IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD ABDIEL SILVA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 81627

RESPONDENT'S ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Rules

Constitutional Provisions

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RESPONDENT'S ANSWERING BRIEF

I. ROUTING STATEMENT

Appellant Richard Abdiel Silva ("Silva") was convicted by a jury of Murder With the Use of a Deadly Weapon, a category A felony. Appellant's Appendix ("AA") Volume 8, pages 1790-1791. Because Silva was convicted of a category A felony, this appeal is not presumptively assigned to the Court of Appeals. NRAP 17(b)(2)(A). However, the case also does not fall within the categories of cases that shall be heard by the Supreme Court. NRAP 17(a). Therefore, this case can either be retained by the Supreme Court or assigned to the Court of Appeals. NRAP 17(b).

II. STATEMENT OF THE FACTS

The State largely agrees with the Statement of Facts as set forth in the Opening Brief. Additional and specific factual citations are included

throughout this brief as necessary, particularly in section B of the argument pointing out the overwhelming evidence against Silva.

III. STATEMENT OF THE ISSUES

A. Did the district court err by allowing the State to present Silva's statement to his brother acknowledging that he killed the victim that was recorded after a police interrogation that was suppressed?

B. Even if Silva's statements to his brother were impermissibly presented to the jury, was the error harmless in light of the other overwhelming evidence against him?

C. Did the district court violate Silva's right to an impartial jury?

IV. ARGUMENT

A. The district court properly allowed the State to present Silva's statements to his brother because they were made voluntarily, at his own request, and not the result of interrogation by the police.

i. Standard of Review

"[A] trial court's custody and voluntariness determinations present mixed questions of law and fact subject to this court's de novo review." Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005) (citations omitted).

ii. Discussion

Silva claims that his recorded statements made to his brother, Bernard Silva, immediately after he confessed to detectives should not have been presented to the jury. The district court granted a motion to suppress Silva's confession to detectives because it found that the detectives had not scrupulously honored Silva's right to remain silent. 2AA 206-207.

The United States Supreme Court has recognized that "the goals of the Miranda safeguards could be effectuated if those extended not only to express questions, but also to 'its functional equivalent.'" Arizona v. Mauro, 481 U.S. 520, 526, 107 S. Ct. 1931, 1935 (1987) *quoting* Rhode Island v. Innis, 446 U.S. 291, 301 100 S. Ct. 1682, 1689 (1980). The Supreme Court has also "explained the phrase 'functional equivalent' of interrogation as including 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id quoting* Innis.

In Mauro, the court found that the defendant had not been subjected to interrogation when, after invoking his right to counsel, police allowed his wife into the room to talk to him. The Mauro court wrote that "[w]e doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way." 481 U.S. at 528, 107 S. Ct. at 1936. Additionally, the Mauro court re-emphasized what it had held since Miranda: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." Miranda v. Arizona, 384 U.S. 436, 478, 86 S. Ct. 1602, 1630 (1966) *cited by* Mauro, 481 U.S. at 529, 107 S. Ct. at

1936 and Innis, 446 U.S. at 299-300, 100 S. Ct. at 1689. The Mauro court ultimately held that the police had not violated Mauro's rights by allowing his wife to speak to him in a monitored environment. 481 U.S. at 529-30, 107 S. Ct. at 1937. "Officers do not interrogate a suspect simply by hoping that he will incriminate himself." Mauro, 481 U.S. at 529, 107 S. Ct. at 1936.

Here, Silva asked detectives if he could speak to his brother, Bernard, because "I want to be the first to tell my brother what I really did." 2AA 227.[1] The district court acknowledged that the detectives "didn't initiate the contact. They didn't suggest the contact. They responded to [Silva's] request." 2AA 278. Detectives were initially hesitant about the idea due to the relationship between all the parties - they weren't sure whether Bernard would try to hurt Silva for having killed his wife. 2AA 285-286, 6AA 1247. This was not a situation in which the detectives sought to get Silva's confession by use of a third-party conducting the functional equivalent of a custodial interrogation.

