IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO TREJO, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 84724

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellant, MARIO TREJO ("Trejo"), appeals from a final judgment under Nevada Rule of Appellate Procedure 4(b) and NRS 177.015. The district court filed the Judgment of Conviction on June 16, 2022. Appellant's Appendix ("AA") Vol. IV 898. Trejo filed a Proper Person Notice of Appeal on May 12, 2022. Id. at 892. The Clark County Public Defender's Office filed its Notice of Appeal on June 28, 2022. Id. at 904.

ROUTING STATEMENT

Trejo's case is presumptively assigned to the Nevada Supreme Court because he was convicted after jury trial of one (1) category A felony and 12 category B felonies. Id. at 898-899. Convictions involving category A and B felonies after jury trial are not within the original jurisdiction of the Court

of Appeals. See See Nevada Rules of Appellate Procedure ("NRAP") NRAP 17(b)(2)(A). Additionally, Trejo's case presents issues of first impression and statewide public importance in Nevada. Therefore, the Nevada Supreme Court should retain jurisdiction. NRAP 17(a)(11)-(12).

ISSUES PRESENTED FOR REVIEW

I. The District Court Violated Trejo's Right to an Interpreter at Critical Stages.

II. The District Court Violated Trejo's Fundamental Right to Counsel.

III. The District Court Abused its Discretion by Admitting Videos at Trial Which Had Not Been Provided to Trejo.

IV. The District Court's Jury Instruction Errors Violated Trejo's Right to a Fair Trial.

V. The District Court Erred by Allowing the State to Admit Bad Act Evidence and by Not Providing a Limiting Instruction.

VI. The State Failed to Present Sufficient Evidence to Support Trejo's Conspiracy Conviction.

VII. Cumulative Error Warrants Reversal.

STATEMENT OF THE CASE

On October 4, 2018, the State of Nevada charged Trejo *via* Indictment with: count 1 - Burglary While in Possession of Firearm; counts 2, 3, 4, 5, 6, 7, 8 – Robbery with Use of a Deadly Weapon; count 9 – First-Degree Kidnapping with Use of a Deadly Weapon; counts 10 and 11 – Assault on a Protected Person with Use of a Deadly Weapon; count 12 – Conspiracy to Commit Robbery, count 13 – Attempt Robbery with Use of a Deadly Weapon. AA I 1-5. Counts 1 through 11 pertained to an incident at Superpawn, located at 1150 Rainbow Ave., Las Vegas, Nevada, on September 3, 2018. Id. Counts 12 and 13 pertained to an incident at the same Superpawn approximately one month earlier on August 4, 2018. Id.

At his district court arraignment on October 15, 2018, Trejo pleaded not guilty and waived his constitutional and statutory right to a speedy trial. AA IV. 910. The district court scheduled calendar call for March 27, 2019, and jury trial for April 1, 2019. Id. At the calendar call, the court continued the trial to October 14, 2019, per Trejo's request. Id. at 913. The court eventually continued the trial a few more times due to the parties' inability to proceed and the Covid-19 pandemic. See Id. at 914-918.

On March 02, 2021, Trejo filed a proper person motion to dismiss the Clark County Public Defender as his attorney. AA I 117-20. At a hearing

on Trejo's motion the district court granted Trejo's motion to withdraw the Public Defender's Office after conducting a Faretta[1] canvass and concluding Trejo knowingly, intelligently, and voluntarily waived his right to counsel. AA IV 920; AA V 1136. However, the district court also appointed the Public Defender's Office to act as standby counsel.[2] Id. at 1137.

Trial began on April 18, 2022 and ended on May 4, 2022. AA IV 942, 954. After deliberating for two hours the jury returned its verdict finding Trejo guilty on all counts. Id.; AA IV 887-91. On May 12, 2022, Trejo filed a proper person Notice of Appeal although the district court had not yet pronounced sentence. At Trejo's sentencing hearing on June 15, 2022, the district court sentenced Trejo to an aggregate sentence of 180 months to life in the Nevada Department of Corrections with 1,382 days credit for time served. Id. at 957. The district court appointed the Clark County Public Defender's Office to represent Trejo on direct appeal. AA XIV 3196. The district court filed the Judgment of Conviction on June 16, 2022. AA IV 898. On June 28, 2022, the Public Defender filed its Notice of Appeal. Id. at 904.

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[1] Faretta v. California, 422 U.S. 806 (1975).

[2] The court conducted another Faretta canvass on February 3, 2022, after this Court's decision in Miles v. State, 500 P.3d 1263 (Nev. Dec. 23, 2021). See AA IV 934-35; AA V 1200.

STATEMENT OF FACTS

On August 4, 2018, around 8:10 a.m., Jennifer Incera ("Incera") arrived for work at the Superpawn located at 1150 Rainbow Ave., Las Vegas, Nevada. AA XI 2429. Upon arrival Incera noticed a black Acura sedan with blackout windows and a sunscreen backed into a parking stall near the Superpawn. Id. at 2432-33. Incera and employees Juliana Saldana ("Saldana") and Ivan Jaquez ("Jaquez") were opening the store's security gate when someone began charging towards them. Id. at 2439. The person appeared to be male and was wearing a motorcycle helmet, a leather jacket, dark jeans, boots, and was carrying an unknown type firearm.[3] AA X 2177-78. After Saldana exclaimed, "we're getting robbed," Incera, Saldana, and Jaquez ran to the side of the Superpawn where Saldana had parked her Jeep Liberty. Id. at 2175. After briefly hiding behind the Jeep, Saldana entered the driver's seat while Incera and Jaquez entered the backseat, and Saldana drove away. Id. at 2180.

As Saldana drove away, Jaquez called 911 and handed the phone to Incera who reported the incident. AA X 2359. Meanwhile, Saldana, Jaquez, and Incera believed the same Acura that had been parked at the Superpawn

[3] Incera did not notice the suspect holding a firearm. AA XI 2460. Jaquez did notice the suspect holding a firearm but could not describe the firearm in any way. AA X 2356-57.

during the attempted robbery was now following them. AA X 2182, 2360; AA XI 2445. Saldana was eventually able to "lose" the Acura. AA X 2184-85. 911 dispatchers then advised Incera to proceed to a nearby BMW dealership to meet with responding officers. Id. at 2185.

Metro robbery detective Jeffery Clark ("Clark") responded to the BMW dealership and met with Incera, Jaquez, and Saldana. Id. at 2288. Incera, Jaquez, and Saldana all advised they believed there were two suspects involved in incident. Id. at 2291, 2299. Clark attempted to recover surveillance footage from the Superpawn, however there was no footage from outside the store during the incident. AA IX 2145; AA X 2292, 2294. Clark did recover a still photograph of the Acura taken from a business near the Superpawn. Id. at 2298.

On September 3, 2018, Saldana and Jaquez were working at the same Superpawn along with fellow employees: Melani Howard ("Howard"); Giovani Andino ("Andino"); Johnathan Rivera-Sandoval ("Sandoval"); and Adriane Serrano-Borjorquez ("Borjorquez").[4] AA XI 2471. Around 1:00 p.m., Andino and Borjorquez – the assistant store manager – were in a back

[4] Count 2 of the Indictment charged Trejo with Robbery against Serrano. AA I 2. Count 3 charged Robbery against Andino. Id. Count 4 charged Robbery against Jaquez. Id. Count 5 charged Robbery against Carla Reck ("Reck"), a Superpawn employee who was present on September 3, 2018 (see XI 2471) but did not testify at trial. AA I 3. Count 6 charged Robbery

office batching jewelry and completing miscellaneous paperwork. AA XII 2739. Sandoval was stationed at the front door to greet customers. Id. at 2856. Saldana had just returned to the store after picking up pizza for the staff. AA IX 2194.

Around 1:08 p.m. a man entered the Superpawn wearing a motorcycle helmet, black jacket, dark jeans, worker boots, gloves, and holding a firearm with another firearm strapped to his back. AA X 2195-96. Sandoval activated the alarm pendant he was wearing to alert police. AA XII 2859. Howard dropped to the floor and eventually hid inside a cabinet. AA XI 2476-77. Saldana ran to the manager's office and told Borjorquez and Andino "210," which is a security code indicating a robbery in progress. AA X 2196. The suspect ordered everyone in the store to lay on the floor. Id. at 2364-65. Meanwhile, from her hiding place in the cabinet, Howard called 911. AA XI 2477.

