IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVONTAE WHEELER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 81374

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

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

STATEMENT OF THE ISSUES

1. Whether the district court properly admitted messages from co-defendant Robertson during Robinson's testimony.
2. Whether the district court properly admitted Robinson's accomplice testimony.
3. Whether the district court did not err in denying appellant's challenge to the jury venire.

STATEMENT OF THE CASE

On December 14, 2017, Appellant, Davontae Wheeler ("Appellant") was charged with Count 5 — Conspiracy to Commit Robbery (Category B Felony —

NRS 200.380, 199.480); Count 6 — Attempt Robbery with Use of a Deadly Weapon (Category B Felony — NRS 200.380, 193.330, 193.165); and Count 7 — Murder with Use of a Deadly Weapon (Category A Felony — NRS 200.010, 200.030, 193.165). 2AA334-38. Appellant was charged for having committed these crimes with Demario Lofton-Robinson ("Lofton-Robinson"), DeShawn Robinson ("Robinson"), and Raekwon Robertson ("Roberston"). Id.

Appellant's and Robertson's jury trial regarding Counts 5 through 7 began on February 11, 2020. 5AA1115. On February 12, 2020, Appellant moved to strike the jury panel and requested an evidentiary hearing. 6AA1400. The trial court granted Appellant' request, held an evidentiary hearing that same day, and denied Appellant's motion to strike. Id.

On February 24, 2020, the jury found Appellant and Robertson guilty of Conspiracy to Commit Robbery and Second-Degree Murder. 14AA3271. The jury found Appellant not guilty Attempt Robbery With Use of a Deadly Weapon. Id.

On June 11, 2020, the district court sentenced Appellant to Count 1 – 24 to 72 months; Count 2 – dismissed pursuant to verdict; and Count 3 – 10 years to life in the Nevada Department of Corrections. 14AA3303. Appellant's aggregate sentence was 144 months to life in the NDOC. Id. Appellant's Judgment of Conviction was filed on June 17, 2020. 14AA3318-19.

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STATEMENT OF THE FACTS

In the early morning hours of August 9, 2017, just after midnight, Gabriel Valenzuela ("Mr. Valenzuela") was coming home from nursing school when he was shot in the driveway of his own home, located at 5536 Dewey Drive, in Las Vegas, Nevada. 8AA1886-89. Dr. Corneal testified that Mr. Valenzuela suffered from a gunshot wound to the head, left lower chest, right ankle, and left ankle. 10AA2342. Based on these injuries, she concluded that the gunshot wounds to the ankles would have made moving incredibly painful, and that either the gunshot wound to the abdomen or the gunshot wound to the head could have been fatal. 10AA2350-55. She further opined that Mr. Valenzuela was shot first in the stomach and then in the head. Id. Ultimately, Dr. Corneal concluded that Mr. Valenzuela's cause of death was multiple gunshot wounds, and the manner of death was homicide. 10AA2356.

Immediately prior to the shooting, Robert Mason was jogging in his and Mr. Valenzuela's neighborhood when he noticed four suspicious individuals standing in front of Mr. Valenzuela's home. 8AA1768-74; 9AA1995. Mr. Mason described these individuals as black males wearing dark colored sweatshirts. 8AA17774-76. As seeing people meandering on street corners around midnight was unusual, Mr. Mason decided to run down the street rather than run through the group. 8AA1773-74. Mr. Mason rounded the corner and saw what looked to be a white Crown Victoria with NV license plate of 473YZB. 8AA1777.

As Mr. Mason continued down the street, he began to worry that he left the front door to his home unlocked, so he called his wife and told her what he saw. 8AA1778-79. Mr. Mason specifically told his wife that he thought it was odd that a group of men would have sweatshirts on with their hoods up in August in Las Vegas. Id. Mr. Mason was also uncomfortable because it was odd for a car to be parked on that street given how busy it was. 8AA1781. Based on this information Mr. Mason's wife called the non-emergent 311 number to report these suspicious individuals. 8AA1838. She specifically explained that she thought it was very odd that people were wearing hoodies during a hot August night. 8AA1839.

One minute later, at 12:12 AM, Mr. Valenzuela's cousin, John Relato, was inside his house at 5536 Dewey Drive when he heard a gunshot. 8AA1892. Mr. Relato ran to the upstairs window where he saw Mr. Valenzuela's car door open in the driveway. 8AA1893. Thinking this was odd, Mr. Relato, went outside to check on Mr. Valenzuela and saw him lying on the ground bleeding. 8AA1894. Mr. Relato called 911, removed his shirt, and placed it on Mr. Valenzuela's wounds in an effort to stop the bleeding. 8AA1895-97.

Officer Calleja was the first officer to respond to 5536 Dewey Ave at 12:20 AM. 8AA1801-07. 8AA1807. Once the paramedics took Mr. Valenzuela to the hospital, Officer Calleja began securing the scene. 8AA1811-16. Officer Calleja had further been informed that one minute prior to the call regarding Mr. Valenzuela's

shooting, individuals living on the south side of the street called about a suspicious circumstance in the neighborhood. 8AA1830-31. Three .45 caliber cartridge cases and one .22 caliber cartridge case were found at the scene of the murder. 8AA1918-22; 9AA2028. The .45 caliber cartridge cases bore three separate head-stamps: R-P 45 AUTO, NFCR, and WINCHESTER 45 AUTO. 8AA1918-22; 9AA2028.

Mr. Mason was continuing his run and had just returned to the area about 20 or 25 minutes later where he saw officers in the area where he had just seen the four men. 8AA171780-82. Mr. Mason approached one of the officers, told him about the four individuals he saw less than half an hour ago, and gave them the license plate number from the car he passed. 8AA1783-84.