[1] The transcript of the conversation appears to be missing from the Appellant's Appendix. 2AA 219-20. The Respondent does not believe this was done intentionally, but instead is an artifact resulting from the way that exhibits are included as separate documents when filing pleadings before the district court. In the interest of completeness, it has been included in a Respondent's Appendix. Respondent's Appendix, pp. 8-9.

In fact, the detectives would have had no reason to believe they might need to elicit a confession through Bernard because they had just finished hearing it directly from Silva. Although that confession was later suppressed, at the time Bernard entered the room to talk to Silva, detectives had just heard what they believed to be an admissible confession and thus would have had no reason to send Bernard in with the purpose of extracting a confession from Silva. Moreover, although asking questions is not the only way in which law enforcement can conduct an interrogation, there is no evidence to suggest that they did anything other than facilitate Silva's request to confess to his brother, *i.e.*, detectives did not tell Bernard to ask questions or suggest to Silva that he should come clean to his brother.

Silva's suggestion that his conversation with Bernard should have been suppressed as the fruit of the poisonous tree is a misapplication of Fourth Amendment jurisprudence to a Fifth Amendment issue. Silva argues that since police failed to scrupulously honor his request to remain silent, anything that flowed from his confession, including Bernard's "functional equivalent of continued police interrogation" must be suppressed. Opening Brief, p. 19.

However, as discussed above, Silva's statement to Bernard was entirely voluntary and not in response to any functional equivalent of

police-led interrogation. This was not some clever ploy by the detectives to coerce Silva into incriminating himself. Instead, this was the detectives reluctantly giving Silva the opportunity to tell his brother directly that he was responsible for killing his wife.

The Nevada Supreme Court has previously dealt with this issue. In Rhodes v. State, the court succinctly phrased the issue as: "May the fruits of confessions given in violation of the procedural safeguards of Miranda be received in evidence if the confessions otherwise are shown to have been freely and voluntarily given?" 91 Nev. 17, 22, 530 P.2d 1199, 1202 (1975). Answering its own question, the Rhodes court agreed with the United States Supreme Court and held that testimony "need not be excluded where there has been no direct infringement upon the suspect's privilege against compulsory self incrimination, but only a violation of the prophylactic rules which Miranda developed to protect that right." *Id citing* Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357 (1974).

Here, Silva's confession was suppressed because of detectives violating Miranda's safeguards, not for extracting an involuntary confession. As a result, the fruits of that confession, including Silva's subsequent voluntary statements to his brother, were admissible. As the district court pointed out, "[t]here is no indication the police initiated the

conversation between Mr. Silva and his brother" but that "[t]o the contrary, the police seemed uncertain about allowing the contact…and expressing concerns over Mr. Silva's safety." 2AA 307.

Most importantly, Miranda violations have their own built-in remedy - exclusion of the statement. The Supreme Court has held that "the exclusion of unwarned statements is a complete and sufficient remedy for any perceived Miranda violation." U.S. v. Patane, 542 U.S. 630, 642, 124 S. Ct. 2620, 2629 (2004) (internal alterations and quotations omitted) *citing* Chavez v. Martinez, 538 U.S. 760, 790, 123 S. Ct. 1994 (2003). Here, the district court imposed the Miranda remedy to exclude Silva's confession to detectives. That represented a complete remedy for the Miranda violations and there is no reason, and no supporting authority, to exclude Silva's subsequent voluntary, unsolicited statements to his brother.

B. Any error in admitting Silva's statements to Bernard was harmless in light of the overwhelming evidence supporting his conviction.

If this Court disagrees and does find that Silva's statements were admitted in violation of Miranda, the Court should find that the error was harmless in light of the overwhelming evidence against him. *See* Boehm v. State, 113 Nev. 910, 916, 944 P.2d 269, 273 (1997) (applying harmless error analysis to Miranda violations).

Here, on the morning of November 2, 2017, prior to 5:00 a.m., witnesses saw a SUV parked the wrong way on Parkview Street near Mazzone Avenue, just off Neil Road. 3AA 576, 577, 580, 588. One witness saw a man wearing all black clothing, including a black hoodie, in the area near the SUV. 3AA 578, 589-90. Kimberly Vazquez, one of the witnesses who had seen the man and the SUV, heard gunshots, and then noticed that the SUV was gone. 3AA 591. Another witness, Juan Gonzalez, heard gunshots and then saw a gray Toyota SUV leave the area and briefly travelled behind it while on his way to work. 4AA 598-600.

