IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DA
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

AARON FORD
Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1265

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DA
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

AARON FORD
Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

FACTS

Trejo incorporates by reference the Statement of Facts contained within his Opening Brief. However, Trejo also notes erroneous factual assertions in the State's Answering Brief. Correcting the State's erroneous assertions is important as both assertions relate to Trejo's argument concerning the sufficiency of evidence to support his Conspiracy conviction. See Appellant's Opening Brief (AOB) p. 51-53.

First, the State asserts that Trejo told police on September 8, 2018, with respect to the August 4, 2018, attempt robbery incident at the Superpawn, that "he knew Incera from High School and that it was a coincidence that she was there during the attempted robbery."

Respondent's Answering Brief (RAB) p. 5. This is not accurate. During this portion of his statement Trejo discussed the September 3, 2018, robbery and acknowledged he knew Serrano-Borjorquez from high school, not Incera.[1] See AA X 2321-22.

Second, the State claims "[u]pon juror 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." RAB 11. This is also inaccurate. Trejo's answer regarding being labeled a "snitch" was in response to a juror question regarding his alleged accomplice, but the question that did not distinguish between August 4 and September 3. AA XIII 3111.

REPLY ARGUMENT

I. The District Court Committed Reversible Error by Failing to Provide Trejo a Qualified Interpreter.

A. Correctional officers were not properly "appointed" community interpreters.

The State argues the district court did not violate Trejo's right to an interpreter at critical stages because the court appointed corrections

[1] The prosecutor asked Detective Clark, "[n]ow, when he talked about the September 3rd robbery, did he mention that he happened to know the MOD, right?" Clark answered, "[h]e said he knew her from high school.").

officers pursuant to NRS 50.051 to read Trejo's written statements. RAB 15-16. Trejo disagrees. Before the court could use a corrections officer as an interpreter it had to find that a community interpreter was unavailable, conduct a *voir dire* examination of the corrections officer, and make a finding that the corrections officer was "readily able to communicate" with Trejo, "translate the proceedings" for Trejo, and "accurately repeat and translate [Trejo's] statements to the court[.]" NRS 50.0515(2). This did not happen in Trejo's case and therefore, the district court clearly erred by conducting hearings in Trejo's case without a registered community interpreter or another qualified person **appointed** pursuant to NRS 50.0515.

B. Trejo did not waive his claim that the district court failed to provide him with a registered community interpreter.

The State argues this Court should reject Trejo's claim that the district court erroneously used a foreign language interpreter during trial without first complying with NRS 50.051(2) because Trejo "fails to explain how the court failed to comply with NRS 50.051(2)." RAB 16. The State is incorrect.

In his Opening Brief Trejo noted he was entitled to a registered community interpreter per NRS 50.050(1)(b), 50.051, 50.0515(1).

AOB 17. Trejo also noted that 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.'" Id. (citing NRS 50.050(1)(c)). Although Trejo primarily argued the district court failed to provide an interpreter during pre-trial hearings, Trejo also noted the court used a foreign language interpreter at trial without complying with NRS 50.0515(2) – which Trejo had previously explained allowed the court to appoint someone other than a registered community interpreter when a registered community interpreter is not available and after conducting a *voir dire* examination of the prospective interpreter. AOB at 17, 20-21.

Trejo's argument is obvious. Trejo believes that a foreign language interpreter is not automatically "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." Accordingly, before the court could use a foreign language interpreter at trial, it had to find that a community interpreter was unavailable, conduct a *voir*

dire examination of the foreign language interpreter, and make a finding that the foreign language interpreter was "readily able to communicate" with Trejo, "translate the proceedings" for Trejo, and "accurately repeat and translate [Trejo's] statements to the court[.]" NRS 50.0515(2).

Next, relying upon Burns v. State, 137 Nev. 494, 496 (2021), the State claims "Trejo agreed to waive his rights to appeal anything related to his inability to speak and directly communicate with the jury." RAB 17 (citing AA VI 1290-92). This argument is illogical.

