was never asked to identify Donko. Ramos never identified Donko to police after the incident occurred and was never asked by anyone to do so. Ramos did not identify Donko at the preliminary hearing because he did not testify. On the third day of trial, Genaro Ramos testified. III AA 693. During this testimony, Ramos did not identify Donko, but instead testified that on the day of the shooting, a Toyota sped by him and then stopped. III AA 696. After the vehicle stopped, he saw a man wearing a red shirt exit the vehicle, look around suspiciously, search his pockets, and then walk down the street. III AA 696. No one, including Donko's counsel, ever asked Ramos during his testimony whether he could identify Donko. III AA 693-703.

After Ramos testified, the State went outside of the courtroom to release Ramos from his subpoena, but when it did so, Ramos responded that he was very nervous. IV AA 758. When the State asked Ramos why he was nervous, Ramos indicated he was nervous because he saw the man he saw on the day of the shooting in the courtroom. IV AA 758.

During a bench conference in its case in chief, the State informed the district court and Donko's counsel that he would be recalling Genaro Ramos to testify. IV AA 751-52. In response, Donko's counsel stated, "Okay." IV AA 752. The State

then recalled Ramos and began to ask him questions regarding what happened after he was released from his subpoena and what he told the State he wanted to share. IV AA 755-56. Ramos eventually identified Donko as the man he saw coming out of the Toyota on the day of the shooting and Donko's counsel objected. IV AA 756. The district court then hosted a bench conference with the parties. IV AA 756.

During the bench conference, Donko's counsel argued that Ramos' identification of Donko was improper because he failed to previously identify Donko when he testified for the first time, but then after the State walked Ramos out of the courtroom, he then wished to identify Donko. IV AA 756. Counsel further argued that Donko was not given any discovery related to Ramos' newfound identification. IV AA 757. The State explained that he put on the record exactly what happened, that Ramos had appeared extremely nervous and told the State he wanted to identify the man in court but got scared. IV AA 757. The district court stated that while it understood Donko's counsel's points, it could not sustain an objection as there was no legal basis to do so since it was permissible testimony, and invited Donko's counsel to cross-examine Ramos on the full gamut. IV AA 757-58. Donko's counsel then moved for a mistrial on the same basis. IV AA 758. The State then recounted, in detail, exactly what happened:

> MR. LEXIS: Again, Judge, it's fair cross-examination. I'm telling the Court exactly what happened as far as what occurred in this case is I went out to release him from his subpoena. I said, You're good to go.

> He then told me he was extremely nervous. I said Why? He says, Because I saw the guy in court, that was the guy.

IV AA 758. The Court denied the motion for mistrial as it did not appear that the State did anything improper but would permit Donko to cross-examine the witness. IV AA 758-59. Ramos' testimony then continued and he identified Donko as the man he saw. IV AA 759.

After Ramos concluded his testimony, and outside the presence of the jury, Donko's counsel again made a record that what occurred was improper and wanted to ensure that her motion to strike and motion for mistrial were on the record. IV AA 773. The State then explained:

> MR. LEXIS: Your Honor, State did nothing improper. I asked him myself if, after Defense counsel got up there and asked for a mistrial, and addressed their concerns, that the State never told him, Hey, come in here and identify the victim -- or, excuse me, the defendant.
>
> I never showed him a picture of the defendant. The cops never showed him a picture of the defendant. Simply walked him out, as he stated, told him you're good to go, and that's when he told me he wished he would have said that that was the man. He was nervous, but he recognized that person in this court as being the guy with the red shirt. So I asked to recall him.

IV AA 773-74. The district court repeated that it was denying Donko's motions and explained:

> THE COURT: Okay. So, look, I understand both sides. Right? I don't know what are prosecutors supposed to do if a witness walks out and then turns around and says, hey, I was nervous, I wanted to ID the guy, but I was too scared to do so.
>
> On the other side, I see the defense's position, because they feel like, well, he never ID'd him. Then he had the ability to sit here for 30

> minutes or however long it was, get the opportunity to be alone, and now he wants to identify him. But that's really kind of the beauty and mess of a trial, right? It's completely fluid and it's almost like organized chaos.
>
> You never know what's going to happen. And so here, I definitely don't think that the State did anything wrong. I don't think that they followed him out and, you know, tried to get him to change his story. It's clear, I think everybody would probably agree, he's very nervous up there. In fact, once Mr. Hauser started asking him questions, he kind of looked to me and said, I really -- I need a break, or whatever it was that he said.
>
> So I understand why the defense is frustrated. But I don't think that there was anything wrong with what happened. I think exactly what happened, happened. He walked out, he told the prosecutor, Hey, I was scared, but I wanted to identify him. And so he came back in and he did that. I think that that was fair game for cross examination, and I think the arguments that you are making are great arguments to be hand on cross-examination and then in front of a jury. But I don't think that they're objectionable and make the identification inadmissible, nor do I think it's cause for a mistrial.

IV AA 774-75.