In response to reports of gunshots, first responders arrived at the scene and discovered the victim, Luz Linarez-Castillo, had been shot six times to death inside her vehicle. 4AA 610, 612, 616-17, 623, 630-31, 633, 638.

Reno Police Department Sergeant John Silver found some fresh cigarette butts in the area where the suspicious male had been seen by witnesses. 4AA 652, 659-60. All the cigarette butts appeared to be Marlboro NXT butts. 4AA 660-61. The cigarette butts were collected and submitted for DNA testing. 4AA 662, 684. A DNA profile generated from the cigarette butts located at the crime scene were compared against a sample obtained from Bernard. 4AA 808-09. Those samples were found

not to match Bernard, but they were found to be a male familial match to Bernard, meaning one of Bernard's male relatives. 4AA 809.

While examining the contents of Ms. Linarez-Castillo's vehicle, Detective Ben Rhodes discovered two credit cards in the name of Silva and his brother, Bernard Silva Guzman, thus linking them to the investigation. 4AA 709-10.

Reno Police Department Detective Mike Barnes identified a transaction for two packs of Marlboro NXT cigarettes at a 7-11 store in Sparks from November 1, 2017, at 10:48 p.m., and emailed a photograph of the customer involved in that transaction to other detectives. 4AA 763-65.

Roman Arora, the owner of that 7-11 provided surveillance video of that transaction to detectives. 4AA 767-68. Detective Rhodes identified a silver Toyota Sequoia, seen on that surveillance video, to Sylvia and Arturo Guzman, the parents of Yiovannie Guzman. 4AA 732-33, 741. Silva was seen on that video wearing a 49ers hat inside the 7-11. 4AA 819. When he was arrested several weeks later, he was wearing a similar 49ers hat. *Id*, 6AA 1242-43. Silva was also seen wearing a black hooded sweatshirt on the surveillance tape from 7-11, like what witnesses described the suspicious man wearing at the scene that morning before the shooting, and similar to a black hoodie taken from him at the time of his arrest. 4AA 819-20, 5AA

873. Silva was seen exiting the passenger side of a silver SUV at the 7-11, which led detectives to believe that another person might possibly be involved. 4AA 821.

Detective Ernie Kazmar testified that he learned that Ms. Linarez-Castillo had been with Bernard for either 11 or 13 years, and that Silva was her brother-in-law. 4AA 801-02. Detective Kazmar also learned that Ms. Linarez-Castillo had a romantic relationship with Arturo Manzo and that he lived at 3515 Mazzone. 4AA 804. The morning of her murder, Ms. Linarez-Castillo had been staying at Mr. Manzo's home. *Id.* Detective Kazmar further testified that he learned that Silva was involved in an affair with Ms. Linarez-Castillo, and she was also involved in an affair with Mr. Manzo. 4AA 818.

Detectives obtained a sample of Silva's DNA on a water bottle during an interview at the Reno Police Department on November 8. 4AA 811, 5AA 856, 865, 6AA 1234, 1236. Detectives later submitted that water bottle for DNA testing. 5AA 865. DNA analysis matched the DNA profiles from the Marlboro NXT cigarette butts to the sample obtained from Silva's water bottle. 6AA 1202-05, 1207. A reference sample later identified Silva as the source of those DNA samples with an estimated frequency of 1 in 8.217 octillion individuals. 6AA 1208-09, 1211.

During that interview, Silva told detectives that he had not been to the area of Parkview and Mazzone for a number of years, when he had gone to that area to work on a school project. 5AA 864, 6AA 1235-36. In fact, Silva claimed "that he specifically avoided the area of Neil Road as well as other locations within Reno that he, quote, deemed a high crime area." 5AA 864-65.