Sergeant Tromboni responded to the Dewey drive crime scene, where she helped block off traffic. 8AA1943-47. When Sergeant Tromboni left that call, he stopped at a Short Line Express convenience store to use the restroom less than a 10-minute drive from the murder scene. 8AA1948-49; 8AA1959; 9AA1998. Inside, he spoke to the clerk, Nikolaus Spahn, who told him that four males had been inside the store about 45 minutes prior and seemed suspicious.[1] 8AA1952-53. Specifically,

[1] Appellant claims that he "contends" that there were five men in the car at the convenience store." AOB6. At trial, Appellant called Marcell Solomon who testified that when he spoke to police a month later regarding how many suspects were at the convenience store it may have been four or five. 13AA2980. Mr. Solomon came to this conclusion after a self-described "quick" interaction with these men wherein he agreed to buy them cigarettes. 13AA2982-86. However, other than that single witness, Appellant did not testify and there was zero evidence presented that after

Mr. Spahn testified that he was working at the Short Line Express convenience store the night of August 8, 2017 and early morning hours or August 9, 2017. 8AA1955. He testified that at around 11:30 PM, four men came into his store looking suspicious. 8AA1956. One of the men was open carrying a firearm and used the restroom for about 15 to 20 minutes. 8AA1956. That man was wearing maroon shoes, a maroon sweatshirt, and a gray hat with a black bill. 9AA2107-08. After the four men left, Mr. Spahn went outside to smoke a cigarette where he saw those men just sitting at a table hanging out. 8AA1959. Mr. Spahn also noticed that these four men were in a white older model vehicle that looked like a Crown Victoria. Id.

Based on the description provided by Mr. Spahn, Sergeant Tromboni decided it would be prudent to obtain surveillance footage from the store. 8AA1953. At trial, Mr. Spahn's identified the four men who entered the store as well as the vehicle they were in from that surveillance footage. 8AA1962-64. The vehicle was seen on surveillance footage arriving to the store at approximately 11:25 p.m. and leaving the store at approximately 11:45 p.m., roughly 25 minutes before the murder. Id.

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the convenience store, Appellant got on a bus and went home. Moreover, despite Appellant's reliance on his recorded statement made to the police and his offer to take a polygraph test, neither the statement nor the test was admitted at trial and therefore it is inappropriate for Appellant to reference or rely on in this instant appeal. See NRAP 10(a), (b); Carson Ready Mix, Inc. v. First Nat'l Bank of Nev., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

Detective Cody, a homicide detective, was at the crime scene at Dewey drive when she received a call from Sergeant Tromboni regarding the information from the convenience store clerk. 9AA2155-59. She responded to the convenience store to retrieve video surveillance. 9AA2161. During her review of that surveillance, she was able to identify a vehicle with the license plate matching the description given by Mr. Mason. 9AA2160-61. Detective Cody further observed four black males in the surveillance footage. 9AA2162. Detective Dosch also reviewed the surveillance footage and concluded that the vehicle could also be a Mercury Grand Marquis because both the Crown Victoria and Grand Marquis model cars were released by Ford and were identical other than the emblems. 13AA2904.

Detective Cody set to tracking down the owner of the vehicle and subsequently learned that the car belonged to Lofton-Robinson and was registered at 919 Bagpipe Court in North Las Vegas. 9AA2163-65. Detective Cody drove to that residence on August 9, 2017, and saw the Grand Marquis depicted in the surveillance from the convenience store parked in the driveway. 9AA2166-68. Detective Cody watched two black males exit the residence, get into the car, and drive away. 9AA2168-69. Those men resembled the same men in the convenience store surveillance footage. 9AA2169. Detective Cody followed the vehicle. 9AA2169-71. The vehicle was ultimately stopped, and the occupants were taken into custody. Id. Those occupants were Robinson and Robinson-Lofton. 13AA2910-11.

Search warrants were subsequently obtained and executed on both the Mercury Grand Marquis and at 919 Bagpipe Court. 13AA2911. From the Mercury Grand Marquis, CSA Fletcher impounded a box of .45 firearm ammunition from the glove box, a pair of red air Jordan athletic shoes, a sweatshirt matching the sweatshirt worn by one of the men in the convenience store surveillance, as well as DNA prints from the vehicle. 9AA2184-88. CSA Claire Bowing similarly searched the vehicle and collected latent print evidence. 9AA2192-98. Robinson's and Robinson-Lofton's fingerprints were found on multiple locations of the Mercury Grand Marquis. 8AA1862-67; 12AA2736-42. Appellant's fingerprints were found in the car along with co-defendant Robertson's. 12AA2740-43.

Crime Scene Investigator William Speas On August 9, 2017, at around 11:00 PM, CSA Speas responded to a house located at 919 Bagpipe Court. 8AA1926. there, he impounded a pink backpack containing a handgun and red air Jordan athletic shoes. 8AA1929-33; 9AA2092-34. CSA Speas processed all impounded pieces of evidence for fingerprints. 8AA1930-33. At trial, Robinson identified the pink backpack containing the firearm recovered during the search of 919 Bagpipe Court as a backpack that both he and Robinson-Lofton would use. 10AA2226.

During the search of the Bagpipe Court residence, officers located a .45 caliber firearm and ammunition bearing a headstamp of R-P .45, which matched one of .45 caliber cartridge cases found at the scene of the murder. 12AA2796-98;

13AA2911-12. Ballistic testing revealed that three .45 caliber cartridge cases found at the scene of the murder were fired from this firearm. 12AA2773-74.

Both Robinson's and Robinson-Lofton's cell phones were seized, and Detective Dosch recovered a message thread referencing two other suspects involved in the robbery: Ray Logan and Sace. 13AA2914-15; 13AA2920-21. Detective Dosch ultimately learned that Ray Logan was co-defendant Robertson, and "Sace" was Appellant. 13AA2919-22. Based on this conclusion, Detective Dosch learned that Robertson was living at 6647 West Tropicana Ave, and Appellant was living at 3300 Civic Center. 13AA2923-26. Detective Dosch obtained and executed search warrants on both addresses. Id.

In Appellant's apartment, Detective Dosch recovered all the clothing worn by Appellant in the surveillance of the convenience store: the shoes, hat, shirt, and gun including the holster. 13AA2930-32. Specifically, officers recovered a .45 caliber firearm. 10AA2373. The magazine of the firearm contained 10 rounds of live ammunition bearing the head stamp of RP45 AUTO (the same head stamp as one of the .45 cartridges found at the scene of the murder). 10AA2375. Detectives also recovered a pair of red Nike Huaraches, and a black and grey baseball cap, which matched the items worn by Appellant in the surveillance footage from the convenience store. 10AA2375-77. Appellant's fingerprints were found on the magazine found inside the firearm. 13AA2930. A search of Appellant's phone

number showed a Facebook account of "Young Sace Versace." 12AA2700. Appellant's phone also showed a call history between co-defendant Robertson, Robinson-Lofton, and Robinson. 12AA2701. Specifically, between August 2, 2017 and August 9, 2017, Appellant called Lofton-Robinson 29 times.

