

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO TREJO,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

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Case No. 84724

RESPONDENT'S ANSWERING BRIEF

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

WILLIAM M. WATERS
Nevada Bar #009456
Chief Deputy Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155
(702) 455-4685

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Appellant

Counsel for Respondent

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RESPONDENT'S ANSWERING BRIEF

**Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County**

STATEMENT OF THE ISSUES

1. Whether the District Court violated Trejo's right to an interpreter at critical stages by appointing a correction officer to read Trejo's written words to the court during pre-trial proceedings and appointing Clark County Interpreter Services during jury trial.
2. Whether the District Court violated Trejo's right to counsel by granting his Motion to Dismiss Counsel and allowing him to represent himself.
3. Whether District Court's jury instructions violated Trejo's right to a fair trial when it did not *sua sponte* give jury instructions that was not supported by evidence and/or did not affect the verdict.
4. Whether the District Court erred by not giving limiting instructions *sua sponte* after a witness inadvertently testified to bad act evidence where the testimony was not solicited by the state and not clearly and enduringly prejudicial, and the evidence of guilt was overwhelming.
5. Whether there was sufficient evidence to support Trejo's conspiracy conviction where text messages between Trejo and his co-conspirator showed agreement and plan to commit robbery; Trejo's admitted on September 3 and 6, 2018 that he had he had co-conspirators for the attempt robbery on August 4, 2018 and the robbery on September 3, 2018; and Trejo's testified at trial that he had co-conspirators but that he did not want to name them in danger of being labeled a snitch in prison.

6. Whether cumulative error warrants reversal where the issue of guilt was not close, and the error was slight and did not affect the verdict.

STATEMENT OF THE CASE

On October 4, 2018, the State of Nevada filed an Indictment charging Trejo with Count 1 – Burglary While in Possession of Firearm; Counts 2-8 –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. Volume 1 Appellant Appendix (hereinafter “AA”) 1-5.

On March 2, 2021, Trejo filed a pro per Motion to Dismiss Counsel, asking the District Court to allow him to represent himself or appoint a different legal counsel. 1AA117-20. On March 15, 2021, Mr. Alexander Henry (hereinafter “Mr. Henry”) from the Public Defender’s Office filed a Motion to Withdraw as Attorney on Record, based on Trejo’s request. 1AA121-28.

On March 24, 2021, the District Court held a hearing via BlueJeans for both motions. 5AA1103-1108. The hearing was continued to March 31, 2021. 5AA1109. During the hearing, the District Court found that Trejo was not entitled to dismiss his attorney and be appointed a new one. 5AA1116-17. Upon the District Court’s inquiry, Trejo asked the Court to represent himself rather than be represented by his counsel from the Public Defender Office. 5AA1117.

The District Court held a Faretta hearing and the found that Trejo knowingly, competently, and voluntarily waived his right to counsel. 5AA1118-36. The District Court appointed Mr. Henry as standby counsel. 5AA1136-38.

On September 23, 2021, Trejo filed a Motion to Dismiss Standby Counsel. 1AA240-42. On September 23, 2021, Trejo filed a Motion for Proper In-Court Disability Adjustment. 1AA 243-47. On October 11, 2021, the District Court denied the Motion to Dismiss Standby Counsel; and granted the Motion for Proper In-Court Disability Adjustment. 5AA1174-79. On February 3 and 4, 2022, the Court held a second Faretta hearing and accepted Trejo's waiver of right to counsel. 5AA1203-47.

Trejo's thirteen-day jury trial began on April 18, 2022. 6AA1285. On May 4, 2022, the jury returned a verdict finding Trejo guilty of all counts. 4AA3143, 3164-68; 4AA887-91. On May 12, 2022, Trejo filed a Notice of Appeal on May 12, 2022. 4AA892.

On June 15, 2022, Trejo was sentenced to an aggregate total sentence of one hundred eighty (180) months to life in the Nevada Department of Corrections. 13AA3171, 3196-97. The Judgment of Conviction was filed on June 16, 2022. 4AA898-901. The Public Defenders Office filed a Notice of Appeal on June 28, 2022. 4AA904-06. The District Court appointed the Public Defender's Office to

represent Trejo on direct appeal. 14AA3196. Trejo’s Opening Brief (hereinafter “AOB” was filed on February 16, 2023.

STATEMENT OF THE FACTS

AUGUST 4, 2018

Jennifer Incera (hereinafter “Incera”) testified she was a manager at Super Pawn at 1150 South Rainbow Boulevard in Clark County, Nevada (hereinafter “Super Pawn” or “store”). 10AA2425. On August 4, 2018, she arrived at work around 8:00 a.m. with two other employees, Julie Saldana (hereinafter “Saldana”) and Ivan Jaquez (hereinafter “Jaquez”).

She testified that after arriving at work in their respective cars, they walked from their cars to the front of the store so they could unlock and go inside the store. 11AA2435. Aside from their three cars, Incera noticed a black Acura parked in one of the parking spaces. 11AA2432-33. She said it caught her attention because there was no reason for the car to be there as their store did not open for almost another 50 minutes. 11AA2434.

As Incera was about to unlock the door, she saw a man later identified as Trejo, charging towards her in an aggressive manner and looked like he was about to tackle her. 11AA2439. Incera said she was petrified and screamed for Saldana and Jaquez to run because they were getting robbed. 11AA2440. The three of them ran and hid behind Saldana’s car because it was the highest and parked the farthest

from the store. 11AA2441. They went inside the car and Saldana drove them away from the parking lot to escape. 11AA2441-45. Trejo's Acura followed their car and copied their car's movement as they changed lanes, sped up, or made a turn. 11AA2242-45. After some maneuvering, Trejo's car stopped following their car and they met up with responding officers from Las Vegas Metropolitan Police Department (hereinafter "LVMPD") to report the crime. 11AA2448-49.

Incera, Saldana and Jaquez testified that Trejo was completely covered up in dark clothing including a full motorcycle helmet, a leather jacket, body armor, dark jeans, and boots. 10AA2176, 2356; 11AA2439. Saldana and Jaquez saw Trejo holding a gun as he was charging up to them. 10AA2179, 2356-58.

A text message sent from Trejo's phone on August 4, 2018 at about 8:28 a.m. stated, "There was a hiccup." 9AA2117. Detective Jeff Clark (hereinafter "Detective Clark") testified that he spoke with Trejo on September 8, 2018. 10AA2308-09. During a recorded statement, Trejo admitted that he and another individual attempted to rob Super Pawn on August 4, 2018; that he encouraged his friend to help him with the robbery because he was desperate; that they both had firearms with them; that he had an AK and that his friend had a Kel-Tec; and that they drove an Acura. 10AA2319-22. Trejo also stated that he knew Incera from High School and that it was coincidence that she was there during that attempted robbery. 10AA2322.

At the end of the recorded statement, Trejo wrote a letter stating as follows:

To all the people I have hurt physically, mentally, or emotionally, I have no excuse or right to do what I did. I'm sorry for putting y'all through this mess. I want to express the remorse that I have, not because I was shot, but because I realize the damage I have left behind. I hope one day I get the chance to apologize face-to-face for my wrongdoing.

As for Adriane, I'm especially apologetic for putting you in this predicament. I knew you well in high school, and I never thought we would get to this point. I hope one day I'm worthy for all of your forgiveness.

Sincerely, Mario B. Trejo.

10AA2324.

During jury trial, Trejo testified that he spoke and with Detective Clark about the attempt robbery. 13AA3099. He admitted that he gave his co-conspirator a Kel-Tec to use in the robbery. 13AA3101-02. He admitted that he and his co-conspirator fled after the attempt robbery. 13AA3103.