In Burns the defendant pleaded guilty mid-trial pursuant to an agreement with the State. Burns, 137 Nev. at 495. Per the agreement, the defendant waived his right to appeal issues that occurred during the trial's guilt phase. Id. at 497. The defendant eventually appealed his conviction and on appeal this Court clarified which issues he waived per his agreement with the State. Id. at 497-99. Here, Trejo did not plead guilty. Trejo's trial proceeded through verdict. Therefore, he never agreed to waive any appellate rights pursuant to an agreement with the State.

The State also relies upon an April 18, 2022, exchange where the prosecutor nonsensically suggested the court inform Trejo that, "he

waives any appellate rights when it comes to his inability to communicate verbally while presenting to the jury." RAB 17 (citing AA VI 1290-92). However, the State doesn't explain the legal basis for the argument the prosecutor asserted. Moreover, there was no agreement that Trejo would give up his right to appeal interpreter issues in exchange for the State giving up something as well.

Nevertheless, assuming the court had the power to coerce Trejo – at the State's prompting – to waive certain appellate rights, the supposed waiver clearly did not apply to issues involving whether the court erred by failing to provide a registered community interpreter. Rather, during the court's discussion with Trejo the court explicitly noted, "[a]nd so what the State is asking is to make sure you understand that by not having an attorney, you're not going to be able to directly communicate with the jury. You're going to have to do it either through Mr. Henry or through whoever we've got here from the interpreter's office." AA VI 1291. Thus, it appears the court merely admonished Trejo that due to his disability, and decision to represent himself, he could not argue on appeal that his inability to talk **directly** to the jury rendered the trial unfair.

C. Ability to assist with Trejo's defense is not the standard because Trejo represented himself.

Relying on Ton v. State, 110 Nev. 970, 971-72 (1994), the State agues Trejo fails to demonstrate that without a registered interpreter he did not understand the court proceedings nor could not assist with his defense. RAB 18. Trejo mentioned Ton in his Opening Brief as analogous authority. See AOB 19. However, Trejo also noted this Court has never addressed a situation like his where the district court refused to appoint a registered community interpreter for a person unable to speak. Moreover, there is no authority addressing the lack of a qualified community interpreter for a defendant acting as his own attorney. Accordingly, this is an issue of first impression in Nevada.

While Ton can provide some guidance, it does not adequately address Trejo's situation. Here, Trejo had no assistance from a qualified community interpreter during critical hearings that impacted his ability to mount a proper defense. The State attempts to minimize this unfairness by claiming Trejo understood the proceedings and assisted in his defense. However, the Nevada Legislature would not require the court appoint a "registered community interpreter," or a similarly qualified individual, if it did not believe clear standards and

guidelines governing interpreters is necessary to protect a criminal defendant's right to a fair trial.

Furthermore, Trejo did not "assist with his defense," rather he was his defense. Defending oneself without the ability to personally address the court is far more problematic than simply using an unqualified intermediary between the defendant and his attorney because the attorney is ultimately responsible for making representations to the court and advocating on his client's behalf.

D. The district court's error rendered the proceedings unfair.

1. Plain error does not apply

The State agues Trejo did not preserve for appeal his claim that the district court erroneously failed to appoint a registered community interpreter. RAB 18. Accordingly, the State argues plain error applies. Id. Once again, the State is incorrect.

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 as well. Id. at 1106 ("I know every other appearance we've had it's been a similar issue, Your Honor."). NRS 50.051 and 50.0515 obligates the court to appoint an interpreter to

someone with a communications disability by using the terms "must" and "shall." Therefore, the court was obligated to appoint an interpreter the moment it learned Trejo needed one. Moreover, although Trejo did not explicitly object **at that point**, objections are less necessary when the trial court errs in its affirmative duties because "the necessity of informing him of dereliction in such duties and the likelihood that he would properly perform such a duty merely because defense counsel informed him of it, is slight." Winston v. State, 332 N.E.2d 229, 233 (Ct. of App. Indiana 1975).

