IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALFRED C. HARVEY, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 72829-COA
ALFRED C. HARVEY, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 75911-COA

ORDER OF AFFIRMANCE

Alfred C. Harvey appeals from a judgment of conviction, pursuant to a jury verdict, of robbery, and from a district court order denying post-trial motions. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.[1]

Harvey entered a T.J. Maxx store and concealed three wallets, face cream, and fragrance items on his person.[2] A security guard, watching on a live security monitor in an office, observed Harvey conceal the three wallets in his coat and face cream in his pocket. The security guard left the office to apprehend Harvey. The security system continued recording as Harvey concealed several fragrance items before he left the store. The security guard confronted Harvey outside in the parking lot. He asked

[1]Senior Judge James Bixler presided over Harvey's trial and sentencing hearing. Judge Smith signed Harvey's judgment of conviction and presided over Harvey's post-trial motions.

[2]We do not recount the facts except as necessary to our disposition.

Harvey to surrender the items and Harvey gave him two wallets. The security guard asked Harvey to reenter the store to fill out paperwork, whereupon Harvey allegedly produced a knife and refused to reenter the store. The security guard testified that he heard the knife open, that it was black and had a four-inch blade, and that he was in fear of injury, so he let Harvey leave the scene without further confrontation.

Harvey walked away from the security guard and towards a U-Haul van. At roughly the same time, a second security guard arrived and was informed by the first security guard that Harvey had a knife. The first security guard then called the police and gave them the license plate number of the U-Haul, and the second security guard used his iPhone to take pictures of the U-Haul and its license plates. We note that, although the record is not precise in this regard, the second security guard may have also taken photos of Harvey in or near the U-Haul. A witness observed part of this dispute, asked what happened, and the first security guard said that he had been held up at knife point. Harvey fled from the parking lot in the U-Haul, and the witness followed Harvey in his vehicle and gave the police the van's location. After a brief pursuit, the police arrested Harvey and recovered one wallet, the face cream, and the fragrance items that the security guard had not recovered from Harvey in the parking lot. The knife was never found. The police brought Harvey back to the first security guard and he identified Harvey as the perpetrator approximately 40 minutes after the initial encounter.

The State charged Harvey with robbery with the use of a deadly weapon, alleging that he used a knife to take "miscellaneous clothing items" from the security guard's person, or in his presence, or to facilitate his

escape. The jury found Harvey guilty of robbery but not guilty of robbery with the use of a deadly weapon.

On appeal, Harvey argues that (1) insufficient evidence supports his robbery conviction; (2) the district court erred by denying his challenge to the racial composition of the venire; (3) the district court erred by limiting the content of his opening statement; (4) the district court erred by denying his motion to suppress an in-court identification of Harvey; (5) the district court abused its discretion by denying Harvey's motion to dismiss for failure to gather material evidence; (6) the district court abused its discretion by rejecting his proposed jury instruction on larceny as a lesser-included or lesser-related offense of robbery; (7) the district court abused its discretion, or committed structural error, by answering a jury question without conferring with the parties; (8) cumulative error warrants reversal; (9) the district court erred by assigning different judges for the trial and the post-trial motions; and (10) the district court abused its discretion by denying his post-trial motions to reconstruct the record, for an evidentiary hearing, and for a new trial. We disagree.

Sufficient evidence supports Harvey's robbery conviction

Harvey argues that insufficient evidence supports three components of his robbery conviction: (1) that he took "miscellaneous clothing items"; (2) that he did so from or in the security guard's presence; and (3) that he did so by force, violence, or fear of injury. We conclude that sufficient evidence supports each component of Harvey's robbery conviction.