SEPTEMBER 3, 2018

On September 3, 2018, Adriane Serrano-Borjorquez (hereinafter "Serrano-Borjorquez") was working as an assistant store manager at Super Pawn alongside her co-workers Giovanni Andino (hereinafter "Andino"), Jaquez, Carla Reck (hereinafter "Reck"), Jonathan Rivera-Sandoval (hereinafter "Sandoval"), Saldana, Melani Howard (hereinafter "Howard"). 13AA2929-31.

Serrano-Borjorquez testified that around 1:07 p.m., a man later identified as Trejo, walked into the store holding a gun. 13AA2933. Trejo was wearing a black

helmet, a Kevlar vest, a black jacket, black gloves, a utility belt with knives, and a backpack. 13AA2934, 39.

Trejo pointed the gun at Sandoval and ordered everyone to lay on the sales floor. 13AA2935. Afraid that Trejo would hurt her or her employees, Serrano-Borjorquez identified herself as the manager. 13AA2935-36. Trejo ordered her to zip tie the store's door, then ordered her to open the safe. 13AA2937-98. To open the safe, one had to put in a code, wait for five minutes, then enter the code again. 13AA2937. After she entered the code and while waiting for the five-minute delay, Trejo told her to put the money in the safe that could be accessed without delay into his backpack. 13AA2939. While holding a gun, Trejo ordered her to put the jewelry from the jewelry case and money from the tills into his backpack. 13AA2939-40. Serrano-Borjorquez testified that she was panicked that Trejo would shoot her or the other employees. 13AA2944.

At some point, LVMPD arrived responding to reports of robbery. 13AA2949. Trejo grabbed her and told her that they were leaving. 13AA2950. She told him she did not want to go but he held a gun to her head and pushed her in front of him, using her as a shield. 13AA2950.

Once outside, she heard a helicopter, and saw a police car and a few police officers. 13AA2951. As Trejo was using Serrano-Borjorquez as a shield from the police officers to get to his getaway car, he was pushing her, pulling her cardigan,

and moving her while he had a gun to her head. 13AA2951. She said she felt like she was going to die, and did not know if she would see her family again so she thought she could not get in the car Trejo was leading her to. 13AA2952.

Serrano struggled with Trejo for the gun by trying to wedge her hand in between Trejo's gloved hand and the handle of the gun. 13AA2952. The gun went off immediately after she brought it down and aimed it away from the police officers. 13AA2952.

After he fired that one shot, Trejo kept trying to pull the trigger, but Serrano-Borjorquez said she was holding the gun on the slide which prevented the slide from moving and caused the gun to jam. 13AA2953. She said she was familiar with the gun because she owned a similar one. 13AA2953. Serrano-Borjorquez was able to get the gun from Trejo, eject the magazine, throw the gun, and run back inside the store. 13AA2954. As she was running, she saw Trejo reaching for the firearm that was strapped to his shoulder, then she heard gunshots. 13AA2954.

Officer Thomas Carrigy (hereinafter "Officer Carrigy") testified that he and his partner, Detective Maria Fulwiler (hereinafter "Detective Fulwiler), responded to Super Pawn wearing their standard police uniform with markings identifying them as police officers. 11AA2566-68, 70. He also testified that they drove a marked LVMPD black and white SUV with lights and siren on top. 11AA2569.

Officer Carrigy testified that he saw Trejo come out of Super Pawn holding a handgun with one hand and the other arm around Serrano-Borjorquez's neck. 11AA2583. Officer Carrigy stood up from his kneeling position, behind his cover, and told Trejo to show his hands. 11AA2584. Officer Carrigan saw Trejo pointing his gun at his head. 11AA2584. Officer Carrigan ducked down behind the wall and heard gunshots. 11AA2584.

Officer Kennan Graham (hereinafter "Officer Keenan") responded to Super Pawn with his partner, Detective Brian Farrington. 12AA2890-91. He was wearing his police uniform with badges that showed he was a police officer. 12AA2887-89. At first, he saw Trejo pointing his gun at Serrano-Borjorquez. 12AA2896. At some point after she escaped, he observed Trejo fumbling with something, then start to bring his arm; like he was presenting a weapon in a shooting position with the gun pointing at Officer Graham's general direction. 12AA2899-2900. Officer Graham shot Trejo and he fell on the ground. 12AA2900.

Detective Farrington testified that after Serrano-Borjorquez escaped, Trejo took a firing stance to draw a weapon up by lowering his waist and bringing his hands together. 12AA2838-39.

Sergeant Zachary Baughman (hereinafter "Sergeant Baughman") responded in a police helicopter unit. 12AA2775-76. He testified that he observed a discharge

from Trejo's firearm. 12AA2789. Sometime after that, he saw Trejo transition from that firearm to a new firearm that was slung across his body. 12AA2789.

Trejo was eventually taken into custody. 11AA2538. In addition to the gun that Serrano-Borjorquez wrestled from him, Trejo also had a rifle slung on his body, and a large bouy knife. 12AA2901, 12AA2789; 12AA2852.

Detective Blake Penny ("hereinafter "Detective Penny") testified that LVMPD searched the car Trejo drove to Super Pawn and found a handgun, a Zastava AK-47 pistol, rifle and pistol magazines loaded with cartridges. 10AA2271-72, 12AA2697. LVMPD forensic scientist Christine Whittle testified that Trejo's DNA matched the DNA samples taken from the weapons recovered from the car. 12AA2709-2732.

During the jury trial, Trejo admitted that he was the person in the motorcycle helmet who entered Super Pawn with a firearm. 13AA3050. He admitted that the Kel-Tec recovered from the scene "lookes like" his Kel-Tec. 13AA3051. He also admitted that he gave a statement to Sergeant Joe Patton regarding September 3, 2018, where he admitted choosing Super Pawn because it was close to his house; changing the plates of the car he drove; putting on shooting gear; wearing a gun belt; going to Super Pawn armed with weapons to get money and jewelry; and owning the Glock recovered from the scene. 13AA3052-59.

Upon jurors's questioning, Trejo said he did not want to name his co-conspirators for August 4 and September 3 crimes because of the danger of being labeled a snitch if he had to go to prison. 13AA3111.

SUMMARY OF THE ARGUMENT

This Court should affirm Appellant's Judgment of Conviction.

First, the District Court did not violate Trejo's right to an interpreter at critical stages. The District Court did not violate Trejo's right to an interpreter during pre-trial proceedings because NRS 50.051(2) allowed the court to appoint a correctional officer to read Trejo's writings in lieu of a registered community interpreter. The District Court did not violate Trejo's right to an interpreter during jury trial because he had interpreters from Clark County Interpreter Services, and he waived his right to appeal issues relating to his ability to communicate. Furthermore, Trejo's due process rights were not violated because he does not claim that he did not understand the proceedings, or that he did not adequately assist in his defense.

Even if there was error, Trejo's claim should be denied under either plain or harmless error review because any alleged error did not affect Trejo's substantial rights. The role of Trejo's interpreter was solely to read his written words on paper and not to translate from another language to English. 6AA1285. Trejo did not suffer prejudice because Trejo does not claim that the correctional officers made mistakes in reading his words, much less show that those mistakes affected his rights.

Second, the District Court did not violate Trejo's right to counsel by granting his Motion to Dismiss Counsel. The District Court did not abuse its discretion by not appointing a substitute counsel because Trejo did not have adequate cause to reject his court-appointed counsel then request a substitute counsel at the public's expense. Furthermore, the District Court did not abuse its discretion by allowing Trejo to represent himself because Trejo made a knowing and voluntary waiver of counsel under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975).

Third, the District Court did not abuse its discretion by admitting the digital evidence because the State provided the videos to Trejo's counsel while he was still represented. The State was not required to ensure that Trejo viewed the videos it had previously provided the defense.

