IN THE SUPREME COURT OF THE STATE OF NEVADA

DIPAK KANTILAL DESAI, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 64591

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUES

1. The Evidence was Sufficient to Convict Desai Under an Aiding and Abetting Theory

2. The Evidence was Sufficient to Convict Desai of Second-Degree Murder

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STATEMENT OF THE CASE

On June 4, 2010, the Grand Jury returned an Indictment charging Dipak Kantilal Desai with twenty-eight separate counts. Desai was charged with one count (Count 1) of Racketeering (Felony – NRS 207.350, 207.360, 207.370, 207.380, 207.390, 207.400), seven counts (Count 3, 7, 10, 13, 17, 20, 23) of Performance of Act in Reckless Disregard of Persons or Property (Felony – NRS 0.060, 202.595), seven counts (Count 4, 8, 11, 14, 18, 21, 24) of Criminal Neglect of Patients (Felony – NRS 0.060, 200.495), ten counts (Count 2, 5, 6, 9, 12, 15, 16, 19, 22, 25) of Insurance Fraud (Felony – NRS 686A.2815), one count (Count 26) of Theft (Felony – NRS 205.0832, 205.0835) and two counts (Count 27 and 28) of Obtaining Money Under False Pretenses (Felony – NRS 205.265, 205.380). 1 Appellant's Appendix (hereinafter "AA") 1-42. An Amended Indictment was filed on June 11, 2010, alleging the same charges. 1 AA 43-84.

On March 20, 2012, counsel for Desai, Ronald Lakeman, Keith Mathahs, and the State met for a video deposition of Rodolfo Meana. 1 AA 91.

On August 10, 2012, after the death of Rodolfo Meana, the State filed a new Indictment charging Desai, Lakeman and Mathahs with Second Degree Murder (Category A Felony – NRS 200.010, 200.020, 200.030, 200.070, 0.060, 202.595, 200.495). 1 AA 130-33. A Second Amended Indictment was filed adding the Second Degree Murder charge as Count 29. 1 AA 134-176. A third Amended

Indictment was filed to reflect Keith Mathahs' decision to cooperate with the State. 1 AA 177-212.

On December 21, 2012, Desai filed a Motion and Notice of Motion for Competency Evaluation. 1 AA 213- 218. On January 8, 2013, the court denied Defendant's Motion. 1 AA 230, 245.

On March 7, 2013, the State filed a Notice of Motion and Motion to Use Reported Testimony. 1 AA 285. Desai filed an Opposition to State's Motion to Use Reported Testimony on March 25, 2013. 2 AA 451-54. The court allowed the videotaped deposition of Rodolfo Meana but denied the use of the civil deposition testimony. 2 AA 455.

On March 7, 2013, the court was informed that Desai had been taken to the intensive care unit and had recently been released. 2 AA 415. Defense counsel requested another competency evaluation as Desai had suffered another stroke. 2 AA 415. An independent medical evaluation of Desai at Cedars-Sinai Medical Center was ordered by the court with the agreement of the State. 2 AA 416, 2 AA 446-48.

On March 11, 2013, Desai filed an Opposition to State's Motion to Admit Foreign Documents Relating to Rodolfo Meana. 2 AA 441-45. The Court admitted the medical records from the Philippines pursuant to NRS 51.115. 2 AA 450. The

court further denied the State's Motion to Admit the Autopsy Report and Laboratory Findings. 2 AA 450.

On April 17, 2013, the court found that while the report from the independent medical expert did confirm that Desai suffered a stroke in February of 2013, nothing in the report suggested a competency evaluation was necessary. 2 AA 457-58. Desai's counsel asked for a hearing and renewed the earlier motion for a move to competency court. 1 AA 465-66. The court determined there was an exaggeration of symptoms and there was no need for any further inquiry into the issue of competency. 2 AA 474-75, 84.

A Fifth Amended Indictment was filed on May 26, 2013 charging Desai and Lakeman with ten counts (Count 1 (Sharrief Ziyad), 4 (Michael Washington), 5 (Kenneth Rubino), 8 (Stacy Hutchinson), 11 (Rodolfo Meana), 14 and 15 (Patty Aspinwall), 18 (Sonia Orellano Rivera), 21 (Carole Grueskin), 24 (Gwendolyn Martin)) of Insurance Fraud, seven counts of (Count 2 (Michael Washington), 6 (Stacy Hutchinson), 9 (Rodolfo Meana), 12 (Patty Aspinwall), 16 (Sonia Orellano River), 19 (Carole Grueskin), and 22 (Gwendolyn Martin)) Performance of Act in Reckless Disregard of Persons or Property Resulting in Substantial Bodily Harm, seven counts of (Count 3 (Michael Washington), 7 (Stacy Hutchinson), 10 (Rodolfo Meana), 13 (Patty Aspinwall), 17 (Sonia Orellano Rivera), 20 (Carole Grueskin), 23 (Gwendolyn Martin)) Criminal Neglect of Patients Resulting in Substantial Bodily

Harm, one count (Count 25) of Theft, two counts (Count 26 (Gwendolyn Martin) and 27 (Sonia Orellano Rivera)) of Obtaining Money Under False Pretenses, and one count (Count 28 (Rodolfo Meana)) of Second Degree Murder. 3 AA 498-533.

Desai and Lakeman's jury trial began on May 3, 2013. On July 1, 2013, the jury found Desai guilty of all counts but Count 4. 41 AA 9552-59.

On October 24, 2013, the Defendant was sentenced. The district court imposed various concurrent and consecutive sentences reflecting a sentence structure of life with parole eligibility in 18 years. 41 AA 9568-72.

Desai filed a Notice of Appeal on December 6, 2013. 41 AA 9596-9600.

STATEMENT OF THE FACTS

The following is a recitation of the facts regarding the Hepatitis C outbreak itself and the investigation that followed. Pertinent facts are also included within the argument sections.

July 25, 2007

On July 25, 2007, Sharrieff Ziyad had an endoscopy done by Dr. Desai at the Endoscopy Center. 5 AA 1144-45, 1158. Before the procedure, Ziyad disclosed that he was positive for Hepatitis C. 5 AA 1145. His procedure occurred in the morning—as he was the first patient of the day. 5 AA 1146. He protested being put under as his medical records were not in the room. 5 AA 1153. However, Desai

demanded Ziyad be put under anyway. 5 AA 1154. Ron Lakeman administered the anesthesia. 5 AA 1160.

Michael Washington went to the Endoscopy Center of Southern Nevada for a colonoscopy performed by Dr. Desai on July 25, 2007. 4 AA 892, 895. Before the colonoscopy, Washington had never had any symptoms of Hepatitis C. 4 AA 894, 4 AA 979-80. About a month after his colonoscopy, he began to jaundice and had stomach problems. 4 AA 895. Washington was eventually told he had Hepatitis C, and was contacted by the Center for Disease Control (hereinafter "CDC"). 4 AA 911-12. At the time of his testimony, Washington could not walk or eat and had gone from weighing 250 pounds to 193 pounds. 4 AA 913. Washington has since passed away.

September 21, 2007

In 2000, Kenneth Rubino was diagnosed with Hepatitis C. 5 AA 1080. He was referred to the Endoscopy Clinic of Southern Nevada (hereinafter "Shadow Lane Clinic"), and discussed options for treatment of his condition with Dr. Carrol. 5 AA 1082. Rubino was on pills and injections in order to treat his Hepatitis C for six months, but stopped the treatment as the virus did not respond. 5 AA 1084-86. On September 21, 2007, Rubino had a colonoscopy at the Shadow Lane Clinic. 5 AA 1088. His procedure was scheduled between 7:00 and 7:15 a.m., and he was the

first patient of the day. 5 AA 1088. Rubino informed the nurse who was taking his blood pressure that he had Hepatitis C. 5 AA 1090.

Later that day, Sonia Orellana Rivera and Gwendolyn Martin went to the Shadow Lane Clinic for a routine colonoscopy and endoscopy respectively. 10 AA 2246. A month later Martin had flu like symptoms, dark urine, no appetite, was losing weight rapidly, and developed jaundice. 10 AA 2282-83. Her husband took her to the emergency room and she was diagnosed with Hepatitis C. 10 AA 2283-84. In March of 2008, Rivera received a letter from the health district regarding a Hepatitis C outbreak, and her blood was tested. 10 AA 2253-54. She was also told she was positive for Hepatitis C. 10 AA 2254.

Patty Aspinwall had a colonoscopy at the Shadow Lane Clinic on September 21, 2007, as well. 8 AA 1947. On November 13, 2007, Aspinwall went to see her primary care doctor, Dr. Casalman, complaining of a decreased appetite, nausea, general itchiness, and dark urine. 5 AA 1062. Casalman noticed she was icteric and jaundiced and sent her to the emergency room. 5 AA 1062. Aspinwall was eventually diagnosed with Hepatitis C. 5 AA 1063, 8 AA 1974.

Dr. Son Bui was the primary care doctor for Stacy Hutchison starting in 2005 and referred her to the Shadow Lane Clinic for a colonoscopy and endoscopy. 5 AA 1183, 1186. Desai performed the colonoscopy on September 21, 2007 and Lakeman was the CRNA. 5 AA 1203, 1230. About three weeks after the colonoscopy,

Hutchison experienced flu like symptoms, dropped weight, and had a bladder infection. 5 AA 1214. Two weeks later her liver was biopsied and she was diagnosed with Hepatitis C. 5 AA 1216. Hutchison did not indicate a possible Hepatitis C infection prior to her colonoscopy. 5 AA 1184.

On September 21, 2007, Rodolfo Meana, a married man with two daughters living in Las Vegas, went to the Shadow Lane Clinic for a routine colonoscopy, after which he was discharged with normal results. 1 AA 97, 101, 106. A month later, Meana developed diarrhea, yellowing of the skin, fever, and a slight depression. 1 AA 101. Meana went for a blood test to try and determine the source of these strange symptoms, and was told he had contracted Hepatitis C. 1 AA 102-03. Meana *did not* have Hepatitis C before going to the Shadow Lane Clinic for a colonoscopy. 1 AA 104.

After discovering he had somehow contracted this blood-borne disease, Meana received treatment for the Hepatitis C, but failed interferon therapy. 1 AA 103-04. At the time of the video deposition taken in this case, Meana's liver was not functioning and he was experiencing kidney failure. 1 AA 104. Meana testified that prior to his colonoscopy his health was "very normal and strong." 1 AA 105. Meana eventually died from complications of Hepatitis C. 37 AA 8642.

Investigation Into the Hepatitis C Outbreak

After learning of multiple reports of patients contracting Hepatitis C, the Southern Nevada Health District launched an investigation on January 2, 2008. 6 AA 1264; 33 AA 7769. Samples of blood were collected from Rodolfo Meana, Carole Grueskin, Michael Washington, Gwendolyn Martin, Stacy Hutchinson, Patty Aspinwall, Sonia Orellana Rivera, Kenneth Rubino and Sharrief Ziyad and were sent to the CDC. 6 AA 1269, 1273. Every person was positive for Hepatitis C. 6 AA 1305. The CDC was able to determine that the Hepatitis C viruses contracted by patients in July was a different strain of the virus than the one contracted by patients in September, and, further, that the source patients for the strains were Ziyad Sharrief and Kenneth Rubino. 6 AA 1360, 1363.

