IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY DECORLEON BROWN

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 81962

Direct Appeal From A Judgment of Conviction
Eighth Judicial District Court
The Honorable Valerie Adair, District Judge
District Court No. C-17-326247-1

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction, by jury verdict, of conspiracy to commit robbery, robbery with use of a deadly weapon, and first-degree murder with use of a deadly weapon. 17AA 3360. The district court twice amended the judgment of conviction, to correct errors, on October 20, 2020 and December 2, 2020. 18AA 3431, 52. A timely notice of appeal was filed on October 19, 2020. 18AA 3429. An amended notice of appeal was filed on December 8, 2020. 18AA 3458. This Court has jurisdiction under NRS 177.015.

II. ROUTING STATEMENT

The issues in this appeal are of a constitutional dimension and present an issue of first impression in Nevada: whether deference to a private contractor's claim of trade secrets may abridge a defendant's constitutional right to confrontation. This case should be retained by the Nevada Supreme Court. NRAP 17(a)(11). This appeal is not within the case categories presumptively assigned to the Court of Appeals. NRAP 17(b).

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III. STATEMENT OF THE ISSUES

A. Whether the district court committed numerous evidentiary errors in violation of state and federal law.

B. Whether the state violated *Batson v. Kentucky* and the district court committed structural error.

C. Whether the district court's rulings violated Larry's rights under the Confrontation Clause.

D. Whether cumulative error warrants a new trial.

IV. STATEMENT OF THE CASE

On December 20, 2019, the State indicted appellant Larry Brown on charges of conspiracy to commit robbery, robbery with use of a deadly weapon, murder with use of a deadly weapon, and ownership or possession of a firearm by a prohibited person.[1] 14AA 2728.

Trial began on December 9, 2019. 5AA 965. Prior to trial, the court made several rulings relevant to this appeal. The district court denied Larry's request to strike evidence of comparative footwear analysis, finding the State could present this evidence without any expert report or scientific testimony. 4AA 873; 5AA 948.

[1]During trial, Larry entered an Alford Plea to Count 4, ownership or possession of a firearm by a prohibited person. 15AA 2792.

Citing the Confrontation Clause, Larry moved to exclude all the evidence obtained from Cellebrite, objected to the expert from Cellebrite being allowed to limit their testimony to protect trade secrets, and to testify via video. 9AA 1630-31. The court overruled these objections. 5AA 928.

After jury selection, Larry argued the State violated *Batson v. Kentucky* for three jurors 8AA 1488. The court denied his challenges but committed structural error doing so. 8 App. 1522.

Larry testified during trial. He objected to a highly prejudicial and improper question the State asked him during cross-examination and moved for a mistrial. The State asked him if he would find it odd that his girlfriend Angelisa searched on her phone for information related to the shooting. 13AA 2473. The court sustained the objection but denied the mistrial. 13AA 2474; 14AA 2506, 36. As a result of the improper question, the State introduced rebuttal evidence, which Larry opposed on grounds of being unauthenticated, hearsay, and improper rebuttal evidence. 14AA 2645. The court admitted the evidence. *Id.*, 14 AA 2613-29.

The jury found Larry guilty of conspiracy to commit robbery, robbery with use of a deadly weapon, and first-degree murder with use of

a deadly weapon. 17AA 3360. On May 15, 2019, the district court sentenced Larry on Count One, to a minimum term of 28 months and a maximum term of 6 years; on Count Two, to a minimum term of 6 years and a maximum term of 15 years, with a consecutive sentence of a minimum of 6 years and a maximum term of 15 years for the deadly weapon enhancement, Count Two to run concurrent to Count One; Count Three, to a minimum term of 20 years and a maximum term of life; and on Count Four, to a minimum term of 28 months, with a maximum term of 6 years, Count Four to run Consecutive to Count 3. 18 AA 3427. The aggregate sentence was 30 years to life. 18AA 3455.

V. STATEMENT OF THE FACTS

The State alleged that on February 21, 2017, Larry Brown shot and killed Kwame Banks during a robbery that was planned in advance with Anthony Carter. Larry contested the State's charges, arguing that its case was based on circumstantial evidence, unreliable cell phone records, and improperly admitted footwear impressions. No eyewitness testimony or other evidence directly identified Larry as the shooter.

Larry testified at trial. He is originally from Atlanta, Georgia but lived in Las Vegas with Angelisa Ryder. 13AA 2435. He visited Atlanta

several times a year. *Id*. He did not know Kwame and police did not find any communication between the two. 11AA 2126; 13AA 2439. On February 21, 2017, Larry wanted to buy marijuana from his friend Anthony, whom he had bought marijuana from previously. 13AA 2440. Usually, Larry met him at a store to buy drugs and, since Anthony did not have a car, Larry would give him rides. *Id*. Larry dropped Angelisa off at work around 7 p.m. and headed back home. 14AA 2457.

That night, around 9:30 p.m., Larry waited in the parking lot of a gas station for Anthony to arrive with marijuana. 14AA 2441. Anthony sent Larry text messages that he was arriving. 14AA 2442-43. Larry got out of his car and, to his surprise, he was attacked by multiple men wearing hoodies. 14AA 2443. They pistol-whipped him, took his phone and cash. 14AA 2443-45. He did not report the robbery because he was afraid to tell police he was robbed while attempting to buy drugs. *Id*.

Kwame Banks's Death

On February 21, 2017, Kwame Banks was with his girlfriend, Tiffany Seymour, at 5850 Sky Pointe Drive. 8AA 1557-58. According to her, around 8 p.m., Kwame received a phone call about setting a meeting to do what he did regularly, sell large amounts of marijuana. 8AA 1560,

1562–63; 9AA 1677. After he got the call, Kwame loaded foot long bags of marijuana in his car. 8AA 1563. He left and came back within 5 to 10 minutes. *Id*.

Around 10:30 p.m., Dereka Nelson was alone in her apartment. 8AA 1568-70. She heard someone ask for help— then she heard a gunshot. 8AA 1570. She called 911. *Id.* Dereka looked out the window and saw two men "tussling" on top of her car, a pearl white Toyota. 8AA 1573. She believed Kwame was on the bottom of the fight. 8AA 1574. Then, she heard a second shot. *Id.*

Initially, she claimed she saw the second man (the man Kwame was tussling with) going through his pockets. 8AA 1574. On cross-examination she conceded she told police he did not go through his pockets. 8AA 1576. Also, she testified she was sure it was the same person, yet moments later, changed course and admitted she could be wrong. *Id*. She heard someone get in a vehicle and then saw a Blue Mazda drive away. *Id.*; 8AA 1577.

Jakhai Smith lived in the same apartment building as Dereka. 8AA 1579. That night, he saw two men fighting in the parking lot. 8AA 1585. He testified at trial that he saw a man wearing all black pull out a gun

during the fight and fire it. 8AA 1585. But, on cross-examination, he admitted he told police he did not see a gun. *Id*. On direct examination he was asked if he remembered the man in all black say something to the victim, to which he testified several times that he did not. 8 AA 1591. After having his recollection refreshed with his voluntary statement to police, he testified he told them he heard the man in all black saying "don't move n[*]gga." *Id*. Unlike Dereka, Jakhai did not see or hear a vehicle. 8AA 1595.

Forensic Pathologist Christina Di Loreto did not conduct the autopsy but testified to its findings. 8AA 1609, 11. Kwame had two gunshot wounds, one to the chest and the other to the back, with the shot to the chest causing death. 8AA 1613, 1619. There were two cartridges found near Kwame's body. 9AA 1701. The State argued that Kwame was robbed—yet according to the autopsy report, Kwame had about $1,900 in cash, earrings, and a bracelet on his person. 8AA 1612, 9AA 1718. He also had THC and THC metabolites in his system. 8AA 1623.

Cell Phone Examination and Evidence

Police found three cell phones in the parking lot where Kwame was shot. 10AA 1818. One was broken into pieces near the front entrance, one

was in the rocks, and the third was under Kwame's arm. 9AA 1670. Officers gathered the phones. 9AA 1672. The phone found in the rocks was encrypted, so they took out the sim card and handed it to the LVMPD digital forensic lab. 9AA 1688. The lab obtained the phone's records from Sprint, which identified the phone as registered to Larry Brown of Atlanta, Georgia. 9AA 1690. Co-defendant Anthony's phone was never found. 9AA 1693.

The other two phones found at the parking lot were Verizon phones under Kwame's name. *Id*. Using Cellebrite[2] software, CSA Wilcox extracted information for these two phones. 8AA 1691, 9AA 1774. Both phones had a contact saved as "POE ATL," which Wilcox identified as Anthony. 9AA 1692. Kwame also had a third phone. 8AA 1564. Wilcox could not confirm if there was any testing for fingerprints on any of Kwame's phones. 9AA 1778.

LMVPD Detective Eugenio Basilotta, testified for the State about cell site information 11AA 2112, 17, 42, 47. Working in the Technical And Surveillance Squad ("TASS"), he testified there were no calls or texts

[2] Multiple issues were raised prior to and during trial regarding Cellebrite, a company who assists law enforcement with extracting data from cell phones. 4AA 723. These issues are discussed below.

between Larry and Kwame. 11AA 2113, 15-16, 26. However, Kwame had numerous communications with Anthony, who in turn had numerous communications with Carnell Cave. 11AA 2145, 48. Detective Basilotta went over different texts and calls between Anthony and Larry's phone on the day of the shooting. 11AA 2130-40.

Investigation

Law enforcement recovered several additional items from the parking lot, including a .40 caliber cartridge next to Kwame's body, a red-handled knife in his waistband, and a torn black nitrile glove on the ground. 9AA 1666.

