

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
May 03 2010 04:23 p.m.
Tracie K. Lindeman

NORMAN K. FLOWERS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 53159

Direct Appeal From A Judgment of Conviction,
Amended Judgment of Conviction and Order Denying Motion for New Trial
Eighth Judicial District Court
The Honorable Stewart Bell, District Judge
District Court No. 52733

APPELLANT'S REPLY BRIEF

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1 **I. INTRODUCTION**

2 Appellant Flowers is entitled to a new trial based upon the numerous violations of his
3 constitutional rights that took place at his trial. Each of the violations is set forth at length
4 in the Opening Brief. The State's Answering Brief fails to establish the validity of the
5 judgment. Flowers is therefore entitled to relief.

6 **II. REPLY TO THE STATE'S ARGUMENT**

7 **A. The district court violated Flowers' constitutional rights by allowing the**
8 **State to introduce unrelated prior bad act testimony.**

9 Flowers contends that his rights to due process and right to a fair trial were violated
10 because the district court allowed the State to introduce prior bad act evidence of another
11 murder which was not relevant and which was highly prejudicial. His rights were further
12 violated because the State presented bad act evidence in excess of that permitted by the
13 district court's order. In response, the State argues that evidence of the Marilee Coote
14 murder was properly admitted because the two murders were sufficiently similar and that the
15 probative value of the Coote murder was not outweighed by its prejudicial effect as such
16 evidence was needed to prove the absence of consent in Sheila's murder. Answering Brief
17 at 13-15.¹ The State also contends that the evidence produced at trial did not exceed the
18 bounds allowed by the district court's order. Answering Brief at 17-18.

19 The State's argument that the evidence of Coote's murder was properly admitted
20 under the identity exception to NRS 48.045(2) is without merit. Despite some marginal
21 similarities, the State failed to show any unique or signature similarities between the two
22 murders sufficient to satisfy the identity exception. The identity exception to NRS 48.045(2)
23 generally involves situations where a positive identification of the perpetrator has not been
24 made, and the offered evidence establishes a signature crime so clear as to establish the

25 ¹The State also contends that Flowers has conceded there was clear and convincing evidence
26 to establish he committed the Coote murder because he did not argue so in the Opening Brief.
27 Answering Brief at 13. This is untrue. Flowers cited the three prong test for admissibility and
28 stated, "Flowers submits that the State failed to establish the admissibility of the Coote
murder under these three prongs." Opening Brief at 19. Flowers' intent is to challenge
admissibility on all three prongs but focused his arguments on the last two prongs.

1 identity of the person on trial . Mortensen v. State, 115 Nev. 273, 280, 986 P.2d 1105, 1110
2 (1999) (citing Canada v. State, 104 Nev. 288, 756 P.2d 552 (1988)).

3 When the purpose for which such evidence is offered is that of identifying the
4 defendant as the perpetrator of the charged offense through showing a modus
5 operandi common to the charged and uncharged offenses, particular care must
6 be exercised to insure that the inference of identity, upon which probative
7 value depends, is of significant force. It is apparent that the indicated
8 inference does not arise from the mere fact that the charged and uncharged
9 offenses share certain marks of similarity, for it may be that the marks in
10 question are of such common occurrence that they are shared not only by the
11 charged crime and defendant's prior offenses, but also by numerous other
12 crimes committed by persons other than defendant. On the other hand, the
13 inference need not depend upon one or more unique or nearly unique features
14 common to the charged and uncharged offenses, for features of substantial but
15 lesser distinctiveness, although insufficient to raise the inference if considered
separately, may yield a distinctive combination if considered together. Thus
it may be said that the inference of identity arises when the marks common to
the charged and uncharged offenses, considered singly or in combination,
logically operate to set the charged and uncharged offenses apart from other
crimes of the same general variety and, in so doing, tend to suggest that the
perpetrator of the uncharged offenses was the perpetrator of the charged
offenses. The important point to be made is that, when such evidence is
introduced for the purpose of proving the identity of the perpetrator of the
charged offense, it has probative value only to the extent that distinctive
"common marks" give logical force to the inference of identity. If the
inference is weak, the probative value is likewise weak, and the court's
discretion should be exercised in favor of exclusion.