After an investigation into the Shadow Lane Clinic practices, the CDC's conclusion was that the "outbreak occurred due to unsafe injection practices through the use of syringes to enter propofol vials and then using those for multiple patients." 25 AA 5733-34. When administering propofol, the anesthetic used on the patients of the Shadow Lane Clinic, the CDC recommends using a single vial of propofol and a new syringe and needle for each patient. 24 AA 5548. About 20 cc of propofol is needed for each procedure, and about 10 cc of propofol can fit in one syringe. 18 AA 4280, 4287. Propofol comes in 200 milligram or 500 milligram bottles, and thus there are multiple ways that a Certified Registered Nurse Anesthetist (hereinafter

"CRNA") can administer the propofol without risking contamination. The first is to use only one vial of propofol on each patient. 15 AA 3618. In that scenario, the same syringe and needle may be used more than once on the same patient without risk of contamination. The second option is for the CRNA to fill up multiple syringes out of one vial of propofol before the procedures begin—never putting the syringes or needles back into the vial. The risk of contamination occurs when a CRNA administers one dose of propofol using a needle and syringe, and takes that same syringe and puts it back in a vial of propofol. 15 AA 3619. If that vial of propofol is later used on another patient, there is risk that blood from the syringe used on patient number one has contaminated the propofol, and will be spread to patient number two. 15 AA 3619, 7 AA 1503-04. This practice is commonly called "double-dipping." 25 AA 5770-71.

Gayle Langley, an employee at the CDC, investigated the outbreak at the Shadow Lane Clinic. 25 AA 5763. She witnessed Keith Mathahs, a CRNA employed at the Shadow Lane Clinic, "double-dipping" back into a bottle of propofol. 25 AA 5770-71. Further, employees of the CDC observed the pooling of propofol at Shadow Lane Clinic. 24 AA 5546. If something happens to contaminate one vial that is pooled with other vials, there is no telling how many patients are put at risk. 24 AA 5546.

Melissa Schaefer, a medical officer at the CDC, spoke with Ronald Lakeman, a CRNA at the Shadow Lane Clinic over the phone. Lakeman admitted to reusing syringes in one vial, and then using the propofol from that already contaminated vial on a new patient. 23 AA 5355, 5417. When asked if Lakeman used that technique at his current employment, he responded that he did not use that policy currently, and it was the policy at his new job that the extra propofol and Lidocaine would be wasted and discarded. 23 AA 5418. He acknowledged that "double-dipping" was not the safest practice, but explained he would keep pressure on the plunger in an attempt to prevent backflow of blood into the syringe from the patient. 23 AA 5423. Lakeman was questioned about the risk and had a clear understanding of what it was. 23 AA 5423. Lakeman told Schaefer that he would deny all he had confessed. 23 AA 5420.

Shadow Lane Clinic

Desai was the managing partner of the Southern Nevada Endoscopy Clinic (referred to as the "Shadow Lane Clinic"). 9 AA 1997. He made all of the major decisions regarding the practice, including the hiring of the CRNAs, the amount of supplies to be ordered and used, and even smaller aspects of the practice down to the scheduling of each patient. 9 AA 2004, 2005, 2014-15. After the Shadow Lane Clinic moved to a new facility in 2004, the amount of patients went up from 25 to 32 patients per day to 60 to 75 per day. 7 AA 1982-93, 1595. Many employees felt

that the amount of patients being rushed through the Shadow Lane Clinic was unmanageable. 7 AA 1596-97; 7 AA 1596-97; 7 AA 1529; 10 AA 2414; 11 AA 2498-50, 2538; 16 AA 3861-62. A nurse quit because she felt the amount of patients made the clinic unsafe. 7 AA 1527, 1529. Routinely patients would be booked for the same time period. 10 AA 2421.

Dr. Clifford Carrol, a gastroenterologist who began to work with Desai in 1997, was granted immunity in return for his testimony regarding the events that occurred at the clinic from 2004-2008. 11 AA 2498-2550. Desai was the managing partner and was the ultimate supervisor. 11 AA 2534-35. On the medical side, Desai had two shares of the practice for every one share acquired by the other partners. He owned 60% of the endoscopy side of the clinic. 11 AA 2622. Carrol testified that Desai controlled anything substantive within the practice— hiring, firing, supplies, contracts, and negotiation. Desai ran the group meetings and managed all facilities. 11 AA 2503-04, 2510-11.

Carrol testified Desai was involved in every layer of the clinics operation at all times including cost, supply usage, and wasteage. He would admonish Carrol for changing his gown between patients as it cost $5 every time it had to be changed; this, even if the gown was soiled with fecal matter or other discharge. 11 AA 2607. Carrol tried to get liquid called "endspot", which allowed surgeons to accurately

identify lesions inside of colons, but Desai refused to get this as it was too expensive, despite the accuracy it would allow. 11 AA 2607-11.

Carrol had concerns over the number of patients being seen in the endoscopy area, as well as the way the patients were being treated on the medical side. 11 AA 2537. He felt that 70 to 80 patients were too many to responsibly see in one day, and at one point attempted to limit the patients but was stopped by Desai. 11 AA 2538-39. When Desai left on medical leave, Carrol changed various processes to make patients more comfortable. 11 AA 2541-42. However, when Desai returned from medical leave, he was angry at Carrol for instituting this new plan and aggressively castigated Carrol. 11 AA 2547-58. The number of patients slowly moved back toward 70 a day. 11 AA 2554.

In early 2008, Carrol was in a meeting where CDC officials told members of the Shadow Lane Clinic that they had observed the CRNAs "double-dipping". In response, Carrol wrote a policy for the CRNAs on how to properly administer propofol. Yet soon after, Carroll noticed a CRNA not following policy, contacted Desai, and was told she would be fired. He found out later she had not been terminated. 11 AA 2600-03.

CRNA Keith Mathahs pleaded guilty to criminal neglect of patients resulting in death, criminal neglect of patients resulting in substantial bodily harm, obtaining money under false pretenses, insurance fraud, and conspiracy and agreed to testify

against Desai and Lakeman. 7 AA 1580. Mathahs was a CRNA who began working at the Shadow Lane Clinic in 2003 until 2008 and regularly worked with Desai. Mathahs testified that as time went on, the amount of procedures increased, and he felt the amount became unmanageable. Mathahs was not given breaks between the first patient at 7a.m. and the last patient 5p.m., and as a result developed foot rot in 2003. 7 AA 1592-1602. He described the atmosphere within the clinic as horrible due to Desai's constant anger. 7 AA 1695-96.

Mathahs testified that on a regular basis he would request to administer additional anesthetic, and Desai would order him not to. At times Mathahs would give the patient the anesthesia despite Desai's direction, in order to keep the patient in a sedated state. Mathahs always tried to review the charts so he was aware of what medical issues the patient may have, but was not always successful due to Desai's pushing him to hurry up. Mathahs felt it was inappropriate, was uncomfortable with the situation, and felt that patients were potentially compromised. 7 AA 1613-29.

Anne Yost is a registered nurse who was employed at Shadow Lane for three days in July 2007. When she worked in the procedure room she noticed some charting deficiencies, such as the time overlapping, as well as vitals being filled in before the patient started the procedure. She resigned her position as she was uncomfortable with the charting procedures. She contacted the nursing board and filed a complaint letting them know about the pre-charting. 21 AA 4868-82.

Mathahs testified that propofol was something that was forbidden to waste and Desai would be angry if a CRNA did so. Desai encouraged Mathahs to use syringes over again. He also instructed that if more propofol was needed, the CRNAs should flush the little bit that was left in the catheter using saline. He would stop Mathahs from giving the patient more anesthesia while the patient was writhing in pain on the table. 7 AA 1671-83. Vincent Mione, a CRNA at the Shadow Lane Clinic, testified that Desai would occasionally end the procedure and extract the scope extremely fast instead of administering more propofol. It concerned Mione that the patient would be moving while the scope was inside of them for fear of puncturing the intestine. 18 AA 4293-94.

Everything that was disposable was supposed to go into the "sharps" container, and Desai would check the containers to make sure nothing had been thrown away. If a partial bottle of propofol had been discarded, Mathahs felt he would have been fired. If a bottle of propofol had not been used on one patient, Desai would instruct them to use the rest of the bottle on another patient. Mathahs would attempt to put the extra propofol into a wastebasket so that Desai would not see it hadn't been used. 7 AA 1689-91.

According to Mathahs, CRNAs would routinely reuse propofol bottles and syringes between patients. At the end of each day, partially used bottles of propofol were also taken to rooms that were still doing procedures. This was common practice

at Desai's directive. Mathahs told Desai that there was a risk of contamination by using this practice, but Desai instructed those in his clinic to use this technique despite the risk. Desai regularly became frustrated with the CRNAs for moving too slowly, and would grab the anesthesia and put it in himself. 7 AA 1693-1709.

Multiple times per week Desai would also knowingly start procedures without anesthesia on board. Desai was so impatient, he would give the CRNAs one chance to put the needle in, and if it didn't work he would administer it himself and leave the patient's blood running out of their veins. This would cause the blood to run over the patient's arms and onto the CRNAs as they tried to put the port in. 7 AA 1674-85.

Improper CRNA Supervision

Just as Desai created an atmosphere of fear and pressure at the Shadow Lane Clinic through limiting supplies—including propofol—he also did not provide the proper supervision for the CRNAs. The requirement in Nevada is that there must be a supervising physician for the CRNAs, which at the time was not being met as Carrol did not consider himself to be in a supervising role. 12 AA 2885. Dr. Satish Sharma, an anesthesiologist and pain specialist who arrived in Las Vegas in 2006, worked with the group of physicians of which Dr. Desai was a part of, but she never worked at Shadow Lane. While Sharma's signature appears on an agreement to supervise the CRNAs, she did not read the agreement and had never discussed it

with Desai. 9 AA 2066-80. Dr. Thomas Yee is an anesthesiologist who worked with Desai at the Shadow Lane Clinic between 1996 and 2001. Yee was initially in talks to supervise the CRNAs as they administered the anesthesia, but a formal agreement never materialized. Yee did not know of any physician hired to supervise the CRNAs at the Shadow Lane clinic. 6 AA 1417-37.

SUMMARY OF THE ARGUMENT

Much of Desai's Opening Brief is an attempt to confuse the issues at hand. Desai repeatedly mischaracterizes the theory of the State's case and takes quotes from prosecutors and the district court out of context. The evidence against Desai is clear and overwhelming, and the jury was appropriately instructed on the law. Despite Desai's continued assertions that the State did not have evidence showing the he aided and abetted or conspired with Lakeman and Mathahs to employ these unsafe injection practices, this is belied by the record. Desai contends the State made this case needlessly complex, but this makes light of his actions and the direct consequences of those actions—the contraction of a painful disease by seven of his patients culminating in the death of Rodolfo Meana.

ARGUMENT

I. The Evidence Was Sufficient to Convict Desai Under an Aiding and Abetting Theory

Desai contends that the State failed to sufficiently prove that he was appropriately convicted as an aider and abettor because the State did not allegedly

prove 1) that Desai knew any injection practices employed by Mathahs or Lakeman were a violation of any standard of care that would constitute reckless endangerment or neglect, and 2) that Desai intended Lakeman or Mathahs to commit the conduct that constituted the endangerment crimes. Desai mischaracterizes the State's theory by contending that his connection to the reckless endangerment and neglect was solely through the "atmosphere" created at Shadow Lane Clinic.

The standard of review for sufficiency of the evidence on appeal is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979). A reviewing court need not decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20. This standard preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id.; see also Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380. ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses."). In rendering its verdict, a jury is free to rely on circumstantial evidence. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

Circumstantial evidence alone may support a judgment of conviction. Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000).