Analyst Kristin Thomas testified there were shoeprints in blood on the pavement near where Kwame was found.[3] 10AA 1802, 04–05, 15.

Police searched Anthony's and Carnell's homes. 9AA 1698. They failed to collect or test evidence that might have shed light on what happened at the parking lot. For example, outside Anthony's home, detectives found a pair of shoes but for reasons never defined, decided against testing the shoes or taking any pictures. 10AA 1834, 37, 53. This

[3] The shoeprints were a key piece of evidence in the State's case and a focus of pre-trial litigation. Larry challenged the admission of the footprints before trial, 4AA 873, an issue discussed below.

was unusual since Aireonte Reed, a security guard at the Skye Pointe apartments, told police that he did not think the suspect had boots but wore tennis shoes. 9 AA. 1729. Instead, police took shoes from only Angelisa's home, where Larry lived. 9AA 1702–03, 31. On the same day LMVPD searched Anthony's home, they also executed a search warrant at Angelisa's home. 9AA 1702–03. Police impounded a pair of red and black "Ralph Lauren Polo Sport" shoes, size 13 D, with reddish brown stains, but a presumptive blood test was negative. 9AA 1731; 10AA 1878. Jurors asked questions about the shoes, such as how long it takes for blood to appear or deteriorate on a shoe, indicating they were curious why Larry's shoes did not test positive for blood. 10AA 1883–84.

Law enforcement did not find Kwame's black Nissan Altima until two days after the shooting. 9AA 1677–79. The car was half a mile from where Kwame was shot with its plates removed. *Id.* An officer saw the car as he was driving by and took notice because there were no license plates and it matched a description of Kwame's car. *Id.* He saw a black male near the car but when he approached, the man was gone and a white SUV was leaving. 9AA 1685–86. Based on this and surveillance footage from nearby businesses, police developed a description for the suspect

car—a white mid-sized SUV. 9AA 1687, 88. As it happened, Angelisa owned a 2015 White Jeep SUV that LVMPD officers observed parked outside her home. 9AA 1748; 13AA 2429; 14AA 2678–79.

The State strung together an elaborate theory with these strained, imprecise facts as circumstantial evidence to identify Larry as the shooter. *Id*. By argument alone—not by evidence—the State submitted that the SUV seen near the unlicensed Altima was the same as the one found at Angelisa's house, and implied the black male who entered it must have been Larry. *Id*. However, Officer English, who first saw the SUV driving away from Kwame's Altima, never identified the make or the model of the SUV and did not run its license plate. 9AA 1747, 53. Thus, he could not claim with any degree of reliability that this was the same vehicle. *Id*.

Inconsistent DNA Results & Contamination of the Crime Scene

When police found the Altima, it was scorched. 8AA 1683. Police searched the Altima and recovered a charred seat cushion, burnt fabric towels, a beanie, baseball cap, lighters, swisher sweets wrapped in "green leafy substance," swabs of blood from the accelerator pedal and the brake, and DNA swabs from several bottles. 9AA 1740. Despite all these

evidentiary leads, only accelerator and brake pedals were tested for DNA. 9AA 1740, 10AA 1916-17; 12AA 2309.

There were inconsistencies in the limited DNA testing. The State argued that Larry was in the parking lot where Kwame died based on the presence of a torn nitrile glove with traces of Larry's DNA found inside the glove. 12AA 2262. However, LVMPD forensic analyst Marjorie Davidovic testified there was a mixture of three individuals in the glove and that she had to keep retesting the swabs. 12AA 2236, 03. In her third and final report, Larry's DNA was still included in the inside of the nitrile glove, but now it was inconclusive as to whether Kwame, Carnell, or Anthony's DNA was present. 12AA 2303. She confirmed that the outside of the glove excluded Larry, but had DNA from Kwame, with two unknown contributors. 12AA 2304.

There was also vial-swab contamination. Davidovic conceded on cross-examination there was a corrective action report for this case, in which a CSA, not assigned to this case, contaminated swabs taken from the pedals of the Altima. 12AA 2315. Of particular concern, she testified that the CSA who contaminated the Nissan pedals never came into contact with the pedals, acknowledging that someone may provide DNA

without ever coming into contact with an item. *Id*. She also conceded it was possible that if someone came into contact with Larry, they could transfer his DNA onto the glove. 12AA 2316.

Further troubling was her revelation that the inside-out pockets from Kwame's sweatpants were never tested, despite a witness testifying that someone went through his pockets. 12AA 2318. However, Kwame's sweatpants and the right hip pocket were tested and Larry's DNA profile was excluded. 12AA 2319. Larry's DNA was also excluded from the phone under Kwame, the back and shattered glass of the cell phone near the exit road, and the accelerator and brake pedals of the Altima. 12AA 2320.

Other Suspects Left Unexamined

Anthony, charged as a co-defendant in Larry's case, was in contact with both Carnell and Kwame before and on the night of the shooting. 12AA 2145. Carnell lived in the apartment building near the shooting, and his phone number was in Kwame's phone. *Id*. Detective Basilotta claimed investigators could not obtain cell site information from his phone because they did not have his cell tower records. 12AA 2164. However, the jury was unsatisfied with this answer—one juror again asked why Carnell's cell tower records were not obtained. 13AA 2217.

Basilotta conceded a search warrant could have produced the information, but detectives on the case did not request one for Carnell's phone. 13AA 2218.

On the morning of March 20, 2017, police and SWAT officers searched an apartment associated with Anthony. 10AA 1834-35. They found a 9 .mm firearm and marijuana. 9AA 1698. Police did eventually execute a warrant on Carnell's apartment, where they found marijuana. 9AA 1702.

Besides failing to investigate Carnell's relationship with Kwame, police also failed to look into Carnell's relationship with Anthony. On the night of the shooting when police were canvassing the area for witnesses, they knocked on Carnell's door, but he did not open. 9AA 1751. Police later learned that Anthony was hiding inside Carnell's apartment that night. 9AA 1697, 1749, 1751. There were also numerous communications between Anthony and Carnell. *Id*. Ultimately, Carnell's role in the events of that night was never seriously investigated and he was never charged. 14AA 2728.

Anthony pleaded guilty to one count of Voluntary Manslaughter with Use of a Deadly Weapon for Kwame's death and was sentenced to a

minimum of 8 years with a maximum of 20 years in the Nevada Department of Corrections. 18AA 3413. Anthony cooperated with the State but did not testify. His text messages were read into the record against Larry, and given to the jury for deliberation. 10 AA 1981-84, 17 AA 3292-3324. The State pointed to certain texts between Larry and Anthony that it argued demonstrated conspiracy to commit robbery. 14 AA. 2664-72. For example, Anthony sent a text about where "he" kept money in the console, or that "he" was tired. 17 AA 3292, 97. Yet, the texts never explicitly discuss a robbery and no text indicates Larry knew Kwame. 17 AA 3292-3324.

Larry's Arrest in Atlanta

Larry testified during trial he never met or communicated with Kwame and was not involved in his shooting. 13AA 2439.

Nearly a month after Kwame was killed, Larry moved back to his hometown of Atlanta—he disputed, as the State later argued, that he was fleeing after committing a crime. 12AA 2376. Larry left for Atlanta before law enforcement searched Angelisa's and Anthony's apartments. 13AA 2436. He traveled with his friend, Loshalonda Ford, who visited him in

Las Vegas. 13AA 2413, 17. She confirmed he was planning on moving back to Atlanta. *Id*.

While in Atlanta, Larry heard police had kicked down the door of Angelisa's home, looking for him. 13AA 2447. He hired an attorney in Las Vegas who communicated on his behalf to Metro to discuss his surrender. 12AA 2343, 45-46, 86. Larry first spoke to his attorney on March 28, 2017. 12AA 2345. On April 4, 2017, his attorney informed law enforcement Larry would surrender. 12AA 2346. At the time, there was no arrest warrant. 12AA 2381.

On June 29, 2017, FBI agents arrested Larry in Atlanta, on LMVPD's behalf. 9AA 1703, 10AA 1902, 12AA 2346.

VI. SUMMARY OF THE ARGUMENT

Larry's rights were violated throughout trial. His rights to Confrontation and a Fair Trial were violated by the district court's decision to admit text messages obtained by Cellebrite, a third-party contractor. The district court denied Larry the ability to properly prepare an expert to rebut the evidence. Moreover, the Court unconstitutionally limited Larry's cross-examination of Cellebrite because it opted to protect Cellebrite's purported trade secrets—blatantly raising Cellebrite's

undisclosed, amorphous financial interests over Larry's Sixth Amendment right to Confrontation. Worse still, the court exacerbated this error by allowing Cellebrite to testify remotely from New Jersey without a requisite finding of necessity.

Larry's right to a fair trial and due process were violated by the district court's decision to admit unreliable footwear impressions without an expert. While the district court initially indicated an expert would likely be needed, it later changed its mind—without citation to or reliance on any authority, but instead relying only on its own subjective analysis—ruling an expert was unnecessary.

Larry's right to a fair trial and an impartial jury were violated by the State's violations of *Batson v. Kentucky*, and the district court committed structural error in resolving the challenge. Larry's rights against Self-incrimination, to Due Process and a Fair Trial were violated during cross-examination, when the State asked whether he would be find it odd that Angelisa conducted searches on her phone related to shootings. 13AA 2473. Although the district court sustained the objection, it denied Larry's request for a mistrial. Reversal is also mandated because the district court admitted unauthenticated text

messages and cell phone search history into evidence, based on the State's improper question during cross-examination. This evidence was not only inadmissible but highly speculative and prejudicial. While each of these issues warrant a reversal of his conviction, the cumulative error also necessitates a new trial.

