IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL SAMUEL SOLID, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 85189

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals under NRAP 17(b)(3) because it is an appeal from a postconviction petition that involves a Category A felony.

STATEMENT OF THE ISSUES

1. Whether the district court correctly denied Appellant's motion for a mistrial based upon the outburst of the victim's father.
2. Whether the district court correctly admitted call detail records and text messages into evidence.
3. Whether the State committed prosecutorial misconduct by commenting on Appellant's post-arrest silence.
4. Whether the district court correctly admitted the previous testimony of Matthew Nicholas.
5. Whether sufficient evidence was presented at trial to support the jury's finding that Appellant committed the offenses with use of a deadly weapon.
6. Whether Appellant demonstrates cumulative error.

STATEMENT OF THE CASE

On June 5, 2013, the State filed an Indictment charging Appellant Michael Solid ("Appellant") and co-defendant Jacob Dismont with: Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 199.480, 200.380); Count 2 – Robbery (Category B Felony – NRS 200.380); Count 3 – Murder With Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165). 1 Appellant's Appendix ("AA") 1-5.

The State filed an Amended Indictment on August 23, 2016, and a Second Amended Indictment on August 24, 2016. 1 AA 6-14.

On May 16, 2022, a seven-day jury trial commenced and lasted until May 24, 2022. Id. A verdict was rendered and filed on May 24, 2022. VII AA 1520-1521. On July 26, 2022, Appellant was sentenced to the Nevada Department of Corrections (NDC) as follows: COUNT l - a maximum of seventy-two months with a minimum parole eligibility of twenty-four months; COUNT 2 - a maximum of fifteen years with a minimum parole eligibility of two years, concurrent with Count 1 ; COUNT 3 - a maximum of fifty (50) years with a minimum parole eligibility of twenty years, plus a consecutive term of twenty years with a minimum parole eligibility of eight years for the use of a deadly weapon, consecutive to Count l. 7 AA 1662. The aggregate total sentence imposed was seventy-six years maximum with a minimum parole eligibility of thirty years. Id.

On August 12, 2022, Appellant filed his second Notice of Appeal. 7 AA 1698-1699. On May 19, 2023, Appellant filed his Opening Brief (hereinafter "AOB"). The State now responds as follows.

STATEMENT OF FACTS

On March 15, 2013, Ivan Arenas bought his fifteen-year-old son, Marcos, an iPad. 3 AA 522-523. On the afternoon of May 16, 2013, Marcos and his friend, Gacory, were walking near the intersection of Charleston Boulevard and Torrey Pines Drive in Las Vegas, Nevada, when co-defendant Jacob Dismont ran up and grabbed the iPad from Marcos. 3 AA 536-543.

Marcos refused to let the iPad go. Id. Dismont, who towered over Marcos, struggled with Marcos over the iPad. Id. After struggling over the iPad, Dismont gained possession of it and ran to his white Ford Explorer, driven by Appellant, which was waiting for him in traffic. Id. Marcos ran after Dismont and grabbed on to the vehicle as it sped off. 3 AA 68. Marcos attempted to keep up with the car but was unable. 3 AA 546. When Marcos let go of the Dismont's vehicle, his face hit the side of the vehicle and the impact knocked him down. Id. The vehicle ran directly over Marcos and proceeded to drive away, leaving the young teenager lying limp and bloody in the middle of the street. Id.

Marcos was bleeding from his ears, nose, and mouth, and eyes were open but not moving. Id. Tire tracks were visible on Marcos' body. 3 AA 530. Emergency

medical professionals provided CPR to Marcos at the scene and en route to University Medical Center. 3AA 656-660. At UMC, Marcos underwent emergency surgery and was in a coma. 3 AA 644. Marcos ultimately passed away from his injuries. 3 AA 531. During the autopsy, the medical examiner determined that Marcos suffered from a lacerated liver and pancreas and significant blunt force trauma to the head. 3 AA 644-650.

During the investigation, the Las Vegas Metropolitan Police Department ("LVMPD") sought the public's help in identifying Marcos' assailants. 3 AA 664. A former neighbor to Appellant, Desirie Jones, contacted the police and identified Appellant. Id. LVMPD located and arrested Appellant on May 18, 2013. 5 AA 1124.