Fourth, the District Court's jury instructions did not violate Trejo's right to fair trial. The District Court did not err by not instructing the jury *sua sponte* on the lesser included offense of second-degree kidnapping because there was no evidence presented that that would have absolved Trejo of First-Degree Kidnapping but would have still supported a finding of Second-Degree Kidnapping. The lack of jury instructions regarding voluntariness of Trejo's confessions was harmless error because his statements were voluntary, and the State presented overwhelming evidence of his guilt.

Fifth, the District Court did not err by not giving a limiting instruction *sua sponte* after a witness inadvertently stated a bad act evidence because the statement was not solicited by state, not clearly and enduringly prejudicial, and the evidence of guilt was overwhelming.

Sixth, the State presented overwhelming evidence to support Trejo's conspiracy conviction including text messages between Trejo and his co-conspirator; Trejo's statement on September 3 and 6, 2018 that he had co-conspirators; and Trejo's trial testimony admitting he had a co-conspirators but he did not want to name them in fear of being labeled a snitch while in prison.

Last, there is no cumulative error that warrants reversal because the issue of guilt is not close, and the quantity and character of the error was not great and did not affect the verdict. Accordingly, Trejo's Judgment of Conviction should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT VIOLATE TREJO'S RIGHT TO AN INTERPRETER AT CRITICAL STAGES

Trejo claims "the District Court violated Trejo's right to an interpreter at critical stages." AOB at 16. Trejo's claim fails because Trejo was appointed an interpreter during his relevant pre-trial proceedings and jury trial.

NRS 50.051 states that "an 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 proceedings. “Interpreter” means a (1) registered community interpreter; or (2) person who is appointed as an interpreter pursuant to a NRS 50.0515(2). NRS 50.050.

NRS 50.051(2) states:

If a registered community interpreter cannot be found or is otherwise unavailable, or if the appointment of a registered community interpreter will cause a substantial delay in the proceeding, the court, magistrate or other person presiding over the proceeding may, after making a finding to that effect and conducting a voir dire examination of prospective interpreters, appoint any other interpreter that the court, magistrate or other person presiding over the proceeding 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, magistrate or other person presiding over the proceeding.

The question of an interpreter’s competence is a factual one for the trial court; thus, the trial court is given considerable latitude and its ruling will not be disturbed on appeal absent a manifest abuse of discretion. Baltazar-Monterrosa v. State, 122 Nev. 606, 615, 137 P.3d 1137, 1143 (2006) (citing Sampson v. State, 121 Nev 820, 122 P.3d 1255, 1259 (2005) and People v. Aranda, 186 Cal. App. 3d 230, 230 Cal. Rptr. 498, 502 (1986)).

A manifest abuse of discretion is a “clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” Jones v. Eight Jud. Dist. Ct., 130 Nev. 493, 501, 330 P.3d 475, 481 (2014) (citing State v. Eight Jud. Dist. Ct., 127 Nev 927, 267 P.3d 777, 780 (2011)).

A. The District Court Did Not Violate Trejo's Right To An Interpreter During Pre-Trial Proceedings Because The Court Had Discretion To Appoint A Correctional Officer To Read Trejo's Writings In Lieu of A Registered Community Interpreter

Trejo claims the District Court conducted numerous hearings without the assistance of an interpreter after the District Court acknowledged Trejo's disability on March 24, 2021. AOB at 18. Trejo's claim fails because under NRS 50.051(2), the District Court had discretion to appoint any readily able person to read Trejo's words, in lieu of a registered community interpreter.

Sometime after Trejo's arrest for the instant case, he had a tracheostomy after a "tracheal stenosis secondary to a gunshot wound." 1AA45; 5AA1105. Trejo's could not speak clearly due to his tracheal tube, but he was able to communicate by writing down his words. 1AA45; 5AA1105; 6AA1286. Thus, his interpreter's role was to read his writing. 6AA1286.

Since Trejo's need for interpreter was limited to reading his written words to the court, the possible voir dire was limited to their ability to read Trejo's writing. 6AA1286. The court asked the correctional officers to read Trejo's written words. See 5AA1109-1139, 1143-47, 1151-73, 1192-1202; 6AA1248-68, 1272-83. During all pre-trial court appearances after March 24, 2021, Trejo was in jail and attended court through BlueJeans. Id. In those appearances, Trejo communicated through a correction officer who read Trejo's words to the court. Id.

Trejo specifically claims the District Court conducted the second Faretta canvass without an interpreter. AOB 18-19. This is belied by the record. The District Court held the second Faretta hearing on February 3-4, 2022. 6AA1203. Trejo was in jail and participated through BlueJeans. 6AA1204. Throughout the Faretta hearing, the District Court acknowledged Trejo's responses to yes or no questions. 6AA1203-1246. For longer responses, Trejo wrote his reply and a correction officer read Trejo's words to the court. 6AA1207-46. Furthermore, it was clear that his need for an interpreter was limited for someone to read his writing, and he informed the court that he had no other issues preventing him from understanding court proceedings. 6AA1206-07.

In summary, the District Court did not violate Trejo's right to an interpreter under NRS 50.051 because it was allowed to appoint a readily able interpreter in lieu of a community registered interpreter.

B. Trejo's Right To Interpreter At Trial Was Not Violated Because He Had Interpreters From Clark County Interpreter Services And He Waived His Right To Appeal Issues Relating To His Ability To Communicate

Trejo claims the District Court "used a foreign language interpreter from Clark County Interpreter Services - without first complying with NRS 50.051(2)- when trial began on April 18, 2022." AOB at 20-21. Trejo's bare and naked claim must be denied because he fails to explain how the court failed to comply with NRS 50.051(2).

Regardless, Trejo's claim fails because NRS 50.051(2) only applies when the court's appointed interpreter is not a registered community interpreter. One to three interpreters from Clark County Interpreter Services were present each jury trial day to read Trejo's written words to the court. See 6AA1285; 7AA1453; 8AA1689; 9AA1926, 2037; 10AA2235, 2346; 11AA2503, 2612; 12AA2772, 2919; 13AA3030, 3143.

Furthermore, Trejo agreed to waive his rights to appeal anything related to his inability to speak and directly communicate with the jury. 6AA1290-92. See Burns v. State, 137 Nev. 494, 496, 495 P.3d 1091, 1097 (2021) (enforcing a waiver of appellate rights because it "involved a bargained-for exchange between a defendant and the State" and therefore was subject to contract principles and enforceable as written). Thus, the District Court did not violate Trejo's right to interpreter during trial.

C. Trejo's Due Process Rights Were Not Violated Because He Does Not Claim That He Did Not Understand The Proceedings Or That He Did Not Adequately Assist in His Defense

Trejo claims the District Court violated his right to an interpreter at all crucial stages of the criminal process. AOB at 19-20.

A criminal defendant who does not understand the English language has a due process right to an interpreter in all crucial stages of the criminal process. Ton v. State, 110 Nev. 970, 971-72, 878 P.2d 986, 987 (1994). A defendant who cannot

understand the court proceedings cannot adequately assist in his defense and has not received due process of law. Id.

Here, Trejo does not claim to not understand the English language. Even if the right to interpreter in all crucial stages under Ton is extended to someone with a speaking disability, Trejo's fails to demonstrate that his due process rights were violated because he does not claim that he failed to understand the proceedings and that he could not adequately assist his defense.

D. Any Alleged Error Did Nor Prejudice Trejo

Trejo fails to establish that the District Court erred by violating his right to an interpreter in critical stages of the case. Even if the District Court erred, this claim must be denied because any alleged error did not prejudice Trejo.

