IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No.: 64221

APPEAL

(Direct Appeal from Judgment of Conviction – Jury Verdict)

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

CASES CITED **PAGE NO.**

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REGULATIONS, RULES & ACTS **PAGE NO.**

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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

(A) This is an appeal from the Judgment of Conviction by Jury Verdict from the District Court.

(B) Judgment of Conviction was filed on September 11, 2013 by the District Court. (AA, 2088-2089) A Notice of Appeal was timely filed on October 11, 2013. (AA, 2090-2091).

(C) This appeal is from the Judgment of Conviction filed by the District Court and under this Court's jurisdiction pursuant to N.R.A.P. 4(b) and N.R.S. 177.015.

STATEMENT OF THE ISSUES

I. **WAS THERE AN INSUFFICIENCY OF EVIDENCE TO SUSTAIN A VERDICT OF GUILT FOR SECOND DEGREE MURDER?**

II. **DID THE DISTRICT COURT ERR ALLOWING PRIOR SUGGESTIVE IN-COURT IDENTIFICATION WHEN THE WITNESS FAILED TO IDENTIFY DEFENDANT AT TRIAL?**

III. **DID THE DISTRICT COURT ERR BY ALLOWING AN INCOMPETENT WITNESS TO TESTIFY?**

IV. **DID THE DISTRICT COURT ERR IN ALLOWING A MATERIAL WITNESS WARRANT TO ISSUE ENGENDERING A SYMPATHY FOR A STATE'S WITNESS?**

V. **WAS IT PROSECUTORIAL MISCONDUCT TO PROCEED WITH A PREJUDICIAL GANG ENHANCEMENT ONLY TO DROP IT MIDTRIAL?**

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STATEMENT OF THE CASE

The Original Indictment was filed on or about March 19, 2010. (1 AA 1-6).

Plea negotiations had been entered on or about March 17, 2011, however, they were defective and a Motion to Withdraw Guilty Plea was allowed on February 21, 2012. This was the initial reason for an Amended Indictment and the subsequent Second and Third Amended Indictments. (1 AA 43-44; 2 AA 294-96; 5 AA 973-975). In the Third Amended Indictment which was in place as the jury trial commenced, Evaristo Garcia (hereinafter "Garcia") was charged with Conspiracy to Commit Murder and Murder with Use of A Deadly Weapon With the Intent to Promote, Further or Assist a Criminal Gang. (5 AA 973-975).

Garcia, before trial, filed two significant Motions at issue herein. The first was a Motion to Suppress In-Court Identification on September 25, 2012. (1 AA 51-67). The State filed an Opposition on October 4, 2012. (1 AA 155-179). A Reply brief was filed on October 8, 2013. (1 AA 180-82). The second was a Motion for an Evidentiary Hearing to Determine the Competency of the State's Key Witness (Jonathan Harper) on September 27. 2012. (1 AA 68-154). The State filed an Opposition on October 23, 2012. (2 AA 183-243). At hearing on the Motions on October 30. 2012, the trial

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court denied the Motion to Suppress, and ultimately found the witness competent to testify without ordering a mental or psychological evaluation. (2 AA 244-291).

A seven (7) day trial commenced on July 8, 2013. (2 AA 297). During trial, Garcia challenged the gang enhancement as being utterly insufficient as a matter of fact and law, and as a result of numerous trial court rulings, the gang enhancement was dropped by the State and a Fourth (and final) Indictment was filed reflecting that change. (10 AA 1850-1851). During the trial, the jury noted some concern with being in the public hallways which was the subject of a lengthy court canvass. (8 AA 1526-1584).

At its conclusion on July 16, 2013, the Jury acquitted Garcia of Count I- Conspiracy to Commit Murder, and returned a guilty verdict only on Count II – but as the lesser-included charge of Second Degree Murder with Use of a Deadly Weapon. (11 AA 2017-2018). Garcia had filed a compelling Sentencing Memorandum requesting sentencing under the new guidelines or a term of years in the alternative. (14 AA 2059-2064). However, on August 29, 2013, Garcia was sentenced to life with the possibility of parole after ten years for Second Degree Murder and an equal and consecutive life with the possibility of parole after ten years for the

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weapon enhancement with 1,959 days credit for time served. (14 AA 2224-2246). Garcia filed his timely Notice of Appeal on October 11, 2013. (14 AA 2249-2250). The instant appeal follows.