In reviewing a challenge to the sufficiency of evidence supporting a conviction, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (emphasis

omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The jury determines the credibility of the witnesses, weighs the evidence, and decides whether it is sufficient to meet the elements of the crime. *Id.* We will not disturb a verdict supported by substantial evidence. *Id.*

"Robbery is the unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person. . . ." NRS 200.380(1). "A taking is by means of force or fear if force or fear is used to: (a) [o]btain or retain possession of the property; (b) [p]revent or overcome resistance to the taking; or (c) [f]acilitate escape." *Id.* "The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property." *Id.*

The variance between the information and evidence was immaterial, and sufficient evidence supports the finding that Harvey took the items

The State's complaint and information charged Harvey with robbery with the use of a deadly weapon, alleging that he used a knife to take "miscellaneous clothing items" from the security guard's person, or in his presence, or to facilitate escape.

Harvey contends that the State failed to present evidence that he took "miscellaneous clothing items" because the items he took are not "clothing." Harvey took wallets, fragrances, and cream, and while these are not precisely "clothing items,"[3] we conclude that the variance between the information and the evidence presented at trial was immaterial. Under NRS 178.598, "[a]ny error, defect, irregularity or *variance* [that] does not

[3]*See, e.g., Clothing, Webster's Third New International Dictionary*, 428 (2002) ("[A] covering for the human body or garments in general: all the garments and accessories worn by a person at any one time.").

affect substantial rights shall be disregarded." (Emphasis added.) The Nevada Supreme Court has distinguished between pretrial and "belated or untimely" challenges to information or indictment-evidence variances, and applies a reduced standard to the latter. *State v. Jones*, 96 Nev. 71, 74, 605 P.2d 202, 204 (1980). In cases where the defendant raises a pretrial challenge, the supreme court has held that "a normal standard" applies, whereby the indictment or information must notify the defendant of the charged crime and the prosecution's theory. *Simpson v. Eighth Judicial Dist. Court*, 88 Nev. 654, 661, 503 P.2d 1225, 1226 (1972) (holding that an indictment or information that "alleges nothing whatever concerning the means by which the crime was committed" is insufficient under Nevada's notice-pleading standard); *see also Alford v. State*, 111 Nev. 1409, 1415, 906 P.2d 714, 717 (1995).

Here, Harvey raised the issue of variance before trial, and thus, the "normal standard" applies and the variance will be considered material only if the information did not notify Harvey of the charged crime and the prosecution's theory. *Simpson*, 88 Nev. at 661, 503 P.2d at 1226. The original information, as well as the amended information, both gave Harvey sufficient notice of the charged crime by stating that it was robbery, citing to the robbery statute (NRS 200.380), and listing each element of robbery. The information and amended information likewise notified Harvey of the prosecution's theory by alleging that he took items and used a knife as a means of "force or fear to obtain or retain possession of [the items], to prevent or overcome resistance to the taking of [the items], and/or to facilitate escape." In addition, Harvey was charged under Chapter 200 of the NRS, which is titled "Crimes Against the Person," and not under Chapter 205, which is titled "Crimes Against Property." Thus, the actual

items Harvey took is of little importance in evaluating the elements of robbery. Therefore, we conclude that the variance between the information and evidence presented at trial was immaterial.

The remaining issue under Harvey's first argument is whether sufficient evidence supports the finding that Harvey took the items. At trial, the first security guard testified that (1) he watched Harvey conceal three wallets and face cream; (2) when he confronted Harvey outside the store, Harvey surrendered only two wallets; and (3) after presenting a knife, Harvey walked away from the security guard towards a U-Haul van. The State presented security footage of Harvey concealing the items, and a police officer testified that he found a wallet, face cream, and the fragrance items in Harvey's U-Haul. After viewing this evidence in the light most favorable to the State, a rational trier of fact could have found that Harvey took the items.

Sufficient evidence supports the finding that Harvey took the items in the security guard's presence

Harvey asserts that he did not take the items from the security guard's presence because, when he concealed the items in his clothing, the security guard merely watched him from a separate room at the back of the store via security cameras. Harvey concedes, however, that a taking may also occur in the presence of a person when a shoplifter attempts to leave with the merchandise by using force.