Borjorquez exited the office ignoring the suspect's request to get on the ground. AA XIII 2935. Borjorquez told the suspect she was the manager and advised, "just tell me what you want." Id. at 2937. The suspect told Borjorquez to set the time-lock safe and zip tie the front doors. Id. Borjorquez unsuccessfully attempted to zip tie the front doors. Id. at

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against Sandoval. Id. Count 7 charged Robbery against Saldana. Id. Count 8 charged Robbery against Howard. Id.

2937-38. The suspect then ordered Borjorquez to open the tills where employees kept cash. Id. at 2938. The suspect told Borjorquez he did not want "any of that track pack shit[.]" Id. at 2939. After Borjorquez placed the money from each till into the suspect's backpack, the suspect ordered her to open the jewelry cases and put the jewelry into the backpack. Id. at 2939-40. After Borjorquez complied with the suspect's request for the jewelry, he took her back into the office where the safe was located. Id. at 2943. Once in the office the suspect became frustrated that the time-delayed safe had not opened yet. Id. Meanwhile, two customers attempted to enter the store. Id. According to Borjorquez, the suspect told the customers to enter while Borjorquez told them to run. Id.

The suspect demanded Borjorquez let him exit through the Superpawn's back door. Id. at 2945. However, Borjorquez explained her key to the backdoor had broken and she could not open the door. Id. at 2949. The suspect then went to the front door, peaked outside, and returned to Borjorquez. Id. The suspect allegedly grabbed Borjorquez, placed his gun to her head, and forced her towards the front door with him. Id. at 2950. Meanwhile, numerous police officers began to arrive.

Officer Maria Fulwiler ("Fulwiler"), along with her partner Officer Thomas Carrigy ("Carrigy") arrived first – before the suspect and

Borjorquez exited the Superpawn – and parked at a business next door. AA XI 2528. As Fulwiler began broadcasting information over her radio she noticed the suspect and Borjorquez exiting the Superpawn. Id. at 2532. Officers Brain Farrington ("Farrington") and Keenan Graham ("Graham") arrived just as the suspect and Borjorquez exited. AA XII 2894.

According to Borjorquez, the suspect had a firearm placed at the right side of her head as he led her from the Superpawn to his vehicle. AA XIII 2951-52. Officers gave the suspect verbal commands to drop the firearm. AA XI 2534. Borjorquez decided to attempt to disarm the suspect. AA XIII 2952. As Borjorquez struggled to disarm the suspect, one round discharged striking the ground and causing a "stovepipe malfunction" in the firearm.[5] AA XI 2534, 2584, 2651; AA XII 2835, 2898; AA XIII 2952. Borjorquez was able to take the firearm. AA XIII 2953. Borjorquez broke free from the suspect, ejected the firearm magazine, threw the gun, and ran back towards the Superpawn. Id. at 2954. At that point officers Carrigy, Farrington, and Graham shot the suspect.[6] AA XI 2588; AA XII 2837, 2900. While on the ground, the suspect still had another firearm strapped to his back. AA XI 2535, 2595; AA XII 2901. Officers gave verbal commands to remove the

[5] A "stovepipe malfunction" occurs when a bullet cartridge becomes stuck in a firearm's ejection port. AA XI 2634.

[6] Carrigy discharged his weapon two (2) times, Farrington three (3) times, and Graham five (5) times. AA XIII 3011.

weapon. AA XI 2535, 2595; AA XII 2901. The suspect complied and officers placed him in custody. AA XI 2538. The suspect removed his motorcycle helmet and advised his name was Mario Trejo. Id. at 2539.

After Trejo's arrest, Crime Scene Analysts ("CSA") from Metro processed the scene for evidence. AA XI 2626. CSA Tabatha Paine ("Paine") recovered the handgun – a Glock – and the magazine that Borjorquez had removed. Id. at 2633. Paine also collected Trejo's helmet, boots, backpack,[7] facemask, tactical belt, zip ties from the Superpawn door, and another firearm. Id. at 2633-37, 2660. Paine swabbed the Glock, 3 firearm magazines, and a knife, for DNA and obtained a buccal swab from Borjorquez.[8] Id. at 2639, 2643, 2645. Paine noted there was a bullet impact in the ground near the vehicle Trejo drove to the Superpawn,[9] three impacts in the rear passenger side of the vehicle, one on the rear driver's side, three

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[7] Paine recovered wire cutters, US currency, and jewelry from inside the backpack. Id. at 2662. According to Tim Hiner ("Hiner"), the regional loss prevention manager from Superpawn, there was approximately $38,000.00 worth of jewelry and $3,500.00 in cash from Superpawn in the backpack. AA IX 2143, 2166. Hiner also confirmed Trejo was employed at the Superpawn between July 2011 and November 2012. Id. at 2148.

[8] Police obtained Trejo's buccal on September 12, 2018, while Trejo was in custody at the Clark County Detention Center. AA X 2273

[9] Paine did not use a bullet hole testing kit on this impact. Rather, she assumed it was a bullet impact based upon her experience. AA XII 2677. Paine acknowledged she did not recover the slug from the bullet that allegedly struck the pavement during Borjorquez's struggle with Trejo over the Glock. Id.

in face of the wall near where the vehicle had been parked, and two more farther down the wall. Id. at 2651.

Police executed a search warrant on the white Hyundai Trejo drove to the Superpawn. AA X 2269. The Hyundai had a Utah plate attached to the rear, which was not assigned to that vehicle, and a Nevada plate in the trunk, which was assigned to the vehicle. Id. at 2269, 2272; AA XII 2693. The Hyundai was registered to Trejo's friend Matthew Jason Mongeau ("Mongeau").[10] AA XII 2704. Elsewhere in the vehicle police recovered a cell phone from the center console, a .40 caliber magazine from the center console, a satchel, and an "AK-47-style pistol." AA X 2267, 2271-72; AA XII 2697. Inside the satchel police discovered two .40 caliber magazines. AA XII 2697. Trejo's DNA was located on many items recovered from his person and from inside the Hyundai as well. AA XII 2730-33.

Metro Detective Jeffery Clark ("Clark") first spoke to Trejo on September 6, 2018, while Trejo was in the hospital recovering from his gunshot wound. AA X 2308-09. Clark had been assigned to investigate the August 4, 2018, attempt robbery at the same Superpawn. Id. at 2301. Clark believed based upon similarities between the incidents, Trejo was likely the

[10] Trejo called Mongeau on September 3, 2018, around 10:00 am asking to borrow the Hyundai. AA XII 2808. Mongeau agreed after Trejo advised he needed the vehicle to "pick up his two daughters and his girlfriend from her mother's house." Id. at 2809.

suspect from the August 4th incident. Id. According to Clark, during his interview Trejo admitted he and another individual attempted to rob the Superpawn on August 4, 2018, and both possessed firearms at the time. Id. at 2319. Additionally, Trejo admitted to robbing the Superpawn on September 3, 2018, and that he knew Borjorquez from high school. Id. at 2321-22. At the interview's conclusion, Trejo wrote an apology letter to the alleged victims.[11] Id. at 2322.

Although police recovered a cell phone from inside the Hyundai on September 3, 2018, the phone was eventually examined three years later, on September 14, 2021. AA IX 2137. According to Metro Detective Barry Jones ("Jones"), the cell phone showed a Google search on September 1, 2018, at 12:28 p.m. for the Superpawn located at Rainbow and Charleston Blvd. Id. at 2101-02. The phone also contained text messages from August 4, 2018, September 1, 2018, and September 2, 2018, which police believed discussed the August 4, 2018, incident and preparation for the September 3, 2018, incident. See Id. at 2010-2125. Police also recovered text messages from the phone from Mongeau on September 3, 2018, asking to return his vehicle. Id. at 2126-28. Finally, police recovered a photograph of an

[11] The State admitted the letter at trial as State's Exhibit 158. AA X 2323.

unidentified individual wearing a skull mask and sunglasses which was placed or transferred onto the phone on March 22, 2018. Id. at 2103-05.

SUMMARY OF THE ARGUMENT

Numerous errors occurred in the proceedings below which individually and collectively deprived Trejo of his Due Process right to a fair trial.

First, due to injuries from an incident which occurred before the incidents at issue in this case – where Trejo had been shot – as well as his injuries during the October 3, 2018, incident, Trejo suffered a medical episode at the Clark County Detention Center while awaiting trial. This episode left Trejo unable to speak. Although the court became aware of Trejo's disability, it did not appoint a registered community interpreter to assist Trejo during court appearances until trial. Accordingly, Trejo could not effectively communicate with the court during critical stages of the proceedings. The court's failure to appoint an interpreter is reversible error.