In the instant appeal, Donko argues that Ramos' in-court identification of Donko was suggestive because he had not previously identified Donko and only identified Donko for the first time at trial after he had seen him at the defense table during his first testimony. AOB at 13-17. Not only is such argument based on pure speculation, but also Donko fails to identify that he is attacking the credibility of Ramos' testimony, i.e. whether the jury should have believed the identification of Donko, which is a matter solely within the province of the jury. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (concluding that the Court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility

of the trier of fact). Indeed, in Browning v. State, 104 Nev. 269, 274, 757 P.2d 351, 354 (1988), this Court concluded that a witness' failure to positively identify the defendant during a pre-trial lineup, but was able to subsequently able to identify the defendant during trial did not render the in-court identification inadmissible. Instead, such fact was something to be weighed by the jury. Id. Accordingly, Donko's citation to this Court's and U.S. Supreme Court's precedent to support his challenge to Ramos' testimony is ineffective as it would not have provided the district court with grounds to grant a mistrial or strike the testimony, but rather was a matter for the jury to contemplate. AOB at 14-17.

Moreover, Donko attempts to argue that there was improper "ex parte communication" between Ramos and the State. Not only did the State explain multiple times the exact details of what happened, which the district properly determined did not amount to improper behavior, but also there is no such thing as an ex parte communication between a witness and a prosecutor. Further, to the extent Donko complains that he was surprised by Ramos' testimony because the State had never mentioned Ramos could identify Donko, the record demonstrates that the State was equally surprised. Indeed, Ramos was never asked to identify Donko prior to trial or even during his first testimony at trial because everyone presumed that Ramos could not identify Donko. The State even mentioned that it never showed Ramos a picture of Donko. Ramos did not testify at the preliminary hearing in this case, so

trial was probably the first time Ramos would have been able to see Donko up close since the day of the incident. Yet, Donko, like the State, was given an equal opportunity to question Donko about this newly discovered identification. Indeed, Donko's counsel effectively tested the veracity of what exactly happened during Ramos' testimony. IV AA 761. Not only did counsel ask who Ramos spoke to prior to his testimony, but he also asked Ramos whether the State approached him after he testified and whether he could confuse Donko with others in the courtroom. IV AA 761-65. Thus, counsel was able to effectively question and test Ramos' identification of Donko and therefore Donko's "trial by ambush" argument is a red herring.

Donko had the ability to contact Ramos and ask him about what he recalled from the day of the shooting and whether he could identify anyone. Indeed, the State provided Donko with its witness disclosure that named Ramos and would provide his address. I AA 12-13. Nothing prevented Donko from questioning Ramos prior to trial in order to potentially retrieve this information—information that not even the State had. Sanchez v. State, 466 P.3d 1290, unpublished, 2020 WL 4194095, Docket No. 77457 (Nev. 2020) (concluding that the district court appropriately denied the defendant's motion for mistrial regarding a witness' testimony because "where the record does not support that the victim relayed this specific detail to the State, nothing prohibited Sanchez from interviewing the victim ahead of time or

impeaching him during trial, and the State's witness disclosures and discovery materials included the victim's contact information."); Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998) (concluding that the State is not required to "disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense").

Regardless, any error would have been harmless. See NRS 178.598 (Any "error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"); Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). On the other hand, constitutional error is evaluated by the test laid forth in Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967). The test under Chapman for constitutional trial error is "whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n.14 (2001).

Under any standard, any error would not warrant reversal. Donko was permitted to cross-examine Ramos and thereby cast doubt on Ramos' identification of Donko. Moreover, the jury was presented with overwhelming evidence linking Donko to the shooting. Woods identified Donko as the man that shot at him and the other men. III AA 705-06. An older model, gray, Toyota Corolla, that several

eyewitnesses described as the vehicle the shooter used to flee the scene, was found in the same neighborhood as the crime scene. III AA 553; IV AA 811, 813. Inside of the vehicle, investigators found a .40 caliber cartridge that matched the casings found at the scene. IV AA 812. A latent print found on the license plate inside of the vehicle was a match for Donko's left middle finger. IV AA 818-19. The shooter was described as wearing a red shirt, and a red shirt containing Donko's DNA was found in the same neighborhood where the shooting occurred. III AA 557-58; IV AA 814, 823. Surveillance video footage corroborated Ramos' testimony and depicted an individual matching the description of the shooting suspect, wearing a red shirt, walking in the direction of where the red shirt was ultimately found. IV AA 815.

Ramos' testimony helped the jury identify Donko, but there was a great deal of additional evidence also identifying him. Accordingly, Donko was not prejudiced by Ramos' testimony.

II. THE DISTRICT COURT DID NOT VIOLATE DONKO'S PROTECTIONS AGAINST DOUBLE JEOPARDY

Donko claims that after he began serving his sentence, the district court improperly increased his sentence and violated Donko's protection against Double Jeopardy. AOB at 18-36. More specifically, he argues that the district court's action was a miscalculation as opposed to a "clerical error" and the district court should have amended his aggregate sentence in a less severe manner. AOB at 21-26.

However, his argument fails as the district court merely amended a clerical error in its aggregate total sentence calculation.