VII. ARGUMENT

A. The district court committed numerous evidentiary errors in violation of state and federal law.

Larry's state and federal constitutional rights to due process of law, equal protection, a fair trial, cross-examination, confrontation, and right to present evidence was violated by the district court's abuse of discretion in admitting unreliable forensic footwear impressions without expert testimony or analysis. The court further erred by admitting internet search history allegedly taken from a phone associated with Larry's girlfriend that was unauthenticated, did not have a sufficient chain of custody, and constituted hearsay. U.S. Const. amends. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

A district court's decision to admit evidence is reviewed for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106,

109 (2008). A district court abuses its discretion if its decision is arbitrary or capricious or exceeds the bounds of law or reason. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). But to "the extent the evidentiary ruling rests on a legal interpretation of the evidence code, the Court reviews de novo." *Stephans v. State*, 127 Nev. 712, 716, 262 P.3d 727, 730 (2011) (citing *United States v. LeShore*, 543 F.3d 935, 941 (7th Cir.2008)). Whether particular evidence falls within the scope of a rule of evidence is also reviewed de novo. *U.S. v. Lillard,* 354 F.3d 850, 853 (9th Cir. 2003). When a state court "admits evidence that is 'so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.'" *Dawson v. Delaware*, 503 U.S. 159, 179 (1992) (internal citations omitted). The error must survive harmless error review. *Rosky v. State*, 121 Nev. 184, 198, 111 P.3d 690, 699 (2005) (errors in the admission of evidence are subject to a harmless error review.)

1. The district court abused its discretion by allowing the State to present forensic evidence to the jury unguided by any scientific analysis.

The district court abused its discretion in admitting footwear impression evidence without expert testimony because the evidence was

unreliable, and the danger of substantial prejudice and confusion of the issues substantially outweighed any probative value it might have had.

a. The district court abused its discretion by admitting footwear impressions as evidence.

To be admissible, evidence must be relevant. NRS 48.025. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. However, even relevant evidence is inadmissible if "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1).

Before trial, Larry moved to exclude Ralph Lauren shoes recovered from his girlfriend Angelisa's house because they were irrelevant, and any probative value was outweighed by the prejudice. 3AA 654. Over defense objection, the court admitted the impressions.[4] 5AA 948.

Although this Court has discussed footwear impressions in prior decisions, it has not explicitly addressed whether the science itself is

[4] Larry filed a Writ of Mandamus with this Court, which was denied because Larry had a remedy of appeal. 4AA 897; *Brown v. Eighth Judicial Dist. Court*, Unpublished, Docket No. 80094, (Nev. 2019).

reliable. *See e.g. Doyle v. State*, 116 Nev. 148, 160, 995 P.2d 465, 473 (2000) (Footwear impressions were relevant where appellant's counsel did not object to the photographs and "relied on them to support [defendant's] defense of mere presence."); *Walker v. State*, 113 Nev. 853, 861, 944 P.2d 762, 767 (1997) (Court considered footwear impressions in a sufficiency of evidence claim where "an expert in footwear comparison, testified that several impressions in Marble's blood trail corresponded to the Jordache athletic shoes in evidence, although not to the exclusion of all other athletic shoes.").

None of this Court's decisions addressing footwear impressions were released before the publication of the President's Council of Advisors on Science and Technology ("PCAST"), released in 2016. That landmark scientific report belies the underlying bases upon which this Court relied in forming its prior decisions on the matter, necessitating a reexamination of the issue in light of these new scientific developments.

Regarding forensic footwear analysis, the PCAST report noted:

> PCAST finds that there are no appropriate black-box studies to support the foundational validity of footwear analysis to associate shoeprints with particular shoes based on specific identifying marks. Such associations are unsupported by any

> meaningful evidence or estimates of their accuracy and thus are **not scientifically valid**."[5]

Scientifically invalid evidence cannot be considered "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." *Id.*, NRS 48.015. As such, the court abused its discretion by admitting the footwear impressions. This error was compounded by its decision to admit this evidence without offering the jury expert guidance by which to interpret the evidence, which falls outside the common knowledge and understanding of lay jurors.

b. The district court further abused its discretion by admitting the footwear impressions without an expert.

The standard for expert admissibility in Nevada is found in *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008):

> (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the

[5] https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf, pgs. 12-13. (emphasis added).

> scope of [his or her specialized] knowledge" (the limited scope requirement).

(Citing NRS 50.275). Beyond these requirements, this Court has re-emphasized the latitude district court judges retain to admit or deny expert testimony, within the parameters of NRS 50.275. The district court judges are tasked with being the gatekeepers of the admissibility of expert testimony. *Higgs v. State* 126 Nev. 1, 17, 222 P.3d at 648, 658 (2010).

Although the issue here was not that an expert could testify, but was not required to, the same principle applies. Specifically, the nature of the photograph required forensic analysis and testimony, necessitating an expert qualified in an area of "scientific, technical or other specialized knowledge," and whose specialized knowledge would "assist the trier of fact to understand the evidence or to determine a fact in issue" *Hallmark*, 124 Nev. at 498, 189 P.3d at 650 (citing NRS 50.275).

After the court denied Larry's motion to exclude the shoes, he moved for reconsideration, pointing out the severe prejudice from admitting the photos through a lay witness, rather than a forensic expert. 5AA 943-46. The court denied this motion, indicating it would not reconsider its prior ruling. 4AA 884. Larry argued that footwear

comparison was beyond a layperson and required expert testimony. 4AA 874. The court rejected this argument, substituting legal analysis with its own subjective standard: "…I think the jury can look at the footprint. If you compare it with the sneaker print, I don't know. To me it's pretty darn clear."[6] 4AA 885. The court's ruling was wrong and abused its discretion: it failed to meet and outright contradicted this Court' standard for determining the difference between lay witness and expert witness testimony.

Assuming *arguendo* that footwear comparison evidence is ever admissible (though, as explained it the section above, it should not be), the next question is whether an expert must testify for the evidence's admission. This is an issue of first impression in Nevada.

This Court has ruled in both criminal and civil contexts that expert testimony is a requisite for introduction of certain evidence. *See Burnside v. State*, 131 Nev. 371, 382, 352 P.3d 627, 636 (2015) (While "[a] lay

[6] The court's conclusion contradicts the scientific community's assessment, as expressed by the White House's report that such conclusions are unsupported by any meaningful evidence or estimates of their accuracy and thus are not scientifically valid. https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf, pgs. 12-13.

witness may testify to opinions or inferences that are 'rationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue,'" (*quoting* NRS 50.265), a "qualified expert may testify to matters within their 'special knowledge, skill, experience, training or education' when 'scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.'" (*quoting* NRS 50.275); *see also Beattie v. Thomas*, 99 Nev. 579, 586-587, 668 P.2d 268, 273 (1983) ("a lay witness may not express an opinion 'as to matters which are beyond the realm of common experience and which require the skill and knowledge of an expert witness.'") (*quoting Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir. 1979))).

The determining factor as to whether the testimony falls within the realm of expert or lay testimony lies in the substance of the testimony: specifically, "does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience?" *Burnside*, 131 Nev. at 382–83, 352 P.3d at 636.

Whether expert testimony is a requisite for admissibility of evidence was recently addressed in *Sims v. State,* Unpublished, Docket No. 78999, Lexis No. 1024, 474 P.3d 835 (Nev. 2020)), in which this Court analyzed a layperson testifying as an expert witness. Specifically, the Court noted that an officer's testimony that a firearm was functional was speculative because "the State did not call a firearms expert at trial who could testify from their 'specialized knowledge or skill beyond the realm of everyday experience' to educate the jury as to whether the gun fit the definition of 'firearm.'" *Id.* (quoting and citing *Burnside*, 131 Nev. at 382-83, 352 P.3d at 636; and NRS 50.265).

The holding of *Sims* applies with even stronger force in this case. In *Sims*, the State at least *attempted* to have a witness testify as to whether the firearm was functional. *Id*. The State made no such attempt here—the State just introduced the photos to the jury to conduct their own footwear comparison, without even attempting to offer expert guidance (something the scientific community has now rejected as junk science). *See* 9AA 1658–59; 10AA 1877–79; *Compare* 16AA 3107 (footprint); *with* 17AA 3277, 79 (Larry's footwear). Rather than offer expert testimony on the matter, the State simply provided the argument

in closing—something our court system does *not* recognize as evidence. 14AA 2635. *See* Sevier v. State, Unpublished, Docket No. 74542, Lexis No. 283, 435 P.3d 1230 (Nev. 2019) ("DNA evidence. . . is highly revered and relied upon by juries as it provides 'powerful new evidence unlike anything known before.'") (quoting *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62 (2009) (also citing *McDaniel v. Brown*, 558 U.S. 120, 136, (2010) ("reiterating that '[g]iven the persuasiveness of [DNA] evidence in the eyes of the jury, it is important that it be presented in a fair and reliable manner'")))).

Further confounding the matter is the court's initial position supported Larry's argument—an expert was required:

> THE COURT: This one's a little more concerning to the Court for the reason I've just stated, that it -- I'm concerned about kind of putting them in a quasi-expert role to make a boot or a shoe comparison that's normally something that's done by experts. You know, it would be almost like, hey, look at this fingerprint, you guys see this ridge, you know, that's what's concerning to me. So I'm going to look at it. I'm taking that one under advisement.