16 Mayes v. State, 95 Nev. 140, 142, 591 P.2d 250, 251-52 (1979) (quoting People v. Haston,
17 444 P.2d 91, 99-100 (Cal. 1968)).

18 When crimes of a certain type are committed in much the same manner, it is essential
19 that some distinctive characteristics be demonstrated before evidence of other crimes is
20 admitted to prove identity. Mayes, 95 Nev. at 143, 591 P.2d at 252. In Mayes, a prostitute
21 was charged with grand larceny for allegedly stealing the victim's valuables after having
22 sexual intercourse with the man. Id. at 141. During the trial the State called two witnesses
23 who claimed that the prostitute had also slept with them and stole their valuables after sex.
24 Id. This Court held it was improper to admit evidence of the other crimes because of the lack
25 of any similar characteristics between the three thefts the defendant allegedly committed that
26 would differ from how any other theft by a prostitute would occur. Id. Similar to Mayes, the
27 State failed to prove any similarities between Sheila's and Coote's murder/rapes that are
28 distinctive from what would be expected in any other murder/rape. The State contends that

1 there are sufficient similarities because both victims were found face up, there was evidence
2 of strangulation and blunt force trauma and both were victimized in their homes. Answering
3 Brief at 14-15. There is no evidence that these characteristics are distinctive to these two
4 murders. Many murder/rape cases could share these same similarities. Also, there were
5 substantial differences between the two incidents. See Opening Brief at 19-20. The district
6 court erred in admitting evidence of the Coote murder.

7 The State's argument that evidence regarding Coote's murder was more probative
8 than prejudicial because it was needed to prove lack of consent is without merit. Answering
9 Brief at 15. First, the evidence was allowed for the limited purpose of proving identity, not
10 lack of consent. 2 App. 318-19. Second, the State's propensity argument is exactly what the
11 rule was designed to prevent. The State cannot argue and the jury cannot convict Flowers
12 on the idea that if he committed a crime on one occasion, he must have committed it on this
13 occasion too. NRS 48.045(2). Lastly, the probative value of the Coote murder was
14 substantially outweighed by the danger of unfair prejudice, even if the evidence was only
15 used for identity purposes.

16 Evidence of other crimes has a strong probative value when there is sufficient
17 evidence of similar characteristics of conduct in each crime to show the
18 perpetrator of the other crime and the perpetrator of the crime for which the
19 Mayes, 95 Nev. at 142, 591 P.2d at 251. The probative value of the Coote murder was very
20 low considering there were no distinctive similarities between the two crimes. By its very
21 nature, evidence of another murder is highly prejudicial. Under these circumstances, the
22 district court abused its discretion in finding that the probative value of the evidence was not
23 outweighed by the danger of unfair prejudice to Flowers.

24 The State's last contention is also without merit. It argues conclusory that the
25 evidence presented during trial did not exceed the court's order. The district court ruled:

26 You can put on the Coote case to show intent to and to show identity by
27 talking to the detective about the similarities in the case, the nurse and the
28 coroner/medical examiner about the way she died, the similarities in vaginal
tearing, and the DNA profile person, and then that's as far as the State is
going.

1 2 App. 318-19. In response, the State contends that the testimony of the apartment manager
2 who found Coote's body, 2 App. 422-23; a neighbor of Coote's who claimed to have seen
3 Flowers while police officers were at Coote's apartment, 3 App. 509; and a friend of Coote's
4 who testified that Coote did not watch pornography and did not have a boyfriend. 2 App.
5 444, was necessary because Flowers claimed he had consensual sex with Sheila. The district
6 court's order was clear that testimony regarding the Coote murder was to be limited to the
7 detectives and the nurse. The State's perception of what it believes is necessary to prove a
8 case should not be allowed to trump a clear order of the court.

9 The district court erred in admitting the evidence regarding the Coote murder. As
10 stated in the Opening Brief, the evidence against Brass was as equally strong. Thus, the
11 prejudice to Flowers was great as there is a substantial likelihood that he would not have
12 been convicted had evidence concerning the Coote case not been introduced. The judgment
13 of conviction should therefore be reversed.

