IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A. HIDALGO, III,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO: 54272

ANSWER TO PETITION FOR EN BANC RECONSIDERATION

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and submits this Answer to Appellant's Petition for En Banc Reconsideration filed August 23, 2012, pursuant to this Court's order dated September 19, 2012.

This answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 2nd day of October, 2012.

Respecfully submitted,

STEVEN B. WOLFSON
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BY */s/ Steven S. Owens*
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MEMORANDUM

On June 21, 2012, a panel of this Court issued an unpublished Order affirming a judgment of conviction pursuant to a jury verdict for conspiracy to commit battery with a deadly weapon, second-degree murder with the use of a deadly weapon, and solicitation to commit murder. A petition for rehearing was denied unanimously on July 27, 2012. On August 23, 2012, Hidalgo filed the instant Petition for En Banc Reconsideration which this Court directed the State to answer within 15 days by Order filed on September 19, 2012. The Court's Order directed the answer to be limited to the issue of "whether the giving of Jury Instruction 40 was per se reversible error."

Standard of Review for En Banc Reconsideration

En banc reconsideration of a panel decision is disfavored, and this Court will only reconsider a matter when necessary to ensure consistency in its decisions or when the case implicates important precedential, public policy, or constitutional issues. NRAP 40A(a). This Court has granted en banc reconsideration when necessary to clarify and extend existing precedent or to reconcile it with statutory authority. See e.g., Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d 103 (2006); City of Las Vegas v. Walsh, 121 Nev. 899, 124 P.3d 203 (2005); Ronning v. State, 116 Nev. 32, 992 P.2d 260 (2000). But where legal opinions are consistent, en banc reconsideration is unwarranted. Skender v. Brunsonbuilt Const. and Development Co., 123 Nev. ___, 171 P.3d 745 (2007). Matters presented in the briefs and oral arguments may not be reargued in the petition, and no point may be raised for the first time. NRAP 40A(c). The practice of instructing the jury on when it may consider coconspirator statements as evidence under NRS 51.035(3)(e), does not implicate any constitutional right or structural error. Because there was no reasonable likelihood the jury confused the law pertaining to coconspirator statements with the reasonable doubt burden of proof, any error was harmless.

The Giving of an Instruction on the Consideration of Co-Conspirator Statements is Not Structural Error

The jury in this case was instructed that it may not consider co-conspirator statements and acts as evidence against Hidalgo unless it first found there was "slight evidence" that a conspiracy existed and that Hidalgo was a member of the conspiracy. 1 AA 47 (Instruction #40). The instruction is a correct statement of Nevada law. McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149 (1987); NRS 51.035(3)(e). On appeal, Hidalgo argues the instruction's reference to "slight evidence" may have confused the jury and possibly reduced the State's "beyond a reasonable doubt" burden of proof constitutionally required for conviction. Because of the risk that the jury may have convicted him based on only slight evidence, Hidalgo argues the error is structural and warrants automatic reversal.

The Panel concluded that although Instruction #40 was unnecessary, it "did not misstate the law" which a district court must apply when considering whether to admit a statement into evidence under the coconspirator exception to the hearsay rule. Because the jury was also correctly instructed on the reasonable doubt standard and a jury is presumed to follow the district court's instructions, the Panel concluded that the jury was not confused as to the State's burden of proof. The Panel specifically rejected Hidalgo's contention that the instruction amounted to structural error because Instruction #40 did not "actually" reduce the State's burden of proof.

The Supreme Court has recognized a special category of errors which must be corrected regardless of their effect on the outcome of the case. Arizona v. Fulminante, 499 U.S. 279, 306-12, 111 S.Ct. 1246, 1263-66 (1991). The Supreme Court has labeled this category of errors as "structural." Id. A structural error in a criminal trial always requires reversal of a conviction because such error "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827 (1999). Structural error constitutes a "defect [ ] in the constitution of

the trial mechanism" which defies harmless error analysis. Fulminante, 499 U.S. at 309, 111 S.Ct. at 1265. Structural error affects the "framework within which the trial proceeds, rather than simply ... the trial process itself." Id. at 310, 111 S.Ct. at 1265. "Harmless-error analysis applies to instructional errors so long as the error at issue does not categorically vitiate all the jury's findings." Hedgepeth v. Pulido, 129 S.Ct. 530, 532 (2008), *citing* Neder, supra.