STATEMENT OF FACTS

Evaristo Garcia, 16, was accused of shooting and killing Victor Gamboa (herinafter "Gamboa"), 15, as the ostensible outgrowth of a schoolyard melee. There was no evidence, however, that the boys EVER knew each other or EVER engaged in any conflict or actual fight even up to the seconds before the shooting. Indeed, of the dozen or so available, independent witnesses who indicated they were in or an observer to the melee, none (with the exception of purported gang members and unindicted accomplices, Jonathan Harper and Edshel Cavillo) were able to identify Evaristo Garcia out of a line-up as even being at the school, let alone being the shooter. (9 AA 1654-1660).

The State's theory was essentially that as a result of the brewing schoolyard conflict between an individual named Crystal Perez and an individual named Giovanny Garcia (who did not testify), a tense, but non-physical confrontation between another individual named Jesus Alonzo (who did not testify) and Giovanny Garcia occurred. (5 AA 822-835). Jesus Alonzo dated Melissa Gamboa. (5 AA 824). According to the State's

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theory, as a result of this tension between Jesus Alonzo and Giovanny Garcia, a second (also non-physical) confrontation occurred between Crystal Perez and Giovanny Garcia on a different day. (5 AA 836-837).

There was testimony as to two different telephone calls that were made after this second non-physical confrontation between Giovanny Garcia and Crystal Perez. Jena Marquez testified that she saw Giovanny Garcia make a phone call which upset her. (The Giovanny call is described in more detail, *infra*).

This caused Jena and her friend Melissa Gamboa to leave school and call her brother Bryan Marquez. (5 AA 839-840). As a result of Jena's call, Bryan Marquez and Victor Gamboa (the brother of Melissa Gamboa) arrived at the school. (5 AA 841). Once arrived, this of group of young people went back to the school to meet up with Jesus Alonzo. (5 AA 841). The melee where many, many young people started fighting was described to have begun when Giovanny Garcia struck Bryan Marquez. (5 AA 844).

This melee was observed by various school personnel. (6 AA 1072, 1098).

There was no evidence that Evaristo Garcia had any direct contact whatsoever on the day in question with Crystal Perez, Jesus Alonzo, Bryan Marquez, Jena Marquez or Melissa Gamboa.

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The State argued that a call was placed by Giovanny Garcia to encourage people to come down to the schoolyard for an impending conflict. (5 AA 837). In order to establish who was on the other end of this phone call, the State (still operating under a theory that this was underlying gang activity) called supposed gang members Edshel Calvillo and Jonathan Harper. Calvillo did not receive that call but allegedly heard the gist of the conversation second-hand. (5 AA 870-871). Calvillo initially testified that when the call from Giovanny Garcia came into Sal Garcia's apartment the following people were present: himself, Sal Garcia, Jonathan Harper, an individual named Padre, an individual named Periso and numerous girlfriends. (5 AA 871-874). Evaristo Garcia was NOT among those originally listed by Calvillo to be present when that call came. (5 AA 871, lines 18-20). Nonetheless, Calvillo then testified that as a result of the phone call from Giovanny Garcia (which he did not hear), Evaristo Garcia got into a car with Jonathan Harper and a man named Puppet in Puppet's El Camino. (5 AA 876). Calvillo claims he was in a different car with Sal Garcia and others which never made it to the school (5 AA 876-77). Calvillo could not remember the model of car he was in. (5 AA 877). Calvillo also admitting lying to the police. (6 AAA 998). Jonathan Harper testified to similar facts. (7 AA 1277-1283).

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There was testimony that the murder weapon belonged to an individual named Puppet and that many people had handled that weapon. (5 AA 878, 6 AA 1024, 7 AA 1282). There was also evidence adduced that Puppet (aka Manuel Lopez) was identified as previously working at the site where the murder weapon was found. (9 AA 1652-1654). Puppet also admitted to owning the murder weapon. (9 AA 1652). There was also evidence adduced that Giovanny Garcia had a gun at the melee. (9 AA 1648-1649).