In this section, Desai first appears to argue that no evidence was adduced at trial that he had any knowledge or intent related to the CRNAs' reckless acts, and therefore the evidence was insufficient to convict him of the various reckless disregard/criminal negligence counts. To the contrary, Desai's knowledge of the actions by Mathahs and Lakeman were proved by the State through direct testimony, the amount of supplies available to the CRNAs in contrast to the amount of patients, and the testimony from multiple witnesses put on by the State that Desai exercised control over every single part of the clinic. Desai did intend for Mathahs and Lakeman to unsafely reuse syringes and propofol vials on various patients. The testimony regarding Desai's control over supplies and cost-cutting served to show both the motive behind Desai's actions and the pressure the CRNAs were under. It also served to bolster the direct testimony with a reasonable inference that Desai was so intimately involved with the ordering and conserving of supplies that he limited the syringes and the propofol and encouraged unsafe injection practices. Viewing this evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

A. Desai Knew About the Unsafe Injection Practices and the Risk

Desai knew about the unsafe injection practices and the risks involved. He was a practicing gastroenterologist for many years and a specialist in Hepatitis C. Desai's contention that the State did not adequately prove that he understood the risk he was taking with patient lives is nonsensical.

Keith Mathahs testified that it was common practice to reenter a bottle of propofol to use on the same patient, but he would take the needle off and put on a new needle and reenter the bottle with the same syringe. 7 AA 1693. The CDC observed this practice when they were at the clinic. 7 AA 1719-20. **This was common practice and instructed by Desai.** 7 AA 1693-94; 11 AA 2459. Mathahs also expressed the risk of contamination to Desai:

> Q. Are you aware that there is at least a risk of potential contamination even changing out the needle in that situation?
> A. Yes, there is.
> Q. Did you ever express your concerns about doing this to Dr. Desai?
> A. Yes.
> Q. What was his response?
> A. It's to save money, just go ahead and do it.
> Q. So he instructed you to do it even though you made him aware of the risk?
> A. Yes.

7 AA 1694. At the end of each day, partially used bottles of propofol were also taken to rooms that were still doing procedures. 7 AA 1709; 22 AA 5194. Propofol vials were reused from patient to patient. 9 AA 2202. Further, Vincent Mione told

Brian Labus of the Southern Nevada Health District that they were instructed to reuse the syringes, but that he refused. 33 AA 7687. At one point Jeff Krueger gave Desai information regarding the risk of reusing forceps. Desai ignored the risk and continued to reuse that equipment, similar to ignoring the risk regarding propofol.

Desai's contention that he did not know that the CRNAs were using this technique or understand the risk is further belied by Dr. Carrol's testimony. After Carrol wrote a policy regarding the proper propofol administration and had each CRNA sign that they understood, Carrol observed a CRNA named Linda Hubbard saving the unused propofol in a bottle and saving it for the next patient. 11 AA 2601. Carrol had the nurse manager observe this as well:

> [S]he is pulling the propofol, she is not discarding it, she's taking the unused portion, putting it into a syringe, a new syringe, but – and then finishing with a new bottle of propofol for the next patient. But—so—so therefore part of the propofol being given to the next patient came from the case before.

11 AA 2601-02. Carrol shut down the room and told Hubbard to meet him in her supervisor's office where he confronted her about the improper technique. 11 AA 2602. Carrol then told her she needed to be terminated and was under the impression that had occurred. 11 AA 2602. However, Desai overrode his decision and instead transferred Hubbard to another facility. 11 AA 2603.

Peggy Tagle worked as a nurse at the Endoscopy Center of Southern Nevada from August 9, 2006 to March 7, 2008. 21 AA 4779. She witnessed a confrontation

between Hubbard and Desai regarding the propofol. 21 AA 4805-06. She heard Desai tell Hubbard he was in control and would do what he told her. 21 AA 4806.

Desai told employees to change their practice when the CDC came to observe, but the CDC still witnessed problematic injection practices. Desai talked to Ralph McDowell, a CRNA at the Shadow Lane and Burnham Clinics:

> Q. Okay. And did you have a – Did Dr. Desai talk to you about [the CDC] coming around and talking to you?
> A. Yes.
> Q. And what did he tell you about how to handle that situation.
> A. Okay. If somebody asks you whether you use multi-dose vials you say to him what's that.
> . . .
> Q. Yeah. And did that instruction strike you as odd?
> . . .
> A. It would be – the idea was that we were saying to them – we were—it would mean that we were telling them, no, we didn't because we don't even know what such a thing is.
> Q. Okay. But you – you knew what a multi-dose vial is.
> A. Oh, certainly. Yes. Of course.

20 AA 4623. Daniel Sukhdeo, who worked at Shadow Lane as a gastroenterologist technician from August of 2007 until March of 2008, testified that after the CDC arrived the CRNAs changed out the syringes more often. 10 AA 2417-18, 2448. Desai understood the techniques he had pushed the CRNAs to use were not appropriate, which is evidenced by his instructions to change those techniques when under observation.

While much evidence was presented showing that Desai kept a tight grip on all supplies, including cutting chux in half and only allowing so much use of KY Jelly before inserting the scope into the patient's rectum, he was also aware of the practice being used by the CRNAs in order to cut down on propofol use and *knew and was told of the risk* that he was taking with patient lives.

B. Desai Intended that Shadow Lane Clinic Did Not Have Enough Supplies to Use Proper Aseptic Technique

Along with the direct testimony, the amount of supplies ordered create a reasonable inference that the CRNAs were not using two syringes per patient, or one bottle of propofol per patient.

Nancy Sampson, a former analyst in the intelligence section at the Las Vegas Metropolitan Police Department (hereinafter "LVMPD") prepared multiple charts using the procedure files from the two days the infections were spread. 25 AA 5846, 5848. Sampson used information from the search warrants to create a medical supply analysis and in particular looked at the propofol, syringes and bite blocks. 25 AA 5860, 5862. When looking at the total inventory in 2007, Sampson determined that there was no way one bite block, one propofol vial, and one syringe per injection had been used per patient. 25 AA 5864. The number of patients at the Shadow Clinic in 2007 was 14,957 and at Burnham Clinic 8,619, for a total of 23,576 patients. The total number of vials of propofol ordered was 11,874, making it a ratio of 1.99 patients to one vial of propofol for both locations combined. 26 AA 6011. This is

more than a 2 to 1 ratio at the Shadow Lane Clinic, as it had a majority of the patients. 26 AA 6012.

Further, at Shadow Lane Clinic there were 17,100 syringes for 14,057 patients. 26 AA 6015. This equals 67.3 syringes for 54 working days, with an average of 59 patients per day. 27 AA 6158-59. As each procedure took two separate doses of propofol to complete, based on the amount of syringes ordered, it was not possible for the CRNAs to use two new syringes on each patient. 26 AA 6014-15. Sampson also determined that the times listed on the charts could not possibly be accurate because there weren't enough hours in the day. 26 AA 6144. Carrol also noticed that anesthesia times in all the insurance records were all for 31-32 minutes. 11 AA 2587. In order to use appropriate aseptic technique, each CRNA would either have to dedicate one bottle per patient, or use multiple syringes per one vial. Therefore, as there were not enough syringes for two syringes per patient, and not enough propofol vials for one vial per patient, proper aseptic technique could have been used by the CRNAs at the Shadow Lane Clinic.

Dr. Carmelo Herrero, a gastroenterologist who worked at Shadow Lane and was a partner in the practice with Desai, testified that Desai was aware of what supplies needed to be ordered and how much was being used. 9 AA 1997, 2005. Further, multiple witnesses testified that Desai attempted to limit supplies. 11 AA 2458, 2459; 16 AA 3871. Desai also constantly commented that too much propofol

was being used at the clinic. 11 AA 2495; 18 AA 4289; 20 AA 4591-92. At one point the CRNAS were told that if the cost of propofol could be brought down to an acceptable level the savings would be shared with them in the form of a bonus. 20 AA 4611.

While Desai contends that Mathahs and Lakeman simply made a "mistake," it is clear based on the amount of propofol and syringes Desai ordered for the Shadow Lane Clinic that the CRNAs were not physically able to use proper aseptic technique due to lack of supplies and number of patients. Moreover, Desai financially incentivized them to violate it.

C. Desai Maintained Total Control Over All Aspects of the Shadow Lane Clinic

Desai's total control is evidenced by not only the fact that he was managing partner and owned most of the business, but also that he managed every piece of the Shadow Lane Clinic, no matter how small. The purpose of this micro-management was to maximize every piece of equipment, many times beyond its intended use. From limiting supplies, to cutting corners when it came to cleaning procedures, Desai attempted to save every penny he could, at patients' risk.

Many supplies which were supposed to be disposable were reused at Shadow Lane. Desai would routinely reprimand all employees, including doctors, if he felt supplies were wasted. 16 AA 3871; 14 AA 3425-3424.

Desai told the technicians not to use too much K-Y jelly, which was used for lubricant on the scope so as not to perforate an intestine and for patient comfort. 7 AA 1675; 10 AA 2449-50; 14 AA 3424; 16 AA 3871. Employees were only supposed to use a dime sized amount and one piece of 4x4 gauze for each patient. 10 AA 2451. Desai would comment if there was too much lubricant placed on the gauze 4x4s. 7 AA 1676.

Bite blocks, which are used during an upper endoscopy, were reused on a regular basis, along with snares and forceps, though they were supposed to be single use items. 7 AA 1677-68; 15 AA 3543. Joshua Lee Cavett, a gastroenterology technician at the endoscopy center, was employed by Desai for a year and three months, until the clinic was closed. 9 AA 2174-75. He worked in the sterilization room and assisted in cleaning the beds. 9 AA 2176. Part of his duty was to clean the dirty scopes post surgery. 9 AA 2179. He testified that the scopes and the bite blocks would go into the same bucket. 9 AA 2181. Instead of being thrown away after a single use as intended, bite blocks and bands would not be thrown away until the end of the day and would get processed three to four times a day. 9 AA 2187. Cavett would put anywhere from four to eight scopes in the bucket before the solution was changed. 9 AA 2189. Cavett testified there would be fecal matter "just floating" in the bucket holding the bite blocks and scopes. 9 AA 2190.

Multiple employees testified that a larger syringe that was used to flush out the scopes when inside a patient was being reused over and over again on various patients, and it was sometimes not changed for an entire day. 7 AA 1677; 10 AA 2446-47; 18 AA 4233. Desai's attempts to conserve supplies extended to the point where he would yell if a nurse put a sheet on a patient because the sheets cost $.03 to clean. 7 AA 1679; 14 AA 3423-24. 16 AA 3871. He would go so far as to remove the sheets from the patients himself. 16 AA 3872-73. Chux, which go underneath a patient when they are having a colonoscopy to catch any fecal matter, were routinely cut in half, despite costing a few pennies each. 7 AA 1680; 16 AA 3871.

Dr. Eladio Carrera joined the Gastroenterology Center of Nevada in 1998 and became a partner in 1990. 15 AA 3578, 3581. Desai scolded Carrera for using too much lubricant and overuse of personal protective gear. 15 AA 3623. Carrera was told by Desai to try and limit his use to one facial protective mask per day. 15 AA 3624. He once made a comment to everyone in the facility in 2007 that the nurses were using too much tape on the IVs to hold them in place and it was costing him money. 15 AA 3624-25. In August 2007, Carrera asked Lakeman during a procedure if the patient could safely get more propofol, and Lakeman responded that Desai did not want them giving more than 200 milligrams of propofol per patient. 15 AA 3633. Carrera told Lakeman to administer the medication if the patient needed it. 15 AA 3633-34.

Desai berated Carrera multiple times regarding the lack of speed with which Carrera did procedures. 15 AA 3637. Desai would say "speed = confidence." 15 AA 3638. Desai bragged that he could do a colonoscopy faster than anybody and was well known for his speediness in this regard. 11 AA 2516; 9 AA 2198. For most practitioners, an average colonoscopy would take ten to fifteen minutes, with some of the newer doctors taking up to forty minutes. 9 AA 2198; 11 AA 2515. Mathahs testified it took Desai a maximum of five minutes and a minimum of two to three minutes to do an upper endoscopy and five to ten minutes to do a colonoscopy. 7 AA 1617-18.

