IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 64221

RESPONDENT'S ANSWERING BRIEF

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

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STATEMENT OF THE ISSUE(S)

1. Whether there was sufficient evidence to support the jury's guilty verdict.

2. Whether the district court properly denied Garcia's pre-trial motion to suppress.

3. Whether the district court properly allowed Jonathan Harper to testify.

4. Whether Appellant was not prejudiced by the material witness warrant.

5. Whether it was not prosecutorial misconduct for the State to proceed to trial on the gang enhancement.

6. Whether any alleged error was harmless

STATEMENT OF THE CASE

On June 19, 2006, Evaristo Jonathan Garcia ("Appellant") was charged by way of Criminal Complaint with Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). Respondent Appendix ("RA") 55-56. On November 26, 2008, Appellant was charged by way of Amended Criminal Complaint with Murder with Use of a Deadly Weapon with the Intent to Promote, Further or Assist a Criminal Gang (Felony – NRS 193.168, 193.169, 200.010, 200.030, 193.165). RA 53-54. The preliminary hearing was held on December 18, 2008, and Appellant was bound-over to district court. RA 1-31.[1]

On December 29, 2008, Appellant was charged by way of Information with Murder with Use of a Deadly Weapon with the Intent to Promote, Further or Assist a Criminal Gang in Case No. 06C226218-2. RA 74-75. On March 19, 2010, Appellant was charged by way of Indictment with Conspiracy to Commit Murder with the Intent to Promote, Further or Assist a Criminal Gang (Felony – NRS 200.010, 200.030, 199.480, 193.168, 193.169) and Murder with Use of a Deadly Weapon with Intent to Promote, Further or Assist a Criminal Gang in Case No. 10C262966-1. Appellant Appendix ("AA") 1-6. On May 25, 2010, the State

[1] While pages 1-4 and 65-100 of the preliminary hearing transcript is included in the Appellant's Appendix, Respondent has included the entirety of the transcript in the Respondent's Appendix.

voluntarily moved to dismiss Case 06C226218-2 to proceed in Case 10C262966-1. RA 102.

On March 17, 2011, pursuant to negotiations, the State filed an Amended Indictment and charged Appellant with Second Degree Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). I AA 43-44. That same day, Appellant entered a plea of guilty to the count charged in the Amended Indictment, pursuant to the North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970), but on May 12, 2011, the district court granted Appellant's pre-sentence Motion to Withdraw Guilty Plea. I AA 45-46.

On September 25, 2012, Appellant filed a Motion to Suppress In-Court Identification Pursuant to NRS 174.152(1). I AA 51-67. On October 4, 2012, the State filed an Opposition to the Motion to Suppress. I AA 155-179. On October 8, 2012, Appellant filed a Reply to the State's Opposition. I AA 180-81. On October 30, 2012, the district court denied the motion. II AA 253-54.

On September 27, 2012, Appellant filed a Motion for Evidentiary Hearing to Determine Competency of State's Primary Witness and Order Compelling Production of Medical Records and Psychological Examination and Testing to Determine Extent of Memory Loss. I AA 68-154. On October 23, 2012, the State filed an Opposition. II AA 183-243. On October 30, 2012, the district court denied the motion. II AA 276.

On July 8, 2013, the State filed a Second Amended Indictment charging Appellant with the same crimes as the March 19, 2010, Indictment. II AA 294-96. Trial commenced that day. II AA 297. On July 9, 2013, the State filed a Third Amended Indictment correcting a clerical error but charging Appellant with the same crimes. X AA 973-75. On the fourth day of trial, July 11, 2013, the court granted Appellant's motion to preclude the state's gang expert from testifying. VII AA 1355-57. However, the court also found that the State had brought the gang enhancement in good faith. VII AA 1357. In response to the court's ruling, the State filed a Fourth Amended Indictment on July 12, 2013, dropping the gang enhancements. X AA 1850-52. On July 15, 2013, the jury returned a verdict of guilty of Second-Degree Murder with Use of a Deadly Weapon and not guilty of Conspiracy to Commit Murder. XI AA 1995.