A .22 caliber semi-automatic Taurus firearm was located at 6647 West Tropicana, co-defendant Robertson's residence. 13AA2933-34. Officers also located ammunition bearing the headstamp "C." Id. This ammunition matched the .22 caliber cartridge case found at the murder scene. 13AA2934. Co-defendant Robertson's and Appellant's fingerprints were both on the magazine of the Taurus handgun. 8AA1870; 12AA2743-44. Ballistic testing revealed that the .22 caliber cartridge case found at the scene of the murder was fired from this firearm. 12AA2772-73.

At trial, Robinson testified that when he was 14 years old, himself and his brother Robinson-Lofton had been living with their grandmother at 919 Bagpipe Court. 9AA2211-15. Robinson explained that about a week before August 8, 2017, Robinson-Lofton purchased a white Mercury Grand Marquis, which they began living out of. 9AA2215. Robinson-Lofton also bought each of them a pair of red Air Jordan athletic sneakers, which Robinson wore the night of August 8, 2017. 9AA2222-24.

Robinson testified that on August 8, 2017, a man he knew as Ray Logan messaged him on Facebook asking if Robinson-Lofton was "trying to hit a house" and that Ray Logan, Robinson, and Sace were "in." 10AA2241-47. Both Ray Logan and "Sace" were nicknames that each male went by. 10AA2254-55. At trial, Robinson identified Appellant as the person he called "Sace," and co-defendant Robertson as the person he called Ray Logan 10AA2268-69. Robinson testified that the night of August 8, 2017, he, Robinson-Lofton, Appellant, and co-defendant Robertson went first to a convenience store in Robinson-Lofton's Mercury Grand Marquis, and to a home afterwards. 10AA2226-27.

When shown a picture of the males inside the convenience store, Robinson identified himself wearing the red Air Jordans along with a black shirt and black pants. 9AA2224; 9AA2108. Robinson similarly identified Robinson-Lofton in the surveillance video, also wearing the same pair of Air Jordans. 10AA2225; 9AA2108. Robinson identified Appellant as the man wearing the burgundy sweatshirt, gray baseball hat with a black bill and sticker on it, black pants, and Nike Huaraches. 10AA2247-48; 9AA2106-07. He also confirmed that Appellant was at Mr. Valenzuela's home. 10AA2232-35. Next, Robinson confirmed that co-defendant Robertson was with them in the surveillance footage, and was the person in all black who entered the store behind Appellant. 10AA2241; 9AA2106.

When shown a photograph of Mr. Valenzuela's home, Robinson confirmed that it was the house he, Robinson-Lofton, Appellant, and co-defendant Robertson stopped at after leaving the convenience store. 10AA2228-29. Robinson further confirmed that all the men except himself had firearms. 10AA2229-30. Additionally, Robinson confirmed that the four of them went to Mr. Valenzuela's home to rob it and that on the way to the home he overheard a conversation between the men about exchanging bullets in their guns. 10AA2236; 10AA2265-66. Robinson's job was supposed to be to enter the home first and tell everyone to get down. 10AA2249.

While they were standing on the corner waiting to enter the home, Robinson confirmed that a jogger ran past them just before they saw Mr. Valenzuela arrive at the home. 10AA2250. Once Mr. Valenzuela arrived, they men surrounded him, and co-defendant Robertson commanded Mr. Valenzuela to give them everything he had. 10AA2267-68; 10AA2251. A struggle ensued, and Mr. Valenzuela was shot several times by these four men who then fled the scene. 10AA2250-52. Robinson, Robinson-Lofton, co-defendant Robertson, and Appellant fled in Robinson-Lofton's Mercury Grand Marquis, and first dropped co-defendant Robertson Ray Logan off at an apartment before returning to their grandmother's home. 10AA2254.

SUMMARY OF THE ARGUMENT

First, the district court properly admitted messages sent by co-defendant Robertson to Robinson implicating Appellant in the conspiracy and murder. These

messages were properly admitted as statements made during the course and in furtherance of the conspiracy. Indeed, it was these statements establishing the existence of the conspiracy. Moreover, as the statements were nontestimonial in nature, the Confrontation Clause is inapplicable as to whether they were properly admitted. Finally, given the overwhelming evidence of Appellant's guilt, any error was harmless.

Second, Robinson's accomplice testimony was properly admitted and corroborated. There was substantial corroborating evidence of the existence of this conspiracy that was admitted as eyewitness, forensic, and detective testimony. Specifically, eyewitness testimony and surveillance connected Appellant and his co-conspirators to the murder as well as the vehicle all four men were in. In that surveillance footage, Appellant was seen wearing the same clothes that were found in his apartment days later. Police also recovered a firearm containing a magazine with Appellant’s fingerprints, as well as cartridges matching the headstamp of one of the cartridges recovered from the homicide. Finally, Appellant’s fingerprints were found in the vehicle observed at the homicide scene and belonging to Robinson-Lofton. Therefore, there was sufficient corroborating evidence connecting Appellant both to his co-conspirators and to the homicide. Accordingly, Robinson’s accomplice testimony that Appellant was present and participated in the conspiracy to commit robbery and Mr. Valenzuela’s murder was properly admitted.

Third, the district court properly denied Appellant's motion to strike the jury venire panel. When Appellant moved to strike the panel because only 2 out of 60 venire members identified as African American, the district court summoned the jury commissioner who testified that the process of sending out jury summonses to Clark County was based on four random factors, and that not every zip code received an equal number of summonses. The process in place to select who is summoned for jury duty is random and not unreasonable. This does not systematically exclude African Americans and Appellant has failed to show otherwise.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ADMITTED MESSAGES FROM ROBERTSON DURING ROBINSON'S TESTIMONY

Appellant argues that the district court improperly admitted a message sent to Robinson from co-defendant Robertson which stated: "Ask DJ if he is trying to hit a house tonight; me, you, Sace, and him. Sace already said yeah." AOB10. Appellant was later identified as "Sace." 10AA2268-69. Appellant argues that this message was improperly admitted for three reasons: (1) it was inadmissible hearsay; (2) its admission violated the Confrontation Clause because co-defendant Robertson was not subjected to cross-examination; and (3) it was inadmissible non-hearsay because the statement was not made in furtherance of the conspiracy. AOB11-13. Appellant further argues that any error was not harmless because the State had no evidence against Appellant without that evidence. AOB13-15. Appellant's claim fails.

