IN THE SUPREME COURT OF THE STATE OF NEVADA

CLEMON HUDSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82231

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

Under the Nevada Rule of Appellate Procedure 17(b), the Supreme Court may assign this case to the Court of Appeals.

STATEMENT OF THE ISSUES

On Direct Appeal:

1. Whether the district court abused its discretion by denying Appellant's Motion to Sever.
2. Whether any prosecutorial misconduct warrants reversal.
3. Whether the district court issued correct jury instructions.
4. Whether the district court erred in permitting uniformed police officers to attend the trial.
5. Whether cumulative errors warrant reversal.

On Appeal of Habeas Petition:

6. Whether the district court erred in denying a claim of ineffective assistance of counsel for failure to object to the flight instruction.

7. Whether the district court erred in denying a claim of ineffective assistance of counsel for failure to object to the reasonable doubt and equal and exact justice instructions.

8. Whether the district court erred in denying Appellant's request for an evidentiary hearing.

STATEMENT OF THE CASE

On September 23, 2015, a Clark County grand jury indicted Appellant Clemon Hudson ("Appellant") and his co-defendant, Steven Turner, on the following charges: Count 1 – Conspiracy to Commit Burglary (Gross Misdemeanor – NRS 205.060, 199.480); Count 2 – Attempt Burglary while in Possession of a Firearm or Deadly Weapon (Category C Felony – NRS 205.060.4); Count 3 – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count 4 – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count 5 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481); and Count 6 – Discharging Firearm at or into Occupied Structure, Vehicle, Aircraft, or Watercraft (Category B Felony – NRS 202.285). 1 AA 0174-79. The indictment was amended on April 15, 2018, dropping Count 6. 2 AA 0275-79. Appellant and Turner were arraigned on October 1, 2015, pled not guilty, and waived the sixty (60) day rule. 1 AA 0180-86.

Appellant filed a pretrial Motion to Sever on August 28, 2017. 2 AA 0187-92. The State filed its opposition on September 18, 2017. 2 AA 0193-0202. After hearing the parties, the district court denied the Motion to Sever without prejudice on October 12, 2017. 2 AA 203-30. Appellant subsequently renewed his objections to the statements of the co-defendant, but this Court once again denied severance without prejudice on November 16, 2017. 2 AA 0249-54.

Following a ten-day jury trial from April 16, 2018, through April 27, 2018, Appellant was found guilty on all five counts. 9 AA 1588-89. The district court sentenced Appellant on June 21, 2018, after five victims spoke about the crime's impact on them. 10 AA 1615-58. Appellant was sentenced as follows: Count 1 – three hundred sixty four (364) days; Count 2 – sixteen (16) to seventy-two (72) months, concurrent with Count 1; Count 3 – forty-eight (48) to one hundred twenty (120) months, plus a consecutive thirty-six (36) to one hundred twenty (120) months for use of a deadly weapon, concurrent with Count 2; Count 4 – forty-eight (48) to one hundred twenty (120) months, plus a consecutive thirty-six (36) to one hundred twenty (120) months, consecutive to Count 3; and Count 5 – thirty-six (36) to one hundred twenty (120) months, concurrent with Count 2. 10 AA 1659-61. The district court rendered the aggregate total sentence as one hundred sixty-eight (168) months to four hundred eighty (480) months, with 1,022 days of credit for time served. 10 AA 1659-61.

The Judgment of Conviction was filed on July 2, 2018. 10 AA 1659-61. Appellant did not appeal his conviction.

On October 25, 2018, Appellant filed a Petition for Writ of Habeas Corpus, 10 AA 1662-69, then filed a Supplemental Brief in Support of his Petition on December 18, 2019, 10 AA 1672-1741. The State filed its response on December 31, 2019. 10 AA 1742-54. Appellant's reply was filed on January 16, 2020. 10 AA 1755-59. The district court held an evidentiary hearing on October 15, 2020, on the limited issue of whether Appellant had been denied his right to a direct appeal. 10 AA 1763-86. Following the hearing, the district court granted Appellant a direct appeal but denied his other habeas claims on December 16, 2020. 10 AA 1788-1800.

Appellant filed a Notice of Appeal from the Judgment of Conviction on December 16, 2020, and a Notice of Appeal from the District Court's denial of his other habeas claims on December 17, 2020. 10 AA 1802-03, 1804-05. The State's response to both appeals follows.

STATEMENT OF THE FACTS

Jury Trial

On September 4, 2015, at approximately 3:45AM, Eric Clarkson was at the home he shared with Willoughby Grimaldi when he heard his metal outdoor patio furniture being moved outside his window. 4 AA 0716-18. He looked out and saw an African American man on his patio. 4 AA 0720. Mr. Clarkson grabbed his phone,

let his roommate know what he saw, and contacted 911 to report that someone was in his backyard. 4 AA 0720.

When Mr. Grimaldi went to the patio window, he saw an African American man with a billed cap on his head, racking a shotgun. 4 AA 0750. Moments later, Mr. Clarkson and Mr. Grimaldi heard someone banging on the front door, and Mr. Grimaldi saw a shirtless figure outside, wearing basketball shorts. 4 AA 0723, 0753. Mr. Grimaldi believed he saw a third person outside his bedroom window. 4 AA 0752, 0754, 0757. Mr. Grimaldi did not recognize any of the individuals. 4 AA 0759. Prior to the robbery, Appellant's co-defendant Mr. Turner had frequently visited the house to smoke marijuana with Mr. Clarkson, with whom he had had a sexual relationship. 4 AA 0686, 713, 735; 5 AA 847.

Officers Malik Grego-Smith and Jeremy Robertson responded to the dispatch call regarding a prowler. 6 AA 1010. After asking dispatch to inform the homeowner to open the front door, Officers Grego-Smith and Robertson entered the residence. 4 AA 0726; 6 AA 1018. Using hand signals, the officers indicated they saw two suspects with guns. 4 AA 0762.

When Officer Robertson opened the back door, two prowlers opened fire. 4 AA 0729-30, 762-63. Mr. Clarkson saw two types of bullets enter the home, describing one as molten metal and the other as a giant sparkler. 4 AA 730. One rifle round struck Officer Robertson in the thigh, fracturing his femur. 6 AA 1070. After

the shooting started, Mr. Clarkson and Mr. Grimaldi retreated to a bedroom. 4 AA 0731.