On July 22, 2013, Appellant filed a Motion for Acquittal or in the alternative, Motion for New Trial. XI AA 2019-33. On July 29, 2013, the State filed an Opposition. RA 115-48. On August 1, 2013, the district court denied the Motion. XI AA 2049.

On August 29, 2013, Appellant was sentenced to life with the possibility of parole after ten (10) years for second-degree murder, plus an equal and consecutive term of life with the possibility of parole after ten (10) years for the deadly weapon enhancement. XI AA 2081. Appellant received one thousand nine hundred fifty-nine

(1,959) days credit for time served. XI AA 2081. On September 11, 2013, the Judgment of Conviction was filed. XI AA 2088-89. On October 11, 2013, Appellant filed a Notice of Appeal. XI AA 2090-91.

STATEMENT OF THE FACTS

Crystal Perez (Perez) was attending Morris Sunset East High School in February of 2006. VI AA 1140. Among her classmates were Giovanny Garcia aka "Little One" (Garcia), Gena Marquez (Marquez), and Melissa Gamboa (Gamboa). VI AA 1137-36, 1140. Perez was friends with Gamboas's boyfriend, Jesus Alonso (Alonso), an active member of Brown Pride who went by the moniker Diablo. VI AA 1139-40, 1164. Perez was aware of Garcia's membership in the Puros Locos gang. VI AA 1144-45. The week prior to February 6, 2006, Perez had gotten into a confrontation with Garcia over a book. VI AA 1141. Following this confrontation, Alonso approached Garcia and revealed his gang membership. VI AA 1143. Perez then observed Garcia make the Puros Locos hand signal to Alonso. VI AA 1147.

On February 6, 2006, Perez observed Garcia talking on his cell phone and heard him say "bring Stacy." VI AA 1149-50. Following this call, Perez and Marquez left school early, fearing an altercation would take place. VI AA 1150. Perez and Marquez went to Marquez's house to get help from Marquez's brother Bryan Marquez. VI AA 1150. Bryan Marquez was with Gamboa's younger brother Victor Gamboa (Victor or victim). VI AA 1150.

Perez, Marquez, Bryan Marquez, and Victor returned to the school. VI AA 1152. Bryan Marquez approached Garcia and hit him. IV AA 842, 844, VI AA 1153. From there, a large group of students began fighting. IV AA 844, VI AA 1153.

Perez got knocked to the ground but observed a person run past her with a gun. VI AA 1155. Perez then heard shots. VI AA 1156. Perez admitted she initially lied to the police and said that Garcia was the shooter because she believed he caused the fight which lead to Victor's death. VI AA 1157. She "wanted it to be him." VI AA 1157.

Gamboa saw Victor outside of the school, but did not see him fighting. V AA 1172-73. During the fight, she observed a gray El Camino carrying two males and one female park at the school. VI AA 1169-71. One of the occupants got out of the car and proceeded to the fight. VI AA 1171. One of the males was wearing a gray hooded sweatshirt. VI AA 1174. The fight broke up and everyone fled. VI AA 1173. Gamboa was running behind Victor when she saw the male in the gray hoodie with a gun in his right hand and watched as he shot her brother. VI AA 1174, 1176. Gamboa could not identify the shooter at trial, over seven (7) years later, but she had previously identified Appellant as the shooter at the Preliminary Hearing on December 18, 2008. VII AA 1203.

During the fight, Campus Monitor Betty Graves observed a Hispanic male with black hair in a gray hooded sweatshirt holding his right hand in his pocket as

he attempted to throw punches with his left hand. VI AA 1100-01, 1098-99. Graves stated to her co-worked, "that boy's got a gun." VI AA 1099. Graves called Principal Dan Eichelberger. VI AA 1070.

