IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN TYRON JACKSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83484

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder, attempted robbery, and felon in possession of a firearm. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

In October 2019, Justin Tyron Jackson and his co-defendant, Daniel Shadow Bear Hutchinson, along with a third man, the first victim, walked together from downtown Reno, Nevada, to a vacant lot in a residential neighborhood on California Avenue. Witnesses heard a gunshot and saw Jackson and Hutchinson hurriedly leave the vacant lot, abandoning the victim as he bled out from the gunshot wound that ultimately resulted in his death. Before dying, police asked the victim why the two perpetrators, later identified as Jackson and Hutchinson, had shot him, and he said that they thought he was leading them to an ambush. Jackson and Hutchinson continued to walk from the California Avenue location to a homeless encampment by John Champion Park, where they approached the second victim, to acquire drugs or paraphernalia. This man took Jackson and Hutchinson to a friend, the third victim, who lived at the encampment, whereupon Jackson and Hutchinson, each respectively

wielding a gun and knife, entered the third victim's tent and demanded drugs from the second and third victim. Police eventually apprehended Jackson and Hutchinson at the scene of the attempted robbery, at which time police also recovered the gun used in the murder of the first victim from Jackson. A jury found Jackson guilty of one count of first-degree murder with the use of a deadly weapon and one count of attempted robbery with the use of a deadly weapon for which he received an aggregate sentence of life with the possibility of parole after 36 years.[1]

On appeal, Jackson argues that the district court abused its discretion by (1) excluding part of the murder victim's statement shortly before he died; (2) excluding evidence of his cooperation with police following his arrest; (3) failing to declare a mistrial based on the use of allegedly unreliable in-court identification procedures; (4) failing to suppress his statements to police before his arrest for the murder charge; (5) failing to sever the attempted-robbery and first-degree murder charges; and (6) failing to sever the trial from his co-defendant's trial. Jackson also argues that the State committed prosecutorial misconduct in charging him with open murder and cumulative error justifies reversal. Having considered the record and the parties' arguments, we perceive no reversible error and therefore affirm.

Evidentiary Issues

We review the district court's evidentiary decisions for an abuse of discretion. *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). A denial of a motion for a mistrial is also subject to an abuse-of-discretion standard. *Chavez v. State*, 125 Nev. 328, 346, 213 P.3d 476, 489 (2009)

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[1]The sentence included Jackson's conviction for one count of felon in possession of a firearm pursuant to a guilty plea.

(assessing denial of a motion for mistrial based on juror misconduct under abuse-of-discretion standard). The district court abuses its discretion when it makes an "arbitrary or capricious" decision or "exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). However, we only reverse a judgment of conviction if the error "substantially affect[ed] the jury's verdict." *Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) (discussing harmless-error analysis as applied to errors "not of constitutional dimension"). We also do not reverse a judgment of conviction based on an unpreserved error unless a "casual inspection" of the record demonstrates the error was "unmistakable". *Garner v. State*, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), *overruled in part on other grounds by Sharma v. State,* 118 Nev. 648, 655, 56 P.3d 868, 872 (2002).

The district court did not abuse its discretion in excluding the murder victim's statement to police regarding Jackson's belief

Jackson argues that the district court abused its discretion in excluding, on hearsay grounds, a statement to police by the murder victim in response to a question from police about why the two perpetrators shot him. He also contends that the district court abused its discretion in declining to admit the statement after the State played before the jury the question from police that prompted the excluded response.