14 **B. The district court violated Flowers' constitutional rights by allowing**
15 **testimony to be introduced in violation of Crawford v. Washington and**
Melendez-Diaz v. Massachusetts.

16 Flowers contends that his rights to due process, confrontation and cross-examination
17 were violated because the district court allowed the State to introduce testimonial hearsay
18 evidence. In response, the State argues that testimony presented by experts concerning the
19 findings of other experts does not violate the Confrontation Clause. The State first argues
20 that testimony from Dr. Simms, concerning the autopsy findings, was permissible because
21 he formed his own independent opinion after reviewing the supporting materials. Answering
22 Brief at 18. The record refutes this argument. Dr. Simms began his testimony by explaining
23 the credentials of Dr. Knoblock and then testified that Dr. Knoblock conducted the autopsy
24 on Sheila on March 25, 2005. 2 App. 350. He testified that Dr. Knoblock prepared an
25 autopsy report, took photos, discussed extensive details of Dr. Knoblock's examination, and
26 presented Dr. Knoblock's findings. 2 App. 350-55. For example, Dr. Simms testified that
27 Dr. Knoblock found that Sheila had been asphyxiated, found bruising on her abdomen, and
28 found lacerations in the vaginal area. 2 App. 350. Although Dr. Simms also testified as to

1 his own observations from photos, there was no foundation for the admission of these photos
2 as Dr. Simms was not present when the photos were taken and had no personal knowledge as
3 to whether they were actually photos of Sheila. 2 App. 350. Dr. Simms also presented direct
4 testimony about Dr. Knoblock's conclusions. 2 App. 351, 354. Similar testimony about Dr.
5 Knoblock's examinations and findings in the Coote case was also introduced by the State.
6 2 App. 355-60. Dr. Simms directly presented Dr. Knoblock's findings to the jury. 2 App.
7 359-60. The State also contends that DNA expert Paulette testified at trial regarding her own
8 findings in Sheila's case and the Coote case. Answering Brief at 18. The record, however,
9 establishes that Paulette also testified about findings by Thomas Wahl, even though Wahl did
10 not testify at trial. 3 App. 551-53.

11 The State next argues that the DNA report was not testimonial. Answering Brief at
12 21-22. It cites to People v. Johnson, 394 Ill. App.3d 1027, 1037-39 (2009) as support.
13 Answering Brief at 41. No other post-Melendez-Diaz authority is cited. Other post-
14 Melendez-Diaz case authority is to the contrary and holds that DNA findings by experts who
15 do not testify at trial are inadmissible as a violation of the defendant's right of cross-
16 examination and confrontation. See Michigan v. Payne, 774 N.W.2d 714, 725-27 (Mich.
17 App. 2009) (finding violation under Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)
18 and reversing conviction under a plain error standard); Hamilton v. Texas, 300 S.W.3d 14,
19 19-22 (Ct. App. Tex. 2009) (finding a confrontation violation based upon one expert's
20 testimony as to the findings of another expert who did not testify, but the error was harmless).

21 The State next argues that the coroner's reports were not testimonial and that the
22 Flowers' rights of confrontation and cross-examination were not violated by the admission
23 of testimony as to Dr. Knoblock's findings despite the absence of his testimony at trial.
24 Answering Brief at 23-25. These arguments are without merit. Several other courts have
25 examined autopsy reports and testimony in light of Melendez-Diaz and have concluded that
26 they these are testimonial reports for which Crawford v. Washington is applicable. See State
27 v. Locklear, 681 S.E.2d 293, 304-05 (N.C. 2009); Com. v. Avila, 912 N.E.2d 1014 (Mass.
28 2009) (expert witness's testimony must be confined to his own opinions); Wood v. State, 299