Desai also extracted the scope from patients' rectums differently than other doctors. Mathahs watched him yank the scope out of somebody, and whatever was "in there" would fly around the room and onto everyone in the room. Mathahs was actually hit with the fecal matter of many patients. 7 AA 1686-87. Marion Vandruff, who worked as a GI technician at the Shadow Lane Clinic, described Desai's action as "cracking the whip." 17 AA 4020, 4026.

It is clear based on the evidence that Desai would do anything to save money. He instructed the CRNAs to conserve propofol and syringes, and was aware of the injection practices used in order to do so, as well as the risk they carried.

Desai contends that the practices used by Mathahs and Lakeman were simply mistakes, and could not have been intended by Desai, thus he should not have been

convicted as an aider and abetter. This too is belied by a voluminous record. Desai points to the testimony of Vincent Mione, Ralph McDowell, Vincent Sagendorf, Linda Hubbard and Ann Marie Lobiondo to show that Mathahs and Lakeman simply made a mistake and Desai was not responsible. But pointing out that certain CRNAs refused to follow Desai's penurious protocol does not show that Desai was not complicit in the actions of the CRNAs who *did* use unsafe techniques. Further, the supply analysis done by Sampson shows that it was physically impossible for all the CRNAs to be using appropriate technique. See supra I(B).

Mione said he never used the technique employed by Lakeman and Mathahs because there was a possibility of blood backing up into the syringe. 18 AA 4283. But Desai mentioned to Mione not to use too much propofol and would occasionally administer it himself. 18 AA 4289. Mione testified that he felt Desai put pressure on the employees to cut costs. 18 AA 4292.

Ralph McDowell was employed as a nurse anesthetist at the Shadow Lane Clinic from February 2002 until its closing in 2008. 20 AA 4571-72. McDowell worked over thirty years as a CRNA in various places. 20 AA 4575. *He worked with Desai on only two days, and Desai made a comment to him that he used too much propofol.* 20 AA 4591-92. Desai said that McDowell was the most expensive CRNA that he had. 20 AA 4592. At the Burnham Clinic, at a certain point in the procedure if it looked like the patient was getting light on anesthesia, McDowell would

administer more propofol. But at the Shadow Lane Clinic this was not the case. 20 AA 4593. On more than one occasion McDowell had administered more propofol to the patient when he was told by Desai it was unnecessary because he was actually done with the procedure. 20 AA 4595.

Vincent Sagendorf only stayed at the clinic for five months, and was alarmed by the number of procedures. 22 AA 5034-35. Essentially Desai is taking credit for Sagendorf's alleged unwillingness to conform to these reckless techniques used in the clinic, including Desai's attempt to start a procedure before the propofol had been administered in order to save time. 22 AA 5036.

While Sagendorf used appropriate aseptic technique, he did see propofol being moved from room to room. 22 AA 5044. He was brought various partially filled bottles of propofol in case he needed more at the end of the day, but chose not to use them because the "standard of care says you never give anything that you didn't open and draw up." 22 AA 5044. When Sagendorf started, he was told by Mathahs that Desai didn't want propofol wasted, but still chose not to use the propofol brought to him in partially filled vials because it may have been contaminated. 22 AA 5045-46. It is clear that Desai knew that questionable injection practices were being used because after the CDC came in, Sagendorf testified that Desai told him when the CDC was there he only *"wanted to see one syringe opened at a time on the – on the counter."* 22 AA 5049. Further, he was told by Desai he

was using too much propofol. 22 AA 5050. In fact, Sagendorf testified he explicity ignored Desai's instructions regarding how much propofol to give to patients. 22 AA 5051.

Linda Hubbard was interviewed by Detective Whiteley in 2008 but at trial could not recall the majority of what she told him at that time. 22 AA 5183. When asked if "she recall[ed] telling the police Dr. Desai wanted me to use, you know, to do it the way Ron did it" she could not recall after having her recollection refreshed. 22 AA 5191. She testified she didn't even remember her interview with the police at all. 22 AA 5197. However, Detective Whiteley was able to testify as to Hubbard's responses as he was present at the interview. He confirmed that she did in fact say she was instructed to follow Lakeman's injection practices. 36 AA 8438. She also said in the interview that Lakeman was using the "double-dipping" method, but that she did not feel comfortable with it. 36 AA 8435. Of course, this is the individual who was caught doing exactly that. 11 AA 2601-02.

Ann Maria Lobiondo is a CRNA and worked at the Shadow Lane Clinic starting in September of 2000, but had been living in Las Vegas working as a CRNA since 1994. 28 AA 6593-94. Lobiondo left in 2004 and came back around 2005. 28 AA 6595. While she never used bottles of propofol that had been opened or partially used by another CRNA, she did testify that there would be open bottles of propofol left in a room for use if she covered for another CRNA. 28 AA 6600, 6604.

While Defendant attempts to take credit for the alleged good judgment of the other CRNAs in his practice, it is also not possible that none of these CRNAs ever used inappropriate technique. The amount of supplies alone show that "double-dipping" must have occurred. See supra I (B).

D. The Jury Was Correctly Instructed On The Intent Required for Aiding/Abetting Liability

Desai mischaracterizes the legal theory of the State's case by stating that the article by Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining within the Constraints of Intent*, 31 Loy. L.A. L. Rev. 1351, 1362 (June 1998), and cited to by this Court in Sharma v. State, 118 Nev. 648 (2002) "warns against applying accomplice liability to a case like this one, where the 'accomplice' does not intend that the principal commit the act." Yet—as Desai notes in his footnote 7—the jury was instructed that they must find that Desai "knowingly and with criminal intent" aided and abetted the CRNAs' crimes. The State is flummoxed as to what the rest of the discussion is aimed at. To the extent that Desai asks this Court to apply the reasoning of Sharma to reckless and negligent crimes, the State is unsure what more than the intent language in above-excerpted instruction would be required for such an application. To the extent that Desai is claiming that the evidence was insufficient to support the jury's verdict under the correct instruction, see the above. The jury was correctly instructed and the evidence to support that verdict was overwhelming.

E. Desai Was Appropriately Charged with Conspiracy

Desai claims that he was not properly charged with conspiracy as "there was no evidence [he] knew that the practices were unsafe or that he had a purpose to have Mathahs or Lakeman employ unsafe injection practices." See supra I for the plethora of evidence showing that Desai conspired with Mathahs and Lakeman.

II. The Evidence Was Sufficient to Convict Desai of Second-Degree Felony Murder

Desai contends that the jury's conviction of Second Degree Murder cannot stand because: 1) the evidence was insufficient to prove that there was an immediate and direct causal relationship between Desai's actions and Meana's death; 2) Jury Instruction 27 omitted the third element required for Second Degree Felony Murder; and 3) the trial court committed plain error in failing to instruct the jury on whether the underlying felony was "assaultive."

The standard of review for sufficiency of the evidence on appeal is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998);

Desai once again mischaracterizes the State's theory of liability in saying "[t]he State clearly relied on a theory based on Felony Murder to charge and obtain a conviction for Second Degree Murder." AOB, p. 34. The jury was instructed as to

the elements of Second Degree Murder as well as Second Degree Felony Murder. 41 AA 9532. While the State did discuss both theories of liability, there is no basis for Desai's characterization that the State relied on one in particular. As there was no special verdict form, the jury was only instructed to determine whether Desai committed Second Degree Murder, and there did not need to be an agreement on the theory of guilt. 41 AA 9535.

Presumably, Desai makes this argument in order to analogize his situation to that in Talancon v. State, 102 Nev. 294, 297 (1986) where the court found that as the jury did not specify which theory of first degree murder was relied on, the court assumed that it was the felony-murder theory. While the State believes Desai was proven guilty of Second Degree Murder under both theories of liability, we are compelled to point out that Desai's reliance on Talancon is misplaced. In Talancon, the prosecutor's closing argument mentioned the felony-murder theory multiple times but only the premeditated murder in passing. Id. Further, there was no direct evidence of the alternative theory of murder. Id. In the instant case, the State presented direct evidence that Desai aided and abetted Mathahs and Lakeman.

While the State contends Desai is misconstruing the record, second-degree felony murder was adequately proven. Desai ends his argument by alleging that second-degree felony murder should be abrogated in Nevada, but this Court has upheld second-degree felony murder in limited situations time and time again.

A. The Purpose Behind the Felony Murder Rule—Deterrence

NRS 200.070, the involuntary manslaughter statute, coupled with NRS 200.030, creates second-degree felony murder in Nevada. In Sheriff v. Morris, 99 Nev. 109, 118, 675 P.2d 852 (1983) this court stated:

> We are not unmindful of the potential for untoward prosecutions resulting from this decision. We therefore emphasize that our holding today is limited to the narrow confines of this case wherein we perceive an immediate and direct causal relationship between the actions of the defendant, if proved, and the [victim]'s demise.

This court found that the felony must be inherently dangerous, so it is "necessary that a potential felon foresees the possibility of death or injury resulting from the commission of the felony." This Court has time and time again stated that the purpose of the second-degree felony murder rule is deterrence. See Ramirez v. State, 126 Nev. __, __, 235 P.3d 619, 622 (2010); Labastida v. State, 115 Nev. 298, 306, 986 P.2d 443, 448 (1999); Noonan v. State, 115 Nev. 184, 189, 980 P.2d 637, 640 (1999).

B. The Conduct of Mathahs and Lakeman Was Not an Intervening Source Precluding Desai's Liability for Murder

Desai contends that this Court incorrectly interpreted the felony-murder rule in its denial of Desai's Petition for Writ of Mandamus filed February 20, 2013. Specifically, Desai claims that this Court's ruling that the predicate felony must be the immediate and direct cause of the death is "not a correct statement of the rule

and not what the jury was instructed." AOB, p. 41. While this misconstrues the ruling made by this Court, Desai's contention is irrelevant. Desai's appeal is from the denial of the Judgment of Conviction, and not from the denial of the Order Denying Petition. Additionally, Desai essentially admits the jury was instructed appropriately regarding the causal link required. Jury Instruction 38 states that there must be "an immediate and direct causal connection – without the intervention of some other source or agency – *between the actions of the defendant and the victim's death*." 41 AA 9534 (emphasis added).

While Desai's purpose behind pointing out an alleged flaw in this Court's Order is unclear, Desai also contends to some extent that Labastida and Noonan v. State, 115 Nev. 184, 980 P.2d 637 (1999), both show that there was not an immediate and direct causal connection between Desai's reckless activities and Rodolfo Meana's death. In Labastida, a mother was convicted of Child Neglect and Second-Degree Felony Murder, but her conviction for Second-Degree Felony Murder was overturned. Importantly, in Labastida the mother had no idea that her husband was abusing the child. 115 Nev. at 307, 986 P.2d at 449. There was no deterrent value in convicting her, as she had no knowledge of the crimes being committed. Thus, Second Degree Felony Murder could not lie where there was not a direct and causal connection between the acts of the Defendant and the death of the victim. Not so here.

In Noonan, a babysitter left a sixteen-month old child in a bathtub or possibly a freezer while he went to pick up another child from school. Noonan, 115 Nev. at 187, 980 P.2d 637 at 638. The court found that the defendant should have foreseen that leaving a young child in the bathtub or freezer had a probability of resulting in death or injury, and that there was an immediate and causal connection. Id. at 189, 980 P.2d at 640. The court cited Morris and the purpose of deterrence in prosecuting those under second-degree felony murder, and upheld the conviction. Id.

