IN THE SUPREME COURT OF THE STATE OF NEVADA

TULY LEPOLO, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 85631

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction from a Jury Trial
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is presumptively assigned to the Nevada Supreme Court under NRAP 17(b)(3) as it is an appeal challenging a judgment of conviction from a trial for a Category A Felony.

STATEMENT OF THE ISSUES

Whether the district court abused its discretion by denying Lepolo's Motion to suppress his statement.

STATEMENT OF THE CASE

On April 5, 2012, On October 6, 2016, the State charged Tuly Lepolo ("Lepolo") by way of Criminal Complaint with: Murder With Use of a Deadly Weapon (Category A Felony - NRS 200.010); I Appellant's Appendix (hereinafter

"AA") 1.

On January 8, 2020, the State filed an Information, adding Count 2 - Assault With a Deadly Weapon (Category B Felony - NRS 200.471) and "pursuant to a challenge to fight" as a theory of liability as to Count 1. I AA 2-4.

On April 1, 2021, Lepolo filed a Motion for Disclosure of Evidence. I AA 5-41. On April 6, 2021, the State filed its Opposition. I AA 42-50. On April 30, 2021, a hearing was held wherein the district court took the matter under advisement. I AA 51.

On May 4, 2021, the district court issued a minute order directing the State to comply with NRS 174.2355, Brady and its progeny. The district court also ordered the State to disclose specific items of discovery. I AA 51-54.

On August 17, 2022, Lepolo's trial commenced and concluded on August 25, 2022.

During trial the State filed an Amended Information on August 22, 2022, and a Second Amended Information on August 23, 2022, removing the "pursuant to a challenge to fight" theory of liability in Count 1. I AA 55-58.

The jury found Lepolo guilty of First-Degree Murder With Use of a Deadly Weapon and Assault With a Deadly Weapon. I AA 59-60.

On August 25, 2022, the day set for penalty phase, the State and Lepolo entered into a Stipulation and Order whereby parties would waive the penalty

hearing before the jury and stipulate to a prison term of 20 to 50 years in the Nevada Department of Corrections on the First-Degree Murder. I AA 61-62. Both parties also agreed that the sentence on the weapon enhancement and the sentence on Count 2 shall be imposed by the district court. Id.

On October 12, 2022, Lepolo was sentenced as follows: COUNT 1- Maximum of FIFTY (50) YEARS with a minimum parole eligibility of TWENTY (20) YEARS; plus, a consecutive term of TEN (10) YEARS with a minimum parole eligibility of FOUR (4) YEARS for the use of a deadly weapon; COUNT 2 - Maximum of FIVE (5) YEARS with a minimum parole eligibility of TWO (2) YEARS, consecutive to Count l; ONE THOUSAND EIGHTY-FOUR (1084) days credit for time served. I AA 63-65.

On October 23, 2022, the Court filed the Judgment of Conviction. I AA 62-65.

On November 3, 2022, Lepolo filed a timely Notice of Appeal. I AA 67-69. Lepolo filed the instant Opening Brief on July 28, 2023. (hereinafter "AOB"). The State's Response now follows.

STATEMENT OF FACT

The Court relied on the following factual synopsis in Petitioner's Presentence Investigation Report (hereinafter "PSI")[1] in sentencing Petitioner:

[1] The State has filed a Motion to Transmit Presentence Investigation Report simultaneously with this Response.

On April 3, 2016, officers were dispatched to a local apartment complex regarding a shooting. Upon arrival, officers located a female, later identified as the victim, who was lying on the ground between two buildings. The victim suffered gunshot wounds to the right side of her body and medical personnel pronounced her deceased.

During the investigation, officers learned that there were two parties at the apartment complex that night, and numerous individuals attended each party. An individual at one of the parties wanted to fight an individual at the other party. Several individuals associated with the two parties began to argue and fight with one another, in the parking lot. Then the two hostesses of the parties became involved in a fight. A male, later identified as the co-defendant Henry Taylor, who was a relative of one of the hostesses, fired a single shot from a 9mm semiautomatic handgun in the parking lot and the fight broke up. The individuals then made their way back to their respective apartments.

Officers interviewed a witness who was reported she was inside her apartment when she saw people gathered in the parking lot from the two parties. A fight ultimately broke out and she heard a single gunshot. She looked outside, saw people started to disperse, and grabbed her phone to call 911. While on the phone, she observed a male, later identified as the defendant Tuly Lepolo aka Tutamua Lepolo, walk to a white Chevrolet Suburban and retrieve a handgun. Mr. Lepolo then walked towards the apartment of one of the parties and fired nine times at the people standing in front of the apartment. After the shooting, Mr. Lepolo fled between two building and left the area on foot.

