IN THE SUPREME COURT OF THE STATE OF NEVADA

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VERNON NEWSON JR.,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83335

RESPONDENT'S ANSWERING BRIEF

Appeal From Conviction After a Jury Trial
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(2)(A) because it is an appeal from a Judgment of Conviction based on a jury verdict that involves convictions for one Category A Felony and three Category B Felonies.

STATEMENT OF THE ISSUE

1. Whether the district court violated Appellant's right to confront witnesses against him by allowing two (2) witnesses to testify via video.

STATEMENT OF THE CASE

On December 22, 2015, Vernon Newson Jr. (hereinafter "Appellant") was charged in North Las Vegas Justice Court by way of Criminal Complaint with one

count of Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165, - NOC 50001) and one count of Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS 202.360, - NOC 51460). Respondent's Appendix ("RA") 001-002. On January 20, 2016, Appellant waived his right to a preliminary hearing within fifteen (15) days and a preliminary hearing date was set for February 19, 2016. RA 005. The preliminary hearing was then continued to April 16, 2016. RA 003.

On April 1, 2016, The State filed an Amended Complaint charging Appellant with one count of Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165, - NOC 50001), one count of Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS 202.360, - NOC 51460) and two (2) counts of Child Abuse, Neglect, or Endangerment (Category B Felony – NRS 200.5089(1) – NOC 55226). RA 006-007. That same day, the case was transferred to district court and arraignment was set for April 11, 2016. RA 003.

The State filed the Information in district court on April 5, 2016. RA 008-011. On April 11, 2016, Appellant pled not guilty to the charges and waived his right to a speedy trial. RA 012. After several continuances, the jury trial was set for February 22, 2018. RA 014.

On January 25, 2018, Appellant filed a Motion to Bifurcate Count 2 (the charge for Ownership or Possession of Firearm by Prohibited Person). RA 013. The

district court granted Appellant's motion on February 8, 2018. RA 013. On February 21, 2018, the case was reassigned to Department 3. RA 015.

The trial began on February 22, 2018. Appellant's Appendix ("AA") Volume II 242. The State filed an Amended Information charging Appellant with one count of Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165, - NOC 50001) and two (2) counts Child Abuse, Neglect or Endangerment (Category B Felony – NRS 200.5089(1) – NOC 55226). RA 016-019. On February 27, 2018, the State filed a Second Amended Information containing the same charges but removing the "aiding and abetting" language from the Child Abuse charge. RA 020-021

On February 28, 2018, the State filed a Third Amended Information adding an additional charge for Ownership or Possession of Firearm by Prohibited Person (Category B Felony – NRS 202.360, - NOC 51460). RA 022-023. That same day, a jury found Appellant guilty of all charges. RA 024-026.

On April 19, 2018, the district court sentenced Appellant as follows: Count 1 - Life in the Nevada Department of Corrections (hereinafter "NDOC") with eligibility for parole beginning after a minimum of twenty (20) years has been served, plus a consecutive sentence of a minimum of ninety-six (96) months and a maximum of two hundred forty (240) months in the NDOC for the deadly weapon enhancement; Count 2 - a minimum of twenty-four (24) months and a maximum of

seventy-two (72) months in the NDOC, consecutive to Count 1; Count 3 - a minimum of twenty-four (24) months and a maximum of seventy-two (72) months in the NDOC, consecutive to Count 2; and Count 4 - a minimum of twenty-four (24) months and a maximum of seventy-two (72) months in the NDOC, consecutive to Count 2. The total aggregate sentence was a term of Life with eligibility for parole after three-hundred eighty-four (384) months in the NDOC have been served, with eight-hundred twenty-six (826) days credit for time served. RA 027-028.

The Judgment of Conviction was filed on April 26, 2018. RA 029-030.

On May 21, 2018, Appellant filed a Notice of Appeal. RA 031-034. On October 10, 2019, the Nevada Supreme Court reversed Appellant's conviction for First Degree Murder, holding that the jury should have been instructed on the crime of Voluntary Manslaughter. I AA 34-35. The Nevada Supreme Court affirmed the remainder of the Judgment of Conviction. I AA 35. Remittitur issued on May 26, 2020. RA 035-037.

On July 13, 2021, Appellant's five (5) day jury retrial commenced as to only the murder charge. II AA 243. On July 19, 2021, the jury returned a verdict of Guilty of First-Degree Murder with Use of a Deadly Weapon. I AA 138.