Noonan acted in reckless disregard for the consequences of his dangerous actions. So did Desai. Desai is unlike the defendant in Labastida because he had knowledge of the negligence and recklessness committed by Mathahs and Lakeman. More than knowledge, he controlled everything in his clinic, and understood the risk he was taking by attempting to save money on propofol and syringes. This is why he is similar to the defendant in Noonan, who took a calculated risk with someone else's life. As this Court noted when denying Desai's Writ Petition, while Desai may have indirectly engaged in the felonies, those felonies were the direct cause of Meana's death.

Convicting Desai of second-degree felony murder has deterrent value. The State presented more than a month of testimony regarding the reckless and negligent practices used in his clinic, simply for the lust of lucre. The CDC witnessed these reckless actions. There was testimony as to the control he exercised in the clinic,

down to the point of managing the amount of KY Jelly used when inserting a colonoscopy probe in a patient's rectum. Upholding Desai's conviction for second-degree felony murder has the ultimate deterrent value for medical professionals in Nevada to follow appropriate practices.

Desai briefly claims that Meana's refusal of treatment and various other ailments were an intervening source. The death certificate and the examination of Rodolfo Meana belie this. Meana *did not* have Hepatitis C before going to the Shadow Lane Clinic for a colonoscopy. 1 AA 104. His daughter testified thoroughly as to the quality of life he enjoyed prior to contracting this disease. 35 AA 8045-46. Meana received treatment for the Hepatitis C, but failed interferon therapy and his condition continued to worsen. 1 AA 103-04.

Further, Dr. Alane Olsen went to the Philippines to observe the autopsy, took her own samples and did her own testing on Meana's heart, lungs, liver, kidneys and spleen and completed her own report. 37 AA 8636-37. Olsen testified that from what she read in the autopsy report and death certificate that "[t]he wording is somewhat different but the – the take home message is that he died as a result of hepatitis C infection." 37 AA 8642.

The Jury Instruction given conforms to the requirements of Labastida, 115 Nev. at 307, 986 P.2d at 449, and Ramirez v. State, 126 Nev. Adv. __, 235 P.3d 622

(2010). Jury Instruction 28 reads that the State must prove each of the following elements beyond a reasonable doubt:

> a. That the defendant did willfully and unlawfully
> b. Cause Rodolfo Meana to die as a result of criminal neglect of patients.
> c. That Rodolfo Meana died as a directly foreseeable consequence of the conduct constituting criminal neglect of patients; and
> d. That there was an immediate and direct causal connection – without the intervention of some other source or agency – between the actions of the defendant and the victim's death.

41 AA 9534. The State adequately proved that there was a direct connection between Desai's actions and Meana's death.

C. The Jury Was Properly Instructed as to the Elements of Second-Degree Felony Murder

Desai contends that the jury was not instructed as to the third Morris element, which Defendant contends is that "the causal relationship must extend beyond the felonious conduct . . . to an involvement by commission or omission in the means that caused the death." However, Desai admits that "[t]his third element has not been mentioned in later cases." AOB, p. 45.

"District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. 1013, 1019, 195 P.2d 315, 319 (2008). While typically this Court would review a district court's decision to give or refuse a particular instruction for abuse of discretion, Desai admits that there was no objection made as to the failure to include this alleged third limitation in the second-degree felony murder instruction

on the trial level. AOB, p. 47. A defendant's failure to object to an issue at trial generally precludes appellate review of that issue unless there is plain error. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). When an error is not preserved, this Court employs a plain-error review and asks whether the defendant demonstrated that the error "affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Id. The burden is on the defendant to show actual prejudice or a miscarriage of justice. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

The United States Supreme Court has explained that the plain error doctrine is limited and "authorizes the Courts of Appeals to correct only 'particularly egregious errors…that seriously affect the fairness, integrity or public reputation of the judicial proceedings.'" United States v. Young, 470 U.S. 1, 15 (1985) (quoting United States v. Frady, 456 U.S. 152, 163 (1982). The Court held that the plain error rule is to be used "sparingly" and only when there has been a fundamental error so basic and prejudicial that justice could not have been done, or when the error deprives the accused of a fundamental right. Young, 470 U.S. at 15.

Desai has not demonstrated that the failure to include the third element from Morris affected his substantial rights by causing actual prejudice or a miscarriage of justice. First, Desai cannot show that he was substantially prejudiced because the third prong seems to suggest a requirement that he was involved in commission of

the crime and he **was** involved in the re-use of contaminated products which were the vector of disease transmission. Second, Desai is essentially arguing that a third element of intent to commit the underlying felony be added. However, the purpose of second-degree felony murder created by statute is to abrogate the need for mens rea, as it is provided by the felonious intent inherent in committing the felony.

Arguably, Labastida, 115 Nev. at 307, 986 P.2d at 449, and Ramirez, 126 Nev. at __, 235 P.3d at 622, either 1) abrogated the third Morris prong by stating the relevant law in only two parts in both succeeding cases, or, 2) implicitly concluded that the "involvement" requirement of the third prong was subsumed in the stated two-part test. In either case, the State contends no independent relief is available.

Jury Instruction 28 is clear that there must be a direct and causal connection. 41 AA 9534. Further, Desai did not object when the court stated, "[t]wenty-eight, the second-degree felony murder rule," and continued on. 39 AA 9204. Desai's attempt to challenge jury instructions on appeal that were never discussed or challenged below should not be considered.

D. The Jury Did Not Need to be Instructed on the "Merger" Doctrine

Desai claims the trial court erred by not instructing the jury on whether or not the two statutory crimes in this case are "assaultive in nature." This was not

preserved for appeal.[1] However, Desai also admits that because this rule has not been tested, "it is unclear what additional jury instructions would be required." AOB, p. 52. Defendant's substantial rights were not violated and Desai cannot show a miscarriage of justice as the merger doctrine is not applicable to this case.

Desai relies on this Court's decision in Rose v. State, 127 Nev. __, 255 P.3d 291 (2011), where the merger doctrine was adopted regarding certain types of felonies. This Court explained the merger doctrine by quoting the California Supreme Court:

> The merger doctrine developed due to the understanding that the underlying felony must be an independent crime and not merely the killing itself. Thus, certain underlying felonies "merge" with the homicide and cannot be used for the purposes of the felony murder.

Rose, 127 Nev. at __, 255 P.3d at 296 (quoting People v. Sarun Chun, 91 Cal. Rptr. 3d 106, 117, 203 P.3d 425, 434 (Cal. 2009).

The merger doctrine is not applicable to the instant case, as the underlying felony is an independent crime. Desai was convicted of both Criminal Neglect of Patients and Reckless Disregard, both of which are entirely separate from Second Degree Murder, and thus there is no merger.

[1] See *supra* II(C) for the appropriate plain error standard of review.

Further, while Desai requests that this claim be reviewed under the plain error doctrine as it was not preserved for appeal, he also admits that, "the Rose rule has not been tested, so it is unclear whether additional jury instructions would be required." AOB, p. 52. Desai has not shown that he suffered actual prejudice or substantial miscarriage of justice due to a lack of jury instruction on the merger doctrine, as he admits it is unclear whether one would be required.

III. Desai's Confrontation Clause Rights Were Not Violated

Desai contends his Confrontation Clause Rights were violated because of the admittance of: 1) the videotaped deposition of Meana; 2) Meana's Death Certificate from the Philippines; and 3) the testimony by Alane Olsen regarding the autopsy report. This Court will generally review a district court's evidentiary rulings for an abuse of discretion. See, e.g., Mclellan v. State, 124 Nev. 263, 182 P.3d 106, 109 (2008). However, whether a defendant's Confrontation Clause rights were violated is "ultimately a question of law that must be reviewed de novo." U.S. v. Larson, 495 F.3d 1094, 1102 (9th Cir. 2007).

A. Meana's Videotaped Deposition Did Not Violate Desai's Right to Confrontation

The District Court ruled that the video-taped deposition of Meana was admissible, but that the civil deposition was not. 2 AA 455. The district court did not abuse its discretion when determining that the videotaped deposition of Meana was

admissible. Under NRS 171.198(b), preliminary hearing testimony may be used "[b]y the State if the defendant was represented by counsel or affirmatively waived his right to counsel, upon the trial of the cause, and in all proceedings therein, when the witness is sick, out of the state, dead, or persistent in refusing to testify despite an order of the judge to do so, or when his personal attendance cannot be had in court." See also Funches v. State, 113 Nev. 916, 944 P.2d 775 (1997).

Although NRS 171.198(6)(b) does not impose a cross-examination requirement for admissibility at a criminal trial, this Court imposed the requirement in Drummond v. State, 86 Nev. 4, 462 P.2d 1012 (1970). In Drummond, the court found that the transcript of the testimony of a material witness given at the preliminary examination may be received in evidence at the trial if three preconditions exist. Id. These elements are: 1) the defendant must have counsel represent him at the preliminary hearing; 2) defendant's counsel must have had the opportunity to cross-examine the witness who is later unavailable for trial; and 3) the witness is actually "unavailable" at trial. Funches, 113 Nev. At 920, 944 P.2d at 777-78; see also Drummond, 86 Nev. At 7, 462 P.2d at 1014.

Desai does not dispute that he had counsel at the time of the deposition, or that Meana was actually unavailable. However, Desai claims that his right to Confrontation was violated as he did not have the ability to perform meaningful cross-examination. Desai's counsel, Richard Wright, started off the cross

examination of Meana at the video deposition. 1 AA 105. Wright questioned Meana about prior medical history, including his military injury. 1 AA 106-07. Meana told him prior to the colonoscopy he had constipation, acid reflux, and an enlarged prostate. 1 AA 107-08. Wright stated that he was about halfway done with his cross-examination when the court took a break, and planned to cross further regarding Meana's time after the colonoscopy and efforts at treatments. 1 AA 113-14. The family then determined that cross-examination could continue for thirty more minutes. 1 AA 121. Wright examined Meana further about the treatment he received, including the interferon treatments prescribed by Dr. Carroll at the clinic. 1 AA 122. The court then called for an end to the session with the intent to continue on Friday. 1 AA 123.

Wright had an opportunity to cross examine Meana about a variety of issues, including his health prior to the colonoscopy. In fact, he asked a total of 63 questions, and thus had 63 opportunities to elicit the information he felt was important. Based on Wright's comments regarding his plans for the remainder of his cross examination and the testimony that was elicited from Meana by Wright, it is clear that he had the opportunity to extensively cross examine him on all the issues in which Wright was interested.

Desai attempts to distinguish Chavez v. State, 125 Nev. 328, 337, 213 P.3d 476, 484 (2009), where this Court found that a preliminary hearing affords an

effective *opportunity* to cross examine and thus the defendant's Confrontation Clause rights are not violated by the admission of preliminary hearing testimony. Desai argues that unlike a preliminary hearing, the opportunity for cross-examination was inadequate because the State failed to reschedule the deposition after it ended due to health concerns. AOB, p. 61. This court found in Chavez that "[w]e will determine the adequacy of the opportunity on a case-by-case basis, taking into consideration such factors as the extent of discovery that was available to the defendant at the time of cross-examination and whether the magistrate judge allowed the defendant a thorough opportunity to cross-examine the witness." Id. at 338-39.

This Court has found that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006). Desai makes no arguments regarding the specific facts of this case, including discovery or the thoroughness of the cross-examination, and simply states that the State precluded meaningful examination by not rescheduling. However, it is clear from the transcripts and Desai's counsel's statements that he was able to cover during his cross-examination the topics that he had planned. Further, as this deposition was held on March 20, 2012, shortly before the trial was supposed to begin, all relevant discovery had been handed over to Desai, and there is no contention from Desai otherwise. Desai does not put forth any facts

or subject areas that Wright wished to cover with Meana that he was not able to, or that was not asked of other witnesses. A follow-up deposition would have been rescheduled, but unfortunately Meana died soon after as a result of the Heptatitis C he contracted at Desai's clinic. The transcript of the deposition belies any contention that he was not given an opportunity for cross-examination, and thus his Confrontation Clause Rights were not violated.