In truth, however, no reliable evidence was offered that even placed Garcia in Sal Garcia's apartment when the call came in. Furthermore, no physical evidence placed Garcia at the scene of the shooting, or the melee prior to the shooting, or any car that allegedly transported people to the school, or the gray hoodie (6 AA 1059, 1089, 1100) the shooter was agreed upon by almost every witness to have worn. (9 AA 1654-1660). At best, and in the light most favorable to the State, they were able to show that Garcia at one point held the murder weapon although many people had touched the murder weapon; and also that Garcia went to Mexico (9 AA 1600-1602) at a time after the melee.

The rest of the case depended primarily on contested and contradicted testimony of Jonathan Harper, and to a lesser extent grossly unreliable

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testimony of Edshel Calvillo and evidence of a prior in-court identification given over objection by Melissa Gamboa.

Indeed, one of the State's key witnesses, an independent school official, Betty Graves, testified that she stared directly into the face of the boy she attributed as the shooter, and yet she did not identify Evaristo Garcia as being that boy. (6 AA 1095-1098). Moreover, there were MANY State witnesses, as well, who saw the shooter but could only identify a hoodie the shooter was wearing; NO ONE ELSE identified Evaristo Garcia at the time of the offense.

Melissa Gamboa (the sister of the decedent) was expected to identify the Defendant in court as she had done at the preliminary hearing which occurred years after the event. Prior to trial, however, Garcia moved to exclude and suppress Ms. Gamboa's prior in-court identification as being overly suggestive. (1 AA 51-67). It is undisputed that Ms. Gamboa did not pick Garcia out of a photo line-up prior to the preliminary hearing (there was contradicting evidence as to whether or not she was shown a line-up). (7 AA 1212). The trial court denied the Motion to Suppress. (1 AA 7-42). At trial, Ms. Gamboa was unable to identify Garcia as the person who shot her brother, thus bolstering the concern about the prior identification coming into evidence and ensuing prejudicing. (6 AA 1161-1189; 7 AA 1190-

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1214). The State, over objection, was allowed asked Ms. Gamboa if she was able to identify the shooter at the preliminary hearing and she indicated "yes." (6 AA 203). Melissa Gamboa admitted that her preliminary hearing identification of Garcia did not match her description of the shooter from her original statement to the police. (7 AA 1195).

Additionally, the State called Edshel Calvillo while ensconced in chains under a so-called "material witness" warrant. (5 AA 899). This was the same Edshel Calvillo had once before testified in an ancillary proceeding (the shooting of witness Jonathan Harper) in a manner (and maintained at trial) that was inconsistent with the State's position that it was an attempt murder versus a self-inflicted injury. (6 AA 1034; 5 AA 931-32). As such, the State placed on the stand an individual who they already had encountered as a perjurer. It was clear from the cross-examination of Calvillo, that his statement to the police about the incident at issue was so utterly unbelievable from its internal inconsistencies and external contradictions that it was a farce to present him as a credible State's witness. (5 AA 978-988; 6 AA 989-1047).

There was no discussion on the record as to the specifics as to why a "material witness warrant" was required.

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Finally, Jonathan Harper testified. The Court ruled that he was an uncharged accomplice and therefore his testimony was required to be corroborated. (10 AA 1803-1806). Jonathan Harper, who had lost 23 percent of his brain tissue due to a bullet being placed in his head at Sal Garcia's apartment, was able to have seemingly flawless recall of events, unlike prior proceedings where he admitted having serious memory problems (7 AA 1313-21). A reading of the record reveals Jonathan Harper testified without hesitation or need for much refreshing of recollection. Dr. Norton Roitman testified that based on his observation of the medical records and testimony, Jonathan Harper's testimony could be a product of confabulation. (9 AA 1760-1766). The State was able to point out that Dr. Roitman did not personally interview Jonathan Harper (inasmuch as it was disallowed by the trial court). (9 AA 1768).

Jonathan Harper's testimony was largely uncorroborated as it related to witnessing the shooting itself, to wit: (1) he testified that he in close enough proximity to the shooting to actually hear Giovanny Garcia encourage the Defendant to shoot Victor Gamboa. (7 AA 1287). (2) No other witness who was close enough to observe (i.e. Melissa Gamboa and Joseph Harris) heard such an exchange. Moreover, every State witness indicated there was either one or two boys pursuing Gamboa, no one

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mentioned a third in close proximity whereas Jonathan Harper stated he was there with Giovanny Garcia and Evaristo Garcia (7 AA 1287). (3) Jonathan Harper also testified that the shooter unloaded his entire clip of bullets into the body of Gamboa (7 AA 1287), which was contradicted by the Coroner. (7 AA 1374).