On April 20, 2020, the district court sentenced Donko to the Nevada Department of Corrections ("NDOC") as follows: Count 1 – 24 to 60 months; Count 2 – 24 to 60 months, concurrent with Count 1; Count 3 – 36 to 96 months, consecutive to Counts 1 and 2, plus 12 to 30 months for the Use of a Deadly Weapon, consecutive to Count 3; Count 4 – 36 to 96 months, plus a consecutive term of 12 to 30 months for the Use of a Deadly Weapon, to run consecutive to Count 3; Count 5 – 36 to 96 months, plus 12 to 30 months for the Use of a Deadly Weapon, to run consecutive to Count 4; Count 6 – 12 to 30 months, to run concurrent; Count 7 – 12 to 30 months, to run concurrent; and Count 8 – 12 to 30 months, to run concurrent. V AA 973-74. The Court further clarified that the only sentences that would run consecutive were "the three Attempt Murders with Use of a Deadly Weapon," Donko would receive an aggregate sentence of 12 to 31.5 years, i.e., 144 to 378 months, including the deadly weapon enhancements, the district court would retain jurisdiction over the restitution, and he would receive 150 days credit for time served. V AA 974-75. The Judgment of Conviction filed on April 28, 2020 provided the aforementioned sentences, but listed the aggregate total sentence, including the deadly weapon enhancements, as 144 to 378 months, and the aggregate sentence,

not including the deadly weapon enhancements, as 108 to 288 months. I AA 194-96.

On June 3, 2020, the State filed a Notice of Motion and Motion to Address Aggregate Sentence Calculations, wherein the State argued that the appropriate aggregate sentence, based upon the charges at sentencing, was 168 to 438 months. I AA 197-204. On November 24, 2020, the district court explained by way of Minute Order that while it made a clerical error and miscalculated the aggregate sentence on the day of sentencing, it held that it appropriately ruled that the weapon enhancements for the Attempt Murder charges would run consecutive to those charges and Count 3 would run consecutive to Counts 1 and 2. I AA 217A. Accordingly, the district court found that the appropriate aggregate sentence was 168 to 438 months and ordered that an Amended Judgment of Conviction be filed. V AA 217A.

As a preliminary matter, this issue is moot. An amended judgment of conviction reflecting the district court's correction of the aggregate total sentence has not yet been filed.[1] Minute orders indicate that is the district court's intent, but with no amended judgment of conviction having been filed, the Court should not consider the claim until the judgment of conviction is officially amended by the

[1] Understandably, no amended JOC is included in Appellant's Appendix because it does not exist.

filing of an amended judgment of conviction or, at the very least, the case should be remanded for the limited purpose of correcting the judgment of conviction in accordance with the district court's minute order. I AA 217A.

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that "no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'" Jackson v. State, 128 Nev. 598, 604, 291 P.3d 1274, 1277-78 (2012). The Clause protects against multiple punishments for the same offense. Id.

A judgment of conviction may be amended at any time to correct a clerical error. NRS 176.565. The district court explained at sentencing exactly which counts would run concurrent and which would run consecutive, but merely committed error in how it added the individual sentences to reach the total aggregate sentence. Indeed, the district court specified at sentencing and again in its November 24, 2020 Minute Order, that only Counts 3, 4, and 5 were to run consecutive. V AA 974; I AA 217A. Applying that language and adding the sentences, the appropriate total aggregate sentence would have been 168 to 438 months as opposed to the 144 to 378 months that the district court first calculated.[2] Accordingly, the district court did not

[2] The calculation should have been as follows: The greatest of the concurrent sentences (24 to 60 months) + the consecutive sentences of Counts 3, 4, and 5 ((36 to 96) + (36 to 96) + (36 to 96)) + the consecutive deadly weapon enhancement sentences for Counts 3, 4, and 5 ((12 to 30) + (12 to 30) + (12 to 30)). The minimum

punish Donko for the same crime twice, but instead checked its work and corrected its error in adding the sentences.

Despite the district court's clear explanation of its intent, Donko argues that the district court erroneously corrected its error in such a way that erroneously increased Donko's sentence even though there was a less severe option available. Donko relies on Miranda v. State, 114 Nev. 385, 956 P.2d 1377 (1998), to support his argument. However, Miranda is completely distinguishable from the instant case. In Miranda, the defendant was sentenced to two consecutive terms of 18 to 36 months. Id. at 386, 956 P.2d at 1377. The district court later determined that such calculation violated the rule under NRS 193.130(1) which states that a minimum term of imprisonment "must not exceed 40 percent of the maximum term imposed." Id. In light of this revelation, the district court corrected the illegal sentence by increasing the maximum term of the sentence. Id. This Court has explained that while a district court has the authority to correct illegal sentences and even increase the punishment, to comply with Double Jeopardy principles in may only increase the punishment

> 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.

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sentence is 24+(36x3)+(12x3) 168, and the maximum sentence is 60+(96x3)+(30x3) = 438 months.

Id. at 387, 956 P.2d at 1378. Accordingly, the district court erred because it could have corrected the illegal sentence by decreasing the minimum term as opposed to the increasing the maximum term. Id.

Unlike the district court in Miranda that altered an illegal sentence by increasing it, here the district court did not correct an illegal sentence but instead corrected the language in the judgment of conviction that reflected a miscalculation of the total aggregate sentence. In other words, the district court did not increase Donko's aggregate sentence because it was illegal, but instead modified the aggregate sentence language to comply with the original individual sentences it pronounced. Accordingly, Miranda does not apply to the instant case.

