IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID CRAIG MORTON,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

Docket No. 83884
District Court No. CV 09-5709

RESPONDENT'S ANSWERING BRIEF

Appeal from Judgment of Conviction
Sixth Judicial Distract Court, County of Humboldt
The Honorable Richard A. Wagner

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JURISDICTIONAL STATEMENT

The Respondent does not object to Appellant's jurisdictional statement.

ROUTING STATEMENT

The Respondent objects to Appellant's routing statement and states that while this case is not presumptively assigned to the Nevada Court of Appeals under *Nevada Rules of Appellate Procedure (NRAP) 17(b)(2),* it should nevertheless be assigned to the Nevada Court of Appeals because it does not involve any of the numerated categories in *NRAP 17(a),* does not involve any Constitutional challenge to any Nevada statute, and does not involve any significant legal issues of concern to this Court or the public at large.

STATEMENT OF THE ISSUES

Respondent objects to Appellant's statement of the issues and notes the issues as follows:

ISSUE I: Does this Court have Jurisdiction over this Appeal pursuant to *Nevada Rules of Appellate Procedure (3)(A)(b)(1),* in light of the fact that the District Court's June 21, 2021, Order in this Case was a Final Order Subject to Appeal Regarding the Issues in this Case?

ISSUE II: Was the Jury Improperly Instructed on the State's Burden to Prove Beyond a Reasonable Doubt that the Defendant did not act Under Provocation, in Order to not Reduce the Charge to Manslaughter?

ISSUE III: Was there Improper Bad Act Evidence Admitted in this Case that Rendered the Verdict of the Jury in this case unreliable in violation of Appellant's Due Process Rights under the Fifth and Fourteenth Amendments to the U.S. Constitution?

ISSUE IV: Did the District Court Commit Error when it allowed Appellant's Post-Arrest Statements into Evidence Before the Jury?

ISSUE V. Did the Evidence in this Case of Graphic Photos Admitted Before the Jury Deprive the Appellant of his Right to a Fair Trial and Due Process under the Fifth and Fourteenth Amendments to the U.S. Constitution?

ISSUE VI: Did the District Court's Conduct in this Case, as to one of his Trial Counsel, prejudice the Jury Panel against him, and/or Show Bias Against the Appellant as to Warrant a Mistrial in this Case?

ISSUE VII: Did the District Court Abuse its Discretion at Sentencing in this Case?

ISSUE VIII: Was there Cumulative Error in this Case which Precluded the Appellant from Receiving a Fair Trial in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution?

STATEMENT OF THE CASE

The Respondent does not object to Appellant's statement of the case.

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STATEMENT OF FACTS

On September 22, 2010, Appellant was found guilty after a jury trial for one count of Open Murder in the Second Degree with the Use of a Deadly Weapon, a Category A Felony, in violation of *NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165*; and one count of Discharging a Firearm from Within or From a Structure, a Category B Felony, in violation of *NRS 202.287(b)*.

Thereafter, on January 14, 2011, the District Court sentencing the Appellant on Count I in the Information to imprisonment in the Nevada Department of Corrections for a minimum term of one hundred-twenty (120) months and a maximum term of three-hundred (300) months, with eligibility for parole beginning when a minimum of ten (10) years have been served, with credit for time served of five hundred twenty-six (526) days, with an additional penalty of imprisonment in the Nevada Department of Corrections for a minimum term of ninety-six (96) months and a maximum term of two hundred-forty (240) months, to run consecutive to each other for the one count of Open Murder in the Second Degree with the Use of a Deadly Weapon, a Category A Felony in violation of *NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165*; and for Count II in the Information; imprisonment in the Nevada Department of Corrections for a minimum term of seventy-two (72) months and a maximum term of one hundred-eighty (180) months, to run concurrent to the sentence imposed for Court I for one count of Discharging a Firearm from Within or From a Structure, a Category B Felony, in violation of *NRS*

202.287(b). (See Appellant's Appendix Volume 1, Pages 1-5; Appellant's Appendix Volume 4, Pages 870-924).

The facts of this case arose on or about August 6, 2006, at 1565 Harmony Road, in Winnemucca, Humboldt County, Nevada, where the Appellant shot his wife, Cynthia Morton, in the abdomen while she was in the bathroom of their home, where the cause of death as told to the jury, according to Ellen Clark, M.D., then the Chief Medical Examiner for the Washoe County Medical Examiner Coroner's Office, was due to "multiple organ failure, including sepsis due to gun shot wounds that involved the chests, the abdomen, the flank region, and the buttock." (*See Appellant's Appendix Volume 2, Page 434*).