B. The Death Certificate of Rodolfo Meana was Not Testimonial

Desai contends that the admittance of the Death Certificate violated his Confrontation Clause Rights as the statement regarding the cause of death contained therein was testimonial. AOB, p. 62. The District Court admitted the Death Certificate pursuant to NRS 51.155 on March 21, 2013, on the condition that the State get the document properly authenticated. 2 AA 450. The court did not allow the autopsy report to be admitted. 2 AA 450.

Desai argues that the statement regarding cause of death is testimonial, citing Medina v. State, 122 Nev. 346, 143 P.3d 471 (2006), defining a testimonial statement as one that would "lead an objective witness to reasonably believe that the statement would be available for use at a later trial." Medina involved a hearsay statement made by another individual to the witness—a police operative—which the witness later testified to. In Vega v. State, 126 Nev. Adv. __, 236 P.3d 632, (2010), this Court expounded on whether statements in reports can be considered testimonial

in nature. When determining whether statements in official reports or public documents are considered testimonial, it is appropriate to look to whether the person preparing the report would reasonably believe that a statement would later be used for trial. Id. at 638.

In Melendez Diaz, 557 U.S. 305 (2009), the court found that documents allowed in under the public records exception are typically non-testimonial "because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." The death certificate was not created solely for an "'evidentiary purpose" and "in aid of a police investigation." City of Reno v. Howard, 130 Nev. Adv. Rep. 12, 318 P.3d 1063, 1065 (*citing* Bullcoming v. New Mexico, 564 U.S. ___, ___, (2011) (quoting Melendez-Diaz, 557 U.S. at 311)).

In this case, the coroner in the Phillipines who created the death certificate would not have known that it would be used for trial. Rather, similar to the United States, it is a reasonable inference that a death certificate must be prepared for each deceased individual. The certificate of death was generated based on Meana's death, not as part of an examination done by a medical professional after reporting a crime to the police. While a death certificate's non-testimonial nature has not been considered by the Nevada Supreme Court, in Birkhead v. State, 57 So. 3d 1223, 1236 (Miss. 2011), the Mississippi Supreme Court interpreted Crawford v. Washington,

541 U.S. 36 (2004), and Melendez-Diaz to determine that unless the statements provided in the death certificate were included or influenced by police officers with an eye towards prosecution, the findings in a death certificate are not testimonial. Such is the case here.

Accordingly, the District Court did not violate Desai's Confrontation Clause Rights by allowing the death certificate into evidence.

C. The Testimony of Dr. Alane Olsen Did Not Violate Defendant's Right to Confrontation

Desai contends that Olsen's testimony regarding the autopsy violated his Confrontation Clause rights because she did not prepare the autopsy report. The court denied the State's Motion to Admit the Autopsy Report on March 21, 2013. 2 AA 250.

Desai's right to Confrontation was not violated as Olsen only testified to her personal knowledge as a percipient witness. She observed the autopsy as it was performed, but could not perform it herself because she was not licensed to practice medicine in the Phillipines. 37 AA 8626-27. She was able to obtain samples for her own investigation and had been provided with Meana's medical records prior to the autospy. 37 AA 8628. She prepared her own samples and slides. 37 AA 8631. Olsen testified that the autopsy performed in the Phillipines was essentially the same as what would be performed in Clark County. 37 AA 8634.

Olsen testified that the medical examiner in the Phillipines prepared an autopsy report independently, but that Olsen took her own samples and did her own testing on Meana's heart, lungs, liver, kidneys and spleen and completed her own report. 37 AA 8636-37. Olsen testified that from what she read in the autopsy report and death certificate that "[t]he wording is somewhat different but the – the take home message is that he died as a result of hepatitis C infection." 37 AA 8642. The court found that "[s]he did look at the liver so, I mean, certainly she's testifying to her review of that from her own knowledge." 37 AA 3688. The court also found that "I don't know that striking her testimony is the appropriate remedy here because she's – she did view the autopsy, she can testify to the autopsy procedure. She did do her own examination of the liver, limited though it was she did something." 37 AA 8690. Desai's counsel responded by saying that he didn't move to strike her testimony, but rather the Philippine records. 37 AA 8690. In terms of any confusion regarding whether the autopsy report was entered into evidence, this was cured by the judge striking Exhibit 19, the autopsy report. 37 AA 8713.

The judge did not feel the need to strike Olsen's testimony as "she obviously can testify as a percipient witness. She can also, of course, testify as an expert witness. And so, you know, any challenges that would go to the weight of her testimony, not to the admissibility of her testimony. So the testimony stands." 37 AA 8713. Olsen simply read off the autopsy report as to the findings which she

observed at the autopsy herself, including "pneumonia, micronodular cirrhosis, antherosclerosis, hypertensive nephrosclerosis, and cortical cysts." 37 AA 8655. Olsen testified that Hepatitis C cause some of these symptoms, *but was not relying on the report when doing so*. 37 AA 8655. She utilized the report to list what was found in Meana's body, but not how it happened. For that she used her personal medical knowledge and her observations at the autopsy. When she testified that Hepatitis C caused these symptoms she was not reading off the report:

> Q. Now, in those items that were listed up there that you just went through, as far as hepatitis C causing any of these, did it – did it cause all of those things or just one of the other or can you tell us?
> A. Well, directly, hepatitis C causes the micronodular cirrhosis or the scarring in the liver. It can also, as a consequence of the people being very ill, it can lead to pneumonia but it doesn't directly cause pneumonia. And the other items that are listed aren't directly related to hepatitis C infection.

37 AA 8656.

The court also found that:

> [Olsen is] not relying solely on the report, she's relying on the – her eyeball observations of the liver. She's relying on her looking at the slides of the liver. She's relying on the yellowing of Meana's skin. And she's relying on the bruising, although in response to my question she admitted that that could also be caused she felt possibly by kidney failure.

37 AA 8786. Desai has not shown that any information Olsen read from the autopsy report was not something that simply confirmed her own conclusions. The only

thing that counsel elicited on cross-examination regarding her lack of observation was that she didn't see the actual blood test that confirmed Hepatitis C, and that she was unable to confirm in her testing that there was Hepatitis C in his liver. 47 AA 8677-78. Further, the State did not elicit from Olsen what the immediate cause of death was in the autopsy—this was brought up on cross-examination by Desai's counsel. 37 AA 8679.

Additionally, Olsen's testimony as to what was written under the cause of death is harmless. NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Constitutional error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001) (quoting Neder v. United States, 527 U.S. 1, 3 (1999)).

Meana testified as to his Hepatitis C diagnosis, his health and treatment, and the state of his health prior to contracting Hepatitis C. This same information can be found in the death certificate, and from Meana's primary care doctor. It was not disputed that Meana was positive for Hepatitis C at the time of his death. Olsen did not put a cause of death in her report, as her "report is essentially an account of what I did when I went to the Philippines and what I saw in the tissues that I brought back with me." 37 AA 8658.

To the extent that Desai is contending that the statements from the autopsy report violated his Confrontation rights, Olsen had observed these same things herself. Further, the error as to these statements is harmless, as they were simply cumulative to Olsen's own findings and the death certificate.

IV. Desai Was Not Deprived of his Right to a Fair Trial Due to Prosecutorial Misconduct

Desai contends numerous incidents of prosecutorial misconduct. When addressing claims of prosecutorial misconduct, this Court engages in a two-step analysis. Valdez v. State, 124 Nev. 97, 196 P.3d 465, 476 (2008). First, this Court must determine if the conduct was improper, and second, if so does it warrant a reversal. Id. Regarding the second step, constitutional errors are subjection to the beyond a reasonable doubt standard of Chapman v. California, 386 U.S. 18, 24, (1967).[2] Valdez, 124 Nev. at 97, 196 P.3d at 476. Other errors will result in reversal if they substantially affected the verdict. Id. If Defendant fails to object and does not request a curative instruction the matter is considered waived and can only be reviewed for plain error. Id.; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Moreover, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be

[2] 386 U.S. 18, 24, (1967).

viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 11, (1985); Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002).

A. The State Did Not Commit Prosecutorial Misconduct in the Indictment

Desai contends that the State deliberately loaded the Indictment with facts that the State knew were not material. This contention is belied by the record. The District Court found that the evidence involving the general atmosphere of recklessness and neglect went to the motive for Desai's actions, causing Mathahs and Lakeman to be concerned for their job and transmit Hepatitis C by the reuse of supplies.[3] 13 AA 2998-99.

Firstly, Desai challenged the indictment twice by way of Extraordinary Writ. After the first was granted in part, Desai petitioned for another Writ challenging the Indictment, specifically the charge of second-degree murder. This court found that:

> While the instant indictment alleged that Desai may have indirectly engaged in the felonies of criminal neglect of patients and performance of an act in reckless disregard of persons or property, it maintains that those crimes themselves were the direct and immediate cause of the victim's death.

[3] While this section focuses on how the atmosphere Desai created goes to show the motivation of Desai, Lakeman and Mathahs, see supra I for a thorough explanation of how Desai's actions regarding patients and supply support the fact that he was aware of the injection procedure and the risk.

Desai v. State, Docket No. 62461, Order Denying Petition, Mar. 13, 2013, p. 2. The State's theory as to why Lakeman and Mathahs reused syringes and bottles of propofol causing the spread of Hepatitis C was because there was a culture of recklessness and neglect created by Desai, where profits were put before people, and CRNAs felt that they had to abide by Desai's orders to cut corners at every turn. The District Court found that Lakeman and Mathahs were the

> agents of transmission, if you will, but the idea being that they were directed to do that because of Dr. Desai's fixation on cost-controlling measures and other things. . . it's the motive of Dr. Desai in directing the reuse of the propofol bottles and the – really the reuse of the syringes.

13 AA 2998-99.

In Instruction No. 31, the jury was told:

> Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done. Motive is not an element of the crime charged and the State is not required to prove a motive on the part of Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in this case.

41 AA 9537. Desai also argues that the prosecutor admitted that these facts were irrelevant in closing argument, but misconstrues the prosecutor's statement. The prosecutor followed up by saying "[w]e're here because nine people were the victims of a gamble taken by the healthcare providers at the center." 39 AA 9247. The State was simply saying that the patients who didn't receive a blanket or had to wait a long time before their procedure were not victims in this case, and the focus is the

individuals that contracted Hepatitis C. The motivation of those involved is still relevant to those charges, which is made clear by the prosecutor during her closing argument. She stated:

> Now, Dr. Desai is the only doctor charged in the case, as well. He's not being charged because he was a capitalist or because he made a lot of money through his clinic. He set the standards at the endoscopy center. He made the environment at the endoscopy center what it was. He directly advised to – advised the CRNAs to engage in risky behavior.
> All of the treatment was done according to his vision. He was in control. And there was a risk associated in his methods administering healthcare. And that risk, you know, ended up being very costly to nine individuals in 2007. And he has no answer for that. And he's no longer able to duck out of a press conference. He's in criminal court with criminal charges with a jury assessing the charges against him.

39 AA 9250. It is clear that the prosecutors did not commit misconduct, as they were using all the information charged in the Indictment to prove the elements of the crimes charged.