In addition to Miranda being inapplicable to the instant case, Donko's argument that the district court's error was a miscalculation rather than a clerical error equally fails. AOB at 24-26. NRS 176.565 states:

> Clerical mistakes in judgments, orders or other parts of the record and *errors in the record arising from oversight* or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

(emphasis added). Indeed, this Court has stated that "a judgment may be amended at *any time* to correct a clerical error…" Sullivan v. State, 120 Nev. 537, 540, 96 P.3d 761, 764 (2004).

Donko asserts that the district court's miscalculation of the aggregate sentence in this case was not a clerical error that the district court could amend. Donko's

argument fails as this Court has held that a miscalculation of an aggregate sentence in a judgment of conviction is in fact a clerical error that a district court can amend. Devlin v. State, 448 P.3d 550, unpublished, 2019 WL 4392531, Docket No. 73518 (Nev. 2019) (concluding that the district court committed a clerical error when, based on the individual counts, the aggregate minimum sentence totaled eleven years instead of twelve years in the original judgment of conviction). Therefore, at most, the district court committed a clerical error that it corrected in its November 24, 2020 Minute Order. Accordingly, Donko's claim fails.

III. THE DISTRICT COURT'S ALLEGED ERROR REGARDING RESTITUTION IS WAIVED AND/OR HARMLESS

Donko argues that the district court erred when it retained jurisdiction over restitution at Donko's sentencing hearing. AOB at 26-28. The State agrees that the district court erred, but the appropriate remedy is not reversal.

On April 20, 2020, the Court sentenced Donko, but stated that it would retain jurisdiction as to any restitution amount. I AA 194-96; V AA 972-75. The State agrees that a Judgment of Conviction is not final when it omits an amount for Restitution. NRS 176.105(1)(c); Whitehead v. State, 128 Nev. 259, 263, 285 P.3d 1053, 1055 (2012) (concluding "that a judgment of conviction that imposes a restitution obligation but does not specific its terms is not a final judgment.").

In the State's Motion to Dismiss, it argued that the appropriate remedy for the district court's error was to remand the matter to the district court because the Court

did not have jurisdiction over the matter. The State cited to Slaatee v. State, 129 Nev. 219, 221, 298 P.3d 1170, 1171 (2013), in which the Court outlined the appropriate procedure. In Slaatte, the district court failed to provide a specific amount of restitution because it was concerned that the victim might incur additional medical expenses. Id. at 221-22, 298 P.3d at 1171. While recognizing the district court's reasoning, this Court dismissed the defendant's appeal because of a lack of jurisdiction as it stated:

> None of our prior decisions addressed whether the judgment was final given its failure to comply with NRS 176.105(1). If such a judgment is not appealable as a final judgment, see NRS 177.015(3), we lack jurisdiction over this appeal. See Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990) (explaining that court has jurisdiction only when statute or court rule provides for appeal). Our recent decision in Whitehead v. State, 128 Nev. ——, 285 P.3d 1053 (2012), is controlling. In that case, we considered whether a judgment of conviction that imposed restitution but did not specify the amount of restitution was sufficient to trigger the one-year period under NRS 34.726 for filing a post-conviction petition for a writ of habeas corpus. Id. at ——, 285 P.3d at 1055. Based on the requirement in NRS 176.105(1)(c) that the amount of restitution be included in the judgment of conviction if the court imposes restitution, we concluded "that a judgment of conviction that imposes a restitution obligation but does not specify its terms is not a final judgment" and therefore it does not trigger the one-year period for filing a habeas petition. Id. *Given our decision in Whitehead that such a judgment is not a final judgment, we necessarily conclude that it also is not appealable.*

(emphasis added). Indeed, all of the aforementioned case law demonstrates why, ordinarily, the appropriate remedy for the error in the instant case is to return the matter to the district court because this Court does not have jurisdiction. These cases

remain good law and were not overturned by this Court's subsequent decision in Witter v. State, 135 Nev. 412, 452 P.3d 406 (2019).

On the other hand, the circumstance underlying the Witter decision is not factually similar to the instant case. In Witter, 135 Nev. at 415-16, 452 P.3d at 409-410, the defendant treated his Judgment of Conviction as final for several appeals and petition for writ of habeas corpus pleadings. In light of this treatment, the Court concluded that the defendant was estopped from reversing course and subsequently claiming, for the first time, that the Judgment of Conviction was not final when the district court retained jurisdiction over restitution. Id. The Court further explained that estoppel was warranted because of the importance of finality and, more specifically, "a challenge to a conviction made years after the conviction is a burden on the parties and the courts because [m]emories of the crime may diminish and become attenuated, and the record may not be sufficiently preserved." Id. at 416, 452 P.3d at 409 (internal citation omitted).

Not only is the instant case distinguishable because Donko is raising the restitution error in his first timely appeal, but also for that same reason the aforementioned policy reasons underlying this Court's decision in Witter do not appear to apply to Donko. In other words, the Witter Court, was concerned about overturning what was, at that point, years of appeals because of a not-technically-final judgment of conviction that the defendant had treated as final the whole time.