As a matter of procedural history, the Judgment of Conviction in the present case was filed on July 20, 2011. *(See Appellant's Appendix Volume 4, Pages 910-924).* There was no direct appeal originally taken in this case, but the District Court later determined that the Appellant was deprived of his right to a timely direct appeal under *NRAP 4(c),* due to his trial counsel's error. (*See Order Partially Granting Petitioner's Petition for Writ of Habeas Corpus & Staying Decision Pending Belated Appeal, filed November 30, 2021*)(*See also Appellant's Appendix Volume 5, Pages 1040- 1048*). The Appellant then filed his timely Notice of Appeal in the District Court on December 2, 2021. (*See Appellant's Appendix Volume 5, Page 1049).*

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STANDARD OF REVIEW

The Respondent argues that the standard of review for Issue I through Issue VIII is an abuse of discretion standard of review, as discussed below.

ARGUMENT

ISSUE I: There was Sufficient Evidence to Sustain the Conviction in this case to sustain Appellant's Convictions for one count of Open Murder in the Second Degree with the Use of a Deadly Weapon, a Category A Felony, in violation of *NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165,* and one count of Discharging a Firearm from Within or From a Structure, a Category B Felony, in violation of *NRS 202.287(b).*

In *Mitchell v. State*, 124 Nev. 807, 192 P.3d 721 (2008), a very similar case in where the defendant, like here, was also found guilty of second-degree murder with the use of a deadly weapon, in violation of *NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033* and *NRS 193.165*, this Court in discussing a challenge to the sufficiency of the evidence, noted:

> "When determining whether a verdict was based on sufficient evidence to meet due process requirements, this court will inquire "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." This court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact. To support a guilty verdict under NRS 193.165, 200.010, and 200.030, the State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought and used a deadly weapon in the commission of the crime. (*Emphasis original). See Mitchell v. State, supra*, 192 P.3d at 727.

In the present case, after viewing the evidence in the light most favorable to State, there is sufficient evidence in the record for a rational trier of fact to find that the Appellant violated the essential elements of *NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033, NRS 193.165,* as well as *NRS 202.287(b),* and that the malice aforethought element was proven beyond a reasonable doubt, based on the fact that both the Appellant and his wife had a history of domestic violence, had a "toxic relationship"; were aggressive towards each other; that Cynthia Morton had wanted a divorce from the Appellant; that both of them were drinking the night of the incident; that they had been arguing; that Appellant's son, Robert Morton, testified that he heard his mother screaming "Help, Robert, He's hurting me"; that Robert ran to the top of the stairs; that he saw his father naked in the hallway of the bathroom door; that his father was holding the rife used in the shooting at a 45 degree angle toward the ceiling; that his father's right hand was by the trigger; that he saw his mother, Cynthia Morton, moaning and groaning in the bathroom in her nightgown; that he then fought over the gun with his father; that he believed that the gun was loaded; that Cynthia Morton told Winnemucca Police Department Detective Dave Garrison at the hospital that "he shot me with a shotgun"; that she was "urinating on the toilet" when the Appellant shot her; along with the Appellant blurting out at the jail, "I can't believe that I shot her, I'm going to prison for a very long time," before the Appellant paused and said "I should have done it right the first time." (*See Appellant's Appendix Volume 1, Pages 82; 111-112; 120-127; 137; 139; 143; 146; 196-198;211; 212* and

Appellant's Appendix Volume 2, Pages 333; 340. Moreover, even after the Appellant received and waived his Miranda warnings,[1] he told Detective Garrison that he "just lost it and got the gun"; that "I can't believe that I shot her"; that his wife was "seated on the toilet in the hall bathroom;" and finally when Detective Garrison asked the Appellant what his intention was when he pointed a loaded weapon at his wife, (that he originally stored by the front door in the living room), and discharged it, the Appellant said that "he was just trying to scare her." (*Appellant's Appendix Volume 2, Page 334*).

In summary, when viewing the evidence in the record most favorable to State, under *Mitchell v. State, supra*, there is sufficient evidence in the record for a rational trier of fact to find that the Appellant committed the essential elements of *NRS 200.010, 200.030*, and *193.165,* and that the malice aforethought element here was proven beyond a reasonable doubt.

ISSUE II: The Jury was Properly Instructed on the State's Burden to Prove Beyond a Reasonable Doubt that the Defendant did not act Under Provocation, in Order to not Reduce the Charge to Manslaughter.

Appellant next asserts that the jury was not adequately instructed on the issue of provocation, in that they were not advised that the State had the burden to prove the absence of provocation beyond a reasonable doubt.

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[1] See *Miranda v. Arizona,* 384 U.S. 436, (1966).

Under *Higgs v. State*, 126 Nev. 1, 222 P.3d 648, (2010) the Nevada Supreme Court noted that district courts have "broad discretion to settle jury instructions" *citing Cortinas v. State,* 124 Nev., 195 P.3d 315, 319 (2008), and that the Court is limited to inquiring whether there was an abuse of discretion or judicial error. *Higgs v. State, supra* at 661.