Out-of-court statements offered to prove the truth of the matter asserted are generally inadmissible absent an exception to the hearsay rule. NRS 51.065(1) (excluding hearsay, except as otherwise provided in the chapter); NRS 51.035 (defining hearsay). The hearsay rule applies to "each part of" a hearsay statement, such that hearsay within a piece of hearsay evidence must "conform[ ] to an exception to the hearsay rule." NRS 51.067. A "dying declaration" is an exception to the hearsay rule if the statement

was made by the declarant under the belief of imminent death, so long as "the declarant is unavailable as a witness." *Harkins v. State*, 122 Nev. 974, 980, 143 P.3d 706, 709-10 (2006) (internal quotation marks omitted); NRS 51.335; *see also* NRS 51.055(1)(c) (including death as a basis for unavailability). However, like any other witness, a hearsay declarant "must have had the opportunity to observe the facts so that she had personal knowledge of the matter." *Franco v. State*, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993); *see also* NRS 50.025(1)(a) (requiring a witness to have "personal knowledge of the matter"). With such knowledge, a hearsay declarant "may draw inferences that are both rationally based on the observer's perception and helpful to determine a fact in issue," *Brown v. State*, 138 Nev., Adv. Op. 44, 512 P.3d 269, 275 (2022), which may encompass "a summary opinion of another person's behavior, motivation, or intent," *Colorado v. McFee*, 412 P.3d 848, 863 (Colo. App. 2016).

Assuming, as the State concedes, that the dying-declaration exception to the hearsay rule applies to the murder victim's statement that the perpetrators thought he was leading them to an ambush, the statement was still properly excluded because there was no evidence to establish that the victim possessed the personal knowledge required to allow the statement's admission into evidence. There is no evidence of facts, events, behavior, or statements in the record that supports the victim's personal knowledge, such that the district court could have determined that the at-issue statement was a rational conclusion based on his perception.[2] Nor did

[2]For this reason, the dissent's conclusion that the statement was admissible lay opinion misses the mark. The dissent assumes that the victim deduced his opinion of Jackson's and Hutchinson's states of mind from certain facts observed firsthand. Yet, the dissent overlooks that

the State open the door to admission of the evidence by playing a recording that included the officer's question to the murder victim about why the two men shot him, but redacting the answer, as the footage did not create a "false" impression regarding the murder victim's response. *See Jezdik v. State*, 121 Nev. 129, 138, 110 P.3d 1058, 1064 (2005) (discussing that a defendant's "false statements on direct examination trigger or 'open the door' to the curative admissibility of specific contradiction evidence"). Not only did the State refrain from any suggestion that the murder victim responded to the question, but the district court's limiting instruction

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Jackson failed to provide any evidence of such "facts," like "features" of the surroundings, "exchanges" between the men, or "gestures" from any of the men. Even the treatise relied on by the dissent acknowledges, in a paragraph immediately following the dissent's quoted language, that a proponent of evidence must still demonstrate the declarant's personal knowledge to admit an otherwise proper lay opinion. 1 *McCormick on Evidence* § 11, at 97-8 (Robert P. Mosteller ed., 8th ed. 2020) (distinguishing the lay-opinion doctrine from "the superficially similar question of the declarant's lack of personal knowledge," and recognizing that "[i]f the out-of-court declarant had not observed firsthand the fact declared, that deficiency goes not to form [as improper lay opinion] but to substance. . . . [T]he personal knowledge requirement generally applies to hearsay declarants as well as trial witnesses"). Therefore, the dissent's analysis does not persuade us that the district court's exclusion of the statement amounted to an abuse of discretion, where the existence of the victim's personal knowledge necessarily requires speculation.

Likewise, Jackson alleges that one of the defendants "presumably" asked, "'Hey, are you leading us to an ambush,'" and argues that the presumed statement qualifies as a present-sense impression, making it admissible. However, that argument relies on speculation, as there is no such statement in the record. *See Burgeon v. State*, 102 Nev. 43, 47, 714 P.2d 576, 579 (1986) (declining to "speculate as to the nature and substance of excluded testimony" without a proper offer of proof). Thus, we need not address whether an exception to the hearsay rule would apply to such a statement.

regarding the redactions also mitigated any potential prejudice from the footage. *See Tabish v. State*, 119 Nev. 293, 310-11, 72 P.3d 584, 595 (2003) (explaining that a limiting instruction on certain state-of-mind evidence could have mitigated "[t]he prejudicial impact"). Accordingly, we conclude that the district court's exclusion of the statement fell within its discretion, as the murder victim lacked personal knowledge to comment on the states of mind of Jackson and Hutchinson.[3]

The district court did not abuse its discretion in excluding evidence of Jackson's cooperation with police

Jackson argues that the district court misapplied the hearsay rule on several occasions to exclude evidence regarding the assistance he provided to law enforcement, which he contends negated his consciousness of guilt as it pertained to the first-degree murder charge.