Second, prior to trial Trejo requested the court appoint him alternate counsel or allow him to represent himself. The court denied Trejo's request for alternate counsel without conducting an adequate inquiry. Moreover, even though Trejo's request for self-representation was equivocal, the court nevertheless conducted two inadequate canvasses before allowing Trejo to

represent himself. The court's decision violated Trejo's right to counsel and is structural error.

Third, prior to trial Trejo requested a copy of all digital evidence the State intended to use at trial. Although the State and the court acknowledged the obligation to provide Trejo with copies, the State did not provide them to Trejo. Instead, the State relied upon the fact that it could not provide Trejo with copies while Trejo was incarcerated and that it had previously provided copies to Trejo's standby counsel. Trejo objected at trial when the State introduced videos he had not seen. The district court overruled his objection without fashioning a remedy for the State's discovery violation. This error violated Trejo's fundamental right to a fair trial and impacted the jury's verdict.

Fourth, the district court failed to adequately instruct the jury regarding the law governing the case. The court failed to instruct the jury regarding Second-Degree Kidnapping as a lesser included offense to First-Degree Kidnapping even though the State presented evidence at trial which absolved Trejo of guilt for the greater offense while supporting guilt for the lesser offense. Additionally, Trejo moved to suppress his statements prior to trial arguing he did not make them voluntarily. However, although the court denied Trejo's motion by finding the statements were voluntarily, the court

failed to offer an instruction advising the jury it was obligated to determine whether statements Trejo made to police were voluntary. These two instructional errors violated Trejo's fundamental right to a fair trial before a fully instructed jury.

Fifth, the State intentionally elicited testimony from a witness that implicated Trejo in an uncharged criminal act. The State compounded this error by failing to immediately request a limiting instruction. The court also erred with respect to the bad act by not offering Trejo a limiting instruction either immediately after the State introduced the evidence or in jury instructions.

Sixth, the State failed to present sufficient evidence to support Trejo's conviction for Conspiracy to Commit Robbery. The State alleged Trejo conspired with an unnamed individual to commit robbery and in furtherance of this conspiracy robbed Borjorquez on October 3, 2018. However, at trial the only evidence the State presented concerning any "conspiracy" involved the incident on August 4, 2018. Indeed, the State explicitly argued to the jury that the evidence concerning the conspiracy on August 4th somehow proved beyond a reasonable doubt that Trejo committed conspiracy to commit robbery. However, based upon its charging decision the State had

to prove that Trejo's robbery of Borjorquez on October 3rd proved he conspired with someone to commit robbery.

Finally, even if this court does not believe any individual error is sufficient to reverse Trejo's convictions, the cumulative effect of the errors violated Trejo's right to a fair trial and should warrant reversal. The charges Trejo faced were extremely serious. Indeed, Trejo was sentenced to life in prison. Additionally, the non-structural errors in this case were numerous and impacted Trejo's fundamental right to a fair trial before a fully informed jury. Moreover, although there was significant evidence to support some charges, the evidence as to others was not overwhelming.

ARGUMENT

I. The District Court Violated Trejo's Right to an Interpreter at Critical Stages.

Pursuant to NRS 50.051, "[a]n interpreter **must** be appointed at public expense for a person with a communications disability **who is a party to** or a witness in a criminal proceeding." (Emphasis added). "Person with a communications disability' means a person who, because the person is deaf **or has a physical speaking impairment**, cannot readily understand or communicate in the English language or cannot understand the proceedings." NRS 50.050(1)(b) (emphasis added).

In proceedings involving a person with a communication disability the court "**shall appoint a registered community interpreter** to interpret the proceeding to that person and to interpret the testimony of that person to the court, magistrate or other person presiding over the proceeding." NRS 50.0515(1) (emphasis added). A "registered community interpreter" is a person "registered with the Aging and Disability Services Division of the Department of Health and Human Services pursuant to NRS 656A.100 to engage in the practice of sign language interpreting in a community setting." NRS 50.050(1)(c).

If a registered community interpreter is not available, or if procuring one would substantially delay court proceedings, the court "may, after making a finding to that effect and conducting a *voir dire* examination of prospective interpreters, appoint any other interpreter that the court [] determines is readily able to communicate with the person with a communications disability, translate the proceeding for him or her, and accurately repeat and translate the statements of the person with a communications disability to the court[.]" NRS 50.0515(2). Once appointed, the prospective interpreter must "swear or affirm that he or she will make a true interpretation in an understandable manner to the person for whom he or she has been appointed, and that he or she will repeat the

statements of the person with a communications disability in the English language to the best of his or her ability." NRS 50.053(1).

Here, while incarcerated awaiting trial, Trejo lost his ability to speak. See AA I 222; 243-46; AA V 1105. At the hearing on Trejo's Motion to Dismiss Counsel on March 24, 2021, the district court acknowledged Trejo's disability. See AA V 1105-06. The State did not contest the court's findings and noted Trejo's disability was apparent at previous hearings. See Id. at 1106 ("I know every other appearance we've had it's been a similar issue, Your Honor."). Nevertheless, the court did not appoint a communication disability interpreter to assist Trejo. Indeed, the court conducted numerous hearings thereafter – including Trejo's Faretta canvass[12] -- without interpreter assistance. See AA V 1109-73.

On September 23, 2021, Trejo, then representing himself, filed a "Motion for Proper In-Court Disability Adjustment" requesting assistance from an interpreter during all court appearances. AA I 243-46. The court granted his request and indicated it would appoint a certified court interpreter from Clark County Interpreter Services to assist Trejo during court appearances and trial. AA V 1175. Notwithstanding the court's order, no interpreter was present during any subsequent hearing including Trejo's

[12] Faretta v. California, 420 U.S. 806 (1975). The sufficiency of both canvasses will be addressed more fully *infra*.

second Faretta canvass. AA VI 1285-85. An interpreter was only present when trial began on April 18, 2022. Id. at 86.

This Court has never addressed a situation like Trejo's involving the need for a communications disability interpreter. Analogously however, in cases involving foreign language interpreters, this Court has noted, "[a] criminal defendant has a due process right to an interpreter **at all crucial stages of the criminal process**, irrespective of NRS 50.051, if that defendant in fact does not understand the English language." Ton v. State, 110 Nev. 970, 971 (1994) (emphasis added) (citing U.S. ex rel. Negron v. New York, 434 F.2d 386 (2nd Cir. 1970); State v. Hansen, 705 P.2d 466 (Ariz.Ct.App.1985); Parra v. Page, 430 P.2d 834 (Okla.Crim.App.1967)); see also State v. Faafiti, 513 P.2d 697, 699 (HI. 1973) ("It is general law that where a defendant cannot understand and speak English, the judge is required to appoint an interpreter to aid a defendant."). Indeed, because "[t]he defendant in a criminal case clearly has the right to be present throughout the various stages of his trial" (Hanley v. State, 83 Nev. 461, 466 (1967)), a defendant who needs, but is not provided, an interpreter "...might as well have been tried in his or her absence." Ton, 110 Nev. at 972. Appellate courts review a district court's decision on the need and use of interpreters for abuse of discretion and clear error. See Ton, 110 Nev. at

972; U.S. v. Mayans, 17 F.3d 1174, 1179 (9th Cir. 1994) ("Various cases have indicated that the use of interpreters in the courtroom is a matter within the trial court's discretion, and that a trial court's ruling on such a matter will be reversed only for clear error.") (Internal citations omitted)).

The court became aware of Trejo's disability on March 24, 2021. AA V 1105-06. Nevertheless, the court failed to provide a registered community interpreter at any subsequent hearing. Moreover, even after granting Trejo's request for a registered community interpreter on October 11, 2021 (AA V 1175), the court conducted all subsequent hearings without an interpreter present. These hearings included two Faretta canvasses where the court found Trejo waived his fundamental right to counsel. See AA V 1109-73; AA VI 1285-85.