In the present case, the Appellant has not shown why the entire set of instructions given by the Court in this case does not show that the State was not required to meet its burden on "*all the elements of all the crimes that the Appellant was in fact charged with*", especially that of Open Murder in the Second Degree with the Use of a Deadly Weapon, a Category A Felony, in violation of *NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165*, and its lesser included offenses of voluntary manslaughter and involuntary manslaughter, especially since Appellant did not propose a manslaughter instruction in the first place, and where his defense at trial was more of accident and lack on intent. (*See Jury Instructions 9,24-28*)(*Appellant's Appendix Volume 4, Pages 813; 832-837*). *See also Crawford v. State,* 121 Nev. 744, 121 P.3d 582 (2005). Furthermore, the record here reveals that the jury was instructed on the definition of voluntary manslaughter, the definition of heat of passion, along with the specific elements of voluntary manslaughter, with the fact that the State had to prove that the Petitioner, "after having a serious and highly provoking injury inflicted upon himself sufficient to excite an irresistible passion in a reasonable person, or an

attempt on the person killed to commit a serious personal injury on the person killing." (*See Jury Instructions 24-26*)(*Appellant's Appendix Volume 4, Pages 832-835*).

In the present case, Appellant has failed to show why the District Court's failure to give an individualized jury instruction that the State had to prove the abuse of provocation beyond reasonable doubt, was an abuse of the trial court's discretion, especially since one was not proposed by his trial counsel, and all the elements of voluntary and involuntary manslaughter were sufficiently covered in other jury instructions that were in fact give in this case. (*See Jury Instructions 26,28*)(*Appellant's Appendix Volume 4, Pages 832,837*). In *Valdez v. State*, 124 Nev. 1172, 196 P.3d 465 (2008), this Court noted:

> "Failure to object or to request an instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect a defendant's right to a fair trial." The district court had no sua sponte duty in this case, and therefore, this court should review the district court's decision not to give the instruction for plain error. Further, giving an erroneous jury instruction does not require reversal unless a different result would have been likely absent the error. *See Valdez v. State,* 196 P.3d at 483.

In the present case, since Appellant did not object that to the State's jury instructions in this matter on voluntary manslaughter, the failure to give a individualized jury instruction that the State had to prove the abuse of provocation beyond reasonable doubt was not plain error or an abuse of the trial court's discretion, especially since Appellant did not ask for one, and a different result would not have been likely to have occurred in this case due to the Appellant's

overwhelming evidence of guilty, as discussed above. Moreover, the decision not to do so by Appellant's trial counsel, could also be labeled as a normal strategic decision made by his trial counsel, which are assumed to be intentional and are "virtually unchallengeable," under *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996). *See also Johnson v. State*, 133 Nev. Adv. Op. 73, 133 Nev. 571, 402 P.3d 1266 (2017). As a result, Appellant's second issue must fail as well.

ISSUE III: There was not Improper Bad Act Evidence Admitted in this Case that Rendered the Verdict of the Jury in this case unreliable in violation of Appellant's Due Process Rights under the Fifth and Fourteenth Amendments to the U.S. Constitution.

In the present case, Appellant's trial counsel inadvertently opened the door to alleged "bad act" and hearsay evidence of a domestic battery, that he was trying to keep closed by the cross-examination of the Appellant's son, Robert Morton, and that the jury was not advised to disregard these statements. Besides the Appellant here trying to shift blame for any error in this regard by his trial counsel, onto the Court itself, the State, or even to the victim in this case, Cynthia Morton, Appellant not only had failed to not ask for a jury instruction from the Court to disregard these statements, which could very well fall into a strategic decision made by his trial counsel that are assumed to be intentional and are "virtually unchallengeable." *See Doleman, supra,* Appellant has failed to show from the record that any error, if any, affected his substantial rights, where the Appellant generally must

demonstrate prejudice in this regard. *See Mitchell v. State*, 124 Nev. 807, 192 P.3d 721, 728 (2008). In *Michell, supra*, this Court noted:

> "As a general rule, "proof of a distinct independent offense is inadmissible" during a criminal trial. However, if a defendant offers evidence concerning his good character, then the State may offer evidence of his bad character under *NRS 48.045(1)(a)*. Furthermore, after evidence of the defendant's character has been presented, the State may inquire into specific instances of his or her conduct during cross-examination under *NRS 48.055(1)*. Under *NRS 50.085(3)*, the State may inquire into specific instances of a witness's conduct during cross-examination if those instances are relevant to truthfulness. *See Mitchell v. State*, 192 P.3d at 728.