1 S.W.3d 200, 212-13 (Tex. App. 2009) (finding the autopsy report at issue to be testimonial
2 and finding that an expert could not testify about the results of an autopsy because the
3 medical examiner who performed the autopsy did not testify and the expert could not disclose
4 the facts supporting his opinion); Martinez v. State, 2010 WL 1067560 (Tex. App.
5 3/24/2010) (finding an autopsy report to be testimonial and rejecting the State’s business
6 record argument and finding that an expert could not disclose facts from the autopsy report);
7 People v. Dongo, 176 Cal.App.4th 1388, 1398-1404 (Cal. App. 2009), cert. granted 220 P.3d
8 240 (Cal. 2009) (finding that an autopsy report was testimonial and that the medical examiner
9 who testified at trial was not qualified to do so because he was not a percipient witness to the
10 autopsy and because he based his opinion upon the contents of another doctor’s report as
11 “substituted cross-examination is not constitutionally adequate”). See also Seaman,
12 Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion
13 Testimony, 96 Geo. L.J. 827, 847–48 (2008) (If the expert's opinion is only as good as the
14 facts on which it is based, and if those facts consist of testimonial hearsay statements that
15 were not subject to cross-examination, then it is difficult to imagine how the defendant is
16 expected to demonstrate the underlying information is incorrect or unreliable.) The courts
17 have rejected the business record argument proffered here by the State. The authority cited
18 the State, however, all pre-date Melendez-Diaz and is therefore of negligible worth in light
19 of the Supreme Court’s rejection of this argument. See Melendez Diaz, 129 S.Ct. at 2538-40
20 (“Documents kept in the regular course of business may ordinarily be admitted at trial despite
21 their hearsay status. . . . But that is not the case if the regularly conducted business activity
22 is the production of evidence for use at trial.”).

23 Finally, the State asserts that the violation of Flowers’ constitutional rights was mere
24 harmless error. Answering Brief at 27. This argument is without merit. The findings of the
25 coroner as to the cause of death and the findings of the DNA expert concerning the presence
26 of Flowers’ DNA were crucial portions of the State’s case. Indeed, had this testimony been
27 excluded, the State would have essentially no evidence against Flowers. This evidence had
28 a significant impact upon the jury’s verdict and a new trial is therefore mandated.

1 **C. The district court violated Flowers’ constitutional rights by admitting as**
2 **evidence a statement given by Flowers to detectives following invocation**
3 **of his right to remain silent and right to counsel.**

4 Flowers contends that his rights to due process, a fair trial, to remain silent and to
5 counsel were violated because the district court allowed the State to introduce evidence of
6 statements made by Flowers at a time when he was represented by counsel, and had invoked
7 his right to remain silent, in a case for which the conviction here serves as an aggravating
8 circumstance. His constitutional and statutory rights were also violated because the district
9 court prohibited Flowers from introducing his whole statement to the police after the State
10 had introduced a portion of the statement.

11 The State first argues in response that Flowers’ Sixth Amendment right to counsel was
12 not violated. Answering Brief at 27 (citing Kaczmarek v. State, 120 Nev. 314, 326, 91 P.3d
13 16, 24 (2004); Fellers v. United States, 540 U.S. 519 (2004)). The State also notes that the
14 Sixth Amendment right to counsel is offense specific and does not attach to investigations
15 of unrelated cases. Answering Brief at 28 (citing Kaczmarek and McNeil v. Wisconsin, 501
16 U.S. 171, 175 (1991)). The State’s response fails to address the primary issue presented by
17 Flowers: did the district court err in admitting evidence of Flowers’ statement to police
18 officers because he was in custody, had been formally charged, and was represented by
19 counsel for murder charge in the case involving Coote, at the time he was interrogated by
20 police officers in this case, in light of the fact that the State was seeking the death penalty
21 against Flowers in the Coote case and the conviction in this case is alleged as an aggravating
22 circumstance in the Coote case. Flowers recognizes the general rule stated by the State in
23 its Answering Brief, that police officers may interrogate a person who is in custody for an
24 offense which has not yet been charged, but he submits that this general rule does not apply
25 in a case such as this because the conviction for murder in this case is an aggravating
26 circumstance in the other case. The fact that this case is used as an aggravating circumstance
27 for the Coote case distinguishes it from Kaczmarek, Fellers and McNeil.