1. This Court should review this issue under plain error standard

The failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal. United States v. Olano, 507 U.S. 725, 731, 113 S.Ct. 1770 (1993) (“No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right....” (internal quotation marks omitted)).

As a general rule, issues not raised before the district court are deemed waived for appellate review. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d

981, 983 (1981) (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”); see also Powell v. Liberty Mut. Fire Ins. Co., 127 Nev. 156, 161 n. 3, 252 P.3d 668, 672 n. 3 (2011) (explaining that issues not raised below are deemed waived).

Nevada law provides a mechanism for an appellant to seek review of an error he otherwise forfeited. NRS 178.602 (allowing for “plain error” review). “an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing “actual prejudice or a miscarriage of justice.” Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008).

Plain error review is discretionary, not obligatory. Jeremias v. State, 134 Nev. 46, 52, 412 P.3d 43, 49 (2018). To establish plain error, “an appellant must demonstrate that: (1) there was an “error”; (2) the error is “plain,” meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant’s substantial rights. Id. at 50, 412 P.3d at 48. A plain error does not affect a defendant’s substantial rights unless “it causes actual prejudice or a miscarriage of justice.” Id. at 51, 412 P.3d at 49.

Here, Trejo did not ask for interpreter or object to the District Court's appointment of correctional officers for pre-trial hearings until he filed his Motion for Proper In-court Disability Adjustment on September 23, 2021. 1AA245-46.

Furthermore, Trejo's motion did not solely ask for community registered interpreter but asked the District Court (1) "that a method is provided as a form of communication" "or that some of assistance is given that is official and doesn't involve requesting an officer to go out of their way to perform a duty not listed in their job description;" (2) that if there is opposition, that defendant be given proper chance to counter-argue as any defendant in pro-se/attorney would receive; and (3) that a prepared argument, on paper, be given the same audience as a vocal argument. 1AA245-46. The District Court granted Trejo's motion on October 11, 2021, and stated that the Clark County Interpreter Services would be able to provide someone to read Trejo's words as he typed them in court. 5AA1175.

Thus, plain error review should apply because Trejo did not object when the District Court appointed correction officers during pre-trial court appearances.

2. Any Alleged Error Was Harmless

Under harmless error standard, if the error is not of constitutional dimension, the Court will "reverse only if the error substantially affects the jury's verdict"." Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008). "Any error, defect,

irregularity or variance which does not affect substantial rights shall be disregarded.”
NRS 178.598.

Trejo claims he was harmed in three ways. First, he claims the lack of a registered community interpreter at the Faretta hearings harmed him because he was unable to communicate except for hand signals and short written responses read by the correctional officers. AOB at 21. This claim fails because Trejo does not explain how he would have communicated better when a registered community interpreter would have read the same written words that the correctional officers read to the court.

Second, Trejo claims that without an interpreter, he was “unable to advocate for himself at critical hearings-including the hearings where the court refused to consider his motions to suppress.” AOB at 21. This bare and naked claim must be denied because Trejo fails to cite the specific hearings to which he refers to. Trejo also does not explain how a registered community interpreter would have helped him advocate in court when the interpreter’s sole role was to read his written words to the court.

Third, Trejo claims that without a registered community interpreter, the court refused to allow Trejo to make representations at two calendar calls and instead allowed the State to make representations on his behalf. AOB at 21. This bare and naked claim must be denied because Trejo does not specify what the State

misrepresented on his behalf and how he was harmed. Trejo's first cited page shows Trejo responding to the court regarding court schedule for the following day. 6AA1226. Trejo's next cited pages show a calendar call on April 13, 2022, where a judge covered for the department's judge and all pending motions were simply continued to the next court date. 6AA1269-71.

Regardless, Trejo's claim should be denied under either plain or harmless error review because the alleged error did not affect Trejo's substantial rights. The role of Trejo's interpreter was solely to read his written words on paper and not to translate from another language to English. 6AA1285. Trejo did not suffer prejudice because Trejo does not claim that the correctional officers made mistakes in reading his words, much less show that those mistakes affected his rights.

Further, any claim that Trejo's self-representation was affected by the District Court's appointment of correctional officers to read Trejo's words, is belied by the record. During the fifth day of jury trial, Trejo said he would have argued a Brady claim pre-trial if he was aware there was an issue:

I was under the impression that I couldn't see the videos because I was incarcerated. If I knew that issue, I would have argued that issue. I've argued evidence -- every issue. **I've argued every issue that I thought that I could argue.**

9AA2063-64 (emphasis added).

Thus, Trejo's self-representation was not limited by the appointment of correctional officers to read Trejo's words.

3. There was overwhelming evidence of Trejo's guilt

There was no prejudice to Trejo due to the overwhelming evidence of his guilt. Numerous witnesses testified that Trejo went to Super Pawn with firearms on September 3, 2018, wearing all black outfit consisting of motorcycle helmet, black jacket, dark pants and boots. 10AA2195, 2365; 11AA2473-75; 12AA2858-59; 13AA2933-34. Witnesses testified he demanded cash and jewelry; took a hostage at gunpoint, discharged his firearm; then pointed his gun towards the officers before he was shot and arrested. 10AA2195-96, 2356; 11AA2475; 12AA2743-45, 2859; 13AA2934, 39.

Numerous Super Pawn surveillance videos, LVMPD helicopter unit and body camera videos were entered into evidence showing Trejo's crimes. 9AA2046-2065. Numerous text messages between Trejo and another person showed they agreed and planned to commit robbery on September 3, 2018. 9AA2118-2125. Trejo's DNA matched samples taken from various firearms recovered on the scene. 12AA2709-32.

Furthermore, Super Pawn employees testified that he wore the same outfit to a prior attempt robbery on August 4, 2018 where he attempted to charge at them while holding a gun; then chased them in his Acura as they drove away. 10AA2195, 2358-65, 2382-83, 2387-88.

On top of these, Trejo confessed numerous times. During post-arrest interviews, Trejo admitted to both the attempt robbery on August 4, 2018, and the robbery on September 3, 2018. 10AA2308-22. Additionally, Trejo wrote a letter apologizing to his victims. 10AA2324. Last, Trejo testified and confessed on the stand during the jury trial. 13AA3099-3103.

II. THE DISTRICT COURT DID NOT VIOLATE TREJO'S RIGHT TO COUNSEL BY GRANTING HIS MOTION TO DISMISS COUNSEL

A. The District Court Did Not Abuse Its Discretion By Not Appointing A Substitute Counsel Because Trejo Did Not Have Adequate Cause To Reject His Court-Appointed Counsel Then Request For Substitute Counsel At The Public's Expense

This Court reviews a denial of a motion to substitute counsel for an abuse of discretion. Young v. State, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). “An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” See e.g., Jackson v. State, 117 Nev. 116, 17 P.3d 998 (2001).

The “essential aim of the [Sixth] Amendment is to guarantee an effective advocate,” not an attorney preferred by a defendant. Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 1697 (1988); United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998); Young, 120 Nev. 963, 102 P.3d 572; Gallego v. State, 117 Nev. 348, 362, 23 P.3d 227, 237 (2001). If the complete collapse of the attorney-client relationship is evident, the defendant's Sixth Amendment rights require a

substitution of attorney. Id. at 969, 102 P.3d at 576. However, absent a showing of adequate cause, a defendant is not entitled to reject his court-appointed counsel and request substitution of other counsel at public expense. Young, at 968, 102 P.3d at 576.