Additionally, Trejo appeared without an interpreter at three calendar calls and the hearings on his motions to suppress. See Id. at 1192, 1198; AA VI 1249, 1257, 1265, 1269, 1273. During these hearings the court would either have Trejo give a "thumbs up" or "thumbs down" to communicate yes or no or would have a corrections officer read Trejo's brief handwritten statements. Id. At some critical hearings the court did not address Trejo at all. See AA VI 1269. The court finally used a foreign language interpreter

from Clark County Interpreter Services – without first complying with NRS 50.0515(2) – when trial began on April 18, 2022. AA VI 1285.

The district court clearly erred by failing to have a registered community interpreter present at all Trejo's court hearings and trial because NRS 50.051, *et seq*, **mandates** the court do so. Moreover, the error was not harmless. As will be discussed more fully *infra*, the court conducted two Faretta canvasses where Trejo ostensibly waived his fundamental right to counsel without an interpreter present. Without question, Trejo's inability to communicate – except for hand signals or short written responses read by a correction's officer – affected the hearings' adequacy. Additionally, and which will also be discussed in greater detail *infra*, without an interpreter Trejo was unable to advocate for himself at critical hearings – including the hearings where the court refused to consider his motions to suppress. Finally, without an interpreter present, the court refused to allow Trejo to make representations at two calendar calls preceding trial and instead allowed the district attorney to make representations on Trejo's behalf. AA VI 1266, 1269-71. Thus, given the clear and harmful error in refusing to have an interpreter aid Trejo at critical stages, this Court should reverse Trejo's convictions.

II. The District Court Violated Trejo's Fundamental Right to Counsel.

A. The District Court abused its discretion in denying Trejo's Motion to Substitute Counsel.

Both the Sixth and Fourteenth amendments to the United States Constitutions guarantee a criminal defendant the right to counsel at critical stages of the proceedings. See Patterson v. State, 129 Nev. 433, 437 (2013) (citing U.S. Const. amend. VI, XIV; Gideon v. Wainwright, 372 U.S. 335, 341-45 (1963); U.S. v. Wade, 388 U.S. 218, 224 (1967)). When an indigent criminal defendant is appointed counsel, he cannot reject and substitute that counsel absent adequate cause. Junior v. State, 91 Nev. 439, 441 (1975). However, when a defendant moves to dismiss and substitute counsel, "considerably in advance of trial, the court may not summarily deny the motion but must adequately inquire into the defendant's grounds for it." Gallego v. State, 117 Nev. 348, 363 (2001) (abrogated on other grounds by Nunnery v. State, 127 Nev. 749, 769 (2011)).

This Court reviews the district court's denial of a motion to substitute appointed counsel for abuse of discretion. Young v. State, 120 Nev. 963, 968 (2004). When reviewing whether the district court abused its discretion this Court looks at three factors: (1) the extent of the conflict; (2) the adequacy of the district court's inquiry; and (3) the timeliness of the motion.

Id. (citing U.S. v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). If the district court abuses its discretion regarding substitution of counsel the error is structural. E.g., Patterson, 129 Nev. at 175.

Here, Trejo filed a proper person motion to dismiss counsel on March 2, 2021. AA I 117. The motion concluded by requesting, "either allow me to invoke my rights to self-represent **or that the courts appoint the defendant effective legal counsel**." Id. at 119 (emphasis added). The Deputy Public Defender assigned to Trejo's case filed his own motion on March 16, 2021, requesting to withdraw as attorney or record. Id. at 121. That motion similarly requested, "to be withdrawn as the attorney of record, so Defendant can represent himself **or obtain new counsel**." Id. at 122 (emphasis added). When Trejo filed his motion, trial was scheduled for May 24, 2021. AA V 1102.

At the initial hearing on Trejo's motion the court acknowledged Trejo's motion requested to dismiss counsel, claimed Trejo had made "bare allegations," but immediately pressured Trejo into self-representation – all while knowing Trejo could not effectively communicate. AA V 1104-05. Indeed, the court questioned whether it could conduct a Faretta canvass considering Trejo could not speak. Id. at 1105. After a brief discussion,

which did not include the need for an interpreter, the court continued the hearing. Id. at 1107-08.

At the continued hearing on March 31, 2021, the court broached Trejo's request for substitute counsel. Id. at 1110. Trejo was not present in court due to Covid19 protocols and instead appeared *via* Blue Jeans video from the Clark County Detention Center. Id. at 1111. Without a registered community interpreter present, the court allowed a correction officer to read a statement Trejo had prepared. Id. The court cautioned Trejo that it had "limited time because other courts need to use the Blue Jeans link in the jail so there's no need to write a novel."[13] Id. at 1112. Trejo's written statement indicated that he felt due to his inability to speak, the "true facts of the case and [] medical condition" had not been adequately conveyed to the court during previous hearings. Id. The court then asked Trejo to explain "what Mr. Henry has or has not done that you're saying that." Id. at 1113. After Trejo briefly expressed some complaints regarding counsel's representation, the court asked counsel to respond. Id. at 1114-15. After hearing counsel's explanation, the court denied Trejo substitution request stating, "the issues that you've presented have not been persuasive as to whether or not you will

[13] Although the court refused to allow Trejo sufficient time to explain his concerns with counsel, the court conducted an entire Faretta canvass that same morning without any concern for "limited time."

be allowed to get different counsel." Id. at 1116. The court informed Trejo his only option was to represent himself. Id. Trejo indicated he did not wish to represent himself but would rather do so than proceed with assigned counsel. Id. at 1117.

The district court abused its discretion in denying Trejo's motion to substitute counsel. First, Trejo's motion was timely. Indeed, neither the State nor the court objected to timeliness below. Second, the extent of the conflict was not sufficiently explored due to the court's inadequate inquiry. Trejo had been incarcerated and unable to post bail for 32 months when the court considered his motion. Id. at 1114. Although the court believed Trejo's concerns were unimportant and counsel's refusal to file motions and present certain arguments were merely "strategic decisions" (Id. at 1116), that is not necessarily germane to whether there existed an irreconcilable conflict. Indeed, there can be an irreconcilable conflict even if counsel believes he is making wise decisions in the case. Moreover, the court's abbreviated inquiry only explored Trejo's concerns regarding motions and bail. The court did not inquire into counsel's communication with Trejo regarding the case, whether counsel had explained the charges to Trejo, and discussed the evidence and possible defenses. The court did not inquire into what steps counsel had taken to repair the relationship and did not ask

counsel why he filed his own motion to withdraw. Although the court need not invade attorney-client confidentiality, "respect for the privilege should not prevent it from engaging in a genuine inquiry into the quality of defense counsel's representation." Young, 120 Nev. at 971.

B. Trejo did not knowingly and voluntarily waive his right to counsel.

A defendant may waive his right to counsel and represent himself. See generally Faretta, 422 U.S. at 819-20. However, a defendant who desires to waive counsel "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Miles v. State, 500 P.3d 1263, 1266 (Nev. 2021) (internal quotations omitted). Thus, "an accused who chooses self-representation must satisfy the court that his waiver of the right to counsel is knowing and voluntary." Vanisi v. State, 117 Nev. 330, 337-38 (2001).

"A court may [] deny a request for self-representation if the request is untimely, **equivocal**, or made solely for purposes of delay or if the defendant is disruptive." (Emphasis added). Id. at 338. This Court "indulge[s] in every reasonable presumption against waiver' of the right to counsel." Hooks v. State, 124 Nev. 48, 57 (2008). (quoting Brewer v. Williams, 430 U.S. 387, 404 (1977)). "A conviction obtained after an invalid waiver of the

right to counsel—that is, one that fails to demonstrate that the defendant knowingly, intelligently, and voluntarily waived the right—is per se invalid and is not subject to harmless-error analysis". Miles, 500 P.3d at 1268.

During Trejo's initial Faretta canvass on March 31, 2021, the court failed to provide Trejo with a registered community interpreter and instead relied upon hand signals and the correction's officer to relay information to the court while Trejo appeared *via* Blue Jeans video. Based upon this fact alone this Court should reverse Trejo's conviction.

Nevertheless, during that first canvass Trejo also expressly advised that he did not want to represent himself but instead merely desired another attorney. AA V 1117. Thus, Trejo's supposed request for self-representation was equivocal and the court should have – at minimum – discussed appointing conflict counsel for the limited purpose of discussing the consequences of self-representation. See SCR 253(1); Hooks, 124 Nev. at 54.