28 The State next argues that the district court did not abuse its discretion by prohibiting
Flowers from introducing his entire statement to detectives after the State introduced a

1 portion of that statement. Answering Brief at 28. The State claims that the district court
2 properly prohibited reference to Flowers’ statement that he would not decide whether to
3 answer the detectives’ question until he spoke with his attorney, 3 App. 534, because
4 reference to his counsel implicated the Sixth Amendment. Answering Brief at 28. This
5 decision, however, was a strategic call that properly belonged to Flowers and his counsel, not
6 the district court. The cases and statute cited by the State, at page 29 of the Answering Brief,
7 correctly hold that the *State* or prosecution may not introduce evidence of a defendant’s
8 silence or desire to speak with his attorney. See Doyle v. Ohio, 426 U.S. 610, 619 (1976);
9 Griffin v. California, 380 U.S. 609, 615 (1965) (the Fifth and Fourteenth Amendments forbid
10 comment by the prosecution on the accused’s silence) ; and Diomampo v. State, 185 P.3d
11 1031, 1039-40 (Nev. 2008) (“the prosecution is forbidden at trial . . .”). None of these cases,
12 however, address the issue of whether a defendant may introduce evidence that he wished
13 to talk with his attorneys before answering additional questions presented by the detectives.
14 It was a matter of sound trial strategy for trial counsel to conclude that this testimony was
15 less prejudicial than allowing the evidence to simply reflect that officers attempted to
16 question Flowers and he refused cooperation without any explanation. The district court
17 abused its discretion by substituting its own judgment for that of defense counsel as to this
18 matter of trial strategy. The State fails to address this issue.

19 The State next argues that Flowers was not prejudiced by the district court’s ruling.
20 Flowers was prejudiced by the district court’s decision because the jury was precluded from
21 hearing his statement that he might be willing to discuss Sheila’s death, but he wanted to talk
22 with his attorney before doing so. 3 App. 669-71. He was further prejudiced because during
23 closing arguments the State repeatedly emphasized Brass’s cooperation with the detectives
24 and it contrasted Flowers lack of cooperation and evasiveness with police officers, 3 App.
25 595, 612, 613. Had Flowers been allowed to introduce the entirety of his statement, these
26 arguments would have had far less impact upon the jury. As a matter of fundamental fairness
27 under the state and federal constitutions, Flowers was entitled to present this evidence and
28 the district court’s exclusion of this evidence warrants reversal of the conviction.

1 **D. The district court violated Flowers’ constitutional rights by admitting**
2 **gruesome photographs from the autopsy.**

3 Flowers contends his rights to due process and right to a fair trial were violated
4 because the district court allowed the State to introduce gruesome photos of body parts
5 dissected by the medical examiner during the autopsy. The State argues that the photos were
6 highly probative as they were necessary to show the similarities between the deaths of Sheila
7 and Coote. Answering Brief at 30. This argument is without merit. First, the State fails to
8 explain how photos of Sheila’s tongue were necessary considering the fact that Dr. Simms
9 did not mention the photos during his testimony. 2 App. 354. Second, no photos of Coote’s
10 autopsy were introduced to show any similarities of injuries which the jury could have used
11 to compare photos. Lastly, the State fails to state why cropping the photos to reduce their
12 inflammatory nature would have rendered them less useful. The State contends in conclusory
13 fashion that cropping the photos would not have allowed the jurors to see the pattern of
14 injuries. Answering Brief at 31. The photo was used to illustrate the hemorrhaging inside
15 the neck. Cropping out Dr. Simms’ hands folding back the flaps of the neck would not have
16 prohibited Dr. Simms from testifying as to the pattern of injuries inside the neck.

17 Next, the State contends that nothing in this Court’s opinion in Dearman v. State, 93
18 Nev. 364, 369-70, 566 P.2d 410 (1977) compels a judge to view the photos outside the
19 presence of the jury before ruling on its admissibility. Answering Brief at 30. In Dearman,
20 this Court did not explicitly state that a trial judge must review each photo before
21 determining its admissibility. However, it is clear that this Court put a lot of weight on the
22 trials court’s careful review of the photos before ruling on admissibility.

23 The trial judge exercised caution and took the intermediate step of determining
24 whether the probative value of the proffered evidence outweighed any
25 prejudicial effect. The trial court considered all of the objections to the
26 photographs, rejecting several and admitting others.

27 Id. Common sense dictates that a judge could not properly determine if the probative value
28 of potential evidence is outweighed by any prejudicial effect without looking at the evidence
first. There is “no other way for a court to make this important decision involving prejudice
and redundancy.” See Curtin v. United States, 489 F.3d 935, 957 (9th Cir. 2007) (a judge

1 must read every line of a inflammatory story in a child pornography case in order for its
2 weighing discretion to be properly exercised and entitled to deference on appeal).