Mr. Manzo testified that he had been Ms. Linarez-Castillo's boyfriend for approximately six months before she was killed. 5AA 875-76. Mr. Manzo was aware that Ms. Linarez-Castillo had been married to Bernard and had previously confronted him over an accusation of domestic battery. 5AA 882-85. During that conversation on October 20, 2017, Mr. Manzo confirmed to Bernard that he was "with Lucy." 5AA 885. On that same day, Mr. Manzo received a phone call from Silva, during which Silva asked if he was dating Ms. Linarez-Castillo. 5AA 886-88.

Louise Roberts testified that she was a manager of programming at DMV in 2017 and was tasked with checking who might have performed searches for various information on DMV computers. 5AA 904-05. In the course of that search, she learned that an employee named J. Macias had performed a computer search for Mr. Manzo's license plate on October 26, 2017. 5AA 909-911. Ms. Roberts testified that information would give

access to a variety of other information such as a current registered address. 5AA 912.

Detective Rhodes executed a search warrant at 1440 Sbragia Way on November 16 and recovered a dark hooded sweatshirt and Silva's DMV employee ID. 4AA 721, 724-25. Detective Rhodes also searched Silva's vehicle and found a Marlboro NXT cigarette butt in the trunk. 4AA 727, 729-30.

Detective Josh Watson examined Yiovannie Guzman's phone and discovered text messages between Silva and Mr. Guzman. 5AA 935-36, 1026. One of those texts asked Mr. Guzman where he was at 4:28 a.m. on November 1. *Id.* The text messages continued wherein Mr. Guzman told Silva that he had just woken up at 5:54 a.m. because his alarm had not woken him up and Silva responded that it was "too late." 5AA 937. Silva then wrote that Mr. Guzman should have said that alarms do not wake him up and he "would have had you stay with me until it's time." *Id.* Detective Watson later examined Silva's phone, associated with the same phone number listed in Mr. Guzman's phone, and was unable to find corresponding messages, indicating that they had been deleted. 5AA 947-950.

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By far, the most damaging testimony came from Mr. Guzman himself. He testified that he is Silva's cousin and has known him his whole life. 5AA 997. Mr. Guzman noticed that Silva and Ms. Linarez-Castillo appeared to be "too friendly, more than brother-in-law and sister-in-law should be." 5AA 1001. On Halloween night, sometime after 9:00 p.m., Mr. Guzman drove a 2002 Toyota Sequoia to Paul's Market in Sparks. 5AA 1006-07. While exiting his vehicle, Mr. Guzman saw his cousin, Silva, pull in. 5AA 1008. Mr. Guzman and Silva's companions went into the store, and they were left outside alone with one another and talked. 5AA 1009. Silva asked Mr. Guzman about borrowing his SUV and said that he "had a mission to do and that he had to body somebody." 5AA 1009-10. Mr. Guzman understood "body somebody" to mean "[t]o kill somebody. 5AA 1010.

Mr. Guzman agreed to let Silva borrow his car, but Silva told him to call him later. 5AA 1011. Mr. Guzman called Silva later that night and met up with him at a friend's home in Sparks to let him borrow the car. 5AA 1012-13. While at that house, Silva told Mr. Guzman that he was going to kill Ms. Linarez-Castro and asked if Mr. Guzman would be his driver. 5AA 1014-15. Silva told Mr. Guzman that he was going to kill her because she was threatening to take her kids away from Bernard and that she had information that could put Bernard in prison for a long time. 5AA 1015.

Silva also told Mr. Guzman about Ms. Linarez-Castillo's relationship with Mr. Manzo. 5AA 1016. Mr. Guzman agreed to drive for Silva. *Id.*

The plan was that they would drive to check out residences where Ms. Linarez-Castillo might be so that Silva could kill her. 5AA 1016-17. Silva told Mr. Guzman that he was aware of Ms. Linarez-Castillo's work schedule and that they would go searching for her around the time she went to work. 5AA 1021.