The Nevada Supreme Court defines "presence" broadly with respect to robbery: "[a] thing is in the presence of a person . . . [if it] is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." *Robertson v. Sheriff*, 93 Nev. 300, 302, 565 P.2d 647, 648 (1977) (first alteration in original) (internal quotations omitted). In *Barkley v. State*, the

supreme court held that the appellant shoplifter unlawfully took a bottle of brandy not when he concealed the bottle in his pants and in view of the shopkeeper, but the moment when he left the store without paying for it. 114 Nev. 635, 637, 958 P.2d 1218, 1219 (1998). In *Martinez v. State*, the supreme court clarified that the appellant in *Barkley* used force to escape with the brandy by striking the shopkeeper when the shopkeeper confronted him outside the store, stating, "the force used was part of a continuing 'taking.'" 114 Nev. 746, 748 n.2, 961 P.2d 752, 754 n.2 (1998).

Harvey took items when he left the store without paying for them, and the taking continued as the security guard confronted Harvey outside the store, at which point Harvey was in the security guard's presence. *See* NRS 200.380(1); *see also Martinez*, 114 Nev. at 748 n.2, 961 P.2d at 754 n.2. The security guard testified that Harvey left the store with the items, that he confronted Harvey and asked him to return the items, and that Harvey used a knife to prevent detainment and to walk towards the U-Haul. The police officer who arrested Harvey testified that he recovered the items that Harvey had not surrendered to the security guard. For that reason, Harvey was in the presence of the security guard when he used force to retain the items, prevent resistance, or to facilitate escape. NRS 200.380(1)(a)-(c). Thus, we conclude that sufficient evidence supports the jury's finding that Harvey took items in the security guard's presence.

Sufficient evidence supports the finding that Harvey took the items by force, violence, or fear of injury

Harvey argues that he did not take the items by force, violence, or fear of injury. He further argues that he did not use force to take the items because he surrendered two wallets and the security guard did not ask him to return the other items before asking him to reenter the store. Harvey cites to *Martinez*, 114 Nev. at 748, 961 P.2d at 754, to argue that

even if he used force, it was to resist detainment, rather than to take the items. Finally, he argues that, because the jury found him not guilty of using a knife, the security guard's testimony that Harvey used a knife was insufficient evidence to support a robbery conviction.

In *Martinez*, the supreme court held that because the appellant shoplifter surrendered *all* of the property he took, he thereafter used violence, force, or fear of injury *only to escape detainment*—not to take any property—and thus, did not commit robbery. *Martinez*, 114 Nev. at 747-48, 961 P.2d at 753-54. Harvey, however, retained three items after surrendering only two. Harvey, therefore, used force, violence, or fear of injury not only to facilitate escape, but to retain the items that he took. Also, Harvey's argument fails under NRS 200.380(1)(c), which provides that "[a] taking is by means of force or fear if force or fear is used to: (c) [f]acilitate escape." Thus, even if Harvey used force only to facilitate his escape from detainment, he still committed robbery because he retained the items.

Harvey's argument—that the security guard's testimony is insufficient evidence that Harvey used a knife because the jury did not convict him on the deadly weapon charge—is belied by the record. The security guard testified that (1) Harvey wielded a knife at him, (2) that he was concerned for his safety, so he discontinued the attempted detainment and (3) Harvey walked away from the confrontation despite retaining items. It is also reasonable to infer that, because Harvey walked away from the scene, the first security guard was placed in fear of injury by being held up at knifepoint, which would confirm his testimony that he stopped pursuing Harvey because he was concerned for his safety. The first security guard also testified that he heard the sound of the knife unfolding, and he described the appearance of the knife. In addition, both the second security

guard and the witness testified that the first security guard declared that he was held up at knife point by Harvey. With this evidence, the jury could have rationally concluded that Harvey used a knife, and thus, took the items by threat of force.[4] Therefore, we conclude that each element of Harvey's robbery conviction was supported by sufficient evidence.