Finally, and despite all the references to a criminal gang, and that enhancement in the Indictment, the trial court having heard ALL the State's evidence ruled there was an insufficient basis to have the State's expert testify that he could conclude that Evaristo Garcia was in a criminal gang or that the group described by all the witness was a criminal gang. (7 AA 1359).

SUMMARY OF THE ARGUMENT

This case is about the State proceeding on a very weak case seeking first degree murder. The only actual evidence that linked the Defendant to the offense was that two of his fingerprints (out of three of value and countless more that were not of testing quality) appeared on the gun, and two years later he was located in Mexico. Regarding the former, the Defense more than adequately elicited testimony that the Defendant's fingerprints on the gun meant nothing more than at some time and place the Defendant had held the gun – a point not disputed by the Defense – but that

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does not rise to the level of reasonable doubt necessary to establish he was the shooter. Regarding the latter, the State did not establish when the Defendant went to Mexico or under what circumstances. The State was unable to show that the Defendant went to Mexico after the arrest warrant was issued (June, 2006), or if he had, that he hadn't gone done to Mexico years after the shooting. In sum, there was NO evidence as to when the Defendant first left Las Vegas. Even together with other evidence adduced, there was insufficient evidence to meet the high burden of reasonable doubt.

The jury was presented with a two-count Indictment alleging conspiracy to commit murder and murder (which included as an alternate theory – conspiracy). The Defendant was acquitted of conspiracy and found guilty of only second-degree murder with use of a deadly weapon (which fit NO theory of the case). The jury was clearly swayed by inappropriate-by-law gang evidence that was received early in the proceedings.

LEGAL ARGUMENT

I. THERE WAS AN INSUFFICIENCY OF EVIDENCE TO SUSTAIN A VERDICT OF GUILT FOR SECOND DEGREE MURDER.

Appellant submits that the evidence adduced at trial was insufficient to support his convictions of Murder in the Second Degree with the Use of a Deadly Weapon.

The recognized standard of proof, in support of conviction, is whether

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the evidence is of such certainty that a rational trier of fact will be convinced of the guilt of the accused beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (see *Virginia v. Black*, 538 U.S. 343 (2003); *Mejia v. State*, 122 Nev. 487, 134, P.3d 722 (2006); *Thompson v. State*, 221 P.3d 708 Nev. (2009)). Furthermore, this Court has held that a conviction cannot be upheld where it is based on evidence from which only uncertain references can be drawn. *Woodall v. State*, 97 Nev. 235, 236, 627 P.2d 402 (1981). Further, in evaluating the evidence of an accomplice, corroboration is paramount. NRS 175.291; *Ramirez-Garza v. State*, 108 Nev. 376, 379, 832 P.2d 392, 393 (1992).

Even in the light most favorable to the State, without the benefit of the testimony of accomplices Edshel Cavillo and Jonathan Harper, the conviction is devoid of the necessary quantum of proof.

The State was able to offer evidence that Evaristo Garcia's fingerprints were found on the weapon used in this case, but has to concede that many people touched that weapon. (6 AA 1024). Apart from that fact, there was not a single clean, untainted identification of Evaristo Garcia as the shooter. There was no evidence adduced that Evaristo Garcia knew the victim Victor Gamboa or why Victor Gamboa would have been singled out in the melee by a person who (according to the State's theory) had just

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arrived at the scene. While Evaristo Garcia did go to Mexico at some undetermined time, it must be noted that Jonathan Harper stuck around in Las Vegas and was shot in the head at Sal Garcia's house. Evaristo Garcia did not give a statement or admission to the police. There is no other evidence that links Evaristo Garcia to the offense.

As a result, the State needed to rely heavily on a prior in-court identification by Melissa Gamboa, and the testimony of two admitted "Puros Locos" members – Jonathan Harper and Edshel Cavillo, neither of whom were corroborated by independent evidence. (see more detailed accounts of the errors raised by the testimony of these three individuals, *infra*).

Moreover, even with the enhanced but improper testimony of Melissa Gamboa and the two accomplices (Jonathan Harper rode in the vehicle and engaged in the fight; Edshel Cavillo in response to the telephone call to come to the scene, got in a car and headed to the school to fight), it is clear that there is insufficient evidence upon a reading of the actual record.