Here, Donko immediately challenged the judgment of conviction in his opening brief in his first appeal. The State also challenged the judgment of conviction immediately, arguing that the appeal should be dismissed and the case remanded for the restitution determination so the judgment of conviction would be final. Both Parties argued that the judgment of conviction was not final at the earliest opportunity. And, if the Judgment of Conviction is not final, then this Court lacks jurisdiction over the entire appeal. NRS 177.015(3); Castillo v. State, 106 Nev. 349, 352, 792 P.2d 1133, 1135 (1990). Despite the jurisdictional challenge, this Court did not dismiss the appeal, and relied on Witter in doing so. Because the Witter Court relied on estoppel to overcome a jurisdictional issue, one of three things must be occurring. Either Donko waived the argument that the judgment of conviction was not final when he encouraged the Court to address the merits of the appeal, or the Court waived Donko's argument for him to retain jurisdiction over an appeal that it otherwise would not have if the judgment of conviction was not final, or this Court is overturning Whitehead v. State and is now holding that reserving jurisdiction over restitution does not prevent a judgment of conviction from being a final order, despite NRS 176.015(1)(c). In either of the first two scenarios, Donko's arguments are waived, and in the third scenario the district court did not err by reserving jurisdiction over restitution.

Regardless, even if this Court concludes that Donko did not waive any arguments, the district court's decision to retain jurisdiction over restitution would be harmless error. See NRS 178.598; Knipes, 124 Nev. at 935, 192 P.3d at 1183; Chapman, 386 U.S. at 24, 87 S. Ct. at 828; Tavares, 117 Nev. at 732 n.14, 30 P.3d at 1132 n.14. All of the previous case law on this issue suggested that, except for the circumstance presented in Witter, the remedy for such an error was to remand a case to the district court because this Court lacked jurisdiction, and order the district court to include the restitution, if any, in the judgment of conviction and make a final order. In this case, the Court concluded that the general practice was not appropriate. Other than the technical defect of retaining jurisdiction over restitution, the district court did not commit an appealable error, so there is no remedy. At best, Donko has issued a complaint about an action the district court might make in the future but has not yet done. In conclusion, assuming the Court still intends for a judgment of conviction which does not set an amount of restitution to not be a final order, respectfully the Court should either hold that Donko waived the argument when he motioned to have his appeal considered or should remand for the limited purpose of determining restitution and correct the sentence as discussed *supra* in Section III. Accordingly, the instant issue is moot because no justiciable case or controversy exists. If an error has no remedy, it is obviously harmless.

IV. THE DISTRICT COURT DID NOT VIOLATE DONKO'S CONSTITUTIONAL RIGHTS BY REJECTING THE PROPOSED JURY INSTRUCTIONS

Donko claims that the district court abused its discretion when it rejected some of his proposed jury instructions. AOB at 28-34. Specifically, he believes that the district court should have permitted the following instructions: (1) a modified reasonable doubt instruction, (2) a two reasonable interpretations instruction, (3) a reasonable doubt and subjective certitude instruction, (4) several negatively-worded instructions pursuant to Crawford v. State, and (5) having "not guilty" appear first on the verdict form. AOB at 28-34.

District courts have "broad discretion" to settle jury instructions. Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). District courts' decisions settling jury instructions are reviewed for an abuse of discretion. Crawford v. State, 121 Nev. 746, 748, 121 P.3d 582, 585 (2003). This Court reviews whether an instruction is an accurate statement of the law de novo. Cortinas, 124 Nev. at 1019, 195 P.3d at 319. 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, 14 P.3d 25, 30 (2000), overruled on other grounds, Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006); see also NRS 178.598.

A. Reasonable Doubt Proposed Instruction

Donko argues that he should have been permitted to use a reasonable doubt instruction that substituted the word "unless" for "until" because the instruction as given minimized Donko's presumption of innocence. AOB at 28-29. Specifically, Donko proposed the following instruction in relevant part:

> A defendant in a criminal action is presumed to be innocent *unless* the contrary is proved. This presumption places upon the state the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

I AA 178 (emphasis added).

The district court rejected Donko's proposed amendment and agreed with the State that NRS 175.211 provides the statutory mandated language for a reasonable doubt instruction and that the jury instruction the State proposed was the customary reasonable doubt instruction given. IV AA 780.

Regardless, this Court has previously rejected Donko's exact argument in Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005). In Blake, this Court upheld the use of the phrase "the Defendant is presumed innocent *until* the contrary is proved," because the instruction read as a whole did not nullify the presumption of innocence. Id. (emphasis added). Indeed, the Court found that the "until" phrase read in conjunction with the rest of the instruction, that mirrored the wording

contained in NRS 175.211, ensured that the concept that guilt might not be proven was contemplated. Id. Therefore, Donko's argument fails.

B. Two Reasonable Interpretations Proposed Instruction

Donko next argues that the district court should have permitted his "two reasonable interpretations" proposed instruction because this case relied on unreliable and circumstantial evidence. AOB at 29-30. Specifically, he wanted the following instruction to be used:

> 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 AA 179.

In this case, the State objected to the proposed instruction because it would confuse the jury and was not a required because the jury would be properly instructed on reasonable doubt. IV AA 481. The district court agreed that the language could be confusing to the jury, but would not exercise its discretion to permit the instruction. IV AA 781.

In Bails v. State, 92 Nev. 95, 545 P.2d 1155 (1976), the defendant argued that it was error for the district court to reject his "two reasonable interpretations" instruction. Id. at 96-97, 545 P.2d at 1155-56. As Donko admits, this Court stated that while it is permissible to give such instruction, it is not error for a district court

to refuse such an instruction when the jury is properly instructed regarding reasonable doubt. Id. Indeed, this Court relied on its long list of precedent where it reached the same conclusion. Id. It bears noting that the Court in Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002), affirmed the notion that the district court does not err by failing to give the "two reasonable interpretations" instruction when the jury is instructed on the reasonable doubt standard.