The Nevada Supreme Court listed three factors to consider in reviewing a district court's denial of a motion to substitute counsel: (1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion.” Id. at 968-69, 102 P.3d at 576. In Young, the Court held that district court erred in denying Young’s motion to substitute counsel because (1) there was a significant conflict and breakdown of the attorney-client relationship, and a complete breakdown of communication; (2) the motion was timely; and (3) the district court’s inquiry into the substance of the attorney-client conflict was insufficient as it did not inquire into defendant’s complaints and did not explore how the lack of communication affected the counsel’s trial preparation. Id. at 969-71, 102 P.3d at 576-78.

Here, Trejo did not file a motion to substitute counsel but a Motion To Dismiss Counsel, asking to “**either** allow me to invoke my rights to self-represent **or** that the courts appoint the defendant effective legal counsel.” 1AA119 (emphasis added). Thus, when the District Court allowed Trejo to represent himself after a Faretta hearing, it did not deny but granted Trejo’s motion. 5AA1136-37.

Even if Trejo's motion is deemed as a motion to substitute counsel, the District Court did not abuse its discretion when reviewed under the three factors under Young.

First, unlike Young, Trejo did not claim in his motion, at the hearing, or in his direct appeal that there was a conflict between him and his counsel. 1AA117-19; 5AA1103-1139; AOB at 25. Further, there was no claim of breakdown of communication between Trejo and his counsel. Id. Trejo stated that his counsel had "done a great job in communication and providing inmate advocacy." 5AA1135. His counsel also demonstrated he had repeatedly communicated with Trejo in person and on video. See 5AA1105.

Second, even the timing of Trejo's motion does not clearly lean in his favor. Even though his motion was filed on March 24, 2021, several months before his jury trial commenced on April 18, 2022; the motion was not clearly timely. Trejo was arraigned on October 15, 2018. 4 AA 910. By the time Trejo filed his motion, his counsel had already spent years understanding and working on his case. Thus, it was not unlikely that appointing a new counsel would have considerably delayed the case.

Third, the District Court sufficiently inquired into Trejo's complaints about his counsel. In fact, the District Court continued the hearing from Motion to Dismiss

Counsel from March 24, 2021 to March 31, 2021, to give it adequate time and setting. 5AA1103-1109.

Outside the presence of the State, the District Court asked Trejo why he wanted to dismiss his counsel. 5AA1111-12. Trejo replied that:

READ BY THE OFFICER: Yes, Your Honor. I simply feel that since I've lost my voice the true facts of the case and my medical conditions have not been relayed to the Court during hearings even though I have presented all facts, and those facts have records to back them up. And I've not gotten proper medical treatment, and my case, it's my understanding, has been mishandled for reasons unknown to me. I can specify in detail, but to put it simply, I just feel that I need to present my own case, or have someone else who can express the details of my current situation.

5AA1112.

The District coaxed Trejo to answer with relevant and specific details and stated: "I need you to tell me how it's not being done to your satisfaction. You've said before that it's not but I need to know how" and "I just need to know generally what Mr. Henry did or did not do." 5AA1112.

When Trejo replied with more vague details expressing his dissatisfaction with his case, the District Court explained the difference between the State's and defense's role at trial. 5AA1113. With that context, the District Court again asked Trejo for his specific complaints. 5AA1113-14. At that point, Trejo was able to specify that he was not happy because his counsel did not follow his directions on how to present the case during hearings and what pleadings to file. 5AA1113-14. At

that point, the District Court asked for his counsel's explanation, listened, and determined that Trejo's complaints were strategic decisions in counsel's purview as opposed to Trejo's. 5AA1116-17. The District Court's was adequate as it was able to coax Trejo's specific complaints about his counsel. Id. Thus, the record supported the District Court's finding that Trejo failed to demonstrate that he was entitled to a substitution of counsel.

Furthermore, any alleged error in court's canvass did not prejudice Trejo because his appeal does not allege actual conflict between him and counsel, or other complaints that he would have told the district court had there been further inquiry. AOB at 22-26.

B. The District Court Did Not Abuse Its Discretion By Allowing Trejo's To Represent Himself Because Trejo Made A Knowing And Voluntary Waiver of Counsel Under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975).

Trejo claims "the district court erred by finding that Trejo knowingly and voluntarily waived his fundamental right to counsel." AOB at 30. This claim is belied by the record which shows two Faretta canvasses where Trejo asked to represent himself after acknowledging the District Court's warnings against the dangers and disadvantages of self-representation. 5AA1109-39.

This Court gives deference to the district court's decision to allow a defendant to waive his right to counsel. Hooks v. State, 124 Nev. 48, 55, 176 P.3d 1081, 1085 (2008). "Through face-to-face interaction in the courtroom, the trial judges are much

more competent to judge a defendant's understanding" of his rights than the appellate court since a "cold record is a poor substitute for demeanor observation." Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996).

Generally, a criminal defendant has the right to self-representation under the Sixth Amendment of the United States Constitution and the Nevada Constitution. See U.S. Const. amend. VI; Nev. Const. art. 1, § 8, cl. 1. See Faretta v. California, 422 U.S. 806, 819–20, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) ("The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."). This Court has protected a competent defendant's Sixth Amendment "right not to have counsel forced upon him," even in instances where a defendant facing the death penalty opts to present no defense or mitigating evidence. Watson v. State, 130 Nev. 764, 782, 335 P.3d 157, 170 (2014) (quoting Bishop v. State, 95 Nev. 511, 516–17, 597 P.2d 273, 276 (1979)); see also Colwell v. State, 112 Nev. 807, 811–12, 919 P.2d 403, 406 (1996). This Court has ruled that "the right to self-representation is not an absolute right, because it necessitates the relinquishment of another constitutional right—the right to counsel", but the right to self-representation would be the default. Watson, 130 Nev. at 782, 335 P.3d at 170.

Where an accused chooses to self-represent, he must satisfy the court that his waiver of the right to counsel is knowing and voluntary. Faretta, 422 U.S. at 835, 95 S. Ct. 2525; Vanisi v. State, 117 Nev. 330, 337-38, 22 P.3d 1164, 1169-70 (2001).

The choice to represent oneself “can be competent and intelligent even though the accused lacks the skill and experience of a lawyer.” Id. at 338, 22 P.3d at 1170. “Despite not requiring any “mechanical performance” of a script, we have nevertheless repeatedly “urge[d] the district courts to conduct a thorough inquiry of a defendant who wishes to represent himself and to make findings as to whether the defendant’s waiver of the right to counsel is knowing, intelligent, and voluntary.” Miles v. State, 137 Nev. Adv. Op. 78, 500 P.3d 1263, 1268 (2021) (quoting Hooks v. State, 124 Nev. 48, 55-56, 176 P.3d 1081, 1085 (2008)). Arguments belied by the record must be dismissed. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222,225 (1984).

Here, Trejo claims the court erred in finding that Trejo knowingly and voluntarily waived his right to counsel. AOB at 30. Trejo makes various claims and arguments regarding the first Faretta hearing held on March 24 and 31, 2024 and the second Faretta hearing held on February 3-4, 2022.¹

First, Trejo claims that the court “pressured [him] into self-representation” on March 24, 2021. AOB at 23. This claim is belied by the record which shows the

¹Trejo claims under Section II(B) that his conviction should be reversed because the District Court “failed to provide Trejo with a registered community interpreter” during his Faretta hearings. AOB at 27. This claim is addressed in Section I. This claim fails because the District Court had discretion to appoint a correction officer to read Trejo’s written words to the court. See Section I, *supra*.

District Court addressed in length Trejo's Motion to Dismiss Counsel and his complaints that his counsel did not follow his instructions regarding what arguments to make and pleadings to file to the court. 5AA1114-17.

The court explained in detail that Trejo's proposed arguments were not persuasive in bail hearing, and the decisions regarding writs and motions were strategic and within the counsel's purview. Id. In fact instead of conducting a full Faretta canvass that day, the court continued the case on March 31, 2022 for additional time. 5AA1107. Also and as further demonstrated below, the Court "strongly urged" Trejo multiple times not to represent himself. 6AA1242-43.