Melissa Gamboa admitted that her identification of Evaristo Garcia at the preliminary hearing as the shooter contradicted her depiction of the shooter at the time of offense. (7 AA 1195).

Edshel Cavillo told police he did not travel to the scene (6 AA 1005), but contradicted his own statement at trial by testifying that he did attempt to

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go to the school, but never made it that far (5 AA 879-881). Edshel Cavillo also claimed that Evaristo Garcia confessed to him, but that was not independently verified and the circumstances surrounding that so-called confession are impossible to have occurred in a manner described by Edshel Cavillo given his testimony. (6 AA 1009-1024). Edshel Cavillo also admitted he did NOT see the shooting. (5 AA 881). Jonathan Harper's main testimony supposedly incriminating Evaristo Garcia was actually contradicted (not corroborated) by independent and scientific evidence. (7 AA 1287; 1374).

In sum, there was insufficient evidence to support a conviction that showed that Evaristo Garcia shot into the body of Victor Gamboa and killing him in a manner consistent with Second Degree Murder.

II. THE DISTRICT COURT ERRED IN ALLOWING A PRIOR SUGGESTIVE IN-COURT IDENTIFICATION WHEN THE WITNESS FAILED TO IDENTIFY THE DEFENDANT AT TRIAL.

Melissa Gamboa was never given a photo line-up to identify the alleged shooter of her brother Victor, but she did give a statement describing the shooter to the police. At the preliminary hearing in this matter, Melissa Gamboa identified Evaristo Garcia, who was the only person in custody at the defense table. She also admitted that the person she described close in time to the incident did not match the appearance of the person she identified

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at preliminary hearing. At trial, she did not identify anyone as being the shooter.

Evidentiary rules disallow in-court identification when the circumstances surrounding pre-trial identifications are unduly prejudicial. See *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967 (1968). Initial misidentification "reduces the trustworthiness" of subsequent lineup or courtroom identification. *Id.*

The standard regarding undue suggestiveness comes originally from *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); (see also, *Baker v. State*, 88 Nev. 369, 498 P.2d 1310 (1972)). The test is whether "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that (the defendant is) denied due process of law." *Stovall v. Denno*, 388 U.S. at 301-302, 87 S.Ct. at 1972. This determination is to be made after a review of the "totality of the circumstances." 388 U.S. at 302, 87 S.Ct. 1967.

In *United States v. Wade*, 388 U.S. 218, 233, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), the U.S. Supreme Court gave further examples of impermissibly suggestive lineup procedures, such as presenting a lineup in which all participants except the suspect are known to the witness, or are grossly dissimilar in appearance or clothing, or in which the suspect is

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pointed out before or during the lineup. The United States Supreme Court has held that "reliability is the linchpin." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). The factors which must be considered are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Id.* at 114, 97 S.Ct. at 2253.

In the present case, Garcia's Motion to Suppress an In-Court Identification should have been granted, and it was error to allow the State to present evidence of a prior, tainted identification where every single factor making an identification suspect and prejudicial was present. Melissa Gamboa did not know Evaristo Garcia, had only the quickest opportunity to observe him in the most stressful situation imaginable where there were other distracting factors (a gun, a melee, dozens of kids fighting). The shooter was identified as having worn a hoodie and while she testified it may have come off, for the most part the identity by the nature of that article of clothing was obscured. She wasn't presented with an array of people to choose from (line-up or photo spread), but was confronted with a single

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person, in court, sitting at the defense table. There was no level of certitude discerned and it contradicted a closer in time description of the shooter.

Without Melissa Gamboa's identification of Evaristo Garcia as the shooter, only one other witness claimed to see the shooting – an accomplice who gave an account that contradicts the testimonial and physical evidence. With this one piece of key evidence removed, there is no basis to sustain the conviction and the conviction must be reversed.

III. THE DISTRICT COURT ERRED BY ALLOWING AN INCOMPETENT WITNESS TO TESTIFY.

Jonathan Harper had 23 percent of his brain blown out from a shooting at the hands of Sal Garcia subsequent to the event at issue. The reason for that attempt murder or the impact it must have had upon the witness both in terms of mental ability to recall events and fears in testifying in ways that upset the group of people including Edshel Cavillo who insisted he shot himself is self-evident, or at least worthy of exploration *vis a vis* an examination by an expert. That is why Garcia moved to compel a psychological examination of Jonathan Harper. (1 AA 68-154). It was error to deny that Motion.