Principal Eichelbeger came out of the school and observed "total mayhem." VI AA 1070-71. Principal Eichelberger yelled loudly for the fighting to stop and many participants ran to cars and left. VI AA 1072. He then began escorting the others off school property when he saw a smaller kid running away from a taller male in a gray hoodie. VI AA 1073-74. The male in the hoodie pulled the hoodie over his head and "fired away." VI AA 1074-75.

Joseph Harris (Harris) was at the school to pick up his girlfriend. VI AA 1086. As he was waiting, he observed a young male running across the street. VI AA 1087. A male in a gray hoodie pointed a gun at the boy as he ran away, holding the gun in his right hand. VI AA 1088-89. Harris heard five to six shots, and saw the victim fall against a wall face-first, before sliding down to the ground. VI AA 1091-92.

Vanessa Grajeda (Grajeda) had been watching the fight and observed a male in a gray hoodie. VI AA 1056, 1059. She noticed something black in his pocket, and watched him as he ran to the middle of the street, pulled out a gun, and shot the gun. VI AA 1060.

Daniel Proietto, a Crime Scene Analyst with the Las Vegas Metropolitain Police Department (LVMPD), responded to the school to document the crime scene

and collect evidence. IV AA 733-34. On Washington, Proietto located four bullets and six expended cartridge cases. IV AA 746-48, 750. All six of the cartridge cases were headstamped Wolf 9mm caliber Makarov. IV AA 749, 752. On the North side of Washington, across from the school, Proietto located four bullet strikes on the wall adjacent to the sidewalk and one bullet embedded in the wall. IV AA 752-54.

Officer Richard Moreno began walking in the direction the shooter had been seen fleeing, and located an Imez 9mm Makarov pistol hidden upside down in a toilet tank that had been left curbside outside 865 Parkhurst. IV AA 808.[2] Proietto collected and impounded the firearm. IV AA 756-58.

Dinnah Angel Moses examined the firearm, bullets, and cartridge cases recovered at the crime scene. VIII AA 1460-61. Moses testified that all of the cartridge cases were consistent with the impounded firearm, and was able to identify two of the recovered bullets as being fired by the Imez pistol. VIII AA 1464-67. The remaining two bullets were too damaged to identify, but bore similar characteristics to the other bullets. VIII AA 1465.

Detective Mogg interviewed Garcia. IX AA 1616. Garcia was photographed wearing the same all black clothing he was wearing during the school day. IX AA 1618. Detective Mogg collected Garcia's cellular telephone and discovered that just

[2] Russell Carr, the owner of the home where the toilets were outside, testified that the gun found in the toilet by Officer Moreno had never been inside his house and he did not know how it got there. VII AA 1219-1220.

prior to the shooting, Garcia placed twenty calls to Manuel Lopez (Lopez), a fellow member of Puros Locos who went by the moniker Puppet, and twelve calls to Melinda Lopez, the girlfriend of Salvador Garcia, another member of Puros Locos. XI AA 1617, 1621-22.

In late March of 2006, Detective Mogg received a call from Detective Ed Ericcson with the LVMPD's Gang Unit. IX AA 1623. Detective Ericcson was investigating a shooting of Puros Locos member Jonathan Harper (Harper) that had occurred on February 18, 2006 at the home of Salvador Garcia. IX AA 1623-24. Detective Ericcson believed that Harper might have information regarding the homicide at Morris Sunset East High School. IX AA 1624.

Detectives Mogg and Hardy interviewed Harper on April 1, 2006. VIII AA 1401. Harper provided the moniker of the shooter in the gray hoodie, which led the LVMPD to Evaristo. VIII AA 1396-97.

