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DEC 23 2019

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIAN LAMAR BROWN,

Petitioner-Appellant,

v.

STATE OF NEVADA; RICK WALKER;
BILL DONAT,

Respondents-Appellees.

No. 18-15727

D.C. No.
2:02-cv-00770-GMN-PAL

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Submitted December 2, 2019**
San Francisco, California

Before: SILER,*** BYBEE, and R. NELSON, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

*** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Appellant Brian Brown filed a petition for habeas corpus under 28 U.S.C. § 2254, alleging that his constitutional rights had been violated during his criminal trial. The district court denied the habeas petition. We granted a certificate of appealability on the issue of “whether the prosecutor committed prejudicial misconduct during closing arguments.” Because the parties are familiar with the facts, we do not recite them here. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

We review the Nevada Supreme Court’s 1999 decision on Brown’s direct appeal of his conviction because it is the last reasoned state-court decision addressing the issue at hand. *See Van Lynn v. Farmon*, 347 F.3d 735, 738 (9th Cir. 2003). We may not grant habeas relief under these circumstances unless the Nevada Supreme Court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1).

A prosecutor’s improper comments violate a defendant’s constitutional rights only if the comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

Any curative instructions given by the trial court and “heavy” evidence of the defendant’s guilt soften the impact of improper comments. *See id.* at 182.

The Nevada Supreme Court found that “the fairness of [Brown’s] trial was not affected” by the prosecutor’s comments. Although the Nevada Supreme Court did not cite *Darden*, the Nevada Supreme Court’s language is nearly identical to *Darden*’s standard for a constitutional violation. We thus conclude that the Nevada Supreme Court found that the prosecutor’s comments did not violate Brown’s due process rights. As a result, we must decide whether the Nevada Supreme Court unreasonably applied *Darden*. It did not.

Brown argues that his constitutional rights were violated when the prosecutor (1) asserted that Brown shot the victims in the back, (2) misstated witness testimony, (3) argued facts not in evidence, and (4) denigrated Brown’s expert witness. None of these comments “infected the trial with unfairness.” *Id.* at 181.

1. Contrary to Brown’s assertion, the prosecutor did not say that Jason Banks was shot in the back. Instead, the prosecutor argued that Brown did not draw his gun until the victims’ backs were turned. Although one witness had testified that the victims were walking towards Brown when he drew the gun, other witnesses contradicted that testimony. The prosecutor’s argument was thus a fair inference

from the testimony elicited at trial. Regardless, any detrimental effect engendered by these comments was softened by the trial court's instruction that “[n]othing that counsel say[s] during the trial is evidence in the case.” Absent a contrary showing, we presume the jury followed that instruction. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

2. Brown contends that the prosecutor misstated the testimony of two witnesses: Robin Skipworth and Michelle Marlette. Skipworth had testified that Brown was “between [Banks and Randy Beach] and the car” prior to the shooting, so they were walking towards Brown when he drew his gun. During his closing arguments, the prosecutor said that Skipworth had testified that Brown did not draw his gun until the victims’ backs were turned. This was a misstatement. But it did not affect the fairness of Brown’s trial. Brown’s counsel immediately objected to the misstatement. A few moments earlier, the trial court had cautioned the jury, “Ladies and gentlemen, you decide what you heard.” And throughout closing argument, Brown’s counsel highlighted the prosecutor’s misstatement and accurately recounted Skipworth’s testimony.

The prosecutor did not misstate Marlette’s testimony. Rather, the prosecutor proffered a hypothetical to highlight an inconsistency between Marlette’s testimony—that Brown fired all the shots from the basketball court—and the fact

that multiple bullet casings were found outside of the basketball court. This did not violate Brown's right to due process.

3. Brown identifies two facts not in evidence that the prosecutor allegedly argued during closing statements: (1) that the shooting occurred when Brown was thirty feet away from Banks and Beach, and (2) that the crime investigators found gun residue on Banks after swabbing the back of his hands. As previously mentioned, the first was merely a hypothetical proffered by the prosecutor. As for the second, Brown is correct; no witness testified that Banks was swabbed on the back of his hands. But Brown fails to show how this comment undermined the fairness of his trial, especially when Brown's counsel immediately objected.

4. Finally, the prosecutor denigrated Brown's expert witness by saying, "You saw Dr. Bittker. One might wonder why he's not ever called by us here. You know why? We don't use that man. Ph.D. You've heard of that, piled higher and deeper." This statement is clearly improper. But Brown's counsel immediately objected to it, and the trial court sustained that objection. This softened the impact of the statement, particularly given the trial court's earlier instruction to the jury that it was to "disregard" and "draw no inference from" statements when the court sustains an objection. In any event, it is unlikely the jury discounted Dr. Bittker's

opinion that Brown acted in self-defense based solely on the prosecutor's isolated comment about Dr. Bittker's education.¹

In sum, the Nevada Supreme Court did not unreasonably apply *Darden* or any other clearly established federal law, precluding Brown from habeas relief. *See* 28 U.S.C. § 2254(d).

AFFIRMED.

¹ Brown also argues that the prosecutor engaged in “reverse voicing” for the State’s witnesses by attacking Dr. Bittker and that the prosecutor’s suggestion that the Washoe County District Attorney’s Office never uses Dr. Bittker as a witness was likely false. But Brown did not present these arguments in his habeas petition, so they are waived. *See Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 10 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BRIAN LAMAR BROWN,

Petitioner-Appellant,

v.

STATE OF NEVADA; et al.,

Respondents-Appellees.

No. 18-15727

D.C. No. 2:02-cv-00770-GMN-PAL
District of Nevada,
Las Vegas

ORDER

Before: BERZON, Circuit Judge.

The request for a certificate of appealability (Docket Entry No. 6) is granted with respect to the following issue: whether the prosecutor committed prejudicial misconduct during closing arguments. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

The opening brief is due January 29, 2019; the answering brief is due February 28, 2019; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk shall serve on appellant a copy of the “After Opening a Case - counseled Cases” document.

If the State of Nevada, Rick Walker or Bill Donat is no longer an appropriate appellee in this case, counsel for appellees shall notify this court by letter of the

appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

App.0008

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

• • •

BRIAN LAMAR BROWN

Case No. 2:02-cv-00770-GMN-PAL

v.

Petitioner

ORDFR

ATTORNEY GENERAL FOR THE STATE
OF NEVADA, et al.,

Respondents.

16 This matter comes before the Court on consideration of the merits of the remaining
17 claims in petitioner's original petition for writ of habeas corpus pursuant to 28 U.S.C. §
18 2254 (ECF No. 5 & ECF No. 19 at 8). Respondents have answered (ECF No. 85), and
19 petitioner has replied (ECF No. 93).

Factual and Procedural Background

21 Petitioner herein challenges his conviction pursuant to a jury trial of second degree
22 murder with the use of a deadly weapon and attempted murder with the use of a deadly
23 weapon. (See ECF No. 5).

24 On the evening of January 18, 1996, petitioner and his friend, Daniel Hill, met with
25 Randy Beach and Jason Banks at Stewart Park. (Ex. 57 (Tr. 60-61); Ex. 58 (Tr. 18)).¹ Hill
26 and Beach were meeting to argue over a debt Beach owed Hill. (Ex. 57 (Tr. 72-73); Ex.
27 58 (Tr. 25-26)). Beach and Banks, who were friends, arrived together in Beach's car. (Ex.

¹ The exhibits cited in this order, which comprise the state court record, are located at ECF Nos. 38, 39 and 41-47.

1 57 (Tr. 60-61)). Petitioner, who did not know Beach or Banks, arrived with Hill in Hill's car.
 2 (Ex. 57 (Tr. 72); Ex. 58 (Tr. 27)). Both parked their cars on the west side of the park, which
 3 had a brick wall running north to south along its western edge. (Ex. 57 (Tr. 62-63, 66, &
 4 89-90)).

5 The four met on the basketball court – on the other side of the wall -- where Beach
 6 and Hill proceeded to have a verbal altercation for about ten to twenty minutes. (Ex. 57
 7 (Tr. 68); Ex. 58 (Tr. 161)). During this time, petitioner walked around them, occasionally
 8 speaking up to take Hill's side. (Ex. 57 (Tr. 69); Ex. 58 (Tr. 67, 162-63, 189)). When the
 9 argument ended, Beach and Banks were to the north and Hill was to the south; Hill turned
 10 to begin walking south while Banks and Beach turned to begin walking north/northwest.
 11 (Ex. 57 (Tr. 67, 92); Ex. 58 (Tr. 48-47, 52, 54, 79, 86, 164, 166, 174-75)). As they were
 12 walking away, Hill and petitioner claimed they heard Banks or Beach say "Let's do it." (Ex.
 13 58 (Tr. 52)). Beach denied saying this. (Ex. 57 (Tr. 101-02)). Petitioner, who was either
 14 south of Banks and Beach or somewhere to their north, pulled out a gun from his back
 15 waistband and fired shots at Banks and Beach. (Ex. 57 (Tr. 91-92); Ex. 58 (Tr. 174-75,
 16 191, 196-97)). Banks was hit in the front, right part of his chest. (Ex. 61 (Tr. 170)). Beach
 17 was shot in his back. (Ex. 57 (Tr. 70, 95)). Beach saw Banks fall and then began to run.
 18 (Ex. 57 (Tr. 70); Ex. 58 (Tr. 192)).