4AA 794-95. Despite its expressed concern, the court changed its mind and admitted the photos without requiring expert testimony. 5AA 885. This rationale could apply to fingerprint analysis, which, as the court noted, an expert's guidance is necessary to explain the ridges or

distinguishing characteristics of. 4AA 794. When Larry pointed out the court's contradicting statements, it responded, "[y]eah. But that's exactly the issue I took under advisement as to whether or not you can look at it and say it's similar. It's similar. I mean it's -- okay. It's the same, you know." 5AA 890. This clearly violated Nevada precedent and would be a dangerous precedent of subjectivity for future cases. *Higgs*, 126 Nev. at 17–18, 222 P.3d at 658–59.

The court abused its discretion. Because the issues of whether a lay person or expert witness was needed to introduce the photographs is a legal question, the standard is de novo. *Stephans,* 127 Nev. at 716, 262 P.3d at 730. The analysis rests on whether the error was harmless. *Rosky*, 121 Nev. at 198, 111 P.3d at 699.

In *Townsend v. State*, 103 Nev. 113, 118, 734 P.2d 705, 708 (1987), this Court affirmed where an expert testified on the truthfulness of the victim and identified the defendant as the perpetrator. As part of its harmless error analysis, the Court noted that the evidence against the defendant, including a confession to the arresting officer, was overwhelming. *Id.*

Unlike *Townsend*, there was no confession here or overwhelming evidence. Further, the State relied heavily on footwear impressions. 14AA 2673. Despite other stains on the shoes, nothing matched the blood from the parking lot where the blood stains were located. 10AA 1880. There was no eyewitness testimony identifying Larry as the shooter, or even being in the area at the time of the shooting. 5AA 1568–76, 85–95. Essentially, all the State argued was that there was a murder; they could not tie the weapon to Larry, and could not prove who the shooter was but it *had* to be Anthony or Larry, so the jury should convict Larry. 14 AA. 2648-82, 2698-2717.

However, the State's argument was not supported by the record—there was another suspect, Carnell. The killing occurred in the parking lot of Carnell's building, he had marijuana in his apartment, and on the night of the shooting, Anthony was hiding in his apartment. 10AA 1751; 1880–81. Detective Basilotta conceded if a search warrant had been requested, Carnell's cell phone mapping information could have been obtained. 13AA 2217-18. This is especially troubling, as even the State conceded during closing argument that Carnell was likely involved in the crime. 14AA 2650. Indeed, Carnell was suspicious and had the court

below correctly ruled on the exclusion of footwear evidence (or required an expert to testify, as required for admissibility of such evidence, who would have had to acknowledge to the jury that there are substantial issues about its unreliability, a jury would have harbored reasonable doubt about Larry's guilt given the potential that Carnell was the real shooter, which the State did not disprove. *Supra.* An inadequate investigation into Carnell likely prevented his arrest, so the jury was asked to find that Larry was the shooter, despite the lack of a weapon or any evidence he ever owned a .40 caliber gun. 8AA 1547, 1553; 14AA 2649-2653; 18AA 3413. The only suspect in the case who had a gun was Anthony – although it was a .9 mm semi-automatic, not the .40 caliber used in the shooting. 9AA 1698-99. Furthermore, the State's DNA examiner conceded that numerous items from the Altima were recovered but not tested, a CSA had contaminated some of the evidence, and the DNA linking Larry to the glove could have been transferred without contacting the object. *See* 12AA 2315. The State failed to follow up with witnesses who reported men going in opposite directions from the parking lot after the shooting. 9AA 1731-33. Given that a witness saw someone go through Kwame's pants, which Larry's DNA profile was

excluded from, it is even less likely he was "tussling" with Kwame in the parking lot. 8AA 1573, 76. The State had a weak case, built on an island of circumstantial evidence and assumptions that barely connected Larry with the shooting, let alone established that he was the shooter.

Larry testified he was robbed of his cell phone before the robbery. 13AA 2444. That his cell phone was left at the parking lot while Anthony's was not could leave a jury with reasonable doubt as to whether Anthony and Carnell framed Larry, and could explain how a partial DNA mixture matched the nitrile glove found in the parking lot. *Supra*. Had the district court properly limited the footprint evidence, as the law required, the remaining evidence would have left reasonable doubt as to whether Larry was at the scene of the robbery. *Supra*.

The admission of the unreliable footprint impressions, combined with the lack of an expert, severely prejudiced Larry. As Larry argued, the court's suggestion that he should get an expert was not a valid remedy; approaching the evidence this way created an effective presumption that the photographs of the footwear did match, burden-shifting to the defense to *disprove* what the constitution requires the State to *prove* with reliable, scientifically valid evidence. 5AA 888. *See*

McNelton v. State, 115 Nev. 396, 408, 990 P.2d 1263, 1271 (1999) (Burden "shifting is improper because it suggests to the jury that the defendant has the burden to produce proof by explaining the absence of witnesses or evidence.") (internal citation omitted). Whether the footprints were a match should not have been left to the jury. It was testimony that required some specialized knowledge or skill beyond the realm of everyday experience. *Burnside*, 131 Nev. at 382-383, 352 P.3d at 636. The district court abused its discretion, both in admitting the forensic footwear analysis and failing to require that the State utilize an expert to testify. This resulted in an abdication of the court's role as a gatekeeper, was avoidable, and severely prejudiced Larry. The State cannot show this error was harmless beyond a reasonable doubt. The only remedy is reversal of Larry's judgment and conviction.

2. The district court erred by admitting alleged text messages and search history purportedly from Angelisa Ryder.

During Larry's cross-examination, the State asked an improper question, which caused Larry to move for a mistrial:

> Q Okay. Would you agree with me it would be odd if Angelisa is searching this murder on her phone hours after it happened?

13AA 2473. Because the court did not record bench conferences, it sustained the objection and later, outside the presence of the jury, it was revealed that Larry moved for a mistrial. 13 AA 2474; 14AA 2506. As Larry argued below, the State's question assumed facts not in evidence. Specifically, before cross-examination, there was no evidence presented that Angelisa conducted searches on her phone. *Id*. Because the State improperly injected this issue, they had to call a rebuttal witness. *Id*. The court noted that the State must have a rebuttal witness to support the question it asked, implying it would grant the mistrial if not. *Id*. After the defense rested, the State called LVMPD Detective Mangione to testify about the contents of Angelisa's phone. 14AA 2536. The court denied Larry's request for a mistrial, and admitted the testimony, along with Angelisa's search history and text messages from her phone, over defense counsel's objections on grounds of authenticity, chain of custody, Confrontation Clause violation, and impermissible hearsay.

a. Angelisa's text messages and search history were unauthenticated.

In *Rodriguez v. State*, this Court addressed the authentication of text messages, noting that the analytical challenges presented by text messages "do not require a deviation from basic evidentiary rules applied

when determining authentication and hearsay." 128 Nev. 155, 159-160, 273 P.3d 845, 848 (2012). As only relevant evidence is admissible, authentication is crucial because it "represents a special aspect of relevancy, . . .in that evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims." *Id.* at 160-61, 273 P.3d at 848 (*q*uoting *U.S. v. Branch*, 970 F.2d 1368, 1370 (4th Cir. 1992)). The requirement for 1evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." NRS 52.015(1). The burden falls on the proponent who "can control what will be required to satisfy the authentication requirement" by "deciding what he offers it to prove." *Rodriguez*, 128 Nev. at 160-161, 273 P.3d at 848-84.

Applying these evidentiary principles of authentication of cell phone text messages, in *Rodriguez*, the Court held that 10 of the 12 text messages were unauthenticated and improperly admitted. *Id*.

Here, the issue was not just authentication of text messages, but also authentication of who conducted searches on a phone. 14AA 2506, 46. The State incorrectly asserted Larry "inserted the issue," necessitating the State to introduce the texts and searches as rebuttal

evidence. 14AA 2547. However, as defense counsel noted, nothing in direct examination had anything to do with what the State was referencing. *Id*. The State brought up searches by Angelisa on its own. 14AA 2547-48.

In *Rodriguez*, this Court determined that because the purpose of the text messages was to prove the defendant assaulted the victim, the messages were relevant only to the extent the State could show they were from the defendant. 128 Nev. at 162-63, 273 P.3d at 849-50. The Court noted that the "State provided sufficient evidence that the text messages offered into evidence were sent from the victim's cell phone to her boyfriend's cell phone," however, there, the State introduced evidence that only two of the proffered 12 text messages were authored by the defendant (video surveillance indicating he had access to the phone.). *Id*.

Here, the State produced no evidence of authorship beyond the fact that the number was Angelisa's, 14AA 2615. The State argued it was "self-authenticating" because she provided detectives with the phone number and her phone was impounded by police. 14AA 2547. But under Nevada law, this is not enough. *Supra*. The State failed to establish Angelisa actually conducted those searches because they failed to call her

to testify, and thus failed to establish whether she or someone else had access to her phone that day. 14AA 2547-60.

As the proponent, the State introduced cell phone account and subscriber information, cell site location information, and other identifying evidence to authenticate Kwame, Carnell, Larry, and Anthony's phone numbers. 9AA 1694; 11AA 2113, 2115-16. *Rodriguez*, 128 Nev. at 160-61, 273 P.3d at 848-49.

However, in rebuttal, the State failed to meet the authentication standard for the messages and search records from Angelisa's phone. 14AA 2547-60, 2625. Essentially, the State created this issue during Larry's cross-examination, and then presented a prosecution rebuttal witness to introduce the unfounded and unauthenticated evidence. *Supra*. If the State could indeed authenticate the messages, they would have introduced them with the other text messages they presented during trial. *See e.g.*, 11AA 2161, 64.