Harper testified at trial that in February of 2006, he was a member of Puros Locos for a short time, and went by the moniker Silent. VII AA 1273, 1276. On the day of the murder, he was at Salvador Garcia's apartment with Lopez, Edshell Calvillo (Calvillo) (who went by the moniker Danger, V AA 857) and Evaristo (who he called "E"). Harper identified Appellant as E. VII AA 1278, 1280; IX AA 1629-30. Harper stated Appellant was wearing a gray hoodie. VII AA 1284. While at Salvador's apartment, Garcia called. VII AA 1280-81. Salvador told them they had

to go to the school. VII AA 1280-81. Before leaving, Harper noticed that Lopez had his "nine" in his waistband and that he gave it to Appellant. VII AA 1282. Harper, Lopez, Appellant, and Lopez's girlfriend Stacy got into Lopez's El Camino. VII AA 1281.

Once they arrived, Harper saw a big brawl in front of the school. VII AA 1284. A kid ran from the fight. IV AA 1286. Garcia and Appellant chased the kid and were fighting over the gun. VII AA 1287. They were yelling loud enough that Harper could hear it. VII AA 1287, 1307. Harper heard Appellant say, "I got it." VII AA 1287. Then Appellant shot the victim, and "dumped . . . the whole clip in the kid." VII AA 1288. Harper testified that later Appellant told him, "I got him." VII AA 1289. Harper overheard several people at Salvador's apartment talking about the gun being hidden. VII AA 1289.

In May of 2006, Detective Mogg received an anonymous tip via "Crime Stoppers." IX AA 1627. The tip led him to the 4900 block of Pearl Street. IX AA 1628. Detective Mogg began investigating residents for any connection to a person named Evaristo, and located Maria Garcia and Victor Tapia. IX AA 1628. Maria Garcia worked at the Stratosphere, and listed Appellant, her son, as an emergency contact with her employer. IX AA 1628.

On July 26, 2006, Calvillo came forward because the fact that a young boy had been killed "weighed heavy on his conscience." VI AA 991. Calvillo testified

that on February 6, 2006, he was at Salvador Garcia's apartment with Lopez, Harper and Appellant. V AA 871. They received a call from Garcia to "back him up" at the school. V AA 871, 877. Calvillo testified that Lopez gave the gun to Appellant. V AA 878-79. Harper, Appellant, Lopez, and "Puppet's girl" left in Lopez's El Camino. V AA 876. Calvillo got into another car with Sal, and followed Lopez's car. V AA 877. Sal's car got stuck at a light and by the time they got to the school everyone was running and they heard shots. V AA 879-80. After the shooting, he spoke with Appellant. V AA 884. Appellant admitted he shot a boy and laughed. V AA 888. Appellant also told Calvillo that he hid the gun in a toilet. V AA 894. Calvillo stated Harper told him he saw the whole thing. V AA 885.

An arrest warrant was issued on October 10, 2006. VIII AA 1590-91. FBI Special Agent T. Scott Hendricks, of the Criminal Apprehension Team (CAT), a joint task force of the FBI and local law enforcement, was granted pen register warrants for the cellular telephones of Appellant's parents. VIII AA 1591, IX AA 1590-92, 1594. On April 23, 2007, Detective Mogg spoke to Appellant's parents. IX AA 1595-97. Shortly after that conversation, Appellant's parents placed a call to Vera Cruz, Mexico. IX AA 1597-98. Appellant was arrested on April 23, 2008, and was extradited to the United States on October 16, 2008. IX AA 1599, 1601, 1603.

Alice Maceo, a Latent Print Examiner and the Lab Manager of the Latent Prints Section of the LVMPD, examined the firearm. IX AA 1682, IX AA 1699.

Maceo was able to lift three (3) latent prints from the upper grip below the slide (L1), the back strap (L2) and the grip (L3). IX AA 1709. The print from the grip (L3) was not of sufficient quality to make any identification. IX AA 1709-10. Maceo was able to exclude Giovanny Garcia and Manuel Lopez as to the remaining two prints. IX AA 1707, 1710. After Appellant was taken into custody, Maceo was then able to compare his prints to L1 and L2. IX AA 1711. Maceo identified Appellant's right ring finger on the upper left side of the grip (L1). IX AA 1719. She also identified Appellant's right palm print, the webbing between the thumb and the index finger, on the back strap of the gun just above the grip (L2). IX AA 1717-19. Maceo demonstrated at trial that the print on the back strap is consistent with holding the firearm in a firing position, and the location of the print on the upper grip could be consistent with placing the gun in the toilet in the position in which it was found. IX AA 1736-37.