Nevertheless, on September 23, 2021, Trejo filed a "Motion for Proper In-Court Disability Adjustment" requesting assistance from an interpreter during all court appearances. AA I 243-46. In his motion Trejo objected to the court's informal use of correctional officers as interpreters during the proceedings. Id. at 244. The court granted Trejo's motion. AA V 1175. However, the court conducted numerous hearings after granting Trejo's motion without assistance from a registered community interpreter.[2] Accordingly, the issue was

[2] Trejo's trial began on April 18, 2022. See AA VI 1285. The court conducted 11 hearings, after granting Trejo's motion, including a Faretta canvass, calendar calls, and hearings on suppression motions, without a registered community interpreter. Accordingly, even if this Court accepts the State's argument, Trejo preserved the issue at least

adequately preserved for appeal and plain error does not apply. See Richmond v. State, 118 Nev. 924, 932 (2002) ("We, therefore, hold that where an objection has been fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling, then a motion in *limine* is sufficient to preserve an issue for appeal.").

2. Trejo could not effectively represent himself without a properly qualified interpreter.

The State argues the district court's failure to provide a qualified interpreter to Trejo was harmless as "[t]he role of Trejo's interpreter was solely to read his written words on paper and not to translate from another language to English." RAB 22. Furthermore, the State claims "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." Id. Finally, the State argues "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." Id.

---

as to any hearing (and trial) that occurred after the district court granted Trejo's motion.

Specifically, the State notes during trial Trejo advised the court, "I've argued every issue that I thought that I could argue." Id. citing AA IX 2063-64. Trejo respectfully disagrees.

Pursuant to NRS 50.053(1), the court appointed 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." Here, although the interpreter's role was to essentially read to the court what Trejo wrote, the corrections officers used by the court were not administered the oath before doing so. This is no small matter. In other contexts, this Court has found structural error when the district court fails to administer a statutorily required oath. See Barral v. State, 131 Nev. 520, 525 (2015). As applied here, without having first administered the oath in Trejo's case, there's no way to know with absolute certainty that the corrections officers read Trejo's statements verbatim.

Additionally, pursuant to NRS 50.053(2), while engaged as an appointed interpreter the person, "acts in the place of the person with a communications disability and to that extent has all of the rights and

privileges of that person for purposes of the proceeding, including access to all relevant material." The State cannot possibly suggest its is appropriate to appoint jailers, who work closely with the District Attorney's Office and the court, to assist a criminal defendant in consequential matters before the court which implicate the defendant's liberty.

Furthermore, at certain hearings where there was no qualified interpreter Trejo had to resort to hand signals or brief "yes" or "no" responses when communicating with the court. See AA V 1192, 1198; AA VI 1249, 1257, 1265, 1269, 1273. Similarly, given the additional time required to accommodate Trejo's disability, the court expressly limited Trejo's ability to effectively communicate. See AA V 1112 ("Mr. Trejo, just understand we do still have limited time because other courts need to use the Blue Jeans link in the jail so there's no need to write a novel."). During crucial appearances in court a defendant must be provided an opportunity to adequately converse with the court regarding the status of his case. This cannot be accomplished without a sufficient back and forth between a *pro se* defendant and the judge.

Finally, the State misrepresents the significance of Trejo's suggestion that he "argued every issue" he could. Trejo's statement in no way suggests he had **sufficiently** argued every issue he could. Rather, Trejo essentially noted he **raised** every issue he thought he could. Raising an issue and effectively presenting the issue during argument in court are not the same.

3. Evidence of guilt

Lastly, the State implies if the district court erred, "[t]here was no prejudice to Trejo due to the overwhelming evidence of his guilt." RAB 23. Specifically, the State cites the surveillance and bodycam videos – which Trejo contends should not have been admitted – as well as victim testimony and Trejo's confessions. RAB 23-24. However, the requirement that the appellant demonstrate prejudice only applies when the error is unpreserved. See Green v. State, 119 Nev. 542, 545 (2003); NRS 178.602.

As noted, Trejo preserved the district court's error regarding the interpreter. Accordingly, Trejo need only demonstrate the district court abused its discretion and "clearly erred." See 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); Easley

v. Cromartie, 532 U.S. 234, 242 (2001) (in determining whether the lower court clearly erred "a reviewing court must ask whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed." (Internal citations omitted). And notwithstanding the State's claim otherwise, as discussed *infra*, the State did not present overwhelming evidence to support its First-Degree Kidnapping and conspiracy allegations.

II. The District Court's Decision Regarding Trejo's Right to Counsel.

A. The district court's inquiry into Trejo's request to substitute appointed counsel.

The State first claims Trejo did not request substitute counsel. RAB 25. However, this claim is expressly belied by Trejo's motion where Trejo requested, "either allow me to invoke my rights to self-represent **or that the courts appoint the defendant effective legal counsel.**" AA I 119 (emphasis added).