Failing to authenticate these messages is concerning because the phone was not Larry's. Detective Mangione testified this was a phone number associated with Angelisa, and there were searches done regarding Las Vegas hotels that did not take credit cards and homicide

detectives investigating a death in Northwest Las Vegas. 15AA 2623. Furthermore, Detective Mangione testified that on February 21, 2017, at 8:33 p.m., the phone number associated with Angelisa sent a text message to the number associated with Larry asking if he was okay. 15AA 2626. At 8:33 p.m., the phone associated with Larry sent a number to Angelisa's phone responding "yes." *Id*. Detective Mangione said that on February 22, 2017, a text went out from Angelisa's phone to a different number than Larry's but with the contact name listed as "Larry Brown." 15AA 2628. This was the extent of the State's attempt to authenticate that this new number was Larry's. The State produced no cell provider records, account information, cell site location information, nor anything else to show this was Larry's number—not even direct testimony from Angelisa. *Id*.

On cross examination, Detective Mangione conceded that he did not extract Angelisa's phone, another detective did, and he did not review chain of custody – rather, he just, reviewed reports from another detective who did the extracting. 15AA 2629. He acknowledged that other searches on the phone looked up a shooting on Lake Mead and Martin Luther King Blvd, and Vegas Valley's safety ranking for children. 15 AA

2633. He also conceded he did not know who did the searches based on what was in the phone. *Id*.

Because the State failed to authenticate the text messages and the search history, per the standard applied in *Rodriguez*, the court abused its discretion by admitting them. The prejudice to Larry was severe. After Detective Mangione's testimony and the admission of these texts and search records, several juror questions inquired about specific searches and dates. 14AA 2634. The jurors were told they could look at all the information during deliberation. 14AA 2635.

b. Angelisa's alleged search history and text messages were impermissible hearsay and improper rebuttal evidence.

As a general rule, hearsay is inadmissible, barring certain well-defined exceptions. NRS 51.065. In Nevada, hearsay is recognized as an out-of-court "statement offered in evidence to prove the truth of the matter asserted." As with all evidence, it must be relevant and is only admissible if "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.025; NRS 48.035(1).

Larry argued below that Detective Mangione's testimony concerning unauthenticated text messages between Angelisa and Larry was hearsay, for which no exception applied. 15AA 2643. For example, NRS 51.035(3)(a) did not apply because the lack of authentication meant the messages could not be Larry's statements. Similarly, NRS 51.035(3)(b) did not apply because the statements were not Larry's and he therefore could not have "manifested adoption or belief in its truth." *Id*. In response, the State argued that the messages were not being offered for the truth of the matter asserted but to provide context. 14AA 2643. The court overruled Larry's objection, admitting the text messages. 14AA 2644.

Besides authentication, the *Rodriguez* Court addressed whether the text messages were hearsay, ultimately holding they were not. 128 Nev. at 163-64, 273 P.3d at 850 (citing NRS 51.035(3)(b)). However, the appellant in *Rodriguez* raised a hearsay objection with regard to authenticated text messages, unlike here. *Id*. Because this Court had determined those two text messages were authenticated (i.e., they were Rodriguez's statements, even though they were sent from someone else's phone), the requirements of NRS 51.035(3)(b) were satisfied. *Id*.

Here, the State's reason for why these messages were not hearsay does not withstand scrutiny. Specifically, the State claimed they were *not* being offered for truth:

> They were offered in order to show, obviously, based upon Mr. Brown's testimony yesterday, that he conveyed information to her. And that's why she's doing what she's doing on the phone.

15AA 2643. The State continued:

> And also, the text message from, like, 5:30 or whenever it was in the morning, that was offered to show, obviously, to contradict what Mr. Brown was saying yesterday. Not for the truth, but that this text never would have been made had what he said was the truth. Also –

14AA 2644. The argument of "context" fails. *Id.* Notably, the State also claimed the texts would "contradict" Larry's testimony. *Id.* This gave away the game. To demonstrate the texts contradicted testimony is not offering them just for "context," or to show the messages were merely sent, but instead was to convince the jury the substance of the texts were true and, by extension, that the substance of Larry's testimony was false. The messages were offered for the truth of the matter and should not have been admitted. NRS 51.065.

This was also double hearsay. *See Weber v. State*, 121 Nev. 554, 577, 119 P.3d 107, 123 (2005) (citing NRS 51.067) ("Hearsay included within

hearsay is not excluded under the hearsay rule if each part of the combined statements conforms to an exception . . . .")

Here, Detective Mangione did not testify about statements another witness made directly to him (one level of hearsay), but rather about statements Larry had made to Angelisa (the first level of hearsay), which Detective Mangione then read from a report and extraction someone else conducted, to the jury (the second level of hearsay). 14AA 2613-29. The State was, in effect, arguing Larry somehow communicated to Angelisa to conduct a search and she did so. 15 AA 2643. This is not only hearsay but speculative hearsay, offered for the truth of the matter. NRS 51.065. The fact that Detective Mangione did not actually look at the search logs in the phone or extract the search records from the phone precludes an allowable hearsay exception. NRS 51.067. The text messages and search history were double hearsay and the court abused its discretion in admitting them.

When testimony has been improperly admitted in violation of the hearsay rule, the Court must determine whether the error was harmless. *Weber*, 121 Nev. at 579, 119 P.3d at 124. Specifically, the evidence must be substantial enough to convict the defendant in an otherwise fair trial,

"and it must be said *without reservation* that the verdict would have been the same in the absence of error." *Id.*

Here, the error was not harmless. Besides the several juror questions discussed above, and the State's weak and circumstantial case, the State relied heavily on the search history and the text messages in closing argument. 14 AA 2677. Further, the court itself provided the prejudice from the admission of the text messages:

> THE COURT: And as I already said, I think you can draw a reasonable inference from the content of the search, that she had received information, presumably from Mr. Brown, that there was some kind of a murder or shooting. **Whether it was from Mr. Brown telling her that or because she saw a gun in the car or a big bag of marijuana or anything, there's an inference that's -- there was something that gave her concern that there had been a murder.**
> So --

14AA 2645 (emphasis added). The court indicated that the evidence was, by its nature, prejudicial because it implied knowledge about the murder. *Id.* There was absolutely no evidence that Larry ever had any such quantity of marijuana in his car or a gun. *Supra.* The court was speculating, which is presumably what the State wanted the jury to do.[7]

[7] This prejudicial, improper speculation could have been avoided easily: there was no reason why the State could not call the declarant, Angelisa,

This would not have been possible without the improper admission of this evidence.

Unlike *Weber*, there was not substantial evidence here. *Supra.* Accordingly, the court abused its discretion by admitting impermissible hearsay and the State cannot establish this error was harmless beyond a reasonable doubt. The only remedy of this violation is reversal of Larry's judgment and conviction.

B. The State violated *Batson v. Kentucky* and the district court committed structural error.

Larry's conviction and sentence must be reversed because his state and federal constitutional rights to Due Process, Equal Protection, a Fair Trial, a Fair and Impartial jury, and Right to a Jury of his Peers, were repeatedly violated during jury selection. The State violated *Batson v. Kentucky*, 476 U.S. 79, 82 (1986), and the district court committed structural error in its handling of the *Batson* challenge. U.S. Const. Amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27; NRS 6.010 and NRS 175.031.

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to testify about whether Larry contacted her or what her motives were in allegedly searching. 14AA 2644.

This Court reviews a trial court's rulings on discriminatory intent for an abuse of discretion. *Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008). "Because the district court is in the best position to rule on a *Batson* challenge, its determination is reviewed deferentially, for clear error." *Williams v. State*, 134 Nev. 687, 690, 429 P.3d 301, 306 (2018). If an abuse occurred, it is structural error; which means prejudice is presumed and reversal is necessary. *Williams v. Woodford*, 396 F.3d 1059, 1069 (9th Cir. 2005); *Diomampo*, 124 Nev. at 423, 185 P.3d at 1037. *Batson* provides a three-step process for adjudicating a claim that a peremptory challenge was based on race: First, a defendant must make a prima facie showing that a peremptory challenge has been exercised based on based on race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008); *Diomampo*, 124 Nev. at 422, 185 P.3d at 1036.

Step One: Prima Facie Case

The first step of a *Batson* challenge requires the party challenging the peremptory strike to establish a prima facie showing of purposeful discrimination. *Batson*, 476 U.S. at 93. To establish this first step, the defendant must do more than point out that a member of a cognizable group was struck. *Watson v. State*, 130 Nev. 764, 776, 335 P.3d 157, 166 (2014). He must show "that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 94. He may make this showing by demonstrating a pattern of discriminatory strikes, but "a pattern is not necessary and is not the only means by which a defendant may raise an inference of purposeful discrimination." *Watson*, 130 Nev. at 776, 335 P.3d at 166. Other evidence the defendant may present to establish the first step includes "the disproportionate effect of peremptory strikes, the nature of the proponent's questions and statements during voir dire, disparate treatment of members of the targeted group, and whether the case itself is sensitive to bias." *Id.* at 776, 335 P.3d at 167; *Williams*, 429 P.3d at 306. The standard for a prima facie case "is not onerous and does not require the opponent of the strike to meet his or her ultimate burden of proof under *Batson*." *Cooper v. State*, 134 Nev. 860, 863-64, 432 P.3d 202, 205-206 (Nev. 2018) (quoting

Watson, 130 Nev. at 775, 335 P.3d at 166; *Batson*, 476 U.S. at 93-94)). Instead, the strike's opponent must provide sufficient evidence to permit the trier of fact to draw an inference that discrimination occurred. *Id.* An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. *Id.* Recently, in *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019), the United States Supreme reaffirmed *Batson*'s importance and expounded on several factors to be considered by the trial court, including:

> • statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;
>
> • evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;
>
> • side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
>
> • a prosecutor's misrepresentations of the record when defending the strikes during the *Batson* hearing;
>
> • relevant history of the State's peremptory strikes in past cases; or
>
> • other relevant circumstances that bear upon the issue of racial discrimination.