In the present case, Appellant's trial counsel asked the Appellant's son, Robert Morton, on cross-examination the following question, "Nothing occurred at your home prior to this situation that would lead you to believe, isn't it true, that your father would seriously harm your mother? Would you agree to that?" In response to this question from Appellant's trial counsel, the Court let Robert Morton testify to the following answer, "I remember one time I was at work and my brother was living with us and his wife and his baby girl. I was at work. My brother called me, he was all, hey, you need to come home because dad just punch mom in the face." (*Appellant's Appendix Volume 1, Pages 196*). At this time, Appellant's trial counsel objected to this answer on the ground that the witness was not a personal witness to this event, but, on the next day of trial, the Respondent filed a Motion on behalf of the State to admit this character evidence under *NRS 48.045(1)(a)*, which the Court did allow under very limited circumstances, contrary to how the Appellant now implies and frames what

the Court actually said, like it was encouraged by the Court. (*Appellant's Appendix Volume 1, Pages 197; 203-208*). This evidence was simply proper character evidence under *NRS 48.045(1)(a),* with the additional fact that Appellant has not shown here that the failure to not ask for a jury instruction from the Court to disregard these statements did not fall into strategic decisions that made by trial counsel that are assumed to be intentional and are "virtually unchallengeable." *See Doleman,* 112 Nev. at 848, 921 P.2d at 280. As a result, Appellant's third issue must fail as well.

ISSUE IV: The District Court did not Commit Error when it allowed Appellant's Post-Arrest Statements into Evidence Before the Jury.

In the present case, Appellant below failed to file a motion to suppress his statements made at the Humboldt County (NV) Detention Center, that he was too intoxicated to voluntary waive his Miranda Rights under *Miranda v. Arizona,* 384 U.S. 436, (1966). The Nevada Supreme Court in *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102, (1996) is illustrative in this regard, where the Court stated:

> "To be admissible, a confession must be made freely and voluntarily, without compulsion or inducement. *Passama v. State,* 103 Nev. 212, 213, 735 P.2d 321, 322 (1987). A confession must be the product of a free will and rational intellect. *Id.* at 213-14, 735 P.2d at 322. Physical intimidation or psychological pressure constitute coercion, making a confession involuntary. *Id.* at 214, 735 P.2d at 322-23. The voluntariness of a confession must be determined from the effect of the totality of the circumstances on the defendant's will. *Id.,* 735 P.2d at 323. This court has listed the following factors to be considered: the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.

See Kirksey v. State, 112 Nev. 980, 923 P.2d 1102, 1109 (1996).

Moreover, to determine the voluntariness of a confession, the Court must consider the effect of the totality of the circumstances on the will of the defendant. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 226-227 (1973)(The question in each case is whether the defendant's will was overborne when he confessed). *See Schneckloth v. Bustamonte,* 412 U.S. at 225-226. Furthermore, consent is an exception to the Fourth Amendment of the U.S. Constitution's search requirement, *Schneckloth v, Bustamonte, 412* U.S. *218, 222* (1973). Consent must be voluntary, meaning that citizens must give consent in the absence of explicit or implied coercion. *See also Bumper v. North Carolina,* 391 U.S. 543, 548 (1968). When determining whether consent is given voluntarily, a court must consider all circumstances within the case, and the State must prove that the defendant gave consent freely and voluntarily. *See Sehneckloth, sura* 412 *U.S.* at 233; *Bumper, supra* 391 U.S. at 548. Finally, the State must prove by clear and convincing evidence that the defendant consented freely and voluntarily. *Mckforran v. State,* 118 *Nev. 379, 383, 46* P.3d *81, 85 (2002); see also Howe v. State,* 112 Nev. 458, 464, 916 P.2d 153, 158 (1996)(requiring clear and persuasive evidence).

In the present case, despite speculating otherwise that his free will was overborne in this case by his intoxicated state, which the District Court had found otherwise when it ruled the Appellant's statements admissible, Appellant has not shown that there was a reasonable likelihood that the exclusion of his confession

would have changed the result of his trial in this case. *See Kimmelman v. Morrison,* 477 U.S. 365 (1986). (*Appellant's Appendix Volume 5, Pages 1064-1074*).

Additionally, Appellant has not shown that his confession was not voluntary under the totality of the circumstances in the present case under *Passama v. State, supra*, or that his waiver of his rights under *Miranda v. Arizona, supra* were not freely or voluntarily given. *See Miranda v. Arizona, supra* 384 U.S. at 479. *See also Echavarria v. State,* 108 Nev. 734,742. 839 P.2d 589,595 (1992). Moreover, any decision by Appellant's trial counsel not to actually file a motion to suppress his confession in this case would be fall again into strategic decisions that are made by trial counsel and that are assumed to be intentional and are "virtually unchallengeable." *See Doleman,* 112 Nev. at 848, 921 P,2d at 280 (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). As a result, Appellant's fourth issue must fail as well for lacking any merit.

ISSUE V. The Evidence in this Case of Graphic Photos Admitted Before the Jury Did Not Deprive the Appellant of his Right to a Fair Trial and Due Process under the Fifth and Fourteenth Amendments to the U.S. Constitution.

In the present case, Appellant challenges the admissibility of several pictures of the victim in this case, Cynthia Morton, as well as photos of the crime scene itself. In *Baltazar-Monterrosa v.* State, 122 Nev. 606, 137 P.3d 1137 (2006), the Nevada Supreme Court held that the district court's decision "to admit or exclude evidence is given great deference and will not be reversed absent manifest error."