Next, the State argues assuming Trejo did request alternate counsel, the district court did not abuse its discretion in denying his request. RAB 26. Specifically, the State argues Trejo did not claim a

conflict with appointed counsel, that Trejo's motion was untimely, and the district court sufficiently inquired into Trejo's claims. RAB 26.

1. Conflict

The State argues Trejo did not claim in his motion, at the hearing on his motion, or in his direct appeal, that there was a conflict between him and his counsel. RAB 26 (citing AA I 117-19; AA V 1103-1139; AOB 25). This is not necessarily true. As Trejo noted in his Opening Brief, the extent of the conflict was not sufficiently explored by the district court. See AOB 24-25.

2. Timeliness.

The State argues Trejo's motion was not timely because "[b]y 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." RAB 26. Trejo was first arrested in 2018. Trejo waived his speedy trial right. Prior to filing his motion, Trejo's trial had been postponed for years in part due to the Covid 19 pandemic. Indeed, at calendar call on January 20, 2021, the district court noted, "[t]his matter is unable to go forward to trial right now because trials resume on February 1st due to Covid." AA V 1101. Accordingly, the court

rescheduled trial to May 24, 2021. Id. Trejo then filed his motion in March 2021, during the Delta wave of the coronavirus pandemic. At that time, per the Eighth Judicial District Court's administrative order 21-03, which explained Covid 19 safety protocols for district courts, certain trials were being prioritized while others were not. See Eighth Judicial District Court Administrative Order 21-03, available at <http://www.clarkcountycourts.us/res/rules-and-orders/2021-03-15_09_24_12_ao%2021-03.pdf>, accessed June 14, 2023. Simply put, the court was going to continue Trejo's May 24, 2021, trial irrespective of whether the court appointed alternate counsel.[3] Thus, Trejo's request was timely.

3. Sufficiency of inquiry.

The State claims the district court sufficiently inquired into Trejo's claims regarding counsel and determined any differences were not material as they involved decisions within counsel's purview. RAB 26-28. Assuming this is true, disagreements between a

[3] The district court can also deny a request for self-representation if the request is untimely. See Guerrina v. State, 134 Nev. 338, 342 (2018). Yet here, the district court granted Trejo's request for self-representation after rejecting his request for alternate counsel and the State does not suggest that the request for self-representation was untimely.

defendant and his attorney regarding strategic decisions reserved for counsel can nevertheless create sufficient conflict to warrant appointment of alternate counsel. The standard is whether there is an irreconcilable conflict, not necessarily whether the court believes the defendant's disagreements with counsel are not legitimate. See Young v. State, 120 Nev. 963, 969 (2004). Thus, even if Trejo's complaints involved decisions reserved for counsel, the court's abbreviated inquiry did not explore whether those disagreements made the conflict irreconcilable.

B. Trejo's waiver of the right to counsel.

The State claims the district court did not pressure Trejo to represent him because it "strongly urged" Trejo "multiple times" not to represent himself. RAB 31 (citing AA V 1242-43). However, the transcript portion the State relies upon demonstrates the court only **once** informed Trejo it believed he should not choose self-representation.

Next, the State claims the court did not err by not appointing substitute counsel to discuss the consequences of self-representation because it was not required to do so. RAB 32. Trejo never claimed the court was **required** to appoint alternate counsel to discuss

consequences of self-representation. Rather, Trejo noted the court probably should have exercised its discretion and appointed counsel under SCR 253(1) and Hooks v. State, 124 Nev. 48 (2008) to discuss self-representation given Trejo's equivocation. AOB 27.

The State also claims although Trejo lacked knowledge regarding certain elements of the charged crimes, that fact isn't relevant to whether Trejo knowingly chose self-representation. RAB 33. Yet, this Court has explicitly stated the district court "should not ignore a defendant's lack of understanding about the charges." Miles v. State, 137 Nev. 747 (2021).

