IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID CRAIG MORTON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 83884

D. Ct. CR09-5709

APPEAL FROM JUDGMENT OF
THE HONORABLE RICHARD WAGNER

SIXTH JUDICIAL DISTRICT COURT

APPELLANT'S OPENING BRIEF

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ROUTING STATEMENT

This case is not presumptively handled by a transfer to the Court of Appeals and is exactly the direct appellate litigation that was anticipated to remain at the Nevada Supreme Court when the Court of Appeals was created. Mr. Morton has waited for an extensive period of time to get to this direct appeal. This case belongs at the Nevada Supreme Court.

The jury verdict and conviction that entered against David Craig Morton, ("Mr. Morton"), was on the charge of Second Degree Murder with the Use of a Deadly Weapon, a Category A felony, and the aggregate sentence imposed upon

this Defendant was that of 18 years to 45 years in prison. Under NRAP 17(b)(2) this case is not presumptively assigned to the Court of Appeals. 4AA 919-924.

This case involves serious legal issues of interpretation by this Court and arguments which are worthy of oral argument. Actions of the trial judge toward defense counsel prejudiced the defense case. Defense counsel was erroneously dressed down in front of the jury on an issue that the trial court was wrong about. 2AA 442-445. The jury was never instructed correcting the error which allowed the jury to believe that defense counsel was mistaken when in fact, Judge Wagner was mistaken. 3AA 508-512.

This jury was never instructed that the State had to prove beyond a reasonable doubt the absence of provocation. 4AA 803-855. Bad act evidence was admitted at this trial without jury instruction on how to properly evaluate the bad act evidence. Cumulative graphic photographic evidence was admitted. 2AA 334-335. Three hundred thirty-five (335) photographs were sough to be admitted by the State. Three hundred thiry-two (332) photographs were admitted by the trial court. 5AA 1104-1123. A statement Mr. Morton made to police when his

blood alcohol level was over 0.276 was admitted as a voluntary and knowing statement to police. 5AA 1103.

The presentence report in this case should have been stricken by the Court and completely re-written. The presentence report contained suspect allegations which the record demonstrates were relied upon by the sentencing judge. Defense counsel objected to the content of the presentence report in a sentencing memorandum filed with the court and at argument during the sentencing hearing.

These serious errors are worthy of Supreme Court review.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the direct appeal from the judgment of conviction which entered after a jury verdict of guilt. 4 (b). The judgment of conviction entered on January 20, 2011. 4AA 919-924. A timely petition for writ of habeas corpus (postconviction) was filed on December 29, 2011. 4AA 925-939. After conclusion of the evidentiary hearing, the appeal deprivation claim was granted by the district court on November 30, 2021. 5AA 1039-1048. The notice of appeal was timely filed on December 2, 2021. 5AA 1049-1064.

STATEMENT OF THE CASE

On October 22, 2009, the State filed its open murder charge by way of an Information against Mr. Morton. 1AA 1-5. The murder charge included a deadly weapon enhancement. Count II of the Information charged Mr. Morton with discharging a firearm in an occupied residence in violation of NRS 202.287(b). 1AA 1-5. Mr. Morton was appointed counsel to represent him, Richard Molezzo. At some point in the defense, Del Hardy joined the defense team.

Factually, the Information charged Mr. Morton with shooting his wife, Cynthia, with premeditation, deliberation and malice aforethought. There was one gun shot fired. The defense at trial was that of an accidental discharge. 1AA 1-5. The jury ultimately convicted Mr. Morton of second degree murder, enhanced by the use of a firearm and the crime of discharging a firearm in an occupied dwelling. 5AA 1086.

The State filed a motion to admit the interview statement Mr. Morton provided the police the night of the shooting. 5AA 1064-1074. At the time Mr. Morton provided the police interview his blood alcohol was tested at 0.276. 5AA

1081, 1103. Mr. Morton's statement to the police was not recorded by the police. It was admitted against him at trial over defense objection. Mr. Morton did take the stand in his own defense and testify before the jury.

The defense filed a motion to preclude admission of prior bad act allegations of domestic violence and arguments between Mr. Morton and his wife, Cynthia. 5AA 1082-1085. In spite of that objection, evidence of prior domestic battery was admitted to the jury without any type of instruction on how to evaluate the evidence.

The case proceeded to jury trial. During that trial, Judge Robert Wagner, dressed down defense counsel Del Hardy in front of the jury. 2AA 4424-445. A review of the transcript is mandatory. Ultimately, Judge Wagner admitted he was wrong on his definition of homicide and agreed to correct the definition in the jury instructions. Judge Wagner never did so. 3AA 509-512. The jury was not instructed that the State had to prove beyond a reasonable doubt the absence of adequate provocation to take the charge to murder rather than the manslaughter charge. 4AA 803-855.

The case proceeded to sentencing on January 14, 2011. 4AA 870. The actual judgment of conviction entered on January 20, 2011. 4 AA 919. Prior to the sentencing, a presentence report was prepared by the Department of Parole & Probation. Defense counsel objected to that PSI in a formal filed sentencing memorandum and objected during the sentencing hearing. 5AA 1087-1095. The record demonstrates that Judge Wagner relied upon the suspect evidence relayed in that PSI. (See PSI).