Hearsay, while ordinarily "[a]n oral or written assertion," includes the "[n]onverbal conduct of a person, if it is intended as an assertion." NRS 51.045. Regardless of the hearsay rule, *see* NRS 51.065(1), evidence is inadmissible unless, at a minimum, it is relevant, *see* NRS 48.025. Relevant evidence has "any tendency to make the existence of any fact that is of consequence . . . more or less probable than it would be

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[3]Nevertheless, even if the statement reflected the murder victim's personal knowledge and, therefore, was admissible as a dying declaration, any error committed by the district court in excluding the statement was harmless. A rational jury would have still found Jackson guilty even had the district court admitted the murder victim's statement because of the overwhelming evidence of guilt, including witness testimony, forensic gunshot-residue evidence, and surveillance footage, that established Jackson's participation in the murder. *See Belcher v. State*, 136 Nev. 261, 270, 464 P.3d 1013, 1025 (2020) (concluding an error was harmless where the jury would have found the defendant guilty "with or without" an erroneously admitted statement).

without the evidence." NRS 48.015. Consciousness-of-guilt evidence encompasses acts or "declarations made after the commission of the crime [that] . . . are inconsistent with innocence or tend to establish intent." *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) (quoting *Abram v. State*, 95 Nev. 352, 356, 594 P.2d 1143, 1145 (1979)). Nevertheless, we have recognized that evidence related to consciousness of guilt (or to a lack thereof) may be properly excluded when deemed ambiguous. *See, e.g., id.* at 444-45, 117 P.3d at 181 (concluding that a defendant's "threats" to officers were "more reflective of his frustration at being arrested than demonstrative of his consciousness of guilt"). And "evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury," among other considerations. *See* NRS 48.035(1).

We agree with Jackson that evidence of cooperation with investigators does not, by itself, present a hearsay problem. Testimony that investigators received information regarding the crime from Jackson or that Jackson sat in the vehicle as detectives pieced together the events that occurred on the evening of the crimes, without divulging the content of any information he conveyed, does not transform Jackson's cooperation with police into hearsay, as those pieces of evidence constitute acts with no inherent truth or falsity. *See California v. Cowan*, 236 P.3d 1074, 1129 (2010) (explaining that a defendant's offer to speak with investigators constituted "simply verbal conduct" that "was 'neither inherently true nor false'") (quoting *California v. Curl*, 207 P.3d 2, 19 (Cal. 2009)). But even if the court erred in deeming the evidence inadmissible hearsay, the analysis of the evidence's admissibility does not end. Assuming the evidence has some tendency to negate consciousness of guilt, the existence of alternative

explanations for Jackson's behavior, such as his conceded desire to negotiate a favorable plea deal, diminishes the probative value of the evidence relative to the potential for the evidence to confuse the issues or mislead the jury. *See Bellon*, 121 Nev. at 445, 117 P.3d at 181 (reasoning that the district court's admission of "extremely prejudicial" consciousness-of-guilt evidence that had "minimal probative value" was not harmless); *Cowan*, 236 P.3d at 1129-30 (noting that ambiguous inferences drawn from consciousness-of-guilt, and its converse consciousness-of-innocence, evidence may render such evidence prejudicial and inadmissible); *see also* 23 C.J.S. *Criminal Procedure & Rights of Accused* § 1036 (2022) (explaining that consciousness-of-innocence evidence "is typically of little value because of the variety of possible motives behind the conduct"). Thus, we conclude that the district court's exclusion of the cooperation evidence was a proper exercise of its discretion, even if its decision rested on erroneous grounds.[4]

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[4]Even assuming, arguendo, the district court abused its discretion, its error in excluding the cooperation evidence was harmless. Although we may "overlook" the State's failure to argue harmlessness, as occurred here, only "in 'extraordinary cases,'" we find those circumstances present. *See Belcher*, 136 Nev. at 268, 464 P.3d at 1023-24 (providing, in the context of an error "of a constitutional nature," three factors for overlooking the failure to raise harmless error and describing the certainty of harmlessness as "the most important" factor).