When Appellant's friend, Matthew Nicholas, was contacted by LVMPD in an unrelated case, he provided the location of the iPad Appellant gave him the afternoon of the robbery and told detectives that Appellant admitted his involvement in the robbery and murder of Marcos Arenas. 4 AA 926, 989.

SUMMARY OF THE ARGUMENT

Appellant claims that the district court abused its discretion when it did not declare a mistrial due to an outburst of the victim's father during the Appellant's questioning. However, the district court instituted a curative instruction to the jury and correctly determined that the father's statement was not so prejudicial as to constitute a mistrial of the proceedings.

Appellant also alleges that the district court abused its discretion and committed plain error when it allowed for the admission of phone records from both the Appellant and Appellant's co-defendant. However, Appellant failed to object to the admittance of the phone records ending in 7494 attributed to Appellant and cannot now raise this issue on appeal. In addition, sufficient evidence was introduced by the State to establish this phone number's connection to Appellant. Appellant also argues against the admittance of the phone records from the number ending in 5700, associated to Jacob Dismont. And, while Appellant's counsel did object to their admittance at trial, Appellant's counsel only objected to the extent that they were hearsay statements and did not object to any issue involving authentication as Appellant now argues on appeal. As a result, Appellant cannot raise a different argument on appeal than what was raised below.

Appellant further alleges that prosecutorial misconduct occurred by the State commenting on Appellant's silence during a police interrogation. However, the State did not comment on an invocation of silence because the record reflects Appellant did not invoke his right to remain silent—instead he waived this right and voluntarily spoke with the police, and provided a version of events of the incident in question that was contradicted by the evidence.

Next, Appellant asserts that the prior testimony of Mathew Nicholas from the Appellant's previous 2017 trial was inadmissible and should not have been read into

the record as it prejudiced Appellant. However, Appellant already had the opportunity to cross examine Nicholas, and this cross examination was also read into the record alongside Nicholas's prior testimony. Furthermore, no objection was made at trial regarding the reading of this testimony thus eliminating Appellant's ability to raise this issue now on appeal.

Appellant also claims that there was insufficient evidence to support the jury's finding that Appellant engaged in an act of First-Degree Murder involving a deadly weapon. However, numerous witnesses testified at trial regarding the way Appellant used his vehicle to run over Marcos, thereby establishing the requisite intent.

Lastly, Appellant presents an argument of cumulative error, but as Appellant has failed to identify any cognizable error that occurred in the proceedings, cumulative error cannot exist. Accordingly, the judgment of conviction from the district court should be affirmed.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR A MISTRIAL BASED UPON THE OUTBURST OF THE VICTIM'S FATHER.

The denial of a motion for a mistrial is reviewed for an abuse of discretion. Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007). Such a decision will not be reversed "absent a clear showing of abuse." Id. (internal quotation marks omitted). Here, the district court did not abuse its discretion by denying Appellant's

motion for a mistrial. In this case, during Appellant's testimony, Appellant and counsel gave the following exchange:

> Q: Were you scared of Jake Dismont at the time?
> A: As a man it hurt to say it, yes. I'm 5'6", he's 6'5". He would have whipped my ass. If you would have received the text messages and read the text messages that I read, everyone in this room would have been scared.

5 AA 1226-1227.

Once Appellant gave his answer, the victim's father, who was seated in the spectator area, exclaimed: "Why did you erase those?" 5 AA 1227. Appellant's counsel then moved for a mistrial at a bench conference. Id. The district court determined that because the statement from the father was "just a question" and was something that the State was going to be questioning Appellant on cross examination, the statement was not so prejudicial to constitute a mistrial. 5 AA 1231-1232. The Court then issued the following curative instruction to the jury:

> Ladies and gentlemen of the jury, at this time I'm going to ask you to disregard the outburst by Mr. Arenas. It was inappropriate and should not be considered by you for any purpose.