Officer Grego-Smith returned fire towards the patio, firing twelve shots. 6 AA 1024, 1038. Officer Grego-Smith turned on his flashlight when he started shooting and saw "a light-skinned black male with no shirt and purple basketball shorts" on the patio only a few feet away. 6 AA 1026, 1038. He radioed dispatch to inform them Officer Robertson had been shot. 6 AA 1028.

Co-defendant Turner fled the scene while Appellant hid in the backyard. 5 AA 0923; 7 AA 1189. Both were armed; Turner had a SKS rifle and Appellant had a shotgun. 7 AA 1108, 1186. Investigators later recovered the rifle, the shotgun, a handgun, and a cap in Clarkson and Grimaldi's backyard. 5 AA 0861-64.

Sergeant Joshua Bitsko, a K-9 officer, responded to Officer Grego-Smith's call for help. 5 AA 0909-10, 0918. Upon arrival, Sergeant Bitsko learned from the air unit that Appellant was lying in the backyard with a rifle next to him. 5 AA 0923. A handgun was also nearby. 5 AA 0864. Sergeant Bitsko deployed his police dog into the backyard. 5 AA 0923.

Police secured a wide perimeter around the crime scene to search for Turner. 5 AA 0936. Detective Jeremy Vance searched for Turner for approximately three and a half hours. 5 AA 0936-37. After a neighbor phoned the police about a suspicious person in a backyard, Detective Vance came upon Turner and began to

question him. 5 AA 0937, 0940. Turner had a leg injury and blood on his pants. 5 AA 0941. When questioned, Turner indicated his leg had been caught on a fence at his friend's house. 5 AA 0941. Detective Vance believed a gunshot wound caused the injury. 5 AA 0941. Turner's treating physician later discovered he had bullet fragments in and stippling around the wound. 9 AA 1397.

Officer Robertson told responding officers there were two suspects. 6 AA 1029. Though the homeowners reported that there was potentially a third person, both Appellant and Turner told the police that only two people were involved. 7 AA 1158, 1164, 1190.

Officer Robertson was transported to the hospital for surgery on his shattered femur. 5 AA 1076. Muscles needed to be reattached and a titanium rod and plates inserted into his broken femur. 5 AA 1076-77. He could not walk for two months, and, as of trial, was still missing the upper portion of that bone. 5 AA 1076-78.

Investigators found rifle cartridge cases and what appeared to be pellet marks from a shotgun blast. 5 AA 0838-39; 6 AA 0963. Appellant's DNA was found on the cap and his latent prints were found on the shotgun. 7 AA 1108, 1127. Appellant's DNA was also found on the public sidewalk, the patio table, and the backyard walkway. 7 AA 1130-31.

Each defendant made two statements which were introduced in court. 7 AA 1145-66; 1181-1208. Each statement had significant retractions, and a limiting instruction was issued to the jury for each. 7 AA 1146-47, 1180.

In Appellant's first interview, he said he went with one other person to the house to obtain marijuana, believing no one was home that night. 7 AA 1149, 1170. He said this was his first heist robbery. 7 AA 1156-57.The back and side doors were locked. 7 AA 1149, 1153, 1155. They tried the front door and found it locked, then knocked to see if anyone answered. 7 AA 1150. Their next plan was to break the back window. 7 AA 1150. Appellant said he was carrying a shotgun and was wearing a cap. 7 AA 1150-51. Appellant identified the car parked in front of the house as belonging to his mother. 7 AA 1157.

In the second interview later the same day, the police specifically asked if any one else were involved, but Appellant said it was only he and one other person. 7 AA 1157-58. He said the two of them had a rifle and a shotgun. 7 AA 1159. Appellant had the loaded shotgun and the other person had the rifle. 7 AA 1160-61, 1164. Appellant admitted firing at least one round at the officers, aiming at the bottom of the window. 7 AA 1162-63. After he fired, he fell backwards over a small wall. 7 AA 1162. Appellant admitted also bringing a handgun with him. 7 AA 1162-63.

In his first statement, Turner initially gave a fake name. 7 AA 1182. He said he had injured his leg by jumping over a fence. 7 AA 1183. He said he and another person went to the house to "come up on somebody." 7 AA 1185. Turner said the rifle found at the scene belonged to his uncle. 7 AA 1194. He claimed not to have seen any guns until they arrived at the home, though he saw a shotgun in the back of the car. 7 AA 1187.

Turner provided his correct name during the second interview. 7 AA 1187. After the police began shooting back, he hopped over a wall to leave. 7 AA 1189, 1196-97, 1200. After Turner hopped over the wall, he sat on a couch he found in the neighborhood, then began walking to a friend's house. 7 AA 1189. Turner admitted he had been in the house before and knew who lived there. 7 AA 1192. He was there to steal weed, and if there was any money in the house, he would have taken that as well. 7 AA 1192-94. He denied having a gun or firing a weapon. 7 AA 1200-02.

Post-Conviction Evidentiary Hearing

The district court held a limited evidentiary hearing on October 15, 2020, to determine if Appellant had been denied a direct appeal. 10 AA 1763-86.

Alexis Plunkett represented Appellant at his sentencing. 10 AA 1765. She advised Appellant not to make a statement at sentencing due to his "mandatory appeal." 10 AA 1766. She felt Appellant should not have been at sentencing

following a jury verdict but "hopefully that would be addressed on appeal." 10 AA 1767. She remained the attorney of record after sentencing. 10 AA 1767-68.

Ms. Plunkett was retained by Appellant's family before the week before trial, but declined to defend the case for various reasons. 10 AA 1768. Appellant's family was not pleased with his appointed trial counsel, Mr. Mueller, and did not want him to handle sentencing or an appeal. 10 AA 1768-69. Ms. Plunkett has never filed an appeal and her retainer with Appellant's family specified she only represented him for sentencing. 10 AA 1769.

Appellant's mother contacted the National Freedom Project and Ms. Plunkett suggested they contact someone local. 10 AA 1774-75. She provided a list of potential appellate attorneys to his family. 10 AA 1769. Neither Ms. Plunkett, Mr. Mueller, nor Appellant filed an appeal. 10 AA 1770.

Following the hearing, the district court concluded Appellant had been denied his right to appeal, but denied his other habeas claims on December 16, 2020. 10 AA 1788-1800.