There is no debate that a rational jury would have found Jackson guilty even had the district court admitted the cooperation evidence because the State presented overwhelming evidence of guilt, including witness testimony, forensic evidence regarding gunshot residue, and surveillance footage. *See e.g., id.* at 269-70, 464 P.3d at 1024-25 (determining that defendant's confession was cumulative and much weaker than other evidence of his guilt, and that therefore any error was harmless). Moreover, even if the jury heard that Jackson cooperated with police and concluded that Jackson did not shoot the murder victim, overwhelming evidence

Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (affirming a district court's decision if it "reache[d] the right result, although it [was] based on an incorrect ground").

The district court did not err in declining to exclude identification evidence or to grant a mistrial when the State directed a robbery victim to look at Jackson's table after an erroneous identification by the victim

Jackson argues that the State, in asking one of the attempted robbery victims whether he recognized Jackson or Hutchinson as the perpetrators after the victim had said that he recognized two jurors, used an impermissibly suggestive identification procedure that resulted in irreparable misidentification of the co-defendants. He further contends that in-court misidentification and improper intervention by the State required the district court to sua sponte declare a mistrial.

An in-court witness identification that derives from an "unnecessarily suggestive" pretrial identification procedure is nevertheless admissible if the in-court identification is "independently reliable." *Taylor v. State*, 132 Nev. 309, 322, 371 P.3d 1036, 1045 (2016). We employ a totality-of-the-circumstances analysis, considering factors such as "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *see also*

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allowed the jury to conclude that he conspired with or aided Hutchinson in that endeavor such that it would not have "substantially affect[ed] the jury's verdict." *Valdez*, 124 Nev. at 1189, 196 P.3d at 476 (discussing harmless-error standard for errors "not of constitutional dimension"). Accordingly, any error in excluding the cooperation evidence was harmless.

Taylor, 132 Nev. at 322, 371 P.3d at 1045 (stating we have adopted the same standard and considered the same factors as the U.S. Supreme Court in *Neil*).

Assuming these authorities apply to allegedly suggestive in-court identifications that do not derive from pretrial procedures, the State's direction to the robbery victim to consider the individuals at the defense table did not render the ultimate identification of those men as the perpetrators unreliable. *See, e.g., Jones v. State*, 95 Nev. 613, 617, 600 P.2d 247, 250 (1979) ("Reliability is the paramount concern."). Even if the "procedure" adopted by the State improperly primed the victim to identify the co-defendants, his prior descriptions of Jackson and Hutchinson matched his eventual identification of them as the two men who wielded a gun and a knife, respectively, at him in an enclosed tent during daylight hours. Other evidence corroborated the victim's identification, such as testimony from a second attempted-robbery victim who identified Jackson and Hutchinson as the perpetrators and who confirmed that Jackson held a gun to the first attempted-robbery victim's head. And police arrested both Jackson and Hutchinson at the homeless encampment where the attempted robbery took place. Finally, the victim faced cross-examination on the misidentification. Thus, the totality of the circumstances does not establish that he gave an unreliable identification. After the juror identification and the direction by the State to the defense table, the district court clarified that the witness was to look around the entire courtroom, and the witness indicated that he had incorrectly understood he was only to look in the direction of the jurors. After the clarification, he promptly identified Jackson and Hutchinson. Thus, the victim's initial identification of two jurors, to the extent it even constituted a misidentification or suggested a

lack of credibility, was for the jury to consider in assessing the weight of evidence produced by the State. *See Gaxiola v. State*, 121 Nev. 638, 650, 119 P.3d 1225, 1233 (2005) ("The jury determines the weight and credibility of conflicting testimony."). Accordingly, the district court did not abuse its discretion in declining to exclude the identification or to declare a mistrial sua sponte based on its resolution of the witness's initial confused misidentification.