On July 30, 2021, the district court sentenced Appellant as follows: Count 1 - Life in the Nevada Department of Corrections (hereinafter "NDOC") with eligibility for parole beginning after a minimum of twenty (20) years has been served, plus a

consecutive sentence of a minimum of ninety-six (96) months and a maximum of two hundred forty (240) months in the NDOC for the deadly weapon enhancement; Count 2 - a minimum of twenty-four (24) months and a maximum of seventy-two (72) months in the NDOC, consecutive to Count 1; Count 3 - a minimum of twenty-four (24) months and a maximum of seventy-two (72) months in the NDOC, concurrent with Count 2; Count 4 - a minimum of twenty-four (24) months and a maximum of seventy-two (72) months in the NDOC, consecutive to Count 2. The total aggregate sentence was a term of Life with eligibility for parole after three-hundred eighty-four (384) months in the NDOC have been served, with two thousand twenty-four (2,024) days credit for time served. RA 065-066.

The Amended Judgment of Conviction was filed on August 3, 2021. I AA 177-180.

On August 5, 2021, Appellant filed a Notice of Appeal. I AA 181-184.

STATEMENT OF THE FACTS

On December 13, 2015, at approximately 10:00-10:30 PM, Janei Bailey ("Bailey") was in the car with her husband driving up the on-ramp at I-15 and Lamb Boulevard when she heard six (6) to seven (7) shots to her right, before hearing a car speed off.[1] III AA 617-618, 626. Bailey looked in the direction of the gun shots and,

[1] Janei Bailey's last name during the first trial was "Hall." Between the first and second trials, Janei's last name changed from "Hall" to "Bailey."

with the help of an approaching cars' headlights, Bailey was able to see a person lying in the street. III AA 618. The person lying in the street was later identified as Anshanette McNeil ("McNeil"). III AA 728. Bailey then got out of her car and approached the scene where she observed McNeil with no shoes on and a damaged phone laying across from her. III AA 621. Bailey noticed McNeil had a bullet wound in her neck. III AA 619. Bailey saw McNeil attempt to take a deep breath, but then became unresponsive. III AA 622. Other motorists had stopped, one of which was an off-duty police officer who was attempting to perform CPR on McNeil, and another was on the phone with 911. III AA 620.

Shortly thereafter, paramedics arrived at the scene. III AA 623. Paramedic August Corrales ("Corrales") was one of the paramedics called to the scene for what was described as a possible auto/pedestrian accident. III AA 631. When Corrales approached McNeil and made an initial assessment, he observed that McNeil had been shot multiple times in the neck and chest. III AA 633-634. Corrales then transferred McNeil to the ambulance where he continued to administer aid by attempting to clear her airway and performing CPR while on the way to the hospital, but he was unsuccessful. III AA 634-635. McNeil died shortly after arrival at the hospital. III AA 726.

At approximately 10:30 PM, North Las Vegas Police Department Officer Boris Santana ("Santana") received a call to report to 1-15 and Lamb in reference to

a shooting. III AA 639-640. When Officer Santana arrived, McNeil had already been taken to the hospital by paramedics. III AA 640. Officer Santana then "locked down" the crime scene by directing police vehicles to block the freeway on-ramp, ensuring that no one entered or left the scene who was not permitted to do so. III AA 640. At the scene, Officer Santana observed shell casings from a gun, a cell phone with a gunshot hole in it, dents in the asphalt which appeared to be caused by bullets, and a pool of blood where McNeil had been located. III AA 642-643.

Earlier in the day, McNeil made plans to meet that evening with her god sister, Zarharia Marshall ("Marshall"), to drop her son off so that Marshall could watch him. IV AA 801-802, 806. At the time, McNeil had six (6) children, but Marshall only babysat the two (2) youngest children, a two (2) year old son and an eight (8) month old son. IV AA 802. Appellant is the father of the eight (8) month old child. IV AA 802. Marshall had agreed to watch McNeil's eight (8) month old son for the evening. IV AA 806. While Marshall is waiting outside for McNeil to drop off the younger child, Appellant arrived at Marshall's home without McNeil. IV AA 808-809.

Appellant got out of his vehicle and was trying to "snatch" the younger child out of car to give to Marshall. IV AA 810. Marshall described Appellant as acting "frantic" at this time. IV AA 819-820. Appellant was able to remove the younger child from the car in his carrier with the help of Marshall, and he then went to the

trunk and handed Marshall a diaper bag and swing. IV AA 810-811. Appellant then went around the car to retrieve the older child to give to Marshall, despite Marshall not knowing she would also be taking care of the older child. IV AA 811. While receiving the children from Appellant, Marshall noticed the victim's purse and sandals inside the vehicle, as well as darks stains in the passenger seat of the vehicle. IV AA 811-812. Marshall also noticed a "clip" into which Appellant was loading bullets. IV AA 812, 820.

Before leaving, Appellant gave Marshall McNeil's purse. IV AA 813. Appellant then kissed his children "goodbye" and told them that he loved them. IV AA 820-821. Marshall asked Appellant where McNeil was, and Appellant responded, "Just know that motherfuckers took me to a point where I can't take it no more." IV AA 821, 825. As Appellant leaves, Marshall notices bullets in her driveway, which she picks up and brings into her home. IV AA 813-814.

After Appellant had left, Marshall attempts to call McNeil, but there is no answer. IV AA 814. Marshall then calls McNeil's mother to explain her concerns. IV AA 814. Following the phone call, Marshall proceeded to change McNeil's youngest son's diaper, when she noticed a red substance on his pants and blood in the car seat. IV AA 814. Upon seeing the blood, Marshall called the police who responded to her home soon after. IV AA 814-815. After speaking with police, Marshall filed a missing person's report for McNeil. IV AA 857.

At approximately 10:30 PM, North Las Vegas Detective Benjamin Owens ("Owens") arrives at the scene of the shooting to conduct evidence collection. IV AA 855. While working on the scene he received information that the victim matched an individual in a missing person's report. IV AA 857. Owens then proceeded to Marshall's home because it was the address associated with the missing person's report. IV AA 857. Marshall showed Detective Owens the bullets she had found, which matched the shell casings found at the crime scene. IV AA 859-860. As a result of this evidence, Marshall's description of Appellant's behavior, and the fact that McNeil had been shot and killed, Detective Owens generated an arrest warrant for Appellant. IV AA 862.

Wendy Radke ("Radke"), a Crime Scene Analyst, also went to the scene to take photographs and collect evidence. IV AA 738. Radke recovered bullet casings, a bullet fragment, two (2) pieces of cloth, blood, and the victim's cell phone which was damaged and looked to have been shot. IV AA 739, 741, 743. After dropping the evidence off, Radke went to Marshall's home and attempted to take fingerprint evidence, which was unsuccessful. IV AA 743.

Owens obtained a warrant for Appellant's arrest on December 22, 2015. IV AA 885. That same day, Rickey Hawkins ("Hawkins") of the Claremont California Police Department responded to a call about a suspicious person using an outlet outside of an apartment to charge his cell phone. IV AA 886-887. Hawkins arrived

and spoke with Appellant who identified himself through his driver's license as Vernon Newson. IV AA 886-887. Hawkins then ran a records check which showed Appellant had a warrant for his arrest for murder. IV AA 887-888. Upon discovery of the warrant, Hawkins arrested the Appellant and notified the Las Vegas Metropolitan Police Department ("LVMPD"). IV AA 889. A pre-booking search recovered eighteen (18) rounds of 9 mm ammo. IV AA 899. As a result of the pre-booking search, Hawkins searched the area where he found Appellant and found another 9 mm round. IV AA 899-900. The next day, Owens traveled to California to pick up the evidence and transported it to Crime Scene Investigation in Las Vegas. IV AA 863.

In early January 2016, Winston Reece ("Reece") called the police to report a vehicle that was left unattended for about four (4) or five (5) days. IV AA 773-774. He observed a male drop off the car and walk away. IV AA 774. Some days after the car was dropped off, Reece received a call from his neighbor telling him he saw what looked like a bullet hole in the trunk. IV AA 776. When Reece went to look at the vehicle, he saw three (3) spent cartridges in the back seat and a bloody beanie hat. IV AA 776-777. Reece then recorded the VIN number and tags and reported it to LVMPD. IV AA 777.

The vehicle was processed by Crime Scene Analyst Renee Harder ("Harder"). IV AA 662. During Harder's processing of the vehicle, she observed and found

bloodstains in the back seat directly behind the driver's seat, on the interior driver's side door handle, and on the rear driver's side interior door near the handle. IV AA 663-668. Additionally, Harder found one bullet and six (6) bullet casings along with bullet fragment in the vehicle's cargo area and in the backseat on the driver's side. IV AA 663-664. Crime Scene Analysts discovered that bullets travelled through from the front driver's seat into the vehicle's rear seats and stopped in the cargo area. IV AA 665.

Kathy Geil, a Forensic Scientist, received eleven (11) cartridge cases collected from the crime scene and found that they were all fired from the same gun; a 9mm Luger. IV AA 850. Allison Rubino, another Forensic Scientist, found that all of the blood collected from the scene, vehicle, car seat, clothes, and watch came from McNeil. IV AA 761.

On December 14, 2015, Dr. Alane Olson ("Olson") performed an autopsy of the victim. IV AA 703. At the time of Appellant's second trial, Dr. Olson had retired, so Dr. Lisa Gavin ("Gavin"), another Clark County Medical Examiner, testified as to her own conclusions based on her review of the autopsy report, photographs taken at the time of the autopsy, and a toxicology report. IV AA 698-699, 703-704.

Dr. Gavin concluded that the victim was shot seven (7) times, with three (3) of those gunshot wounds being independently fatal. IV AA 714, 716, 718, 723. The first bullet entered McNeil's right cheek, exited the right neck, and re-entered

through the right upper chest. IV AA 709. It was recovered from the right upper back. IV AA 713. The second bullet entered the left side of McNeil's chin, exited the left jaw, and then re-entered the left side of the neck. IV AA 714. After re-entering the neck, the projectile entered McNeil's left lung and exited her back. IV AA 714. This wound was independently fatal. IV AA 714. A third bullet entered the left side of McNeil's chest, traveled through her left lung, her aorta, her right lung, and exited her right upper chest. IV AA 715-716. This wound was independently fatal. IV AA 716. A fourth bullet entered the right side of McNeil's mid back, went through her right lung, striking the aorta, and then exited out the left anterior of the chest. IV AA 717-718. This wound was independently fatal. IV AA 718. A fifth bullet entered the left side of her mid back, stayed just under the skin, and exited the mid upper back. IV AA 719. The sixth bullet entered the back of the victim's right upper arm, fractured her humerus, and fragments of the projectile were recovered from that area of the fracture in her arm. IV AA 719-721. A seventh bullet entered the right forearm and exited the left side a little bit farther down on the arm. IV AA 721. IV AA 726.

The results of the toxicology report revealed that McNeil had methamphetamine in her system, along with amphetamine metabolite, hydrocodone, and hydrocodone metabolites, though the levels of these drugs would not have been fatal. IV AA 724.

SUMMARY OF THE ARGUMENT

Appellant alleges that the district court erred in allowing two (2) witnesses, Zarharia Marshall ("Marshall") and Officer Boris Santana ("Santana"), to testify via video. Appellant is incorrect. The district court allowed Marshall and Santana to testify via video to further the important public policy of protecting the public, witnesses, Appellant, attorneys, and staff from COVID-19, and the testimony offered by Marshall and Santana was reliable.

Should this Court find that the district court did err, that error is harmless. The testimony offered by Officer Santana was also offered by other witnesses, and the testimony offered by Marshall was for Appellant's benefit, was clearly understood by the jury, and was also offered by Appellant when he testified. As such, Appellant would have been convicted of First-Degree Murder despite any alleged error by the district court.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY ALLOWED MARSHALL AND SANTANA TO TESTIFY AT APPELLANT'S TRIAL VIA VIDEO.

Appellant claims the district court erred in improperly allowing two (2) witnesses, Marshall and Santana, to testify via video. Specifically, Appellant alleges that the district court summarily granted the State's request to allow these witnesses to testify via video, with the State's "explicit justification" being "that it would be

more convenient for Marshall and Santana to testify remotely" while claiming no necessity to further any important public policy. Appellant's Opening Brief ("AOB") 11. Appellant's argument is incorrect, belied by controlling case law, and therefore fails.

A. The Confrontation Clause Was Not Violated.

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him," and gives the accused the opportunity to cross-examine all those who "bear testimony" against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364 (2004); see also White v. Illinois, 502 U.S. 346, 359, 112 S. Ct. 736, 744 (1992) (Thomas, J., concurring in part and concurring in judgment) ("critical phrase within the Clause is 'witnesses against him'"). The purpose of the Confrontation Clause is to "…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." Maryland v. Craig, 497 U.S. 836, 845, 110 S.Ct. 3157, 3163 (1990).

The Sixth Amendment "reflects a preference for a face-to-face confrontation at trial," but that preference "must occasionally give way to considerations of public policy and the necessities of the case." Id. at 849. "A defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where," (1) the "denial of such confrontation is necessary to further

an important public policy," and (2) "the reliability of the testimony is otherwise assured." Id. at 850. The requisite necessity finding must be case specific. Id. at 855. See also Lipsitz v. State, 135 Nev. 131, 442 P.3d 138 (2019) ("two-way video testimony may be admitted at trial in lieu of physical, in-court testimony without violating the Confrontation Clause only if it is necessary to further an important policy and the reliability of the testimony is otherwise assured"). The reliability of testimony is "otherwise ensured" when (1) the witness gives their statement under oath—thus impressing them the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making their statement, thus aiding the jury in assessing his credibility. California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26 L. Ed. 2d 489 (1970).

While the accused has a right to face their accusers, "the Confrontation Clause reflects a preference for face-to-face confrontation" but defendants do not have an "absolute right to a face-to-face meeting with witnesses against them at trial." Ohio v. Roberts, 448 U.S. 56, 63, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). The Court in Roberts did however caution that "the face-to-

face confrontation requirement" should not "easily be dispensed with." *Id.* at 850, 110 S.Ct. 3157.

Additionally, trial judges have extremely broad discretion to control courtroom activity, even when the restriction touched on matters protected by the Constitution. See Seymour v. U.S., 373 F.2d 629 (5th Cir. 1967). Trial courts have inherent authority to control their courtroom and must be afforded discretion to handle emergency situations as they arise. NRS 1.210; Halverson v. Hardcastle, 123 Nev. 245, 262 (2007); Riley v. State, 83 Nev. 282, 285 (1967).

Appellant relies on a series of cases that hold the Confrontation Clause is violated when "convenience" is cited as the reason to allow witnesses to testify via video, as "convenience" is not an adequate reason to allow video testimony. AOB 18-19. Despite Appellant's assertion that the State cited convenience as the reason to allow Marshall and Santana to testify by alternative means, Appellant cites no finding from the district court that testimony from Marshall and Santana is being allowed via video merely due to "convenience." Additionally, Appellant argues the State's "explicit" reasoning behind allowing Marshall and Santana to testify via video was convenience. However, in the State's Motion to Appear by Alternative Means, the State does not mention convenience, but instead explains witnesses will be unavailable without the use of video testimony. AOB 11; I AA 50. At no point does the State "explicitly" argue that these witnesses wish to testify via video for the

sake of "convenience." Appellant substantiates his claim by pointing to the State's explanation for the necessity for video testimony at trial after Appellant objected to Marshall's video testimony. AOB 19. The State explained:

> I mean we're dealing with someone who's in a different state, who didn't want to travel. She's a new mother. She has children. She had work responsibilities. And under the rules, it's appropriate for the Court to allow those types of witnesses to testify via video means. But until there's more of a demonstration that there was somehow a prejudice to him when this is the witness that they need and wanted in order to trigger their defense, I don't see any basis for a mistrial.

IV AA 828-829.

Aside from the fact that the State does not cite convenience as reasoning for allowing video testimony, each of the reasons cited by the State are also reasons a person would want to avoid the chances of being infected with and spreading COVID-19. While this explanation is given to an objection related to Marshall's video testimony, it is applicable to Santana's video testimony as well. Both witnesses risk becoming infected and spreading COVID-19 by traveling. Both witnesses' increased risk of infection from traveling also raises the risk that they will infect others, which for Marshall includes her infant child. Both witnesses' increased risk of infection from traveling and participating in a trial in person raises the risk that they will infect co-workers or become ill and miss work or suffer serious illness or death.

As such, there was no finding that the witnesses were being allowed to testify via video due to "convenience," and therefore the cases that Appellant relies on for the contention that convenience is not an adequate justification for appearing by alternative means do not apply here.

Appellant goes on to rely on a different set of cases that support the claim that the Confrontation Clause is violated when COVID-19 is cited as the reason for video testimony, as COVID-19 is an inadequate justification for video testimony and "Administrative Order 21-04 did not broadly authorize testimony *via* alternative means." AOB 20-22. These cases come from jurisdictions around the country and are not binding on this Court. Furthermore, these cases do not conform with this Court's recent ruling in State v. Chaparro, 137 Nev. Adv. Opn. 68. Although this Court has not addressed the specific issue of witness testimony via video within the context of COVID-19, in Chaparro, this Court upheld changing procedure pursuant to an emergency like COVID-19, as long as a defendant's rights are protected. In Chaparro, this Court held that holding a defendant's sentencing hearing over Zoom was permissible due to the safety precautions necessary to protect against COVID-19. "Given the limited possibilities created by unprecedented emergency circumstances, we conclude that a fair and just hearing was not thwarted by Chaparro's absence from the courtroom." Id. In upholding this procedural change

due to COVID-19, the Court also upheld the Second Judicial District Court's Administrative Orders in response to COVID-19.

This Court should now uphold the EJDC's Administrative Orders that allow for the changing of procedures which put safety measures in place in response to COVID-19. These measures, including allowing video testimony from witnesses when appropriate, protect defendants' rights while also protecting the population from the spread of the disease.

B. Eighth Judicial District Court's ("EJDC") Response to COVID-19 Related to Appearances by Alternative Means

Throughout the duration of the ongoing COVID-19 pandemic, the EJDC, along with jurisdictions around the country, have adapted and adjusted procedures to perform the essential functions of the court system. The EJDC delineated altered procedures to perform these functions while keeping the public, witnesses, defendants, and staff safe, through the issuance of Administrative Orders ("AO"). On July 13, 2021, the date of Appellant's second trial, the controlling AO was Administrative Order 21-04, issued June 4, 2021. RA 38-64. This AO, like the AO's that had been previously issued, expressed the important public policies that were furthered by these procedural changes:

> During the COVID-19 pandemic, the District Court, in consultation with the Nevada Supreme Court, concurred with the Governor and exercised its ministerial judicial powers. On emergency basis, the District Court entered Administrative Orders 20-01 through 20-14; 20-16·20-17; 20-22 through 20-24; 21-01; and 21-03. *These Orders*

> *changed Court procedures to minimize person-to-person contact and mitigate the risk associated with the COVID-19 pandemic while continuing to provide essential Court services.*
> …
> *The District Court is committed to providing a safe and healthy workplace for all our employees and the public we serve. To mitigate the spread of COVID-19, we will need to continue to operate in a manner that reduces the risks associated with this public health emergency.*

RA 039-040. (emphasis added).

As such, the EJDC acknowledged that a change in some procedures is necessary to protect the public and employees by minimizing person to person contact. AO 21-04, which is signed by the then presiding Chief Justice James W. Hardesty, also specifically addressed witnesses appearing by alternative means:

Appearances by Alternative Means

> To ensure access to justice, minimize foot traffic in court facilities, and to reduce the potential for spread of infection, appearances by alternative means remains preferred in all case types with the exceptions of bench trials, jury trials, and in-custody defendants appearing in the Lower-Level Arraignment Courtroom. For trials, District Court Judges should, to the extent possible, accommodate requests to appear by alternative means for any attorney, party or witness who is considered a vulnerable person under current CDC guidelines. This includes persons who are over 65, pregnant, or suffering from an underlying health condition. For proceedings other than trials, no in-person appearance shall be made unless the assigned District Court Judge or Hearing Master determines that the particular circumstances of the case require a personal appearance.
>
> The District Court has four methods of appearance by alternative means: video conference through BlueJeans, telephone conference through BlueJeans, regular telephone, and CourtCall. Since CourtCall involves a cost to the litigants, no party may be

> required to use CourtCall at this time. Use of BlueJeans is strongly favored given the number of people the system can accommodate and its compatibility with the JAVS system. Video appearance is strongly preferred over other methods of appearance by alternative means, and required in criminal, dependency, and delinquency cases unless a video appearance is prevented by technological issues. Lawyers are urged to provide assistance to clients who lack the independent ability to appear by alternative means.
>
> Attorneys, parties, and witnesses are reminded that alternative means still constitutes a court appearance and attire should remain professional and court appropriate. Appearances should be made from a quiet place free of distractions. Also, for the safety of the community and for the quality of the audio recording, no appearances by alternative means should be made while driving.
>
> …

RA 041.

Accordingly, in seeking to protect the public and those involved in the court system, the district court has made available the option of allowing witnesses to appear by alternative means when appropriate, with a preference being through video. While this point is discussed in more detail below, it should be noted that the district court should accommodate requests to appear by alternative means for those that are at a higher risk of COVID-19, but it clearly does not *require* the district court to make a finding that those appearing by alternative means are at a higher risk for COVID-19.

a. The District Court Correctly Allowed Marshall and Santana to Testify Via Video.

Appellant alleges the testimony of two (2) witnesses, Marshall and Santana, violated Appellant's Sixth Amendment right to confront witnesses against him

because both witnesses testified via video. AOB 11-12. The testimony of both Marshall and Santana was permissible under Craig and permitted by the EJDC's procedural rules at the time of trial, as delineated in AO 21-04 which was signed by this Court.

First, the district court unquestionably had an important interest in furthering the public policy of keeping the community safe from the spread of COVID-19. Like in Chaparro, this Court has recognized the necessity of implementing procedural changes that protect both the public's safety and the defendant's rights. The district court explained this reasoning at trial when Appellant objected to Marshall's testimony:

> *Well, I mean this is the situation we're in. While it's not ideal to have any witnesses testifying via audio/visual technology, it's a different time that we're living in, and we have people under different circumstances. And in light of everything that has happened in the last year, the Court has specific orders that are in place by our chief judge that allows for this type of audio/visual testimony* as well as there are statutes that allow for this. This issue has been brought before the legislature, and that is absolutely allowed.
> Considering the circumstances of this witness, I did grant the motion previously to allow her to testify via audio/visual testimony. While I understand it was not ideal.
> …

IV AA 829-830.

The district court acknowledged that the decision to allow Marshall and Santana to testify via video was made in light of the situation and circumstances the district court was in, as well as everything that has happened in the past year,

certainly referring to the COVID-19 pandemic, and cited the specific orders from the Chief Judge that allow for such a decision. IV AA 829-830. AO 21-04 issued by the Chief Judge explained the public policy considerations behind the AO, stating that the EJDC found it necessary to implement the availability of audio/visual appearances "to minimize person-to-person contact and mitigate the risk associated with the COVID-19 pandemic while continuing to provide essential Court services." RA 039. Again, the EJDC further expounded changes in procedure were meant to support the important public policy of providing "a safe and healthy workplace for all our employees and the public we serve. To mitigate the spread of COVID-19, we will need to continue to operate in a manner that reduces the risks associated with this public health emergency." RA 040.

Additionally, as cited by Appellant, AO 21-04 stated that for jury trials, the district court "should, to the extent possible, accommodate requests to appear by alternative means for any attorney, party or witness who is considered a vulnerable person under current CDC guidelines. This includes persons who are over 65, pregnant, or suffering from an underlying health condition." RA 041. This provision in AO 21-14 does not limit the district court in allowing appearances by alternative means only to those that are at high risk for COVID-19. The district court is not required to make a finding that a witness has a high risk of COVID-19 to allow for the use of video testimony. This provision does not negate the United States Supreme

Court's holding in Craig, nor does it negate the Nevada Supreme Court's holding in Lipsitz v. State, 135 Nev. 131, 442 P.3d 138 (2019), which both allow for video testimony if it is necessary for the furtherance of an important public policy, which is satisfied here as the district court can allow video testimony pursuant to the important public policy of limiting the spread of COVID-19, and the testimony is otherwise reliable. Craig at 850.

In addressing the second prong of Craig, the testimony of both witnesses was absolutely reliable pursuant to Green. First, each witness testified under oath, thus impressing the seriousness of the matter upon them, and guarding against lying under the penalty of perjury. III AA 637-638, IV AA 798-799. Second, Appellant had the opportunity to cross examine each witness. III AA 644, IV AA 815. Finally, the jury had the opportunity to observe the demeanor of each witness while they testified, thus allowing the jury to assess each witness' credibility. Appellant does not allege any specific issues as to this requirement for Officer Santana. The jury was able to hear Officer Santana's answers, observe his expressions, and listen to any fluctuations in his voice or tone, and therefore they were able assess his credibility.

Appellant does, however, claim that the jury was unable to assess the credibility of Marshall because Marshall's testimony, "had audio difficulties, a smoke alarm "kept chiming," Marshall was "moving around the house," and

Marshall held a baby while testifying and the baby could be heard making noises." AOB 16, IV AA 827. These arguments are meritless as none of these issues affect Marshall's credibility. As to the audio difficulties, chiming, and moving around the house the district court found:

> We all know we all have different internet connections, and the Court, in and of itself, you guys know on a daily basis we struggle with the calendars. Today I had to have people log out and log back in just to get to my calendar. So everybody's internet is different.
> And I understand you made the first objection that she was -- Mr. Albright was repeating everything she was saying. And based on that objection, I directed him that if there was confusion as to what she was saying, we were going to ask the witness to repeat herself, which as you noticed a couple times I asked her to repeat herself, because I couldn't understand what she was saying. But she did repeat herself, and I think we were able to get through her testimony.

IV AA 830.

The district court addressed Appellant's grievances at trial to ensure that Marshall was able to testify in a way that the jury could assess her credibility. As to this issue of Marshall's baby, the district court found:

> Upon the second objection in regards to the baby, I understand that the baby was present, but I do not see that the baby caused a disruption in the proceedings. I believe the baby was present. I never actually saw the baby. I don't believe the baby caused a disruption in the proceedings. So based upon the issues that were represented, I don't believe that this denied Mr. Newson his right to confrontation of this witness.

The jury was able to hear Marshall's answers, observe her demeanor, and listen for changes in Marshall's tone or voice. As such, the jury was able to assess

the credibility of Marshall and Santana and the district court correctly found that Appellant's right to confront witnesses against him had not been denied.

Accordingly, under the analysis laid out in Craig, the decision to allow Marshall and Santana to testify via video was done to further the important public policy interest of protecting all parties involved from COVID-19 and the testimony of both witnesses was reliable pursuant to Green.

II. IF THE COURT FINDS THE DISTRICT COURT ERRED, THE ERROR WAS HARMLESS.

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

We have recognized that other types of violations of the Confrontation Clause are subject to that harmless-error analysis, see e.g., Delaware v. Van Arsdall, 475 U.S., at 679, 684, 106 S.Ct., at 1436, 1438, and see no reason why denial of face-to-

face confrontation should not be treated the same. Coy v. Iowa, 487 U.S. 1012, 1021, 108 S. Ct. 2798, 2803, 101 L. Ed. 2d 857 (1988).

As discussed extensively above, the district court did not err in allowing Marshall and Santana to testify via video. However, should this Court find that an error was committed, it should be reviewed under the harmless error analysis as explained in Coy v. Iowa, 487 U.S. 1012, 1021, 108 S. Ct. 2798, 2803, 101 L. Ed. 2d 857 (1988).

First, Officer Santana's testimony via video did not have a "substantial and injurious effect or influence" on the jury in reaching their verdict. Knipes at 935. Even assuming, *arguendo,* that the district court denied the State's Motion to Allow Santana to Appear via Alternative Means, the jury would have reached the same verdict. Officer Santana testified as to the method by which he "locked down" the scene of the shooting and the evidence that was located there. This same testimony as to how the scene was secured and what evidence was recovered from the scene was offered by both Renee Harder and Wendy Radke. III AA 648-670, IV AA 737-744. As such, Officer Santana's testimony offered no additional evidence that was not going to otherwise be presented to the jury. Accordingly, Appellant would have been convicted of First-Degree Murder regardless of any alleged error made by the district court as it relates to Officer Santana's testimony.

Second, Marshall's testimony via video did not have a "substantial and injurious effect or influence" on the jury in reaching their verdict. It should be noted that the reason for Appellant's second trial requiring an instruction for voluntary manslaughter was due to testimony from Marshall at the first trial, as explained by the State:

> This witness is literally the reason this case came back from the Nevada Supreme Court regarding that one statement that she provides that triggers, according to the justices of the Nevada Supreme Court, the instruction on voluntary manslaughter. It's based on this statement that they elicited over our objection.

IV AA 828.

Defense Counsel then explicitly agreed with the State, and stated that Marshall's testimony was critical for their defense:

> Ms. Weckerly is absolutely right. This witness is critical to our defense. And because of constant interruptions, it was broken into several pieces. We did want this witness to testify.

IV AA 829.

Appellant agreed with the fact that Marshall's testimony was required for Appellant's theory of the case. Therefore, if the district court had not agreed to allow Marshall to testify via video, and Marshall did not attend the trial due to the issues she had expressed above, it would have been extremely detrimental to Appellant.

Regardless of Appellant's reliance on Marshall's testimony, Appellant had the opportunity to take the stand and tell his version of events, and the jury did not

believe him, or did not believe that what occurred rose to the level of voluntary manslaughter. IV AA 902. There is no controversy over whether Appellant shot and killed McNeil, as stated during Appellant's opening, and affirmed during Appellant's testimony. III AA 612, IV AA 913-914. The question is whether Appellant committed First Degree Murder or Voluntary Manslaughter. Again, Marshall's testimony was believed to *help* Appellant, showing that he was frantic and excited when she saw him. The jurors were able to hear these statements, as well as evidence that Appellant was, irritated, "amped up", and frantic, from Marshall during Appellant's cross-examination of her. IV AA 814-822. Marshall's words, which the jury was able to hear and weigh for credibility, would not have changed had the district court denied the State's request to allow witnesses to appear by alternative means, assuming Marshall would have even shown up to trial in person. The court's decision also did not change Appellant's testimony, which the jury did not find convincing in light of their verdict. Accordingly, Appellant would have been convicted of First-Degree Murder regardless of any alleged error made by the district court as it related to Marshall's testimony.

Thus, the district court did not err in allowing Marshall and Santana to testify via video, but if this Court determines there was an error, it is harmless.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm Appellant's Judgment of Conviction.

Dated this 3rd day of March 2022.

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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 7,110 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in 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 March, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 3, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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