Additionally, the State argues the district court's canvass was thorough because the court discussed various aspects of the law, trial, procedural rules, evidentiary rules, how to make objections, how to assert a defense, and how to make appellate record. RAB 33-34. However, the State neglects to mention that Trejo's responses indicate he fundamentally did not understand these things and the court failed to impress upon him that his lack of understanding is one of the disadvantages of self-representation. Miles, 137 Nev. at 752-53. Moreover, as noted in his Opening Brief, the court failed to correct Trejo's misunderstanding of something as essential as the elements of

the charged crime, lesser included offenses, and the State's burden of proof. AOB 27-30. Therefore, on balance, the district court's canvass failed to demonstrate Trejo knowingly and intelligently waived his right to counsel.

III. The District Court's Failure to Fashion a Remedy for the State's Discovery Violation Negatively Impacted Trejo's Confrontation Right.

Although Trejo objected to the State's discovery violation prior to and at trial under Brady v. Maryland, 373 U.S. 83 (1963), and the State responded by noting its Brady obligations, on appeal Trejo explicitly argued the substance of Trejo's objection was that the evidence had not been provided to him. See AOB 33 n. 15. The State argues because Trejo objected to the State's failure to turn over evidence at trial under Brady, and concedes on appeal that Brady does not apply, this Court should only review for plain error. RAB 35. Trejo disagrees.

Pursuant to NRS 47.040(1)(a), "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and [] **[i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection.**" (Emphasis

added). Similarly, NRS 178.596 states, "[e]xceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has been necessary prior to January 1, 1968, **it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor**; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice the party." (Emphasis added).

Here, prior to trial Trejo filed a motion to suppress digital evidence and a "Brady motion for discovery." See AA I 171; AA III 553. Additionally, at trial, when the State sought to admit the evidence in question Trejo objected. See AA XI 2048, 2450; 2457; 2492; 2604; AA XII 278; 2848; 2907. Furthermore, Trejo explained the basis of his objection – that the State failed to provide him an opportunity to review the evidence prior to seeking admission. AA IX 2048; 2054-55; 2057-58; 2061; 2065. Therefore, under NRS 47.040(1)(a) and NRS 178.596 Trejo adequately preserved the issue for appeal.

The State also argues Trejo failed "to clearly specify which video he did not receive and/or watch." RAB 35 (citing AOB 31-37). This is not accurate. Trejo noted in his Opening Brief that he first objected during the State's opening statement when it played ariel surveillance footage. See AOB 33 (citing AA IX 2048). Additionally, Trejo noted in his Opening Brief that he specifically objected to the following: (1) Incera's 911 call (AOB 34 citing AA XI 2450); (2) Howard's 911 call (AOB 34 citing AA XI 2492); (3) State's exhibit 141, Fulwiler's bodycam video (AOB 34 citing AA XI 2542); (4) State's exhibit 140, Carrigay's bodycam video (AOB 34 citing AA XI 2604); (5) State's exhibit 143, air surveillance helicopter video (AOB 34 citing AA XII 2781); (6) State's exhibit 139, Farrington's bodycam video (AOB 34 citing AA XII 2848); (7) State's exhibit 142, Graham's bodycam video (AOB 34 citing AA XII 2907).[4]

Next, the State argues it did not violate its discovery obligations under NRS 174.235 because it gave all videos to Trejo's former counsel at the Public Defender's Office. RAB 36. Moreover, the State argues it could not provide Trejo the videos once Trejo began

[4] The district court noted Trejo's ongoing objection each time the State introduced bodycam video. See AA XI 2542; 2064; AA XII 2848; 2907.

representing himself due to Trejo's custody status. Id. However, the State cannot absolve itself by suggesting it satisfied its discovery obligations by providing the disputed videos to Trejo's counsel because counsel advised the court that he was not certain which videos he had played for Trejo. AA V 1153; AA XI 2052-53. Also, after the court allowed Trejo to represent himself, the court expressly limited standby counsel's role, which did not include playing videos for Trejo at the detention center. AA V 1137; AA VI 1245.

Essentially, the State cannot ignore its obligation to provide Trejo, a *pro se* defendant, an opportunity to review the evidence it intends to introduce at trial merely because the defendant is incarcerated – especially when the State repeatedly, vociferously, opposed Trejo's numerous attempts to be released from custody prior to trial. See AA I 81-89, 102-114, 151-170. The simple fact is, NRS 174.235 contains no incarceration exceptions to the State's discovery obligations. The mere fact it couldn't send Trejo digital media, due to Trejo's incarceration, does mean the State could not have a representative visit the detention center to provide Trejo an opportunity to inspect the State's evidence and therefore, meet its discovery obligations.