Suppression Issues

A district court's resolution of a motion to suppress evidence presents a mixed question of law and fact. *State v. Beckman*, 129 Nev. 481, 485, 305 P.3d 912, 916 (2013). We review factual findings for clear error, but legal conclusions de novo. *Id.* at 486, 305 P.3d at 916.

The district court properly declined to suppress Jackson's statements to police

Jackson argues that his statements to police regarding the murder and attempted-robbery offenses, before he had been charged with first-degree murder, were the product of a joint effort by the prosecutor and investigating detectives to elicit incriminating statements, take advantage of him, and capitalize on his counsel's inaction. He contends that the statements were involuntary because law enforcement created the illusion that his cooperation would result in some sort of plea deal.

"A confession is inadmissible unless freely and voluntarily given."[5] *Richard v. State*, 134 Nev. 518, 526, 424 P.3d 626, 632 (2018)

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[5]While Jackson cites both the Fifth and Sixth Amendments, we analyze the claim under the Fifth Amendment because, first, a proper *Miranda* waiver suffices to waive an attorney's presence under the Sixth Amendment, *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009), and, second, a claim of error related to an attorney's alleged ineffectiveness must be raised

(quoting *Chambers v. State*, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997)). Voluntary means "the product of a rational intellect and a free will." *Chambers*, 113 Nev. at 981, 944 P.2d at 809 (internal quotation marks omitted)). Voluntariness of a confession is examined under the totality of the circumstances. *See id.* We have relied on "[s]everal factors . . . in deciding whether a suspect's statements are voluntary," including (1) the suspect's "prior experience with law enforcement;" (2) "the youth of the accused; (3) his lack of education or . . . intelligence; (4) the lack of any advice of constitutional rights; (5) the length of detention; (6) the repeated and prolonged nature of questioning; and (7) the use of physical punishment . . . ." *Rosky v. State*, 121 Nev. 184, 193-94, 111 P.3d 690, 696 (2005) (internal quotation marks omitted).

Here, Jackson's own testimony that police read him his rights under *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966), that he understood those rights, and that he never asked for his attorney to attend the interview support the district court's finding that he voluntarily, knowingly, and intelligently waived his *Miranda* rights. *See Mendoza v. State*, 122 Nev. 267, 276, 130 P.3d 176, 181-82 (2006) ("A waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement." (quoting *United States v. Doe*, 155 F.3d 1070, 1074 (9th Cir. 1998))). While not always dispositive, the *Miranda* waiver presents strong evidence of a voluntary confession here, where no contrary evidence exists. *See Berkemer*

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in a post-conviction habeas petition, *see Gibbons v. State*, 97 Nev. 520, 523, 634 P.2d 1214, 1216 (1981) (holding that a claim for ineffective assistance of counsel is properly challenged in post-conviction relief because factual issues are best determined in the district court).

v. McCarty, 468 U.S. 420, 433 n.20 (1984) ("We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite . . . adhere[nce] to the dictates of *Miranda* are rare."). Moreover, Jackson was in his 50s, he initiated contact with police, and he spoke with them on prior occasions. He provided no evidence that he lacked education or intelligence to understand his rights. Nor did he testify that he felt coerced, intimidated, or deprived of necessities. The interview took place during daylight hours. He knew about the investigation of his involvement in the murder. Finally, Jackson did not offer any evidence that police promised him some benefit in exchange for his cooperation or otherwise engaged in coercive conduct in speaking with him; to the contrary, police affirmed several times to him that he faced charges for the murder if the evidence supported such charges. *See Rosky*, 121 Nev. at 193, 111 P.3d at 696 ("A confession is involuntary if it was coerced by physical intimidation or psychological pressure." (quoting *Brust v. State*, 108 Nev. 872, 874, 839 P.2d 1300, 1301 (1992))). The totality of the circumstances supports the conclusion that Jackson made the statements voluntarily—free from any duress—and the statements were the product of his rational intellect; thus, the district court did not err in denying suppression.