B. Prosecutors Did Not Improperly Elicit Evidence

Desai first challenges questions from the State to Dr. Carrerra on direct examination regarding the content of a meeting in which Desai and lawyers were present. However, as soon as the prosecutor realized that the Public Relations firm was not present at the meeting she stopped the questioning:

> Q. And who is present at that meeting?
> A. Physician partners, including Dr. Desai.

> Q. Was – R&R Partners the PR people there?
> A Not that I recall.
> Q. Were any- was anyone besides the – the physician partners present?
> A. Various attorneys.
> Q. And whose – whose attorneys were those?
> A. They were corporate attorneys, meaning Abe Vigil, I believe Mr. Wright was there, I believe Ms. Stanish was there.
> Ms. Weckerly: Can I have the Court's indulgence for one second?
> The Court: Sure.
> Mr. Wright: Can we approach the bench?

15 AA 3666. Desai contends that this was a deliberate elicitation by the State of privileged information, but this is belied by the record. Ms. Weckerly stated to the court:

> I think when I established who the participants were at the meeting I asked the Court if I could have the Court's indulgence. My purpose in asking who was at the meeting was my belief that R & R Partners was present, as well as other individuals outside of the attorney-client privilege.

15 AA 3670.

After an off the record bench conference, the court found that any conversations had at that meeting were privileged so the State must move on. 15 AA 3666. The State did so. As no statements were elicited, there was no prosecutorial misconduct, and as such does not warrant reversal.

Desai also believes that the prosecution purposely elicited a statement from the CDC expert regarding why Lakeman was "double-dipping" the propofol. The

prosecutor asked "[w]as there ever any concern, on his part about waste or about things along those lines –," referring to Lakeman. 23 AA 542. The CDC expert responded, "[y]eah, he mentioned that the owner was concerned with waste." 23 AA 5425. At that point counsel approached the bench.

There is no evidence the State deliberately elicited this testimony, and the court did not find as such. In fact, Mr. Staudaher explained that he was simply trying to get at Lakeman's motivations for using that technique at that clinic, not necessarily to elicit any information regarding Desai. 23 AA 5428. The prosecution explained: "it was just not intentional to elicit a statement by him. I know that that's – it – I just was trying to get that cost as an issue out of that." 23 AA 5435. The court found that the State did not deliberately violate what had been represented to the bench, and that "this has been the practice throughout the trial. You know, you're just eliciting all the information you can get and you're crossing every T and dotting every I and think that's what you were doing here, as opposed to some kind of willful [sic] misconduct, which I don't find that." 23 AA 5437.

The statement elicited does not warrant reversal as the error did not contribute to the verdict. The court found that the testimony that was elicited was not overly prejudicial as it was "cumulative of everything we've heard from . . . all of these other witnesses, over and over and over again." 23 AA 5437. Desai's interest in cost cutting was elicited from various other witnesses before the CDC expert

testified. 7 AA 1679; 7 AA 1680; 11 AA 2607; 15 AA 3624-25; 18 AA 4292; 20 AA 4611. The vague statement about "the owner" made by the CDC expert would not have contributed to the verdict, as it was simply cumulative.

Desai also contends that the statements elicited from Nancy Sampson were prosecutorial misconduct, as her testimony went beyond her expertise. Desai mischaracterizes the findings the court made regarding Sampson's chart. The court found that she could not testify as to "medical stuff," and told the State "as long as we're cognizant of that, mindful of it, you can go forward. But all she can say is numbers to numbers. I'm not going to let her spin it in something that calls for medical expertise." 27 AA 6247. Further, Sampson testified that her purpose was not to draw medical conclusions but rather "to put the patients on a chart so we could see what the day was like and would have something to refer to." 27 AA 6248.

Moreover, Desai's contention that the court found the chart "resulted from a flawed analysis and was wrong" mischaracterizes the court's ruling. AOB, p. 71. As the State explained multiple times, the charts were simply hard numbers off the records at the clinic. 27 AA 6231, 6232, 6237. "Counsel is allowed to argue any reasonable inferences from the evidence the parties have presented at trial." Jain v. McFarland, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993). As Desai points out, a clarification instruction was given to the jury regarding the chart. The instruction was not that the chart was incorrect, but that some of Sampson's testimony regarding

how many vials equals a certain amount of dosage was beyond the parameters of her expertise. 28 AA 6449. Desai repeats that the chart was misleading, but it simply reflected the hard numbers found in the evidence already admitted.

Regarding Desai's claim about bringing in records during witness testimony that the witness had not seen before, looking at the context of the court's ruling, it appears that defense counsel had requested the State to bring in the particular document. AOB, p. 70-71. The court stated "[the State is] trying to comply the best he can and give you all the information. So I'm not going to fault him or yell at him for doing more than he was required to do. So I don't see an issue there." 34 AA 7872. This is not prosecutorial misconduct as the defense counsel requested the document.

C. The State Did Not Threaten A Witness

Desai contends that the State attempted to strong arm Mathahs by telling his counsel he was in violation of his plea agreement. The court stated "I can't say that was misconduct on the part of the State. . . ." 8 AA 1841. After Mathahs testified differently on cross-examination than he did on direct-examination, the prosecutor was simply letting counsel know that Mathahs was in violation of his proffer as at some point he had not been truthful.

Further, any alleged error on the part of the prosecutor was harmless. NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not

affect substantial rights shall be disregarded." Non-constitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

The conversation between the prosecutor and Mathahs' counsel was never communicated to Mathahs and thus it had no bearing on his testimony and therefore the verdict. The prosecutor and Mathahs' counsel went on the record at the conclusion of Mathahs' testimony, agreeing that the State's discussion with counsel had not been passed along to Mathahs and his testimony was unaffected. 8 AA 1902.

D. Prosecutor's Elicitation of Testimony Regarding the Federal Indictment Was Harmless

Desai contends that the prosecution purposely elicited inadmissible evidence of a pending federal Indictment against him. While the State acknowledges the information came out, it was fleeting and elicited unintentionally. At any rate, the curative instruction given assuaged any prejudice and thus did not affect the jury's verdict. In ruling on the defense's objections, the court found that "[i]n my honest opinion, I believe that Dr. Desai can still get a fair trial notwithstanding the testimony of the federal indictment. . . ." 29 AA 6682.

"Generally, when evidence is heard by the jury that is subsequently ruled inadmissible, or is applicable only to limited defendants or in a limited manner, a cautionary instruction from the judge is sufficient to cure any prejudice to the

defendant." United States v. Escalante, 637 F.2d 1197, 1202-1203 (9th Cir. 1980). "It is the exceptional case in which such instructions are found insufficient to cure prejudice." Id. at 1203.

The State was trying to further explain Rushing's limited immunity in the State prosecution, and then simply tried to follow up. 28 AA 6614. The State agreed the question was presented inartfully, but also that the question was only asked because "we had gone through those things with literally every witness that got on the witness stand with regard to, you know, the immunity and who had been involved with the federal authorities and with the state authorities and so forth, and that was the reason to go down the line of questioning." 28 AA 6624. It was not purposeful on the State's part to elicit that response, and the State suggested a curative instruction. The court was correct in its determination that the curative instruction cured any potential prejudice. 28 AA 6633.

Further, evidence had already come out prior regarding the participation of the FBI and other federal authorities' involvement in this case. 38 AA 6620. Rushing actually volunteered she was under federal indictment when asked if she was facing charges in this case. 28 AA 6614. Linda Hubbard also talked about being interviewed by the FBI. 22 AA 5189. Most notably, defense counsel brought up the federal case on cross examination of Mathahs:

> Mr. Wright: Okay. Now had you previously – I jumped over something there. Had you previously gone and talked to the feds, federal prosecutors?
> Mathahs: Yes.
> Mr. Wright: Okay. With that – that – do you recall if that was back in 2010 after you had been indicted by the State?
> Mathahs: Yes.
> Mr. Wright: Okay. And you – when I say you went and talked to the federal prosecutors, you went with your lawyer, correct?
> Mathahs: Correct.
> Mr. Wright: Okay. Mr. Cristalli?
> Mathahs: Correct.
> Mr. Wright: And the federal prosecutors were contemplating prosecuting you for billing fraud.
> Mathahs: Correct.
> Mr. Wright: And you went with your lawyer and gave a – an interview under terms of a proffer agreement. Do you recall that?
> Mathahs: Yes.

8 AA 1865. Defense counsel then further explores Mathahs' proffer given to the federal prosecutors:

> Mr. Wright: Okay. Do you know what a proffer agreement is?
> Mathahs: Not truly.
> Mr. Wright: Okay. Well, it was something where you could go in and talk to them and they would hear what you have to say and *then they would decide whether they're going to make you a witness or a defendant*. Is that true?
> Mathahs: Okay.
> Mr. Wright: I mean, was that your understanding of it?
> Mathahs: I understand now, yes.
> Mr. Wright: Okay. And so you – you went in and talked to the federal prosecutors with your lawyer, correct?
> Mathahs: Correct.
> Mr. Wright: Okay. And then you – you were not prosecuted federally, correct?

Mathahs: Correct.

8 AA 1865-66 (emphasis added). Defense counsel did not ask one or two questions regarding the federal investigation, but drug the issue out with Mathahs— going so far as to express that the federal prosecutors were deciding whether to make him a defendant. The reasonable inference is that there was or would be a federal indictment involving the major players in the Hepatitis C outbreak. Therefore, Desai was not prejudiced by the prosecutor's question, and relief is not warranted.

E. Any Errors Were Harmless and Not Cumulative

Defendant contends that the alleged prosecutorial misconduct was of a constitutional dimension, and thus cumulated to deny Desai his constitutional right to a fair trial. Defendant's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (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, 855 (2000).

Here, while the charges against Defendant were serious, the issue of guilt was not close, as the evidence against Defendant was overwhelming. Further, each and every one of Defendant's claims is without merit as discussed above. As such, even if this Court did decide to accumulate Desai's claims, his argument still fails.

To the extent that any of these aforementioned references to prosecutorial conduct would be considered by this Court to be errors, the errors were harmless

because there was strong admissible evidence of Defendant's guilt. As the district court stated, "just the fact that the defense has made numerous motions for mistrial does not mean, in my mind, that there have been numerous instances of misconduct, because I don't agree with that." 29 AA 6668.

V. The District Court Did Not Abuse its Discretion When Refusing to Grant Yet Another Competency Hearing

This Court will review a district court's determination regarding a Defendant's competency to stand trial under an abuse of discretion standard. Olivares v. State, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008). A formal competency hearing must be held if there is "substantial evidence" that the defendant may not be competent to stand trial. Id. "A district court abuses its discretion and denies a defendant his right to due process when there is reasonable doubt regarding a defendant's competency and the district court fails to order a competency evaluation." Id. "An incompetent defendant is defined under NRS 178.400(2)(a) as:

> [O]ne who does not have the present ability to understand either the nature of the criminal charges against him or the nature and purpose of the court proceedings, or is not able to aid and assist his counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.

Id. at 1147, 195 P.3d at 868. NRS 178.405 requires that "if doubt arises as to the competence of the defendant, the court shall suspend the proceedings, the trial or the pronouncing of the judgment, as the case may be, until the question of competence

is determined."

On July 21, 2010, a competency evaluation was ordered due to defense counsel's insistence that Desai was unable to testify as he was mentally incompetent. 1AA 85.[4] On February 8, 2011, Desai was found not competent to stand trial and ordered to be admitted to Lake's Crossing. 1 AA 86. On January 27, 2012, Desai was found competent pursuant to a hearing. 1 AA 87-90. The court found that the testimony consistently and overwhelmingly established Desai's competency. 1 AA 81. All three evaluators, who regularly observed Desai's behavior and functional abilities both directly and indirectly, testified that he was exaggerating his symptoms. 1 AA 81-82. In fact, they found that at no time, *other than when directly questioned by his evaluators*, did Desai show any "cognitive deficits." 1 AA 82. The only impediment evaluators could identify were self-reported symptoms and amnesia relevant to facts regarding his criminal charges. 1 AA 82. In short, the evidence shows that Desai is a patent malingerer.