19 Petitioner chased after Beach, firing several more shots. (Ex. 57 (Tr. 70); Ex. 58
 20 (Tr. 164-65)). He caught up with Beach on the porch of a nearby house. (Ex. 57 (Tr. 70)).
 21 He told Beach to give him his car keys, which Beach did, and then began pulling Beach
 22 toward the cars. (Ex. 57 (Tr. 70-71); Ex. 58 (Tr. 105-06)). At the same time, Hill was
 23 helping Banks into his car. (Ex. 57 (Tr. 75)). Beach got into Hill's car and Hill drove Banks
 24 and Beach to the hospital, where Banks died. (Ex. 57 (Tr. 75-77); Ex. 58 (Tr. 91)).

25 In the meantime, petitioner got into Beach's car and began to idle down the street.
 26 (Ex. 58 (Tr. 92); (Ex. 62 (Tr. 56-57)). Shortly after the shooting, police located petitioner
 27 near the park, still in Beach's car, and arrested him. (*Id.* at 202-07).

28

1 On January 22, 1996, petitioner was charged by way of criminal complaint with
 2 one count of first degree murder with use of a deadly weapon, one count of attempted
 3 murder with use of a deadly weapon, and one count of grand larceny. (Ex. 2). Trial on the
 4 charges commenced on September 16, 1996. (Ex. 57).

5 At trial, petitioner argued that he acted in self-defense, an argument based in part
 6 on a claim that the victims had come after him, and in part on a claim that petitioner was
 7 suffering from a diabetes-related insulin reaction that confused him or caused him to
 8 misread the situation. Although petitioner did not testify, his interview with police following
 9 his arrest was shown.² (See Ex. 62 (Tr. 8)). During the interview, petitioner stated that he
 10 was an insulin dependent diabetic and that although he felt a little shaky he could continue
 11 with the interview. (ECF No. 43-4 (Ex. 98C at 9-10)). He also stated, at least twice, that
 12 he hadn't felt good most of the day and couldn't remember a lot of what happened. (*Id.* at
 13 10-11). Asked if he ever had blackouts, petitioner said he frequently did. (*Id.* at 10). Asked
 14 if he had been frightened, petitioner said he had been. (*Id.* at 12) Petitioner then
 15 remembered being in the park and that one of the guys really wanted to fight. (*Id.*) He
 16 remembered this person calling him and Hill a "b***h" and a "punk." (*Id.*) He recalled that
 17 one of the guys said something like, "F*** it; let's do it," which made him feel "disturbed."
 18 (*Id.*) Petitioner then remembered shooting the gun but claimed he had been trying to shoot
 19 past the victims and that he had not shot anyone. (*Id.*) When asked if the shooting might
 20 have been in self-defense -- if he might have been afraid of the victims -- petitioner stated
 21 he felt that one of the victims was coming at him so he shot him. (*Id.* at 13). Petitioner
 22 stated that he had gone to the park with Hill as back-up and he took his gun because he
 23 felt he might need it. (*Id.*) He said one of the victims was hostile and wanted to fight. (*Id.*)
 24 He said that when one of the victims said "let's do it," he turned around and saw that

25

 26 ² The interview was not transcribed as part of the trial transcript, and the Court has been unable to locate the full
 27 transcript of the interview elsewhere in the record. However, the police summary of the interview is in the record.
 28 (ECF No. 43-4 (Ex. 98C)). Defense counsel quoted the summary in briefs filed with the trial court (see Ex. 56), and the
 summary is consistent with arguments made by both counsel during the course of trial. The Court therefore
 concludes that the summary is sufficient to evaluate the nature of the statements petitioner made during his
 interview, which were presented to the jury during trial.

1 person walking toward him, looking "real crazy," so he pulled out his gun and fired. (*Id.*)
2 When asked if it bothered him that he was called a "b***h" and a "punk," petitioner
3 admitted it made him angry but he denied that that was the reason he shot the victims.
4 (*Id.*) At one point, petitioner told the police that both subjects were coming in his direction
5 and he shot in self-defense; he said he felt he didn't have a choice. (*Id.* at 14).

6 Petitioner also called an expert witness, Dr. Bittker. Dr. Bittker testified that
7 petitioner suffered from "the most fragile, the most brittle, the most severe" type of
8 diabetes. (Ex. 64 (Tr. 11)). He explained that if a person in petitioner's situation has too
9 much insulin and not enough food in his system, he can have an insulin reaction,
10 symptoms of which can include shakiness, feelings of weakness, fatigue, irritability,
11 difficulties with coordination, and difficulties with visual motor coordination and making
12 visual judgments; he further said that "sometimes people even distort what they see as a
13 consequence of this kind of state, and when one is in this state we get to a point where
14 the brain suffers from what we call a delirium." (*Id.* at 12-13). Dr. Bittker opined that, based
15 on how much insulin and food petitioner reported having that day, along with petitioner's
16 behavior during his interview with police, petitioner was likely suffering from an insulin
17 reaction the evening of January 18, 1996. (*Id.* at 12-14). The prosecutor engaged in a
18 lengthy cross-examination of Dr. Bittker during which he challenged the doctor's
19 conclusions. (See Ex. 64 (Tr. 17-96 & 114-21)).

20 Following a six-day trial, petitioner was convicted of second degree murder with a
21 deadly weapon and attempted murder with a deadly weapon and acquitted of grand
22 larceny. (Ex. 68). On December 2, 1996, petitioner was sentenced to a prison term of ten
23 years to life on the second degree murder charge with a consecutive like term for the use
24 of deadly weapon, and a prison term of four to twenty years on the attempted murder
25 charge with a consecutive like term for the use of a deadly weapon. (Exs. 75 & 76).
26 Petitioner appealed, and the Nevada Supreme Court affirmed. (Exs. 77, 81 & 84).
27
28

1 On June 30, 2000, petitioner filed a state petition for writ of habeas corpus. (Ex.
 2 96). After an evidentiary hearing (Ex. 115), the state district court denied the petition. (Ex.
 3 117). On appeal, the Nevada Supreme Court affirmed. (See Exs. 119, 136 & 159).

4 Thereafter, petitioner filed his federal petition for writ of habeas corpus in this court.
 5 (ECF No. 5; see also ECF No. 19 at 9-15 (Ground IA)). Following various proceedings,
 6 the surviving claims of the original petition come before the Court for consideration on the
 7 merits.

8 **Standard**

9 28 U.S.C. § 2254(d) provides the legal standards for this court's consideration of
 10 the merits of the petition in this case:

11 An application for a writ of habeas corpus on behalf of a person in custody
 12 pursuant to the judgment of a State court shall not be granted with respect
 13 to any claim that was adjudicated on the merits in State court proceedings
 14 unless the adjudication of the claim –

- 15 (1) resulted in a decision that was contrary to, or involved an
 16 unreasonable application of, clearly established Federal law, as
 17 determined by the Supreme Court of the United States; or
- 18 (2) resulted in a decision that was based on an unreasonable
 19 determination of the facts in light of the evidence presented in the
 20 State court proceeding.

21 AEDPA "modified a federal habeas court's role in reviewing state prisoner
 22 applications in order to prevent federal habeas 'retrials' and to ensure that state-court
 23 convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685,
 24 693-694 (2002). This court's ability to grant a writ is limited to cases where "there is no
 25 possibility fairminded jurists could disagree that the state court's decision conflicts with
 26 [Supreme Court] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The
 27 Supreme Court has emphasized "that even a strong case for relief does not mean the
 28 state court's contrary conclusion was unreasonable." *Id.* (citing *Lockyer v. Andrade*, 538
 U.S. 63, 75 (2003)); see also *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing
 the AEDPA standard as "a difficult to meet and highly deferential standard for evaluating

1 state-court rulings, which demands that state-court decisions be given the benefit of the
 2 “doubt”) (internal quotation marks and citations omitted).

3 A state court decision is contrary to clearly established Supreme Court precedent,
 4 within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts
 5 the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts
 6 a set of facts that are materially indistinguishable from a decision of [the Supreme Court]
 7 and nevertheless arrives at a result different from [the Supreme Court’s] precedent.”
 8 *Andrade*, 538 U.S. 63 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing
 9 *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

10 A state court decision is an unreasonable application of clearly established
 11 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court
 12 identifies the correct governing legal principle from [the Supreme Court’s] decisions but
 13 unreasonably applies that principle to the facts of the prisoner’s case.” *Andrade*, 538 U.S.
 14 at 74 (quoting *Williams*, 529 U.S. at 413). The “unreasonable application” clause requires
 15 the state court decision to be more than incorrect or erroneous; the state court’s
 16 application of clearly established law must be objectively unreasonable. *Id.* (quoting
 17 *Williams*, 529 U.S. at 409).

18 To the extent that the state court’s factual findings are challenged, the
 19 “unreasonable determination of fact” clause of § 2254(d)(2) controls on federal habeas
 20 review. *E.g., Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause requires
 21 that the federal courts “must be particularly deferential” to state court factual
 22 determinations. *Id.* The governing standard is not satisfied by a showing merely that the
 23 state court finding was “clearly erroneous.” *Id.* at 973. Rather, AEDPA requires
 24 substantially more deference:

25 [I]n concluding that a state-court finding is unsupported by substantial
 26 evidence in the state-court record, it is not enough that we would reverse in
 27 similar circumstances if this were an appeal from a district court decision.
 28 Rather, we must be convinced that an appellate panel, applying the normal
 standards of appellate review, could not reasonably conclude that the
 finding is supported by the record.

1 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); see also *Lambert*, 393 F.3d at 972.