Id.

Step Two: Race Neutral Reasons

The party raising the Batson challenge is relieved of showing the first step of the challenge, when "the State provides a race-neutral reason for the exclusion of a veniremember before a determination at step one." *Williams*, 429 P.3d at 306-07 (internal citations omitted).

Here, because the State provided race neutral reasons for all three jurors, the first step is moot.[8] 8AA 1512; *see also* 8AA 1508. Although the first step is moot, Larry notes that he sufficiently established the first step under *Batson*. Larry argued that the State's peremptory challenges were used in a discriminatory manner when the State struck prospective Juror No. 183, Maria Simon, who is Hispanic; prospective Juror No. 465, Dilkshan Pernies, who is Asian; and Juror No. 454 Marquita Allen, who is African-American. 8AA 1488; 1497; 1508. Relying on *Diomampo*, he raised a mixed race challenge, with the court acknowledging that he may

[8] The record is somewhat confusing, in part because the court did not wait until both sides exercised all their peremptory challenges. 8AA 1496. Instead, the court asked if Larry wanted to raise a *Batson* challenge after three of the peremptory challenges were made, before other jurors were dismissed. *Id*. This not only added to the confusion of the challenge but diminished Larry's ability to determine and argue whether the State was "engaging in a pattern" or examine the "disproportionate effect of the peremptory strikes," *Watson*, 130 Nev. at 776, 335 P.3d at 167; *Williams*, 429 P.3d at 306.

have this argument. 124 Nev. at 421, n.4, 185 P.3d at 1036 (reviewing *Batson* challenge where two jurors were Hispanic and two were African-American); 8AA 1505.

Specifically, regarding Juror No. 465, Larry noted that he was the only Asian juror on the panel. 8AA 1497. The court misconstrued Larry's argument, stating that the simple fact he was Asian is not a valid method to establish the first step. *Id*. The court's argument contradicts this Court's ruling in *Cooper*, 134 Nev. at 863, 432 P.3d at 204-05, where it noted "[w]hile numbers alone may not give rise to an inference of discriminatory purpose, we conclude that the percentage of peremptory challenges used against African Americans in this case was disproportionate to the percentage of African Americans in the venire such that an *inference* of purposeful discrimination was shown in this case." There, African-Americans comprised 13.04 percent of the panel, and the State used 2 challenges to remove 67 percent of African-Americans. *Id*.

Here, the State had nine peremptory challenges but waived two, utilizing only seven. 15AA 2803. In the case of Juror No. 465, it used 14.3 percent of its peremptory challenges to remove 100 percent of Asian

panelists. 8AA 1497. Under the mixed challenge Larry raised, the State used 43 percent of its peremptory challenges on minorities. 6AA 1115, 17; 8AA 1497, 1505-06, 08-10. *See Cooper*, 134 Nev. at 863, 432 P.3d at 205 (citing and quoting *Watson*, 130 Nev. at 778, 335 P.3d at 168) (approving a method that compares the percentage of "peremptory challenges used against targeted-group members with the percentage of targeted-group members in the venire")).

The State asserted race-neutral reasons for all three jurors it dismissed. For Ms. Simon, it claimed she was a troubled youth, had misdemeanors until 22, and claimed she tried to solicit. 8AA 1494. For Mr. Peries, it claimed he had numerous negative interactions with law enforcement and complained of his demeanor. 8AA 1498, 1508. For Ms. Allen, it claimed that the lead detective in Larry's case was involved in Ms. Allen's brothers' case. *Id*. The State argued when a defendant raises a *Batson* challenge, they are calling the prosecutor racist. 8AA 1508.

Step Three: Sensitive Inquiry

At the third step, the district court must determine whether the defendant has proven purposeful discrimination by undertaking "'a sensitive inquiry into such circumstantial and direct evidence of

intent as may be available' and 'consider all relevant circumstances' before ruling on a *Batson* objection and dismissing the challenged juror." *Conner v. State*, 130 Nev. 457, 465, 327 P.3d 503, 509 (2014) (quoting *Batson*, 476 U.S. at 96).

However, here, instead of conducting the sensitive inquiry or addressing defense counsel's argument, the district court went back to the first step. Specifically, regarding part of the State's claim that Ms. Simon was a troubled youth and interacted with law enforcement, Larry argued the race neutral reason was pretextual because multiple other jurors had issues with convictions such as DUIs. 8AA 1494, 95. Furthermore, Larry noted that Ms. Simon was a victim of domestic violence and assisted the prosecution in her case. 8 AA 1488. The court did not address this argument, as required at the third step, instead noting "we'll see, you know, if they strike some of the other people with other problems in their past, and we'll see if they do or they don't." 8 AA. 1495. The court ultimately ruled the challenge was not discriminatory, not by addressing defense counsel's argument or even the State's proffered race neural reason, but going back to the first step, which was already moot at this point:

> THE COURT: Yeah. All right. I'm satisfied with the race neutral reason. As I said already, I don't think a prima facie showing has been made. I certainly don't think the state of the law is that any time someone happens to be of a race or ethnicity that's nonCaucasian [*sic*] that it's racially motivated.

8AA 1495-96; *Williams*, 429 P.3d at 306-07. Just as in *Williams*, the record on this juror "does not allow meaningful, much less deferential review." 429 P.3d at 308. Larry provided a valid argument that there were other jurors with criminal records who the State did not dismiss and the court failed to address this argument. 8AA 1495-96.

Then, the court cited the remaining diversity of the panel to explain why it was denying the challenge. 8AA 1496. This too was error. It is black letter law that a *Batson* violation can occur if even one juror is struck. "A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." *Batson*, 476 U.S. at 95 (internal quotations and citations omitted). Even though other members of a protected class may ultimately serve on the jury, "[e]ven a single instance of race discrimination against a prospective juror is impermissible." *Flowers v. Mississippi*, 139 S.Ct. 2228, 2242 (2019); *Snyder*, 552 U.S. at 478 (citing *United States v. Vazquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994) ("[T]he

Constitution forbids striking even a single prospective juror for a discriminatory purpose")). "[I]t is misguided to infer that leaving some members of cognizable racial groups on a jury while striking the only African-American member proves the prosecutor's strike was not racially motivated. *Batson* is concerned with whether a juror was struck because of his or her race, not the level of diversity remaining on the jury." *City of Seattle v. Erickson*, 398 P.3d 1124, 1130 (Wn. 2017).

Regarding Mr. Peries, the State's proffered race-neutral reason was invalid. The State claimed he negatively interacted with law enforcement, but while he acknowledged he had negative interactions, he noted that it was his fault, not law enforcement's. 7AA 1327; 8AA 1498-1499. Similarly, regarding his friend with a negative interaction, he noted there, too, it was his friend's fault not law enforcement's. *Id*. This contradicted the State's inference he would hold negative interactions against police. *See Conner*, 130 Nev. at 466, 327 P.3d at 510 ("A race-neutral explanation that is belied by the record is evidence of purposeful discrimination.").

Defense counsel made this point to the court when explaining why the State's race neutral reason was pretextual. 8AA 1499-1500. Just as

with Ms. Simon, the court did not conduct a sensitive inquiry and, as before, at the third step returned to the first step, which was already moot, stating "[s]o look, I think they stated a legitimate reason. I still don't think though just because people, again, happen to be of an ethnic or racial minority doesn't mean that it's racism or that it's, you know, pretextual." 8AA 1500.

Finally, regarding Ms. Allen, the record is conflated as to the second and third step, preventing proper analysis. *Williams*, 429 P.3d at 307 (*quoting United States v. Rutledge*, 648 F.3d 555, 559) (7th Cir. 2011) ("The analytical structure established by *Batson* cannot operate properly if the second and third steps are conflated."))). To the extent the record is decipherable, Larry argued disparate treatment of Ms. Allen and compared her to two other jurors whose families interacted with law enforcement and whom the State did not dismiss. 8AA 1504. Rather than ruling on the first step of the *Batson* challenge, the court interjected but again failed to address Larry's argument, instead pointing to the presence of two other African-American on the panel. 8AA 1506. Before the court ruled on the first step, the State interjected that defense counsel also dismissed an African-American juror. *Id*. The court, instead of

controlling the *Batson* challenge, allowed the State to argue that defense counsel also struck minority jurors and that the State had struck white jurors. 8AA 1506, 09, 12, 15. The State, ultimately, did argue a race neutral reason: Detective Dosch might have been involved in her brother's cases. 8AA 1506-08, 12. The court made a ruling, although defense counsel had still not completed their argument on the third step as to why the State's race neutral reason was pretextual:

> I would, you know, just based on my recollection, you folks took more extensive notes, but it seemed like her family members were, I don't want to say peculiar, but unique is a better word in that -- in the fact that, you know, they actually went to prison, and it was here in Clark County

8AA 1512. Defense counsel argued that the State's reasons were pretextual because if there was any connection with Detective Dosch, it could be easily verified in records from her brother's case and the State failed to do so. 8AA 1514.

At this point, the State should not have responded further, as the court should have conducted the sensitive inquiry. *Conner,* 130 Nev. at 465, 327 P.3d at 509. However, the State interjected and responded to Larry's argument at the third step. 8AA 1514-15. The court did not address Larry's argument that the race neutral reason was pretextual.