Officers interviewed another witness who reported he was inside his apartment when he heard a single gunshot, followed by footsteps running by his front door. He then heard a little girl tell her mom that someone had been shot. The witness went to his bedroom window and saw a male, Mr. Lepolo, run up to the group, yell, "What's up now, you bitch ass nigger?" and fired five to six shots at the group. The deceased victim was caught in the crossfire and was struck several times by Mr. Lepolo.

Officers secured the Chevrolet Suburban to be towed for processing. As the vehicle was being towed, a female exited an apartment and contacted officers. She relayed that she drove to Las Vegas from California to attend a birthday party. She stated that only her and her six children came to Las Vegas. She further stated she was inside the apartment when the shooting occurred and did not see anything. She also denied that anyone would have retrieved a gun from

her vehicle and that the keys were with her the entire night. The female did not assist officers and continued to deny that anyone could have retrieved a gun from her vehicle.

Officers observed several areas of apparent blood along the side of the building were Mr. Lepolo fled on foot and recovered four swabs of blood.

On April 5, 2016, an autopsy was conducted and the coroner determined that the victim's cause of death was a gunshot wound to the right arm and axilla, and the manner of death was a homicide.

Later that date, officers processed the Chevrolet Suburban and recovered latent prints and DNA from an energy drink can in the center console, steering wheel, and shift lever.

On September 14, 2016, the latent prints recovered were identified as belonging to Mr. Lepolo. On November 3, 2016, the DNA recovered was identified as belonging to Mr. Lepolo. And on November 22, 2022, the DNA from the blood sample was identified as belonging to Mr. Lepolo.

On April 19, 2017, officers of the San Bernardino County Sheriff's office established surveillance at Mr. Lepolo's residence and observed him drive away from the home in the female's white Chevrolet Suburban, which had previously been processed and released. Officers made contact with Mr. Lepolo and obtained a DNA sample. Offices also attempted to interview Mr. Lepolo; however, he did not wish to complete a statement.

On September 11, 2017, Mr. Lepolo's DNA sample was processed and found to be consistent with the evidence recovered.

After completing their investigation, officers obtained a Warrant of Arrest for Mr. Lepolo. On October 25, 2019, Mr. Lepolo was booked accordingly at the Clark County Detention Center.

PSI at 6-7.

SUMMARY OF THE ARGUMENT

Lepolo argues that his statements to Detective Sanborn that were submitted to the jury at trial were improperly admitted as the district court erred in denying his counsel's oral motion to suppress the statements as involuntary. AOB at 13.

However, the district court properly assessed several factors that supported the voluntary nature of Lepolo's statements to Sanborn. V AA 880-882. The district court determined that Lepolo's age did not serve as an element for his voluntariness, that Lepolo did not appear to have a lack of education or low intelligence, that Lepolo appeared responsive to questioning and asked appropriate questions back, that Lepolo was notified of his rights, that the questioning only lasted twenty-four minutes in length, and that there was no evidence of repeated or prolonged questioning. Id. As the district court is granted deference in its factual findings and because Lepolo has identified no clear error by the court, the district court's determination of Lepolo's voluntary statement should be upheld.

In addition, Lepolo also argues that his statements to Detective Sanborn were improperly admitted as questioning should have ceased as soon as he mentioned the possibility of counsel. AOB at 17-18. Lepolo further states that he was prejudiced by the admission of the evidence as his statements supported his location at the scene of the crime and revealed his alcoholic past. Id. As an initial matter, Lepolo never preserved his arguments under Miranda for appeal, thus his argument can only be assessed for plain error. However, Lepolo's statement regarding counsel was not unequivocal nor unambiguous and Lepolo proceeded to further clarify his answers to previous questions on his own accord once he mentions counsel. RA at 16-18. Lepolo's statement regarding counsel reflected that he understood that he had a right

to counsel and that it was his choice whether to proceed with questioning. In addition, even if Lepolo's statements were improperly admitted, under a harmless error analysis, overwhelming evidence places Lepolo at the scene of the crime and the State never used Lepolo's alcoholic nature to support its theory of the case. Accordingly, the district court's Judgment of Conviction should be upheld.