Finally, the State claims Trejo fails to specify the videos he did not review. RAB 36-37. This is not true. As noted, Trejo specifically objected to: (1) Incera's 911 call (AOB 34 citing AA XI 2450); (2) Howard's 911 call (AOB 34 citing AA XI 2492); (3) State's exhibit 141, Fulwiler's bodycam video (AOB 34 citing AA XI 2542); (4) State's exhibit 140, Carrigay's bodycam video (AOB 34 citing AA XI 2604); (5) State's exhibit 143, air surveillance helicopter video (AOB 34 citing AA XII 2781); (6) State's exhibit 139, Farrington's bodycam video (AOB 34 citing AA XII 2848); (7) State's exhibit 142, Graham's bodycam video (AOB 34 citing AA XII 2907).

Essentially, the district court is obligated to remedy a party's discovery violation. NRS 174.295(2). Here, court did nothing. Trejo maintains that given Trejo's repeated requests to the district attorney to review the video evidence (AA IX 2048), the State's refusal to do so amounts to bad faith and therefore, he need not demonstrate prejudice. If this Court disagrees regarding bad faith, the State's non-disclosure obviously caused Trejo substantial prejudice which was not alleviated by the court, because the court issued no order. See Evans v. State, 117 Nev. 609, 638 (2001). Without question, it is inherently prejudicial for an attorney, much less a *pro per* litigant, to view video

evidence for the first time in the middle of trial and formulate questions seeking to raise doubt as to the State's allegations. This is especially true for a *pro per* litigant who cannot speak and must have his written questions submitted to an interpreter.

IV. The District Court's Jury Instruction Errors Deprived Trejo of a Fair Trial.

A. Second-Degree Kidnapping.

The State argues because Trejo did not request lesser-included instruction regarding Second-Degree Kidnapping this Court should only review for plain error. RAB 38. Additionally, the State argues there was no evidence that would have absolved Trejo of guilt for First-Degree Kidnapping while supporting guilt for Second-Degree. Id. Specifically, the State notes Trejo's testimony that he moved Serrano-Borjorquez because he did not want to get shot does not "negate the evidence that he moved her to facilitate the robbery and flee from the scene." RAB 39. Moreover, State argues Serrano's testimony that she went with Trejo against her will does not absolve him of First-Degree because First-Degree does not require victim's consent. Id. Trejo disagrees as to each contention.

First, Trejo maintains pursuant to Lisby v. State, 82 Nev. 183, 187 (1966), the district court was obligated to provide an instruction on Second-Degree Kidnapping as a lesser included offense and therefore, plain error should not apply. Second, circumstantial evidence can support the lesser-included offense. See Newson v. State, 136 Nev. 181, 187 (2020). Third, Trejo maintains both the State and Trejo presented evidence which "negated," i.e., absolved, Trejo of guilt for First-degree Kidnapping but supported a finding of guilt for Second-degree. Specifically, Trejo's testimony, which is evidence, that he moved Serrano-Borjorquez with the intent to avoid being shot and not to rob her **absolves** him of, i.e., "negates," guilt for First-degree Kidnapping because it "negates" an element of the charged crime – the intent to commit robbery. Likewise, Serrano's testimony that she went with Trejo against her will supports guilt for Second-degree because her testimony directly supports an element of the lesser-included offense.

Next, the State argues Trejo was not "prejudiced" by exclusion of a lesser-included instruction on Second-Degree Kidnapping because "of the overwhelming evidence that he committed First-Degree Kidnapping." RAB 39. Trejo disagrees. Contrary to the State's

suggestion, there was not "overwhelming" evidence of First-Degree Kidnapping as alleged.

The State theorized Trejo moved Serrano-Borjorquez from the Superpawn into the parking lot with the specific intent to commit Robbery. AA I 3; AA XIII 3128-31. However, because Trejo had already taken the property, before the movement, the State creatively argued the Robbery to support First-Degree Kidnapping was force used **to facilitate escape with the property**. Id.