8AA 1515. Instead, once the State concluded its argument, it simply moved on to the next juror. *Id*. This was structural error. *Supra*.

Judicial Bias[9]

Besides the structural error, the court's comments during the hearing indicate bias towards the State and against Larry on this issue. 8AA 1503; *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) ("Remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence.").

The record here reveals judicial bias against Larry's *Batson* challenge, not only illustrated by the numerous instances the court interrupted defense counsel before they had finished their argument, to advocate against the *Batson* challenge, but how it handled the challenge for the third juror, Ms. Allen:

> THE COURT: Don't forget if they're, you know, excluding people in a racially biased way, State --

[9] Appellant is aware of the untimely passing of The Honorable Valerie Adair and does not intend for this argument to convey disrespect. This judicial bias claim speaks only to the circumstances of this individual issue, not to the personal or professional character of the judge generally.

MS. TRUJILLO: Judge, you can't help the State.

THE COURT: No.

MS. TRUJILLO: You cannot help the State.

8AA 1503. During the challenge on Ms. Allen, instead of conducting the sensitive inquiry at the third step, addressing defense counsel's last argument, the court turned its attention to one of defense counsel's peremptory challenges, asking "[w]hy did the defense excuse the gal from Eritrea? Is that how you say it?" 8AA 1515. This prompted the State to ask:

[Prosecutor #1]: Isn't that a racial reason?

THE COURT: Yeah, that's a racial reason

8AA 1516. *After* the court, for no discernable reason, asked defense counsel why it dismissed a juror, the State raised a reverse *Batson* challenge, clearly buoyed by apparent support from the court: "[Prosecutor #1]: I'm going to make a Batson Challenge." *Id*.

The court committed structural error for all three jurors. Defense counsel established that discrimination occurred during the jury selection process. For the first two jurors, Ms. Simon and Mr. Pernies, defense counsel provided sufficient reasons the State's race-neutral

reasons were pretextual, which the court did not properly rule on at the third step. For the third juror, the State made the final argument and the court moved on. For all three jurors the court failed to conduct the *required* sensitive inquiry at the third step. *Conner*, 130 Nev. at 465, 327 P.3d at 509.

The court ignored this Court's multiple prior rulings stressing that district courts properly conduct a *Batson* challenge. *Williams*, 134 Nev. at 690, 429 P.3d at 306; *Cooper*, 432 P.3d at 204-205. Because the numerous errors were structural, reversal is mandated. *Diomampo*, 124 Nev. at 423, 185 P.3d at 1037.

C. The district court's rulings violated Larry's rights under the Confrontation Clause.

Larry's state and federal constitutional rights to due process of law, equal protection, a fair trial, confrontation, and cross-examination were violated by several of the district court's evidentiary rulings. Specifically, the court erred by forcing Larry to provide a cell phone passcode, permitting Cellebrite to avoid answering certain questions due to expressed concerns of revealing trade secrets, allowing the Cellebrite witness to testify via video, and permitting statements of the cooperating

co-defendant, Anthony, to come in instead of requiring him to testify. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

The district court's construction or interpretation of the rules of evidence is a question of law subject to de novo review. *United States v. Sioux*, 362 F.3d 1241, 1244 n.5 (9th Cir. 2004). Whether particular evidence falls within the scope of a rule of evidence is also reviewed de novo. *United States v. Lillard*, 354 F.3d 850, 853 (9th Cir. 2003). Whether a defendant's Confrontation Clause rights were violated is a question of law, reviewed de novo. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). Constitutional error is harmless only if the State establishes beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Chapman v. California,* 386 U.S. 23-4 (1967).

The Sixth Amendment guarantees a defendant the right to a public trial and the right to confront the witnesses against him. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). The United States Supreme Court has held, "[t]he right to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chamber v. Mississippi*, 410 U.S. 284, 294 (1973).

Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316. The right to cross-examine witnesses is so fundamental that the United States Supreme Court has stressed that, "its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." *Chambers*, 410 U.S. at 295). The Confrontation Clause "bars the admission of testimonial hearsay unless (1) the declarant is unavailable and the accused either (2) had a prior opportunity to cross-examine the declarant or (3) forfeited his or her right to object by wrongdoing." *Id*.

1. The district court abused its discretion by allowing Cellebrite to limit its own testimony.

Before trial, Larry objected to the State's attempts to prohibit a representative from Cellebrite testifying. 4AA 723. Specifically, on August 2, 2019, the State filed a motion in limine requesting that Cellebrite not be required to testify, fearing disclosure of proprietary trade secrets, and arguing instead that a certification regarding chain of custody from Cellebrite was sufficient. 3AA 519; 4AA 796.

In the alternative, the State requested that Cellebrite be required to only testify that they received the phone, accessed the phone using their proprietary software, made a copy of the phone, and sent it to LVMPD. *Id*. Defense counsel objected because this would deprive Larry of his fundamental rights under the Confrontation Clause. 4AA 723. Furthermore, Larry argued that since Cellebrite claimed it did not actually open or access the phone directly, it could not testify that the contents were not altered. 4AA 726. As such, full disclosure of what methods Cellebrite employed to access the phone were necessary for Larry to provide rebuttal expert testimony. 4AA 727. During a hearing where Larry requested a stay to file a writ of mandamus with this Court, he noted that the State had Cellebrite witnesses listed as experts and such a restriction on their testimony would prevent him from properly cross-examining Cellebrite's witness under NRS 50.275 and *Hallmark*, 189 P.3d at 650, without allowing an understanding of how Cellebrite and its designees accessed this cell phone, handled the data, and how it was stored during the months Cellebrite possessed the cellphone. 5AA 922.

In response, the court criticized defense counsel for not mentioning an expert sooner. 5AA 924. The court's attempt to place the blame on Larry is belied by the record. Larry noted that he had retained an expert – the reason this was an issue was not due to his actions, but because the State suddenly, and without proper notice, argued that Cellebrite should not be required to testify. 5AA 927-30.

A crucial aspect of cross-examination is the ability to challenge the chain of custody related to evidence presented by the State. *See Burns v. Sheriff*, 92 Nev. 533, 534-35, 554 P.2d 257, 258 (1976) ("to establish chain of custody and competent identification of evidence Nevada law requires (1) reasonable showing that substitution, alteration or tampering of the evidence did not occur; and (2) the offered evidence is the same, or reasonably similar to the substance seized.")). Larry argued that Cellebrite indicated that they did not access the phone. 4 AA 726. Accordingly, Larry wanted to inquire as to how they could confirm the contents were not altered or tampered with. *Id*. Unfortunately, from the moment the State filed their motion in limine, Cellebrite attempted to dictate its testimony. 3AA 516. At one point, its legal counsel asked the court for a list of defense questions before the sealed hearing. 5AA 917.

Furthermore, Larry noted that his defense would be stymied because Larry needed time and information for his expert to rebut the testimony and evidence from Cellebrite. 5AA 921. The court dismissed these concerns:

> THE COURT -- unless you have some advanced degree in computer science or even not an advanced degree some specialized knowledge of programming, I don't think any of us and certainly not the jury is going to understand it anyway. S [*sic*] I don't know what the -- I guess –

5AA 921-22. The court seemed to recognize this required expert assistance but then determined that it was too complicated and therefore, an expert would be of no use. *Id*. This is the opposite of the court's ruling regarding shoe prints where it found that, in its subjective view, the prints were so identical that no expert was needed.

Larry objected on numerous grounds to the content of the Cellebrite testimony and any evidence derived from it. 4AA 723; 5AA 923-25. Specifically regarding the *Crawford* violation, Larry preserved the issue by arguing that his Sixth Amendment right to confront the witnesses against him, as explained in *Crawford v. Washington*, 541 U.S. 36, 38 (2004), outweighed Cellebrite's supposed concerns about revealing trade secrets. 4AA 723; 5AA 923; 9AA 1631; 11AA 2029. *See Flowers v. State,*

456 P.3d 1037, 1047 (Nev. 2020) (*after Crawford*, a defendant must object that admission of the out-of-court statement will violate his right to confront witnesses; it is not sufficient to object on hearsay grounds).

This Court has not yet addressed, in a published or citable decision, whether expert testimony in a criminal trial may be limited due to risk that trade secrets could be disclosed. However, in Nevada "[i]t is a fundamental principle in our jurisprudence to allow an opposing party to explore and challenge through cross-examination the basis of an expert witness's opinion." *Blake v. State*, 121 Nev. 779, 789-90, 121 P.3d 567, 574 (2005).

Here, the court made a cursory effort to navigate this issue, but erred repeatedly. The court overruled the defense objection to the Cellebrite testimony and conducted a sealed hearing with a representative from Cellebrite and their attorney. 11AA 1996. The hearing did not adequately address the matter because the court allowed Cellebrite to avoid answering certain questions. For example, during the hearing, Larry attempted to inquire about Cellebrite's procedure for a damaged phone, and whether that would affect Cellebrite's ability to accurately get data. 11AA 2021-22. The Cellebrite representative, Brian

Stofik, stated he did not feel comfortable answering the question "because it's proprietary…" *Id*. The State objected on relevance and the court sustained. 11AA 2022-24. However, Larry argued it was relevant because he was attempting to decipher what situations Cellebrite had encountered where they could not access an operable phone. *Id*. The question was relevant because Larry was trying to understand their standard practices and methods for accessing data. *Id*. Given it was a crucial issue, there was no valid reason why, in a sealed hearing, Cellebrite avoided answering this question. 11AA 2020, 22-24. Another example is illustrated by defense counsel's attempt to ask why the phone was sent to Cellebrite twice. 11AA 2024-25. Once again the State objected, and once again the court prevented defense counsel from inquiring further. 11AA 2025-26.