Automatic reversal is strong medicine that should be reserved for constitutional errors that "*always"* or "*necessarily"* produce such unfairness. United States v. Gonzales-Lopez, 548 U.S. 140, 126 S.Ct. 2557 (2006). Structural errors "are the exception and not the rule." Hedgepeth v. Pulido, 555 U.S. 57, 61, 129 S.Ct. 530, 532 (2008), *citing* Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101 (1986). Indeed, the Supreme Court has said that "if the defendant had counsel and was tried by an impartial adjudicator, there is a *strong presumption* that any other errors that may have occurred" are not "structural errors." Rose, *supra*, at 579, 106 S.Ct. 3101. The Supreme Court has found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." Johnson v. United States, 520 U.S. 461, 468, 117 S.Ct. 1544 (1997), citing Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963) *(complete denial of counsel)*; Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927) *(biased trial judge)*; Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617 (1986) *(racial discrimination in selection of grand jury)*; McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944 (1984) *(denial of self-representation at trial)*; Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210 (1984) *(denial of public trial)*; Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993) *(defective reasonable-doubt instruction)*.

In Sullivan, *supra*, the Supreme Court unanimously held that a constitutionally-deficient reasonable doubt instruction was structural. The Court reasoned that "where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings," no jury verdict of beyond-a-

reasonable-doubt exists upon which to base a harmless error analysis. Id. at 281, 113 S.Ct. at 2082 (emphasis in original). The Court continued:

> There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object,* so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt-not that that jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual finding of guilty.

Id. at 280, 113 S.Ct. at 2082 (emphasis in original) (citations omitted). The Court concluded: "The deprivation of that right [to be found guilty beyond a reasonable doubt of every element of an offense], with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.' " Id. at 281-82, 113 S.Ct. at 2083. Notably, Sullivan does not alter the rule that reasonable doubt instructions are reviewed for constitutional error by asking whether "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard." Victor v. Nebraska, 511 U.S. 1, 6, 114 S.Ct. 1239 (1994), citing Estelle v. McGuire, 502 U.S. 62, 72 &n.4, 112 S.Ct. 475 (1991). Also, the Supreme Court subsequently has refused to extend Sullivan beyond situations where there is a "defective" reasonable doubt instruction." Neder, supra.

In fact, other than Sullivan, the Supreme Court has consistently found all other kinds of instructional error are not structural but instead trial errors subject to harmless-error review. See, *e.g.,* Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827 (1999) (omission of an element of an offense); California v. Roy, 519 U.S. 2, 117 S.Ct. 337 (1996) *(per curiam)* (erroneous aider and abettor instruction); Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918 (1987) (misstatement of an element of an offense); Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101 (1986) (erroneous burden-

shifting as to an element of an offense). Hedgpeth v. Pulido, 555 U.S. 57, 60-61, 129 S. Ct. 530, 532 (2008) (instructing a jury on multiple theories of guilt, one of which is invalid).

Hidalgo's reliance upon Sullivan is misplaced. The error at issue in Sullivan was the giving of a defective reasonable doubt instruction which suggested a higher degree of doubt than is required for acquittal and allowed a finding of guilt based on a degree of proof below that required by the Due Process Clause. See Sullivan, *supra*, *citing* Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990). But in this appeal, Hidalgo does not challenge the reasonable doubt instruction as defective or unconstitutional. See 1 AA 42-3. Nor does he challenge Instruction #40 as an incorrect or unconstitutional statement of law regarding the consideration of co-conspirator statements. 1 AA 47. Instead, Hidalgo's claim of error is that only a judge and not a jury may decide the admissibility of co-conspirator statements and that instructing on more than one burden of proof may have confused the jury.

Unlike the failure to correctly instruct the jury on reasonable doubt which results in no constitutional verdict that can be reviewed, the perceived risk that a jury may have confused two correct statements of law is not the kind of error which categorically vitiates all the jury's findings. The alleged possibility of juror confusion is contrary to the presumption that a jury follows the district court's instructions. Weeks v. Angelone, 528 U.S. 225, 234, 120 S.Ct. 727, 733 (2000). For example, this Court has recognized that jurors are intellectually capable of properly following instructions regarding the limited use of prior bad act evidence. Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001). Also, jurors are most certainly intellectually capable of following a clear instruction directing that they must refrain from considering testimonial hearsay in deciding a capital defendant's death eligibility, but that they may nonetheless consider such evidence in deciding whether to actually impose a death sentence on a defendant whom they

found eligible to receive it. Summers v. State, 122 Nev. 1326, 1333-34, 148 P.3d 778, 783 (2006).