Additionally, during the first canvass the court noted Trejo did not accurately describe Burglary's elements but failed to correct him. AA V 1124; see Miles, 500 P.3d at 1266 ("a trial court should not ignore a defendant's lack of understanding about the charges[.]"). Although Trejo indicated a rudimentary understanding of First-Degree Kidnapping's

elements, he did not explain the elements the State had to prove as charged. AA V 1125. The State charged Trejo with kidnapping under a theory Trejo "willfully, unlawfully, and feloniously, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away ADRIANE SERRANO against her will, and without her consent, for the purpose of committing robbery, with use of a deadly weapon, to wit: a firearm." AA I 3. However, Trejo explained he believed the State only had to prove he moved "someone against their will physically while in possession of a firearm." AA V 1125. The court failed to explain the State had to prove the movement was with the intent to commit robbery. See AA I 3; NRS 200.310(1).

Similarly, the court asked Trejo about Assault on a Protected Person's elements and Trejo explained, "To portray a threat or endanger a protected individual with a firearm." AA V 1125. This is inaccurate and the court failed to explain the actual elements of the crime. See NRS 200.471(1)(a)(1)-(2) ("As used in this section: (a) "Assault" means: (1) Unlawfully attempting to use physical force against another person; or (2) Intentionally placing another person in reasonable apprehension of immediate bodily harm.").

Next, the court informed Trejo it could not advise him regarding lesser included offenses. AA V 1131. However, while the court cannot

"advise" as an attorney would, the court is ultimately responsible for instructing the jury regarding lesser included offenses *sua sponte* if "there is evidence [presented by either side] which would absolve the defendant from guilt of the greater offense ... but would support a finding of guilt of the lesser offense." See Rosas v. State, 122 Nev. 1258, 1265 fn.9 (2006).

Trejo also indicated he did not understand the State's burden of proof and that he did not know how to make an appellate record. AA V 1132, 1134. In both instances the court failed to follow-up with Trejo.

At the second Faretta canvass – again without the aid of a community interpreter – Trejo provided a more accurate explanation regarding Burglary's elements, and the State's burden of proof, but once again incorrectly explained the elements for Assault and First-Degree Kidnapping as charged. AA VI 1213-14, 1238. Trejo also indicated an incorrect understanding regarding how to make an appellate record. Id. at 1241. Trejo instead essentially explained how he would file an appeal – ostensibly because he incorrectly thought he had could represent himself on appeal. See Id. ("If I made an appeal, I'd first document everything on record during Court or at trial, use any documents, evidence available, gather as much evidence available, and put it together in order to present it to the Nevada Court of Appeals."). Although the court noted Trejo was incorrect, it did not

explain why. Id. Finally, once again Trejo indicated he did not understand lesser included offenses or how to get lesser included offenses before the jury. Id. at 1223.

Based upon the aforementioned, the district court erred by finding that Trejo knowingly and voluntarily waived his fundamental right to counsel. Trejo's "waiver" was equivocal. The court did not give Trejo time to counsel with conflict counsel on the dangers of self-representation. Trejo repeatedly failed to explain essential elements of some charged crimes and the court failed to point out his error and inform Trejo that his "lack of understanding is one of the disadvantages of representing oneself." Miles, 500 P.3d at 1270. Moreover, Trejo indicated he did not understand lesser included offenses or the court's obligation to instruct on them. Finally, Trejo's responses indicated he had no idea how to preserve appellate issues for review in the event he was convicted.

The court should have rejected Trejo's request for self-representation when Trejo equivocated during his first canvass. Nevertheless, the court also should have explained that Trejo was acting on incorrect information. Had the court done this, Trejo would have almost certainly accepted counsel's assistance. Accordingly, the district court failed to ensure Trejo

knowingly waived his fundamental right to counsel and Trejo respectfully requests this Court reverse his convictions.

III. The District Court Abused its Discretion by Admitting Videos at Trial Which Had Not Been Provided to Trejo.

Pursuant to NRS 174.235(1)(a)-(c) the State must allow a defendant to inspect and make copies of the defendant's or any witness's statements, results of examinations, tests, or experiments, books, papers, documents, or tangible objects the State intends to introduce in its case in chief. If the court becomes aware "at any time during the course of the proceedings" that "a party has failed to comply [] the court may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." NRS 174.295(2). "The district court has broad discretion in fashioning a remedy under [NRS 174.295]; it does not abuse its discretion absent a showing that the State acted in bad faith or that the nondisclosure caused substantial prejudice to the defendant which was not alleviated by the court's order." Evans v. State, 117 Nev. 609, 638 (2001), overruled on other grounds by Lisle v. State, 131 Nev. 356, 366 n.5 (2015).

On May 6, 2021, Trejo filed a proper person motion to suppress digital evidence. AA I 171. Essentially, Trejo requested the court "suppress" digital evidence that the State relied upon in opposition to Trejo's motion for own recognizance release because Trejo had not been provided access to the materials. Id. at 171-75. At the hearing on Trejo's motion for release, the district court inquired of Trejo's standby counsel whether he had shown Trejo the digital evidence. See AA V 1153. Counsel advised he had shown Trejo "the videos that we have," but one video from inside the Superpawn had a "technical issue." Id. Because Trejo's motion only technically sought suppression for the hearing on his motion for release, the court took Trejo's motion off calendar finding it moot. Id. at 1166. The court did not provide Trejo with a disability interpreter at this hearing and instead utilized a correction's officer from the Clark County Detention Center. AA III 1155.

On March 4, 2022, Trejo filed a proper person "Brady[14] Motion of Discovery." AA III 553. In his motion Trejo noted he had received all evidence "on paper" but filed his motion "in order to meet all requirements needed for proper defense and for purposes of appeal in case of conviction."

[14] Brady v. Maryland, 373 U.S. 83 (1963).

Id. The State filed no opposition and the Court granted Trejo's motion on April 15, 2022. AA VI 836; AA VI 1257.

At trial, during opening statements, the State began to play video surveillance footage. AA IX 2048. Trejo objected. Id. At a hearing outside the jury's presence Trejo advised he had not seen the videos the State sought to play.[15] Id. Furthermore, Trejo advised he had asked the prosecutor both in writing and *via* telephone prior to trial to provide him an opportunity to review any videos the State intended to use at trial. Id. Trejo claimed the prosecutor told Trejo "...due to my status of incarceration, I did or could not access these digital pieces of evidence." Id. Trejo indicated he had only seen partial clips from some videos "almost four years ago." Id.

The prosecutor did not address Trejo's claim that he asked for the videos *via* mail and telephone and instead advised, "[t]his video was provided three and a half years ago to Mr. Henry. I imagine Mr. Henry, as an officer of the court, could represent that he did receive the video. I assume the video was transferred over to Mr. Trejo." Id. at 2050. In response, standby counsel confirmed he had received the videos but did not

[15] Although Trejo characterized the State's failure to provide him with the videos as a "Brady violation," and the State addressed its Brady obligations in response, because the issue arose prior to verdict it is more accurately an issue involving a late disclosure or non-disclosure of evidence related to the prosecution. See Thomas v. Eighth Jud. Dist. Ct., 133 Nev. 468, 478 n.12 (2017).

show every video to Trejo and did not provide them to Trejo once the court granted Trejo's request for self-representation because, "[h]e's not allowed to have flash drives or CDs. I did not send those as part of discovery request." Id. at 2052-53.

The court overruled Trejo's objection finding that because the videos had at one point been provided to Trejo's standby counsel, Trejo was somehow in "constructive possession" of the videos. Id. at 2057. Moreover, although Trejo's standby counsel did not provide Trejo the videos due to Trejo's incarceration, the court advised "you are treated the same[.]" Id. at 2059. The court also claimed Trejo should have filed a motion prior to trial based upon his inability to view the videos. Id. at 2063. In response, Trejo accurately reminded the court that he had filed two motions [motion to suppress digital evidence and Brady motion of discovery] prior to trial advising the court he had not reviewed the videos. Id. at 2065. After the Court overruled Trejo's objection, Trejo renewed his objections when the State played various 911 calls and bodycam videos at trial. See AA XI 2450,[16] 2492,[17] 2542,[18] 2604;[19] AA XII 2781,[20] 2848,[21] 2907.[22]

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[16] Incera's 911 call. Because the State could not confirm it had provided Incera's 911 call to Trejo's former counsel the prosecutor chose not to introduce the call. AA XI 2457-58.