During the sentencing hearing, Judge Wagner attempted to impose an illegally excessive sentence on the enhancement for the deadly weapon. An objection was made and Judge Wagner reverted to simply imposing the maximum possible sentence on the enhancement. At the same hearing, Judge Wagner refused to allow Mr. Morton to maintain his innocence and demanded that he admit guilt. The jury had convicted Mr. Morton. 4AA 885, 914, 917.

Trial counsel did not appeal. Mr. Morton filed a petition for writ of habeas corpus (postconviction) in which one of the claims was loss of direct appellate review due to counsel's improper advice. Due to no fault of Mr. Morton, the

postconviction languished. Two separate appointed attorneys took no action to further the litigation. Mr. Morton retained Ms. Butko and the postconviction case proceeded to a two day evidentiary hearing. Ultimately, the District Court granted a belated appeal under NRAP 4 (C) and stayed its rulings on the other postconviction claims. 4AA 925-939; 950-986; 5AA 1039-1048. A timely notice of appeal was filed. 4AA 1049-1064.

While the postconviction case was languishing at the district court, Mr. Morton filed an appeal at the Nevada Supreme Court in Docket 60625. The appellate court ruled that it did not have jurisdiction over the appeal and dismissed it on April 17, 2012.

STATEMENT OF FACTS

David Craig Morton met his Wife, Cynthia Morton, in high school. They married young and had two children, Chad and Robert. Their marriage took a poor turn and they argued frequently. Mr. Morton worked for the railroad and was often traveling for work. Cynthia and he fought the night of the shooting. Mr. Morton testified that he had been drinking alcoholic beverages, that Cynthia left to

live in Salt Lake City and they were getting divorced. Mr. Morton had prepared divorce papers on three separate occasions. Cynthia would destroy the documents. Cynthia returned on the train from Salt Lake City. He and Cynthia went to a friend's house and were drinking together for about three hours. Cynthia drove him home. They argued. Mr. Morton went to bed. He awoke to Cynthia hitting him and yelling. He was naked. He went downstairs and picked up an antique gun, was planning on going outside to shoot himself. He brought the gun out to show her that he meant to kill himself and the gun discharged, with the bullet striking Cynthia in the abdomen. Mr. Morton testified adamantly that he did not point the gun at Cynthia, that he did not pull the gun to his shoulder and that the gun discharged. Mr. Morton was not a gun advocate, hunter or an experienced person with a gun. An ambulance was called and Cynthia was hospitalized for a period of time before she succumbed to the injury and died. 3AA 708- 728.

Mr. Morton took the gun outside with every intent of killing himself. His son, Robert, stepped in, fought with him over the gun and eventually took the gun away from his father. Robert kept his father on the ground until police arrived.

3AA 718.

Chad Morton testified that he never saw his father shoot the 1918 antique .303 firearm. Chad Morton testified that he did not like that firearm. 3AA 539-548.

Defense expert Robert Venkus testified that he test fired this gun in the same type of setting and that three times out of four when the gun stock struck the doorway, the gun accidentally discharged. The 1918 antique weapon had been "sporterized" and was very dangerous. The trigger pull was light and the gun's safety was very worn out. If the safety was off, the gun would fire with no further motion on the trigger. 4AA 755-773.

Police interviewed Mr. Morton on the night of the shooting, in spite of the fact that his blood alcohol was at 0.276. At the scene, Mr. Morton told the officers that he did not want to talk to them. Mr. Morton was suicidal at the jail and attempted to injure his neck with a piece of broken Formica. That statement was ignored and Mr. Morton was interviewed at the jail where he told the officer that he was trying to scare the victim and could not believe that he shot her.

Neither interview was recorded. Even the investigating officer testified that he was not convinced that this was an intentional shooting. 2AA 337, 417, 5AA 1103.

During the testimony of Robert Morton, Robert testified that in the past his brother Chad called police because Mr. Morton punched Cynthia in the face. Robert testified that the police were called by Mr. Morton when Cynthia beat him up. During this testimony, the State moved to admit evidence stating that the defense opened the door to the bad act evidence. The defense replied that the evidence was more prejudicial than probative and not admissible. The district court told the State's prosecutor what they should do to get the evidence admitted. 1AA 196.

During the trial, graphic pictures were admitted as evidence. Defense counsel objected. The district court acknowledged that the photographs were graphic but admitted them anyway. The prosecutor even warned the jury as to how graphic the pictures were. The State offered 335 photographs as evidence in this trial. The Court admitted 332. Only three photographs were ruled to be

cumulative by the Court. 2AA 334-335; 2AA 298-300; 5AA 1104-1123.

Evidence was admitted to demonstrate prescription medications taken by Cynthia including Hydrocodone, Lyrica, Carvedilol, Clonodine and others, issued by various doctors. 2AA 393, 404-409.

Del Hardy joined the defense team and conducted the cross examination of Ellen Clark, M.D., expert on the autopsy and cause of death. During that cross examination, Del Hardy was chastised by Judge Wagner in front of the jury. The defense team argued that Sepsis and MRSA intervened and caused the death of Cynthia. Judge Wagner provided the jury with an improper definition of homicide. Del Hardy objected. The court stated that it would cure this issue with a proper definition of homicide in its written instructions. The court did not do so.

Judge Wagner stated:

> "Just a second. You're using some legal terms, sir. Homicide is an unlawful killing of another human being. And I don't want it confused here as to terms that you're using that I will define what the law is to the jury in terms of what homicide is and so forth. She's not the one to determine that, nor are you. But when you use the word homicide, it implies criminal agency. I just want you to understand that."