SUMMARY OF THE ARGUMENT

Appellant asserts several claims from both his Judgment of Conviction and from the District Court's denial of his Petition for Writ of Habeas Corpus. His appeal from the Judgment of Conviction involves claims of misjoinder, prosecutorial misconduct, improper jury instructions, impermissible influence on the jury, and

cumulative error. The claims from the denial of his Petition for Writ of Habeas Corpus involve claims of ineffective assistance of counsel. None of these claims have merit in light of the overwhelming evidence of Appellant's guilt.

ARGUMENT REGARDING DIRECT APPEAL CLAIMS

I. THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S MOTION TO SEVER

Appellant argues the district court erred when it denied his motion to sever his trial from that of his co-defendant. AOB at 15.

This Court reviews the decision of a district court to deny a motion to sever for an abuse of discretion. Chartier v. State, 124 Nev. 760, 763–64, 191 P.3d 1182, 1184–85 (2008). "[T]he decision to sever a joint trial is vested in the sound discretion of the district court and will not be reversed on appeal unless the appellant carries the heavy burden of showing that the trial judge abused his discretion." Chartier, 124 Nev. at 764, 191 P.3d at 1185 (quoting Buff v. State, 114 Nev. 1237, 1245, 970 P.2d 564, 569 (1998) (internal quotation marks omitted)).

Nevada's law on joinder allows two defendants to be tried together in one trial:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

NRS 173.135. Separate trials slow the administration of justice, clog the trial dockets, and increase the burden on judicial resources, citizen jurors, and testifying witnesses. Jones v. State, 111 Nev. 848, 853-54, 899 P.2d 544, 547 (1995). "Joinder promotes judicial economy and efficiency as well as consistent verdicts and is preferred as long as it does not compromise a defendant's right to a fair trial." Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 379 (2002).

Nevada case law is clear that joinder is the default mode when two defendants are accused of committing a crime together. "[I]t is well settled that where persons have been jointly indicted they should be tried jointly, absent compelling reasons to the contrary." Jones, 111 Nev. at 853, 899 P.2d at 547. To argue for severance, Co-defendants must present "compelling" reasons. Id.

The question the district court must answer in deciding an issue of severance is "whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants." Id. at 854, 899 P.2d at 547. If joinder would result in prejudice, the court *may*, at its discretion, sever the trials. NRS 174.165. The decisive factor is prejudice to either party: "a court must consider not only the possible prejudice to the defendant but also the possible prejudice to the State resulting from expensive, duplicative trials." Marshall, 118 Nev. at 646, 56 P.3d at 378-79.

Finding an abuse of the district court's discretion sufficient to overturn its severance decision requires Appellant to meet two criteria: 1) antagonistic and mutually exclusive theories of defense and 2) that the joint trial compromised a specific trial right or rendered the jury's verdict unreliable.

"[M]utually antagonistic defenses are not prejudicial per se." Jones, 111 Nev. at 854, 899 P.2d at 547. Rather, the defenses must be so conflicting and irreconcilable that the jury might infer guilt solely based on the conflict. Id. "[S]ituations in which inconsistent defenses may support a motion for severance" will be rare. Marshall, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002). "Inconsistent defenses must be antagonistic to the point that they are mutually exclusive." Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990). "Defenses are mutually exclusive when 'the core of the codefendant's defense is so irreconcilable with the core of [the defendant's] own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant.'" Marshall, 118 Nev. 642, 645–46, 56 P.3d 376, 378 (2002) (citing Rowland v. State, 118 Nev. 31, 39 P.3d 114, 123 (2002) (internal citations omitted)).

"A district court should grant a severance "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."" Marshall, 118

Nev. 642, 647, 56 P.3d 376, 379 (2002) (quoting Zafiro v. United States, 506 U.S. 534, 539, 113 S. Ct. 933, 938 (1993)).

This Court listed several potential infirmities that would not justify severance. Lisle v. State, 113 Nev. 679, 689–90, 941 P.2d 459, 466 (1997). "Severance of defendants will not be granted if based on 'guilt by association' alone." Id. (citing United States v. Boffa, 513 F.Supp. 444, 487 (D.Del.1980)). "Merely having a better chance at acquittal if the defendants are tried at separate trials is not sufficient to establish prejudice. Id. (citing United States v. Baker, 10 F.3d 1374, 1388 (9th Cir.1993), cert. denied, 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 289 (1994)). "In addition, a defendant is not entitled to a severance merely because the evidence admissible against a co-defendant is more damaging than that admissible against the moving party." Id. "[M]isjoinder requires reversal only if it has a substantial and injurious effect on the verdict. Marshall, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002). Even if prejudice is shown, severance is not automatic, but rather is left to the "district court's sound discretion." Zafiro, 506 U.S. at 538–39, 113 S. Ct. at 938.

A serious risk that might prevent a jury from making a reliable judgment about guilt or innocence could arise when one defendant's explicit statement about the other is introduced. Bruton v. United States, 391 U.S. 123, 126, 88 S. Ct. 1620, 1622 (1968). If the first defendant does not testify at trial, the second has no opportunity to cross-examine him, thus violating the Confrontation Clause. Id. Even clear

instructions to the jury will not enable the incriminating evidence to be "wiped from the brains of the jurors" in considering the guilt of the non-confessing defendant. Id. at 129, 88 S. Ct. at 1624.

In interpreting Bruton, this Court found relevant that the statements in Bruton directly and explicitly implicated his co-defendant. Burnside v. State, 131 Nev. 371, 393, 352 P.3d 627, 643 (2015) ("a statement that expressly refers to the defendant violates the Sixth Amendment Confrontation Clause."). The statements the co-defendant made in Burnside resulted in no prejudice against the defendant because they "did not directly implicate Burnside," and the State also admitted substantial other evidence supporting his guilt. Id. at 393, 352 P.3d at 642–43.

The United States Supreme Court said redacting a co-defendant's statements so that omit references to the existence of the defendant can avoid a Confrontation Clause issue. Richardson v. Marsh, 481 U.S. 200, 208–09, 107 S. Ct. 1702, 1708 (1987). "If limited to facially incriminating confessions, Bruton can be complied with by redaction—a possibility suggested in that opinion itself." Id. The Court expressed no opinion on the result if the defendant's name were replaced with a neutral pronoun. Id. at 211 n. 5.