This Court reviews the district court's admission of evidence for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 117 Nev. 116, 120, 117 P.3d 998, 1000 (2001).

A conspiracy is an agreement between two or more persons for an unlawful purpose. Doyle v. State, 112 Nev. 879, 886 (1996). The conspiracy agreement may be inferred by a "coordinated series of acts" in furtherance of the underlying offense. Id.; *see also,* Gaitor v. State, 106 Nev. 785, 790 n.1 (1990); *overruled on other grounds* by, Barone v. State, 109 Nev. 1168, 1171 (1993). A conspiracy, like solicitation, is committed upon reaching the unlawful agreement, and nothing more needs to be proven. Burnside v. State, 131 Nev. 371, 397, 352 P.3d 627, 645 (2015). (internal citation omitted).

Pursuant to NRS 51.035:

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

Before statements made by co-conspirators may be admitted, "the existence of the conspiracy must be established by independent evidence, Fish v. State, 92

Nev. 272, 274, 549 P.2d 338, 340 (1976), and the statements must have been made 'during the course and in furtherance of the conspiracy,'" Carr v. State, 96 Nev. 239, 607 P.2d 114, 116 (1980). However, this independent evidence need only be slight. Goldsmith v. Sheriff, 85 Nev. 295, 305, 454 P.2d 86, 92 (1969).

Further, "statements made by a co-conspirator to a third party who is not then a member of the conspiracy are in furtherance of the conspiracy only if they are designed to induce that party to join the conspiracy or act in a way that would assist the conspiracy's objectives." Burnside, 131 Nev. at 392, 352 P.3d at 642. Whether that statement is meant to induce that third party to join the conspiracy must be determined by the context in which the statement was made. Id. Indeed, "a statement may be in furtherance of a conspiracy even though it is susceptible of alternative interpretations' and was not exclusively, or even primarily, made to further the conspiracy, so long as there is some reasonable basis for concluding that it was designed to further the conspiracy." Id. (internal quotations omitted).

Here, the statement at issue is a screenshot of a Facebook message sent to Robinson from co-defendant Robertson. 10AA2245. In that message, co-defendant Roberston, whom Robinson knew as Ray Logan, said:

> Ask DJ if he [sic] trying to hit a house tonight.
> Me, you, Sace, and him. Sace already said yeah.

11AA2582.

Robinson identified Ray Logan as co-defendant Robertson, DJ as Robinson-Lofton, and Sace as Appellant. 10AA2268-69. Appellant and co-defendant Robertson objected that the message was inadmissible hearsay and violated the Confrontation Clause. 7AA1709-18; 7AA1729-35; 10AA2242-44. In response, the State argued that the message was admissible as a co-conspirator statement because the statement was the establishment of the conspiracy and could be supported by other corroborating evidence. 7AA1715-17. The district court overruled Appellant's objection and allowed the statement to be admitted. 10AA2244. The district court did not err when concluding as much.

A. The message was non-hearsay pursuant to NRS 51.035(e).

Here, the message sent to Robinson from co-defendant Robertson was admissible non-hearsay pursuant to NRS 51.035(3)(e). This includes co-defendant Robertson's statement that "Sace already said yeah" because Appellant, co-defendant Robertson, and Robinson were all involved in the same conspiracy, that being to "hit a house."

First, the statement at issue: "Ask DJ if he [sic] trying to hit a house tonight. Me, you, Sace, and him. Sace already said yeah" was made in during the course and in furtherance of this conspiracy. Indeed, this is the statement that established the conspiracy because it was the actual agreement establishing the conspiracy. That this statement was made to induce Robinson to participate in the conspiracy does not

render it inadmissible under NRS 51.035(3)(e) because the context of that statement and the fact that Robinson subsequently participated in that conspiracy established that the statement was indeed meant to induce Robinson's participation. Burnside, 131 Nev. at 392, 352 P.3d at 642. Therefore, the fact that it was an invitation to join the conspiracy does not make the statement inadmissible because it in fact induced Robinson to join the conspiracy.

Moreover, the portion of the statement where co-defendant Robertson says that Sace—Appellant—was "in," was equally admissible under NRS 51.035(3)(e) because that statement was clear that Appellant and co-defendant Robertson agreed to "hit a house." Appellant's agreement and co-defendant's Robertson's statement to Robinson that Appellant had agreed simply established the existence of the conspiracy and was therefore made in the course and furtherance of that conspiracy. As the State explained to the district court when determining the admissibility of this statement, it was the "roll call" for the conspiracy. 7AA1715.

Next, while Appellant's argument focuses more on whether the statements at issue were in furtherance of the conspiracy, and not on whether there was sufficient evidence of the conspiracy; there was nevertheless sufficient corroborating evidence of the conspiracy admitted prior to the admission of the statement. Specifically, Mr. Mason testified to seeing four suspicious looking males in front of Mr. Valenzuela's home minutes before Mr. Valenzuela was murdered. 8AA1768-76. These men were

standing by a car that had the exact same license plate as the car Mr. Spahn saw parked out front of his convenience store, less than 30 minutes prior to the murder. 8AA1959. Mr. Spahn further testified that four men exited car and entered his convenience store carrying weapons and looking suspicious. 8AA1955-56.

Detective Cody had all this information when she testified that she was able to identify the owner of that vehicle as Robinson-Lofton and track his address to 919 Bagpipe Court in North Las Vegas. 9AA2163-65. Detective Cody immediately went to that address, identified the vehicle, set up surveillance, and observed Robinson and Robinson-Lofton leave the residence and get in that car. 9AA2166-69. Detective Cody followed them and ultimately took them into custody. 9AA2169-71. After all this evidence had been admitted, during Robinson's testimony, the State moved to admit the message.