Second, Trejo argues that his request to represent himself was equivocal because he told the court that he did not want to represent himself and merely wanted another attorney. AOB at 27. Trejo's request to represent himself was unequivocal.

On March 31, 2021, after a thorough Faretta canvas discussing all the dangers of self-representation and the court advising him not to do so, Trejo asked to represent himself. 5AA1109-39. On February 3 and 4, 2022. Trejo again asked to represent himself and accepted full responsibility for all his legal responsibility and acknowledged that the standby counsel would not have any responsibility during trial. 6AA1245.

Third, Trejo argues that the District Court should have "discussed appointing conflict counsel for the limited purpose of discussing the consequences of self-

representation.” AOB at 27, 30. This argument fails because Trejo’s cited authorities, SCR 253(1) and Hooks v. State, 124 Nev. 48, 54, 176 P.3d 1081, 1084 (2008) do not require the appointment of a conflict counsel to discuss the consequences of self-representation, only that the “district court’s inquiry should reveal whether the defendant should consult with appointed counsel to discuss the consequences of self-representation before deciding to proceed in proper person.” As discussed below, the District Court’s thorough inquiry, held over four days, showed that Trejo was fully aware of the consequences of self-representation.

Fourth, Trejo claims the District Court repeatedly failed to correct Trejo’s understanding of the law and failed to inform him “that his lack of understanding is one of the disadvantages of representing himself.” AOB at 30 (citing Miles, 500 P.3d at 1270). Trejo states that his answers to the District Court’s questions showed he did not know the “elements of some of the charged crimes,” “lesser included offenses or the court’s obligation to instruct on them,” “the State’s burden of proof,” or how to preserve appellate issues. AOB at 27-30. Trejo argues the court “should have explained to Trejo that he was acting on incorrect information,” and that he would have accepted the counsel’s assistance had the court done so. AOB at 30.

This claim is belied by the record. In both the first and second Faretta hearings, the court repeatedly demonstrated and discussed with Trejo the disadvantages of

representing himself including his lack of understanding and the various aspects of a criminal case. See 5AA1101-39; 6AA1235-47.

For instance, even though the Court was not required to delve into the elements of every charge, the Court asked about his charges then later reminded Trejo that he had “incomplete knowledge of some of the elements” that were key in his case. 6AA1244; see also 5AA1124.

Further, Trejo’s technical legal knowledge of the charged offenses was not relevant to an assessment of his knowing exercise of the right to defend himself. What’s relevant is that Trejo waived his right to counsel despite knowing and acknowledging that he lacked understanding of some of the elements of the charged crimes. 6AA1244.

Additionally, even though it was helpful that the court explained to Trejo various legal concepts such as the State’s burden of proof or what a lesser included offense was; it was more relevant that the court reminded Trejo that since he “was not an attorney [he] may not know” what they are, and that the court could not help him figure it out. 5AA1113, 1131; 6AA1212, 1238.

Furthermore, the court conducted a thorough canvass and discussed various aspects of the law and trial that Trejo may not know such as the rules of criminal procedure and how to look them up (6AA1209), the Eight Judicial District Rules (6AA1210), the rules of evidence (6AA1211-12), making proper objections

(6AA1213), various ways of defending particular charges that an attorney would know (6AA1222), making a record for appeal (6AA1240-41). Furthermore, the court explained that Trejo would give up valuable resources such as his counsel's immigration specialist (5AA1119-20), law library (6AA1210), and ability to contact potential witnesses, gather evidence and question witnesses on his behalf (6AA1240). The court also went through the charges and potential sentences Trejo faced. 6AA1213-1221.

In summary, the Trejo failed to show that the Court erred in granting his motion to represent himself because the Trejo had a "full appreciation and understanding of the waiver and its consequences." 6AA1245.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE TO ADMIT DIGITAL EVIDENCE THAT THE STATE HAD PREVIOUSLY PROVIDED TO TREJO'S COUNSEL

Trejo claims the District Court "abused its discretion by allowing the State to admit digital evidence at trial which had not been provided to Trejo." AOB at 31. NRS 174.235(1) requires the State to permit the defendant "to inspect and to copy, or photograph" certain evidence in its possession, custody or control. Providing the evidence to a standby counsel gives defendant sufficient access to the evidence. Wilson v. State, 121 Nev. 345, 360, 114 P.3d 285, 295 (2005). Trejo's claim fails

because the State provided the evidence to his counsel months before he represented himself.

This issue was not preserved at trial. During the State's opening statement, Trejo objected to the videos on the basis of a Brady violation. 9AA2048. The District Court correctly ruled there was no Brady violation because the videos were not exculpatory and because State provided the videos to Trejo's counsel months before he started representing himself. 9AA2053-54. Trejo also concedes there was no Brady violation. AOB at 33 n.15. Thus, this Court reviews this issues under plain error standard.

As a preliminary matter, this claim should be denied because Trejo fails to clearly specify which video he did not receive and/or watch. AOB at 31-37. Trejo's former counsel, who was also his standby counsel at trial, stated that while he represented Trejo years prior to the trial, the State gave him all the surveillance videos from Super Pawn, and the helicopter and body camera videos from LVMPD. 9AA2050-54. Trejo told the Court he saw the videos four years prior to the trial. 9AA2050. Trejo's standby counsel stated that he showed Trejo Super Pawn videos but since there were so many videos with various angles, he was not able to show each one to Trejo. 9AA2052-53. He said he spent most of their time showing him the "most damning videos" including the air surveillance from the helicopter unit and the body camera videos from the initial officers. 9AA2053. Prior to trial, Trejo's

former counsel also informed the District Court that he had shown Trejo all videos he had except for one video surveillance from Super Pawn. 5AA1153. See also AOB at 32. Trejo's bare and naked claim that he did not receive video(s) must be denied because he fails to specify the video he complains about.

Regardless, Trejo claim fails because the State did not violate its discovery obligations under NRS 174.235. While the statute only required the State to allow Trejo to inspect the evidence, the State went beyond its obligation by providing copies of videos. 9AA2050-54. Trejo's former counsel, who was also his standby counsel at trial, stated that while he represented Trejo, the State gave him the surveillance videos from Super Pawn, and the helicopter and body camera videos from LVMPD. 9AA2050-54. Furthermore, even though providing the evidence to Trejo's standby counsel would have been enough, here the State provided the videos to Trejo's counsel while he was still represented. 9AA2050-54. Thus, the State met its obligation by providing all the videos to Trejo's counsel while he was represented years prior to trial. 9AA2050-54.

Trejo also claims the State acted in bad faith by not ensuring that Trejo viewed the videos. AOB at 35-36. This claim should be denied because NRS 174.235(1) does not require the State to ensure that a defendant views evidence provided to his counsel, and Trejo does not cite any authority that states otherwise. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Furthermore, the State could not give

Trejo copies of the videos because he was in jail in CCDC; and the State had no authority to interfere with CCDC's protocol prohibiting giving inmates flash drives and CDs. 9AA2053.

Trejo claims he was prejudiced by viewing the “videos for the first time at trial” because he could not “effectively cross-examine witnesses and cast doubt on State’s allegations that he committed First-Degree Kidnapping and Assault on Officers Carrigy and Graham with a deadly weapon.” AOB at 37. Trejo’s bare and naked claim for prejudice fails because he does not specify the exact video(s) or what the video(s) ultimately showed; thus, he cannot specify harm. Furthermore, there were multiple evidence demonstrating the kidnapping and assault on the officers including testimonies from the victims and witnesses, and the multiple videos from the body cameras and the helicopter unit. 11AA2584; 12AA2789, 2838-39, 2896, 2899-2900. Trejo’s claim must be denied.