It stands to reason then, that jurors are capable of distinguishing between finding slight evidence of a conspiracy before considering coconspirator statements against Hidalgo and finding proof beyond a reasonable doubt of a conspiracy before conviction. Where jury instructions provided a correct definition of reasonable doubt, a prosecutor's highly improper mischaracterization of reasonable doubt in closing argument as being "if you have a gut feeling he's guilty, he's guilty" was not prejudicial error and did not warrant a mistrial. Randolph v. State, 117 Nev. 970, 36 P.3d 424 (2001). The risk of juror confusion on the reasonable doubt standard in Randolph was far greater than the present case because of the unconstitutional argument lowering the burden of proof and yet it still did not result in structural error. Unlike the unconstitutional instruction in Sullivan, the risk of juror confusion in Randolph and the present case does not "categorically vitiate all the jury's findings," nor does it "always" or "necessarily" produce an unreliable or unfair result. That's because the error is not intrinsic to the framework of the case, but is dependent upon external juror misapplication of accurate jury instructions.

Nor does the alleged error "defy analysis by 'harmless-error' standards" by affecting the entire adjudicatory framework. To the contrary, the Panel was able to assess the likelihood of juror confusion and conduct a harmless error analysis thereby belying any claim of structural error. In rejecting the argument that the jury was confused, the Panel reasoned that the jury was repeatedly instructed regarding the applicable burden of proof, guilt beyond a reasonable doubt, and it seemed "inconceivable" the jury could have misunderstood Instruction #40 as altering that burden. Hidalgo's counsel also emphasized the reasonable doubt standard in his closing argument while the State made no mention at all of the "slight evidence" instruction. Finally, because a jury is presumed to follow

instructions and because Instruction #40 on its face did not actually undermine the reasonable doubt standard, any error was harmless. The mere fact that the Panel was capable of reviewing the likelihood of juror confusion demonstrates any error was not structural.

While determining guilt beyond a reasonable doubt is the main function of a jury in a criminal case, it is not the only determination the jury is called upon to make. Nevada precedent requires a criminal jury to be instructed on lesser burdens of proof in making certain evidentiary determinations. For instance, juries are routinely asked to determine the corroboration of accomplice testimony by independent evidence which "tends to connect" the defendant with the commission of the offense charged. Howard v. State, 102 Nev. 572, 577, 729 P.2d 1341, 1344 (1986); 24 AA 4489. The "tends to connect" standard is no less capable of causing jury confusion than the "slight evidence" standard at issue in this case, but does not result in structural error. To the contrary, the instruction must be given because the question of whether a witness was an accomplice is "clearly an issue for the jury to decide." Id.

Recently, this Court observed that "[a]lthough the district court is charged with making this preliminary determination [of admissibility of text messages], because authentication is essentially a question of conditional relevancy, the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims." Rodriguez v. State, 273 P.3d 845, 849 (Nev. 2012). When the relevancy of evidence depends upon the fulfillment of a condition of fact (ie., the existence of a conspiracy), "the judge shall instruct the jury to consider the issue and to disregard the evidence unless they find the condition was fulfilled." NRS 47.070. The jury's role in determining relevant facts which bear on the admissibility of evidence is permissible under Nevada law.

Juries in criminal cases are also sometimes instructed on lesser burdens of proof of preponderance or clear and convincing evidence in regards to a

defendant's burden of proving insanity or other similar affirmative defenses. The Supreme Court has rejected the idea that instructing on multiple burdens of proof will confuse a jury into convicting on a standard less than proof beyond a reasonable doubt:

> It is contended that the instructions may have confused the jury as to the distinction between the State's burden of proving premeditation and the other elements of the charge and appellant's burden of proving insanity. We think the charge to the jury was as clear as instructions to juries ordinarily are or reasonably can be, and, with respect to the State's burden of proof upon all the elements of the crime, the charge was particularly emphatic. Juries have for centuries made the basic decisions between guilt and innocence and between criminal responsibility and legal insanity upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, the placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc. We think that to condemn the operation of this system here would be to condemn the system generally. We are not prepared to do so.