Here, Donko concedes that this Court has already concluded that the instruction he sought at trial was not required because of the reasonable doubt instruction provided. AOB at 30. Indeed, the jury was properly instructed on reasonable doubt via Jury Instruction No. 6. NRS 175.211; I AA 136. Thus, it appears that the parties agree that the district court did not err because it fully complied with this Court's precedent.

C. Reasonable Doubt and Subjective Certitude Proposed Instruction

Donko claims the district court erred when it failed to permit his jury instruction addressing reasonable doubt and subjective certitude on the part of the jurors. AOB at 30-31. The proposed instruction provided, "[t]he reasonable doubt standard requires the jury to reach a subjective state of near certitude on the fact in issue." I AA 180.

In trying to admit this proposed instruction at trial, Donko argued that providing the jury with this additional language would ensure that the jury was not

confused by the reasonable doubt instruction language that was going to be provided pursuant to NRS 175.211. IV AA 782. The State appropriately argued that the language Donko proposed, which was found in Randolph v. State, 117 Nev. 970, 980, 36 P.3d 424, 431 (2001), was merely dicta and the Randolph Court ultimately concluded that because a reasonable doubt instruction complying with the language of NRS 175.211 was given, this additional language was not necessary. IV AA 782. Accordingly, the district court denied the proposed instruction because it found that the reasonable doubt instruction pursuant to NRS 175.211 provided enough guidance to the jurors. IV AA 782.

As Donko concedes, NRS 175.211 provides the mandatory language for a reasonable doubt instruction. AOB at 30. The jury was given such instruction in Jury Instruction No. 6. NRS 175.211; I AA 136. Yet, Donko argues that this Court should overrule precedent and require, for the first time, that additional explanation of reasonable doubt be required without providing this Court with any explanation as to why. Armenta-Carpio v. State, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) ("[U]nder the doctrine of stare decisis, we will not overturn [precedent] absent compelling reasons for so doing.") (internal citation omitted).

In this case, the district court provided the statutorily mandated language pursuant to NRS 175.211 and appropriately, within its discretion, rejected additional language that has never been mandated in the state of Nevada.

D. Negatively-worded Proposed Instructions

Donko argues that the district court abused its discretion when it rejected several of his negatively-worded proposed instructions pursuant to Crawford, 121 Nev. at 748, 121 P.3d at 585. AOB at 31-32.

First, Donko proposed: "[i]f the State fails to prove beyond a reasonable doubt that Mr. Donko did willfully, unlawfully, and feloniously, use force or violence upon the person of another, with use of a deadly weapon, resulting in substantial bodily harm, you must find him Not Guilty." I AA 181. Second, Donko proposed "[i]f the State failed to prove beyond a reasonable doubt that Mr. Donko did willfully, unlawfully, feloniously and with malice aforethought attempt to kill a human being with use of a deadly weapon, you must find him Not Guilty." I AA 182. Third, "[i]f the State fails to prove beyond a reasonable doubt that Mr. Donko did willfully, unlawfully, feloniously, and intentionally place another person in reasonable apprehension of immediate bodily harm, you must find him Not Guilty." I AA 183. Third, Donko proposed "[i]f the State fails to prove beyond a reasonable doubt that Mr. Donko did then and there willfully, unlawfully, maliciously, and felonious discharge a firearm at or into a structure, said structure, not having been abandoned, you must find him Not Guilty." I AA 184. Finally, he provided: "If the State fails to prove beyond a reasonable doubt that Mr. Donko did willfully, unlawfully, and

feloniously own, or have in his possession and/or custody or control, a firearm, you must find him Not Guilty." I AA 185.

At trial, Donko argued that the aforementioned instructions amounted to merely inverse instructions of other instructions already given and should be permitted under Crawford. IV AA 783. The State argued that repeating what is contained in the information did not serve any specific element, and Donko failed to provide how such instructions served his specific defense theory. IV AA 783. The district court then explained:

> THE COURT: [...] And so I do think that it needs to be a specific theory of the case. I don't think if you charge a person with 30 charges, then the defense gets to say the opposite thing of all 30 charges.
>
> So what I offered to Defense is I said, Look, I'm not -- I don't pretend to be an attorney on your case, but it seems to me from opening arguments and from where everyone is going thus far is this a ID case, which both attorneys agreed with me. And I said, If you wish to, you know, ride two horses and said it's an ID case, but, for instance, just for example, if you find it's him, the State has not met the burden of showing he had the intent to kill, and offered a Crawford instruction in regards to whether or not the State had proved the defendant, in his mind, had the intent to kill someone. But they -- it's my understanding that Defense is stating no, that they don't want that.
>
> And without any other reason of showing you what the theory of their case is and how specific detailed Crawford instruction could be made, I am not going to be giving that.

IV AA 784. Without providing any specific theory to justify such instructions, Donko's counsel merely thanked the district court. IV AA 784-85. Indeed, when the matter was re-visited later during trial, the district court echoed its previous ruling

and still did not find that the instructions would serve Donko's theory of the case or any specific element. IV AA 949-950.