The district court abused its discretion by allowing the State to admit digital evidence at trial which had not been provided to Trejo. First, standby counsel confirmed that he had not shown Trejo the videos and due to Trejo's incarceration, he did not give Trejo the digital media while Trejo was housed at the detention center because it would be contraband. See AA IX 2052-53. Second, standby counsel – a role totally undefined by statute and generally undefined by caselaw – had no obligation to visit Trejo at the detention center and spend hours reviewing video. Indeed, when the court appointed the public defender as standby counsel it limited his role to filing motions "that you send him and have his investigator serve subpoenas on your behalf." AA V 1137; see also AA VI 1245. The court told Trejo that standby counsel would not "be your assistant" nor "do any legal research for you." Id. Additionally, the court explained, "if you lose your nerve in the middle of trial, Mr. Henry's not going to take over for you." Id. Thus, the

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[17] The court admitted Howard's 911 call over Trejo's objection even though standby counsel could not confirm he played the call for Trejo when counsel represented Trejo. AA XI 2493.
[18] State's exhibit 141, Fulwiler's bodycam footage. AA XI 2542.
[19] State's exhibit 140, Carrigy's bodycam footage. AA XI 2603-04.
[20] State's exhibit 143, video from air surveillance helicopter. AA XII 2780-81.
[21] State's exhibit 139, Farrington's bodycam footage. AA XII 2848.
[22] State's exhibit 142, Graham's bodycam footage. AA XII 2907.

court should not have imputed "possession" to Trejo merely because Standby counsel possessed the videos when the court limited counsel's role.

Moreover, the State was aware of standby counsel's limited role and did not dispute that Trejo had asked the prosecutor *via* letter and telephone call for an opportunity to review the videos prior to trial. Therefore, the State could not rely on standby counsel to ignore its obligations under NRS 174.235 – which included providing Trejo (acting as his own attorney) an opportunity to review evidence the State intended to offer at trial. Simply put, it was not standby counsel's obligation to sit with Trejo at the detention center for hours – at taxpayer's expense – while Trejo watched videos to prepare for trial. Rather, that obligation was on the State of Nevada represented by the Clark County District Attorney's Office. Therefore, the State acted in bad faith.

NRS 174.295(2) provides the court with options when it appears a party has not complied with its discovery obligations. Here, the court arbitrarily and capriciously refused to consider these options. The court should have prohibited the State from introducing the videos at trial[23] because the State acted in bad faith and the State's non-disclosure caused

[23] Although the court expressed concern about re-starting trial, at minimum the court could have called a recess and played the videos for Trejo in the courtroom before resuming trial.

Trejo substantial prejudice which was not alleviated by the court because the court issued no remedy.

Given the court's refusal to fashion a remedy, Trejo could not adequately effectuate his fundamental right to confrontation through cross-examination because he only viewed the videos for the first time at trial. Had Trejo been provided an opportunity to review the videos prior to trial, Trejo could more effectively cross-examine witnesses and cast doubt on the State's allegations that he committed First-Degree Kidnapping and Assault on officers Carrigy and Graham with a deadly weapon. See AA I 3-4; AA IX 2048-49. Accordingly, this Court should reverse Trejo's convictions.

IV. The District Court's Jury Instruction Errors Violated Trejo's Right to a Fair Trial.

"Upon the close of the argument, the judge shall charge the jury." NRS 175.161(1). In doing so, "the judge shall state to them all such matters of law the judge thinks necessary for their information in giving their verdict." NRS 175.161(2). Although "[e]ither party may present to the court any written charge, and request that it be given" (NRS 175.161(3)), the district court is ultimately responsible for ensuring that the jury is fully and correctly instructed. Crawford v. State, 121 Nev. 744, 754-55 (2005).

On appeal, this Court generally reviews the district court's decision regarding jury instructions under an abuse of discretion or judicial error

standard. Hoagland v. State, 126 Nev. 381, 384 (2010). However, this Court reviews whether a particular instruction contains a correct legal statement *de novo*. Guidry v. State, 510 P.3d 782, 787 (Nev. 2022).

"Generally, the failure to clearly object on the record to a jury instruction precludes appellate review." Green v. State, 119 Nev. 542, 545 (2003). However, this Court can review jury instructions for plain error. Id.; see also NRS178.602. Under plain error the Court determines whether there was error, whether the error is plain or clear from the record, and whether the error affected a defendant's substantial rights, i.e., the defendant must show prejudice or a miscarriage of justice. Green, 119 Nev. at 545. Essentially, this Court looks to "whether [the error] had a prejudicial impact on the verdict, contributed to a miscarriage of justice, or otherwise seriously affects the integrity or public reputation of the judicial proceedings. Guidry, 510 P.3d at 787 (internal citations omitted).

A. The district court erred by failing to instruct the jury on Second-Degree Kidnapping as a lesser included offense.

Pursuant to NRS 175.201, "Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against the person, and there exists a reasonable doubt as to which of two or more degrees the person is guilty, the person

shall be convicted only of the lowest." Additionally, NRS 175.501 states pertinently that a defendant "may be found guilty... of an offense necessarily included in the offense charged." An offense is necessarily included in the charged offense when the charged offense "cannot be committed without committing the lesser offense." Estes v. State, 122 Nev. 1123, 1143 (2007) (internal citations omitted).

In Lisby v. State, 82 Nev. 183, 187 (1966), this Court, interpreting NRS 175.501, noted three situations which implicate the necessity of lesser-included offense jury instructions and corresponding verdict forms.[24] Most germane to Trejo's case, this Court noted when evidence is presented which absolves a defendant of guilt for a greater offense yet supports guilt for a lesser offense the district court must instruct the jury on the lesser offense "without request." Id.

Years later, this Court revisited lesser-included offenses in Rosas v. State, 122 Nev. 1258 (2006). In Rosas, this Court explained that NRS 175.501 is essentially the codification of a prosecutor's common law right to allow the jury to consider a lesser-included offense when the State had failed to present sufficient evidence to convict for the greater offense. Id. at 1264.

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[24] When this Court decided Lisby, NRS 175.501 was codified as NRS 175.455. NRS 175.455, as quoted in Lisby, is identical to the present-day version of NRS 175.501. See Lisby, 82 Nev. at 187.

Rosas further explained that although NRS 175.501 codified a prosecutor's common law right to submit lesser-included offenses to the jury, subsequent court decisions acknowledged the defendant's right to lesser-included offense instructions as well. Id. Rosas noted defendants were entitled to lesser-included offense instructions, "because of the 'substantial risk' that a jury will convict despite a failure to prove the charged offense if the defendant appears guilty of some offense." Id. at 1264. Importantly, Rosas reaffirmed Lisby's requirement that the district court must offer a lesser-included offense instruction without request when, "there is evidence which would absolve the defendant from guilt of the greater offense ... but would support a finding of guilt of the lesser offense." Id. at 1265 fn. 9.

Here, the State alleged Trejo committed First-Degree Kidnapping by seizing, confining, inveigling, enticing, decoying, abducting, concealing, kidnapping, or carrying Borjorquez away against her will, and without her consent, **for the purposes of committing robbery** with use of a deadly weapon. AA I 3. The State's theory of prosecution was that Trejo moved Borjorquez from the Superpawn into the parking lot to facilitate escape with the property from the robbery. See Id.; AA XIII 3128-31.

When the State charges First-Degree Kidnapping under a theory of movement to commit a predicate offense, the State must prove a defendant's

specific intent to commit the predicate offense. See generally Lofthouse v. State, 136 Nev. 378, 380-81 (2020). However, under Second-Degree Kidnapping, the State merely needs to prove movement or detention against the victim's will. NRS 200.310(2) ("[a] person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, **or in any manner held to service or detained against the person's will**, is guilty of kidnapping in the second degree which is a category B felony." (Emphasis added). Second-Degree Kidnapping is a lesser included offense of First-Degree Kidnapping. See McNamara v. State, 132 Nev. 606, 620-21 (2016).

At trial the State presented evidence *via* Trejo's statement to police as well as Trejo himself that he moved Borjorquez from the Superpawn not to with the intent to rob Borjorquez, or facilitate escape with property, but instead to avoid being shot by police. See AA XIII 3059 ("you said the reason why you took Adriane out with you is because you, quote, 'because I didn't want to get shot.'"). The State also presented evidence that the movement was against Borjorquez's will. AA XIII 2950. Thus, the State presented evidence at trial which absolved Trejo of guilt for the greater

offense but supported guilt for the lesser offense. However, the court did not instruct the jury regarding Second-Degree Kidnapping. See AA IV 845-885.