Mr. Hardy: " Well, Your Honor, in regard to homicide, um, using Black's

dictionary definition of homicide. It's simply the killing of one human being or another."

DA: "I would object to that, Your Honor. It doesn't matter –"

Judge Wagner: "We're not going to argue the law here, gentlemen. I'm just telling you, you're using the word as a legal term that I will define for the jury. So you can ask her questions of a lay nature, but for her or you to assume the legal definition, which I will tell the jury about at the end of the case" --

Mr. Hardy: "Right."

Judge Wagner: "is not appropriate. I'm just telling you that.

Mr. Hardy: "All right Your Honor."

The Court: "So"

Mr. Hardy: By the way, since I mentioned this to you, would the Court like a copy of the"

Judge Wagner: " Laws?"

Mr. Hardy: In regard to Law– Black's Law Dictionary since I did make a reference to it?"

Judge Wagner: "No sir."

Mr. Hardy: "All right. Thank you."

Judge Wagner: "It's like a dictionary. There's thousands of cases and other things that also define homicide. So I don't want to get into this debate with you."
2AA 442-445.

During the next recess, Mr. Hardy apologized and told the court he was not

trying to argue with the court but wanted to make a good record. Judge Wagner advised counsel to seek to have the jury removed to have discussions with him. Mr. Hardy even used the phrase, "In the heat of it, while I was standing here talking to you about that, Judge, that simply just didn't come to mind." Mr. Hardy told the Court that he still believed the Court improperly instructed the jury on the definition of homicide. Judge Wagner agreed and stated that he was wrong and would correct that error in the instructions. Judge Wagner admitted that he mixed up the definition of murder with that of homicide. 3AA 509-511.

The jury was instructed on voluntary manslaughter. The transition instruction advised the jury that if they found the defendant not guilty (acquit first) or were unable to unanimously agree whether to acquit of convict, they could review the charges of voluntary or involuntary manslaughter. JI 9 at 4AA 413. The voluntary manslaughter instruction failed to advise the jury that it was the State's burden to prove beyond a reasonable doubt that Mr. Morton did not act under adequate provocation to reduce the charge from murder to manslaughter. JI's 24, 25, 26 and 27 at 4AA 832-836.

Prejudicial bad act evidence was admitted during this trial, include past allegations of domestic violence between the defendant and the victim, drinking to excess, and bad language. The jury was not instructed under NRS 48.045 or *Tavares.* 4AA 803-855.

The presentence report stated:

> "It is horrific to imagine that a union where two people vowed to love, honor and cherish each other could end in such tragedy. It is impossible to understand the extreme psychological trauma a child would go through seeing his mother, who was just shot by his father, lying in the floor covered in blood. In fact, the way Mr. Morton shot his wife was a heartless and demoralizing act of hate and rage." Page 8, PSI.

As noted, the jury did not convict Mr. Morton of first degree murder. 5AA 1086. The report painted Cynthia Morton as a beloved mother, grandmother, sister, daughter and friend. The report failed to note that Cynthia had been arrested for domestic abuse upon David and agreed to enter into treatment to get the charge dismissed. Cynthia was an alcoholic and drug user. The report went forth to recommend maximum consecutive sentences on all charges and enhancements.

Prior to the sentencing hearing, Judge Wagner advised counsel that he did

not believe that Mr. Morton had the right to maintain his innocence. The jury had found him guilty. Judge Wagner refused to allow Mr. Morton to stand by his defense that the discharge of the firearm was accidental. Judge Wagner refused to allow Mr. Morton to state at sentencing that he maintained his innocence. Judge Wagner took into account his own interpretation of the life of the Morton family, attributed that thirty years of domestic abuse had been happening. Mr Morton's family members were in court but Judge Wagner did not acknowledge that. Judge Wagner attempted to impose a sentence of 300 months on the top end of the weapon enhancement and had to be told by defense counsel that would be illegal. He then imposed the maximum possible weapon enhancement. This appeal follows a lengthy period of time to get to an evidentiary hearing and gain access to a belated appeal pursuant to NRAP 4 (C). 4AA 914-916, 5AA 1049.

ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE JURY CONVICTION FOR SECOND DEGREE MURDER WITH THE USE OF A DEADLY WEAPON.

Standard of Review:

Insufficiency of the evidence occurs where the prosecution has not produced "a minimum threshold of evidence" upon which a conviction may be based. *State v. Walker*, 109 Nev. 683, 685, 857 P.2d 1, 2 (1993). It occurs when, even if the evidence presented at trial were believed by the jury, it would still be insufficient to sustain a conviction, as it could not convince a reasonable and fair-minded jury of guilt beyond a reasonable doubt. *Id.* Indeed, when there is truly insufficient evidence to convict, a defendant must be acquitted. *Evans v. State*, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996), *emphasis added.*

Argument:

This murder conviction should be set aside. The combination of the testimony of the investigating officer who stated he did not believe this shooting was intentional, coupled with the defense expert explaining that this 1918 antique firearm accidentally discharged three times out of four when the stock hit the doorway demonstrates just how insufficient the evidence was.

Mr. Morton's blood alcohol content was in excess of 0.276 at the time of the shooting. He was naked. He was going to kill himself. The gun, a 1918 antique

303 which had been "sporterized" was very dangerous. Mr. Morton was not familiar with guns and his sons had not witnessed him ever shoot the .303 antique firearm. 4AA 755-773.