ARGUMENT

I. LEPOLO'S STATEMENT WAS PROPERLY ADMITTED

A. Lepolo made his statement voluntarily.

When considering challenges to the denial of a motion to suppress, this Court reviews the district court's legal conclusions de novo and gives deference to the district court's factual findings only reviewing for clear error. Lamb v. State, 127 Nev. 26, 31, 251 P.3d 700, 703 (2011). A suspect subjected to a custodial interrogation must be advised of and knowingly and intelligently waive his Miranda rights; otherwise, the suspect' s responses cannot be introduced into evidence to establish his guilt. See Dickerson v. United States, 530 U.S. 428, 431-32 (2000) (upholding Miranda); Miranda v. Arizona, 384 U.S. 436, 444 (1966); Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 251 (1996). The primary concern of Miranda addresses those situations in which an accused might feel compelled by police to incriminate himself. See Miranda, 384 U.S. at 46;7. A suspect who is in the "coercive environment," Oregon v. Mathiason, 429 U.S. 492, 495 (1977), of custodial

interrogation faces "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. Miranda, 384 U.S. at 467. These pressures may lead the suspect to believe that he has no choice but to submit to the officer's will and to confess." Minnesota v. Murphy, 465 U. s. 420, 433 (1984). "The coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." Id. at 433.

The test for determining whether a suspect who has not been arrested is in custody "'is how a reasonable man in the suspect's position would have understood his situation.'" Alward, 112 Nev. at 154, 912 P.2d at 252 (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)). "[T]he inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." Stansbury v. California; 511 U.S. 318, 322 (1994); Taylor v. State, 114 Nev. 1071, 1082, 968 P.2d at 315, 323 ("Rather, an individual is deemed 'in custody' where there has been a formal arrest, or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave."); Alward, 112 Nev. 141, 154, 912 P.2d 243, 251 (custody determined by "'how a reasonable man· in the suspect's position would have understood his situation.'") (quoting Berkemer, 468 U.S. 420,

442). A suspect's or officer's subjective view of the situation is not determinative whether a suspect is in custody. Stansbury, Taylor, supra.

"The court will consider the totality of the circumstances, including: (1) the site of interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning." Mitchell, 114 Nev. at 1423, 971 P. 2d at 818. Indicia of arrest include whether (1) the suspect was told the questioning was voluntary; (2) the suspect was formally arrested, (3) the suspect could move about freely during questioning, (4) the suspect responded voluntarily to questions, (5) the questioning was police-dominated, (6) the police used strong-arm tactics or deception during questioning, and (7) the police arrested the suspect after questioning. See State v. Taylor, 114 Nev. 1071, 1082 n.1, 968 P.2d 315, 323 n.1 (1998). No single factor is dispositive. Alward, 112 Nev. at 154, 912 P.2d at 251 (1996).

Here, the District Court properly found Lepolo's statement was voluntary. In resolving Lepolo's motion to suppress for a lack of voluntary statement, the trial court heard oral arguments from both Lepolo's counsel and the State. V AA 831. After considering the evidence and argument, the trial court concluded that several factors supported the voluntariness of Lepolo's statement. V AA 880-882.

The district court determined that Lepolo's age did not favor Lepolo as the court determined that he was "somewhere north of 50 during this interaction." Id.

The court also determined that Lepolo did not appear to have a lack of education or low intelligence. Id. The Court found that Lepolo appeared responsive of the questions asked and he also asked appropriate questions back. Id. The district court also determined that Lepolo was notified of his rights "almost immediately," and that the interview only lasted twenty-four minutes. Id. Further, the court found that there was no evidence of repeated or prolonged questioning. Id. In fact, the court determined that Lepolo himself prolonged questioning when he "repeatedly asked the detectives, over and over again, about the incorrect usage of his name." Id. The court also found no evidence of physical punishment or the deprivation of food or sleep in Lepolo's police questioning and found both parties to be respectful of one another. Id. As a result, the district court properly denied Lepolo's oral motion to suppress. Id.

The district court's factual determinations regarding the factors surrounding Lepolo's questioning are entitled to deference. As a result, the district court did not commit clear error when it determined that Lepolo gave his statement voluntarily. Accordingly, Lepolo's claim fails.

B. Lepolo did not unequivocally invoke either his right to silence or his right to counsel.

i. Lepolo fails to establish plain error.

A district court's determination of whether a defendant requested counsel prior to questioning will not be disturbed on appeal if supported by substantial evidence.