5 AA 1233.

Accordingly, the court's curative instruction to the jury was sufficient to cure any prejudice and ensure a fair trial. See Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) ("A jury is presumed to follow its instructions") (internal citations omitted). In light of all of the evidence against Appellant, including his phone

records, the testimony of eyewitnesses who were at the scene of the crime, and the prior testimony of Matthew Nicholas who confirmed that he received the stolen iPad from Appellant, Appellant fails to show that this isolated comment prejudiced him. 3 AA 546, 569, 595, 616; 4 AA 870; 4 AA 927-933. In addition, the State questioned Appellant in a similar manner to the aforementioned exclamation when they asked, "so you are denying deleting text messages and phone call records between you and Jacob Dismont?" 6 AA 1343. Where the Appellant responded "yes." Id. Thus, the district court did not abuse its discretion in finding that this isolated exclamation by Marcos' father did not warrant a mistrial.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING CALL DETAIL RECORDS AND TEXT MESSAGES INTO EVIDENCE.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. Mclellan v. State, 124 Nev. 263, 182 P.3d 106, 109 (2008).

A. Call detail records from 7494

Appellant failed to object to the admission of these records at trial, and therefore this issue has been waived for appellate review. Generally, issues not raised before the district court are deemed waived. 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).

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)). Nevada law provides a mechanism for an appellant to seek review of an error he otherwise forfeited. NRS 178.602 (explaining when an unpreserved error "may be noticed").

Before this court will correct a forfeited 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. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Here, Appellant attempts to appeal the use of the phone records associated to the number ending in 7494. AOB at 11-12. However, as Appellant acknowledges, Appellant did not object to the admission of these records at trial. Id. Accordingly, this claim has not been preserved for appeal. Appellant has also not demonstrated plain error, because there was no error in admitting these records. Appellant also

cites Rodriguez v. State, 128 Nev. 155, 273 P.3d 845 (2012), a case that sets forth what the State must prove when a party objects to the admissibility of text messages, but because Appellant did not object in this instance, Rodriguez is inapplicable.

Additionally, sufficient evidence was also presented at trial to establish that the 7494 number presented at trial was used by Appellant. Both Robert Taylor and Desirie Jones, neighbors of Appellant, testified that they were in possession of Appellant's phone number and gave this number to both officers and investigators. 3 AA 667; 4 AA 815. An investigator with the Federal Bureau of Investigations (FBI), Ryan Burke, a specialist in cell phone analysis, also testified that he was able to connect Appellant's 7494 phone number to his address at 7467 Hawk Shadow Avenue. 4 AA 861. Burke also testified how, although that number was associated with the mother of Appellant's girlfriend, Kayrn Licari, it was not unusual for a person to be using the phone number of a member of their household consistently as if it was their phone. 4 AA 886. Burke also determined that the two numbers associated with Appellant were used within the vicinity of both Appellant and his co-defendant Dismonts' addresses. 4 AA 870. The officers who arrested both Appellant and Dismont also seized their phones which had 7494 as one of the active numbers. 5 AA 1125-1128. Accordingly, the State presented enough evidence for Appellant to be connected to the phone number in question. Appellant has failed to

preserve this claim, and he fails to establish plain error due to admittance of this evidence. Accordingly, he is not entitled to relief on this claim.

B. Call detail records from 5700

Appellant claims his counsel objected to the admission of the cell phone records connected to his co-defendant Jacob Dismont. AOB at 14-16. Appellant did indeed object to the use of text messages between Dismont and third parties at trial. Id. However, an objection at trial must be on the same basis as the claim raised on appeal to be preserved. Jeremias v. State, 134 Nev. 46, 55, 412 P.3d 43, 52 (2018) ("Because the objection below was on a different basis than the claim asserted on appeal, we review for plain error."); Schuck v. Signature Flight Support of Nevada, Inc., 126 Nev. 434, 437, 245 P.3d 542, 544 (2010) (internal quotation marks and citation omitted) ("parties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.").

Here, the objection at trial did not relate to authentication as Appellant alleges in his immediate appeal, before the trial court, counsel argued that these records were inadmissible hearsay and violated the confrontation clause. 4 AA 993. Thus, this claim has been forfeited for appellate review. Furthermore, Appellant has not demonstrated plain error because the messages were sufficiently authenticated. A witness named Jody Faust testified that she told police Jacob Dismont's number and did not disagree that she likely gave officers Dismont's number ending in 5700. 5

AA 1026. In addition, special agent Ryan Burke testified that the number ending in 5700 was registered in the name of Jacob Dismont's family member Richard Dismont. 4 AA 861. And agent Burke later testified that it was not unusual for family members to use phones registered to someone in the same household. 4 AA 886. Appellant's counsel also did not contest the authentication of the text messages coming from the phone number and conceded in argument that the messages were authored by Dismont. 4 AA 994. Appellant's counsel instead argued that the conversations that Dismont had with others in these text messages with were hearsay. Id.