2 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be
 3 correct unless rebutted by clear and convincing evidence. The petitioner bears the burden
 4 of proving by a preponderance of the evidence that he is entitled to habeas relief. *Cullen*,
 5 563 U.S. at 181.

6 As the Nevada Supreme Court reached the merits of petitioner's claims, its
 7 decisions are entitled to deference under AEDPA and may not be disturbed unless they
 8 were ones "with which no fairminded jurist could agree." *Davis v. Ayala*, -- U.S. --, 135 S.
 9 Ct. 2187, 2208 (2015).

10 **Analysis**

11 The petitioner's remaining claims are as follows:

12 Ground 3: The prosecutor committed misconduct in closing arguments
 13 by misstating facts that had been presented to the jury;

14 Ground 4: The trial court violated petitioner's rights when it refused to
 15 allow evidence of specific acts regarding the character of the
 16 victims pursuant to Nev. Rev. Stat. § 48.055(2);

17 Ground 5: The trial court violated petitioner's rights by refusing to give
 18 the defense's proffered self-defense jury instructions;

19 Ground 6: The trial court violated petitioner's rights by refusing to give a
 20 jury instruction regarding the burden of proof on the
 21 prosecution;

22 Ground 17: Trial counsel rendered ineffective assistance of counsel by
 23 failing to move to dismiss the charge of larceny after the
 24 Justice Court abused its discretion by binding over the larceny
 25 charge based on a "substantial mistake of fact"; and

26 Ground 1A: The trial court erred in denying petitioner's habeas claim that
 27 he was improperly denied a jury instruction critical to his
 28 theory of the case.

I. **Ground 3**

29 In Ground 3, petitioner asserts that during closing arguments, the prosecutor made
 30 several misstatements of fact and disparaged petitioner's witnesses, thereby violating his
 31 due process rights. Specifically, petitioner asserts that the prosecutor: (1) repeatedly
 32 stated the victims were shot in the back; (2) misstated the testimony of eyewitnesses

1 Michelle Marlette and Robin Skipworth; (3) misrepresented forensic evidence; (4)
 2 misstated who evinced certain testimony from Marlette; (5) stated that gunpowder residue
 3 was taken from the back of the victims' hands when no such evidence was in the record;
 4 and (6) made inappropriate disparaging remarks about petitioner's medical expert, Dr.
 5 Bittker, in an effort to discredit him. (ECF No. 5 at 9-18).³

6 A defendant's constitutional right to due process of law is violated if the
 7 prosecutor's misconduct renders a trial "fundamentally unfair"; thus, a prosecutor's
 8 improper comments amount to a constitutional violation if they "so infected the trial with
 9 unfairness as to make the resulting conviction a denial of due process." *Darden v.*
 10 *Wainwright*, 477 U.S. 168, 181-83 (1986). However, even if there was a constitutional
 11 violation, a petitioner is entitled to relief only if he was actually prejudiced by the
 12 comments. *Id.* (citing *Ayala*, 135 S. Ct. at 2197, and *Brecht v. Abrahamson*, 507 U.S. 619,
 13 627, 637 (1993)). Comments cause actual prejudice if they had a "substantial and
 14 injurious effect or influence on the jury' verdict." *Wood v. Ryan*, 693 F.3d 1104, 1113 (9th
 15 Cir. 2012). "Under this test, relief is proper only if the federal court has 'grave doubt about
 16 whether a trial error of federal law had 'substantial and injurious effect or influence in
 17 determining the jury's verdict.'" *Ayala*, 135 S. Ct. at 2197-98.

18 Claims of prosecutorial misconduct are reviewed "on the merits, examining the
 19 entire proceedings to determine whether the prosecutor's [actions] so infected the trial
 20 with unfairness as to make the resulting conviction a denial of due process." *Johnson v.*
 21 *Sublett*, 63 F.3d 926, 929 (9th Cir. 1995) (citation and internal quotation marks omitted).

22 In addressing this claim, the Nevada Supreme held:

23 We have previously held that "[a] criminal conviction is not to be lightly
 24 overturned on the basis of a prosecutor's comments standing alone, for the
 25 statements or misconduct must be viewed in context; only by so doing can
 26 it be determined whether the prosecutor's conduct affected the fairness of
 27 the trial." *Greene v. State*, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997)
 28 (quoting *United States v. Young*, 470 U.S. 1, 11 (1985)) (citations omitted).

³ One of petitioner's pages in Ground 3 is out of order. Petitioner's page 7-C, which is CM/ECF page 12, appears to belong between petitioner's pages 7-H and 7-I, or between CM/ECF pages 17 and 18.

1 After careful review of the record, we conclude that the prosecutor's
 2 statements during closing argument do not rise to the level of reversible
 3 misconduct. Hence, we conclude that the fairness of the trial was not
 4 affected.

5 (Ex. 84 at 3).⁴

6 As a preliminary matter, the Court does not agree with petitioner that the Nevada
 7 Supreme Court found that there was a constitutional violation and thus the only question
 8 in this case is prejudice. A prosecutor's comments violate the Constitution if they "so
 9 infected the trial with unfairness as to make the resulting conviction a denial of due
 10 process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The Nevada Supreme Court
 11 found "the fairness of the trial was not affected," which amounts to a finding that there
 12 was no constitutional violation.⁵ Accordingly, the Court considers whether the Nevada
 13 Supreme Court's conclusion that no constitutional violation occurred was objectively
 14 unreasonable.

15 A. Victims' Backs Were Turned

16 Petitioner argues that the prosecutor repeatedly asserted during closing
 17 arguments that Banks and Beach were shot in their backs, which was inconsistent with
 18 the testimony and forensic evidence that established Banks had been shot in the front.
 19 Petitioner objects to the following statements by the prosecutor:

20 (1) "No, this man waited purposefully, calculated, waited until the victim's
 21 backs were turned, produced the firearm and opened fire. And that's what
 22 the physical evidence tells us," (Ex. 66 (Tr. 14-15));

23 (2) "He waited until the moment in time in which their backs were turned,
 24 and the physical evidence tells us that. And he opened fire," (*id.* at 16);

25 (3) Beach and Banks were "[t]urned and walking away," (*id.* at 82);

26 (4) "When the two victims had their backs turned, she saw [petitioner] reach
 27 for something. ... And Robin Skipworth said he pulled the gun out and fired,"
 28 (*id.* at 13); and

29 (5) "[T]he bullet was in the back," (*id.* at 109).

30 ⁴ Citation is to the CM/ECF generated page number at the top of the page.

31 ⁵ It is less clear whether the Nevada Supreme Court also found that any violation was "harmless beyond a reasonable
 32 doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967) (standard on direct review is whether a due process violation
 33 was "harmless beyond a reasonable doubt"). The court certainly did not find as much explicitly and, as it concluded
 34 there was no constitutional violation, it was not required to reach the question.

1 Beach was shot for the first time in his back. (Ex. 57 (Tr. 70, 95)). Banks, however,
 2 was shot in the front, not the back; the bullet entered his right lateral side and traveled in
 3 a general right to left, front to back and slightly downward direction. (Ex. 61 (Tr. 177)).
 4 Thus, at least as of the moment the bullet reached Banks, Banks' back was not toward
 5 petitioner. However, the prosecutor did not argue that Banks had been shot in the back.
 6 Rather, he argued that Banks and Beach had turned their backs to petitioner when
 7 petitioner reached for the gun. While conflicting testimony was presented at trial,⁶ at least
 8 some evidence supported this inference. James Hampton testified that petitioner was
 9 south of Banks and Beach, that Banks and Beach were walking out of the park in a north
 10 to northwest direction and that Banks had just "turned like [he] had heard something or
 11 [was] motioned or ... had a sense of something" when he was shot. (Ex. 58 (Tr. 166, 174-
 12 75, 178 & 182)). This testimony implicitly supports a conclusion that Banks and Beach
 13 had their backs to petitioner when petitioner reached for his gun. It "is certainly within the
 14 bounds of fair advocacy for a prosecutor, like any lawyer, to ask the jury to draw
 15 inferences from the evidence that the prosecutor believes in good faith might be true."
 16 *Shaw v. Terhune*, 380 F.3d 473, 480 (9th Cir. 2004) (internal punctuation omitted). The
 17 Nevada Supreme Court's conclusion that petitioner's due process rights were not violated
 18 by the prosecutor's repeated references to the victims' backs being turned was not
 19 objectively unreasonable.

20 The prosecutor did, however, misstate the testimony of Robin Skipworth when he
 21 stated:

22 And what did Robin Skipworth tell you? . . . When the two victims had their
 23 backs turned, she saw [petitioner] reach for something. In fact, she said he
 24 was having a difficult time getting something. . . . And Robin Skipworth said
 25 he pulled the gun out and fired.

26 (Ex. 66 (Tr. 13)). Skipworth never said that Beach and Banks had their backs to petitioner
 27 when petitioner pulled out his gun. Skipworth's testimony was that petitioner was standing
 28 very close to one person, who was to his east, and about four to five feet north of the

28 ⁶ Specifically, some of the witnesses placed petitioner north of Banks and Beach and others placed him south, but
 all agreed that Banks and Beach had turned and were walking in a north/northwest direction back toward their car.

1 other two people, who were to his south; she testified that everyone was turning around
 2 to leave and that Banks and Beach started heading in a northerly direction; she testified
 3 that Banks and Beach had to pass by petitioner to get back to their car; and she testified
 4 that Banks was facing petitioner when he was shot. (Ex. 58 (Tr. 189-97)). Far from
 5 establishing that Banks and Beach had their backs to petitioner when he pulled out his
 6 gun, Skipworth's testimony actually supported the opposite inference.