Severance Issues

We review a district court's decisions on whether to sever charges and to sever a joint trial for abuses of discretion. *Farmer v. State*, 133 Nev. 693, 701, 405 P.3d 114, 122 (2017); *Marshall v. State*, 118 Nev. 642, 646-47, 56 P.3d 376, 379 (2002).

The district court did not abuse its discretion in failing to sever the counts of first-degree murder and attempted robbery under a common-scheme theory

Jackson contends that joinder of the first-degree murder charge and attempted-robbery charge was improper, and even if proper, the failure to sever the counts "was extremely prejudicial" because "it allowed the State to present the conduct as some continuous course of action," despite that the murder and attempted robbery charges "have nothing to do with each other."

"A proper basis for joinder exists when the charges are 'based on the same act or transaction; or based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.'" *Rimer v. State*, 131 Nev. 307, 321, 351 P.3d 697, 708 (2015) (quoting NRS 173.115) (alterations omitted). Under the latter theory,[6] a "common plan" comprises offenses that "relate[ ] to one another for the purpose of accomplishing a particular goal," whereas offenses that form a "common scheme . . . share features idiosyncratic in character." *Farmer*, 133 Nev. at 698, 405 P.3d at 120 (internal quotation marks omitted). Although distinct concepts, *see id.*, some overlap exists between the two terms, *see Scott v. Virginia*, 651 S.E.2d 630, 635-36 (Va. 2007). But "[e]ven when charges have been properly joined . . . unfair prejudice to the defendant" may warrant severance. *Rimer*, 131 Nev. at 323, 351 P.3d at 709 (explaining that unfair prejudice "requires more than a mere showing that severance may improve his or her chances for acquittal"); *see also* NRS 174.165(1) (giving discretion to sever counts if "it appears that a defendant . . . is prejudiced by" joinder).

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[6]Neither party argues that joinder would be proper under the same-transaction or connected-together theories, so we do not address those theories.

Here, the evidence does not support that the offenses were motivated by a common plan to obtain drugs, as it did not strongly point to a robbery motive or drug motive for the murder; indeed, the murder victim disclaimed that the perpetrators took money from him. *Cf. Richmond v. State*, 118 Nev. 924, 934, 59 P.3d 1249, 1255 (2002) (committing sexual assault against two victims did not form a "common plan," where the defendant "appeared simply to drift from one location to another, taking advantage of whichever potential victims came his way"). Nevertheless, the murder and attempted-robbery offenses formed a common scheme based on their shared distinctive features. *See, e.g.*, *Farmer*, 133 Nev. at 700, 405 P.3d at 121 (concluding that sexual assaults of five unrelated victims "within the span of several weeks" that "were not identical" were nevertheless part of a common scheme, where the defendant took advantage of each victim's similar "vulnerable state," justified his behavior with each victim in the same manner and used his position at a hospital to access the victims). Surveillance footage shows that, whatever the motive for the murder, Jackson and Hutchinson appeared to befriend the murder victim, entering a marijuana dispensary and attempting to get funds from a bank together, before shooting him and leaving him for dead. Similarly, the second robbery victim testified that Jackson and Hutchinson befriended him, seeking to acquire drugs in exchange for other drugs, before ultimately threatening him and the other robbery victim with a gun and knife. The evidence showed that they used the same gun in both offenses. Jackson and Hutchinson also spent the entire day together, and the offenses occurred in succession within a relatively short time (one hour) and distance. Given Jackson's failure to object below, consideration of these facts does not make it unmistakably clear on casual inspection that joinder was improper. *See,*