Desai requested a competency hearing in which to challenge the conclusions of the Lake's Crossing's evaluators. 1 AA 216. Another hearing was granted, but was limited to cross-examination of the two doctors who deemed him competent and

[4] For a full recitation of the competency proceedings in this case see the Independent Medical Examination. Desai has included the Independent Medical Examination in the Appellant's Appendix, but transmitted it under seal to the Nevada Supreme Court. Therefore, the State cites directly to the document itself.

the presentation of one expert witness. 1 AA 216. Desai sought extraordinary relief from the Nevada Supreme Court due to the restricted scope of his hearing, but this Court denied his Writ on January 24, 2012. 1 AA 216. On February 2, 2012, it was determined that Desai was competent to stand trial. 1 AA 216.

On January 8, 2013, the court found:

> My feeling is this issue has been thoroughly litigated on Dr. Desai's competency. He spent a significant period of time at Lake's Crossing. He was found to – while he – you know, no one disputes he suffered two strokes, one of which, at least, he again continues working, but no one's disputing the strokes. The consistent opinion is that there are deficits with respect to language and his ability to think of words and whatnot that, you know, many of us suffer from time to time. . . . And so, frankly the way I read this, Mr. Wright, just because you come to the Court again with a new affidavit from a different doctor, essentially the same kinds of things that we've already heard about, I don't know that that creates new doubt and necessitates us going back to square one. That's my concern.

1 AA 234.

Desai suffered a new bout of small strokes in February 2013. On March 7, 2013, Desai requested that due to his recent stroke, he be sent to competency court or for a competency evaluation. 2 AA 415. The court found that "[t]he other thing, you know, to address is [sic] Mr. Staudaher pointed out, you know, Dr. Desai was advised to do this therapy and other things that apparently he hasn't been doing." 2 AA 432-32. Desai did not avail himself of the opportunity to go to speech therapy after his initial evaluation. 2 AA 433. There were indications that the organization

had even attempted to communicate with Desai in order to set up his therapy, but they were informed he was not interested in being treated by them. 2 AA 433. The court stated that "given the fact that Dr. Desai has already been found to be a malingerer and an exaggerator, I must look at this recent request with suspicion." 2 AA 415. The court found that Desai would be sent to competency court if there was an independent medical evaluation that stated 1) there was a stroke and 2) there was new and additional brain impairment that would affect Desai's ability to be competent and stand trial. 2 AA 416. The court ordered an independent medical evaluation to follow up on Desai's request. 2 AA 416. The court looked at:

> the long-standing history of this case where Dr. Desai has been found to be an exaggerator and a malingerer and to have feigned, essentially feigned symptoms. And so, you know, this may be a case of the boy who cried wolf, but unfortunately, you know, the defense is stuck with the record that has already been made in this case.

2 AA 419. The State agreed there should be an independent medical evaluation, and made note of the fact that there were not records that Desai had attempted to go to speech pathology, speech therapy, cognitive therapy or occupational therapy. 2 AA 422.

On April 14, 2013, Dr. David Palestrant of Cedars Sinai Medical Center finished his independent medical evaluation of Desai's condition. Independent Medical Evaluation (IME), April 14, 2013. Palestrant was an active treating Vascular Neurologist and Neurointensivist, as well as the former director of the

Stroke and Neurocritical care programs at Cedars Sinai. IME 2. Palestrant reviewed all of Desai's medical records and all of the imaging studies. IME 2, 14. Palestrant concluded based on this review that Desai embellished his symptoms between 2009 and the 2013 stroke:

> Dr. Desai's claimed degree of neurologic dysfunction and neuropsychiatric testing performances between 2009-2013, are far worse than would be expected and not corroborated by the extent and anatomic distributions of his strokes. In my opinion there has been a significant amount of embellishment of his symptoms and incomplete efforts on neuropsychiatric testing. What the exact actual underlying extent of his neurologic deficits were at this time is almost impossible to tell, given the extent of the embellishment.

IME 21. Palestrant found that based on Desai's physical symptoms:

> [a]t worst he would have had partial verbal memory disturbances more involved with forming new long-term memories and some degree of retrograde amnesia for events up to 2 years before the 2008 stroke, but beyond this he should have been able to recall most past events with not much disturbance. *Logical thinking would remain intact as well as many high order executive functions.*

IME 22 (emphasis added). Palestrant lays out the evidence supporting his conclusions that Desai had been embellishing his physical and cognitive symptoms; Desai's low scores on various tests did not match up with the parts of the brain affected by the strokes, worsening test performance over time, discordance between functional status and testing, discordance in memory loss expected from the stroke

and claimed memory loss, and inconsistencies in reported and observed functions. IME 22-24.

The crux of Desai's claim is that he should have been allowed another competency hearing based on the February 2013 stroke. Desai contends there was reasonable doubt as to his competency after the IME, and thus the district court abused its discretion by refusing to hold yet another competency hearing. However, this contention is clearly belied by the independent medical evaluation.

Palestrant did find that he suffered a shower of small embolic strokes, but pointed out that "[o]nce again members of his treatment team have noticed inconsistencies between his observed functional ability and his performance during formal examination." IME 25. Palestrant determined that based on the size of the strokes and the areas of the brain affected, "*memory and executive function should not be affected by these new strokes*." IME 25 (emphasis added). Palestrant's conclusion was to "be cautious about claims as to the degree of his aphasia in the future. A claim of little improvement *should be viewed with suspicion* and carry a very high burden of proof." IME 26 (emphasis added).

Throughout these competency proceedings, Desai has embellished his symptoms. When Desai is interviewed by an expert using a screening tool like the Mini Mental Status Exam (MMSE), Desai scores as low as someone who requires 24-hour care and can do nothing for himself. IME 10-11, 23. When Desai was

observed for a length of time outside of the professional interview context, he was capable of perambulating, performing mathematic calculations, and engaging in political discourse. IME 10-11. The conclusion of staff was that his working memory was "heavily embellished." IME 10. Curiously, he was able to "give quite extensive personal history but blanks on entire professional history after he left New York after residency." IME 11. Palestrant found that at worse his memory loss should only extend out two years, and he ultimately concluded that "all indicators" point to embellishment. IME 24.

On April 22, 2014, Defendant filed his third extraordinary Writ to this Court. He requested to be allowed to confer with his counsel at the end of each prosecution witness, along with partial daily transcripts. 3 AA 544, 549. While one of Desai's main contentions throughout this process and in the Writ is that he has amnesia, as this court pointed out:

> [C]ourts have uniformly held that amnesia regarding the alleged crime does not constitute incompetence per se but may establish a basis for a finding of incompetence in a particular case." 2 *United States v. No Runner*, 590 F.3d 962, 965 n.2 (9th Cir. 2009); see also *Palmer*, 31 P.3d at 866-67. Where the issue of competency turns on amnesia, there are a number of questions that are relevant to the issue and "the answers to these questions may not be known prior to trial; it may be the trial itself that illuminates them." *No Runner*, 590 P.3d at 965.

Desai v. State, Docket No. 63046, Order Denying Petition, Apr. 29, 2013, p. 3. This court found that "the record before the district court as to the extent of Desai's

current aphasia as a result of the series of small strokes in February 2013 does not include substantial evidence that Desai is incompetent to stand trial." Id. at 4. This court pointed out that Defense counsel observed Desai's communication difficulties throughout this process, at the same time medical professionals were concluding he was embellishing his symptoms.

This Court did find that competency may be raised at any time. But Desai's arguments do not include any new information regarding his alleged aphasia or how his communication difficulties were reflected at trial. The only evidence that Desai has put forth is further exclamations from defense counsel that he is not able to communicate. Nowhere in the Opening Brief does Desai present any new information in the record that occurred during trial that would change the analysis of this Court when determining whether there was substantial evidence that he was incompetent. Further, in the IME, Palestrant found that his symptoms should improve over time. IME 25. He noted that members of the treatment team after the February 2013 strokes once again noticed inconsistencies between his observed function ability and performance during formal examination. IME 25.

In Desai's construction, there is no discretion to consider if the claimant is lying or misinformed, no discretion to consider the defendant's extensive history of malingering, and no discretion to consider the totality of the circumstances when ruling on the threshold issue of competence. In Desai's construction, all that is

required is that the defense counsel state the defendant is incompetent and the district court is deprived of further discretion to act and must, as a matter of law, automatically appoint experts and begin the statutory competency process as many times as the defendant would like. Such a result would permit a malingering defendant to hijack the trial process at will. This Court should not condone such an outcome.

VI. The Predicate Felonies are Not Lesser Included Offenses of Second-Degree Felony Murder

Desai contends that he cannot be convicted of both the underlying predicate felonies and the resulting second-degree felony murder. Desai did not raise this claim below, and thus it should not be considered by this court. If this Court chooses to consider the claim, it must do so using plain error review.[5]

Defendant cites Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986), in explaining the test put forth by this Court, but misstates this Court's findings regarding punishment for predicate felonies and felony murder. Desai misconstrues both elements of the test, and in particular confuses this Court's findings regarding the legislative intent prong.

In Talancon, the court addressed whether it was double jeopardy for a defendant to be sentenced both for felony murder and the predicate felony. The

[5] See supra II(c) for the full plain error review standard.

court found first, that the felony-murder and underlying felony are two separate offenses under the Blockburger v. United States, 284 U.S. 299 (1932) test. Id. at 767 (*citing* Brimmage v. State, 93 Nev. 434, 443 567 P.2d 54, 69 (1977) (finding that robbery, the underlying felony, and murder, were clearly not the same crime and thus robbery was not a lesser included offense)).

While Desai contends the second part of the test directs the court to the legislative intent, he misstates the test by failing to look at the legislative intent behind the felony-murder rule, as prescribed by this Court. Talancon, 721 P.2d at 767. Instead, Desai analyzes the predicate felony statutes. However, this Court looked to the legislative intent regarding felony murder and determined that "we are convinced that our legislature did intend multiple punishments for felony murder and the underlying felony." Id. at 768.

Desai cites to Athey v. State, 106 Nev. 520, 524, 797 P.2d 956, 958 (Nev. 1990), where this Court did determine that punishing the defendant for premeditated first degree murder and for felony child abuse violated double jeopardy. However, the instant case is distinguishable as Athey is not a felony-murder case. The decision in Athey turned on an interpretation of the statutes in the absence of clear legislative intent otherwise. Athey, 106 Nev. at 524, 797 P.2d at 958.

Further, Desai's case is similar to Bludsworth v. State, 98 Nev. 289, 290-93, 646 P.2d 558, 559-60 (1982), where this Court upheld separate offenses of child abuse

and murder, as the child victim had been consistently abused up until the time of the murder. Similarly, the reckless disregard and criminal neglect of patients was occurring for years prior to the actual death of Rodolfo Meana. In Athey, 106 Nev. at 523, 797 P.2d at 957, this Court agreed with the appellant that his case was distinguishable from Bludsworth as the child abuse had occurred on the same evening of the murder. Here, there was substantial testimony that the felonious conduct was occurring consistently for a period of time prior to the murder.

Defendant was not subject to double jeopardy and completely misinterprets the test and the legislative intent behind felony murder. Defendant has not met his burden to show a miscarriage of justice under the plain error review.

CONCLUSION

Based on the foregoing arguments, Defendant's Judgment of Conviction should be AFFIRMED.

Dated this 27th day of February, 2015.

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 type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 18, 606 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of February, 2015.

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 February 27, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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