The denial of Harvey's venire challenge was not structural error

Harvey avers that the district court committed structural error by prejudging that the jury selection process did not systematically exclude African American and Hispanic jurors, and by denying his request for a new venire or for an evidentiary hearing to question the Jury Commissioner regarding the jury selection process.

We review for structural error de novo. *Buchanan v. State*, 130 Nev. 829, 831, 335 P.3d 207, 209 (2014). To establish a prima facie violation of the fair cross-section guarantee, the defendant must show the following:

> (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) *that this underrepresentation is*

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[4]We also conclude that the jury's contradictory verdict on the deadly weapon charge does not necessarily mean that the jury found that Harvey did not use a knife. *See United States v. Powell*, 469 U.S. 57, 64-68 (holding that inconsistent verdicts do not provide grounds to vacate a conviction); *Brinkman v. State*, 95 Nev. 220, 224, 592 P.2d 163, 165 (1979) ("[T]here was adequate evidence to convict appellant of [robbery with the use of a deadly weapon]. He should not now be heard to complain that the jury . . . relieve[d] him of the enhanced penalty . . . ."); *see also Morgan v. State*, Docket No. 71988 at *1 (Order of Affirmance, June 15, 2018) ("*The acquittal on the deadly-weapon enhancement does not undermine the sufficiency of the evidence to support the robbery conviction.*" (emphasis added)).

due to systematic exclusion of the group in the jury-selection process.

Id. at 832, 335 P.3d at 209 (emphasis added) (footnotes omitted) (internal quotations omitted).

During voir dire, Harvey offered statistics to show that the allegedly excluded racial groups—African Americans and Hispanics—are distinctive groups in the community and that their representation in the venire was not fair and reasonable in relation to their numbers in the community. Harvey, however, failed to offer evidence of systematic exclusion. Thus, we conclude that Harvey failed to establish a prima facie violation of the fair-cross section guarantee under *Buchanan* and, therefore, there was no structural error. *Id.* We further conclude that, because Harvey did not allege systematic exclusion, the district court properly denied his request for an evidentiary hearing to question the Jury Commissioner regarding the jury selection process. *Id.*

The district court did not plainly err by limiting Harvey's opening statement

Harvey argues that the district court committed structural error by limiting the content of his reserved opening statement. Harvey avers that this limitation amounted to the denial of an opening because NRS 175.141 does not limit the scope of a defendant's opening statement.

Harvey, however, did not object to this issue at trial, and thus, we review for plain error. *See, e.g., Valdez v. State*, 124 Nev. 1172, 1191, 196 P.3d 465, 478 (2008) ("As the defense did not object, we apply plain-error review."). Under plain error review, the "appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48, *cert. denied*, ___ U.S. ___, 139 S. Ct. 415 (2018). "[A]

plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a grossly unfair outcome)." *Id.* at 51, 412 P.3d at 49 (internal quotations omitted).

"The defendant . . . may . . . reserve [the opening statement] to be made immediately prior to the presentation of evidence in the defendant's behalf." NRS 175.141(2). "An opening statement outlines what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument." *Watters v. State*, 129 Nev. 886, 889-90, 313 P.3d 243, 247 (2013) (internal quotations omitted).

Before and after Harvey commenced his opening statement, the district court admonished counsel not to offer argument on evidence that the State had already presented, and explained that Harvey would have an opportunity to offer argument in his closing. The record shows that Harvey was allowed to continue his opening statement after the district court's admonishment and thereafter briefly concluded it. Thus, the district court's direction that Harvey not engage in argument was consistent with existing Nevada precedent. *E.g., Watters*, 129 Nev. at 889-90, 313 P.3d at 247. Also, Harvey was allowed to give a full closing argument. As a result, Harvey has not demonstrated plain error.

The district court did not err by denying Harvey's motion to suppress the in-court identification

Harvey argues that the district court erred because, despite suppressing the security guard's show-up identification of Harvey, it (1) denied Harvey's motion to suppress the security guard's in-court identification of Harvey at the preliminary hearing, and (2) allowed the security guard to identify Harvey at trial.

"Suppression issues present mixed questions of law and fact." *Johnson v. State*, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 771-72, 263 P.3d 235, 250-51 (2011). "This court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo." *State v. Beckman*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013). Even when the district court finds that a witness has offered an unreliable identification because of an unnecessarily suggestive pretrial procedure, the court need not exclude an in-court identification by the same witness if the court finds that the in-court identification is independently reliable. *Taylor v. State*, 132 Nev. 309, 322, 371 P.3d 1036, 1045 (2016) (holding that "at least one good look at the suspect" was a sufficient, independent basis for an in-court identification), *cert. denied*, ___ U.S. ___, 137 S. Ct. 633 (2017); *see also Hicks v. State*, 96 Nev. 82, 84, 605 P.2d 219, 221 (1980) ("[T]he [witness] made independent, positive, and unequivocal in-court identifications of [the defendant] at the preliminary examination and trial which were sufficient to render any possible error in the [pretrial] identification procedure harmless.").

Harvey's argument fails for two reasons. First, the security guard's in-court identification of Harvey at the preliminary hearing was never admitted into evidence at trial. The security guard identified Harvey at trial without objection and without reference to the pretrial identification. Therefore, Harvey's argument in regard to suppressing the security guard's identification at the preliminary hearing is moot because it does not affect Harvey's existing rights. *See, e.g., Newman v. State*, 132 Nev. 340, 344, 373 P.3d 855, 857 (2016) ("[W]e will not decide moot cases. A case [or issue] is moot if it *seeks to determine* an abstract *question which*

does not rest upon existing facts or *rights*." (emphasis added) (citation omitted)).

Second, the security guard had an independently reliable basis—notwithstanding the district court's finding that the show-up identification was unnecessarily suggestive—to identify Harvey at trial. The security guard observed Harvey on surveillance video and confronted and conversed with him outside the store. The security guard, therefore, had "at least one good look at" Harvey, which constitutes a sufficient, independent basis for his in-court identification. *Taylor*, 132 Nev. at 322, 371 P.3d at 1045. Thus, the district court did not err in refusing to suppress the trial identification of Harvey because it was independently reliable.

The district court did not abuse its discretion by denying Harvey's motion to dismiss the information due to the investigating officer's failure to gather evidence

Harvey argues that the district court abused its discretion by denying his motion to dismiss because the investigating officer failed to gather photos that the second security guard took of Harvey entering the U-Haul van in which he fled. Harvey argues that the pictures would have been exculpatory (i.e., they would have shown that he did not have a knife).

"We review a district court's decision to grant or deny a motion to dismiss an indictment [or information] for abuse of discretion." *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008). In *Daniels v. State*, the supreme court adopted a two-part test to analyze a defendant's motion to dismiss based on the State's failure to gather evidence. 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998). "The first part requires the defense to show that the evidence was 'material,' meaning that there is a reasonable probability that, had the evidence been available to the defense. the result of the proceedings would have been different." *Id.* at 267, 956 P.2d at 115.

If the evidence was material, the district court must decide "whether the failure to gather evidence was the result of mere negligence, gross negligence, or a bad faith attempt to prejudice the defendant's case." *Id.*

Here, Harvey has failed to produce evidence to satisfy either prong of the *Daniels* test. In regard to the first prong, Harvey offered no evidence to show that the pictures—had they been available to the defense—would have reasonably increased the probability that the jury would have returned a favorable verdict. Harvey offered no specific evidence to show that the pictures would have been exculpatory. The security guard that took the photos specifically testified that he never saw Harvey with a knife, nor saw one on the ground, and it is also unclear from the record whether Harvey was still outside of the U-Haul when the guard took the photos. Thus, on our review, we cannot conclude that a different result would have been probable if the officer had gathered these photos. Therefore, Harvey has not satisfied the first prong of *Daniels*.

Under the second prong of *Daniels*, Harvey failed to prove that the officer's failure to gather the photos was negligent or in bad faith. The investigating officer testified that he had no reason to know that the second security guard had taken photos of the U-Haul, and to the contrary, Harvey offered no more than speculative argument that the officer should have known about the photos and gathered them for trial. Thus, the district court's denial of Harvey's motion to dismiss for failure to gather material evidence was not an abuse of discretion.

The district court did not abuse its discretion by denying Harvey's request for a larceny instruction

Harvey argues that the district court erred by refusing to give the jury a larceny instruction.[5] This court "review[s] the district court's settling of jury instructions for abuse of discretion or judicial error." *Alotaibi v. State*, 133 Nev. 650, 652, 404 P.3d 761, 763-64 (2017), *cert. denied*, ___ U.S. ___, 138 S. Ct. 1555 (2018)).

Here, the district court did not abuse its discretion in denying Harvey's request for a larceny instruction as a lesser-included offense of robbery because larceny and robbery each require proof of an independent element. The crime of robbery requires two elements independent from larceny: the property be taken from the person or presence of another and by means of force or violence or fear of injury. NRS 200.380. The crime of larceny, on the other hand, has the unique element of specific intent that does not require force or the presence of the person. NRS 205.220(1)(a).[6] Harvey, as a result, was not entitled to an instruction on larceny as a lesser-

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[5]Harvey also argues that while larceny is not "a lesser-included" offense of robbery," it is a "lesser-related" offense. Harvey, however, does not present authority to show that a larceny instruction was warranted because it is a "lesser-related" offense of robbery, and thus, we conclude that this point has not be cogently argued. *See, e.g., Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed [on appeal]."). Also, "[a] district court [is] not required to give an instruction on a lesser-related offense, as the defendant is not entitled to such an instruction." *Alotaibi v. State*, 133 Nev. 650, 652 n.3, 404 P.3d 761, 763 n.3 (2017), *cert. denied*, ___ U.S. ___, 138 S. Ct. 1555 (2018).

[6]Our analysis is supported by a non-precedential supreme court order, which reached a conclusion identical to our analysis. *See Simpson v. State*, Docket No. 64529 at *5 (Order of Affirmance, September 10, 2015). This court also reached the identical result in *Naylor v. Nevada*, Docket No. 69571-COA (Order of Affirmance, July 27, 2016).

included offense of robbery. Therefore, we conclude that the district court did not abuse its discretion in refusing to instruct the jury on larceny.

The district court committed harmless error by responding to a jury question without first notifying and conferring with the parties

During deliberations, the jury sent a note to the district court seeking elaboration on the definition of "by means of force or violence or fear of injury," as pertaining to NRS 200.280(1). The district court did not notify or confer with either Harvey or the State, and responded, "The Court is not at liberty to supplement the evidence." Harvey argues that the district court's failure to notify and confer with the parties deprived him of assistance of counsel and due process and constituted structural error.

"[T]he [district] court violates a defendant's due process rights when it fails to notify and confer with the parties after receiving a note from the jury." *Manning v. State*, 131 Nev. 206, 211, 348 P.3d 1015, 1019 (2015). Such an error, however, does not mandate reversal. *Id.* "[W]hen a district court responds to a note from the jury without notifying the parties or counsel or seeking input on the response, the error will be reviewed to determine if it was harmless beyond a reasonable doubt." *Id.* at 212, 348 P.3d at 1019. This court considers three factors to determine the harmlessness of such an error: "(1) the probable effect of the message actually sent; (2) the likelihood that the court would have sent a different message had it consulted with appellants beforehand; and (3) whether any changes in the message that appellants might have obtained would have affected the verdict in any way." *Id.* (internal quotations omitted).