e.g., *Martinorellan v. State*, 131 Nev. 43, 49, 343 P.3d 590, 593 (2015) (reversing under plain error only if the error is "'*so unmistakable* that it is apparent from a casual inspection of the record'" (emphasis added) (quoting *Vega v. State*, 126 Nev. 332, 338, 236 P.3d 632, 637 (2010))). Finally, Jackson's vague claim of prejudice, which appears to presume joinder itself inherently prejudices the jury's ability to render a verdict based on the evidence, does not satisfy the required showing of unfair prejudice. *Rhyne v. State*, 118 Nev. 1, 13, 38 P.3d 163, 171 (2002) ("Contentions unsupported by specific argument or authority should be summarily rejected on appeal." (quoting *Mazzan v. Warden*, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000))); *see also Rimer*, 131 Nev. at 323, 351 P.3d at 709 (rejecting "a mere showing" of improved chances at acquittal as sufficient to establish unfair prejudice from joinder of offenses). Accordingly, the district court did not abuse its discretion in failing to sever the murder and attempted robbery counts against Jackson.

The district court did not abuse its discretion in failing to sever Jackson and his co-defendant's joint trial on the murder offense as neither his specific trial rights nor the jury's guilty verdict were compromised

Jackson argues that the district court abused its discretion, as not severing the trials as to the murder charge compromised his right to remain silent where his co-defendant's confrontation rights precluded Jackson from using his statements to law enforcement. Additionally, he claims that he and Hutchinson had antagonistic defenses because Jackson implicated Hutchinson in the murder charge, and the gun found on Jackson came from Hutchinson.

NRS 174.165(1) gives the district court discretion to sever a joint trial if "it appears that a defendant . . . is prejudiced by a joinder of . . . defendants . . . for trial together." Because "the decisive factor in any

severance analysis remains prejudice to the defendant," *Marshall*, 118 Nev. at 646, 56 P.3d at 378, "the district court has a continuing duty at all stages of the trial to grant a severance if prejudice does appear," *Chartier v. State*, 124 Nev. 760, 765, 191 P.3d 1182, 1186 (2008) (quoting *Marshall*, 118 Nev. at 646, 56 P.3d at 379) (internal quotation marks omitted). However, a "general rule favoring joinder" of trials exists. *Jones v. State*, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995) (discussing that joint trials promote "judicial economy"). Severance is appropriate only where "joint trial compromise[s] a specific trial right or prevent[s] the jury from making a reliable judgment regarding guilt or innocence." *See Marshall*, 118 Nev. at 648, 56 P.3d at 380; *see also Jones*, 111 Nev. at 853, 899 P.2d at 547 (observing that only "*compelling* reasons" justify severance of a joint trial (emphasis added)). Thus, we have emphasized that severance under NRS 174.165(1) "requires more than simply showing that severance ma[kes] acquittal more likely." *Marshall*, 118 Nev. at 647, 56 P.3d at 379. And we "must consider not only the possible prejudice to the defendant but also the possible prejudice to the State resulting from expensive, duplicative trials." *Id.* at 646, 56 P.3d at 379.

We conclude that Jackson fails to show any basis requiring severance of the trial. First, as the district court concluded, the record does not support Jackson's claim that his and Hutchinson's defenses were mutually antagonistic because evidence that Hutchinson, as opposed to Jackson, obtained the gun and shot the victim does not compel acquittal of Jackson, where the State asserted accomplice and conspiracy theories as alternative grounds of liability. *See id.* at 646, 56 P.3d at 378 (explaining that "[d]efenses are mutually exclusive when 'the core of the codefendant's defense is so irreconcilable with the core of the defendant's own defense that

the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant'" (alterations omitted) (quoting *Rowland v. State*, 118 Nev. 31, 45, 39 P.3d 114, 123 (2002))).