In his Motion, Garcia set forth in great detail the statements of Jonathan Harper that indicated that he was having great difficulty with his memory. (1 AA 72-77). In that recitation, it is clear that both the

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prosecution and defense efforts to get Jonathan Harper to provide relevant information were severely hampered by his brain injury and that fundamental facts, such as what clothing Evaristo Garcia was alleged wearing on the day in question were unattainable from him. And while the Defense was given many medical records which allowed Defense Expert Dr. Norton Roitman to conclude that there was a great likelihood of confabulation, it was necessary for an actual examination of Jonathan Harper. It was only a few questions into the cross-examination where the State exploited the fact that Dr. Roitman did not personal meet or examine Jonathan Harper – disingenuous since they opposed such an examination (2 AA 183-243), but effective in discrediting the expert's basis for conclusion.

When the competency of any witness has been questioned, it is within the trial court's discretion to consider facts relative to qualification and to determine if such a person is competent to testify. NRS 175.221(2); Fox v. State, 87 Nev. 567 (1971). Further, there do sometimes arise circumstances where a person's mental or emotional state affects their veracity. Generally, there is a compelling reason for a psychiatric examination where there is little or no corroboration of allegations and the defense has questioned the effect of the witness' emotional or mental condition upon veracity. Washington v. State, 96 Nev. 305, 307, 608 P.2d 1101, 1102 (1980). And

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while a great number of cases deal with this issue in the context of child sexual abuse victims, the logic remains the same, to wit: the court has a need to deal with witnesses who because of an obvious emotion or mental condition are not competent to testify.

Here, Jonathan Harper suffered a devastating, verifiable injury that unquestionable affected his ability to recall events and thereby his ability to testify truthfully. His testimony was contradicted by other witnesses and miraculously, his testimony got more clear and concise by the time he got to trial which was a highly unlikely scenario given his injury as described by Dr. Norton Roitman. Indeed, it was necessary for Dr. Roitman (or frankly some other expert – the Defense would not have been limited had the Motion been properly granted) to examine Jonathan Harper prior to his testimony to better gage the limits of his incompetence to testify and the degree of his confabulation. As it happened, Jonathan Harper was able to testify in a way that clearly was unfounded in veracity, and utterly lacked proper corroboration, but prejudicially was allowed to be offered.

It was error to disallow a mental examination of Jonathan Harper given the facts and circumstances of his brain injury, his inability to recall events and his lack of corroboration and contradiction to independent evidence. The conviction should be reversed.

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IV. THE DISTRICT COURT ERRED IN ALLOWING A MATERIAL WITNESS WARRANT TO ISSUE ENGENDERING SYMPATHY AND/OR CREDIBILITY FOR A STATE'S WITNESS.

Edshel Calvillo should not have had a material witness warrant issued against him and the discussion of whether or not he be presented in chains should have been discussed before he was paraded out in front of the jury. Clearly, the jury's view of Mr. Calvillo in this setting was designed to bolster his credibility (i.e. "forcing" him at great personal suffering to testify in chains against his "friend"). Further, there can be certain circumstances where the coercive environment is so overwhelming that it is akin to securing a witness to testify in a particular fashion.

NRS 178.494 provides in relevant part, that:

> 1. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure the person's presence by subpoena, the magistrate may require bail for the person's appearance as a witness, in an amount fixed by the magistrate. If the person fails to give bail the magistrate may: (a) Commit the person to the custody of a peace officer pending final disposition of the proceeding in which the testimony is needed

In the present case, there was no justifiable cause why a material witness warrant was issued for Edshel Cavillo, nor was there any basis for why he had to appear in shackles in front of the jury.

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"Government misconduct that amounts to substantial interference with a witness's free and unhampered determination to testify may be deemed a violation of due process." *United States v. Foster*, 128 F.3d 949, 953 (6th Cir.1997). In considering "prosecutorial misconduct," the U.S. Supreme Court has stated that prosecutors must "refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). The Supreme Court has also held that the appropriate standard of review for prosecutorial misconduct is "the narrow one of due process," because a defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). See also *Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

As such, the State's tactics here were designed either to make sure Calvillo testified in a certain way favorable to the State and/or presented him in a way in chains to bolster credibility – either way it was a violation of the Defendant's due process rights to have this evidence received in such a fashion.