As Trejo noted in his Opening Brief, when the State charges First-Degree Kidnapping under a theory of movement to commit a predicate offense, it must prove the defendant's specific intent to commit the predicate offense. AOB 40-41 (citing Lofthouse v. State, 136 Nev. 378, 380-81 (2020)). Accordingly, here, the State had to prove Trejo moved Serrano- Borjorquez with the specific intent to escape with the property. However, evidence presented at trial showing Trejo moved Serrano-Borjorquez against her will to avoid being shot, disproves the State's theory. It cannot be confidently claimed that a rational jury would have still found Trejo guilty of First-Degree Kidnapping had the district court properly instructed the jury on Second-Degree Kidnapping. Accordingly, the district court's

error is not harmless. See Wegner v. State, 116 Nev. 1149, 1155-56 (2000), overruled on other grounds by Rosas, 122 Nev. at 1267 n. 26.

B. The voluntariness of Trejo's alleged confession.

The State essentially argues there is no precedent requiring the district court to *sua sponte* instruct the jury to determine whether a defendant's alleged confession is voluntary. RAB 40. This is true, and Trejo acknowledged as much in his Opening Brief. See AOB 45. Nevertheless, because Trejo is obligated to argue "...in good faith for an extension, modification or reversal of existing law[]" (Ramos v. State, 113 Nev. 1081, 1085 (1997)), Trejo believes this Court should reconsider precedent.

The State next argues the district court's failure to instruct on voluntariness was harmless because the evidence presented at trial demonstrated Trejo's confession was voluntary and the State presented overwhelming evidence of guilt. RAB 41-42. However, the jury is empowered to determine voluntariness regardless of the evidence the State presents. Additionally, other than some vague text messages which were never directly tied to Trejo, without Trejo's supposed confession there was very little evidence presented at trial regarding Trejo's involvement in the August 4, 2018, attempt robbery.

V. The State Decision to Elicit Bad Act Evidence.

The State essentially concedes detective Penny's testimony concerning the short-barreled rifle implicated bad acts. See RAB 42. However, the State argues Trejo's claim "fails" and his reliance on Tavares is not "relevant" because Penny's testimony was inadvertent and as such, the State did not "explicitly seek[] to admit bad acts evidence for certain allowed purposes." Id. Instead, the State relies upon Geiger v. State, 112 Nev. 938, 942 (1996), overruled on other grounds by Barber v. State, 131 Nev. 1065 (2015) and claims, "[t]o 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." RAB 43 (emphasis added).

As an initial matter, Penny's description of the rifle, and his testimony that possessing the rifle in its configuration was illegal, was not "inadvertent." His answer was plainly prompted by the prosecutor's explicit question, "can you just talk a little bit about the

firearm; explain how it works and what it is?" AA X 2277. The discovery of the alleged short-barreled rifle in the car was not relevant to any of the State's allegations. The rifle was not used in the alleged robbery and no victim knew it was in the vehicle. Therefore, there was absolutely no reason whatsoever for the prosecutor to ask Penny to "talk a little bit about the firearm; explain how it works and what it is." Accordingly, the error is plain from the record.

Moreover, the State's reliance on Geiger is misplaced. In Geiger this Court noted the defendant had to prove the inadvertent reference to his **prior conviction** "was so prejudicial as **to be unsusceptible to neutralizing by an admonition to the jury.**" Geiger, 112 Nev. at 942 (emphasis added). Here, Penny's testimony did not reference a prior conviction. More importantly, as Trejo noted in his Opening Brief, there was no admonition to the jury. See AOB 49. Accordingly, Geiger is inapplicable to Trejo's case and Tavares v. State, 117 Nev. 725 (1998) applies. Under Tavares the court's failure to provide a limiting instruction, even in the absence of an objection, is reviewed for non-constitutional harmless error. Id. at 731.