7 Notwithstanding this error, the state courts' conclusion that it did not so infect the
 8 trial as to render it fundamentally unfair was not objectively unreasonable. Skipworth
 9 testified that it looked like the argument had ended and that Beach and Banks "were
 10 turning to walk away" and were "leaving" when "the [petitioner] pulled out a gun." (Ex. 58
 11 (Tr. 191-93)). She testified that while Beach and Banks would have had to pass by
 12 petitioner when walking back to their car, they at no time provoked the shooting or made
 13 any aggressive movements toward petitioner, and they did not approach him as they left.
 14 (*Id.* at 195 & 199). Skipworth's observation -- and that of virtually every other witness who
 15 observed the event⁷ -- was that that the conflict had ended and that Beach and Banks
 16 were leaving the scene. Stating that the victims' backs were turned is not materially
 17 different from stating that the conflict had ended and that the victims were leaving. The
 18 only evidence to the contrary was petitioner's own statements to the police that one or
 19 both of the victims came after him, which statements he did not make until prompted by
 20 the interviewing officer. In this context, a fairminded jurist could conclude that the even
 21 with the misstatement of Skipworth's testimony, the trial was still fundamentally fair.

22 Even if this conclusion was objectively unreasonable, however, the Court cannot
 23 find that the prosecutor's misstatement caused the petitioner actual prejudice. As just
 24 discussed, stating that the victims' backs were turned is not materially different from
 25 Skipworth's testimony that the conflict had ended and the victims were leaving. In
 26 addition, defense counsel objected to the prosecutor's argument on the grounds that "that

27 ⁷ Michelle Marlette, who was called as a defense witness, did not testify that Banks and Beach were walking away,
 28 but she also did not testify that they attacked or approached the petitioner. Her testimony lacked any observations
 in that regard.

1 was not the testimony." (Ex. 66 (Tr. 13)). While the trial court did not rule on the objection
2 at the time, it had -- just minutes before -- advised the jury that it had to decide what the
3 testimony was. (Ex. 66 (Tr. 9)). The jury instructions also included a charge that "[n]othing
4 that counsel say during the trial is evidence." (Ex. 65 at 14). Accordingly, in the context of
5 the trial as a whole and that portion of the closing argument specifically, the prosecutor's
6 misstatement of Skipworth's testimony could not have had a substantial and injurious
7 effect on the jury's verdict.

8 Petitioner also takes issue with this statement by the prosecutor: "Remember, Dr.
9 Bittker said I didn't know that the bullet was in the back. I didn't know this fact." (Ex. 66
10 (Tr. 109)). Although not immediately clear from the context, the prosecutor was probably
11 referring to his cross-examination of Dr. Bittker, during which he asked Dr. Bittker if he
12 knew that the first bullet struck Beach in his back, to which Dr. Bittker responded he did
13 not. (See Ex. 64 (Tr. 47-48)). Petitioner's contention does not appear to be that the
14 prosecutor misrepresented where Beach was shot; rather, he appears to take issue with
15 the statement insofar as it suggests Banks was shot in the back. (See ECF No. 5 at 11).
16 As noted, whose bullet the prosecutor was referring to is not clear. However, both the
17 prosecutor and defense counsel had reminded the jury early in their arguments that
18 Banks had been shot in the front right side. (Ex. 66 (Tr. 7 & 36)). In this context, a
19 fairminded jurist could conclude that the "bullet in the back" statement did not so infect
20 the trial as to render it fundamentally unfair. It was therefore not objectively unreasonable
21 for the Nevada Supreme Court to conclude that this statement did not violate petitioner's
22 due process.

23 **B. Misstating Testimony of Skipworth and Marlette**

24 Michelle Marlette placed petitioner to the north of Banks and Beach, and
25 Skipworth, who placed petitioner north of one and east of the other, testified that Banks
26 and Beach had to pass by petitioner to get back to their car. Petitioner asserts that the
27 following statement of the prosecutor misrepresented Marlette's and Skipworth's
28

1 testimony: "So why would Mr. Beach and Mr. Banks want to do anything to a man who
 2 wasn't even involved? They didn't. They walked away." (Ex. 66 (Tr. 80)).

3 The prosecutor did not, by way of this statement, purport to describe the testimony
 4 of either Skipworth or Marlette. Moreover, the statement is not inconsistent with their
 5 testimonies. While Skipworth told the jury that Banks and Beach had to pass by petitioner
 6 to go back to their car, she also said that they had turned around to walk away and did
 7 not approach or make any aggressive movements toward petitioner. (Ex. 58 (Tr. 193, 195
 8 & 199)). Marlette's testimony did not include any observation about whether Banks and
 9 Beach were walking away or whether they approaching or attacking the petitioner. The
 10 objected-to statement therefore did not misstate Marlette's and Skipworth's testimony.
 11 Moreover, as discussed above, the statement had a foundation in other trial testimony.
 12 As such, the state court's conclusion that this statement did not violate petitioner's due
 13 process rights was not objectively unreasonable.

14 **C. Misrepresented Forensic Evidence**

15 The forensic evidence established that Banks had been shot from within a range
 16 of zero to six feet. (Ex. 61 (Tr. 100)). Petitioner argues that the prosecutor misrepresented
 17 this evidence when during closing arguments he said "We have two guys who are
 18 standing more than 30 feet away, and he's still firing a gun at 'em, boom, boom, boom,
 19 boom." (Ex. 66 (Tr. 89)).

20 In context, it is clear that the prosecutor was addressing the testimony of Michelle
 21 Marlette, who stated that petitioner fired four to five shots from the basketball court. (Ex.
 22 62 (Tr. 68)). The prosecutor specifically argued that Marlette's testimony was inconsistent
 23 with the physical evidence. (Ex. 66 (Tr. 87)). When the prosecutor stated that petitioner
 24 fired at the victims from 30 feet away, he was not asserting that that was what had actually
 25 happened. (*Id.* at 89). Even if he were, the suggestion that petitioner was firing shots at
 26 people 30 feet away is not in itself contradictory of the fact that Banks was shot at close
 27 range. The prosecutor's argument therefore did not misstate, at least not in a material
 28 way, the forensic evidence. Accordingly, the Nevada Supreme Court's conclusion that

1 this statement did not violate petitioner's due process rights was not objectively
2 unreasonable.

3 D. Misstated who Evinced Testimony from Marlette

4 During Marlette's examination, the prosecution asked her about observing
5 petitioner carrying one of the victims to the cars. (Ex. 62 (Tr. 74)). However, during rebuttal
6 the prosecutor stated that it was defense counsel who had asked this question. (Ex. 66
7 (Tr. 88)). The Court has difficulty seeing how this misstatement could have made the trial
8 unfair or in any way impacted the jury's verdict. Who asked Marlette about petitioner
9 carrying the victim to the car is immaterial, especially as there was other testimony in the
10 record establishing the very same thing (including the testimony of the victim himself, Mr.
11 Beach). In addition, defense counsel immediately objected, at which time the trial court
12 advised the jury that it had to determine what the evidence was. (*Id.* at 89). The Nevada
13 Supreme Court's conclusion that this statement did not violate petitioner's due process
14 rights this claim was therefore not objectively unreasonable.

15 E. Gunpowder Residue on Back of Hands

16 The State's expert, Nancy Rizzo, testified that she found gunpowder residue on
17 Banks' hands, which was consistent with being shot at very close range, zero to six feet,
18 or having been in the general vicinity where there were several rounds fired. (Ex. 61 (Tr.
19 100)). In rebuttal, the prosecutor argued: "[I]n order to vote not guilty, you gotta buy self-
20 defense . . . says he's coming at him. And he's got the gunpowder, right, ladies and
21 gentlemen, the swabbing is of the back hands. If you're in a room where a gun is fired,
22 as you learned, you're likely to have gunpowder residue on you. It's on the backside is
23 where they swabbed the hand." (Ex. 66 (Tr. 84)). Defense counsel objected "the same
24 objection I made earlier," and the court responded "OK." (*Id.*)

25 There was no evidence in the record as to which side of the victims' hands were
26 swabbed, a point respondents concede. The argument thus, very clearly, asserted facts
27 not in evidence. The prosecutor's apparent insinuation was that finding residue on the
28 back of the hands negated a claim of self-defense. However, that conclusion does not

1 necessarily follow. As Rizzo told the jury, a person can have gunpowder residue on them
 2 just by being in the general vicinity when several shots are fired. (Ex. 61 (Tr. 100)). Thus,
 3 the Court cannot conclude that the prosecutor's statement was so impactful on the jury's
 4 determination that it caused petitioner actual prejudice.

5 F. Disparaging Remarks about Dr. Bittker

6 During rebuttal, the prosecutor stated: "You saw Dr. Bittker. One might wonder
 7 why he's not ever called by us here. You know why? We don't use that man. Ph.D. You've
 8 heard of that, piled higher and deeper." (Ex. 66 (Tr. 106)). Defense counsel objected,
 9 pointing out that Dr. Bittker was an M.D., not a Ph.D, and the court sustained the
 10 objection. (*Id.*)

11 These comments were clearly improper. However, the Nevada Supreme Court
 12 was not objectively unreasonable in concluding that they did not rise to the level of a due
 13 process violation. The trial court sustained counsel's contemporaneous objection to the
 14 Ph.D comment, neutralizing its effect. And in the overall context of Dr. Bittker's testimony,
 15 it is unlikely that the prosecutor's statement that his office did not use Dr. Bittker had much
 16 of an effect on the jury's verdict. Dr. Bittker testified that he had been used at least four
 17 times by the prosecutor's office in Clark County. (Ex. 64 (Tr. 10)). In addition, the
 18 prosecutor's aggressive cross-examination of Dr. Bittker appears to the Court far more
 19 damaging than this isolated statement in closing. Accordingly, a fairminded jurist could
 20 conclude that the trial was not rendered fundamentally unfair by the prosecutor's
 21 comments, and the Nevada Supreme Court's rejection of the claim was not therefore
 22 objectively unreasonable.