Mr. Guzman confirmed that they went to 7-11 on Greenbrae on the night of November 1. 5AA 1022-23. Mr. Guzman said they went there because Silva needed cigarettes and was trying to find either a mask or gloves. 5AA 1023. Mr. Guzman knew that Silva liked Marlboro cigarettes sold in black and green packaging. *Id.*

The original plan on Halloween night was that Mr. Guzman would go home, sleep for a couple of hours, and then drive to Silva's house. 5AA 1024-25. After he arrived at Silva's house, the plan was to go drive around and look for Ms. Linarez-Castillo. 5AA 1025. The plan for the morning of November 1 (following from Halloween night) was not executed because Mr. Guzman fell asleep and did not wake up to his alarm. 5AA 1025-26.

After Mr. Guzman slept through his alarm on November 1, the plan was "just set back" a day. 5AA 1028. Silva instructed Mr. Guzman to sleep

over at his house the following night so that they could carry out the plan. 5AA 1029.

That night, November 1, Mr. Guzman and Silva drove to Ms. Linarez-Castillo's residence near Nissan of Reno on Kietzke Lane to look for her. 5AA 1031-32. After not seeing Ms. Linarez-Castillo's car at her house, they proceeded to Mr. Manzo's house. 5AA 1032-33. They saw Ms. Linarez-Castillo's car parked at Mr. Manzo's house. 5AA 1033. Silva provided Mr. Guzman with the addresses for both houses. 5AA 1033-34. Silva said he got the addresses from a female coworker at DMV. 5AA 1034. After finding Ms. Linarez-Castillo's car at Mr. Manzo's house, Silva and Mr. Guzman headed back to Silva's house to sleep. 5AA 1034-35. Silva told Mr. Guzman consistently throughout the night not to get cold feet. 5AA 1039.

Mr. Guzman woke up the following morning to an alarm and to Silva waking him up. 5AA 1038. They got into Mr. Guzman's Sequoia and drove to several locations before again arriving at Mr. Manzo's residence. 5AA 1040-1044. Mr. Guzman parked his car facing the wrong way. 5AA 1044-45. They waited there for approximately 30 minutes to an hour before Ms. Linarez-Castillo came out. 5AA 1046. During that time, Silva exited and re-entered the vehicle once. *Id.* Mr. Guzman saw Silva smoking when he was out of the vehicle. 5AA 1055. Silva was out of the vehicle and alerted

Mr. Guzman when he saw Ms. Linarez-Castillo's car coming down the street. 5AA 1047-48.

Mr. Guzman saw Ms. Linarez-Castillo's car come to a stop and Silva fire the first shot into the vehicle. 5AA 1049. Mr. Guzman looked away after the first shot, but he heard a total of six shots. *Id.* After the shooting, Silva quickly got back to Mr. Guzman's car. 5AA 1051.

After Silva got back into the car, Mr. Guzman drove normally away from the scene. 5AA 1052. Silva instructed Mr. Guzman to drive as if nothing had happened so as not to appear suspicious. *Id.* Mr. Guzman described seeing a vehicle conduct a U-turn, something that Mr. Gonzalez testified he had done that morning. 5AA 1053.

Following his arrest, Silva told his mother on a recorded phone call from the Washoe County Jail that "they have a search warrant for my car" and that "they are trying to find… the pistol, and they aren't going to find it. I already got rid of it. 6AA 1180, 1182, 1292-93. Detectives were unable to locate the 9mm handgun that was used to kill Ms. Linarez-Castillo. 4AA 808.

The overwhelming weight of the other evidence that the jury heard demonstrated Silva's guilt. Aside from the conversation with Bernard, the jury heard directly from Silva's accomplice who drove him to and from the

scene of the crime, heard his rationale for the murder, and participated in the planning. They also saw text messages corroborating Mr. Guzman's testimony and the absence of related text messages on Silva's phone, showing that they had been deleted as he sought to cover his tracks. Silva's DNA was found at the scene in an area where Silva claimed he had not been for years. Silva obtained DMV information that provided him with address information for Mr. Manzo's residence. And after the shooting, Silva told his mother that he had already gotten rid of the gun. Thus, even if the district court erred in admitting the conversation between Silva and Bernard, the error was harmless in light of the other overwhelming evidence demonstrating his guilt.