Accordingly, the district court did not abuse its discretion by admitting these records.

III. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT BECAUSE APPELLANT DID NOT INVOKE HIS RIGHT TO REMAIN SILENT DURING HIS INTERROGATION.

Claims of prosecutorial misconduct that have not been objected to at trial will not be reviewed on appeal unless they constitute "plain error." Leonard v. State, 17 P.3d 397, 415 (2001); See Mitchell v. State, 114 Nev. 1417, 971 P.2d 813, 819 (1998); Rippo v. State, 113 Nev. 1239, 946 P.2d 1017, 1030 (1997).

When resolving claims of prosecutorial misconduct, this Court undertakes a two-step analysis: 1) determining whether the comments were improper; and 2) deciding whether the comments were sufficient to deny the defendant a fair trial.

Valdez v. State, 124 Nev. 1172, 1188 (2008). This Court views the statements in context and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

With respect to the second step, this Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-89. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. at 1189 (quoting Darden v. Wainright, 477 U.S. 168, 181 (1986)). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. at 1189.

"[A]s long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented." Id. (internal citation omitted). Further, the State may respond to defense theories and arguments. Williams v. State, 113 Nev. 1008, 1018-19 (1997). This includes commenting on a defendant's failure to substantiate his theory. Colley v. State, 98 Nev. 14, 16 (1982); See also Bridges v. State, 116 Nev.

752, 762 (2000) (*citing* State v. Green, 81 Nev. 173, 176 (1965) ("The prosecutor had a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully his views as to what the evidence shows.")).

The Nevada Supreme Court has noted that "statements by a prosecutor, in argument, . . . made as a deduction or conclusion from the evidence introduced in the trial are permissible and unobjectionable." Parker v. State, 109 Nev. 383, 392 (1993) (quoting, Collins v. State, 87 Nev. 436, 439 (1971)). Ultimately, the State is permitted to offer commentary on the evidence that is supported by the record. Rose v. State, 123 Nev. 194, 209 (2007).

A defendant is required to demonstrate "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (*citing* Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)). This is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). In determining if the prosecution's statements were prejudicial, the relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986).

"It is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights." McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986). Anderson v. Charles, 447 U.S. 404, 408, 100 S. Ct. 2180, 2182 (1980) ("a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all."); Doyle v. Ohio, 426 U.S. 610, 618-19, 96 S.Ct. 2240, 2244-45 (1976) (finding that a defendant's silence following Miranda warnings may not be used against him at trial); U.S. v. Vargas, 580 F.3d 247, 277 n.1 (5th Cir. 2009) (finding prosecutor's statement about defendant's failure to offer post-arrest exculpatory explanation was not improper because defendant answered several questions after Miranda warnings, "making fair game both his answers and omissions"); Johnson v. Acevedo, 572 F.3d 398, 402 (7th Cir. 2009) (finding prosecutor's questions about inconsistency between post-Miranda statements and trial testimony were not improper because defendant waived right to remain silent).

Here, Appellant claims that the State asked questions of the detective who interviewed Appellant and made arguments regarding Appellant's right against self-incrimination. AOB at 16-17. However, Appellant takes the questioning by the State out of context. During Appellant's interview with Detective Sanborn, Appellant gave a statement that he was not the individual who drove the car responsible for

killing Marcos. 5 AA 1101. Specifically, when the State questioned Detective Sanborn regarding his interview with Appellant, Sanborn gave the following response:

> Q: Okay. So when you were talking with Mr. Solid in May of 2013, he said he was not the person driving the vehicle?
> A: Correct.
>
> Q: And he said it was some other African-American gentlemen?
> A: Correct.

Id.