Although Trejo did not object to the court's failure to instruct the jury on Second-Degree Kidnapping, Trejo asserts he has no obligation to ensure the district court correctly instructs the jury regarding lesser included offenses with evidentiary support. Lisby, 82 Nev. at 187. Moreover, this Court has previously held, "all written instructions given in a criminal case are deemed excepted to, and any error regarding them may be reviewed on appeal." Kuk v. State, 80 Nev. 291, 300 (1964).[25] Thus, Trejo contends the issue is "preserved" and not subject to plain error review.

Assuming this Court disagrees and believes plain error review applies, the error is plain from the record because Nevada law allows a defendant to be convicted of a lesser included offense, Second-Degree Kidnapping is a lesser included offense of First-Degree Kidnapping,[26] the State presented evidence to support a conviction for Second-Degree Kidnapping, and the court did not instruct the jury on Second-Degree Kidnapping. Moreover, the

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[25] Kuk cites NRS 175.515, which has since been repealed. Nevertheless, this Court has not formally declared the proposition embodied in NRS 175.515, upon which Kuk relied, is no longer applicable in Nevada.

[26] The district court acknowledged this during Trejo's Faretta canvass. See AA VI 1223.

error caused Trejo prejudice because based upon the evidence presented at trial, had the court instructed the jury it is substantially likely the jury would have found Trejo guilty of Second-Degree Kidnapping and not First-Degree. And had Trejo been convicted of Second-Degree Kidnapping, he could not have been sentenced to life in prison. AA VI 901.

B. The court erred by failing to instruct the jury regarding whether Trejo's supposed confession was voluntary.

"Nevada follows the Massachusetts rule when the voluntariness of a defendant's statement is put in issue." Laursen v. State, 97 Nev. 568, 570 (1981) (citing Carlson v. State, 84 Nev. 534 (1968)). Under the Massachusetts rule, if the trial court determines the defendant's statements are voluntary it can admit the statements at trial, but "**must** later submit the issue by appropriate instruction to the jury. Id. (Emphasis added).

Prior to trial Trejo file two motions to suppress statements he made to the police. See AA III 537-49; AA III 738-750. In both motions Trejo essentially argued he was incapacitated at the time he spoke with police and could not voluntarily waive his right to counsel and that police used coercive questioning tactics. Id. at 539-41, 741-44.

In opposing Trejo's first motion, the State argued the court should deny Trejo's motion because it failed to comply with Rule 3.20(b) of the Rules of Practice for the Eighth Judicial District Court, which requires a

moving party to file "a memorandum of points and authorities in support of each ground thereof." Id. at 560. The State argued alternatively that Trejo's statements were voluntary. AA III 561-565. The court denied Trejo's motion on March 23, 2022, based solely upon non-compliance with Rule 3.20(b).[27] AA VI 1262.

Trejo filed a second Motion to Suppress statements on April 6, 2022, with a request for a Jackson v. Denno, 378 U.S. 368, 380 (1964) evidentiary hearing. AA III 738-50. This motion included points and authorities. Id. The State filed an Opposition on April 7, 2022. AA IV 762. The State argued Trejo's motion was untimely under Nevada Rules of Criminal Procedure, Rule 8(1) and Eighth Judicial Dist. Ct. Rule 3.20(a). Id. at 767. The State also argued Trejo's statements were voluntary. Id. at 768-772. The court entertained argument on Trejo's motion on April 18, 2022, just before jury selection. AA VI 1276. A registered community was not present. Id. at 1272-83. The court denied Trejo's request for an evidentiary hearing due to timeliness. Id. at 1279. Additionally, the court found Trejo's statements were voluntarily.[28] Id.

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[27] The court filed its written order denying Trejo's motion on March 29, 2022. AA III 667.

[28] The court filed its written order denying Trejo's motion on June 9, 2022. AA IV 895-97.

Although the court concluded Trejo's statements were voluntary, the court did not offer a jury instruction at trial advising the jury it had to determine whether Trejo's statements were voluntary. Therefore, the court clearly erred. See Laursen, 97 Nev. at 570; Grimaldi v. State, 90 Nev. 83, 88 (1974). Moreover, while Trejo did not object to the court's failure to include the required jury instruction, Trejo contends the court's failure to properly instruct the jury is not subject to plain error review.

First, Trejo is unaware of any **published decision** from this Court holding that the district court's failure to provide a jury instruction on voluntariness is reviewable only for plain error in the absence of an objection.[29] Second, in his dissent in Grimaldi, Chief Justice Thompson indicated the trial court has a *sua sponte* duty to instruct on voluntariness when the issue has been raised and decided by the court. See Grimaldi, 90 Nev. at 89 (Thomspon, C.J., dissenting (citing authorities which held court has *sua sponte* duty to instruct jury on voluntariness)). Third, NRS 175.161(2) mandates that the court must instruct the jury on the law

[29] This Court has addressed, in a published decision, counsel's failure to request a voluntariness instruction in the context of a post-conviction ineffective assistance of counsel claim. See Dawson v. State, 108 Nev. 112, 120 (1992). However, in Dawson this Court found counsel's failure to request an instruction was not unreasonable under Strickland v. Washington, 466 U.S. 668 (1984) because the voluntariness of defendant's statements was not challenged prior to trial.

irrespective of the Defendant's right to present other instructions. Fourth, this Court has repeatedly recognized it is the court's obligation to ensure the jury is fully and correctly instruction on the law. E.g., Crawford, 121 Nev. at 754-55. Accordingly, this Court should review the district court's failure to accurately instruct the jury on the law regarding voluntariness for harmless error. Grimaldi, 90 Nev. at 85-86.

Trejo contends the error is not harmless. Notwithstanding the court's conclusion that his statements to police were voluntary, the jury could have easily determined that Trejo's medical condition at the hospital, use of painkillers, and his mental state, rendered his statements involuntary. Moreover, while there was other evidence – aside from his statements – implicating Trejo in the October 3rd incident, there was very little evidence, apart from Trejo's statements, implicating him in the August 4, 2018, incident. Additionally, the State never established definitively that the text message on the phone recovered from Trejo's vehicle which was sent on August 4, 2018, to Michelle Padilla stating, "there was a hiccup," came from Trejo or that it implicated him in the attempted robbery.[30] See AA IX 2117. Finally, no victim from the August 4th incident identified Trejo as the perpetrator. Indeed, the only definitive evidence implicating Trejo in the

[30] The State acknowledged the message was only circumstantially relevant to the attempt robbery charge. AA IX 2119.

August 4th incident was his statement to police. Accordingly, failure to instruct the jury on voluntariness, when it was substantially likely the jury would find the statements involuntary, "had substantial and injurious effect or influence in determining the jury's verdict." Tavares v. State, 117 Nev. 732 (2001); NRS 178.598.

V. The District Court Erred by Allowing the State to Admit Bad Act Evidence and by Not Providing a Limiting Instruction.

Evidence of uncharged crimes, wrongs, or bad acts is presumptively inadmissible at trial. NRS 48.045(2). However, the evidence may be admissible for other purposes. Id. Nevertheless, use of uncharged bad act evidence is heavily disfavored in our criminal justice system. Tavares, 117 Nev. at 725. In particular, "[e]vidence of uncharged misconduct may unduly influence the jury, and result in a conviction of the accused because the jury believes he is a bad person" Berner v. State, 104 Nev. 695, 697 (1988).

To overcome the presumption of inadmissibility, the party seeking to introduce bad act evidence must request a hearing outside the presence of the jury and establish: "(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (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."

Bigpond v. State, 128 Nev. 108, 117 (2012). If, after the hearing, the court admits the evidence it "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 trial reminding the jurors that certain evidence may be used only for limited purposes." Tavares, 117 Nev. at 733. The defendant is not required to ask for the limiting instructions (Id. at 731) but can explicitly waive the instruction. Mclellan v. State, 124 Nev. 263, 270 (2008).

When police searched the vehicle Trejo used to drive to the Superpawn they discovered a firearm inside. See AA X 2277. At trial, Detective Penny testified regarding the recovered firearm noting:

> This is a semiautomatic -- this would be considered a pistol in its configuration. However, it has been modified **to make it a short-barrel rifle**.
>
> In essence, with a folding stock on it, had – this makes it, **by legal definition, a short-barrel rifle**. A rifle would be anything a 16-inch barrel or over, which it should have. By having the fixed stock on it, **you need to have a federal authorization to have it with a 10-inch barrel as it is in this configuration**.
>
> Id. at 2277-28. (Emphasis added).