23 G. Cumulative

24 "Even when separately alleged incidents of prosecutorial misconduct do not
 25 independently rise to the level of reversible error, '[t]he cumulative effect of multiple errors
 26 can violate due process.'" *Wood*, 693 F.3d at 1116 (quoting *United States v. Nobari*, 574
 27 F.3d 1065, 1082 (9th Cir. 2009)).

28

1 Even considering the cumulative effect of the prosecutor's comments, the Court
 2 does not find the Nevada Supreme Court's decision objectively unreasonable and does
 3 not find actual prejudice. The evidence in this case was by no means unanimous and the
 4 prosecutor was entitled to argue the theory of his case. Petitioner's self-defense case was
 5 not exceptionally strong. Apart from the petitioner's own statements that the victims had
 6 come at him, which were made only after the police suggested self-defense, there was
 7 no evidence that Banks and Beach attacked petitioner. And Dr. Bittker's testimony did not
 8 appear to be incredibly compelling. On the other hand, petitioner admitted that he went
 9 to the park as Hill's back-up and intentionally brought a loaded gun because he might
 10 need it, and there was no evidence that Banks or Beach was armed. Petitioner also
 11 chased after Beach as he was running away and continued to fire shots. This last point
 12 is probably the most damaging to petitioner's claim that he was acting in self-defense. In
 13 the context of the trial as a whole and the weight of the evidence against petitioner, a
 14 fairminded jurist could conclude that the prosecutor's cumulative statements did not
 15 violate the petitioner's due process rights. Nor does the Court have any grave doubt that
 16 these errors had a substantial and injurious effect on the jury's verdict.

17 Petitioner is therefore not entitled to relief under Ground 3.

18 II. Ground 4

19 At trial, petitioner sought to introduce specific, prior bad acts of both Banks and
 20 Beach. The trial court deemed the evidence inadmissible but allowed introduction of
 21 opinion and reputation testimony as to Banks' and Beach's characters. Petitioner asserts
 22 that the trial court's refusal to allow evidence of the victims' specific acts pursuant to
 23 Nevada Revised Statutes § 48.055(2) violated his right to a fair trial and due process.⁸

24 In addressing this claim, the Nevada Supreme Court held:

25 Next, Brown argues that he should have been allowed to present reputation
 26 and opinion evidence, as well as specific act evidence, regarding the
 27 propensity for violence of the victims pursuant to NRS 48.045. Brown claims
 28 that the character of the victims is an essential element in a self-defense

⁸ The Court notes that while petitioner also labels this (and several other of his claims) as a Sixth Amendment "counsel" claim, (see ECF No. 5 at 22), Ground 4 does not state a cognizable denial of counsel claim.

theory and, therefore, is an exception to the general rule against the admissibility of character evidence.

NRS 48.045 provides, in relevant part:

1. Evidence of a person's character or a trait of his character is not
2 admissible for the purpose of proving that he acted in conformity
3 therewith on a particular occasion except:
4

5 ...
6
(b) Evidence of the character or trait of character of the victim of the
7 crime offered by an accused, subject to the procedural requirements
8 of NRS 48.069 where applicable, and similar evidence offered by the
9 prosecution to rebut such evidence . . .

10 However, character evidence must be relevant before it is admissible. We
11 have held that "[t]he character of the deceased can only be brought in issue
12 where the circumstances are such as to raise a doubt whether the homicide
13 was committed in malice or was prompted by the instinct of self-
14 preservation." *Coombs v. State*, 91 Nev. 489, 490, 538 P.2d 162, 162
15 (1975) (quoting *State v. Pearce*, 15 Nev. 188, 191 (1880)).

16 Moreover, the form or proof of character evidence "may be established by
17 testimony as to reputation or in the form of an opinion. The character of the
18 victim cannot be established by proof of specific acts." *Burgeon v. State*,
19 102 Nev. 43, 46, 714 P.2d 576, 578 (1986) (footnote omitted). However,
20 "specific acts which tend to show that the deceased was a violent and
21 dangerous person may be admitted, provided that the specific acts of
22 violence of the deceased were known to the accused or had been
23 communicated to him." *Id.* at 45-46, 714 P.2d at 578. NRS 48.045(1)(b)
24 permits the admission of the deceased victim's general character offered by
25 the accused whether the accused has knowledge of the victim's character
26 or not. See id.

27 Here, Brown concedes that he did not previously know the specific acts of
28 violence of the victims that he sought to introduce. Thus, we conclude that
the victim's specific acts of violence are not admissible pursuant to Burgeon
to establish the reasonableness of Brown's fear or his state of mind. We
conclude, however, that opinion testimony and evidence of the victim's
general reputation were admissible. After review of the record, we conclude
that Brown did not attempt to introduce opinion testimony or evidence of the
victims' general reputation; therefore, there is not district court error to
address.

29 Brown attempts to distinguish Burgeon by arguing that the character of the
30 victim is an essential element of his claim of self-defense, thereby falling
31 under NRS 48.055(2). [footnote 1 omitted]. Brown cites to many
32 authoritative treatises and case law from other jurisdictions to support his
33 contention that character evidence of a victim is allowed in claims of self-
34 defense.

35 We conclude that Brown's reliance on such authority is misplaced. Although
36 the authority cited by Brown does suggest that pertinent character evidence
37 of the victim is admissible when establishing self-defense, such evidence
38 may only take the form of reputation and opinion testimony. Here, Brown
39 attempted to introduce evidence of specific acts of violence of the victims.
40 Thus, we conclude that due to the form of the evidence, it was inadmissible.

1 Furthermore, we conclude that the character of the victim is not an essential
 2 element of self-defense. See NRS 200.120. The accused need only
 3 establish that the victim was manifesting violence tendencies on that
 4 particular occasion. The accused need not establish that the victim had a
 violence character before that fatal point in time. Thus, we conclude that
 Brown's argument lacks merit.

5 (Ex. 84 at 3-5) (footnotes omitted).⁹

6 “[I]t is not the province of the federal habeas court to reexamine state court
 7 determinations on state-law questions. In conducting habeas review, a federal court is
 8 limited to deciding whether a conviction violated the Constitution, laws, or treaties of the
 9 United States.” *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). Therefore, as a general rule,
 10 federal courts may not review a trial court’s evidentiary rulings. *Crane v. Kentucky*, 476
 11 U.S. 683, 689 (1986). A state court’s evidentiary ruling, even if erroneous, is grounds for
 12 federal habeas relief only if it is so fundamentally unfair as to violate due process. *Dillard*
 13 *v. Roe*, 244 F.3d 758, 766 (9th Cir. 2001); *see also Windham v. Merkle*, 163 F.3d 1092,
 14 1103 (9th Cir. 1998) (The federal court’s “role is limited to determining whether the
 15 admission of evidence rendered the trial so fundamentally unfair as to violate due
 16 process.”). Habeas relief is thus available only if an evidentiary ruling or rule was arbitrary,
 17 disproportionate to the end it was asserted to promote, or so prejudicial that it rendered
 18 the trial fundamentally unfair. *See Holmes v. South Carolina*, 547 U.S. 319, 324 (2006);
 19 *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir.1995).

20 Petitioner concedes that under Nevada law, specifically Nevada Revised Statutes
 21 § 48.045 and *Burgeon v. State*, 714 P.2d 576 (Nev. 1986), specific acts of conduct were
 22 not admissible unless the victim’s character was an essential element of self-defense.
 23 See Nev. Rev. Stat. § 48.055(2) (providing that “[i]n cases in which character or a trait of
 24 character of a person is an essential element of a charge, claim or defense, proof of
 25 specific instances of the person’s conduct may be made on direct or cross-examination”).
 26 What petitioner appears to take issue with is the Nevada Supreme Court’s conclusion

27
 28 ⁹ The Court notes that although the Nevada Supreme Court held that petitioner did not attempt to introduce
 reputation and opinion testimony, in fact petitioner was allowed to present reputation and opinion testimony and
 did so. (See Ex. 64 (Tr. 126-29, 131-32, 133-34, 166, 168)).

1 that a victim's character is not an essential element of a defense of self-defense.
2 However, Nevada is far from alone in concluding that a victim's character is not an
3 essential element of a self-defense claim. See, e.g., *United States v. Keiser*, 57 F.3d 847,
4 857 (9th Cir. 1995) ("Even had Keiser proven that Romero is a violent person, the jury
5 would still have been free to decide that Romero was not using or about to use unlawful
6 force, or that the force Romero was using was not likely to cause death or great bodily
7 harm, or that Keiser did not reasonably believe force was necessary, or that he used more
8 force than appeared reasonably necessary. On the other hand, a successful defense in
9 no way depended on Keiser's being able to show that the Romero has a propensity
10 toward violence."). That conclusion can therefore not be said to be arbitrary,
11 disproportionate or fundamentally unfair.