Tomarchio v. State, 99 Nev. 572, 575, 665 P.2d 804, 806 (1983). In addition, any possible error is waived or invited when a defendant participates in the alleged error, and they are estopped from raising an objection on appeal. See Jones v. State, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979). And a defendant who invites district court action perceived as favorable to him may not then claim it as error on appeal. Sidote v. State, 94 Nev. 762, 762–63, 587 P.2d 1317, 1318 (1978).

Here, Lepolo's counsel specifically stated that he was not seeking to suppress his statements based on a Miranda violation. V AA 882. When the district court inquired if Lepolo's counsel was making a Miranda claim, the following exchange with the district court occurred:

> MR. GIORDANI: One other thing. Just for the record's sake,
> Mr. Margolis isn't making any kind of Miranda claim as to the second.
> It's just the voluntariness claim as to the second statement.
> THE COURT: That was my --
> MR. GIORDANI: -- correct?
> THE COURT: -- my understanding.
> MR. MARGOLIS: That's correct.

V AA 882.

Lepolo also argues that despite a failure to object to the suppression of his statement at trial under a Miranda violation, that this Court should assess his argument under a plain error standard. AOB at 20. However, Lepolo's claim fails as he does not demonstrate how the district court erred. Lepolo's counsel explicitly stated that they were not seeking to suppress Lepolo's statements for a Miranda

violation. V AA 882. Thus, the district court did not err on its suppression ruling for a lack of Miranda analysis that was not asked of them.

ii. Assuming arguendo Lepolo's claim is reviewed, Lepolo's claim also fails under a Miranda analysis.

Nevertheless, even if reviewed under Miranda, the district court did not err. A defendant must unambiguously invoke his rights following Miranda. Berghuis v. Thompkins, 560 U.S. 370, 130 S.Ct. 2250 (2010). When a defendant does not unambiguously invoke his right to either counsel or the right to remain silent, questioning officers may ask follow-up questions to clarify the defendant's statement. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). However, the U.S. Supreme Court has held that the Edwards rule, which requires cessation of the interview if a suspect requests counsel at any time during the interview, applies only where a suspect has actually invoked his right to counsel. Davis v. United States, 512 U.S. at 459, 114 S.Ct. 2350 (1994). The determination must be made on an objective basis. Id. To require cessation of police questioning, "the suspect must unambiguously request counsel" by articulating:

> his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect.

Id. at 459, 114 S.Ct. 2350 (citing Moran v. Burbine, 475 U.S. 412, 433 n. 4, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)); accord Boehm v. State, 113 Nev. at 915, 944

P.2d at 272 (1997) (to invoke the Fifth Amendment right to counsel during a custodial interrogation, a suspect "must make some statement that 'can reasonably be construed to be an expression of a desire for the presence of an attorney' " (quoting McNeil, 501 U.S. at 178, 111 S.Ct. 2204)).

In Harte v. State, while questioned by police, Harte asked, "Just out of curiosity, when do I get to talk to a lawyer?" Harte v. State, 116 Nev. 1054, 1067, 13 P.3d 420, 429 (2000). Immediately following this, Harte said, "I .. they .. they told me, you know, that they thought I should talk to a lawyer or whatever." Id. Later in the interrogation, Harte said, "I don't wanna be a bitch and say, you know, give my [sic] lawyer. But I mean." Id. Following that, Harte stated, "What do you think a lawyer would tell me right now?" Harte, 116 Nev. 1054, 1067, 13 P.3d 420, 429. This Court held that Harte's statements to police inquiring on when he would get a "lawyer" and other attorney related comments did not undermine the validity of his waiver rights. Id. On the contrary, this Court determined that Harte's comments regarding possible counsel indicated that Harte understood that he had the right to counsel and to refuse to answer questions. Id.

Likewise, in Dietz v. State, this Court determined that a defendant's references to counsel during an interrogation were also equivocal and ambiguous. Dietz v. State, 124 Nev. 1462, 238 P.3d 806 (2008). Dietz appealed the court's denial of his motion to suppress that he gave to officers during his second custodial interrogation

stating that the interrogation violated Miranda as he had invoked his right to counsel. Id. Dietz's statements regarding counsel included the following exchange:

> Dietz: It's all right. Should I have an attorney here?
> [Detective] Burnum: Huh?
> Dietz: Should I have an attorney?
> [Detective] Burnum: It's up to you.
> Dietz.: Cuz, I don't know what I'm doing.
> [Detective] Burnum: If you don't want to speak with us anymore that's your right.
> Dietz: I don't know I just.
> [Detective] Burnum: Do you want to finish this up and talk about, get this out of what happened? You're so close to getting it all out there John I don't. I think you want to and I think it's hard and I understand that and I respect that. I do agree that you didn't have any intent to hurt her. But I think things went out of control that day. But I think you want to get it out and I think you deserve, I think Terry deserves it.