Additionally, while Appellant claims that the portion of the statement indicating Appellant's agreement to participate was inadmissible because co-defendant Robertson may have attributed something to Appellant that Appellant never said; that claim is clearly belied by the record. Appellant was seen in the surveillance with co-defendant Robertson, Robinson, and Robinson-Lofton, in a convenience store less than 12 hours after the message establishing the conspiracy was sent, and less than 30 minutes before Mr. Valenzuela was murdered. Accordingly, both co-defendant Robertson's statement inducing Robinson's

participation in the conspiracy, and co-defendant Robertson's statement that Appellant agreed to participate in the conspiracy was properly admitted.

Accordingly, the district court properly admitted the message from co-defendant Robertson to Robinson because the statement was made during the course and in furtherance of the conspiracy.[2]

B. Appellant's Confrontation Clause rights were not violated.

Whether the admission of an out-of-court statement violates the Confrontation Clause is reviewed *de novo*. United States v. Larson, 495 F.3d 1094, 1102 (9th Cir.2007) (en banc). To satisfy the requirements of the Sixth Amendment Confrontation Clause, if the State seeks to introduce hearsay statements against a criminal defendant, either such evidence must bear adequate indicia of reliability by falling within a firmly rooted hearsay exception or the state must demonstrate that the statement possesses particularized guarantees of trustworthiness. Ramirez v. State, 114 Nev. 550, 557-58, 958 P.2d 724, 729 (1998).

The United States Supreme Court has held that the Confrontation Clause does not apply to out-of-court statements that are nontestimonial. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). Nontestimonial statements are

[2] While Appellant argued that the statement was both inadmissible hearsay and inadmissible non-hearsay, because the State's position is that the statement was admissible non-hearsay pursuant to NRS 51.035(3)(e), it is not necessary to address Appellant's claim regarding whether there was an applicable hearsay exception available to admit this statement.

those made to police officers under circumstances objectively indicating that the primary purpose of the statement is address and respond to an ongoing emergency. Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct 2266, 2243-74 (2006).

Admission of a co-defendant's confession in a joint trial is not admissible when that confession implicates their co-defendant. Bruton v. U.S., 391 U.S. 123, 124-26, 88 S.Ct. 1620, 1621-22 (1968). However, this Court has held that Bruton must be viewed through the lens of Crawford. Burnside, 131 Nev. at 393, 352 P.3d at 643. The rule announced in Bruton does not apply to statements and conversations between co-conspirators. Bruton, 391 U.S. at 124-26, 88 S.Ct. at 1621-22. This Court has made clear that if the challenged out-of-court statement by a nontestifying codefendant is not testimonial, then Bruton has no application because the Confrontation Clause has no application. Burnside, 131 Nev. at 393, 352 P.3d at 643 (internal citations omitted).

For example, this Court in Burnside held that Burnside's co-defendant's statements made to his mother were non-testimonial because they were not made to law enforcement in the course of the investigation and were instead made in furtherance of a conspiracy. 131 Nev. at 394, 353 P.3d at 643. As a result, Burnside's Confrontation Clause rights were neither implicated nor violated by the statement's admission. Id.

Here, like Burnside, admitting co-defendant Robertson's statement to Robinson stating that Appellant agreed to participate in the robbery and statement inducing Robinson to participate in the conspiracy were nontestimonial and therefore did not violate Appellant's Confrontation Clause rights. Neither statement was made to the police during the course of an investigation. Instead, both statements were made between co-conspirators in furtherance of the conspiracy. Therefore, not only is Bruton inapplicable, but any claim that Appellant's Confrontation Clause rights were violated fails.

C. Any error was harmless.

Pursuant to NRS 178.598, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Nonconstitutional trial errors are reviewed for harmlessness based on whether the error had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008). On the other hand, the test for constitutional errors are "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) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 828 (1967)).

As an initial matter, the State would note that the test for harmless error Appellant relies on—Stamps v. State, 107, Nev. 372, 377, 812 P.2d 351, 354

(1991)—applies only to errors implicating the Confrontation Clause. As explained *supra* I.B, Appellant's argument does not implicate the Confrontation Clause. Therefore, the test for determining whether any error by admitting the message at issue was harmless is whether it had a substantial and injurious effect or influence in determining the jury's verdict. Knipes, 124 Nev. at 935, 192 P.3d at 1183. Regardless, under any standard, the error was harmless.

Here, there was overwhelming evidence of Appellant's guilt. Mr. Mason placed four individuals outside of Mr. Valenzuela's home within minutes of Mr. Valenzuela's murder. 8AA1768-77. Mr. Mason further provided police a description of the car they were by that matched the car depicted in the surveillance footage from the convenience store located less than 10 minutes away from Mr. Valenzuela's home, and taken within 30 minutes of Mr. Valenzuela's murder. 8AA1783-84; 9AA2160-62; 13AA2904.

When both Detectives Cody and Dosch reviewed the surveillance footage from the convenience store, they noted the clothing and physical descriptions of the four men whom Mr. Spahn testified as being the ones in the vehicle matching Mr. Mason's description. 8AA1783-84; 9AA2160-62; 13AA2904. Detectives ultimately identified the owner of that vehicle as Robinson-Lofton, tracked him to his address within 24 hours of the murder where they saw that car parked in the driveway, saw

him and his brother Robinson get into that car and drive away. once those gentlemen were stopped, they were taken into custody and their car was searched.

Inside the car, officers recovered ammunition matching ammunition used in the murder, shoes matching the shoes worn by the individuals in the convenience store, as well as Appellant's and co-defendant Robertson's fingerprints. 9AA2184-88; 9AA2192-98. Police also searched Robinson-Lofton's and Robinson's residence and found a .45 caliber firearm and ammunition matching one of the cartridge cases found at the scene of the murder. 12AA2796-98; 13AA2911-12.

When officers searched Robinson's cell phone, they were able to identify the two other suspects: Appellant and co-defendant Robinson. 13AA2914-15; 13AA2920-21. Even if the message implicating all four co-conspirators had not been admitted at trial, officers would have nevertheless been permitted to testify that their investigation ultimately led them to suspect both Appellant and co-defendant Robertson in Mr. Valenzuela's murder. 13AA2919-22.

Officers then would have been permitted to testify that when they searched both Appellant's and co-defendant Robertson's residences, they found the clothes matching those worn by the suspects in the surveillance footage of the convenience store, as well as firearms and cartridges matching those recovered from the murder scene. Specifically, for Appellant officers found the shoes, hat, shirt, firearm, and holster worn by the man in the surveillance footage in Appellant's home.