///

///

VI. Sufficiency of the Evidence, Conspiracy.

The State argues it presented sufficient evidence to support its conspiracy allegation by noting it introduced text messages from September 2 and 3, 2018, suggesting Trejo, a phone number ending in 5067, and a contact named Michelle "Padilla,"[5] planned the September 3, 2018, Superpawn robbery. See RAB 46-48. The State does not address Trejo's claim that although it alleged in the charging document that Trejo committed conspiracy by committing the acts set forth in count 2 – the robbery of Serrano-Borjorquez, on September 3, 2018 – prosecutors specifically argued at trial that the conspiracy counts "apply to the August 4th attempted robbery" and not the September 3, 2018, robbery. See AOB 52 (citing AA XIII 3134-36). By arguing on appeal that the text messages from September 2 and 3, 2018, somehow prove its conspiracy allegation, the State is improperly asserting a new theory for the first time on appeal. See Dermody v. City of Reno, 113 Nev. 207, 210 (1997) (parties "may not raise a new

[5] The State claims the text messages Trejo sent to Padilla were to a telephone number ending in 8480. However, the portions of the record the State cites to support this claim shows text messages between Trejo and a number ending in 0733. See AA IX 2120-21. Additionally, there's no reference to a Michelle Padilla within the portion of the record the State cites. The reference to Padilla can be found at AA IX 2117.

theory for the first time on appeal, which is inconsistent with or different from the one raised below.") (Quoting Powers v. Powers, 105 Nev. 514, 516 (1989)).

Nevertheless, assuming this Court considers the State's new argument on appeal, the September 2 and 3, 2018, text messages do not prove conspiracy. As the State itself noted in its Answering Brief, none of the text messages to the number ending in 5067 indicate any agreement to commit a robbery. See RAB 46. In fact, the last message to 5067 purportedly from Trejo stated, "I guess I'm going solo." Id. (citing AA IX 2114-17). This statement clearly indicates there was not an agreement between Trejo and the person behind 5067 to rob the Superpawn. See Doyle v. State, 112 Nev. 879, 894 (1996) (overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 333 (2004), "[m]ere knowledge or approval of, or acquiescence in, the object and purpose of a conspiracy without an agreement to cooperate in achieving such object or purpose does not make one a party to conspiracy."). Likewise, the text messages purportedly between Trejo and "Padilla" or 0733 doesn't evidence any "agreement" to commit the Superpawn robbery. See AA IX 2119-26. In fact, the evidence the State did present at trial clearly established that "Padilla"

or someone else was **not present** at the Superpawn on September 3, 2018.

Here, the State made a specific allegation that Trejo conspired with another person to commit robbery and in furtherance, robbed Serrano-Borjorquez on September 3, 2018. See AA I 2-4. However, at trial the State claimed the conspiracy charge applied to the August 4, 2018, attempt robbery. If the jury complied with the law as instructed, applied the evidence presented to the State's specific allegation, and listened to the prosecutor's argument, it could not rationally find that Trejo's conspired to commit robbery and in furtherance robbed Serrano-Borjorquez on August 4, because Serrano-Borjorquez was not present at the Superpawn on that date.

VII. Cumulative error.

State argues the issue of Trejo's guilt was not close, the quantity and character of the errors were slight – and did not affect the verdict – and although Trejo was convicted of serious crimes, he only satisfies this element of plain error and not the others. RAB 49.

The crimes the State alleged against Trejo were serious. Indeed, the district court sentenced Trejo to life in prison for First-Degree Kidnapping. AA IV 957. However, the State presented conflicting

evidence to support that specific allegation. Additionally, as noted, the State presented no evidence to support its specific conspiracy allegation. These failures, coupled with the numerous, serious, errors committed by the district court, rendered the proceedings unfair. Allowing Trejo's convictions to stand in the face of multiple, serious, prejudicial, errors would pervert justice. Because the charges Trejo faced, like First-Degree Kidnapping and Robbery with Use of a Deadly Weapon are such serious offenses in Nevada, the district court should have been hypervigilant in ensuring its decisions were correct and compatible with Trejo's Due Process rights. Having failed to do so, this Court should reverse Trejo's convictions.

CONCLUSION

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

Respectfully submitted,
DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
WILLIAM M. WATERS, #9456
Chief Deputy Public Defender

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.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 6,182 words which does not exceed the 7,000 word limit.

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 20th day of June, 2023.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
WILLIAM M. WATERS, #9456
Chief Deputy Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 20th day of June, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD
ALEXANDER CHEN
WILLIAM M. WATERS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

MARIO BLADIMIR TREJO
NDOC NO: 1258166
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070

BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office