Second, Jackson's reliance on antagonistic defenses does not establish the prejudice necessary to sever a joint trial. *See id.* at 648, 56 P.3d at 379 (holding that "antagonistic defenses are a relevant consideration but not, in themselves, sufficient grounds for concluding that joinder of defendants is prejudicial"). To the extent he alleges that the joint trial compromised his specific right to remain silent, Jackson never sought to admit his statements, let alone show that Hutchinson's confrontation rights precluded their admission. Further, Jackson failed to make any argument that the joint trial undermined the jury's ability to render a reliable judgment as to his guilt. Likewise, he does not address how the alleged prejudice to him outweighs the potential prejudice to the State if it was required to put on duplicative trials. Finally, as the State points out, the district court instructed the jury to consider the case against each defendant separately. *See Zafiro v. United States*, 506 U.S. 534, 539 (1993) ("[L]ess drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice."). Accordingly, we do not find any abuse of discretion in failing to sever the joint trial.[7]

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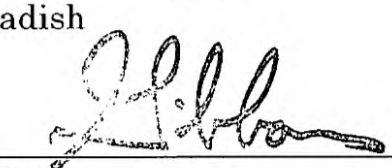
[7]Jackson also argues that the prosecutor committed misconduct by charging him with open murder in violation of the ethical duty to bring charges only supported by probable cause. However, he failed to provide the transcript of the preliminary hearing in the record, precluding our review. *See Jacobs v. State*, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975) ("It is the appellant's responsibility to provide the materials necessary for this court's review.").

Finally, although we conclude that the district court, at most, committed two harmless errors, cumulative error does not justify reversal of Jackson's conviction. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481 ("The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." (quoting *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002))). While the crimes charged are undisputedly serious, this case does not present a "close" issue of guilt. *See id.* (providing factors of the cumulative-error doctrine). And the errors, even taken together, did not infect the trial with unfairness, *see id.* (discussing whether substantial evidence overcame the "unfairness" of cumulative error), as they were "minor" compared to the substantial evidence presented, *see also Hernandez*, 118 Nev. at 535, 50 P.3d at 1115 (declining to reverse under cumulative error for "minor" errors).

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.[8]

_____, J.
Cadish



_____, Sr. J.
Gibbons

[8]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

PICKERING, J., concurring in part and dissenting in part:

I respectfully dissent from that part of the majority's order that affirms the district court's exclusion of the victim's dying declaration that the men who shot him "thought I was leading them into an ambush." The statement was admissible as lay opinion deduced from facts the record shows the victim knew firsthand—the features of the park or vacant lot where they went to trade marijuana for methamphetamine; the exchanges the three had immediately before the shooting; and the body language and gestures the victim and his assailants exhibited. True, the victim could not know for certain what his assailants had in mind, but he perceived the circumstances that led to the shooting and could reasonably infer from those circumstances what he thought prompted them to attack him and express an opinion on that subject in response to the police's questioning of him.

Given the victim's unavailability as a witness and the assurances of trustworthiness that undergird the dying declaration rule, it was error amounting to an abuse of discretion to exclude the ambush statement under the hearsay rule (the district court's holding) or for lack of personal knowledge (the majority's). Had the victim been available to testify, counsel could have elicited the concrete underlying facts on which he based his dying declaration to the police. But he was not, and based on the record evidence as to the victim's involvement with his assailants before and at the scene, his short-hand statement to the police represents a permissible inference from the facts he observed firsthand and could and should have been admitted as lay opinion testimony. For a general discussion see 1 McCormick on Evidence, § 11, at p. 97 (8th ed. 2020) (noting that in the usual case counsel can elicit the specific underlying facts the witness bases his or her opinion on "[b]ut to automatically reject the same

statement by an out-of-court declarant in a dying declaration mistakes the function of the opinion rule and may altogether foreclose a valuable source of proof. When the source is an unavailable declarant, the stark choice facing the court may be between admitting the opinionated hearsay statement or denying the jury any information from that source. The legislatures and courts should choose the first option.").

The question is close but, while I dissent from the majority's finding of no error in the exclusion of the ambush statement, I agree that it was harmless and with the remainder of the majority's analysis. I therefore concur in part and dissent in part.

Pickering, J.
Pickering

cc: Hon. Kathleen M. Drakulich, District Judge
Washoe County Alternate Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk