MARCUS CAMPBELL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 51021

RESPONDENT'S ANSWERING BRIEF

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

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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STATEMENT OF THE ISSUES

1. Whether there was prosecutorial misconduct during the opening statement.
2. Whether the district court abused its discretion when it allowed a transcript prepared by the state's gang expert to be provided to the jury as a listening aid.

STATEMENT OF THE CASE

On April 20, 2007 Marcus Campbell, hereinafter the defendant, was charged by way of a Grand Jury Indictment with Murder with Use of Deadly Weapon and With the Intent to Promote, Further, or Assist a Criminal Gang (Felony- NRS 200.010, 200.030, 193.165, 193.168, 193.169); Attempt Murder with use of a Deadly Weapon and with the Intent to Promote, Further, or Assist a Criminal Gang (Felony- NRS 200.010, 200.030, 193.330, 193.165, 193.168, 193.169); and Discharging Firearm at or into Vehicle with the Intent to Promote, Further, or Assist a Criminal Gang (Felony- NRS 200.285, 193.168, 193.169). On May 10, 2007 the defendant pled Not Guilty at the initial arraignment. On November 7, 2007 the defendant's trial began and lasted five days, culminating in the jury's findings of guilt on Counts I through

III.[1] At the penalty hearing scheduled on November 15, 2007, the jury returned with the verdict on Count I of Life in the Nevada Department of Corrections with Eligibility for Parole Beginning When a Minimum of Forty Years Has Been Served. On January 8, 2008 the defendant was sentenced on Count I to life with the possibility of parole, parole eligibility beginning when a minimum of 20 years has been served, plus an equal and consecutive term for the deadly weapon enhancement, on Count II to a minimum term of 72 months in the Nevada Department of Corrections and a maximum term of 240 months in the Nevada Department of Corrections with an equal and consecutive term for the criminal gang enhancement, to run concurrently with Count I, and on Count III to a minimum term of 12 months in the Nevada Department of Corrections and a maximum term of 60 months in the Nevada Department of Corrections plus an equal and consecutive term for the criminal gang enhancement, to run consecutively to the sentences in Counts I and II. On January 17, 2008 the Judgment of Conviction was filed. The Notice of Appeal was filed January 31, 2008. The State responds as follows.

STATEMENT OF THE FACTS

Marcus Campbell shot at Patrick Russum causing his death and injuries to bystanders and resulting in the defendant being charged, tried by a jury and convicted. At about 5:15 on January 28, 2007, in front of 833 and 839 Hassel, Marcus Campbell, the defendant, shot multiple rounds into a vehicle occupied by Devlon Mason, Antonio Randolph and the victim, Patrick Russum. See Trial Transcript (hereinafter TT) at Day 2, page 73, generally.[2] Thirty-one spent cartridges were found. See TT at Day 2, page 74, line 20. As the result of being struck by ten or eleven bullets, Patrick Russum, who had been seated in the back seat of the vehicle, died. See TT at Day 2,

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[1] On the Court's Order the defendant received a haircut prior to trial. Appellant's Appendix pg 7.

[2] Copies of all transcripts that are necessary to the Supreme Court's review of the issues presented on appeal shall be included in an appendix. NRAP Rule 30(b). Instead of preparing an appendix, Defendant has cited directly to the trial transcripts. As the initial burden to prepare an appendix rests with the appellant, the State will also cite to the trial transcripts.

page 76, line 1-4. The apparent motive for the shooting was that the street gang Squad Up, of which the defendant was a known member, believed that Patrick Russum had been involved in the death of one of its members. See TT at Day 2, page 78, generally. The murder sparked a rivalry between Squad Up and another gang, The Wood. See TT at Day 2, page 78, generally.

During the investigation, detectives discovered a video posted on MySpace which depicted two individuals, one of whom was determined to be the defendant, performing a rap song. See TT at Day 2, pages 80, 82, generally. The lyrics to that song, authored by the defendant, were later found on the other pictured individual's computer during the execution of a search warrant. See TT at Day 2, page 80-81, generally. Both the lyrics and the video contained threats to the victim and showed personal knowledge of him, stating that Patrick was in Arizona, where he in fact had been. See TT at Day 2, page 81, line 12-15.

The defendant was identified by the driver of the target vehicle, who saw the defendant as he was shooting. See TT at Day 2, page 76, lines 18-22. The driver first identified the defendant by his street name, Muck, and then picked him out of a photo line-up. See TT at Day 2, page 76, lines 18-22. The defendant, additionally, was seen in the neighborhood earlier in the day by a neighbor who described the defendant as "hyper... angry about something." TT at Day 2, page 78, line 9. In addition, the defendant spoke to another Squad Up gang member twice after the shooting and admitted to being the triggerman. See TT at Day 2, page 79, line 5-6.

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ARGUMENT

I

THE STATE DID NOT COMMIT MISCONDUCT, OR VIOLATE THE DEFENDANT'S RIGHT TO CONFRONTATION, DURING OPENING STATEMENTS BY REFERRING TO ANGELA CONWAY'S EXPECTED TESTIMONY

If a prosecutor overstates in his opening statement what he is able to prove at trial, misconduct does not lie unless the prosecutor makes the statement in bad faith. Rice v. State, 113 Nev. 1300, 989 P.2d 262, 270 (1997). "Many things might happen during the course of the trial which would prevent the presentation of all the evidence described in advance. Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given." Frazier v. Cupp, Warden, 394 U.S. 731, 736, 89 S.Ct. 1420, 1423 (1969). However, if the court determines that there has been prosecutorial misconduct in the presentation of evidence, and that the statement violated the defendant's right of confrontation, the violation "is subject to the harmless error analysis." Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986).

There Was No Prosecutorial Misconduct.

A prosecutor has a duty to refrain from stating facts in an opening statement that cannot be proven at trial. Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991); Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991); Garner v. State, 78 Nev. 366, 374 P.2d 525 (1962) However, if the statement is made with a good faith belief that the evidence to support it will be admitted at trial, there is no misconduct. Rice, 113 Nev. 1300. The standard of review for prosecutorial misconduct rests upon the defendant showing "that the remarks made by the prosecutor were 'patently prejudicial.'" Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995), citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993). Prosecutorial statements are reviewed in context for effect. Thomas v. State, 120 Nev. 37, 83 P.3d 818, 825 (2004).

In this case, during opening arguments that State made the short remark, "You'll hear from Angela Conway that in 2006, they had sent Patrick Russum to Arizona because they were afraid for him because he had been receiving threats." TT at Day 2, page 81, lines 14-16. This comment was made in reference to the MySpace video which was presented to the jury and which referred the victim, "I hear you're in Arizona, I'll call you long distance." TT at Day 2, page 81, lines 12-13. In fact, during testimony, the victim's mother, Angela Conway, stated that her son had been in Arizona until Thanksgiving. See TT at Day 3, page 21, lines 4-8.

The statement made during opening arguments was made in good faith and was not patently prejudicial. The defense had not raised an objection to Angela Conway's proposed testimony before the day of her testimony and the court had not made its ruling that the witness must limit her testimony to what she heard on a specific day. See TT at Day 3, page 13, lines 13-14. The ruling, during trial, that the witness could not refer to any previous threats in her testimony made it so that the reason for the victim's stay in Arizona could not be introduced. Id. Because the prosecutor, at the time of opening statements, believed that the reason for the victim's stay in Arizona would be introduced during trial, the short remark during opening statements was not inappropriate. Because the statement was made in good faith, it was not prosecutorial misconduct.

a) Even if the Court Finds Prosecutorial Misconduct, the Error was Harmless.

Where the Court concludes Petitioner's right of confrontation was violated by the prosecutor's opening statement, the violation is subject to the harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986). In determining whether any prosecutorial misconduct was prejudicial, the court considers "the duration of the prosecutor's reference to the never-admitted testimony, the emphasis placed upon that testimony by the prosecutor, the strength of the other evidence presented... the importance of the never-admitted testimony to the

prosecutor's case, and the effectiveness of limiting instructions to protect the defendant's constitutional rights." Hicks v. Straub, 239 F. Supp. 2d 697, 709 (2003) citing Frazier, 394 U.S. at 734. In addition, the Court noted, where "a proper limiting instruction has been given not every variance between the advance description and the actual presentation constitutes reversible error." Id. at 736. In Frazier, the Court found no prejudicial error where the Judge had cautioned "the jurors that they 'must not regard any statement made by counsel in your presence during the proceedings concerning the facts of this case as evidence,'" and the comment was made in passing during an opening statement. Id. at 734.