Leland v. State of Or., 343 U.S. 790, 800, 72 S. Ct. 1002, 1008, (1952). Instructing a criminal jury on evidentiary standards and burdens of proof less than reasonable doubt is not prejudicial per se. Juries are capable of correctly applying more than one burden of proof in making different factual determinations.

Hidalgo's reliance upon federal authority condemning the use of the "slight evidence" standard is also unavailing. Aside from being mere dicta, the issue in Huezo was the sufficiency of the evidence for conspiracy and the case had nothing at all to do with instructing a jury on the admissibility of co-conspirator statements. United States v. Huezo, 546 F.3d 174 (2nd Cir. 2008). The concurring judges did not believe that "slight evidence" should be part of the substantive definition of the elements of conspiracy out of concern it would undermine the reasonable doubt standard. Huezo, 546 F.3d at 184-89. Likewise, the admissibility and consideration of coconspirator statements was not at issue in Partin, where the "slight evidence" language appeared in an instruction to the jury on the definition and elements of the substantive crime of conspiracy. United States v. Partin, 552 F.2d 621 (1977).

Unlike the practice in some federal courts, Nevada does not use the "slight evidence" standard when instructing a jury on the substantive law of conspiracy nor did such instructions in the present case contain such language. 1 AA 22-5. Instead, the "slight evidence" language appears only in Instruction #40 which informs the jury when it may consider co-conspirator statements as evidence against Hidalgo. McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149 (1987). Most federal courts stopped instructing juries on the admissibility of coconspirator statements in accord with changes in the federal rules of evidence in 1975. See Ethel R. Alston, *Admissibility of Statement by Co-Conspirator Under Rule 801(d)(2)(e) of Federal Rules of Evidence*, 44 A.L.R. Fed. 627 (1979). Although largely abandoned, the practice was uniformly and consistently found to have been harmless error:

> No court has held, however, that an instruction that gives the jury an opportunity to second-guess the court's decision to admit coconspirator declarations, otherwise inadmissible as hearsay, is reversible error prejudicing the defendant. To the contrary, it has been generally held that, so long as the court fulfills its responsibility to make the initial determination, such a charge only provides a windfall to the defendant.

United States v. Cont'l Group, Inc., 603 F.2d 444, 459 (3d Cir. 1979). Likewise, the Fifth Circuit has held that while it was erroneous to allow a jury to decide the admissibility of coconspirator hearsay, such an error does not affect a defendant's substantial rights and is not grounds for reversal. United States v. Sutherland, 656 F.2d 1181, 1200 (5th Cir. 1981).

Even if Hidalgo's jury were somehow confused and convicted him under an unconstitutional "slight evidence" standard, any prejudice is limited to the conspiracy count and fails to vitiate "all" the jury's findings further demonstrating any error is not structural. Instruction #40 was limited to the jury's consideration of coconspirator statements and the existence and membership in a conspiracy. Therefore, any unlikely confusion of the burden of proof was limited to the crime of conspiracy. Instruction #40 makes no mention at all of the crime of murder.

Significantly, the jury acquitted Hidalgo of conspiracy to commit murder and convicted instead on conspiracy to commit a battery. 1 AA 60. Therefore, in convicting Hidalgo of second degree murder, the jury did so on a theory other than conspiracy liability. The jury's findings and verdict as to second degree murder and solicitation to commit murder remain entirely unaffected by any alleged confusion about slight evidence of a conspiracy.

Regardless of whether the en banc court elects to weigh in on the continued viability of Instruction #40 in Nevada, its use can in nowise be deemed prejudicial per se due to the very narrow and limited definition the Supreme Court has given to structural error.

WHEREFORE, the State respectfully requests that the petition for en banc reconsideration be denied.

Dated this 2nd day of October, 2012.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing/reconsideration or answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the page or type-volume limitations of NRAP 40 or 40A because it is either proportionately spaced, has a typeface of 14 points or more and contains no more than 4,667 words or does not exceed 10 pages.

Dated this 2nd day of October, 2012.

Respecfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 2, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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