The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Milton v. State*, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). A review of this record does not provide sufficient evidence to sustain a conviction for second degree murder.

2. THE JURY WAS IMPROPERLY INSTRUCTED ON THE STATE'S BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT DID NOT ACT UNDER PROVOCATION WHICH REDUCED THE CHARGE TO MANSLAUGHTER.

Standard of Review:

This court reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error. *Brooks v. State*, 124 Nev. 203, 206, 180 P.3d 657, 658-59 (2008); however, whether the instruction was an accurate statement of

the law is a legal question that is reviewed de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). A defendant has the right to have the jury instructed on his or her theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). This Court reviews a district court's denial of proposed jury instructions for abuse of discretion or judicial error. Id. "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). However, this Court reviews whether an instruction was an accurate statement of law de novo. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009). This court reviews unobjected-to conduct for plain error. *Valdez v. State*, 124 Nev. 1172 at 1190, 196 P.3d 465 at 477 (2008).

Argument:

In a murder case, the state is required to prove (1) the fact of death, and (2) the criminal agency of another as the cause of the death. To sustain a homicide conviction, the relevant inquiry for reviewing court is whether, after viewing

evidence in light most favorable to prosecution, any rational trier of fact could have concluded beyond reasonable doubt that victim's death was caused by a criminal agency.

The case law in Nevada deems voluntary manslaughter a lesser-included offense of murder. *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). For voluntary manslaughter "there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing," NRS 200.050. "The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible." NRS 200.060. Per NRS 200.040 manslaughter is a voluntary killing "upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible".

The jury was not instructed that the State has to prove beyond a reasonable doubt that the Defendant was not adequately provoked to reduce the conviction from murder to manslaughter. *Crawford*, supra, at 754.

This case has very weak evidence to support a conviction for murder rather

than manslaughter. The jury may well have reached a verdict on the lesser count of manslaughter if it was properly instructed on the State's burden of proof.

The United States Supreme Court held in *Mullaney v. Wilbur* that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." 421 U.S. 684, 704 (1975). The Nevada Supreme Court has followed the *Mullaney* doctrine and has held, with respect to a theory of self-defense, that instructions imposing a burden of proof upon a defendant to negate an element of a charged offense are improper. See *St. Pierre v. State*, 96 Nev. 887, 890-91, 620 P.2d 1240, 1241-42 (1980); *Celso v. State*, 95 Nev. 37, 41, 588 P.2d 1035, 1038 (1979); see also *Runion v. State*, 116 Nev. 1041, 1052, 13 P.3d 52, 59 (2000).

The night of the shooting, Mr. Morton went to sleep. He was naked in his bed and woke up to Cynthia hitting him and screaming at him. He wanted to kill himself. He was adequately provoked and the jury would have returned a manslaughter verdict had it been properly instructed by the trial court.

Failure to instruct this jury that the State had to prove the absence of provocation beyond a reasonable doubt violated the due process rights of Mr. Morton. A new trial should be granted.

3. IMPROPER PREJUDICIAL BAD ACT EVIDENCE WAS IMPROPERLY ADMITTED. FAILURE TO INSTRUCT THE JURY ON EVALUATION OF BAD ACT EVIDENCE RENDERED THE VERDICT OF THE JURY UNRELIABLE IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH & FOURTEENTH AMENDMENTS.

Standard of Review:

In *Tavares v. State*, 117 Nev. 725, 30 P.3d 1128 (2001), this Court determined that when a district court admits uncharged bad acts into evidence, "a limiting instruction should be given both at the time evidence of the uncharged bad acts is admitted and in the trial court's final charge to the jury." The State must request a limiting instruction prior to the admission of bad acts evidence. The District Court has a burden to give such an instruction sua sponte if the prosecutor fails to request one.

Argument:

This Court has repeatedly advised against the admission of bad act

evidence. "A presumption of inadmissibility attaches to all prior bad act evidence." *Braunstein v. State*, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). "The principal concern with admitting this type of evidence is that the jury will be unduly influenced by it and convict a defendant simply because he is a bad person." *Walker v. State*, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000). Before admitting prior bad act evidence, the district court must determine whether the evidence is relevant and proven by clear and convincing evidence. Additionally, the evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." *Taylor v. Thunder*, 116 Nev. 968, 973, 13 P.3d 43, 46 (2000) and NRS 48.035.

The State did not file a motion in advance of trial to admit bad act evidence. The defense did file a motion in limine to preclude bad act evidence. 5AA 1092-1084.

The District Court admitted the bad act evidence, after advising the State's prosecutor how to get the evidence admitted, without instruction to the jury. A limiting instruction was mandatory and should have been given by the court. The

jury heard Robert Morton's hearsay testimony that Chad Morton said that the Defendant had allegedly punched Cynthia in the face before. 1AA 196. This hearsay evidence was not proven by clear and convincing evidence. The jury heard evidence of Mr. Morton's alcohol abuse issues.

Due to its highly prejudicial nature, if the district court's admission of the uncharged conduct was manifestly wrong, prejudice occurred and reversal is warranted. *Bellon v. State*, 121 Nev. 436, 117 P.3d 176 (2005) and *Sutton v. State*, 114 Nev. 1327, 972 P.2d 334 (1998). The use of prior act evidence pursuant to NRS 48.045(2) should always be approached with circumspection." *Ledbetter v. State,* 122 Nev. 264, 129 P.3d 671, 679-80 (2006). Additionally, the district court failed to issue a limiting instruction as required under *Rhymes v. State*, 121 Nev. 17, 22, 24, 107 P.3d 1278, 1281-82 (2005).