The prejudice to Larry cannot be overstated. Larry retained an expert to challenge Cellebrite's findings. 4AA 818. The cell phone expert was deprived of crucial information needed to rebut Cellbrite's testimony. The State had no way to establish conspiracy to commit robbery without the text messages Cellebrite supposedly extracted from Larry's phone. *Id*. As discussed above, Larry had no communication with Kwame and

none of Kwame's property or belongings were connected to Larry. It was necessary for Larry's defense to be able to properly question Cellebrite, as is his right under the Sixth Amendment.

In addition to the prejudice Larry suffered, Cellebrite's actions offend the most basic notions of justice. Cellebrite's request to have a list of defense questions before the sealed hearing was improper. 5AA 917. Measures like the ones used here are typically requested in cases where witness safety is a concern. *See, e.g., United States v. DiSalvo*, 34 F.3d 1204, 1218-1219 (3rd Cir. 1994) (sealing was appropriate to avoid compromising a trial set in another jurisdiction);

United States v. Ramey, 791 F.2d 317 (4th Cir. 1986) (sealing was appropriate for witness protection and to prevent defendants from fleeing))). These measures do not and should not apply to a private company that would not even explain in a sealed hearing why certain questions would reveal proprietary secrets.

Because there is no justifiable basis why Cellebrite was allowed to avoid answering questions in a sealed hearing, Larry's Confrontation rights were limited, and he could not offer adequate rebuttal expert testimony. *Id.* The court should have either permitted Larry to properly

cross-examine Cellebrite, or as Larry requested, all evidence derived through Cellebrite should have been excluded. *Id*. The only remedy of this constitutional violation is reversal of Larry's conviction.

2. The district court abused its discretion in allowing Cellebrite to testify via video as it violated Confrontation Clause as well as notice requirements.

During the fourth day of trial, the State notified the court that the witness from Cellebrite would be testifying via video. 9AA 1626. Defense counsel agreed to conduct the evidentiary hearing with the witness outside the presence of the jury through Skype, if there was no other way. 9AA 1631. However, Larry objected to the witness testifying via Skype for the jury. *Id*. The court ruled he could testify via Skype, without explicitly stating why. 9AA 1632. The court's decision to do so was error.

In Nevada, witnesses may be permitted to testify if certain conditions are present. Under Nev. Sup. Ct. Rule Part IX-A(B)(4)(1),

> "a witness may appear by simultaneous audiovisual transmission equipment at trial if the court first makes a case-specific finding that (1) the denial of physical confrontation is necessary to further an important public policy, and (2) the reliability of the testimony is assured; and in all other criminal proceedings or hearings where personal appearance is required unless the court

> determines that the personal appearance of the witness is necessary."

In *Lipsitz v. State*, this Court addressed two-way video testimony. 442 P.3d 138, 143 (Nev. 2019). This Court acknowledged that "[t]he elements that comprise the right of confrontation, i.e., 'physical presence, oath, cross-examination, and observation of demeanor by the trier of fact,' ensure 'the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" *Id.* (*quoting Maryland v. Craig*, 497 U.S. 836 (1990)). Adopting the test from *Craig*, the Court determined the district court did not abuse its discretion in allowing a witness to testify via two-way video transmission instead of in person. *Id.* ("Under *Craig*, two-way video testimony may be admitted at trial in lieu of physical, in-court testimony only if (1) it 'is necessary to further an important public policy,' and (2) 'the reliability of the testimony is otherwise assured.' 497 U.S. at 850."). Specifically, the Court ruled that the district court properly made the requisite finding of necessity: the witness was in a long-term drug treatment facility out-of-state and could not travel, and Lipsitz would not waive his speedy trial rights and refused a continuance until the witness was released from the rehabilitation center. *Lipsitz*, 442 P.3d at 144.

Here, Larry did not object to the Cellebrite witness appearing by audiovisual means for the evidentiary hearing, but did object to audiovisual testimony in front of the jury during trial. 9 AA 1631. When determining Cellebrite could testify at trial using audiovisual means, the court not only failed to make the requisite finding of necessity, but also noted that "the issue today is whether or not he can effectively testify over Skype." *Id*. As discussed above, contrary to the court's findings, this is not the federal standard that Nevada has adopted. The issue is not *effectiveness* of testifying via video but whether the testimony should be *permitted* via video. Furthermore, unlike the witness in *Lipsitz*, who had a legitimate reason – participation in a drug rehabilitation program – for not appearing, the reasons provided for the Cellebrite witness's absence amounted to mere inconvenience. *Lipsitz*, 442 P.3d at 144; 9AA 1630-31. This hardly meets the first step of the test adopted in *Lipsitz* that the witness's virtual testimony further an important public policy interest. *Id*., 442 P.3d at 144 ("use of the technology under the[ ] circumstances furthered the important public policy of protecting the victim's well-being while also protecting the defendant's right to a speedy trial while ensuring that criminal cases are resolved promptly.").

The State attempted to support its argument that it met the statutory requirement by saying, "Our good cause would be to allow that witness to testify via Skype and audiovisual." 9AA 1629. Even when the court inquired why the witness could not travel on another day, the State did not give a specific answer but referenced employees of the company being on vacation. 9AA 1630. The State also cited the cost of travel. 9AA 1630-31. Nowhere in this Court's rule on video testimony, are such trivial reasons considered sufficient to meet the standard for allowing a witness to testify virtually. *Id*. Allowing the State's reasoning to stand would set a dangerous precedent.

The Confrontation Clause should not be marginalized simply because a company does not want to send their witness in person and because the State wants to save on travel fees. 9AA 1629-31. Because the State's proffered reasons could not meet the standard this Court has employed for virtual witness testimony and because the court did not make a requisite finding of necessity, it abused its discretion and violated Larry's right to confrontation.

The State cannot establish this constitutional violation was harmless beyond a reasonable doubt. Because the evidence was very

weak and circumstantial, the text messages were imperative to the State's case. 14AA 2652, 2659-70; *supra*. Because of Cellebrite's credibility issues, given their murky role working with law enforcement and reluctance to answer basic questions related to their standards and practices, Larry was deprived the fundamental constitutional "opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242-43 (1895).

Because Larry was already limited in his ability to question Cellebrite, permitting audiovisual testimony without good cause further hindered his defense. The only remedy of this constitutional violation is reversal of Larry's judgment of conviction.

D. Cumulative error warrants a new trial.

Larry's state and federal constitutional rights to Due Process, Equal Protection, Confrontation, and a Fair Trial were violated because

of cumulative error. U.S. Const. Amend. I, V, VI, VIII, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21, 27.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004); *United States. v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993) (although individual errors may not separately warrant reversal, "their cumulative effect may nevertheless be so prejudicial as to require reversal"). This Court will reverse a conviction if the cumulative effect of these errors deprived appellant of his right to a fair trial. *Gonzalez v. State*, 131 Nev. 991, 1003, 366 P.3d 680, 688 (2015).

"The Supreme Court has clearly established that the combined effect of multiple trial errors violates due process where it renders the resulting criminal trial fundamentally unfair." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (citing *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996)). "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." *Parle*, 505 F.3d at 927 (citing

Chambers, 410 U.S. at 290). The record here establishes cumulative error. *See DeChant v. State*, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000). ("[I]f the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction."). "Relevant factors to consider in deciding whether error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id.* (internal quotations omitted).

Here, the errors directly affected Larry's convictions for conspiracy to commit robbery, robbery with use of a deadly weapon, and first-degree murder with use of a deadly weapon. He was denied the right to confront witnesses and have only relevant and admissible evidence presented to the jury by the court's decision to admit evidence of footwear impressions, without expert testimony. His right to a jury of his peers was denied by the State's violation of *Batson v. Kentucky* and the court's structural error in addressing the challenge. His right to confront the witnesses against him, and have only relevant and admissible evidence presented against him was again violated by the court's decision to permit a private company to avoid answering questions based on unsubstantiated claims

of revealing trade secrets. This right was further violated by the court's error in admitting improper, irrelevant, unauthenticated, and highly prejudicial phone search records and text messages. The crimes he was convicted of are grave. Therefore, the cumulative effect of all these errors denied him a fair trial.

Whether or not any individual error requires the vacation of the judgment, the totality of these errors and omissions resulted in substantial prejudice. The State cannot show, beyond a reasonable doubt, that the cumulative effect of these numerous constitutional errors was harmless. The totality of these violations substantially affected the fairness of the proceedings and prejudiced Larry. He requests that this Court vacate his judgment and remand for a new trial.

VII. CONCLUSION

Larry respectfully submits that his judgment of conviction be reversed, or that in the alternative, this case be remanded for a new trial.

DATED this 8th day of July, 2021.

Respectfully submitted,

/s/ ***NAVID AFSHAR***

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CERTIFICATE OF COMPLIANCE

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).

2. I hereby certify that this brief does comply with 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 in 14 point font of the Century Schoolbook style.

3. I hereby certify that this brief does NOT comply with the word limitation requirement of NRAP 32(a)(7)(A)(ii). The relevant portions of the brief are 14,586. A Motion to Allow Appellant's Opening Brief to Exceed Word Limitation has been submitted simultaneously with this Brief.

4. 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 of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of July, 2021.

/s/ NAVID AFSHAR

_____

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 8th day of July, 2021, a copy of the foregoing Opening Brief (and Appendix) was served as follows:

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