13AA2930-32. The magazine of the firearm recovered also had the same headstamp as one of the .45 cartridges found at the scene of the murder. 10AA2375. Moreover, Appellant's cell phone records showed multiple calls to co-defendant Robertson, Robinson-Lofton, and Robinson. 12AA2701.

This evidence was further corroborated by Robinson's testimony confirming that Appellant was with them at the convenience store and at the scene of the murder. 10AA2268-69; 10AA2226-27. Robinson further confirmed that Appellant was the male in the gray hat wearing the burgundy shoes, both of which were found during the search of Appellant's apartment. 10AA2247-48; 9AA2106-07. Accordingly, given the overwhelming evidence of Appellant's guilt, any error in admitting the message between co-defendant Robertson and Robinson was harmless.

II. THE DISTRICT COURT PROPERLY ADMITTED ROBINSON'S ACCOMPLICE TESTIMONY

Appellant argues that co-defendant Robinson's testimony that Appellant, Robinson, co-defendant Robertson, and Lofton-Robinson were all involved in the shooting and death of Mr. Valenzuela was not admissible because there was no independent corroborating evidence of Appellant's guilt. AOB16. Specifically, Appellant claims that the only thing placing him at the scene of the murder is Robinson's testimony because there was no forensic evidence tying Appellant to the murder and there was sufficient evidence that there was a fifth man who met the group at the convenience store but did not participate in the conspiracy or murder.

AOB16-17. According to Appellant, without Robinson's testimony, he could not have been convicted. Id. Appellant's argument fails.

NRS 175.291(1) states, "[a] conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." Corroborative evidence "need not in itself be sufficient to establish guilt—it will satisfy the statute if it merely tends to connect the accused to the offense." Cheatham v. State, 104 Nev. 500, 504–05, 761 P.2d 419, 422 (1988)).

Additionally, "corroborative evidence may be either direct or circumstantial, and can be taken from the evidence as a whole." Id. Inferences are permitted in corroboration of accomplice testimony. LaPena v. Sheriff, Clark County, 91 Nev. 692, 694-95, 541 P.2d 907, 909 (1975). This inference need not be found in a single fact or circumstance; if several combined circumstances show a defendant's criminal involvement, the requirement for corroboration is satisfied. Id. However, evidence is insufficient where it "'shows no more than an opportunity to commit a crime, simply proves suspicion, or is equally consonant with a reasonable explanation pointing toward innocent conduct on the part of the defendant.'" Heglemeier v. State, 111 Nev. 1244, 1250-51, 903 P.2d 799, 803-04 (1995) (quoting State v. Dannels, 226 Mont. 80, 734 P.2d 188, 194 (1987)).

Importantly, corroborating evidence sufficient to allow a conviction based on testimony of accomplice need not in itself be sufficient to establish guilt. Evans v. State, 113 Nev. 885, 891-92, 994 P.2d 253, 257 (1997). Instead, corroborating evidence need only connect the accused to the offense. Id. Moreover, "it 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, 114 Nev. 378, 381, 956 P.2d 1378, 1380. (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

This does not require this Court to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20, 99 S.Ct. at 2789 (quoting Woodby v. INS, 385 U.S. 276, 282, 87 S.Ct. 483, 486 (1966)). A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 376, 609 P.2d 309, 313 (1980). Also, this Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (*citing* Crawford v. State, 92 Nev. 456, 457, 552 P.2d 1378, 1379 (1976)).

Here, the evidence from the police investigation, as explained in detail *supra* I.C., corroborated Robinson's testimony that Appellant was involved in the conspiracy and murder of Mr. Valenzuela. Robinson's testimony was corroborated by eyewitness, forensic, and detective testimony. Mr. Mason testified that four men near a white Mercury Grand Marquis were seen outside Mr. Valenzuela's home

minutes before the murder. 8AA1768-76. Mr. Spahn testified that four men in a car with the same license plate at the car seen by Mr. Mason walked into his convenience store less than 30 minutes before the murder. 8AA1777; 8AA1955-59. Mr. Spahn's testimony was supported by surveillance footage. 8AA1962-64; 9AA2160-61. In that footage, the clothing and accessories worn by those four men were easily identifiable. 9AA2107-08. A search of Appellant's residence revealed the shoes, hat, shirt, and gun worn by one of the four men in the surveillance footage. 13AA2930-32. There is no question that Appellant was one of the four men at the convenience store.

While Appellant may have argued at trial that there was a fifth man with them at the convenience store and that it was this unknown fifth man, and not Appellant who travelled with the group to Mr. Valenzuela's home, the jury was reasonable in rejecting this claim. The only evidence Appellant presented regarding his theory was the testimony of Mr. Solomon. Mr. Solomon spoke to police a month after the murder and told them that when he bought cigarettes at the convenience for a group of men in a vehicle matching the description of the one at the murder scene, there could have been four or five men in the car. 13AA2982-86. Mr. Solomon further explained that his interaction with these men was very short and occurred while all of the men were in the car. This testimony was not sufficient to establish reasonable doubt, particularly given the fact that the surveillance footage showed only four men.

Unless this fifth man has mastered the art of invisibility, or never got out of the vehicle, any claim that he existed was reasonably rejected by the jury.

Further, detectives connected Appellant to Robinson and Robinson-Lofton through diligent investigation and surveillance. Once detectives identified the owner of the Grand Marquis, they were able to track down that owner's residence. 9AA2163-68. When detectives went to that residence, they observed Robinson and Robinson-Lofton exiting that residence and driving away in the car. 9AA2168-69. After Robinson and Robinson-Lofton were taken into custody, both their residence and their car were searched. 13AA2911. Appellant's fingerprints were found in Robinson's Grand Marquis. 10AA2375.

Officers also searched Robinson's cell phone which ultimately led detectives to identify a person with the nickname of "Sace" as a suspect. 13AA2914-15; 13AA2920-21. Continued investigation revealed that this "Sace" was Appellant, a fact that was confirmed through a review of Appellant's Facebook. 13AA2919-22. Moreover, when Appellant's home was searched, police recovered a magazine with cartridges matching those recovered from Mr. Valenzuela's murder. 13AA2930. That magazine had Appellant's fingerprints on it. Id.