The district court "should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of the trial reminding the jurors that certain evidence may be used only for limited purposes." *Tavares*, 117 Nev.

725 at 733, 30 P.3d at 1133 (2001). The District Court did not give a jury instruction as required by *Tavares or Big Pond*, either at the time of the admission of the bad act evidence or in the final jury instructions.

NRS 48.045(2) prohibits the use of "other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." Such evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). "To be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (19 97). In assessing "unfair prejudice," this court reviews the use to which the evidence was actually put—whether, having been admitted for a permissible limited purpose, the evidence was presented or argued at trial for its forbidden tendency to prove propensity. See

Rosky v. State, 121 Nev. 184, 197-98, 111 P.3d 690, 699 (2005). Also key is "the nature and quantity of the evidence supporting the defendant's conviction beyond the prior act evidence itself." *Ledbetter,* 122 Nev. at 262 n.16, 129 P.3d at 678-79 n.16.

The admission of prior bad acts evidence requires a limiting instruction, unless waived by the defendant prior to admission. The State and the district court share blame for this failure to follow standing law. The district court failed to heed the Nevada Supreme Court's direction and "raise the issue sua sponte" after the State neglected its duty to do so. In the face of imminent unfair prejudice, the district court should have taken appropriate steps to properly instruct the jury. Though this procedural safeguard would not have been adequate to ameliorate the unfair prejudice arising from admission of prior crimes and allegations of prior physical abuse into a jury trial for this murder case, at least the jury would have understood that it could not use that testimony to deem that Mr. Morton had the propensity to commit a crime. See *Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110-11 (2008).

A new trial is warranted. The State presented insufficient evidence to attempt to sustain a second degree murder conviction. There was prejudice incurred by the admission of overly prejudicial bad act evidence. The hearsay bad act was not proven by clear and convincing evidence.

4. THE DISTRICT COURT SHOULD HAVE DENIED THE STATE'S MOTION TO ADMIT THE STATEMENT MADE BY AN INTOXICATED DEFENDANT TO THE POLICE ON THE DATE OF THE SHOOTING. *MIRANDA* RIGHTS WERE NOT VOLUNTARILY, KNOWINGLY OR INTELLIGENTLY WAIVED. ADMISSION VIOLATED THE FIFTH AMENDMENT.

Standard of review:

This Court adopted the United States Supreme Court's standard of review of a district court's "in custody" determination for purposes of *Miranda*, and held that a district court's "purely historical factual findings pertaining to the 'scene- and action-setting' circumstances surrounding an interrogation" are entitled to deference and will be reviewed for clear error, whereas the district court's ultimate determination of custody and voluntariness will be reviewed de novo. *Rosky v. State*, 121 Nev. 184 at 190, 111 P.3d 690 at 694 (2005) (citing *Thompson v.*

Keohane, 516 U.S. 99, 112-13 (1995) and *Miller v. Fenton*, 474 U.S. 104, 112-18 (1985)); *Miranda v. Arizona*, 384 U.S. 436 (1966).

Argument:

The Fifth Amendment privilege against self-incrimination requires that a suspect's statements made during custodial interrogation not be admitted at trial if the police failed to first provide a *Miranda* warning. *See Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Taylor*, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998); *Koger v. State*, 17 P.3d 428 (Nev. 2001).

In order to admit statements made during custodial interrogation, the defendant must knowingly and voluntarily waive the *Miranda* rights. *See Miranda,* 384 U.S. at 479, 86 S.Ct. 1602; *Echavarria v. State*, 108 Nev. 734, 742, 839 P.2d 589, 595 (1992). The waiver must be voluntarily, knowingly and intelligently made. *Miranda v. Arizona*, 384 U.S. 426, 475-77 (1966); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1932).

The signature of Mr. Morton on the Miranda waiver says it all. See 4AA 983;5AA 1081. His normal signature, when not intoxicated, is seen at 4AA 984.

His blood alcohol was 0.276. 5AA 1103. Mr. Morton was intoxicated and unable to voluntarily and intelligently waive his *Miranda* rights. His signature was abominable. 983, 984. Detective Garrison testified that prior to the interview Mr. Morton attempted to hurt himself at the jail by using a piece of broken Formica to try to cut his neck. Mr. Morton was despondent, withdrawn and crying. Mr. Morton was in no physical or emotional condition to knowingly or voluntarily waive a constitutional right. . 2AA 337, 417, 5AA 1103.

Review of the district court's determination that a defendant's *Miranda* waiver was knowing and intelligent is reviewed for clear error. *Collazo v. Estelle*, 940 F.2d 411 at 416 (1991). A determination of waiver depends on the totality of circumstances, including the background, experience and conduct of the accused. *United States v. Rodriquez-Gastelum*, 569 F.2d 482, 488 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978).

An inculpatory statement is voluntary only when it is the product of a rational intellect and a free will. *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960); *United States v. Crespo de Llano*, 830 F.2d 1532, 1541-2 (9th Cir. 1987).

Courts should indulge every reasonable presumption against waiver of fundamental rights. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937). Moreover, the government has the "heavy burden" of establishing any waiver:

> If the interrogation continues without the presence of any attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda, 384 U.S. at 475.