3 Lastly, the State argues that the district court did not abuse its discretion in light of Dr.
4 Simms testimony that he used the minimum amount of photos necessary to make his point.
5 Answering Brief at 31. This argument is without merit. The State cites to no authority which
6 supports its position that the district court may abandon his decision making role to the
7 witness. Contrary to the State's position, the trial judge's decision to admit evidence over
8 objection is not entitled to deference unless the trial court engages in the proper weighing
9 process. See Seim v. State, 95 Nev. 89, 97, 590 P.2d 1152, 1157 (1979).

10 The district court failed to subject the autopsy photos to a proper balancing test before
11 ruling on admissibility. Although gruesome photos which help ascertain the truth may be
12 admissible, there is no per se rule allowing for their admissibility. See Shuff v. State, 86
13 Nev. 736, 739-40, 476 P.2d 22, 24-25 (1970). The district court abused its discretion by
14 admitting the photos by abandoning his discretion to the witness. The probative value of the
15 photos were outweighed by its prejudicial effect. This highly inflammatory evidence fatally
16 infected the trial and deprived Flowers of his right to a fair trial. The State fails to prove
17 such error was harmless beyond a reasonable doubt. Thus, the judgment must be reversed.

18 **E. The district court violated Flowers' constitutional right to present**
19 **evidence by precluding Kinsey from testifying that the victim told him she**
was seeing someone named "Keith."

20 Flowers contends his rights to due process, a fair trial, and to present evidence were
21 violated because the district court prohibited him from introducing evidence that Sheila's
22 boyfriend knew of her relationship with Flowers. Specifically, Flowers asserts the district
23 court erred by excluding the testimony of Kinsey. Flowers wished to elicit testimony from
24 Kinsey that he was aware of the fact that Sheila was dating someone named Keith (which is
25 Flowers' middle name and the name he used). 3 App. 541. The district court sustained the
26 State's hearsay objection to this testimony, after noting that Kinsey did not ever personally
27 observe Sheila and Keith together as Kinsey was incarcerated during the relevant time. 3
28 App. 541-43. The decision to exclude Kinsey's testimony was an evidentiary error and also

1 deprived Flowers of his right to due process under the state and federal constitutions.

2 In his Opening Brief, Flowers noted that the testimony he was precluded from
3 introducing was essentially the same as that which was introduced against him by the State,
4 through witness Ameia Fuller, who testified that she was aware that Sheila and Brass had a
5 relationship with each other. In response, the State argues that Fuller's testimony was not
6 introduced for the truth of the matter asserted, but was instead introduced to show that Fuller
7 told police officers about the relationship between Sheila and Brass. Answering Brief at 32.
8 This argument is without merit. First no limiting instruction was given as to Fuller's
9 testimony. 2 App. 493. Second, Fuller testified directly that Sheila and Brass were involved,
10 and did not merely state that she told officers that Sheila told her she was friends with Brass.
11 2 App. 493. Third, the State argued in closing arguments that Brass and Sheila were
12 involved in a relationship, and based that argument upon Fuller's testimony, thus refuting the
13 State's claim here that the testimony was not introduced for this purpose. 3 App. 594.
14 Finally, the fact that Fuller told officers of a relationship between Brass and Sheila was
15 irrelevant and immaterial, so the evidence could not have been introduced for that purpose.
16 Leonard v. State, 117 Nev. 53, 74 n.14, 17 P.3d 397, 411 n.14 (2001); Zemo v. State, 646
17 A.2d 1050, 1053 (Md. Ct. Spec. App. 1994)..