Moreover, the Nevada Supreme Court also stated in *Vallery v.* State, 118 Nev. 357, 46 P.3d 66 (2002) that a district court's improper exclusion of evidence is reviewed for harmless error, and in *McKellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008), the Court noted that an error is harmless unless there was a substantial and injurious effect or influence in determining the juries.

The factual situation here in this case is similar to the situation in *Doyle v. State*, 116 Nev. 148, 995 P.2d 465 (2000), where the defendant in *Doyle, supra* also argued that the photographs were cumulative and gruesome, and were inadmissible because the cause of death was not disputed. S*ee Doyle v. State*, supra 995 P.2d at 473. In rejecting these arguments, the Court in *Doyle, supra* noted:

> "Doyle has not shown that any of the photographs were duplicative, and we conclude that all were relevant to the cause of death and manner of injury. Most of the photographs depicted patterns on Mason's body consistent with footwear impressions and were additionally relevant to show the relationship between Mason's injuries and the soles of shoes found in Doyle's possession. Trial counsel relied on some of these photographs to support Doyle's defense of mere presence. Therefore, it is apparent that defense counsel made a strategic decision not to object to these photographs. Counsel's strategy decisions are not subject to challenge absent extraordinary circumstances. *Doleman v. State,* 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996). Two of the photographs depict injuries to Mason's head and face, and are gruesome. However, even gruesome photographs are admissible if they aid in ascertaining the truth, such as when used to show the cause of death, the severity of wounds and the manner of injury. *Browne v. State,* 113 Nev. 305, 314, 933 P.2d 187, 192 (1997); *Domingues v. State,* 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996).
>
> Doyle's argument that the autopsy photographs could not be utilized to show the cause of death where he did not dispute it is without merit. By pleading not guilty, a defendant puts all elements of the offense at

> issue. *Sonner v. State,* 112 Nev. 1328, 1338-39, 930 P.2d 707, 714 (1996), *modified in part on other grounds on rehearing,* 114 Nev. 321, 955 P.2d 673, *cert. denied,* 525 U.S. 886, 119 S.Ct. 199, 142 L.Ed.2d 163 (1998). Therefore, in the wake of Doyle's not guilty plea, the photographs were admissible to prove the State's case with essential facts relating to Mason's murder."

See *Doyle v. State*, *supra* 995 P.2d at 473

Likewise, in the present case, besides the fact that by pleading not guilty, which Appellant did here, he put all the elements of the offense at issue that he was charged with, and he has not shown that the photographs admitted before the jury in this case were not duplicative in nature and that they were not all were relevant to the cause of death and manner of injury, that the Appellant then inflicted on his wife, Cynthia Morton. See *Doyle v. State*, *supra.* As a result, Appellant's fifth issue lacks merit and must fail as well.

ISSUE VI: The District Court's Conduct in this Case, as to one of his Trial Counsel, did not prejudice the Jury Panel against him, and/or Show Bias Against the Appellant as to Warrant a Mistrial in this Case.

In *Oade v. State*, 114 Nev. 619, 960 P.2d 336 (1998), the Nevada Supreme Court noted:

> "A trial judge has a responsibility to maintain order and decorum in trial proceedings. *Parodi v. Washoe Medical Ctr.,* 111 Nev. 365, 367, 892 P.2d 588, 589 (1995); *see Nevada Code of Judicial Conduct Canon 3(B) (1991).* "What may be innocuous conduct in some circumstances may constitute prejudicial conduct in a trial setting, and we have earlier urged judges to be mindful of the influence they wield." *Parodi,* 111 Nev. at 367, 892 P.2d at 589.

> Judicial misconduct must be preserved for appellate review; failure to object or assign misconduct will generally preclude review by this court. *Id.* at 368, 892 P.2d at 590. However, this court has reviewed judicial misconduct, absent the appellant's failure to preserve adequately the issue for appeal, under the plain error doctrine. *See id.* at 369-70, 892 P.2d at 591 ("failure to object will not always preclude appellate review in instances where judicial deportment is of an inappropriate but nonegregious and repetitive nature that becomes prejudicial when considered in its entirety").
>
> In holding that judicial misconduct may fall under the purview of the plain error doctrine, this court adopted the reasoning in *Agee v. Lofton,* 287 F.2d 709 (8th Cir.1961), in which the Eighth Circuit concluded that, while exceptions to objectionable remarks should be voiced during trial, "counsel ... are, understandably, loath to challenge the propriety of a trial judge's utterances, for fear of antagonizing him and thereby prejudicing a client's case." *Parodi,* 111 Nev. at 369, 892 P.2d at 590 (*quoting Agee,* 287 F.2d at 710).
>
> *See Oade v. State*, 114 Nev. at 621, 960 P.2d at 338.