C. The district court did not deny Silva his right to an impartial jury.

i. Standard of Review

This court reviews a district court's ruling on challenges for cause to a juror for an abuse of discretion. *See* Blake v. State, 121 Nev. 779, 795-96, 121 P.3d 567, 577-78 (2005).

ii. Discussion

Silva claims that he was deprived of an impartial jury for the penalty phase because Juror No. 1 might have been biased based upon a family member of Silva's having followed him home.

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Pursuant to NRS 175.036(1), a party may challenge a juror "for any cause…which would prevent the juror from adjudicating the facts fairly." "[W]e generally will defer to the trial court's decision so long as the trial court sufficiently questioned the juror and determined the juror was unbiased and could be impartial." Sayedzada v. State, 134 Nev. 283, 289, 419 P.3d 184, 191 (Nev. Ct. App. 2018) (citations omitted). Moreover, "[w]hen reviewing whether a juror demonstrated bias, the juror's statements must be considered as a whole." *Id*.

The Opening Brief asserts that "[o]f concern, the district court did not ask Juror No. 1 how he became aware that an assumed family member of Appellant, whom he said he recognized at trial, was a co-worker of his wife." Opening Brief, p. 21. The Opening Brief cites to a copy of the juror's note wherein he notified the district court that he believed he knew one of Silva's family members and a "guard." 2AA 311. The Opening Brief fails to cite to the district court's colloquy with Juror No. 1 where it asked for additional information about the note. 4AA 839-844. As a result, Silva concludes it can be implied that Juror No. 1 must have spoken to his wife about Silva's sister. However, no such implication is necessary.

a. Juror No. 1 recognizes someone in the courtroom.

When Juror No. 1 was asked by the district court to describe why he had written that he believed he knew some of Silva's family, he replied that

"I didn't really recall where I knew that individual from, and so on my way home I was processing, you know, yesterday, all the information and stuff, and it was on my drive home where I recalled that yes, I do know this person." 4AA 841.

Juror No. 1 went on to explain that he knew this person "through my wife that we attended an event from her work" and also, "I believe, from school." *Id.* The court asked Juror No. 1 if Silva's family member was a coworker with his wife and he responded, "I don't believe now, but at some point in the past." 4AA 841-42. Juror No. 1 explained that he did not know this person's name, that this person was not in his cellphone contacts, he had not been to their home, nor had they been to his home, and if he saw them in public he would not stop to acknowledge them. 4AA 842.

When asked why he believed that this person was one of Silva's family members, Juror No. 1 explained that because she stuck around after jury selection, he "figured she wasn't a juror" and, although he didn't know if she was one of Silva's family, he deduced that "if, you know, you're around for cases, usually it's family that's around." 4AA 843. Later, after the jurors had returned their verdict and Juror No. 1 was being questioned by the court about a different incident, he further explained that:

> No one has confirmed to me that she is a family member. I assumed that she was because usually when things get bad in

> life, friends are not around. It's usually family that's there. So that's why I assumed she was family. No one has confirmed this to me, the court even asked. It was never asked if she was family, as far as I recall, when we were here. So I have not confirmed that she is family. I was just assuming she was.

8AA 1615.

Juror No. 1 also explained that his wife would know her "because my wife worked with her, but I have not told my wife who -- you know, the details." 8AA 1612. Thus, Juror No. 1 explicitly addressed whether he had disclosed any information to his wife when he told the court later that he believed his wife would know the person's name, but he still did not because he had not discussed it with his wife.

Juror No. 1 agreed that he "liked" Silva's sister because "[s]he's never given me a reason not to like her or anything like that." 4AA 843. He said that he wouldn't say his relationship with her was "positive," but that he says "hi to everybody I see" and that "she's never given me a reason not to like her is what I'm saying." *Id.* He confirmed again that he did not even know her name. 4AA 843-44.

The record clearly shows that on the first day of trial, after the venire had left the courtroom, Juror No. 1 recognized someone that he had seen before. After thinking about it on his way home, he was able to place that person as a former co-worker of his wife. His relationship with that person

was so minimal that he would not stop to greet the person if he saw them in public, he did not know their name, and he had never socialized with them at either of their homes.