This corroborating evidence belies any claim that the only evidence connecting Appellant to the murder was Robinson's testimony. Accordingly, all this evidence more than sufficiently corroborated Robinson's accomplice testimony.

Indeed, Robinson's testimony simply added greater weight to what the overwhelming circumstantial evidence proved: that Appellant was in fact present and involved in Mr. Valenzuela's murder.

III. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S CHALLENGE TO THE JURY VENIRE

Appellant claims that African Americans are systematically excluded from jury venires in Clark County because the panels are not selected from a sufficient cross section of sources. AOB19. Specifically, Appellant claims that in this case, out of 60 prospective jurors, only 2 were African American and implies that African Americans are being intentionally excluded from venire panels. AOB19-20. In support of this claim Appellant argues—without proper citation—that "most African Americans in the Las Vegas area live in North Las Vegas and other less affluent communities," and that this fact should be considered when sending out jury summonses. AOB20. According to Appellant, the process of sending an equal number of jury summonses to all zip codes will always result in venire panels that are light on minorities. AOB21. As a result, this system is unconstitutional, and courts should instead send a greater number of jury summonses to zip codes with more minorities. Id. Appellant's claim fails.

The United States Constitution guarantees a criminal defendant the right to a jury venire representative of the community. Morgan v. State, 134 Nev. 200, 207, 416 P.3d 212, 221 (2018); Taylor v. Louisiana, 419 U.S. 522, 526-27, 95 S.Ct. 692,

696 (1975); Williams v. State, 121 Nev. 934, 125 P.3d 627 (2005). However, "[t]he Sixth Amendment only requires that 'venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.'" Williams, 121 Nev. at 939–40, 125 P.3d at 631 (quoting Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996)). This right does not "guarantee a jury or even a venire that is a perfect cross section of the community" but recognizes that, as long as the process behind selecting the jury pool is fair, "random variations that produce venires without a specific class of persons or with an abundance of that class are permissible." Id.

In a challenge to the representativeness of the venire, the Nevada Supreme Court has explained that the burden is on the defendant to conjunctively show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 940, 125 P.3d at 631 (internal quotations and emphases omitted).

In Williams, this Court found that there is no constitutional right to a venire that perfectly reflects the community's composition. Id. at 939, 125 P.3d at 631. Specifically, Williams concluded that the defendant failed to show both a history of discrimination and failed to show that Clark County systematically discriminates against African Americans during the jury selection process. Id. at 941, 125 P.3d at

632. In doing so, this Court stated that "[e]ven in a constitutional jury selection system, it is possible to draw venires containing" 0% to 2.5% or 15% to 20% African Americans and that such variations would be normal in a county with 9.1% African Americans. Id.

Here, on the second day of jury selection, Appellant's trial counsel moved to strike the entire venire panel based on inadequate representation of African Americans. 6AA1402. Specifically, Appellant argued that out of 60 venire-members, only 2 identified as African American. Id.

In response, the State first argued that Appellant's motion was untimely as 17 out of 60 venire-members had already been excused without objection. 6AA1405. The State further noted that based on the information provided from the jury commissioner, there were three African Americans, not two, in the panel; and 12 people on the panel had listed their race as "other," making it impossible to determine whether a fair cross section of the community had been summoned. 6AA1405-07. Based on the timing of Appellant's motion, the State argued that only the remaining 48 jurors should be used to determine whether there was sufficient representation of African Americans in the venire panel. 6AA1408.

Prior to ruling, the trial court noted that Appellant had not met the first two prongs of the fair-cross-section test and that it appeared as though he was making a general allegation that African Americans were underrepresented. 6AA1412-14.

The trial court then gave Appellant the opportunity to calculate the comparative and absolute disparity in his specific jury panel, and when he did so he used the entire jury panel of 60 and calculated the absolute disparity of 7% and a comparative disparity of 58.33%. 6AA1415. Counsel then focused his argument again under the third prong, and claimed that "the under representation is due to systemic exclusion of the group in jury selection process." 6AA1416.

Based on Appellant's argument, the trial court summoned the jury commissioner and allowed her to be questioned by both Appellant and the State. 6AA1421. The jury commissioner testified that the law stated that a random selection of members of the community must be selected for jury service and proceeded to explain the procedures of doing so. 6AA1422. Specifically, she testified that 6,300 jurors are summoned six weeks in advance. Id. She further explained that the persons sent a summons are randomly selected from the jury management system. 14AA1423. The jury commissioner testified that approximately 13% of Clark County is African American. 6AA1425. When Appellant asked what policies and procedures she undergoes to make sure that an average jury pool is comprised of approximately 13% African Americans, the commissioner responded that the jury management system randomly selects jurors, which is what the law requires. Id. She explained that because this system is based

on randomness, there are days when the number of African Americans who are summoned are higher, and there are days when that number is lower. 6AA1426-27.

The jury commissioner testified that the list of prospective jurors summoned gets its names from four sources: the Nevada DMV, NV Energy, voter rolls, and the Department of Employment, Training, and Rehabilitation. Id. The commissioner clarified that anyone who is over 18 with an ID card is eligible to be summoned, anyone who has an account with NV Energy is able to be summoned, anyone registered to vote is eligible to be summoned, and people receiving unemployment benefits are eligible to be summoned. 6AA1429-31. None of those four criteria have anything to do with race or socioeconomic statutes. Importantly, the commissioner testified that she is not aware of any source that tells her how many people of a specific ethnicity live in a specific zip code, and that African Americans live in every zip code in Clark County. 6AA1438. Finally, the commissioner testified that when a person reports for jury duty, they may self-report their race, have the option to check "other." 6AA1440-41.

At the conclusion of the jury commissioner's testimony, both Appellant and the State made further argument and the district court concluded that while Appellant met the first two prongs of the test, they had made no showing that the underrepresentation was due to the systematic exclusion of African Americans in the jury selection process. 6AA1451. On that basis, the court denied Appellant's

motion to strike the jury venire. Id. The district court did not err when concluding as much.

First, the State does not contest that this Court has held that African Americans are a distinctive group in the community. Williams, 121 Nev. at 940, 125 P.3d at 631 (quoting Evans, 112 Nev. at 1187, 926 P.2d at 275 (1996)). However, Appellant failed to make a prima facie showing that the representation of African Americans in the venire was not fair and reasonable in relation to its representation in Clark County.