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Also, while the Defense was aware of Calvillo's earlier statement, it was so far-fetched that Calvillo, a person known to the State to be a perjurer, would be called to testify and so the Defense to some degree was caught at unawares. More significantly, however, is that the Defense learned new information on the stand that Calvillo did not reveal to the police in the earlier statement, to wit, that he did in fact embark upon a journey to the school to engage in a fight. (He told police he didn't). As such, Calvillo clearly established himself as an accomplice and given his lack of corroboration and the circumstances of his appearance, his testimony cannot be relied upon as supportive of a finding beyond reasonable doubt as to the guilt of Garcia.

There was no basis for a material witness warrant for Edshel Calvillo. He should not have appeared in chains or been coerced by the governments conduct in arresting him to testify. The whole charade of Edshel Calvillo's testimony is grounds for reversal of the conviction.

V. IT WAS PROSECUTORIAL MISCONDUCT TO PROCEED WITH A PREJUDICIAL GANG ENHANCEMENT ONLY TO DROP IT MIDTRIAL.

It was absolute prejudice for the State to proceed through this trial with a gang enhancement theory only to realize it was unsupportable. Their unfounded pursuit of this theory tainted jury selection and opening

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statements as well as other witness' examination. (4 AA 705-06, 716; 5 AA 859). The record is devoid of any legitimate representation that the State could ever prove that LEGALLY this was a gang.

The Defense had objected prior to trial, and during trial, and yet the State proceeded. There was, therefore, a bad faith effort to sully the Defendant and the proceedings with gang references when in fact they could NEVER have PROVEN that this a gang per statute with felonious activities as their commonality.

The State knew there were never sufficient felony convictions to establish a gang, and yet proceeded anyhow in violation of statute and their obligation to seek justice under the law. *Jimenez v. State*, 112 Nev. 610, 618, 918 P.2d 687, 692 (1996) ("The prosecutor represents the state and has a duty to see that justice is done in a criminal prosecution."); ABA Standards for Criminal Justice, Prosecution Function Standard 3–1.2(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); *Id.* cmt. ("[I]t is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public"). See also, *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

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Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

Arguably, the State might transgress constitutional limitations if it exercised its sovereign powers so as to hamper a criminal defendant's preparation for trial. See generally, *United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971), and *United States v. Lovasco*, 431 U.S. 783, 795, n. 17, 97 S.Ct. 2044, 2051 n. 17, 52 L.Ed.2d 752 (1977).

The Nevada Rules of Professional Conduct 3.4(e) provides that a lawyer shall not: "In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." A prosecutor may not argue facts or inferences not supported by the evidence. *Collier v. State*, 101 Nev. 473, 705 P.2d 1126 (1985).

This Court has also taken special umbrage with the grave prejudicial impact of unfounded gang insinuations at all stages. See, *Norwood v. State,*

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112 Nev. 438, 440, 915 P.2d 277, 278 (1996); also, generally, *Butler v. State*, 120 Nev. 879, 102 P.3d 71 (2004). Indeed, in *Butler*, the Court favored that before gang-type evidence be admitted that there be some manner of *Petrocelii* hearing to determine at least clear and convincing evidence. *Id.* Here, there was no common felonious activity in existence at all (thus making a criminal gang's existence impossible), and at trial there was no reliable testimony that Evaristo Garcia was a member of this purported gang or any other gang. Once the canard was exposed, the Defendant's request for a mistrial (or the subsequent motion for new trial/ acquittal) should have been granted. It is worth noting that at some point in the middle of trial, the jury became on some level "upset and afraid" but could not reasonably articulate their concern even after a canvass and were thereafter kept in the back hallways. (8 AA 1526-1584).

Framing this case as a gang matter and proceeding in such a fashion before the jury when it was patently clear that it could not be supported was error of such a prejudicial magnitude that reversal is required.

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CONCLUSION

As a result of the error at the trial admixed with prosecutorial misconduct, the convictions must be reversed.

Dated this 13th day of June, 2014.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman type style; or

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains no more than 14,000 words, and does not exceed 30 pages, in fact it is 7100 words.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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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 13th day of June, 2013.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 19th day of June, 2014, the above and foregoing ***Appellant's Opening Brief*** was served upon the appropriate parties hereto via the Supreme Court's notification system in accordance to the Master Service List.

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