IV. THE DISTRICT COURT’S JURY INSTRUCTIONS DID NOT VIOLATE TREJO’S RIGHT TO FAIR TRIAL

A. The District Court Did Not Err By Not *Sua Sponte* Instructing The Jury on Second-Degree Kidnapping

Generally, a defendant must request a lesser-included instruction, and if there is any evidence to support it, the court must give the instruction. Lisby v. State, 82 Nev. 183, 188, 414 P.2d 592, 595 (1966). If the defendant does not request the instruction, the lesser-included instruction is only required “if there is evidence that

would absolve the defendant from guilt of the greater offense, but would support a finding of guilt of the lesser offense.” Rosas v. State, 122 Nev. 1258, 1264 n.9, 147 P.3d 1101, 1106 n.9 (2006) (quoting Lisby, 82 Nev. at 187, 414 P.2d at 595), abrogated on other grounds by Alotaibi v. State, 133 Nev. 650, 404 P.3d 761 (2017). Trejo did not request this instruction at trial, so this issue is reviewed for plain error.

Count 9 charged that Trejo committed First Kidnapping With Use of A Deadly Weapon when he “did willfully, unlawfully, and feloniously, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away Adriene Serrano, a human being with the intent to hold or detain the said Adriene Serrano against her will, and without her consent, for the purpose of committing robbery, with the use of deadly weapon, to wit: a firearm.” 1AA; NRS 200.310(1). Second-degree kidnapping is committed by a person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person in any manner held to service or detained against the person’s will, is guilty of kidnapping in the second degree. NRS 200.310(2).

Here, there was no evidence presented that would have absolved Trejo from guilt as to First Degree Kidnapping, but that would have still supported a finding of Second-Degree Kidnapping. Trejo claims two evidence at trial absolve him First Degree Kidnapping and still support a finding of Second-Degree Kidnapping. AOB at 41. First, he points out to his testimony that he took Seranno-Borjorquez with him

because he “didn’t want to get shot.” AOB at 41; 13AA3059-60. Next, he points Serrano-Borjoquez went with him against her will. AOB at 41; 13AA2950.

Neither absolve him of First-Degree Kidnapping. First, Trejo’s testimony that he moved the victim because he did not want to get shot did not absolve him of First-Degree Kidnapping. Moving the victim, to use her as a shield from police officers, does not negate the evidence that he moved her to facilitate the robbery and flee from the scene. 13AA3059-60. Second, the victim’s testimony that she went with Trejo against her will because he had a gun pointed at her does not absolve him of First-Degree Kidnapping; the crime does not require the victim’s consent.

Furthermore, Trejo was not prejudiced because of the overwhelming evidence that he committed First-Degree Kidnapping. Serrano-Borjoquez, the responding officers and videos showed that Trejo moved, pulled, and/or pushed Serrano-Borjoquez and used her as a human shield from responding officers to flee from the robbery. 11AA2583; 12AA2896; 13AA2950-54.

B. The Lack of Jury Instructions Regarding Voluntariness of Trejo’s Confessions Was Harmless Error

Trejo claims the District Court “erred by failing to instruct the jury regarding whether Trejo’s supposed confession was voluntary.” AOB at 43. Trejo filed a Motion to Suppress Evidence on April 6, 2022, claiming that his confessions to law enforcement on September 3 and 6, 2018 were not voluntary. 3AA738-46.

On April 18, 2022, the District Court denied holding a Jackson v. Denno, 378 U.S. 368, 380 (1964) hearing because the motion was untimely; but stated that it agreed with the states reasoning that that two oral statements were voluntary and “were under Miranda.” 6AA1279. The District Court did not make any finding regarding Trejo’s written confession because it had not read the statement. 6AA1279. Trejo did not request a voluntariness instruction at trial, so this issue has been waived for appellate review.

Trejo claims that despite his lack of objection at trial, this Court should review under harmless error and cites a dissenting opinion in Grimaldi v. State. 90 Nev. 83, 518 P.2d 615 (1974) and NRS 176.161(2) requiring the court to correctly instruct a jury regarding the law. AOB at 45-46. Trejo fails to acknowledge that a dissenting opinion is irrelevant to his claim and that the Nevada Supreme Court has never found that the statutory requirement to correctly instruct a jury regarding the law, also requires a court to *sua sponte* formulate a defendant’s proposed instructions for him.

Under harmless error standard, if the error is not of constitutional dimension, the Court will “reverse only if the error substantially affects the jury’s verdict.” Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008). “Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” NRS 178.598.

Here, the District Court's failure to instruct the jury was harmless because Trejo's confessions were voluntary. Detective Patton interviewed Trejo on September 3, 2018; and Detective Clark interviewed Trejo on September 6, 2018. 4AA776.

Detective Clark testified that before he went into Trejo's hospital room on September 6, 2018, he asked the nurse if Trejo "was okay to talk" because did not want to speak to Trejo if he was not coherent. 10AA2309.

In both interviews, the detectives read Trejo his Miranda rights before asking questions. 4AA777, 806. During both interviews, Trejo immediately explained why he committed the robbery on September 3 and the attempt robbery on August 4, 2018. 4AA777-78, 806-807.

During both interviews, Trejo rapidly confessed to his crimes; thus, both interviews were relatively short. 4AA777-828. Detective Patton's interview on September 3, 2018, lasted less than 18 minutes; while Detective Clark's interview on September 6, 2018, was about 25 minutes long. 4AA777, 803, 805, 828. During those relatively short interviews, Trejo's answers to questions were logical, intelligent, and responsive; there were no signs of hesitation on Trejo's part to answer the questions; and there were of any king of physical. 4AA777-828.

Furthermore, the lack of instruction regarding voluntariness of Trejo's prior confessions did not substantially affect the verdict due to the overwhelming evidence of Trejo's guilt. See Section I(D)(3), *supra*.

V. THE DISTRICT COURT DID NOT ERR BY NOT GIVING A LIMITING INSTRUCTION SUA SPONTE AFTER A WITNESS INADVERTEDLY TESTIFIED TO BAD ACT EVIDENCE

Trejo claims the District Court erred by allowing Detective Blake Penny to testify that the car Trejo drove contained pistol that was modified making it a ten-inch barrel rifle. AOB at 47-48. Trejo explains that it is a category D felony to possess a rifle with a barrel less than 16 inches; thus, Detective Penny's testimony amounted to an "uncharged crimes, wrongs, or bad acts" presumptively inadmissible at trial. AOB at 4.

Trejo also claims "the District Court's failure to give a limiting instruction *sua sponte* is reviewed for non-constitutional harmless error" and cites Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001). AOB at 50. Trejo's claims fails because his citations to Tavares and limiting instructions are not relevant; that law concerns situations in which the prosecution explicitly seeks to admit bad acts evidence for certain allowed purposes.

Here, the State did not explicitly seek to admit the evidence that Trejo possessed an illegal ten-inch barrel in his car. Detective Penny's testimony was an

inadvertent statement in his attempt to describe the numerous items found in Trejo's car including the pistol that has been modified as a short-barrel rifle.

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. Thomas v. State, 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998). To determine whether an inadvertent reference to a prior criminal activity is so prejudicial that it cannot be cured by an admonition to the jury, the following four factors may be considered: (1) whether the remark was solicited by the prosecution; (2) whether the district court immediately admonished the jury; (3) whether the statement was clearly and enduringly prejudicial; and (4) whether the evidence of guilt was convincing. Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995-96 (1996), (citing Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1983)).