Pursuant to NRS 202.275, it is a category D felony in Nevada to possess a rifle with a barrel less than 16 inches. Therefore, the State,

through Detective Penny, introduced prejudicial bad act evidence against Trejo by claiming he unlawfully possessed a "short-barrel" rifle. See Thomas v. State, 114 Nev. 1127, 1141 (1998) ("The test for determining whether a statement refers to prior criminal history is whether the jury could reasonably infer from the facts presented that the accused had engaged in prior criminal activity."). The State compounded the error by not immediately requesting a limiting instruction. Tavares, 117 Nev. at 731 ("[b]ecause the prosecutor is the one who must seek admission of uncharged bad act evidence and because the prosecutor must do so in his capacity as a servant to the law, we conclude that the prosecutor shall henceforth have the duty to request that the jury be instructed on the limited use of prior bad act evidence."). Moreover, the district court erred because it did not *sua sponte* inquire into whether Trejo desired a limiting instruction at that time or in the jury instructions. Id. at 731-33; Mclellan, 124 Nev. at 270.

Although this Court typically reviews a district court's decision to admit bad act evidence for an abuse of discretion (Jezdik v. State, 121 Nev. 129, 136 (2005)), Trejo did not object at the time the State intentionally elicited Penny's prejudicial testimony. Nevertheless, the State's deliberate introduction of bad act evidence is still reviewable for plain error. See NRS 178.062; Green, 119 Nev. at 545. However, the district court's failure to

give a limiting instruction *sua sponte* is reviewed for non-constitutional harmless error. Tavares, 117 Nev. at 731 ("[b]ecause the defendant no longer has the burden of requesting a limiting instruction on the use of uncharged bad act evidence, we will no longer review cases involving the absence of the limiting instruction for plain error."). The test for non-constitutional harmless error is whether "the error had substantial and injurious effect or influence in determining the jury's verdict." Id. at 732 (quoting Kotteakos v. U.S., 328 U.S. 750, 776 (1946)); see also NRS 178.598.

A minimally competent prosecutor should know when her witness testifies the defendant committed an uncharged criminal act that she has introduced bad act evidence and is obligated to request a limiting instruction. In Trejo's case, the record plainly shows that Penny – at the prosecutor's prompting – testified that Trejo committed illegally possessed a rifle with a barrel less than 16 inches.[31] AA X 2277-78; see Marinorellan v. State, 131 Nev. 43, 49 (2015). Moreover, the record plainly shows that the prosecutor did not request a limiting instruction when Penny testified Trejo possessed the illegal firearm. Thus, the error is unmistakable from the record. While

[31] The prosecutor prompted Penny's answer by asking, "[a]nd you said -- can
you just talk a little bit about the firearm; explain how it works and what it is?" AA X 2277.

the improper introduction of bad act evidence here may not have, in-and-of-itself, affected Trejo substantial rights, it certainly caused prejudice, especially when considered in the context of the cumulative errors in this case.

Finally, the district court's failure to *sua sponte* issue a limiting instruction is also obvious from the record. See Tavares, 117 Nev. at 731. Although this failure standing alone might not have had a "substantial and injurious effect or influence in determining the jury's verdict[,]" it certainly did in the context of the cumulative errors in Trejo's case.

VI. The State Failed to Present Sufficient Evidence to Support Trejo's Conspiracy Conviction.

"The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Carl v. State, 100 Nev. 164, 165 (1984); Oriegel-Candido v. State, 114 Nev. 378, 382 (1998). "The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." LaPierre v. State, 108 Nev. 528, 529 (1992).

The State charged Trejo in count 12 of the Indictment with Conspiracy to Commit Robbery. AA I 4. The State alleged Trejo "did

willfully, unlawfully, and feloniously conspire with an unnamed co-conspirator to commit a robbery, by defendant and/or unnamed co-conspirator **committing the acts set forth in Count 2**, said acts being incorporated by this reference as though fully set forth herein." Id. (Emphasis added). In Count 2, the State alleged Trejo committed Robbery with Use of a Deadly Weapon by "willfully, unlawfully, and feloniously [taking] personal property, to wit: jewelry and/or U.S. Currency, from the person of ADRIANE SERRANO, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of ADRIANE SERRANO, with use of a deadly weapon, to wit: a firearm. Id. at 2.

The State essentially alleged that Trejo conspired to commit robbery with an unknown person and in furtherance of this conspiracy one member robbed Borjorquez on September 3, 2018. AA I 4; see NRS 173.075(2) ("Allegations made in one count [of an indictment] may be incorporated by reference in another count."). However, during closing argument at trial the State noted, "Counts 12 and 13 apply to the August 4th attempted robbery[.]" AA XIII 3134. The prosecutor then described the evidence the State had introduced **related to August 4th**. See Id. at 3134-36. Based upon this evidence the prosecutor argued, "[s]o the defendant is guilty, the

evidence proved that he's guilty of Count 12, conspiracy to commit robbery. Id. at 3136.

Problematically, Borjorquez was not present at the Superpawn on August 4, 2018. Rather, Saldana, Jaquez, and Incera, were present on August 4, 2018, during the attempted robbery. See AA IX 2170; AA X 2350, 2425. Notwithstanding the evidence related to the August 4th incident, the State presented no evidence whatsoever that Trejo conspired with someone else to commit a robbery and in furtherance **robbed Borjorquez on September 3, 2018**. Accordingly, no jury, acting reasonably, could have been convinced of Trejo's guilt for Conspiracy to Commit Robbery, **as alleged**, beyond a reasonable doubt.

VII. Cumulative Error Warrants Reversal.

"Although individual errors may be harmless, the cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial." Byford v. State, 116 Nev. 215, 241-42 (2000). "When evaluating a claim of cumulative error, [this Court] consider[s] 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." Valdez v. State, 124 Nev. 1172, 1195 (2008).

As an initial matter, Trejo contends the district court's error with respect to his motion for alternate counsel or motion for self-representation was structural and therefore, the court should reverse his convictions based upon those errors alone. If this Court disagrees that errors occurred, it would be illogical for Trejo to analyze these issues under cumulative error. Therefore, Trejo's cumulative error analysis only involves the non-structural errors which occurred in the proceedings below.

Here, with respect to some counts, the evidence against Trejo was not substantial. Had the jury been correctly instructed regarding Second-Degree Kidnapping there is a substantial likelihood that, based upon the evidence presented, the jury would have concluded Trejo simply moved Borjorquez against her will and not with the intent to commit robbery. Similarly, had Trejo had time to prepare cross-examine by viewing the bodycam footage before trial, there is a reasonable possibility his questions would have convinced the jury to reject the State's claim that Trejo assaulted the officers.

Additionally, the court's numerous errors individually and collectively impacted Trejo's fundamental right to a fair trial before a fully informed and impartial jury. The court's refusal to appoint a community interpreter to assist Trejo at critical stages of the proceedings left Trejo alone

and unable to effectively advocate for himself. The court's refusal to craft a remedy for the State's discovery violation affected Trejo's fundamental right to confront his accuser because he could not adequately prepare cross-examination after seeing the videos and listening to the 911 calls for the first time at trial. The district court's jury instruction errors deprived Trejo of his fundamental right to have a fully informed jury determine his guilt or innocence based upon accurate legal principles. The State's deliberate decision to elicit evidence that Trejo committed an uncharged criminal act, and the court's failure to contemporaneously offer a limiting instruction, allowed the jury to convict Trejo in-part because was a person of bad character and not based upon the sufficiency of the State's evidence.

Finally, the charges Trejo faced were serious. Indeed, the district court sentenced Trejo to life in prison. However, the seriousness of these offenses does not mean the State and the district court should abandon basic fair-trial principles so the State can later claim the seriousness of the crime should cancel multiple errors which deprived Trejo of a fair trial. Rather, because the charges are serious the district court has an obligation to ensure that Appellant receives the fairest possible trial. Obvious trial errors affecting fundamental Constitutional rights should never be ignored simply because a criminal offense could be deemed "serious." Therefore, if this Court does

not believe that any of the substantial errors which occurred below independently warrant reversal, Trejo nevertheless requests this Court reverse his conviction because the cumulative effect of the errors denied him his fundamental right to a fair trial.

CONCLUSION

Based upon the foregoing arguments, Trejo respectfully requests this Court reverse his convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of February, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of February, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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