12 But even assuming that Nevada's evidentiary position in this regard violated
13 petitioner's due process rights, such error would subject to harmless error analysis,
14 *Crane*, 476 U.S. at 691, meaning that petitioner would be entitled to habeas relief only if
15 the error has a "substantial and injurious effect or influence in determining the jury's
16 verdict." *Brecht*, 507 U.S. at 637. Here, there was no prejudice. The jury was presented
17 with several witnesses who testified as to the victims' characters generally. Several
18 people testified that Beach was the type of person to carry guns, that he often threatened
19 people, and that he liked to frighten people. (Ex. 64 (Tr. 126-29, 131-34)). One witness
20 testified that Banks was "absolutely the most evil human I have ever met, totally,"
21 explaining that he had terrorized her family for years. (Ex. 64 (Tr. 166, 168)). In addition,
22 the evidence was fairly clear that during their altercation Beach repeatedly told Hill that
23 he wanted to fight and verbally challenged both Hill and petitioner (See Ex. 57 (Tr. 99);
24 Ex. 56 at 11). The jury thus had substantial evidence with which to conclude that Banks
25 and Beach were violent or aggressive people and even that they were acting in an
26 aggressive manner that night. Petitioner has not established that there is more than a
27 reasonable possibility that the jury's verdict would have been different had it been
28

1 presented with Banks' and Beach's prior bad acts.¹⁰ Thus, the lack of such evidence did
 2 not have a "substantial and injurious effect or influence in determining the jury's verdict."

3 Petitioner is not entitled to relief on Ground 4.

4 III. Ground 5

5 In Ground 5, petitioner asserts that his rights to due process and a fair trial¹¹ were
 6 violated when the trial court refused to give his proposed jury instructions on self-defense.
 7 Petitioner identifies several self-defense instructions rejected by the Court, apparently
 8 arguing that they all should have been given. (ECF No. 5 at 26-28). The proposed
 9 instructions included language that self-defense can occur when defending another or to
 10 prevent a felony. In rejecting this claim, the Nevada Supreme Court held:

11 Third, Brown argues that the trial court committed reversible error when it
 12 refused to allow Brown's proposed jury instructions pertaining to self-
 13 defense. Brown also argues that the jury should have been instructed on
 14 the theories of self-defense and prevention of a felony.

15 "A defendant in a criminal case is entitled, upon request, to a jury instruction
 16 on his or her theory of the case, so long as there is some evidence, no
 17 matter how weak or incredible, to support it." Ruland v. State, 102 Nev. 529,
 18 531, 728 P.2d 818, 819 (1986) (citations omitted). However, if a proffered
 19 jury instruction "misstates the law or is adequately covered by other
 20 instructions, it need not be given." Barron v. State, 105 Nev. 767, 773, 783
 21 P.2d 444, 448 (1989).

22 We conclude that the district court did not err by refusing to give Brown's
 23 proposed jury instruction because the jury instructions given by the district
 24 court accurately stated Nevada law. We also conclude that the district court
 25 properly refused to instruct the jury regarding defense of others and
 26 prevention of a felony because there was no evidence in the record to
 27 support such instructions.

28
 29 ¹⁰ Defense counsel sought admission of the following prior bad acts: (1) on April 22, 1993, Banks threatened his
 30 mother with a knife for not giving him money for school; (2) on February 18, 1994, Banks stole \$8,000.00 worth of
 31 jewelry and other items and later told the victim's son that anyone who told would be "shot or beat up," (3) on
 32 February 14, 1993, Banks was charged with a curfew violation and possession of a deadly weapon – a four-inch knife
 33 with a double blade; (4) on December 30, 1991, Banks stole a 1991 Honda vehicle; (5) on March 31, 1991, Banks
 34 stole a Kawasaki motorcycle; (6) on October 1, 1988, Banks attempted to steal an air pistol from a Target store; (7)
 35 on June 12, 1996, Beach threatened two people with a handgun, telling them he "had a cap for their ass"; (8) Beach
 36 was a member of a gang; (9) on December 19, 1991, Beach had in his possession a "BB" at school and was firing the
 37 weapon into the school building; (10) on February 26, 1991, Beach was found to be carrying a large Buck knife and
 38 two other pocket knives at school; (11) on November 12, 1993, Beach challenged a car full of adolescents to a fight
 39 and when they refused he hurled rocks at their car; and (12) on October 29, 1994, Beach was charged with possession
 40 of marijuana. (Ex. 56).

¹¹ See supra n.8.

1 (Ex. 84 at 5-6).

2 To obtain federal habeas relief based on an improper jury instruction, petitioner
3 must establish that the instruction so infected the entire trial that the resulting conviction
4 violates due process. *Masoner v. Thurman*, 996 F.2d 1003, 1006 (9th Cir.1993); *Estelle*
5 *v. McGuire*, 502 U.S. 62, 72 (1991); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The
6 question is whether the instructional “error, in the whole context of the particular case,
7 had a substantial and injurious effect on the jury’s verdict.” *Calderon v. Coleman*, 525 U.S.
8 141, 147 (1998). Where a petitioner alleges that the trial court refused to give an
9 instruction, his burden is “especially heavy”; “[a]n omission, or an incomplete instruction,
10 is less likely to be prejudicial than a misstatement of the law.” *Henderson*, 431 U.S. at
11 155. In reviewing jury instructions, the court inquires as to whether the instructions as a
12 whole were misleading or inadequate to guide the jury’s deliberation. *United States v.*
13 *Garcia-Rivera*, 353 F.3d 788, 791 (9th Cir. 2003) (citing *United States v. Frega*, 179 F.3d
14 793, 806 n. 16 (9th Cir.1999) (internal citations omitted). “[A] single instruction to a jury
15 may not be judged in artificial isolation, but must be viewed in the context of the overall
16 charge.” *Boyde v. California*, 494 U.S. 370, 378 (1990). “[N]ot every ambiguity,
17 inconsistency, or deficiency in a jury instruction rises to the level of a due process
18 violation.” *Middleton v. McNeil*, 541 U.S. 433, 437 (2004).

19 The Court has reviewed the petitioner’s proposed instructions and compared them
20 to the instructions given by the trial court. With the exception of the proposed instructions
21 on defense of another and prevention of a felony, the instructions sought by petitioner
22 were substantially the same as those given by the trial court. Petitioner cannot establish
23 a due process violation on these grounds, and thus the Nevada Supreme Court’s rejection
24 of this claim was not contrary to, or an unreasonable application of, clearly established
25 federal law. Insofar as the instructions on defense of another and prevention of a felony
26 are concerned, the Nevada Supreme Court’s conclusion that there was no evidence of
27 either was also not objectively unreasonable. There was no evidence that either Banks
28

1 or Beach were going to attack Hill or commit another felony. In fact, all the evidence
 2 supported a conclusion that the altercation between Beach and Hill had come to an end.

3 Petitioner is therefore not entitled to relief on Ground 5.¹²

4 IV. Ground 6

5 In Ground 6, petitioner alleges that his rights to due process and a fair trial were
 6 violated because the trial court refused to give an instruction regarding the prosecution's
 7 burden of proof. (ECF No. 5 at 30). Specifically, the trial court declined to give the
 8 following proposed instruction: "The state must prove beyond a reasonable doubt the
 9 facts necessary to support every element of the charged crime." (*Id.*) At trial, the court
 10 gave several instructions regarding the burden of proof, including Instruction 18, which
 11 provided that the State bore the burden of proving every element of the crime beyond a
 12 reasonable doubt, and Instruction 35, which provided that the State also bore the burden
 13 of establishing beyond a reasonable doubt a lack of justification, *i.e.* that the defendant
 14 was not acting in self-defense. (Ex. 65 at 20 & 38).

15 In rejecting this claim, the Nevada Supreme Court held:

16 Finally, Brown argues that his proposed jury instruction regarding the
 17 State's burden of proof is far clearer than that given by the district court;
 therefore, failure to use the proffered instruction warrants reversal.

18 "Jury instructions should be clear and unambiguous." *Culverson v. State*,
 19 106 Nev. 484, 488, 797 P.2d 238, 240 (1990). Here, the jury was instructed
 20 that "[t]he State must prove all elements of the crime, including lack of
 21 justification, beyond a reasonable doubt." We hold that such instruction
 comports with Nevada law and properly instructs the jury that the State has
 the burden of proving that Brown did not act in self-defense. Thus, we
 conclude that Brown's argument is without merit.

22 (Ex. 84 at 6-7).

23 The Nevada Supreme Court's rejection of petitioner's claim regarding the burden
 24 of proof instruction was not contrary to or an unreasonable application of clearly
 25 established United States Supreme Court law, nor was it based on an unreasonable
 26 determination of the facts. There is virtually no difference between the instruction

27
 28 ¹² The Court notes that in answering Ground 5, respondents discuss petitioner's related claim, Ground 1A. The Court
 will address those arguments in the context of Ground 1A.

1 petitioner argues the trial court should have given and the ones that it gave. Both placed
 2 the burden of proof on all elements on the State.