Where a confession is not incriminating on its face but only becomes so when linked with other introduced evidence, Bruton is not implicated. Id. at 208-09, 107 S.Ct. at 1708. Appellant's cited case agrees: "evidentiary linkage or contextual

implication may not be utilized to convert a non-Bruton admissible statement into a Bruton inadmissible statement." Vazquez v. Wilson, 550 F.3d 270, 278 (3d Cir. 2008). Redaction alone, however, cannot be a cure-all if the contested statement is the primary evidence against the defendant. Vazquez at 283 (noting that Vazquez never confessed and only his co-defendant's statement "directly identified Vazquez as the shooter.").

In Lisle, a witness described the testimony of a defendant in which he said he saw "the other guy" shoot the victim. Lisle, 113 Nev. at 692, 941 P.2d at 468. Despite testimony introduced earlier that the two defendants shared a group nickname ("Los Vatos") and the victim was with Los Vatos immediately before his death, this statement did not prejudice Lisle because it was only incriminatory in context with the rest of the evidence at trial. Id. (citing Richardson, 481 U.S. 200).

In Jones, this Court found that joinder did not prejudice the defendant because he and his co-defendant each admitted to being at the scene. Jones, 111 Nev. at 854, 899 P.2d at 547. Testimony introduced at trial showed each defendant proclaimed his innocence and neither admitted seeing the other commit the crimes. Id. Based on these similarities, their defenses did not conflict. Id.

Here, Turner's defense theory appeared to revolve around the presence of a "third guy" who might have actually been responsible. 9 AA 1473-74. Turner's statements could have logically implicated this other person as easily as they did

Appellant. The statements Appellant objects to must be read in context with the rest of the evidence introduced at trial in order to be incriminatory.

For example, Appellant states the introduction of his statements immediately followed an identification of Turner. AOB at 21. Appellant does not contest, however, that his statement can be used against himself, so the jury had no occasion to "disregard the statement in assessing Appellant's guilt." AOB at 22. Appellant does not have standing to assert Turner's Confrontation Clause rights, but since Appellant's statements are only incriminatory in context, Turner would lose on this issue as well. See Lisle, 113 Nev. at 692, 941 P.2d at 468.

Turning to his co-defendant's statements, Appellant complains that this statement revealed that someone picked up Turner to go rob a house, there was a shotgun in the car, the person he was with hopped over a wall, and no third person was there. AOB at 23. Appellant argues that the prosecutor made logical inferences from these statements, including that there was no third person, Appellant brought the shotgun bearing his fingerprints, and there were "two guns fired, two people." AOB at 24. As in Lisle, the identity of "the other guy" is context-dependent. It is only within the context of the other evidence introduced at trial that Turner's statements implicate Appellant and therefore the statements are not a violation of Bruton. See Lisle, 113 Nev. at 692, 941 P.2d at 468.

Appellant complains that Turner's counsel argued that Appellant was the one who picked him up. Turner's counsel is also allowed to make logical inferences from the evidence presented. Turner's counsel's argued to the jury that someone other than Appellant or Turner could be responsible: "And then it comes down to this: The State can't prove there were only two people. … I put to you that the State argues that there were only two people, because those are the only people that were seen by the officers." 9 AA 1473-74. This argument by Turner's counsel reinforced the defense theory that someone else fired at the officer, but it also diluted the inference that Appellant, not some other guy, was the person referred to in Turner's statement.

The record reveals that Appellant's and Turner's defense theories were not antagonistic to each other. Appellant's counsel conceded in his closing statement that Appellant was there to steal weed and that he had a shotgun. 9 AA 1491. Counsel also argued Appellant lacked the intent necessary for attempted murder. 9 AA 1491. Counsel argued the shotgun fired because Appellant was startled that someone in a supposedly empty house opened the door, and a piece of shrapnel struck the shotgun, which only contained birdshot. 9 AA 1484-87. Counsel argued Appellant lay down like a scared child, and "[i]f he had murder on the brain, he would have fought." 9 AA 1488-89.

Turner's statements suggesting he was at the crime scene with another guy did not impede Appellant's defense theory that he never had the specific intent to commit a murder.

The district court properly refused to sever the trial because Appellant failed to meet the stringent criteria for demonstrating a need for severance under NRS 174.165. The redactions, combined with the substantial other evidence introduced at trial, supported the jury's verdict. As in Jones, Appellant and Turner each admitted in their statements to the police that they were at the time and place of the crimes and that they arrived there together. 7 AA 1149, 1170, 1185. Through careful redactions, neither admitted to observing the other commit the crimes.

Turner's defense, that some other person shot the officer, and Appellant's, that he never intended to commit murder, are not so conflicting and irreconcilable that the jury could infer guilt based only on the conflicts in their defenses. Rather, like Jones, Appellant was convicted, not because he was tried with Turner, but because the State presented overwhelming evidence of his guilt. There were shotgun pellets fired at the home. 4 AA 730; 5 AA 0838-39; 6 AA 0963. Appellant was found in the backyard with three guns and a cap. 5 AA 0861-64. Appellant's DNA was found on the cap and his latent prints were found on the shotgun. 7 AA 1108, 1127. Appellant's DNA was also found on the public sidewalk, the patio table, and the backyard walkway. 7 AA 1130-31.

In his statements to police, Appellant admitted that he went to the house to rob it. 7 AA 1149, 1170. He was carrying a shotgun. 7 AA 1150-51. The car at the scene belonged to his mother. 7 AA 1157. No one was involved except one other person, and between them they had a rifle and a shotgun. 7 AA 1157-59. He also had a handgun. 7 AA 1162-63. He fired at least one round at the officers. 7 AA 1162-63. These are the incriminating portions of Appellant's statements that were admitted.

These statements would prove much more incriminating to Appellant than the redacted portions of Turner's statements, rendering any alleged error harmless. "[A] defendant's own statements may be considered in assessing whether a Bruton error, if any, was harmless." Rodriguez v. State, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001). Any connection the jury might have made between Turner and Appellant based on Turner's redacted statements was likely based on the fact that overwhelming evidence, apart from Turner's statements, was introduced at trial, proving that Appellant and Turner committed the charged offenses.

II. THE STATE DID NOT ENGAGE IN PROSECUTORIAL MISCONDUCT

When considering claims of prosecutorial misconduct, the court engages in a two-step analysis. Valdez v. State, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476-77 (2008). First, the court determines whether the prosecutor's conduct was improper. Id. Second, if the conduct was improper, the court determines whether it warrants

reversal. Id. The court will not reverse a conviction based on prosecutorial misconduct if it was harmless error. Id. If the error is of constitutional dimension, the State must demonstrate, beyond a reasonable doubt, the error did not contribute to the verdict. If the error is not of constitutional dimension, reversal is appropriate only if the error substantially affects the jury's verdict. Id.

In addition, harmless-error review applies only if the defendant preserved the error for appellate review. "[T]o preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this 'allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury." Id. at 1190, 196 P.3d at 477 (internal citations omitted). Otherwise the comments are subject to plain error review. Plain means obvious from a casual review of the record. Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995). The issue must be clear error under current law. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1224, 1232 (2005).

A prosecutor's comments should be considered in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001). Review of alleged prosecutorial misconduct requires consideration of the nature of the evidence presented against the defendant. Smith v. State, 120 Nev. 944, 947-948, 102 P.3d 569, 572 (2004). Statements construed by the defense as inflammatory

mischaracterizations will not be deemed prosecutorial misconduct where the statements are supported by evidence adduced at trial. Rose v. State, 123 Nev. 24, 163 P.3d 408 (2007). Moreover, where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error. King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

A. "Feeling Good" About Conviction

Appellant did not object to the prosecutor's comment about feeling good about convicting someone who shot a police officer. 9 AA 1499. Therefore, this Court evaluates the comment for plain error. Patterson, 111 Nev. at 1530, 907 P.2d at 987. The State acknowledges that this Court has already determined that this comment was improper. Turner v. State, 136 Nev. __, __, 473 P.3d 438, 449 (2020).

However, this comment does not warrant reversal in light of the substantial evidence of Appellant's guilt. Given the overwhelming evidence against Appellant, he has failed to demonstrate that this comment substantially affected the jury's verdict. This Court reached the same conclusion in Turner. 136 Nev. at __, 473 P.3d at 450. See also Smith, 120 Nev. at 947-948, 102 P.3d at 572.

B. "More Crimes Were Possible"

Again, the State acknowledges that this Court has already determined that his comment was improper. 136 Nev. at __, 473 P.3d 449. However, this error was harmless and therefore does not warrant reversal. Valdez, 124 Nev. at 1188-89, 196

P.3d at 476-77. Given the substantial evidence of Appellant's guilt admitted at trial, including Appellant's own admissions, reversal is clearly not warranted. This Court reached the same conclusion in Turner. 136 Nev. at __, 473 P.3d at 450. See also Smith, 120 Nev. at 947-948, 102 P.3d at 572.

C. "That's the Truth" and "That's the Reality of It"

The remarks Appellant objects to next in his brief are not improper. AOB at 29. The prosecutor stated it does not matter who the defendants tried to kill, it is still attempted murder. 9 AA 1510. They underscored this legal definition of attempted murder by saying "that's the truth," "the reality," and "[t]hat's all that matters."

These statements are not of the prosecutor's personal belief as to Appellant's guilt. AOB at 29. Rather, they were permissible argument that the evidence proved Appellant's guilt. "Statements by the prosecutor, in argument, indicative of his opinion, belief, or knowledge as to the guilt of the accused, when made as a deduction or conclusion from the evidence introduced in the trial, are permissible and unobjectionable." Domingues v. State, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (1996) (citing Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971).

Appellant did not object to the prosecutor's comments about the nature of attempted murder and transferred intent at trial. 9 AA 1510. Therefore, this Court evaluates the comment for plain error. Patterson, 111 Nev. at 1530, 907 P.2d at 987.

Since this is a correct statement of the law of attempted murder, the prosecutor's underscoring the point cannot be improper.

Appellant offers no other definition for attempted murder. The State argued, based on the evidence admitted at trial, that the defendants attempted two counts of attempted murder as defined by the law when they fired at the people standing in the doorway of the victims' home. This is clearly permissible. Domingues, 112 Nev. at 696, 917 P.2d at 1373.

Even viewed cumulatively, the Turner Court did not find the comments warranted reversal. Turner, at 62, 473 P.3d at 450. The prosecutor's comments "did not infect the trial with unfairness so as to affect the verdict and deny [appellant] his constitutional right to a fair trial."). Valdez, 124 Nev. at 1195, 196 P.3d at 480. His criminal conviction should not be overturned. Leonard, 117 Nev. at 81, 17 P.3d at 414.

III. THE JURY INSTRUCTIONS CORRECTLY RECITED NEVADA LAW

Appellant next challenges specific jury instructions issued in his case. AOB at 30.

"District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008) (citing Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005)). The decision to refuse a proposed instruction is reviewed for an abuse of discretion. Id. Whether a particular jury

instruction correctly states the law is reviewed de novo. Id. Claims on appeal regarding jury instructions are weighed using a harmless-error analysis. Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003).

To evaluate whether a jury instruction violates due process, a reviewing court determines if "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, 502 U.S. 62, 72–73, 112 S. Ct. 475, 482 (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400–01 (1973)). "It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Id. "[T]he proper inquiry is not whether the instruction "could have" been applied unconstitutionally, but whether there is a reasonable likelihood that the jury did so apply it." Victor v. Nebraska, 511 U.S. 1, 1–2, 114 S. Ct. 1239, 1241 (1994) (citing Estelle).

A. Jury Instruction No. 29

Jury Instruction No. 29 stated:

> During an attack upon a group, a defendant's intent to kill need not be directed at any one individual. It is enough if the intent to kill is directed at the group. The State is not required to prove that a Defendant intended to kill a specific person in the group.

9 AA 1566. The preceding instruction, No. 28, stated:

> If you believe that at the time of the shooting in this case a defendant intended to kill any person, or to aid and abet his co-defendant with the deliberate intention to unlawfully kill any person, it is of no legal

> consequence that he or his co-defendant mistakenly injured a different person. His intent to kill transfers to the person actually harmed.

9 AA 1565.

Read together, these instructions allowed the jury to find Appellant guilty of attempted murder when he shot at the people in the open doorway of the home. Whether he thought he would kill the homeowners instead of the police was addressed in Jury Instruction No. 28. Whether he shot at a group of people and did not care who he killed was addressed in Jury Instruction No. 29. Both are accurate expressions of Nevada law and are supported by the facts in this case. The instruction on group transferred intent comes from Ewell v. State, 105 Nev. 897, 899, 785 P.2d 1028, 1029 (1989). Ewell stands for the proposition that the State is not required to prove Appellant intended to kill a specific member of a group when he fired at the group. Id.

Whether the group entailed the two officers alone or included the two homeowners who were very close to the bullets being fired, a group was in fact being fired upon. 4 AA 0731. Two officers alone comprise a group. Dictionary.com defines a group as "any collection or assemblage of persons or things." The second definition is more specific: "a number of persons or things ranged or considered together as being related in some way." The two officers were grouped in the doorway; they were part of the larger group of four people near the back door. They related to each other as fellow officers or fellow persons under fire. There is no

logical or legal basis for failing to apply Ewell to the facts here. The assertion that a "large" group must be assembled is unsupported in the law or in common understanding of the term. 9 AA 1413.

A shooter can be accused of attempted murder when he fires at people without wishing a particular one dead, or even without identifying who exactly he is aiming at. Here, the jury did not need to puzzle over whether Appellant desired the death of Officer Richardson, Officer Grego-Smith, Mr. Clarkson, or Mr. Grimaldi. It sufficed that Appellant fired a shotgun at all four men. The State argued, and the district court considered, that the homeowners were also there, together with the officers. 9 AA 1414. The court recalled that the homeowners testified the bullets whizzed past them. 9 AA 1414-15. The district court evaluated and properly dismissed Appellant's objection. 9 AA 1414.

That Ewell concerned a drive-by shooting and the case at bar involved Appellant in a backyard firing a shotgun at whoever opened the door is immaterial. AOB at 31-32. Appellant does not even explain why this fact should undermine the applicability of Ewell, nor can it, since riding in a car is not an element of attempted murder.

As in Ewell, the contested jury instruction did not relieving prosecution of its duty to prove the elements of attempted murder and Appellant had proper notice of the charges he had to defend against.

B. Jury Instruction No. 38

Jury Instruction No. 38 stated:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. The essence of flight embodies the idea of deliberately going away with consciousness of guilt and for the purpose of avoiding apprehension or prosecution. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation

9 AA 1575.

The jury was entitled to be instructed on flight because Appellant's co-defendant fled. 7 AA 1189, 1196-97, 1200. Since Appellant was arrested right in the backyard of the house he planned to burgle, the jury could not reasonably have applied this instruction to him. 5 AA 0923.

Appellant asked for no limiting instruction and made no objection to the instruction, so the giving of this instruction is reviewed for plain error. Contrary to Appellant's contention, an instruction on flight does not inherently wield undue influence. AOB at 31-32. In his cited case, Weber v. State, 121 Nev. 554, 119 P.3d 107 (2005), a significant amount of time passed between the crime and the arrest. Id. at 582, 119 P.3d at 126. Weber contended that this time gap was due to police inefficiency, not his own efforts at evading the police. Id. If true, an instruction on flight could have prejudiced the jury, so the Court carefully scrutinized the record.

The Court concluded ample evidence showed he evaded the police so the instruction was warranted. Id.

Appellant cites Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992), which is also inapplicable. In Guy, the criminal did not flee until thirteen days after the murder, and had many reasons for fleeing at that time independent of the crime charged. Id. at 777, 839 P.2d at 583. The flight instruction was incorrectly given because it implied guilt for one crime even though the fleeing involved guilt of another. Id. The Court held the error was harmless, though. Id.

Miles v. State, 97 Nev. 82, 624 P.2d 494 (1981) is also inapplicable here. In Miles, this Court examined the record to ensure a flight instruction was appropriate, because to do otherwise might allow that instruction to emphasize one part of the evidence over another. Id. at 85, 624 P.2d at 496. The Court wanted "to be certain that the record supports the conclusion that appellant's going away was not just a mere leaving but was with a consciousness of guilt and for the purpose of avoiding arrest." Id.

Here, unlike in Weber, there is no evidence that a significant amount of time passed between crime and arrest. The flight instruction was not used to explain the time between the two events. Unlike in Guy, a flight instruction would not cause the jury to infer Appellant's guilt based on his flight from a different crime. Unlike in Miles, Appellant did not go away at all, so the jury could not misinterpret his doing

so. No jury prejudice could result from a flight instruction where no evidence of flight on Appellant's part existed.

Appellant points to no evidence that the jury improperly imputed this flight instruction to his behavior. He cites to no part of the record that could in any way have confused the jury when combined with the flight instruction. Reviewing this instruction for plain error, Appellant's contentions are subject to summary dismissal. "'Bare' and 'naked' allegations are not sufficient to warrant post-conviction relief." Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

C. Jury Instruction No. 40

Jury Instruction No. 40 stated:

> The Defendant is presumed innocent unless the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

9 AA 1577. This instruction is not only a correct statement of Nevada law, but also is statutorily required. NRS 175.211(2). The second paragraph of the instruction comes verbatim from NRS 175.211(1). Because Appellant did not object to this instruction at trial, this Court reviews the instruction for plain error. NRS 178.602.

The Nevada Supreme Court has upheld this exact instruction on many occasions and for many years. See, e.g., Cutler v. State, 93 Nev. 329, 336-37, 566 P.2d 809, 813-14 (1977); Bollinger v. State, 111 Nev. 1110, 1115 n. 2, 901 P.2d 671, 674 n. 2 (1995); Middleton v. State, 114 Nev. 1089, 1111–12, 968 P.2d 296, 311 (1998) ("there was no reasonable likelihood that a jury applied this language unconstitutionally where the jury was also instructed concerning the presumption of innocence and the state's burden of proof."); Rodriguez, 117 Nev. at 811, 32 P.3d at 780 ("We conclude that the district court did not err in giving the mandatory statutory instruction on reasonable doubt. This court has upheld the constitutionality of the instruction where, as here, the jury received additional instruction on the State's burden of proof and the presumption of innocence."); Belcher v. State, 136 Nev. 261, 276, 464 P.3d 1013, 1029 (2020) ("we have repeatedly upheld the constitutionality of that instruction").[1] The Ninth Circuit Court of Appeals has also found Nevada's statutory reasonable doubt instruction does not violate due process. Ramirez v. Hatcher, 136 F.3d 1209, cert. denied, 525 U.S. 967, 119 S.Ct. 415 (9th Cir. 1998).

Appellant's cited cases support the Nevada Supreme Court in its finding that Nevada's instruction on reasonable doubt complies with due process. In Victor, the

1The State also notes that under NRAP 17(b)(2)(A), this appeal is presumptively assigned to the Court of Appeals, which lacks jurisdiction to overrule the Nevada Supreme Court.

United States Supreme Court said the challenged instructions, "[t]aken as a whole," raised "no reasonable likelihood that the jurors understood the instructions to allow convictions based on [insufficient] proof." 511 U.S. at 1, 114 S. Ct. at 1241. Justice Ginsberg, in her concurrence, agreed, stating trial courts should attempt to define reasonable doubt even if they do so imperfectly. Id. at 26, 114 S. Ct. at 1253. Justice Ginsberg further noted "the law does not require proof that overcomes every possible doubt." Id. at 27, 114 S. Ct. at 1253.

The challenged instruction in Victor said reasonable doubt excludes "mere possible doubt." Id. at 2–3, 114 S. Ct. at 1241 ("That the instruction properly uses 'possible' in the sense of fanciful is made clear by the fact that it also notes that everything 'is open to some possible or imaginary doubt.'"). As in Nevada, this instruction excludes mere possibility or speculation. Id. at 17, 114 S. Ct. at 1248 ("A fanciful doubt is not a reasonable doubt.").

Appellant's reliance on Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990), is misplaced, as the United States Supreme Court found it to be the exception to the rule supporting states' definitions. Victor, 511 U.S. at 5, 114 S. Ct. at 1243 ("In only one case have we held that a definition of reasonable doubt violated the Due Process Clause."). In Cage, the court required "grave uncertainty," "actual substantial doubt," and "a moral certainty." This language is a far cry from Nevada's.

Appellant has failed to offer a compelling reason for the Court to overrule its own precedent or to take the task of writing laws away from the legislature. The NSC has stated "'[w]e are loath to depart from the doctrine of stare decisis' and will overrule precedent only if there are compelling reasons to do so." City of Reno v. Howard, 130 Nev.110, 113-14, 318 P.3d 1063, 1065 (2014) (quoting Armenta-Carpio v. State, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013)).

Under a plain-error standard, it is plain that no error occurred. Not only is Jury Instruction No. 40 a correct statement of Nevada law, but it is also the only statement on this topic permitted by law. Plainly, there is no error.

D. Jury Instruction No. 50

Jury Instruction No. 50 stated:

> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

9 AA 1587.

Again, because Appellant did not object to this instruction at trial, this Court reviews the instruction for plain error. NRS 178.602.

Appellant complains that by telling the jury to apply "equal and exact justice between the Defendant and the State of Nevada," the jury could conceivably have

ignored the presumption of innocence. AOB at 38. This instruction, however, does not deal with the presumption of innocence or the burden of proof. Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1998).

The instructions that did deal with these topics correctly stated Nevada law. The jurors were required to find proof of Appellant's guilt beyond a reasonable doubt. 9 AA 1541; 9 AA 1542; 9 AA 1546; 9 AA 1548; 9 AA 1555; 9 AA 1557; 9 AA 1559; 9 AA 1572; 9 AA 1573; 9 AA 1577; 9 AA 1579; 9 AA 1584. The burden of proof was always on the State. 9 AA 1546; 9 AA 1555; 9 AA 1572; 9 AA 1577. Further, the instructions clearly stated Appellant was presumed innocent "unless the contrary is proven." 9 AA 1577.

The challenged instruction has been repeatedly affirmed by the Nevada Supreme Court, and its use cannot be said to reduce the standard of proof in Appellant's case. See Belcher v. State, 136 Nev. 261, 276, 464 P.3d 1013, 1029 (2020); Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 824-25 (2004); Daniel v. State, 119 Nev. 498, 522, 78 P.3d 890, 906 (2003); Leonard, 114 Nev. at 1209, 969 P.2d at 296. Appellant cites to no evidence in the record to show that as applied to him, this instruction reduced the standard of proof. His bare and naked assertions are fit only for summary dismissal under Hargrove, 100 Nev. at 502, 686 P.2d at 225.

IV. THE DISTRICT COURT DID NOT ERR BY ALLOWING POLICE OFFICERS TO ATTEND A PUBLIC TRIAL

Appellant alleges the presence of uniformed officers in the courtroom attacked the presumption of innocence in Appellant's case. AOB at 39. Further, he argues the burden is on the State to prove their presence did not contribute to the verdict. AOB at 38. Before the burden falls on the State, Appellant must first prove the presence of the officers actually created a presumption-of-innocence error. This he has failed to do. Appellant's case placing the burden on the State, Watters v. State, 129 Nev. 886, 888, 313 P.3d 243, 245 (2013), invoked a presumption-of-innocence error when the prosecutor showed the defendant's booking photo with "GUILTY" written across his battered face during the State's opening statement. The Watters Court held that a "courtroom practice undermines the presumption of innocence when 'an unacceptable risk is presented of impermissible factors coming into play' in the jury's evaluation of the evidence." Id. at 892, 313 P.3d at 248. Unacceptable risks do not serve "an essential state interest" and may taint the jury's mindset enough to impair its fact-finding function. Id.

The Sixth Amendment provides for public trials. U.S. Const. amend. VI. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." In re Oliver, 333 U.S. 257, 271, 68 S. Ct. 499,

506 (1948). The right of public trials does not, however, only accrue to the defendant. Under the First Amendment, "the press and the general public have a constitutional right of access to criminal trials." Globe Newspaper Co. v. Superior Ct. for Norfolk Cty., 457 U.S. 596, 603, 102 S. Ct. 2613, 2618 (1982). "In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 2215, 81 L. Ed. 2d 31 (1984).

"Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Presley v. Georgia, 558 U.S. 209, 215, 130 S. Ct. 721, 725 (2010). This Court has held that "before a trial court can exclude the public from trial proceedings, the following requirements must be met: (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced"; (2) "the closure must be no broader than necessary to protect [the overriding] interest"; (3) "the trial court must consider reasonable alternatives to closing the proceeding"3; and (4) "the trial court must make findings adequate to support the closure." Feazell v. State, 111 Nev. 1446, 1448, 906 P.2d 727, 728–29 (1995) (citing Waller at 48, 104 S.Ct. at 2216).

The right to televise a trial has been found to violate the defendant's right to due process when the cameramen caused significant disruption of the proceedings

and the televising of the pretrial hearing potentially tainted the jury pool. Estes v. State of Tex., 381 U.S. 532, 536, 85 S. Ct. 1628, 1629 (1965).

A police officer might attend a trial in one of two ways—as an officer charged with maintaining the peace or as a member of the public. As members of the public, police officers have the same right to attend a criminal trial as any other member of the community. See Globe Newspaper Co.

When the police are present as a security force, they *may* signal to the jury that the defendant is extraordinarily dangerous, though prejudice is harder to prove. In Holbrook v. Flynn, 475 U.S. 560, 570, 106 S. Ct. 1340, 1346 (1986), the United States Supreme Court had to decide "whether the presence of these four uniformed and armed officers was so inherently prejudicial that respondent was thereby denied his constitutional right to a fair trial." The Holbrook Court found it did not. "[W]e simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section." Id. at 571, 106 S. Ct. at 1347.

The defendant in McKenna v. State, 114 Nev. 1044, 1050, 968 P.2d 739, 743 (1998) claimed that eleven uniformed officers attended the trial, though the Nevada Supreme Court only found evidence of eight. This Court found the presence of the officers did not prejudice the defendant. Id. Their presence did not decide the case for the jury. Id. In McKenna, the officers attended to provide security. The McKenna

Court found the State's need to maintain order outweighed any conceivable prejudice to the defendant. Id. Here, the balance is even more firmly in favor of allowing officers to attend the trial. See Watters. The officers had a right to witness the trial and ensure the triers of fact felt "the importance of their functions." In re Oliver, 333 U.S. at 271. Under the First Amendment, the officers had the right to "show support for the officer who was shot." AOB at 40.

Unlike in McKenna, Appellant makes no effort to describe how many officers attended his trial. AOB at 40. He claims "several" uniformed officers "packed" the courtroom, but the record is silent as to how many attended or what, if anything, they did to disrupt the proceedings like the cameramen in Estes. Appellant offers this Court no guidance as to how the presence of the officers, even if they intended to "show support", prejudiced him in the eyes of the jury. A party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions." Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"). Appellant fails to distinguish his case from McKenna, other than by flatly stating that the cases are not similar. AOB at 40. Such naked assertions are subject to summary dismissal under Hargrove.

V. THERE ARE NO CUMULATIVE ERRORS WARRANTING REVERSAL

Appellant claims cumulative errors require reversal even if individual errors do not. AOB at 41.

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

First, as set forth in detail in the sections above, the issue of Appellant's guilt was not close. Not only was the jury presented with Appellant's admissions of what transpired on the night of his "first heist," but Appellant was actually apprehended at the scene next to the shotgun containing his latent prints. Appellant's DNA was found in various areas around the scene. Appellant's assertion that "the officers likely shot at [him] first" only holds up if the jury chose to disbelieve the testimony of the four victims. AOB at 43. The jury, not Appellant, is charged with weighing the evidence presented at trial.

Second, Appellant has failed to substantively support a single claim of error, much less multiple errors that could be accumulated to warrant relief. Logic dictates that there can be no cumulative error where Appellant fails to demonstrate any.

Third, while the gravity of his conviction for these crimes is, indeed, severe, Appellant cannot demonstrate that the totality of the Mulder factors weighs in Appellant's favor. 116 Nev. at 17, 992 P.2d at 854-55.

Appellant fails to demonstrate that cumulative error entitles him to relief. His claims fail to render the verdict in his trial constitutionally infirm.

ARGUMENT REGARDING POST-CONVICTION CLAIMS

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64; see also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness and

second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the

particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578 F.3d. 944 (2011).

Further, a defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

"Bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

In order to satisfy the Strickland standard and establish ineffectiveness for failure to investigate, a defendant must allege *in the pleadings* what information would have resulted from a better investigation or the substance of the missing

witness' testimony. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); State v. Haberstroh, 119 Nev. 173, 185, 69 P.3d 676, 684 (2003). It must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id. A defendant must also show how a better investigation probably would have rendered a more favorable outcome. Id.

VI. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE FLIGHT INSTRUCTION.

Counsel cannot be ineffective for failing to make futile objections or arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

Further, "[s]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Likewise, the decision not to call witnesses is within the discretion of trial counsel and will not be questioned unless it was a plainly unreasonable decision. Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992).

Raising an objection to this instruction would have been futile since Appellant's co-defendant fled. As discussed in Section III(B) above, this instruction could not reasonably have affected Appellant's rights given the facts of this case. Appellant has not demonstrated deficient performance or prejudice. Thus, the district court correctly denied Appellant's claim.

VII. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE REASONABLE DOUBT AND EQUAL AND EXACT JUSTICE INSTRUCTIONS.

As discussed above in Sections III(C) and III(D), these instructions have been upheld by the Nevada Supreme Court time and time again. To have objected to these instructions at trial would have been an exercise in futility, an exercise reasonable counsel is not required to undertake. See Ennis, 122 Nev. 694, 137 P.3d 1095. To have objected merely for the sake of objecting would have been a "useless charade." United States v. Cronic, 466 U.S. at 657 n.19, 104 S.Ct. at 2046 n.19.

As this Court recently stated, "Counsel could not have successfully challenged any of these instructions in light of controlling caselaw." Keck v. State, 484 P.3d 276 (Nev. 2021). Counsel is not deficient for failing to object. Emerson v. State, 484 P.3d 277 (Nev. 2021).

Appellant has not demonstrated deficient performance or prejudice. Thus, the district court correctly denied Appellant's claim.

VIII. THE DISTRICT COURT DID NOT ERR IN DENYING A REQUEST FOR AN EVIDENTIARY HEARING.

It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing."). The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002).

A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

The United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable

strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Here, the district court held an evidentiary hearing which turned to Appellant's favor. 10 AA 1760. The court held that Appellant had been unfairly denied a direct appeal, but that no hearing was needed on the other alleged errors in Appellant's petition. 10 AA 1764. The district court did not need an evidentiary hearing to question defense counsel's motives for failing to object to certain jury instructions, as counsel's subjective reasons are immaterial. AOB at 49, 50.

The district court correctly held that Appellant's claims could be resolved without expanding the record.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the Judgment of Conviction on all counts.

Dated this 3rd day of September, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 11,143 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 3rd day of September, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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