The district court properly applied Nevada law when it made its ruling. Indeed, in Crawford, 121 Nev. at 751, 121 P.3d at 586, the Court explained: "[t]his court has consistently held that the 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." (internal quotation marks omitted). This Court has also stated "if a proposed inverse or negatively phrased element instruction is misleading or would confuse the issues, the district court will not err by refusing to give it to the jury." Guitron v. State, 131 Nev. 215, 229–30, 350 P.3d 93, 102 (Nev. App. 2015) (citing Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005)). Moreover, district courts are not required to "accept misleading, inaccurate or duplicitous jury instructions." Carter, 121 Nev. at 765, 121 P.3d at 596.

Here, Donko did not and could not explain how the aforementioned inverse instructions would serve a specific element or his theory of the case. Regardless, even if the proposed instructions had served a specific element or Donko's theory, any error would have been harmless as the jury was properly instructed on the elements of the charged crimes. I AA 132-33.

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E. Placement of "Not Guilty" on Verdict Form

Donko argues that the district court erred when it failed to accept his request that "not guilty" be listed on the jury's verdict form. AOB at 32-33. He claims that placing the option of "guilty" first on the form instead of "not guilty" undermines the presumption of innocence because it implies that guilt is the first option the jury should consider and it implies that the district court has a preference of which option the jury selects. IV AA 785-86; AOB at 32-33. When presented with Donko's argument at trial, the district court appropriately rejected the argument and explained that the customary order of the verdict form was accurate. IV AA 786.

This Court has previously rejected Donko's same argument in Yandell v. State, 467 P.3d 638, unpublished, 2020 WL 4333604, Docket No. 78259 (Nev. 2020) ("[w]e have found no case, nor has appellant cited any, adopting appellant's position that the 'not guilty' opinion must be listed before the 'guilty' option on a verdict sheet.") (internal citation omitted).

Donko unpersuasively cites to dicta in Smith v. State, 249 Ga. 228, 232, 290 S.E.2d 43, 47 (1982), to advance his argument. However, such dicta is not instructive, let alone persuasive. In Smith, 249 Ga. at 228, 290 S.E.2d at 46-47, the Georgia Court reviewed whether a lower court erred when it included the terms, "guilty" and "not guilty", but failed to include a not guilty by reason of insanity on the verdict form. The court held that "[i]f prepared forms for verdicts are to be

submitted to juries, it is obviously preferable that the submission contain a form for each verdict which might be permissible in the case." Id. The court then offered an example for the importance of the jury and elaborated that even the order of the words in the hyphenated "guilty-not guilty" option on the verdict form could influence the jury, and that it would be better if such terms would just be omitted all together. Id.

Here all possible options for the jury's verdict were permitted on the verdict form, so any error in the order of the terms "guilty" or "not guilty" would have been harmless as the jury. I AA 186-89. Moreover, any error would have been harmless as the jury was properly instructed on reasonable doubt. I AA 136. Therefore, the district court did not abuse its discretion in rejecting Donko's proposal.

V. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT

Donko argues that the State committed prosecutorial misconduct because the State shifted Donko's burden by arguing that he failed to provide an explanation for the condition of the red shirt and the fingerprint found on the license plate. AOB at 34-36. However, Donko's argument fails.

In resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: (1) determining whether the comments were improper and (2) deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). This Court views the

statements in context and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865, 336 P.3d 939, 950-51 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001), abrogated on other grounds by Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89, 196 P.3d at 476-77. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189, 196 P.3d at 477 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S.Ct. 2464 (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. Valdez, 124 Nev. at 1189, 196 P.3d at 476. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

During its rebuttal closing argument, the State was commenting on Donko's testimony at trial. In its full context, the State argued:

> And then what else did he get tripped up on? Well, no, I told the detective it was an older model beat-up four-door sedan, and I was the passenger. I just -- he didn't confront me with everything, I told him that. And, by the way, it was an Audi now.
>
> What did the detective tell you? He didn't reveal that until he informed him several times with, Oh, well, we got your print inside a car.
>
> He kept him talking until he finally revealed what? Out of all the things you could say about the vehicle, he mentioned an older model vehicle, four-door sedan, beat up, and to top it off, that he was the passenger.
>
> 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.
>
> [...]
>
> And then the fingerprint, same thing. No viable explanation. Found in this unregistered vehicle. And may I point out on the most damaging, damning and damaging piece of evidence in that vehicle, a license plate which is off the unregistered vehicle, again, found minutes after the shooting.

IV AA 923-24.

The State is permitted to argue that the evidence does not support Donko's mistaken identity theory. "[A] prosecutor does *not* improperly shift the burden of proof by commenting on defense's failure to substantiate its theories with supporting evidence." Paschal-Campos v. State, 460 P.3d 26 (Nev. 2020) (citing Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001), overruled on other grounds by Lisle v. State, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015)). Further, "[t]he Ninth Circuit has held that as long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the

defense to counter or explain evidence presented. Evans, 117 Nev. at 631, 28 P.3d at 513 (citing U.S. v. Lopez–Alvarez, 970 F.2d 583, 596 (9th Cir.1992)); see Rimer v. State, 131 Nev. 307, 331, 351 P.3d 697, 714 (2015) (relying on Evans to conclude that the prosecutor did not err when he asked, "what evidence is there to suggest that they were sick. How about a witness," in response to defense's suggestion that the suspect was sick on the day of the crime).