Moreover, he was unsure whether she was a family member of Silva's, but guessed that she was because she had stayed after the courtroom had been cleared of community members who were summoned to be there. Thus, the record does not support Silva's suggestion that Juror No. 1 must have spoken to his wife about the case in violation of the district court's admonition. The district court concluded that Juror No. 1 was "being hypervigilant about rules" and took it as an indication "that the juror will participate in good faith throughout this process." 4AA 844. Neither party disagreed. *Id.*

b. Juror No. 1 reports a suspicious incident after verdict

Juror No. 1 came to the attention of the district court again after the guilt phase of trial. After reaching a verdict on Friday, Juror No. 1 became concerned after he made eye contact with a "young Hispanic man wearing a red hoodie" during his drive home and that person kept looking at him. 8AA 1609. Juror No. 1 saw a car behind him take two of the same turns that he did before he eventually lost it at a red light. 8AA 1609-10. Because of the "tensions of emotions on all sides" as a result of the verdict that day,

Juror No. 1 decided to contact the police on their non-emergency number to report that someone "might have been trying to follow me." *Id.*

The Opening Brief seeks to blend all the circumstances surrounding Juror No. 1 throughout the trial into a single incident in which Juror No. 1 was threatened by a member of Silva's family - "when questioned by the police, [Juror No. 1] associated the person who was following him with the family member of the defendant." Opening Brief, pp. 21-22. This is demonstrably untrue.

The Opening Brief correctly points out that Juror No. 1 reported to the responding police officers that he "knew a family member of the defendant" and that "[t]his person works with [Juror No. 1's] wife, which the judge knew." 4AA 1569. The Opening Brief does not point out that this line of questioning appeared to be for background informational purposes, and not directly related to the incident following the verdict. The email, authored by a Sparks Police Officer and read by the prosecutor, does contain both facts - that Juror No. 1 reported that "he thought he was being followed" and that he "knew a family member of the defendant." 8AA 1569. However, the email, as read, does not suppose any connection between those two facts, nor does it attribute any such link-making to Juror No. 1. *Id.*

Juror No. 1 explained the process by which he disclosed the fact that he "knew" one of Silva's family members to the police officers. Juror No. 1 responded to a question *from officers* asking "if I knew anybody relating to the defendant." 8AA 1612. In response, Juror No. 1 "shared, well, yes, there's a person that knows my wife that I believe is family of the defendant." *Id.* The testimony makes it clear that Juror No. 1 provided the information about Silva's family member in response to a question from officers and that he did not draw any connection between his concerns that evening with his recognition of Silva's family member. It also clearly shows that Juror No. 1 was still unsure whether the person he had recognized inside the courtroom was actually related to Silva.

When asked specifically by the district court, "Did you recognize the driver of that vehicle as someone who had been in the courtroom, or did you just recognize an article of clothing that could have been worn by someone in this courtroom?" 8AA 1611. Juror No. 1 responded, "I did not recognize anyone in that vehicle, not in the vehicle. I noticed there was two people in the vehicle from the rear-view mirror but I didn't see any faces. They were like three cars behind me." *Id.* The only person that Juror No. 1 observed in sufficient detail to offer any description was "a young Hispanic man." 8AA 1609. The only person that he believed he recognized in the

courtroom as a member of Silva's family was female. 4AA 841-44, 8AA 1615. Thus, contrary to the Opening Brief's assertions, Juror No. 1 did not believe that the person in the vehicle who he believed may have been trying to follow him was related in any way with Silva's sister, whom he had earlier recognized.

So, the question becomes, was Juror No. 1 biased? Considering all of Juror No. 1's responses as a whole, as required by decisional authority, the answer is resoundingly no. Initially, Juror No. 1 identified a person in the courtroom whom he recognized through some previous association with his wife. He believed that person to be a family member of Silva's based on her presence in the courtroom after the venire was excused, but he did not actually know whether she was a family member. 4AA 843. That doubt remained, even heading into the penalty phase. 8AA 1615. Nobody has ever suggested that Juror No. 1 might have any bias from having recognized the person who turned out to be Silva's sister sitting in the courtroom. His relationship with that person was so tenuous that he did not even know her name and he would not have done anything more than smile at her if he were to see her in public.