See also Azucena v. State, 135 Nev. Adv. Op. 36, 135 Nev. 269, 448 P.3d 534 (2019)("A trial judge has a responsibility to maintain order and decorum in trial proceedings," *citing Oade,* 114 Nev. at 621, 960 P.2d at 338). *Azucena v. State*, *supra* 448 P.3d at 538.

In the present case, upon a careful review of the transcript in this case, noting in the record below, indicates that that District Court overstepped its boundaries in conducting its responsibility to maintain order and decorum in the trial proceedings below, nor does it appear from the record that either of Appellant's trial counsel objected on the record to the Judge's conduct or behavior in this case in order to preserve it for appeal. *See Parodi,* 111 Nev. at 368, 892 P.2d at 590. This case was after

all, a very emotional and intense murder case involving a couple, where one of the parties, here Cynthia Morton, ended up dying as a direct result of Appellant's conduct. (*See Appellant's Appendix Volume 2, Page 434*). It is understandable on the part of the Court that it would want any legal definitions to be defined properly before the jury through later instructions before their deliberations, as to avoid any misconceptions before the jury, and that appears to be the Court's main intention here. (*Appellant's Appendix Volume 2, Pages 442-445*). However, unpleasant it may have been to one of Appellant's trial counsel, it does not rise to the level of prejudicing the jury panel against him, and/or showed bias against the Appellant, as to warrant a mistrial in this case. As a result, Appellant's sixth issue lacks merit and must fail as well.

ISSUE VII: The District Court did not Abuse its Discretion at Sentencing in this Case.

In the present case, the Appellant Court alleges that Judge Wagner, who at the time of sentencings in this case was on the bench for two decades, of having had an approach to sentencing that demonstrated his reliance upon suspect evidence. (*See Appellant's Opening Brief, filed March 25, 2022, at Page 41*).

Under Nevada law, this Court has previously ruled that the sentencing judge has wide discretion in imposing a sentence, and that this determination will not be overruled absent a showing of abuse of discretion, *Norwood v. State*, 112 Nev. 438, 915 P.2d 177 (1996), *citing Houk v. State,* 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Additionally, a sentencing court is often privileged to consider facts and circumstances

which would clearly not be admissible at trial. *Silks v. State,* 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976). Moreover, it is a well-established law in Nevada that the legislature, within Constitutional limits, is empowered to define crimes and determine punishments and that the courts are not to encroach upon this domain lightly. *Schmidt v. State*, 94 Nev. 695, 697. (1978). *See also Egan v. Sheriff*, 88 Nev. 611, 503 P. 2d 16 (1972); *Deveroux v. State. 96 Nev. 288. 610 P.2d 722,* 723. *See also State v. Sala*, 63 Nev. 270, 169 P.2d 524 (1946). The degree to which a judge considers age and the absence of a prior record of offenses is within his discretionary authority. *Deveroux Supra* 610 P.2d at 723-724, and *Sheriff v. Williams*, 96 Nev. 22, 604 P.2d 800 (1980). There is also a general presumption in Nevada favoring the validity of statutes which dictates a recognition of their constitutionality unless a violation of Constitutional principles is clearly apparent. *State v. Schmidt,* 94 Nev. 665, 584 P.2d 695, 697 (1978). Similar to *Norwood, supra*, the Court in *Deveroux, supra* noted that the trial judge has wide discretion in imposing a prison term and, in the absence of a showing of abuse of such discretion, this Court will not disturb the sentence. *Deveroux, supra* 610 P.2d at 723. *See also State v. Sala, supra.*

Additionally, this Court has held that a sentence of imprisonment which is within the limits of a valid statute, regardless of its severity, is normally not considered cruel and unusual punishment in the Constitutional sense. *Schmidt, supra* 584 P.2d at 697; *United States v. Johnson*, 507 F.2d 826 (7th Cir. 1974), *Cert. denied.* 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975), and that a sentencing proceeding is not a second

trial and the court is privileged to consider facts and circumstances that would not be admissible at trial. *See Silks v. State, supra.*

Finally, a district court is not required to articulate its reasons for imposing a particular sentence. *See Campbell v. Eight Judicial Dist. Court,* 114 Nev. 410, 414, 957 P.2d 1141, 1143 (1998). *See also Park v. Johnson*, No. 2: 19-cv-01298-APG-BNW (D. Nev. Apr. 8, 2021), *citing Campbell v. Eight Judicial Dist. Court, supra.*