3 Accordingly, petitioner is not entitled to relief on Ground 6.

4 V. Ground 17

5 In Ground 17, petitioner alleges that his rights to a fair trial, due process and
 6 effective assistance of counsel were violated when counsel failed to move to dismiss the
 7 grand larceny charge after the Justice Court abused its discretion by binding petitioner
 8 over to trial court based on a “substantial mistake of fact.” (ECF No. 5 at 69). Petitioner
 9 asserts that inclusion of the grand larceny charge during trial “implied that [he] was a bad
 10 or evil person, which inflamed the passions of the Jury.” (*Id.*)

11 Ineffective assistance of counsel claims are governed by *Strickland v. Washington*,
 12 466 U.S. 668 (1984). Under *Strickland*, a petitioner must satisfy two prongs to obtain
 13 habeas relief—deficient performance by counsel and prejudice. 466 U.S. at 687. With
 14 respect to the performance prong, a petitioner must carry the burden of demonstrating
 15 that his counsel’s performance was so deficient that it fell below an “objective standard of
 16 reasonableness.” *Id.* at 688. “Judicial scrutiny of counsel’s performance must be highly
 17 deferential,’ and ‘a court must indulge a strong presumption that counsel’s conduct falls
 18 within the wide range of reasonable professional assistance.” *Knowles v. Mirzayance*,
 19 556 U.S. 111, 124 (2009) (citation omitted). In assessing prejudice, the court “must ask if
 20 the defendant has met the burden of showing that the decision reached would reasonably
 21 likely have been different absent [counsel’s] errors.” *Id.* at 696.

22 Petitioner raised the claim in Ground 17 in his first state habeas petition. The
 23 district court rejected the claim, and the Nevada Supreme Court affirmed. (Exs. 117 &
 24 159). The district court’s decision is the last reasoned state court decision, and the Court
 25 therefore considers its analysis in evaluating petitioner’s claim. See *Murray v. Schriro*,
 26 2018 WL 891266, at *17 (9th Cir. Feb. 14, 2018). In rejecting petitioner’s claim, the district
 27 court stated:

28

1 The court finds that no legitimate grounds for pre-trial dismissal were
 2 available to counsel. The court further finds that the facts supporting the
 3 charge, that Brown drove off from the scene of the shooting in the victim's
 4 car, would have been admissible as part of the res gestae of the crime.
 5 (Ex. 117 at 4).

6 The state courts' determination of this claim was not objectively unreasonable.
 7 Petitioner points to Beach's testimony at the preliminary hearing in which, when asked
 8 whether he gave the petitioner permission to take his car, he responded "I guess. I gave
 9 him the keys." (Ex. 3 (Tr. 43-44)). Petitioner also cites Beach's testimony later in the
 10 preliminary hearing when he said that petitioner did not point the gun at him while they
 11 were on the porch. (*Id.* at 51). Finally, petitioner cites part of the prosecutor's rebuttal
 12 argument in which he stated: "Ladies and gentlemen, you never have the right to use
 13 deadly force with a handgun." (Ex. 66 (Tr. 108-09)). All of this, he appears to argue,
 14 suggests that Beach voluntarily gave petitioner his car and therefore there was no
 15 larceny.

16 A defendant commits grand larceny of the person when he "[i]ntentionally steals,
 17 takes and carries away, leads away or drives away . . . [p]ersonal goods or property, with
 18 a value of \$650 or more, owned by another person." Nev. Rev. Stat. § 205.220(1)(a). The
 19 standard for binding over a defendant on a criminal charge is low; a "defendant may be
 20 bound over for trial if the evidence adduced is sufficient to establish probable cause that
 21 a crime has been committed and the defendant has committed it" and the "finding of
 22 probable cause may be based on slight, even 'marginal' evidence." *Sheriff v. Lyons*, 607
 23 P.2d 590, 591 (Nev. 1980). There was evidence adduced that petitioner took Beach's
 24 car from his person, after shooting him and possibly under threat of the gun. It was
 25 therefore not an abuse of discretion for the Justice Court to bind petitioner over on the
 26 larceny charge.

27 Nor was the state court objectively unreasonable in concluding that defense
 28 counsel was not ineffective for failing to file a motion to dismiss the larceny charge.
 Counsel testified at petitioner's postconviction hearing that he did not consider filing a
 motion to dismiss because there was evidence that petitioner had a car that was not his;

1 while he did consider a motion to sever, he concluded it was not likely to succeed as the
 2 alleged larceny was part of the same series of acts charged in the indictment. (Ex. 115 at
 3 22-23). Counsel's performance was not outside the wide range of reasonable
 4 representation. However, even if it were, petitioner cannot establish prejudice. Petitioner
 5 was acquitted of the larceny charge. Moreover, although petitioner argues that the
 6 admission of the evidence of the alleged larceny prejudiced him with respect to the other
 7 charges, the evidence would have come in regardless because it was part of the same
 8 criminal episode.

9 Petitioner is not entitled to relief on Ground 17.

10 VI. Ground 1A

11 In Ground 1A, petitioner asserts that his Sixth and Fourteenth Amendment rights
 12 were violated when the state court denied his habeas claim that he was improperly denied
 13 a jury instruction critical to his theory of the case. (ECF No. 19 at 9). Petitioner's argument
 14 is based on *Boyd v. State*, 995 P.2d 474 (Nev. 2000), which the Nevada Supreme
 15 Court decided after his conviction became final.

16 In rejecting this claim, the state trial held:

17 The focus of the hearing was on the Boyd decision. Brown took the
 18 position that Boyd altered the law. In Hill v. State, 98 Nev. 295, 647 P.2d
 19 370 (1982), the Court ruled that the defense requests not only that the
 20 defendant perceive a mortal threat but that the perception must be
 21 objectively reasonable as well. 98 Nev. at 297. Brown took the position that
 22 the Boyd Court repudiated Hill and held that the defense is entirely
 23 subjective. Thus, Brown argued that this court erred in refusing the
 24 instructions proffered by [counsel] at the trial.

25 The State took the position that Boyd did not alter the law of self-defense
 26 and that the decision concerned only the error in giving an inappropriate
 27 limiting instruction. Thus, the State took the position that the objective
 28 element of a claim of self-defense remains intact.

29 The court finds it unnecessary to resolve the debate concerning the
 30 significance of Boyd. In affirming the conviction, the Supreme Court ruled
 31 that this court did not err in rejecting the proffered instructions. That ruling
 32 is the law of the case. McNelton v. State, 115 Nev. ___, 990 P.2d 1263,
 33 1275 (1999); Flanagan v. State, 112 Nev. 1409, 1422, 930 P.2d 691, 699
 34 (1996) (propriety of jury instructions not revisited due to "law of the case.");
 35 Valerio v. State, 112 Nev. 383, 387, 915 P.2d 874, 876 (1996). Brown's
 36 conviction was final before Boyd was issued and thus that decision is not
 37 available to him.

1 This court also finds that Brown suffered no prejudice from the lack of the
 2 proffered instruction. Brown's mental state at the time of the killing was
 3 thoroughly explored and argued before the jury. The evidence at trial
 4 revealed that Brown took a loaded gun to an anticipated altercation. He shot
 5 two unarmed men. Brown chased one man across the park, shooting at
 6 him. The evidence that his hypoglycemia actually led him to reasonably
 7 perceive a mortal threat from these men was ambiguous at best. The court
 8 notes, however, that the evidence was skillfully presented and argued by
 9 [counsel] but the effect of the evidence was a conviction for second degree
 10 murder. This court is not persuaded that an additional instruction concerning
 11 the effect of the evidence would have altered the outcome.

12 (Ex. 117 at 4-6).

13 As discussed above, to obtain federal habeas relief based on an improper jury
 14 instruction, petitioner must establish that the instruction so infected the entire trial that the
 15 resulting conviction violates due process. *Masoner v. Thurman*, 996 F.2d 1003, 1006 (9th
 16 Cir.1993); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Henderson v. Kibbe*, 431 U.S. 145,
 17 154 (1977). The question is whether the instructional "error, in the whole context of the
 18 particular case, had a substantial and injurious effect on the jury's verdict." *Calderon v.*
 19 *Coleman*, 525 US. 141, 147 (1998). Where a petitioner alleges that the trial court refused
 20 to give an instruction, his burden is "especially heavy"; "[a]n omission, or an incomplete
 21 instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson*, 431
 22 U.S. at 155.

23 Petitioner's basic argument is that, in line with *Boykins*, he was entitled to a jury
 24 instruction that, in assessing whether a reasonable person would have perceived a threat,
 25 a "reasonable person" was one suffering from a diabetes-related insulin reaction. (ECF
 26 No.19 at 12). The import of *Boykins* is unclear, but it is unnecessary for this Court to
 27 decide. The state court concluded that petitioner was not prejudiced by the lack of such
 28 an instruction. This conclusion was not objectively unreasonable.

29 The jury was instructed to consider whether "a reasonable person in like
 30 circumstances would believe that such immediate danger exists." (Ex. 65 at 39). Thus,
 31 the jury was instructed to consider the petitioner's circumstances.¹³ The jury was

32 ¹³ The Court additionally notes that the instruction is substantially similar to one of several self-defense instructions
 33 approved by the Nevada Supreme in its decision *Runion v. State*, 13 P.3d 52 (Nev. 2000), which was issued after
 34 *Boykins*.

1 presented evidence that petitioner might have been suffering from an insulin reaction the
2 night of January 18, 1996, but that evidence was by no means conclusive. In light of the
3 evidence presented at trial, it was not objectively unreasonable for the state court to
4 conclude that petitioner was not prejudiced by the lack of an instruction tailoring the
5 reasonable person standard to petitioner's specific medical circumstances.