Dietz, 124 Nev. 1462, 238 P.3d 806.

In denying Dietz's claim on appeal, this Court determined that Dietz never clearly requested counsel, and his references to counsel were so equivocal and ambiguous that no reasonable officer in the circumstances would have understood those references to be a request for an attorney. Id.

Here, Lepolo had the following exchange with Detective Sanborn where he makes a comment regarding an attorney:

> Q: I mean that's kind of where we're at. If that's not the case, I mean I'd rather work it out. If that's not the case let me know. Like if - I mean so I can start working on - I - that would mean I still have work to do. Um, if you could remember and -who was shooting and say that it wasn't you and remember who it was, then I could start working on getting you out of here if you're not supposed to be in here. You know what I mean?

A: Oh I know I wasn't supposed to be in here.
Q: Why? Well who was shooting then?
A: See I don't know. I don't know. You guys are pointing at the wrong direction. I mean I talked to you guys two years ago and the same results. It's like, you know, if I did get hit then if I di- if I - if I was bleeding then - then I'm just a victim. Right?
Q: Possibly. Yeah.
A: But I don't know who shot me or whoever - I don't know. I - be honest with you.
Q: Yeah I mean possibly. If you ran off...
A: There was a lot of people out there then, you know, well basically that's your witness saying that okay I might be the other guy or the one that got shot right?
Q: Mm-hm.
A: There go your witness right there. So and this is what - the time that, uh, it's time to get a lawyer.
Q: If that - yeah. Well...
A: I mean I - I - I - I - I, you know, I can't really say who's the other - I mean...
Q: Who...
A: ...I - I can't remember nothing 'cause, you know, when you're - like I told you before, you know, I was pretty much intoxi- um, intoxicated and, you know, so.

Respondent's Appendix (hereinafter "RA") at 15-17.

Lepolo states that his statement that "it's time to get a lawyer" invoked his right to counsel. AOB at 22. However, like both the defendants in Harte and Dietz, Lepolo's statements merely reflect that he understood that he had the right to counsel and that he could refuse to answer questions. Lepolo could have ceased responding to Detective Sanborn after he made his statement regarding counsel, but instead proceeded to further clarify his response. RA at 15-17. After making his statement regarding counsel, Detective Sanborn did not initiate another question before Lepolo

began to further elaborate on his previous answer. Id. The district court also recognized the unequivocal nature of Lepolo's statement when it denied his Motion and stated:

> THE COURT: I mean, and I'll -- I'll put on the record, I obviously recognize that there was a point where Mr. Lepolo, I think, does ask for a lawyer. But immediately after asking for a lawyer, he – he goes in -- like, he says it in the middle of a sentence, and then go – keeps going into the -- the discussion. And so I did not find that to be unequivocal.

V AA 882-883.

Accordingly, Lepolo's statement regarding counsel was not unequivocal nor unambiguous and his claim fails.

iii. Assuming arguendo Lepolo invoked his right to counsel, Lepolo re-initiated discussions with police.

In Edwards, the U.S. Supreme Court held the following:

> [A]lthough we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation, see **2834 North Carolina v. Butler, [441 U.S. 369, 372–376, 99 S.Ct. 1755, 1756–1759, 60 L.Ed.2d 286 (1979)], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as [the defendant], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, **unless the accused himself initiates further communication, exchanges, or conversations with the police**.

Edwards, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (footnote omitted) (emphasis added); See also Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830 (1983); Wyrick v. Fields, 459 U.S. 42, 103 S.Ct. 394 (1982); Taylor, 96 Nev. 385, 609 P.2d 1238 (1980).

Here, Lepolo re-initiated his conversation with Detective Sanborn immediately after mentioning counsel and the court also recognized this in making its decision to deny Lepolo's motion. RA at 15-17; V AA 882-883. Lepolo also further questioned Sanborn regarding different aspects of his case such as issues regarding his identity which only lengthened the interview proceedings. RA at 21. Accordingly, Lepolo cannot now argue that his right to counsel was violated when he also initiated conversations with Detective Sanborn on his own accord.

iv. Even if Lepolo's statement was improperly admitted, any error amounts to harmless error.