In the present case, Appellant laid out his sentencing position in a sentencing memorandum filed prior to the sentencing in this case on January 14, 2011, but he chose to not object at the actual time of sentencing to the Presentence Report in this case prepared by the State of Nevada, Nevada Department of Public Safety, Division of Parole and Probation, stating in response to an inquiry from the District Court, that "I am not asking in any part of the memorandum to strike anything. I am just sharing with the Court my view of how it should be looked at. It's entirely up to you." Which the District Court acknowledged and Appellant's trial counsel indicated that he was ready to go forward. (*Compare Appellant's Appendix Volume 4, page 867 to Appellant's Appendix Volume 5, Pages 1087-1095*). According to *Stockmeier v. STATE, BD. OF PAROLE COM'RS*, 127 Nev. 243, 255 P.3d 209, 213 (2011), the Division of Parole and Probation must disclose the report's factual content to the prosecuting attorney, defense counsel, and the defendant, and give the parties the opportunity to object to any of the PSI's factual allegations. *See Stockmeier v. STATE, BD. OF PAROLE COM'RS*, supra 255 P.3d at 213. Appellant waived his right to do so in this case, and

this appears from the record to be another strategic decision under *Doleman, supra*, made by trial counsel and that are assumed to be intentional and are "virtually unchallengeable." *See Doleman,* 112 Nev. at 848, 921 P,2d at 280 (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

As to Appellant's remaining allegations about his sentencing in this case, including the fact that the District Court abused its discretion when imposing the sentence in this matter due to victim impact testimony, or that he demonstrated prejudice resulting from the consideration of information or accusations founded on facts supported by impalpable or highly suspect evidence, these allegations lack merit. *See Chavez v. State, supra,* 125 Nev. at 348, 213 P.3d at 490 and *Silks v. State, supra* 92 Nev at 94, 545 P.2d 1161. *See also Randell v. State.* 109 Nev. 5, 8, 846 P.2d 278, 280 (1993)("The district court is capable of listening to the victim's feelings without being subjected to an overwhelming influence by the victim in making its sentencing decision).

In the instant matter, the record clearly shows that the District Court had listened intently to the arguments of the parties and the testimony presented at the sentencing hearing, and had reviewed all the documentary evidence submitted at or before the sentencing hearing in this matter, which shows that the District Court did not abuse its discretion and fashioned an appropriate and legal sentence for the Appellant to serve on Count I in the Information to imprisonment in the Nevada Department of Corrections for a minimum term of one hundred-twenty (120) months

and a maximum term of three-hundred (300) months, with eligibility for parole beginning when a minimum of ten years have been served, with credit for time served of five hundred twenty-six (526) days, with an additional penalty of imprisonment in the Nevada Department of Corrections for a minimum term of ninety-six (96) months and a maximum term of two hundred-forty (240) months, to run consecutive to each other for the one count of Open Murder in the Second Degree with the Use of a Deadly Weapon, a Category A Felony, in violation of *NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165*; and for Count II in the Information; imprisonment in the Nevada Department of Corrections for a minimum term of seventy-two (72) months and a maximum term of one hundred-eighty (180) months, to run concurrent to the sentence imposed for Court I for one count of Discharging a Firearm from Within or From a Structure, a Category B Felony, in violation of *NRS 202.287(b). (See Appellant's Appendix Volume 1, Pages 1-5; Appellant's Appendix Volume 4, Pages 870-924*).

The above sentences imposed by the District Judge here was within the legally imposed term of imprisonment within the statutory limits of life with the possibility of parole, with eligibility for parole beginning when a minimum of ten (10) years or one hundred-twenty months (120) has been served; of for a definite term of twenty-five (25) years or three-hundred (300) months, with eligibility for parole beginning with a minimum of ten (10) years having been served, with an additional penalty pursuant to *NRS 193.165* of a minimum term of not less than one (1) year or twelve

(12) months and a maximum term of not more than twenty-years (20) years or two hundred-forty month (240) in the Nevada Department of Corrections for the one count of Open Murder in the Second Degree with the Use of a Deadly Weapon, a Category A Felony, in violation of *NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165*; and where the legally imposed term of imprisonment in this case for Count II was also within the statutory limits of not less than two (2) years or twenty-four (24) months, and not more than fifteen (15) years for one-hundred (180) months in the Nevada Department of Corrections and a fine of not more than $5,000 Court I for one count of Discharging a Firearm from Within or From a Structure, a Category B Felony, in violation of *NRS 202.287(b). (See Appellant's Appendix Volume 1, Pages 1-5; Appellant's Appendix Volume 4, Pages 870-924*).

Finally, the sentence in this case was within the District Court's sound discretion, as allowed under *Norwood v. State, Supra*, and *Silks v. State, Supra,* nor was the sentence imposed here contrary to the Due Process Clause of the Fifth Amendment of the United States Constitution to be considered cruel and unusual punishment under *Schmidt, Supra* at 665 & *United States v. Johnson*, 507 F.2d 826 (7th Cir. 1974), Cert. den. 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975). As a result, Appellant's assertion that his sentence in this case was an abuse of discretion by the District Court is without any legal basis.

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ISSUE VIII: There were no Cumulative Error in this Case which Precluded the Appellant from Receiving a Fair Trial in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Appellant lastly argues that in this case, there was a large degree of cumulative error having been committed in this case, which precluded him from receiving a fair Trial in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. This contention lacks merit.