SUMMARY OF THE ARGUMENT

There is overwhelming forensic evidence, eye witness accounts, and accomplice testimony supporting the jury's verdict. Gamboa's pre-trial identification of Appellant was not unduly prejudicial because she identified Appellant while he was sitting in the jury box with other defendants. Harper was competent to testify despite a head injury because he was able to go "toe to toe" with defense counsel and his memory could be refreshed. The district court's decision

not to compel a psychiatric examination is supported by Appellant's failure to present a compelling reason for such an intrusion. The court did not err in granting the State a material witness warrant for Calvillo, as he admitted under oath that he did not want to testify and failed to appear for court despite a subpoena. The State did not commit prosecutorial misconduct because Calvillo's appearance in custody was pursuant to a valid material witness warrant. There was also no prosecutorial misconduct regarding the State's decision to bring a gang enhancement since it was supported by the facts and was correctly withdrawn after an adverse ruling. Any alleged error was harmless due to the overwhelming evidence against Appellant.

ARGUMENT

I.

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY VERDICT

This Court should decline Appellant's invitation to second-guess the credibility determinations of the jury. Appellant's conviction of Second Degree Murder is supported by overwhelming evidence, including eyewitness testimony, his confessions to his associates and the presence of his fingerprints on the gun.

In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). "Where there is substantial evidence to support the jury's verdict, it will not be disturbed on appeal." Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). "It is for the jury to determine the degree of weight, credibility and credence to give to testimony and other trial evidence, and this Court will not overturn such findings absent a showing that no rational juror could have found the existence of the charged offenses beyond a reasonable doubt." Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994), holding modified, Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006). "Circumstantial evidence alone may support a judgment of conviction." Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000) (citing Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980)).

Multiple witnesses saw a male in a gray hoodie running from the scene of the murder. Gamboa saw a male run by her in a gray hooded sweatshirt with a gun in his right hand following her brother. VI AA 1174, 1176. Campus Monitor Graves saw a Hispanic male in a gray hooded sweatshirt run by her with what she believed was a gun in his right pocket. VI AA 1100-01, 1098-99. Principal Eichelberger also saw a smaller boy running away from a taller male in a gray hoodie. VI AA 1073-74. He also watched as the male in the hoodie "fired away." VI AA 1074-75. Grajeda had been watching the fight and observed a male in a gray hoodie run down the street, pull out a gun, and shoot the gun. VI AA 1056, 1059, 1060. Harris saw a man

in a gray hoodie point a gun at a young male, fire six shots, and watched as the victim fell against a wall. VI AA 1087-93.

Harper was present in the car when Lopez gave the gun to Appellant. VII AA 1280-82. He observed Appellant wearing a gray hoodie when traveling to the school. VII AA 1284. Harper saw Garcia and Appellant fighting over the gun as Victor ran away. VII AA 1286-87, 1307. Harper saw Appellant shoot Victor. VII AA 1288. Appellant told Harper that "[he] got him." VII AA 1289. Harper watched Appellant run toward the neighborhood where the gun was found. VII AA 1288. Gamboa identified Appellant as shooting the victim. VII AA 1070, 1288. Appellant told Calvillo that he shot a boy and laughed. V AA 884-94. Appellant also said he hid the gun in the toilet. V AA 894.

Forensic evidence also support's the jury's verdict. Four bullets and six expended cartridges were found at the murder scene. IV AA 746-48. The gun found in the toilet was the gun that fired the bullets found at the scene, and Appellant's fingerprints were found on that gun. IX AA 1717-19.