Here, the district court erred by not notifying and conferring with the parties after it received the jury note. Under the *Manning* factors, however, this error was harmless beyond a reasonable doubt. First, "the probable effect of the message actually sent" was nominal because the

district court only stated that it was "not at liberty to supplement the evidence." *Id.* (internal quotations omitted) (holding that the district court's response was harmless because it was simple, contained no legal instructions, and directed the jury to continue its deliberations). Second, "the likelihood that the court would have sent a different message had it consulted with [Harvey]" is minimal: Harvey states that he would have proposed another larceny instruction, which the foregoing analysis shows had already been properly denied. *Id.* (internal quotations omitted). Also, Harvey argues that he would "have requested that the Court direct the jury to jury instructions" that they already had, and therefore, there would have been no "different message." *Id.* (internal quotations omitted). Third, it is doubtful that the verdict would have been affected because it is unlikely that a different answer would have been sent to the jury.[7] Thus, this error was harmless beyond a reasonable doubt, and we conclude that reversal is unwarranted on this ground.[8]

The district court did not abuse its discretion by not answering the jury note

The parties also dispute whether the district court's refusal to answer the jury note was an abuse of discretion. This court reviews a refusal to answer a jury note for an abuse of discretion. *Tellis v. State*, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968), *holding modified by Gonzalez v. State*, 131 Nev. 991, 366 P.3d 680 (2015). In *Jeffries v. State*, the district

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[7]We conclude that any hearing with the parties would likely only have led to a more responsive *non-answer*, and that the terms "force," "violence," and "fear of injury" are easily understood terms that did not require further elaboration.

[8]We also decline to review this claim for structural error because we conclude that it was not cogently argued. *See, e.g., Maresca*, 103 Nev. at 673, 748 P.2d at 6.

court received two jury notes asking for "more clarity [or] explanation" and "further understanding" of the instructions, and answered "that the instructions in question are statutorily provided" and "that it could only give the jury the law, which the jury must apply to the facts in order to reach a verdict." 133 Nev. 331, 338, 397 P.3d 21, 28 (2017) (treating the district court's answer to the jury notes as a refusal to answer). If the district court "is of the opinion the instructions already given are adequate, correctly state the law and fully advise the jury on the procedures they are to follow in their deliberation, [its] *refusal to answer a question already answered in the instructions is not error*." *Tellis*, 84 Nev. at 591, 445 P.2d at 941 (emphasis added). When, however, "the jury's question suggests confusion or lack of understanding of a significant element of the applicable law," the district court abuses its discretion by refusing to answer. *Gonzalez*, 131 Nev. at 996-97, 366 P.3d at 683-84.

Here, the jury asked for elaboration on the terms of "by means of force or violence or fear of injury," and the district court's answer stated that it was "not at liberty to supplement the evidence," and therefore, this answer is appropriately reviewed as a failure to answer the note. We conclude that the jury's question had already been answered in the original instructions presented in court. Instruction 11 stated, "In any case the degree of force is immaterial if used to compel acquiescence to the taking of or escaping with the property." This instruction quotes the robbery statute, NRS 200.380. Thus, we conclude that the district court refused to answer a question that was already answered by the instructions, and therefore, the district court did not abuse its discretion. *Tellis*, 84 Nev. at 587, 445 P.2d at 941. Thus, reversal is not warranted on this ground.

There is no cumulative trial error and therefore reversal is unwarranted

Harvey argues that this court should reverse for cumulative trial error. Here, the district court committed one error: the failure to notify and confer with the parties following the jury's question. Cumulative error, however, requires multiple errors to cumulate. *See, e.g., United States v.* Sager, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."). Because Harvey showed only one error, there is no error to cumulate, and thus, there is no cumulative trial error requiring reversal.

It was not error for a different judge to hear Harvey's post-trial motions

Senior Judge Bixler presided over Harvey's trial and Judge Smith presided over Harvey's post-trial motions. Harvey argues that the district court violated his right to due process by assigning a different judge (himself) to hear his post-trial motions. Harvey cites to NRS 175.101, arguing that a different judge can hear post-trial motions only if the trial judge "is unable to perform the duties to be performed by the court" because of "absence from the judicial district, death, sickness or other disability."