To establish waiver, the government must meet the following requirements:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness, both of the nature of the right to be abandoned and consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. 412, 421 (1986).

Most importantly, any purported waiver must be judged on a case-by-case basis in light of the accused's background, experience and circumstances. *Edwards*

v. Arizona, 451 U.S. 477 at 482 (1981); *North Carolina v. Butler*, 441 U.S. at 374-5. Mr. Morton's waiver of his *Miranda* rights was not made with a full awareness of the right to remain silent. He was intoxicated, distraught and suicidal.

The district court advised counsel that the voluntariness of any confession or admission by the defendant would be ruled upon by the court and then become a jury question on the voluntariness. 1AA 8.

The critical portion of the statement that should have been suppressed was when Mr. Morton told Detective Garrison he just lost it, went and got the gun but was just trying to scare his wife. Detective Garrison admitted that Mr. Morton smelled of alcohol but then stated that Mr. Morton was cognizant. The fact that the interview was not recorded by the police is of concern. Was the intoxication level so serious that the police did not wish to document Mr. Morton's appearance, his speech and his *Miranda* waiver? Mr. Morton initially told officers he did not want to talk to them.

A new trial should be granted by this court, at which the statement of Mr. Morton should be suppressed.

5. ADMISSION OF CUMULATIVE GRAPHIC PHOTOS DEPRIVED THE DEFENDANT OF HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS UNDER THE FIFTH & FOURTEENTH AMENDMENTS.

Standard of Review:

Relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury, or if it amounts to needless presentation of cumulative evidence. NRS 48.035. A nonconstitutional error, such as the erroneous admission of evidence at issue here, is deemed harmless unless it had a " 'substantial and injurious effect or influence in determining the jury's verdict.' " *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); see also *Fields v. State*, 125 Nev. 776, 784-85, 220 P.3d 724, 729-30 (2009) (reviewing erroneous admission of evidence, pursuant to NRS 48.045, as nonconstitutional error). The district court's admission of evidence is reviewed under an abuse of discretion standard.

Argument:

The admissibility of photographs is within the sound discretion of the trial court, whose decision will not be disturbed in the absence of a clear abuse of that discretion. *Paine v. State*, 110 Nev. 609, 617, 877 P.2d 1025, 1029 (1994), cert. denied, 115 S. Ct. 1405 (1995). It is within the court's discretion to admit photographs where the probative value outweighs any prejudicial effect the photographs might have on the jury. *Ybarra v. State*, 100 Nev. 167, 172, 679 P.2d 797, 800 (1984), cert. denied, 470 U.S. 1009 (1985).

Defense counsel objected to graphic, cumulative photographic evidence. The State admitted excessive and extensive photographs at this trial. The State moved to admit 335 photographs. Of those photographs, only 3 were excluded by the District Court. 244 pictures were admitted at one time as Exhibit 104. In this day and age of electronic imaging and cell phone pictures, the sheer amount of photography taken by various officers at crime scenes is overwhelming. The admission of 335 photographs was excessive and cumulative. 5AA 1103-1123. The goal at the point of 335 photographs is to prejudice the Defendant and make the jury believe there is overwhelming evidence to support conviction when in

reality, this case came down to whether the 1918 antique .303 gun accidentally discharged and what Mr. Morton's actions were at the time the gun discharged. 335 photographs were unnecessary, cumulative and prejudicial.

The district court noted that the photographs were cumulative. 2AA 298. Defense counsel objected as the photographs were simply too graphic to be admitted without prejudicing the Defendant. 2AA 299. Defense counsel asked that the photographs be admitted as black and white photographs rather than color photographs. That request was denied. 2AA 300. The photographs were published to the jury. The Court did not provide the jury with any type of admonishment when the evidence was presented to the jury. The prosecutor stated, "I warn everybody, they are graphic". 1AA 335.

Admission of irrelevant excessive photographs and graphic photographs deprived Mr. Morton of his right to a fair trial and due process under the Fifth and Fourteen Amendments. A new trial is warranted.

6. THE DISTRICT COURT'S DENIGRATION OF DEFENSE COUNSEL PREJUDICED THE DEFENSE CASE. A MISTRIAL SHOULD HAVE BEEN GRANTED. THE DISTRICT COURT APPEARS TO HAVE BEEN BIASED AGAINST DEFENSE COUNSEL HARDY.

Standard of Review:

Due process is denied by circumstances that create the likelihood or the appearance of bias. Prejudice need not be demonstrated if there is structural error and mandate reversal because they are intrinsically harmful. *Barral v. State*, 131 Nev. 520, 353 P.3D 1197 (2015).

Argument:

One thing appears clear on this record, Del Hardy angered Judge Robert Wagner and he was dressed down in front of this jury. No recess was taken where Judge Wagner could have his say without prejudicing Mr. Morton's position before this jury.

Judge Wagner's chastising of defense counsel Hardy in front of the jury was improper. Mr. Hardy apologized to the court for the discussion of the term homicide but Judge Wagner never provided the jury with the proper definition of

the term homicide. That would have shown the jury that defense counsel Hardy was correct when he quoted the Black's Law Dictionary definition of homicide and that Judge Wagner was incorrect. 2AA 442-445; 3AA 509-511.