II.
THE COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS

Appellant's fundamental error is the belief that a judge must rest control over credibility questions from jurors. Appellant's contentions about Gamboa's identification of him as the shooter do not flow from inappropriately suggestive

police conduct but rather the court process itself and Gamboa's memory. These concerns do not warrant judicial invasion of the province of the jury.

When reviewing a district court's decision regarding a motion to suppress, this Court reviews findings of fact for clear error, but the legal consequences of these facts de novo. State v. Beckman, 120 Nev. __, __, 305 P.3d 912, 916 (2013).

That the recollection of a witness is allegedly impaired does not warrant removing the question of credibility from the jury:

> The right to confront and cross-exam witnesses, however, does not mean that the testimony of a witness must be excluded when the witness is unable to recall the underlying basis for the testimony that is introduced. In Delaware v. Fensterer, the Supreme Court upheld the admission of the prosecution's expert testimony even though the witness was unable to recall the theory upon which his opinion was based. In United States v. Owens, the victim's out-of-court identification of the defendant was admitted into evidence even though the victim testified at trial that he could not remember seeing his assailant. In both cases, rules of the Confrontation Clause were met by allowing cross-examination of the witnesses. *Because the deficiencies in the reliability of the testimony could be addressed in this manner, admitting the testimony was not fundamentally unfair and did not violate the Due Process Clause*.

2 Modern Constitutional Law § 30:67 (3rd. ed. 2011) (italics and underlining added, footnotes omitted).

There is no due process violation if a defendant is afforded the opportunity to challenge the credibility of a witness through the traditional truth finding tools of the courtroom. The United States Supreme Court recently endorsed this principle:

> In our system of justice, fair trial for persons charged with criminal offenses is secured by the Sixth Amendment, which guarantees to defendants the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution. Those safe-guards apart, admission of evidence in state trials is ordinarily governed by state law, and *the reliability of relevant testimony typically falls within the province of the jury to determine*.

Perry v. New Hampshire, ___ U.S. ___, ___, 132 S.Ct. 716, 720 (2012) (emphasis added).

Perry resolved a division of opinion over whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of a suggestive eyewitness identification not arranged by the police. Perry arose out of a defendant's desire to suppress an identification as a violation of due process because factually the witness identification "amounted to a one-person showup in … [a] parking lot." Id. at ___, 132 S.Ct. at 722. According to the defendant, due process was violated because it was "all but guaranteed that … [the witness] would identify him as the culprit." Id. The Supreme Court began its analysis by noting:

> The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safe-guards available to defendants to counter the State's evidence include the Sixth Amendment right to counsel, … compulsory process … and confrontation plus cross-examination of witnesses ... Apart from these guarantees, we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence, and *juries are assigned the task of determining the reliability of the evidence presented at trial*.

Perry, ___ U.S. at ___, 132 S.Ct. at 723 (emphasis added, citations omitted).[3]

Perry held that due process does not require a preliminary judicial inquiry into potentially suggestive eyewitness identifications that are not arranged by law enforcement. Id. at ___, 132 S.Ct. at 730. In reaching this conclusion the Court noted that "[w]e have concluded in other contexts … that the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." Id. at ___, 132 S.Ct. at 728. The Court went on to explain that:

> Our unwillingness to enlarge the domain of due process … rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence. … We also take account of other safeguards built into our adversarial system that caution juries against placing undue weight on … testimony of questionable reliability. These protections include the defendant's Sixth Amendment right to confront the eyewitness. ... Another is the defendant's right to the effect assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. … [and] jury instructions[.] … The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes conviction based on dubious identification evidence.

Perry, ___ U.S. at ___, 132 S.Ct. at 728-29.

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[3] The only instance where the Supreme Court has found a due process violation premised upon the reliability of testimony is where the State knowingly allows an important witness in a criminal prosecution to testify falsely regarding consideration for his testimony. Napue v. People of the State of Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959).