Appellant has failed to provide any information regarding the prospective jury panel. Instead, the only documents Appellant has provided are the jury list after the jury had been selected. 6AA1354-57; 7AA1724. Not only has Appellant failed to provide this information regarding the racial makeup of the venire panel, but he has also implied that because there was not an adequate representation of African Americans on the panel, Appellant was judged by almost exclusively by higher income Caucasian jurors. AOB19. Appellant has made such a claim without providing either the racial or financial status of any member on the panel. As Appellant has provided none of the data needed to conclude whether or not a distinct group was in fact excluded, his claim must fail. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603 (2007) (noting appellant has the burden of providing this court with an adequate appellate record, and when the appellant "fails to include

necessary documentation in the record, [this court] necessarily presume[s] that the missing portion supports the district court's decision''); NRAP 30(b)(3).

Even assuming, *arguendo*, that Appellant's population proportion estimates are correct, the comparative disparity numbers paint an inherently inaccurate picture. By the time Appellant moved to strike the jury panel on the second day of jury selection, 17 venire-members had been dismissed, and at least one of those members marked their race as "other." 6AA1404-05. Indeed, 12 people—or 20% of the panel—marked their race as "other." Moreover, despite Appellant's claim to the contrary, 3—not 2—venire members listed their race as African American. 6AA1405. As Appellant has not provided any of the information of his jury panel to this Court, and as their own calculations are belied by the record, the State is hesitant to agree with Appellant's calculation and this Court should be wary as well.

Appellant has further failed to establish that the representation of African Americans in the jury panel was neither fair nor unreasonable because his proposed solution would be to presume that the majority of African Americans live in certain zip codes, specifically less affluent communities, and that more jury summonses should therefore go to those zip codes. AOB20. Again, Appellant has made such a claim without providing any authority or statistic to support it. This Court should decline to change a law that is designed to ensure random selection of venire-

members based on Appellant's unsupported claims regarding the socio-economic status of the majority of African Americans in Clark County.

Appellant has further failed to establish that the random selection practice of sending out jury summonses systematically excludes African Americans. As an initial matter, Appellant has inaccurately relied on this Court's holding in Valentine v. State, 135 Nev. 463, 454 P.3d 709 (2019). Appellant claims that this Court in Valentine held that "sending an equal number of jury summonses to each Postal code without ascertaining the percentage of the population in each zip code which constituted a distinctive group, could establish a prima facie case of systematic exclusion of that group." AOB20. Unfortunately, Valentine does not stand for that proposition. Instead, Valentine explained that because prior testimony from the jury commissioner regarding a fair cross section challenge did not address whether an equal number of jury summonses go to each zip code, regardless of population density of that zip code, the district court should have held an evidentiary hearing to further explore that question. Valentine, 135 Nev. At 466-67, 454 P.3d at 714-15. The court made no reference to how many members of any particular distinctive group lived in any specific zip code and instead implied that the number of summonses sent to each zip code should be reflective of the total population in that zip code, not the racial makeup. Id. Accordingly, any claim that this Court has held

that the jury summons process should include a consideration of how many members of distinct groups live in each zip code fails.

Regardless, both before the trial court, and on appeal, Appellant has failed to demonstrate systematic exclusion. Before the district court, Appellant simply made generalized claims that did not establish a systematic exclusion of African Americans. 6AA1410-21. On appeal, Appellant claims that because an equal number of summonses are sent to each zip code, that the "random process" systematically excludes African Americans because "most minorities live in two or three zip codes in the city." AOB19-21. This claim is belied by the record.

The district court summoned the jury commissioner who testified to the process and procedures of sending out jury summonses and made clear that not only was the process random, but that who was listed as eligible to serve on a jury had nothing to do with income. 6AA1428-32. The commissioner further made clear that not every zip code received an equal number of jury summonses at the same time and that she had no way of telling what percentage of minorities lived in each zip code:

> Q Okay. Now, shifting gears, right? Then if we go back to the system, as I understood it, the system sends out this randomly based on these four sources, right? Do you have any idea how many people of a specific ethnicity live in a specific zip code?
> A No.
> Q Is there a source that you know of that could possibly give you that information?

A Not specifically that I know of.
Q Right. So how on earth could you be held to a standard of having to figure that out when you don't even know of a system that exists to give you that information?
A I couldn't.
Q Right. And if there were one, right, would you utilize it?
A I would follow the direction of the court, whatever they ask me to do.
Q You wouldn't be trying to specifically and systematically exclude people?
A No.
Q Would you agree with me that members of the community -- in this particular case, the allegation is African-Americans -- live everywhere in the Valley?
A Yes.
Q In fact, one of these defendants lives in Spring Valley. Were summonses sent to Spring Valley?
A I couldn't tell you without -- I mean, I don't know.
Q Okay.
A Without looking at the pool, and looking at the individual records, I don't know
Q But –
A -- if that particular pool had people from that zip code.
Q Some have argued -- nobody here. Some have argued that, you know, there should be even more summonses sent to, let's say the northeast or North Las Vegas, right? You would agree with me, however, that there are members of every different ethnicity all over this Valley?
A Yes.
Q And so, by sending the summons to every zip code, you're not trying to systematically exclude anyone?
A Well, it doesn't necessarily go to every zip code every time.
Q Okay.
A But we do -- but all zip codes are included in the master list.
Q And there's nothing you programmed into the system saying, hey, system, make sure you don't send it to North Las Vegas or the northeast part of town?
A No.

Q And there's nothing that you're doing to try to exclude, in this particular case, African-Americans from serving on this jury?
A No.

6AA1438-40.

The jury commissioner's testimony makes clear that the system in place to summon jurors has nothing to do with race and makes no assumptions about any minority group's socio-economic status. this Court should reject any request to factor race or socioeconomic status into a system meant to ensure that all community members eligible for jury selection have an equal chance of being selected to serve on a jury regardless of race.

CONCLUSION

For the foregoing reasons, this Court should AFFIRM Appellant's Judgment of Conviction.

Dated this 29th day of April, 2021.

Respectfully submitted,

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BY */s/ Alexander Chen*
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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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 9,172 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 29th day of April, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on April 29, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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