Detective Sanborn then testified that Appellant further reiterated that he was not the individual who drove the SUV after Sanborn notified Appellant that they had video evidence of the contrary. Id. When the State asked Detective Sanborn questions regarding this exchange, Detective Sanborn gave the following response:

> Q: And so it's when Mr. Solid tells you that he wasn't driving the SUV. He was on foot that whole time, you confront him with the fact that you have video that shows a contrary; is that true?
> A: Yes.
>
> Q: And at that time that video hadn't been released to the public, had it?
> A: No.
>
> Q: So when he's relaying this story to you, he has no idea that there's video of him actually driving the vehicle and coming out of the vehicle?
> A: Correct. He's just covering the picture that was released on the media release.
>
> Q: Okay. But because the picture of him inside was, in fact, released to the media?
> A: Yes.

> Q: And is it fair to say that you even offer him the out of saying, hey, man, tell me that you just, you know, you didn't know what was going to happen. You weren't involved. You didn't want this to happen. You offered him that out; isn't that true?
> A: Yes.
>
> Q: And did he at that point say, oh, you know what, you're right. I was driving the vehicle. I just didn't know what was going to happen?
> A: No, he did not.
>
> Q: Did he continue to maintain that he was on foot the whole time?
> A: Yes.
>
> Q: That he had no involvement with the white SUV?
> A: Yes.
>
> Q: That he had no involvement with the robbery?
> A: Yes.

5 AA 1102-1103.

Thus, the line of questioning that Appellant argues violates his right against self-incrimination in his brief is belied by the record as the line of questioning goes to demonstrate a lack of truthfulness in his response to police. Appellant did not in fact remain silent when questioned by police but instead gave a response that demonstrated untruthfulness regarding his details of the incident. Id. In addition, when the State on rebuttal reiterated that Detective Sanborn "gave [Appellant] an out," of allowing Appellant to state that he "didn't know what was happening," the State referred to Sanborn allowing Appellant to amend his version of events. 5 AA

1448. The State argued that Detective Sanborn gave Appellant an out by giving him an opportunity to correctly explain the events and his reasoning for the crime. Id.

Indeed, Appellant states in his brief that "Mr. Solid's credibility was crucial to his defense. Mr. Solid testified, and testified that he did not agree with Jacob Dismont to rob Marcos Arenas and was merely present, without the specific intent to rob Marcos Arenas." AOB at 19. Detective Sanborn gave Appellant the opportunity to give this statement to him during his interview. 5 AA 1102-1103. Detective Sanborn gave Appellant the "out" to state that Appellant was indeed present in the vehicle at the time of the crime and that Appellant did not agree with the robbery. Id. Instead, Appellant stated that he was not the one who drove the SUV and denied any involvement in the incident. Id. It was based on this evidence of a lack of truthfulness that the State presented this line of questioning in its case and chief and later reiterated these facts during rebuttal testimony.

In addition, during his interview with law enforcement, Appellant waived his right to silence and agreed to speak with detectives.[1] Thus, any comment on what Appellant said or didn't say during the interview would not be a comment on Appellant's invocation of his right to remain silent because Appellant did not invoke this right.

[1] The State has filed a Motion to Transmit its Trial Exhibit 136 simultaneously with this response as this exhibit contains the interview in question.

Because Appellant waived his right to remain silent, the State was free to comment on what occurred during his police interview. Appellant did not remain silent, Appellant did the opposite and made numerous statements to the police after being informed of his Miranda rights. At trial, the State was commenting on Appellant's interview and not an invocation of silence. At no point did Appellant argue either at trial or in his Opening Brief that the police interview was improperly admitted. Because the interview (State's Exhibit 136) was properly admitted at trial, the State was permitted to comment on the interview during argument. "Once evidence is admitted during trial, the prosecutor is free to argue inferences from that evidence." Brown v. State, 138 Nev. __, __, 512 P.3d 269, 277 (2022). See also Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997) ("the prosecution can argue inferences from the evidence and offer conclusions on contested issues.").

Appellant fails to demonstrate that the prosecution's reference to admitted evidence during closing argument amounted to plain error. Accordingly, Appellant is not entitled to relief on this claim .

IV. THE DISTRICT COURT DID NOT ERR BY ADMITTING THE PREVIOUS TESTIMONY OF MATTHEW NICHOLAS.

As discussed above, the failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal. Olano, 507 U.S. 725, 731, 113 S.Ct. 1770 ("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)). Nevada law provides a mechanism for an appellant to seek review of an error he otherwise forfeited. NRS 178.602 (explaining when an unpreserved error “may be noticed”).

Before this court will correct a forfeited 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. Green, 119 Nev. 542, 545, 80 P.3d 93, 95.

Here, the reading of Mathew Nicholas’s previous testimony from the 2017 trial was never objected to on the record, thus this objection was not preserved for appellate review.

In addition, NRS 51.325 and NRS 51.055, read in combination, permit the publication of testimony of a witness who previously testified under oath for the same matter. Specifically, NRS 171.198(6)(b) codifies the former testimony exception to the hearsay rule. To overcome a hearsay objection, NRS 51.325, which is entitled “Former Testimony,” provides that sworn testimony “is not inadmissible under the hearsay rule if the declarant is unavailable as a witness.” Nevada Revised Statute 51.055(1)(b) provides one of the definitions of “witness unavailability” as “persistent in refusing to testify despite an order of the judge to do so.”

However, in addition to the statutory authority permitting the use of a witness's former testimony, there are numerous cases in which the Nevada Supreme Court has construed the statutes to permit the introduction of previously transcribed testimony at the jury trial when the witness who gave the testimony is now unavailable as a witness. See, e.g., Quillen v. State, 112 Nev. 1369, 929 P.2d 893 (1996) (prior trial testimony of two key witnesses was read to the jury); Hogan v. State, 103 Nev. 21, 732 P.2d 42 (1987); Aesop v. State, 102 Nev. 316, 721 P.2d 379 (1986); Passarelli v. State, 93 Nev. 292, 564 P.2d 608 (1977). Prior testimony does not violate the Confrontation Clause if it is subject to cross-examination. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).

In Funches v. State, 113 Nev. 916, 944 P.2d 775 (1997), the Nevada Supreme Court upheld a conviction and permitted the publication of preliminary hearing testimony from a witness who, although available and in Court for the jury trial, asserted his Fifth Amendment privilege. Moreover, in Turner v. State, 98 Nev. 103, 641 P.2d 1063 (1982), the court permitted the use at jury trial of the defendant's prior testimony upon retrial of the defendant. Finally, in Lisle v. State, 113 Nev. 679,941 P.2d 459 (1997), cert. denied, 525 U.S. 830, 119 S. Ct. 81, 142 L.Ed2d 63 (1998), the Nevada Supreme Court upheld a murder conviction and upheld the district court's decision to admit a witness's prior sworn testimony from a previous trial wherein the defendant's attorney had only asked one question on cross-examination.

Here, Appellant's assertion that there is a lack of motions or discussions in the record regarding the State using prior testimony is belied by the record. AOB at 21; 1 AA 75-84. In the instant case, Appellant was tried before a jury in 2017.[2] 1 AA 77. Appellant was convicted but his conviction was later overturned. Id. Matthew Nicholas was a material witness who testified at this 2017 trial. Id. On March 7, 2022, with the State anticipating several witnesses as unavailable, the State filed its Motion to Admit the Prior Testimony of Any Witness Who Has Previously Testified Subject to Cross-Examination. 1 AA 76-78. Then, on May 12, 2022, the State filed its Ex Parte Application for Order Requiring Material Witness to Post Bail along with the affidavit of Marco Rafalovich, a law enforcement officer who attempted to subpoena Mathew Nicholas over the course of several days. 1 AA 81-82. And on

[2] As Appellant has not included the record necessary to cite to his previous 2017 trial, the State now cites to its Motion to Admit the Prior Testimony of Any Witness Who Has Previously Testified Subject to Cross-Examination contained in the Appellant's Appendix. Appellant has the "responsibility to provide the materials necessary for this court's review." Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975). Under NRAP 30(d), the required appendix should include "[c]opies of relevant and necessary exhibits." See also Thomas v. State, 120 Nev. 37, 43 & n. 4, 83 P.3d 818, 822 & n. 4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.' " (quoting NRAP 30(b)(3)); Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009) (appellant's burden to provide complete record on appeal). "When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision." Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

May 16, 2022, the district court filed its Order Requiring Material Witness to Post Bail or Be Committed to Custody ordering Mathew Nicholas to be present for trial. 1 AA 87.

However, by the time of trial, Nicholas never appeared making his status unknown and making him unavailable under NRS 51.055(1)(b). 1 AA 87-88. Thus, Matthew Nicholas's prior testimony from the 2017 trial was read into the record including the associated cross examination from that trial. 4 AA 920. Because Appellant had already had the opportunity to cross examine Nicholas in his prior trial, Appellant's right to confront adverse witnesses had not been disturbed as he had previously been afforded this opportunity. Chavez v. State, 125 Nev. 328, 338, 213 P.3d 476, 483 (2009) (holding that a cross examination at a preliminary hearing was enough to preserve a defendant's right to confrontation when reading testimonial from an unavailable witness). And the cross examination of Nicholas by Appellant's prior counsel was also read into the record for it to be considered by the jury. 4 AA 943. Accordingly, Appellant failed to preserve their objection to the reading of Nicholas's testimony at trial. Further, because Nicholas had been previously cross examined, there was no violation of the confrontation clause, and the district court did not err in allowing the prior testimony to be read to the jury.

V. SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO SUPPORT THE JURY'S FINDING THAT APPELLANT COMMITTED THE OFFENSES WITH USE OF A DEADLY WEAPON.

Appellant argues that he cannot be convicted of having committed the offense with a deadly weapon because the vehicle is not a deadly weapon as the crime was accidental. However, Appellant was convicted of first-degree murder and the jury in this case determined that Appellant had the requisite intent to kill Marcos. Appellant also attempts to cite to Buschauer v. State, I 06 Nev. __ 890, 895-96, 804 P.2d 1046, I 049-50 (1990) to argue against the weapon enhancement. But Buschauer does not apply in the instant case as the defendant in Buschauer was convicted of involuntary manslaughter, not first-degree murder.

In addition, the vehicle in question in this case meets the requisite requirements to be defined as a deadly weapon under NRS 193.165(6)(b). Under NRS 193.165(6)(b) a deadly weapon is defined as "any weapon, device, instrument, material, or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing substantial bodily harm or death…"

Here, the State presented testimony from several eyewitnesses to support its theory that Appellant intentionally struck Marcos with his vehicle. Gacory Exum, Marcos's friend who was with him at the time of the incident, testified that when Marcos was chasing after the vehicle, Marcos "let go, and turned around, and [Appellant] hit the side of him. The back of the tire, and, in fact, flew off, and I ran to the street, and he was just sitting there, nose – there's blood coming out of his

nose and everything." 3 AA 546. Alejandro Romo was also at the scene working at a car wash and saw Marcos attempt to run alongside Appellant's vehicle when he "slipped" and ended up on the road with Appellant "trying to take off fast." 3 AA 569. Another eyewitness, Rebecca Shanahan, testified that she saw Marcos running alongside Appellant's vehicle and stated that "as the car gained speed, [Marcos's] legs started to drag, and just they were going so fast they either let him go or he separated because of the speed of the car and his feet dragging, and he spun around and then hit his head on the corner of the car, and the car just kept going." 3 AA 595. When describing the speed at which Appellant's vehicle fled the scene after striking Marcos, Shanahan testified that Appellant "floored it." Id. Cristine Bullard also testified to the events in question and stated that she saw Marcos "running, and they're going faster, and I was watching his feet go, and he fell under the car and the car rolled over him." 3 AA 616.

Because Appellant drove his vehicle in a manner that made it "readily capable of causing substantial bodily harm or death," Appellant used his vehicle as a deadly weapon. NRS 193.165(6)(b); see also Bustamante v. Evans, 140 F. App'x 655, 656 (9th Cir.2005) (holding that a defendant used his vehicle as a deadly weapon by driving it at a police car). Accordingly, there was sufficient evidence that Appellant used his vehicle as a deadly weapon.

VI. APPELLANT HAS NOT DEMONSTRATED CUMULATIVE ERROR.

Because Appellant has not demonstrated any errors, there are none to be considered cumulative. 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, 992 P.2d 845, 854–55 (2000). Appellant must present all three elements to succeed on appeal. Id. at 17, 992 P.2d at 854–55. 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)). Appellant has failed to demonstrate a single error, and therefore there are no errors to cumulate.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM the Judgment of Conviction.

Dated this 14th day of June, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 6,155 words and does not exceed 30 pages.
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 14th day of June, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 14, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Nevada Attorney General

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

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