Next, Juror No. 1 reported what he believed was a suspicious incident that occurred on his way home after delivering the guilt-phase verdict.

That incident involved someone whom Juror No. 1 did not recognize as someone who had been in the courtroom. 8AA 1611. Juror No. 1 drew no connections between that incident and his earlier recognition of Silva's sister. 8AA 1611-12. Instead, while responding to a question from the officers who responded, Juror No. 1 said that someone that he believed to be a member of Silva's family knew his wife. 8AA 1612.

In response to a question from Silva's attorney about "did you immediately assume [the person in the red hoodie] was someone in regards to this case," he said, "No." 8AA 1613. He went on to explain that he noticed the person looking at him and when he pulled up closer to see if that person was staring at him, "[i]t felt like he recognized me. I didn't recognize him." 8AA 1614. The only suggested connection between that person and Silva's sister has come from Silva and his attorneys.

When asked directly, "[c]an you still be fair and impartial today," Juror No. 1 responded, "Can I still be fair? Absolutely. Absolutely." 8AA 1613. This came after the court asked, "Is there anything about your experience over the weekend that causes you to be concerned about your continued service?" 8AA 1612. And Juror No. 1 responded, "No. No. No." *Id.* Juror No. 1 further explained that he had rested over the weekend and hadn't "encountered any issues." 8AA 1613. Apparently explaining why he

had called the police after the verdict, Juror No. 1 said, "I was simply going off Friday evening, the emotions, the variables that I was noticing, and so in that moment, for Friday evening, we felt that it was appropriate." *Id*.

There is simply nothing in Juror No. 1's responses to suggest that he manifested any bias against Silva. "[B]ias exists when the juror's views either prevent or substantially impair the juror's ability to apply the law and instructions of the court in deciding the verdict." Sanders v. Sears-Page, 131 Nev. 500, 507-08, 354 P.3d 201, 206 (Nev. Ct. App. 2015) *citing* Preciado v. State, 130 Nev. 40, 44, 318 P.3d 176, 178 (2014); Thompson v. Altheimer & Gray, 248 F.3d 621, 625 (7th Cir. 2001).

Juror No. 1 drew no connection between the person he suspected to be Silva's family member and the person that had caused him some unease after participating in deliberations and delivering a verdict finding Silva guilty. He told the court that he had contacted the police because he felt it was appropriate given the circumstances but said that he did not recognize that person as being related to the case in any way.

Moreover, he told the court that there was nothing about the experience that would cause him any concern in continuing to participate as a juror and he agreed that he could continue to be fair. As a result, the

district court did not abuse its discretion in denying Silva's challenge for cause.

V. CONCLUSION

The district court did not err in admitting Silva's voluntary statement to his brother that he asked to give after making a confession to detectives that was later suppressed. Silva requested to make the statement and indicated that he intended to tell his brother what he had done. The maneuver was not concocted by the detectives to get Silva to make a confession. Instead, it was done in response to Silva's own request. Even if the statement was erroneously admitted, any error is harmless due to the other overwhelming evidence demonstrating Silva's guilt.

Finally, the district court did not err in denying Silva's challenge to Juror No. 1's participation in the penalty hearing. Juror No. 1 had two separate incidents which brought him to the attention of the district court. Silva's Opening Brief seeks to conflate and blend these two incidents into a threat or a perceived threat against the juror by a member of Silva's family. However, Juror No. 1 drew no such connection and indicated that he could continue to participate without concern and that he would remain fair. There is no evidence supporting Silva's claim that Juror No. 1 was biased against him because of a set of facts that were not perceived in the same way that Silva now presents them.

For all of those reasons, Silva's conviction should be affirmed.

DATED: October 22, 2021.

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DISTRICT ATTORNEY

By: Kevin Naughton
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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 Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: October 22, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 22, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Victoria T. Oldenburg, Esq.

/s/ Tatyana Kazantseva
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