In considering the effects of cumulative errors, this Court most recently in *Valdez v. State*, 124 Nev. 1172, 196 P.3d 465 (2008), noted:

> "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." When evaluating a claim of cumulative error, we consider the following factors: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." This court must ensure that harmless-error analysis does not allow prosecutors to engage in misconduct by overlooking cumulative error in cases with substantial evidence of guilt. See *Valdez v. State*, supra 196 P.3d at 481.

Applying the three factors in *Valdez, supra*, there was simply no cumulative error in this case, despite Appellant trying to stack alleged errors all up and blowing them down one by one. Initially, the issue of guilty in this case was hardly close. The evidence presented to the jury, as noted above, was that Appellant and his wife had a history of domestic violence, were aggressive towards each other, which was described as a "toxic relationship"; that the victim had wanted a divorce from the Appellant; that both of them were drinking the night of the incident; that they had

been arguing; that Appellant's son, Robert Morton testified that he heard his mother screaming "Help, Robert, He's hurting me"; that Robert ran to the top of the stairs; where he saw his father naked in the halfway of the bathroom door; that his father was holding the rife used in the shooting at a 45 degree angle toward the ceiling; that his father's right hand was by the trigger; that he saw his mother, Cynthia Morton moaning and groaning in the bathroom in her nightgown; that he then fought over the gun with his father; that he believed that the gun was loaded; that Cynthia Morton told Winnemucca (NV) Police Department Detective Dave Garrison at the hospital that "he shot me with a shotgun"; that she was "urinating on the toilet" when the Appellant shot her; along with the Appellant blurting out at the jail, "I can't believe that I shot her, I'm going to prison for a very long time," before the Appellant paused and then said "I should have done it right the first time." (*See Appellant's Appendix Volume 1, Pages 82; 111-112; 120-127; 137; 139; 143; 146; 196-198;211; 212* and *Appellant's Appendix Volume 2, Pages 333; 340.* Moreover, as noted above, even after the Appellant received and waived his Miranda warnings,[2] he told Detective Garrison that he "just lost it and got the gun"; that "I can't believe that I shot her"; that his wife was "seated on the toilet in the hall bathroom;" and finally when Detective Garrison asked the Appellant what his intention was when he pointed a loaded weapon at his wife and discharged it, the Appellant said that "he was just trying to

[2] See *Miranda v. Arizona,* 384 U.S. 436, (1966).

scare her." (*Appellant's Appendix Volume 2, Page 334*). As result, the jury had before it a very strong case of guilt on behalf of the Appellant, despite Appellant's assertions to the contrary in his Opening Brief. (*See Appellant's Opening Brief, filed March 25, 2022, at Pages* 43-46).

As to the second factor in *Valdez, supra,* the quality and character of the errors in this case are virtually non-existent, and represent more of a disagreement between the District Court and Appellant on evidentiary matters, which as discussed above, were neither an abuse of discretion on half of the District Court in these rulings, nor an abuse of discretion as the District Judge exercised his responsibility to maintain order and decorum in trial proceedings." *See Oade,* 114 Nev. at 621, 960 P.2d at 338.

Finally, as to the third factor in *Valdez, supra,* the gravity of the crime charged, the victim, Cynthia Morton, lost her life by a direct result of Appellant shooting her with a rifle while she was urinating on the toilet, and not a danger to him at the time. The jury here apparently agreed with the Respondent's evidence in this case, and found him guilty of both Open Murder in the Second Degree with the Use of a Deadly Weapon, a Category A Felony, in violation of *NRS 200.010, NRS 200.020, NRS 200.030, NRS 200.033 and NRS 193.165*; as well as Discharging a Firearm from Within or From a Structure, a Category B Felony, in violation of *NRS 202.287(b).* For the Nevada Legislative, as well as for Cynthia Morton here, there really were no more crimes as serious as the ones the Appellant faced in the instant case. As a result, Appellant's final eighth and final issue must fail as well for lacking legal merit.

CONCLUSION

Based on the arguments above, the State of Nevada respectfully asks this Court to affirm the sentence imposed upon Appellant in this case.

Furthermore, pursuant to *NRS 239B.030*, the undersigned hereby affirms this document does not contain the social security number of any person.

Dated this 25th day of May, 2022.

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ATTORNEY CERTIFICATION OF COMPLIANCE

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 in type face of 14 point and Garamond type face.

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

Finally, I hereby certify that I have read the respondent brief and to the best of my knowledge, information, and belief, it is not frivolous or interposed for an improper purpose. I further certify that this brief complies with all the applicable Nevada Rules of Appellate Procedure, in particular *NRAP 23(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 mater 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

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the Nevada Rules of Appellate Procedure.

Dated this the 25th day of May, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 25th day of May, 2022, I mailed/delivered a copy of the **RESPONDENT'S ANSWERING BRIEF** to:

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