18 The State next contends that Kinsey's testimony was not admissible because it was
19 unreliable, and in the alternate, if admissible, the decision to exclude the evidence was
20 harmless error. Answering Brief at 31-33. These arguments are without merit. First the
21 State argues that this case can be distinguished from DePetrus v. Kuykendall, 239 F.3d 1057,
22 1062 (9th Cir. 2001). Answering Brief at 33. The State argues that the evidence in Deptris
23 is different from Kinsey's proffered testimony because in Deptris, the evidence went to the
24 heart of the defense and was reliable. Answering Brief at 33. The State misunderstands the
25 reason for citing Depetris. Flowers cites Depetris for the purpose of illustrating when
26 evidentiary errors rise to the level on a constitutional error. In Depetris, the admissibility of
27 the evidence was not at issue and reliability was never discussed. Depetris, 239 F.3d at 1061-
28 62. The State's attempt to distinguish this case is not persuasive. This contention is equally

1 unpersuasive to the extent it is construed as stating the error in Flowers' case does not rise
2 to a constitutional violation. The State next argues that Chambers is not applicable to this
3 case because Chambers was limited to the "facts and circumstances" of that case. Answering
4 Brief at 33, n. 12. This argument is without merit. A comparison of this case indicates it is
5 sufficiently similar to Chambers to establish a constitutional violation on Flowers' right to
6 due process.

7 "[W]here constitutional rights directly affecting the ascertainment of guilt are
8 implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."
9 Chambers v. Mississippi, 410 U.S. 284, 302 (1973). In Chambers, the trial court excluded
10 three of the defendant's witnesses who would have provided testimony that another
11 individual confessed to the crime. Id. at 298. The testimony was excluded because, although
12 the statements were against declarants' interest, it did not meet Mississippi's hearsay
13 exception that the statement be against the declarant's pecuniary interest. Id. at 298-99.
14 However, the statement did fall within the rule's rationale for admission and was therefore
15 reliable. Id. at 300-301. In holding the statements should have been admitted, the Supreme
16 Court reasoned that when testimony bears assurances of trustworthiness and is critical to the
17 defense, a state cannot exclude the evidence simply because it does not technically meet the
18 requirement of the hearsay exception. Id.

19 Similarly, Kinsey's proffered statement was reliable because it fell within the rationale
20 of an exception to the hearsay rule. NRS 51.355 provides:

21 A statement concerning the declarant's own birth, marriage, divorce,
22 legitimacy, relationship by blood or marriage, ancestry or other similar fact of
23 personal or family history is not inadmissible under the hearsay rule if the
declarant is unavailable as a witness, even though declarant had no means of
acquiring personal knowledge of the matter stated.

24 The excluded statement was made by Sheila concerning her own personal history of dating
25 men. 3 App. 541. Although the statement was not about Sheila's marriage, it was regarding
26 her own personal romantic relationships. Therefore, the same rationale that would render
27 hearsay statements regarding the declarant's marriage reliable enough for admission should
28 also apply to statements regarding the declarant's romantic relationships. The statement

made to Kinsey should have been admitted under the rule as it qualifies an “other similar fact of personal or family history.” NRS 51.355. Also, the statements made by Sheila to Kinsey seem to have been spontaneous. Kinsey was romantically linked to Sheila and it is likely Sheila would share this intimate information with Kinsey. Furthermore, there appears to be no reason for Kinsey to fabricate this information as he and Flowers did not know each other. Kinsey had nothing to gain by testifying on behalf of Flowers. Therefore, the testimony in this case was equally reliable to the testimony in Chambers.

Kinsey’s testimony was critical to Flowers defense. The State concedes that in order for it to prove Flowers was guilty beyond a reasonable doubt, it had to prove Brass was not the perpetrator because both mens’ DNA was found inside the victim. Answering Brief at 35. The State achieved this in part by admitting evidence that Brass and Sheila were involved in a prior consensual relationship. At the same time, it relied on the fact that there was no evidence Flowers was in a consensual relationship with Sheila. The district court’s exclusion of the only evidence which could have established Flowers had a consensual sexual relationship with Sheila deprived him of his right to present witnesses in his defense and confront the State’s accusations. The judgment of conviction must therefore be reversed.

F. The prosecutor committed misconduct by commenting on Flowers’ right to remain silent.

Flowers contends that his rights to due process, equal protection, and right to a fair trial were violated when the prosecutor improperly commented on his failure to talk to police or testify in his own defense. In response, the State argues that the prosecutor did not commit misconduct because he was not commenting on Flowers’ right to remain silent, but was commenting on the evidence. Answering Brief at 34. The State cites to this Court’s decision in Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001), to support its position. The State’s argument is without merit because Leonard is easily distinguishable from this case.