6 Petitioner is not entitled to relief on Ground 1A.

7 **Certificate of Appealability**

8 In order to proceed with an appeal, petitioner must receive a certificate of
9 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*
10 *Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); see also *United States v. Mikels*, 236 F.3d
11 550, 551-52 (9th Cir. 2001). Generally, a petitioner must make "a substantial showing of
12 the denial of a constitutional right" to warrant a certificate of appealability. *Id.*; 28 U.S.C.
13 § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must
14 demonstrate that reasonable jurists would find the district court's assessment of the
15 constitutional claims debatable or wrong." *Id.* (quoting *Slack*, 529 U.S. at 484). In order to
16 meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues
17 are debatable among jurists of reason; that a court could resolve the issues differently; or
18 that the questions are adequate to deserve encouragement to proceed further. *Id.* When
19 the defendant's claim is denied on procedural grounds, a certificate of appealability
20 should issue if the petitioner shows: (1) "that jurists of reason would find it debatable
21 whether the petition states a valid claim of the denial of a constitutional right"; and (2)
22 "that jurists of reason would find it debatable whether the district court was correct in its
23 procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000).

24 This court has considered the issues raised by petitioner, with respect to whether
25 they satisfy the standard for issuance of a certificate of appealability, and determines that
26 none meet that standard. The court will therefore deny petitioner a certificate of
27 appealability.

28

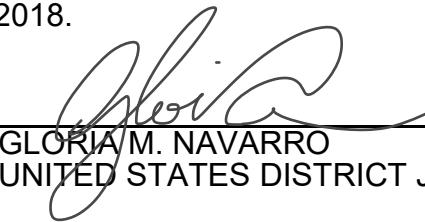
1 **Conclusion**

2 In accordance with the foregoing, IT IS ORDERED that the petition for writ of
3 habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 5 & ECF No. 19 at 9-15) is hereby
4 DENIED on its merits, and this action is DISMISSED with prejudice.

5 IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

6 The Clerk of the Court shall close this action and enter final judgment accordingly.

7 DATED THIS 26 day of March, 2018.

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9 
10 GLORIA M. NAVARRO
11 UNITED STATES DISTRICT JUDGE

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IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN LAMAR BROWN,

No. 29803

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

FILED

JUL 16 1999

JANEITE M. BLOOM
CLERK OF SUPREME COURT
BY *Chas*
DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction pursuant to a jury verdict of one count of murder in the second degree with the use of a deadly weapon, and one count of attempted murder with the use of a deadly weapon. Appellant Brian Lamar Brown was sentenced to life imprisonment with the possibility of parole for the second degree murder count, plus a like consecutive term for the use of a deadly weapon; and to a term of 48 to 240 months in prison for the attempted murder count, plus a like consecutive term for the use of a deadly weapon. All terms run consecutively.

Brown first argues that the prosecutor committed misconduct in his closing argument, thereby denying Brown a fair trial. Specifically, Brown asserts that the prosecutor committed misconduct by repeatedly misstating the fact that Brown intentionally shot the victims in the back; that the prosecutor misstated the testimony of two witnesses; that the prosecutor misrepresented forensic evidence; that the prosecutor misrepresented to the jury which attorney questioned witness Michelle Marlett; that the prosecutor argued facts not in evidence; and that the prosecutor made

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EXHIBIT 84

inappropriate disparaging remarks attempting to discredit Brown's expert witness.

We have previously held that "[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 viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Greene v. State*, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997) (quoting *United States v. Young*, 470 U.S. 1, 11 (1985)) (citations omitted).

After careful review of the record, we conclude that the prosecutor's statements during closing argument do not rise to the level of reversible misconduct. Hence, we conclude that the fairness of the trial was not affected.

Next, Brown argues that he should have been allowed to present reputation and opinion evidence, as well as specific act evidence, regarding the propensity for violence of the victims pursuant to NRS 48.045. Brown claims that the character of the victims is an essential element in a self-defense theory and, therefore, is an exception to the general rule against the admissibility of character evidence.

NRS 48.045 provides, in relevant part:

1. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion except:

...
(b) Evidence of the character or a trait of character of the victim of the crime offered by an accused, subject to the procedural requirements of NRS 48.069 where applicable, and similar evidence offered by the prosecution to rebut such evidence

However, character evidence must be relevant before it is admissible. We have held that "[t]he character of the deceased can only be brought in issue where the circumstances

are such as to raise a doubt whether the homicide was committed in malice or was prompted by the instinct of self-preservation.'" Coombs v. State, 91 Nev. 489, 490, 538 P.2d 162, 162 (1975) (quoting State v. Pearce, 15 Nev. 188, 191 (1880)).

Moreover, the form or proof of character evidence "may be established by testimony as to reputation or in the form of an opinion. The character of the victim cannot be established by proof of specific acts." Burgeon v. State, 102 Nev. 43, 46, 714 P.2d 576, 578 (1986) (footnote omitted). However, "specific acts which tend to show that the deceased was a violent and dangerous person may be admitted, provided that the specific acts of violence of the deceased were known to the accused or had been communicated to him." Id. at 45-46, 714 P.2d at 578. NRS 48.045(1)(b) permits the admission of the deceased victim's general character offered by the accused whether the accused had knowledge of the victim's character or not. See id.

Here, Brown concedes that he did not previously know the specific acts of violence of the victims that he sought to introduce. Thus, we conclude that the victim's specific acts of violence are not admissible pursuant to Burgeon to establish the reasonableness of Brown's fear or his state of mind. We conclude, however, that opinion testimony and evidence of the victim's general reputation were admissible. After review of the record, we conclude that Brown did not attempt to introduce opinion testimony or evidence of the victims' general reputation; therefore, there is no district court error to address.

Brown attempts to distinguish Burgeon by arguing that the character of the victims is an essential element of his claim of self-defense, thereby falling under NRS

48.055(2).¹ Brown cites to many authoritative treatises and case law from other jurisdictions to support his contention that character evidence of a victim is allowed in claims of self-defense.

We conclude that Brown's reliance on such authority is misplaced. Although the authority cited by Brown does suggest that pertinent character evidence of the victim is admissible when establishing self-defense, such evidence may only take the form of reputation and opinion testimony. Here, Brown attempted to introduce evidence of specific acts of violence of the victims. Thus, we conclude that due to the form of the evidence, it was inadmissible.

Furthermore, we conclude that the character of the victim is not an essential element of self-defense. See NRS 200.120. The accused need only establish that the victim was manifesting violent tendencies on that particular occasion. The accused need not establish that the victim had a violent character before that fatal point in time. Thus, we conclude that Brown's argument lacks merit.²

Third, Brown argues that the trial court committed reversible error when it refused to allow Brown's proposed jury instructions pertaining to self-defense. Brown also argues that the jury should have been instructed on the theories of defense of others and prevention of a felony.

¹NRS 48.055(2) provides:

In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof of specific instances of his conduct may be made on direct or cross-examination.

²We further note that some of the character evidence offered by Brown was not even relevant to the character trait of violence and was inadmissible on that ground.

"A defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it." *Ruland v. State*, 102 Nev. 529, 531, 728 P.2d 818, 819 (1986) (citations omitted). However, if a proffered jury instruction "misstates the law or is adequately covered by other instructions, it need not be given." *Barron v. State*, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989).

We conclude that the district court did not err by refusing to give Brown's proposed jury instruction because the jury instructions given by the district court accurately stated Nevada law. We also conclude that the district court properly refused to instruct the jury regarding defense of others and prevention of a felony because there was no evidence in the record to support such instructions.

Finally, Brown argues that his proposed jury instruction regarding the State's burden of proof is far clearer than that given by the district court; therefore, failure to use the proffered instruction warrants reversal.

"Jury instructions should be clear and unambiguous." *Culverson v. State*, 106 Nev. 484, 488, 797 P.2d 238, 240 (1990). Here, the jury was instructed that "[t]he State must prove all elements of the crime, including lack of justification, beyond a reasonable doubt." We hold that such instruction comports with Nevada law and properly instructs the jury that the State has the burden of proving that Brown

did not act in self-defense. Thus, we conclude that Brown's argument is without merit.

Accordingly, we

ORDER this appeal dismissed.

Young, J.
Young

Shearing, J.
Shearing

Leavitt, J.
Leavitt

cc: Hon. Connie J. Steinheimer, District Judge
Attorney General
Washoe County District Attorney
Robert Bruce Lindsay
Washoe County Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

99 AUG 13 P5 00

BRIAN LAMAR BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

CLERK
BY *J. Richards*

No. 29803

District Court Case No. CR960372

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Janette M. Bloom, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed as follows: "... we ORDER this appeal dismissed."

Judgment, as quoted above, entered this 16th day of July, 1999.



IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada, this 11th day of August, 1999.

Janette M. Bloom, Supreme Court Clerk

By:

J. Richards
Chief Deputy Clerk

jw

App.0043

1 CASE NO. CR96-0372

2 DEPT. NO. 4

FILED

9-24-96

JUDI BAILEY, Clerk

By VM Stone
Deputy Clerk

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4
5 IN THE SECOND JUDICIAL DISTRICT COURT

6 OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE

7 STATE OF NEVADA,

8 Plaintiff, Reporter: D. Phipps

9 vs.

10 JUDGMENT

11 BRIAN LAMAR BROWN,

12 Defendant.

13 _____ /
14 No sufficient cause being shown by the State of Nevada
15 as to why judgment should not be pronounced for the Defendant and
16 against the State and based upon the Not Guilty Verdict of the
17 Jury, the Court rendered judgment as follows:

18 That Brian Lamar Brown is adjudged Not Guilty of Grand
19 Larceny as charged in Count III of the Information.

20
21 Dated this 23th day of September, 1996.

22
23
24
25 Connie J. Steinheimer
26 DISTRICT JUDGE

App.0044

EXHIBIT 10