Even if this Honorable Court were to find that Lepolo's statements were improperly admitted, any error in admitting the evidence would be harmless because it is clear, beyond a reasonable doubt that the admission of the evidence did not contribute to the verdict. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824 (1967). Lepolo argues that the introduction of his statements to the jury prejudiced him because the jury "heard that he was an alcoholic," and that what he said could "be perceived as an admission of being present at the scene when he stated that his blood could have been at the scene because his nose bleeds from picking it a lot."

AOB at 17. However, whether Lepolo is or is not an alcoholic was never used by the State to support its theory of the case for Lepolo's charges nor was it ever used in closing argument. V AA 981-994. More importantly, the parties discussed and agreed to redactions of this statement. V AA 825-826. The redactions were agreed to by both parties and did not include Lepolo's alleged alcohol use. Id. Lepolo cannot now claim that portion should have been redacted or was somehow prejudicial. In fact, if he had requested it at trial, the State would have likely agreed, because the alleged alcohol use did nothing but give Lepolo an alternative defense of voluntary intoxication. See Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985) (citing, Williams v. State, 99 Nev. 530, 665 P.2d 260 (1983)) (It is true that voluntary intoxication may negate specific intent, and an accused is entitled to an instruction to that effect if there is some evidence in support of his defense theory of intoxication).

Regardless, multiple witnesses placed Lepolo at the scene of the crime. Eyewitness and surviving victim Flora Taylor identified Lepolo in front of the jury, while under oath at trial. III AA 436-437. Ms. Taylor testified that she and several of her family members knew Lepolo. Id. Taylor testified that Lepolo went to what she described as a "white truck," and at that point, walked over to her with a gun in his hand. III AA 436-440. In addition, Taylor testified that Lepolo put the gun to her face and made a threat stating, "Oh, yeah, you mother fuckers." Id. Taylor testified

that she closed her eyes put her hands up and stated, "No, no wait!" before Lepolo began shooting. Id. Ms. Taylor's testimony in and of itself proved Lepolo's guilt beyond a reasonable doubt.

Further, eyewitness Dana Foreman identified Lepolo as the shooter while under oath in front of the jury. III AA 540. Foreman testified that she had known Lepolo and his family for an extended period of time from living in the same apartment complex. III AA 539-540. The jury also heard from Dana Forman who identified Lepolo as the man who shot towards her apartment. III AA 530. Dana also testified to identifying Lepolo as the shooter at a lineup in 2019 and identified him at trial as the individual who was the shooter outside the alcove at the apartments. III AA 540; 555-557. Ms. Foreman's testimony, coupled with Ms. Taylor's testimony, proved Lepolo's guilt beyond a reasonable doubt.

In addition, eyewitness Henry Taylor also identified Lepolo under oath at trial. III AA 590. Taylor described how Lepolo ran up and started shooting, and Taylor then returned fire upon Lepolo and struck him. III AA 589-592. Mr. Taylor's testimony, coupled with Ms. Foreman's and Ms. Taylor's testimony, proved Lepolo's guilt beyond a reasonable doubt.

Further still, the jury also heard from a forensic scientist, Heather Gouldthorpe who identified four prints lifted from the crime scene as Lepolo's. V AA 807; 811-817. Courtney Franco also testified that she saw Lepolo grab a gun from the back

left passenger side of his vehicle. III AA 499. Lepolo's fingerprints at the scene, coupled with Mr. Taylor's, Ms. Foreman's, Ms. Taylor, and Ms. Franco's testimony, proved Lepolo's guilt beyond a reasonable doubt.

Finally, Lepolo's DNA was found in the middle of the crime scene where the shooter was standing. IV AA 708-716; V AA 862-866. From there, there was a trail of Lepolo's blood leading away from the scene and toward the parking spot where he entered a getaway vehicle. Id. The statistic associated with the DNA match was 1 in 24.1 quintillion. V AA 866. Lepolo's DNA in the middle of the scene and his fingerprints on the vehicle where witnesses described the shooter getting the gun from, coupled with Mr. Taylor's, Ms. Foreman's, and Ms. Taylor's testimony, proved Lepolo's guilt beyond any doubt.

Thus, overwhelming evidence placed Lepolo at the scene of the crime aside from his statements to police that his blood could have been at the scene because of a bloody nose. Lepolo's statement did not put him at the scene – his DNA, fingerprints, and several eyewitnesses did. Accordingly, Lepolo's claim fails, and the district court's Judgment of Conviction should be upheld.

CONCLUSION

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

/ / /

Dated this 29th day of August, 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 2003 in 14 point font of the Times New Roman style.
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 of more, contains 5,238 words and 20 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 29th day of August, 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 29th day of August, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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