In Leonard, this Court considered the issue of whether a prosecutor improperly shifts the burden of proof to the defendant by commenting on the defendant’s failure to substantiate a claim made in defense of the State’s allegations. Leonard, 117 Nev. at 81, 17 P.3d at 414-

1 15. The defendant in Leonard made a claim that another man was responsible for the crime
2 and a piece of evidence introduced at trial belonged to that other person. Id. During closing
3 arguments, the prosecutor commented that the defendant had a prior opportunity to question
4 the other person about the piece of evidence but failed to do so. Id. This Court held that the
5 prosecutor did not improperly shift the burden of proof the to the defendant. Id. This Court
6 reasoned that although a prosecutor may not normally comment on a defendant's failure to
7 present evidence, it can comment on the failure to substantiate a claim. Id. However, unlike
8 the situation in this case, the prosecutor's comment in Leonard does not connote lack of a
9 personal response by the accused himself. Therefore, Leonard is not dispositive because the
10 defendant's right to remain silent was not at issue.

11 The State fails to address Flowers' assertion that the jury would have considered the
12 prosecutor's comments to be an attack on Flowers' failure to testify. Opening Brief at 36.
13 As this Court explained in Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991),
14 the prosecutor commits misconduct if "the language used was manifestly intended to be *or*
15 was of such a character that the jury would naturally and necessarily take it to be a comment
16 on the defendant's failure to testify." Id. (emphasis added). In this case, the jury would have
17 understood the prosecutor's statements to be a comment on Flower's failure to testify in his
18 own defense. The prosecutor specifically commented on the fact that Brass did not have to
19 testify but did anyway. 3 App. 595. The prosecutor then proceeded to compare Brass to
20 Flowers. 3 App. 612-13. It is likely that the prosecutor intended his comments to mean
21 Brass was more credible because he testified while Flowers did not. Even if this was not the
22 prosecutor's intent, the jury would have naturally and necessarily took the comment to mean
23 that if Brass did not have to testify but did anyway, Flowers should have also testified.

24 The State has failed to prove this error was harmless beyond a reasonable doubt.
25 Flowers was greatly prejudiced by the prosecutor's misconduct because the other evidence
26 equally inculpated both men. The judgment of conviction must therefore be reversed.

27 **G. There is insufficient evidence to support the conviction.**

28 Flowers contends that there was insufficient evidence to support his conviction. There

1 was an equal amount of evidence which pointed to Brass as the perpetrator. The State argues
2 in responses there was sufficient evidence to convict Flowers because the jury heard
3 testimony of another rape and murder Flowers allegedly committed. The State further argues
4 that both incidents were similar enough for the jury to decide Flowers murdered and sexually
5 assaulted Sheila. Answering Brief at 37.

6 In attempt to show both incidents were sufficiently similar, the State asserts that both
7 victims were found face up and suffered blunt force trauma. The State fails to state how any
8 of these facts are sufficiently unique as to support the inference that they were committed by
9 the same person. In fact there were substantial difference between both incidents. See
10 Opening Brief at 19-20. The conviction must be vacated because there is insufficient
11 evidence to support the conviction.

12 **H. The judgment should be vacated based upon cumulative error.**

13 Flowers' rights to due process, equal protection, and right to a fair trial were violated
14 because of cumulative error. The State asserts that there was no error and that Flowers' right
15 to a fair trial was not violated. Answering Brief at 37-38. For the reasons set forth above,
16 the State's argument is without merit. There were numerous statutory and constitutional
17 violations at Flowers' trial. A new trial should be granted based upon each of those
18 violations and the combined impact of all of them.

19 **III. CONCLUSION**

20 For each of the reasons set forth above, Flowers is entitled to a new trial. In the
21 alternative, there is insufficient evidence to support his conviction and his judgment should
22 be vacated.

23 DATED this 3rd day of May 2010.

24 Respectfully submitted,

25 By: /s/ JoNell Thomas

26 JONELL THOMAS
27 State Bar No. 4771
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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, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd day of May, 2010.

By: /s/ JoNell Thomas
JoNell Thomas

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 3rd day of May, 2010 a copy of the Appellant’s Reply Brief was served as follows:

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