Here, the State was directly responding to Donko's theory of defense and demonstrating that no evidence supported that theory. Donko failed to counter the evidence presented when he testified, and the State is permitted to say so. Evans, 117 Nev. at 631, 28 P.3d at 513. Accordingly, the State did not shift the burden of proof, but instead permissibly argued that Donko's testimony was not credible and failed to support his mistaken identity defense.

Regardless, any error would have been harmless as the jury was instructed that although counsel would provide argument, it was the duty of the jury to deliberate the evidence. I AA 160. Moreover, any error would have been harmless due to the overwhelming evidence of guilt in this case as discussed *supra* in Section

VI. THE STATE DID NOT FAIL TO PROVE THAT DONKO COMMITTED THE CRIMES IN THIS CASE

Donko argues that the State failed to prove the elements of the charged crimes beyond a reasonable doubt because it offered inconsistent as well as unreliable

witness testimony to prove that Donko was the individual that committed the crimes. AOB at 37-42. However, Donko's argument fails.

"When reviewing a criminal conviction for sufficiency of the evidence, this Court determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution." Brass v. State, 128 Nev. 748, 754, 291 P.3d 145, 149–50 (2012) (internal citations omitted). When there is substantial evidence in support, the jury's verdict will not be disturbed on appeal. Id. at 754, 291 P.3d at 149–50. This Court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Further, circumstantial evidence alone may support a conviction. Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000) (citing Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980)).

Thus, the evidence is only insufficient when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based, even if such evidence were believed by the jury." Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (quoting State v. Purcell, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)) (emphasis removed) (overruled on other grounds). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido v. State, 114 Nev. 378,

381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). It is further the jury's role "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Moreover, in rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins, 96 Nev. at 374, 609 P.2d at 313. Indeed, "circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002). Further, "[t]he jury has the prerogative to make logical inferences which flow from the evidence." Adler v. State, 95 Nev. 339, 344, 594 P.2d 725, 729 (1979).

Here, there was sufficient evidence that Donko was the individual who committed the crimes charged, despite Donko's alleged inconsistencies. First, Donko challenges Woods' identification of Donko for various reasons, including Woods' inaccurate first description of Donko as Hispanic as opposed to Caucasian, Woods not mentioning the shooter having tattoos, incorrectly describing Donko's haircut, and was only 95% sure when he identified Donko during the photo lineup. AOB at 37-38. Regardless of any alleged inconsistencies, the jury was provided with Detective Marin's testimony that in addition to Woods having only brief interactions with the shooter, it is generally common for witness' to mix up race when providing descriptions. IV AA 820. Detective Marin also testified that even when he was

sitting within two feet of Donko, Donko's tattoos were not immediately apparent. IV AA 822.

Moreover, Donko inaccurately states that no other witness identified Donko. AOB at 39. But Ramos identified Donko as the man he saw wearing a red shirt, parking a Toyota Corolla, and walking up the street on the day of the shooting. IV AA 759-760. To the extent Donko claims Espinoza could not identify Donko, Espinoza provided one-worded responses to nearly every question presented at trial and testified under oath that the only reason he came to court to testify was because he was under subpoena and almost did not come. III AA 666-67. It also bears noting that Espinoza and Sanchez-Loza were the individuals that were shot during the crime, so it is not shocking that they could not provide more information. Donko's fingerprints were found on the license plate in the car identified as the shooter's, and a red shirt matching the one worn by the shooter contained Donko's DNA and was located near where the shooting took place. IV AA 814, 818-19, 823. Even assuming only one witness identified Donko, additional evidence implicated him.

As discussed supra in Section I, there was overwhelming evidence presented at trial that Donko committed the charged crimes. Notwithstanding the overwhelming evidence of guilt presented, Donko is not truly arguing that there was insufficient evidence presented for the jury to find him guilty, but instead is complaining about how the jury weighed the evidence. However, it is solely within

the province of the jury to consider all of the testimony as well as the evidence presented and assign the weight to be given to such testimony. McNair, 108 Nev. at 56, 825 P.2d at 573. Therefore, Appellant's claim fails.

VII. THERE WAS NO ERROR TO CUMULATE

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). Appellant must present all three elements to succeed on appeal. Id. at 17, 992 P.2d at 854-55. Moreover, an appellant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357 (1974)).

First, as discussed *supra* in Section VI, there was more than sufficient evidence to support Donko's convictions and, therefore, the issue of guilt is not close. Second, Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors") (emphasis added). Even if there were errors, they were harmless, and do not collectively warrant reversal. See Sections I(C), II(C), and IV(B) supra. Third and finally, the only factor that weighs in Appellant's favor is that he was convicted of grave crimes. See

Valdez, 124 Nev. at 1198, 196 P.3d at 482 (2008) (stating attempt murder is a very grave crime). However, because the evidence was more than sufficient and there was no error, it should not weigh heavily in this Court's analysis. Therefore, Donko's claim of cumulative error has no merit and this Court should affirm the Judgment of Conviction.

CONCLUSION

Based on the foregoing, the State respectfully requests that the Judgment of Conviction be affirmed.

Dated this 8th day of April, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 12,206 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 8th day of April, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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