We review questions of statutory meaning de novo. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). "If the statute's language is clear and unambiguous, we enforce the statute as written." *Id.* "Only when the statute is ambiguous, meaning that it is subject to more than one reasonable interpretation, do we look beyond the language [of the statute] to consider its meaning in light of its spirit, subject matter, and public policy." *Id.* (internal quotations omitted). NRS 175.101 provides the following in relevant part:

> If by reason of absence from the judicial district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilty or guilty but

> mentally ill, any other judge regularly sitting in or assigned to the court may perform those duties . . . .

We conclude that NRS 175.101 clearly and unambiguously provides that "[i]f"—meaning inclusively "if," not exclusively "only if"—a trial judge is unavailable, another judge may hear post-trial motions. Stated another way, NRS 175.101 allows another judge to preside over post-trial motions if the trial judge has died, is sick, or disabled, but did not prohibit Judge Smith from hearing the post-trial motions in this specific case. Further, requiring the trial judge to hear post-trial motions could interfere with the district court's broad authority to administer its caseload and exacerbate difficulties that often arise from district court judges' scheduling assignments. *See Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439-40 (2007) (explaining that the judiciary has broad powers to carry out its basic functions, to administer its own affairs, and to perform its duties); *see also* NRS 169.035 ("This title is intended to provide for the just determination of every criminal proceeding. [It] shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."). Based on the foregoing, we conclude that there was no abuse in discretion in allowing a different district court judge to hear Harvey's post-trial motions.

The district court did not abuse its discretion in denying Harvey a new trial

Harvey argues that the district court erred by denying his motion for a new trial and specifically contends that (1) "[t]he note [regarding the jury question] was newly discovered" evidence because his trial and appellate attorneys "never were advised of" it, and juror and marshal misconduct may also be newly discovered evidence; (2) the "note was material" to his defense "because the question focused on the crux of

[his] defense"; (3) he could not have discovered the note with reasonable diligence because it was in the district court's evidence vault, and he had no reason to know that the note existed; (4) the note is not cumulative with other evidence; (5) the note's admission would render a different result probable on retrial because he would request further instructions and the jury would thus probably find him not guilty; (6) the "note does not contradict or impeach a witness"; and (7) the note "does not involve facts shown by the best evidence."

A district court may grant a motion for a new trial on the ground of newly discovered evidence. NRS 176.515(1). "The grant or denial of a new trial on this ground is within the trial court's discretion and will not be reversed on appeal absent its abuse." *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). To establish a basis for a new trial on the ground of newly discovered evidence:

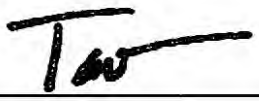
> [T]he evidence must be: newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; *such as to render a different result probable upon retrial*; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence . . . .

Id. at 406, 812 P.2d at 1284-85 (emphasis added) (footnote omitted). Here, Harvey has only presented speculation that a new trial is warranted. The *Sanborn* factors are conjunctive, and if the purported evidence fails to satisfy a single factor, the district court does not abuse its discretion by denying the motion for a new trial. *See Sanborn*, 107 Nev. at 406, 812 P.2d at 1285. We conclude, at a minimum, that Harvey has failed to show that the district court's failure to consult with the parties and give further

instructions—as well as speculative juror misconduct—is such "as to render a different result probable upon retrial." *Id.* at 406, 812 P.2d at 1284. Thus, we conclude that the district court did not abuse its discretion in denying Harvey's motion for a new trial.[9] Accordingly, we

ORDER the judgment of conviction and the denial of post-trial motions AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Linda Marie Bell, Chief Judge, Eighth Judicial District
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[9]Harvey also argues that the district court erred by denying his motion to reconstruct the record and by failing to hold an evidentiary hearing on to his post-trial motions. We have reviewed these arguments and conclude that they have not been cogently argued because they are unsupported by relevant authority. *See, e.g., Maresca*, 103 Nev. at 673, 748 P.2d at 6.