Here, the statement made was a mere three lines nestled in an opening statement that began the five day trial. See TT at Day 2, page 81, lines 14-16. The state's case did not rest upon the information or in fact have any reliance at all on the non-admitted portion, nor was it particularly harmful to the defendant's case in that the information that was pertinent, that the victim had been in Arizona, came out during the examination of victim's mother. See TT at Day 3, page 21, lines 7-8. There was virtually no time spent discussing the non-admitted evidence and the State's case did not rely on it. In addition, the Court, both at the beginning and the end of the presentation of evidence provided the jury with limiting instructions. The first was presented on the first day of evidence,

> "Certain things are not evidence and you must not consider them as evidence in deciding the facts of this case. They include statements and arguments by the attorneys, questions and objections of the attorneys, testimony I instruct you to disregard and anything you may see or hear if the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses."

TT at Day 2, page 69, lines 14-19. The second was provided at the end of trial as jury instruction number 31, "Statements, arguments and opinions of counsel are not evidence in the case." TT at Day 5, page 18, lines 2-4. The combination of these two statements provided more guidance and reminder to the jury than did the limiting

instruction found to be sufficient in Frazier, while the statement made to the jury was innocuous.

Because the Prosecutor's statement was made in good faith, was not prejudicial and was limited by the judge's instructions, there was not reversible error.

II

THE JURY DID NOT USE A TRANSCRIPT AS A LISTENING AID

The defendant asserts that the transcript was provided to the jury, however he is incorrect. He is correct that the judge did not rule on the objection in the record. However the defendant has not carried the burden to show that the transcripts were distributed to the jury, and it is apparent from the trial transcript that they were not. The prosecutor informed the judge that she had had copies of the transcript prepared by the expert witness, and asked "that the jurors be allowed to follow along as he [went] through [his] testimony" and that they would be collected at the end. TT at Day 4, pg 89. After that the defense attorney did not object, but did request a bench conference which was granted. Id. After the bench conference the State continued questioning, without any notation that the transcripts had been distributed. Id. at 90. Throughout the trial transcript where there was action performed which provided information to the jury, as the distribution of transcripts would have done, there is a notation of the conduct, such as when the video was played. See TT at Day 4, pgs 90-98 generally. In addition, for the State to make such a request, have a bench conference, and then proceed to pass out the transcripts in silence without explaining to the jury what was being provided or what it was to be used for would be unusual at best. In addition, the judge did not make any kind of limiting instruction at the time that the transcripts were allegedly distributed, which would have been done without any request from the attorneys. More importantly, the format of questioning which immediately followed the request to introduce the transcript to the jury makes it clear that the transcripts were not actually passed out. When the State resumed questioning, the witness was asked specifically to indicate what the individuals were

saying, "[n]ot verbatim what the individuals on the video [were] saying, but what they [were] referring to or what some of the terminology means without quoting them verbatim in the video." Id. at 90. The fact that the witness was instructed not to verbatim quote the video makes it clear that the judge did not allow the transcripts to be passed out because if the judge had allowed the jury to see the transcripts, then the witness would have been able to refer to the transcripts and make verbatim quotes from the video since the jury would have the verbatim transcript. It is unreasonable to expect that if the jury had the transcript to refer to during the discussion of the video that the witness would not be allowed to state specifically what the individuals in the video were saying. Finally, at the conclusion of the detective's testimony and the evening recess the jury was not given an instruction to leave the transcript on their chairs with their notepads. Id. at 121. In addition, there is no indication anywhere in the trial transcript that the documents in question were ever recollected, and it is beyond credulity to believe that the transcripts were passed out and recollected in complete silence, without any type of mention or comment that that is what was being done. Id. at 89-121. In addition, had the transcript been distributed to the jury, it would have been marked as a demonstrative exhibit, though not introduced into evidence, and there would be a record of such markings in the trial transcript. Because after the State's request to distribute the detective's formulation of what was being stated in the video there was not further conversation about them or reference to them on the record, it is clear that the transcripts were never actually given to the jury, thus the defendant's claim is without merit. However, should the Court not feel that the trial transcript alone provides a sufficient record for the Court to rely on in denying the claim, the State requests a remand to the district court for an evidentiary hearing, where in the state will prove beyond a reasonable doubt that the transcripts were not given to the jury members.

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CONCLUSION

The defendant's conviction should be affirmed because there was no prosecutorial misconduct during opening statements and the transcript of the MySpace video was not passed out to the jury during the trial and therefore the defendant's second argument is moot.

Dated this 25th day of July, 2008.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 25th day of July, 2008.

Respectfully submitted,

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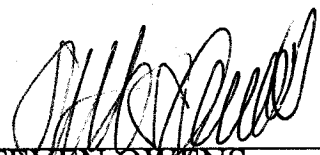
BY 

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 25th day of July, 2008.

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