A fair trial in a fair tribunal is a basic requirement of due process and requires not only an absence of actual bias but the prevention of even the probability of unfairness. *In re Murchison*, 349 U.S. 133, 133-34, 136 (1955). Due process demands not only the absence of bias but the appearance of bias as well.

Even though the appearance of bias is subjected to the harmless error standard of review, the error on this case was not harmless. This was a case where a manslaughter or not guilty verdict was achievable by defense counsel if the case was tried before a fair tribunal.

This Court found error where the trial judge injected levity into proceedings and denigrated defense counsel. *Parodi v. Washoe Medical Ctr.*, 111 Nev. 365, 892 P.2d 588 (1995). This Court found cumulative error where court called the defendant's testimony "malarkey," suggested that defense counsel was intoxicated,

and proposed in front of the jury to teach defense counsel how to practice law. *Earl v. State*, 111 Nev. 1304, 1310-12, 904 P.2d 1029, 1032-34 (1995). This case, by way of analogy, demonstrates error by Judge Wagner which prejudiced the verdict. A new trial should be granted.

7. THE DISTRICT COURT ABUSED ITS DISCRETION AT SENTENCING AND WHEN IT RELIED UPON SUSPECT EVIDENCE AND ARGUMENT. THE DISTRICT COURT DEPRIVED THE DEFENDANT OF HIS RIGHT OF ALLOCUTION AND OF HIS RIGHT TO MAINTAIN HIS INNOCENCE AT SENTENCING, IN VIOLATION OF THE FIFTH & FOURTEENTH AMENDMENTS. THE DISTRICT COURT ERRED WHEN IT FAILED TO STRIKE THE PRESENTENCE REPORT.

Standard of Review:

A district court's sentencing decision is reviewed for an abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). The District Court's decision will stand "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State,* 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

"An abuse of discretion will be found when the defendant's sentence is prejudiced from consideration of information or accusation founded on impalpable or highly suspect evidence." *Blankenship v. State*, 132 Nev. 500, 508, 375 P.3d 407, 412 (2016). see also *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). This court reviews unobjected-to conduct for plain error. *Valdez v. State*, 124 Nev. 1172 at 1190, 196 P.3d 465 at 477 (2008).

Argument:

In the federal court system, a substantively reasonable sentence is one that is "sufficient, but not greater than necessary" to accomplish § 3553(a)(2)'s sentencing goals. 18 U.S.C. § 3553(a); *see, e.g., United States v. Vasquez-Landaver*, 527 F.3d 798, 804-05 (9th Cir. 2008). This sentence was in excess of that needed for society's interests. See *United States v. Rita,* 551 U.S. 338, 127 S. Ct. 2456, 2468-69 (2007). This Court must proceed to review the reasonableness of the available sentence. *See United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006).

Judge Wagner erroneously advised defense counsel that Mr. Morton could not maintain his innocence during the sentencing proceeding. He quoted to *Homick v. State* in support of that position. 4AA 860. Judge Wagner advised attorney Molezzo that during the victim's statements, he could not interrupt or cross-examine them. The victim impact statements were going to be unsworn statements. 4AA 866, 898-900.

Mr. Molezzo filed a sentencing memorandum. In that document, Mr. Molezzo stated that responsible counsel would object and dispute any portion of the presentence report which was unfair, unfounded, based upon hearsay, contained tortured conclusions or slanting. 5AA 1090. Mr. Molezzo did not formally move to strike the presentence report or have it amended, in spite of the outrageous language in the document. 4AA 867.

The presentence report stated:

> "It is horrific to imagine that a union where two people vowed to love, honor and cherish each other could end in such tragedy. It is impossible to understand the extreme psychological trauma a child would go through seeing his mother, who was just shot by his father, lying in the floor covered in blood. In fact, the way Mr. Morton shot

his wife was a heartless and demoralizing act of hate and rage." Page 8, PSI.

The presentence report went on to declare the victim a beloved mother, grandmother, sister, daughter and friend. The drafter of the document then recommended maximum possible sentences, all to run consecutively. Page 9 PSI. Defense counsel objected to the contents of the presentence report. He objected to page 8, a reference that Mr. Morton's actions were heartless and a demoralizing act of hate and rage. Mr. Molezzo objected to the toxic wording used by the presentence report writer. 4AA 882, 886.

At the sentencing hearing, Judge Wagner again advised Mr. Molezzo that Mr. Morton could not maintain his innocence because he was convicted by the jury. 4AA 885. The victim was allowed to speak without cross examination.

The sentencing error continued. Judge Wagner determined this to be a murder and attempted suicide case. He decided that this marriage was destined to end in this violent manner. Judge Wagner relied upon a police statement without a testifying witness to determine that the thirty year marriage had events of this

nature (violent) occurring during the thirty years and were never reported by the victim. Judge Wagner increased the deadly weapon enhancement sentenced based upon this suspect evidence. Judge Wagner decided that he didn't "buy" Mr. Morton's defense position. Judge Wagner was offended that Mr. Morton's children did not make a statement. Yet, the children were in court on the sentencing date. Judge Wagner indicated that the domestic violence in this case was an aggravating factor. Judge Wagner decided that the victim lied to the police. 4AA 902-914.

Judge Wagner's approach to sentencing demonstrated his reliance upon suspect evidence. At the conclusion of the hearing, Judge Wagner attempted to sentence Mr. Morton to 300 months with 120 months to parole eligibility on the weapon enhancement term. 4AA 914. Judge Wagner was corrected by defense counsel as the sentence would have been illegal. Judge Wagner then imposed the maximum 96-240 month term on the enhancement. 4AA 915-916.

Nevada's sentencing courts have "discretion . . . to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the

crime, but also the individual defendant." *Martinez v. State*, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998).

A review of the sentencing transcript demonstrates error. In *Brake v. State*, 113 Nev. 579, 584-85, 939 P.2d 1029, 1032-33 (1997); U.S. Const. amend. V, the Nevada Supreme Court held that the district court violated a defendant's Fifth Amendment right against self-incrimination by considering the defendant's lack of remorse in its sentencing decision.

The case of *Mitchell v. United States*, 526 U.S. 314 (1999), reminds us that Mr. Morton's right to remain silent extends through the sentencing stage of the case.

Buschauer v. State, 106 Nev. 890, 893, 804 P.2d 1046, 1048 (1990), held that witnesses offering oral victim impact statements must be sworn. The victim impact evidence was not provided under oath.

The sentence imposed was in excess of that needed to protect society's interests. The District Court's sentencing analysis was not 'reasoned' as the law requires (NRS 193.165) and relied upon suspect evidence. See *United States v.*

Rita, 551 U.S. 338, 127 S. Ct. 2456, 2468-69 (2007) and *Gall v. United States*, 128 S. Ct. 586 (2007).

Mr. Morton is entitled to a new sentencing proceeding, at which his constitutional rights should be upheld.

8. CUMULATIVE ERRORS PRECLUDED A FAIR TRIAL, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

Standard of Review:

If the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

Argument:

Relevant factors to consider in evaluating a claim of cumulative error include whether "'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" *Homick v. State*, 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996) (quoting *Big Pond v. State*, 101 Nev.

at 3, 692 P.2d at 1289), cert. denied, 519 U.S. 1012, 117 S.Ct. 519 (1996); see also *Lay v. State* , 110 Nev. at 1199, 886 P.2d at 454.

In other words, " '[errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.' " *Thomas v. Hubbard*, 273 F.3d 1164, 1180 (9th Cir. 2001) (quoting *Matlock v. Rose*, 731 F.2d 1236, 1244 (6th Cir. 1984)), overruled on other grounds by *Payton v. Woodford*, 299 F.3d 815, 829 n.11 (9th Cir. 2002) (en banc). "In those cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." *Frederick*, 78 F.3d at 1381. In cases where "there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996) (quoting *United States v. Wallace*, 848 F.2d 1464, 1476 (9th Cir. 1988)).

The type, number and severity of errors demonstrated in this case mandates reversal of the conviction and the right to proceed to a new jury trial. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually. *Burnside v. State*, 131 Nev., Adv. Op. 40, 352 P.3d 627, 651 (2015), cert. denied, ___ U.S. ___, 136 S. Ct. 1466 (2016).

This Court should note that the key investigator for the police department did not believe this shooting was intentional. The defense expert described the antique 1918 .303 firearm to be a dangerous. 4AA 755-773. Failing to advise the jury that the State had to prove beyond a reasonable doubt that Mr. Morton did not act under adequate provocation to reduce a murder charge to manslaughter reduced the State's burden of proof. JI's at 4AA 803-855. Judge Wagner's act of denigrating defense counsel in front of the jury added to the error and prejudiced Mr. Morton's defense case. 2AA 442-445; 3AA 590-511. Admission of graphic

photographs without a limiting instruction from the court exacerbated the errors. Admission of Mr. Morton's statement to police when his blood alcohol was 0.276 and when that statement was not recorded violated *Miranda* and the Fifth Amendment. Failing to advise the jury how to properly evaluate and utilize bad act evidence contributed to the jury verdict of second degree murder. Allowing the bad act evidence to be admitted when it was not proven by clear and convincing evidence was an error by the court. At the end of the day, this case and the conviction is based upon insufficient evidence. Cumulative error matters in a case with slim evidence. This Court should reverse the conviction.

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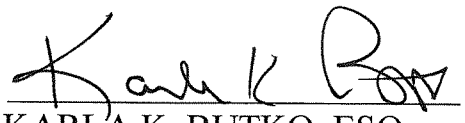
CONCLUSION

This conviction must be set aside. Mr. Morton is entitled to a new trial. Alternatively, the sentencing proceeding was so infected with error that the judgment of conviction should be stricken and a new sentencing proceeding ordered.

DATED this 25th day of March, 2022.

By: 

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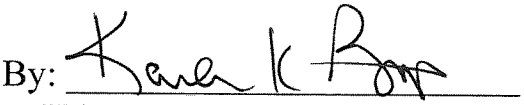
CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S OPENING 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type-volume limitation of 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does exceed 30 pages and meets the word and line counts found in but meets the word and line counts found in the rules. It is less than 14,000 words and less than 1,300 lines of type.

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. The document was prepared in Word Perfect. There are 47 typed pages, 9,041 words in this brief and 908 lines of type. The Brief has been prepared in Word Perfect, proportionally spaced type, 14 point Times New Roman with 2.45 line spacing, so as to imitate double spacing of Word.

DATED this 25th day of March, 2022.

By: 

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

_____ E Flex Delivery of the Nevada Supreme Court System

addressed as follows:

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DATED this 25th day of March, 2022.

KARLA K. BUTKO, Esq.