Here, Detective Penny's description of the rifle was not solicited by the prosecution. Second, the District Court did not admonish the jury. Third, the statement was not clearly and enduringly prejudicial because it was simply a description of the Trejo's firearm and there was no inference that it made Trejo more likely to have committed the charged crimes. Last, the evidence of Trejo's guilt is not only convincing but overwhelming. Thus, Detective Penny's inadvertent description of the rifle is at most harmless error because it was not clearly and

enduringly prejudicial and because of the overwhelming evidence of Trejo's guilt. See Section I(D)(3), *supra*. This claim should be denied.

VI. THE STATE PRESENTED OVERWHELMING EVIDENCE TO SUPPORT TREJO'S CONSPIRACY CONVICTION

Trejo claims there was insufficient evidence to sustain his conviction for Count 12, Conspiracy to Commit Robbery. AOB at 51. He claims "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." AOB at 53.

In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Origel-Candido, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984); see also Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). In State v. Walker, 109 Nev. 683, 685 857 P.2d 1, 2 (1993), this Court delineated the proper standard of review to be utilized when analyzing a claim of insufficiency of evidence:

Insufficiency of the evidence occurs where the prosecutor has not produced a minimum threshold of evidence upon which a conviction may be based. Therefore, even if the evidence presented at trial were believed by the jury, it would be insufficient to sustain a conviction, as it could not convince a reasonable and fairminded jury of guilt beyond a reasonable doubt.

Id.

The Nevada Supreme Court has ruled it will not reverse a verdict even if the verdict is contrary to the evidence where there is substantial evidence to support it. State v. Varga, 66 Nev. 102, 117, 205 P.2d 803, 810 (1949).

Additionally, the Nevada Supreme Court has consistently held that circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976)). A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

A conspiracy is a “knowing agreement to act in furtherance of an unlawful act.” Gonzalez v. State, 131 Nev. 991, 997, 366 P.3d 680, 684 (2015). “A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator . . .” Washington v. State, 132 Nev. 655, 664, 376 P.3d 802, 809 (2016) (quoting Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004)). “[C]onspiracy is usually established by inference from the conduct of the parties.” Rowland v. State, 118 Nev. 31, 46, 39 P.3d 114, 123 (2002).

NRS 200.380(1) states:

Robbery is the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person, or the person of a member of his or her family, or of anyone in

his or her company at the time of the robbery. A taking is by means of force or fear, if fear is used to:

- (a) Obtain or retain possession of the property;
- (b) Prevent or overcome resistance to the taking; or
- (c) Facilitate escape.

Here, Count 12 charged that Trejo conspired “to commit a robbery, by the defendant and/or unnamed co-conspirator committing the acts as set for in Count 2. 1AA4. Count 2 charged Trejo with Robbery With Use of Deadly Weapon by taking jewelry and/or US currency from Adriane Serrano, with use of deadly weapon, a firearm. 1AA2.

State presented overwhelming evidence that Trejo conspired to rob Super Pawn and that he committed the unlawful taking of money and jewelry from Serrano-Borjorquez with use of a firearm.

LVMPD Detective Barry Jones testified that a day prior to the robbery, Trejo sent text messages planning the robbery to two different phone numbers. 9AA2114-17. On September 2, 2018, Trejo sent the following text messages to a phone number ending in -5067: (1) Can you at least drive me, bro? (2) My truck is hella recognizable; (3) You down or not, bro; (3) I will protect you no matter what; (4) Please, broski, help me out one last time; (5) So, no-go, bro; (6) Wish me luck, bro; (7) This chick stopped answering too. (8) I guess I’m going solo.

On September 2, 2018, Trejo sent text messages to phone number 702-417-8480, listed as Michelle Padilla in Trejo’s contact list (hereinafter “Padilla”). Trejo’s

sent the following text messages: (1) WYD (2) “Wanna make some money” (3) “I have a job I need to do but I can’t do it alone” (4) “You can get at least 20 racks” (5) “I have all the gear, and it won’t take more than 10 mins.” 9AA2120-21. Padilla agreed and and texted back the following: (1) “Chilling right now” (2) Yeah (3) What’s up (4) Talk to me.

Padilla asked for more details and texted Trejo: (1) “Doing what?” (2) “And when” (3) “Cause I’m leaving town tomorrow.” 9AA2121. Trejo replied, “Hitting a lick rn.” 9AA2121. Detective Jones explained that “hitting a lick” “referred to somebody going to do a robbery” and “rn” typically meant “right now.” 9AA2121.

Trejo messaged more details and preparation for robbery: (1) “I have an inside man” (2) “A plan ready to go” (3) “Come over” (4) “Torrey Pines and Washington” (5) “You in?” (6) “It is a smooth go, and I’m not going to jail.” 9AA2122.

Padilla’s replies showed she agreed and participated in the planning: (1) “Who and where” (2) “where you at?” (3) “What’s the penitentiary chances?” (4) “You know I’m on probation, so I need to be a smooth go.” (5) How many people do you need? I have a HG2.” 9AA2122-23. Detective Penny testified that “HG2” was an abbreviation for a handgun. 9AA2123.

Further agreement was shown when Trejo messaged with details of the plan and Padilla agreed. Trejo messaged (1) “it’s a two-person job” (2) “ASAP” (3) “I have everything. Just wear clothe that hides tattoos.” (4) “I might have long sleeve

for you.” (5) I have all the gear. 9AA2123-24. Padilla replied (1) “okay” (2) “when do I need to be there by? Because I want to eat and get incognito” (3) “Okay, okay, got you” (4) “I have to probably go buy some real quick because I didn’t bring winter clothes. LOL.” (5) Okay. I need some pants too. I only got white.” 9AA2123-25.

Direct and circumstantial evidence showed that the text messages were about the robbery on September 3, 2018. At about midnight of September 2 to September 3, Trejo texted, “Be ready tomorrow. Come by at 11:00 a.m.” On September 3, 2018, Padilla did not respond to his text messages, so Trejo entered Super Pawn by himself, and took jewelry and money while pointing the gun at Serrano-Borjolez. 9AA2125. 13AA2935-52. In summary, the State presented sufficient evidence of Conspiracy to Commit Robbery.

VII. THERE IS NO CUMULATIVE ERROR THAT WARRANTS REVERSAL

Finally, Trejo alleges that the cumulative effect of error deprived him of his right to a fair trial. AOB 38-39. Under the doctrine of cumulative error, “although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial.” Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17 (2000). Appellant must present all three elements to be successful on appeal. Id. Moreover, an appellant “is not entitled to a perfect trial, but only a fair trial.” Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (citing Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357 (1974)).

Trejo’s claim must be denied because he cannot present all three elements. First, the issue of guilt is not close. There was overwhelming evidence supporting Trejo’s conviction, as set forth in Section I(D)(3), *supra*. Second, the quantity and character of the error was slight and did not affect the verdict. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) (stating that cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors). Finally, the only factor that may possibly weight in Trejo’s favor is that he was convicted of serious crimes including First-Degree Kidnapping With Use of Deadly Weapon. Given that Trejo cannot present all elements, his claim of cumulative error has no merit. This Court must affirm Trejo’s convictions.

CONCLUSION

Wherefore, the State respectfully requests that Trejo’s Judgment of Conviction be AFFIRMED.

Dated this 16th day of May, 2023.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Karen Mishler*

KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

- 1. I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
- 2. I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 11,451 words.
- 3. Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of May, 2023.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Karen Mishler*

KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

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

AARON D. FORD
Nevada Attorney General

WILLIAM M. WATERS
Chief Deputy Public Defender

KAREN MISHLER
Chief Deputy District Attorney

/s/ E. Davis

Employee, Clark County
District Attorney's Office

KM/Jean Curioso/ed