The real danger inherent in Appellant's argument is that it would push the criminal justice system away from its traditional reliance upon the jury as the ultimate decision maker. Appellant assumes that the jury could not be trusted to evaluate Gamboa's testimony; however, this lack of faith in the jury system is directly counter to the Supreme Court's wise "unwillingness to enlarge the domain of due process … [because] the jury, not the judge, traditionally determines the reliability of evidence." Perry, ___ U.S. at ___, 132 S.Ct. at 28.

The precedents of this Court and the Ninth Circuit are in accord with the holding of Perry. In Baker v. State, 88 Nev. 369, 370, 498 P.2d 1310 (1972), the defendant complained that the preliminary hearing examination deprived him of due process in violation of the Fourteenth Amendment by exposing him to identification in a prejudicially suggestive grouping, contrary to Stovall. This Court rejected his argument. Baker, 88 Nev. at 371, 498 P.2d at 1311.

Baker then took his case to the federal courts. In Baker v. Hocker, 496 F.2d 615 (9th Cir. 1974), the Court of Appeals for the Ninth Circuit, found that the defendant failed "to clear even the first hurdle" of a Stovall violation. Id. at 617. In Baker, the defendant had not been identified in an earlier physical lineup, but was identified at the preliminary hearing, where he was seated between the two co-defendants who had been identified in that physical lineup. Id. The court held that the risk of a mistaken identification at preliminary hearing becoming "fixed" and

tainting trial identification "is far less present in the court proceeding because, as here, the identification can be immediately challenged by cross-examination." Id.

The Ninth Circuit reaffirmed Baker, in Johnson v. Sublett, 63 F.3d 926 (9th Cir. 1995), cert. denied, 516 U.S. 1017, 116 S.Ct. 582):

> While conceding that courtroom procedures are undoubtedly suggestive, we stress that only "unnecessary" or "impermissible" suggestion violates due process. We balanced the state's strong interest in conducting the court procedure against the dangers of misidentification, which were already mitigated by cross-examination, and held that the suggestive character of courtroom logistics was not unnecessarily suggestive.

63 F.3d at 929.

As early as 1969, this Court held, in Craig v. State, 85 Nev. 130, 451 P.2d 365 (1969), that a defendant's claim that he was prejudiced by being identified at a preliminary hearing without having had a lineup was without merit. This Court noted that the nature of the alleged prejudice was not clear. Id.

The circumstances of Gamboa's identification of Appellant were not so suggestive as to require judicial trespass into the role of the jury. The court found that the preliminary hearing identification was not unduly suggestive because Gamboa first recognized Appellant while he was sitting in the jury box with other in-custody defendants, nobody talked to her about who he was, and there was a reliable basis for the identification based on her statement to police that she saw him, could identify him, and described what he was wearing. II AA 253.

Moreover, Appellant had the opportunity to cross-examine Gamboa at the preliminary hearing about inconsistencies in her statements, and her identification of him as "the person seated at counsel table." I AA 64-66. She was also subjected to extensive cross examination at trial. VI AA 1184-VII AA 1205.

III.
THE COURT PROPERLY ALLOWED JONATHAN HARPER TO TESTIFY

It was not error to allow Harper to testify and to deny the Motion for Evidentiary Hearing since he was able to communicate his observations, his recollection could be refreshed and he was subject to cross examination.

A trial court's finding of competence will not be reversed on appeal absent a clear abuse of discretion. Lanoue v. State, 99 Nev. 305, 307, 661 P.2d 874, 874 (1983). NRS 50.015 states that "[e]very person is competent to be a witness except as otherwise provided in this title." Nowhere in the remaining sections are persons who express an inability to recall events perfectly or who provide inconsistent statements over a span of several years precluded from testifying.

This Court, in finding an eight-year-old competent, reiterated that the standard of competence is "that the child must have the capacity to receive just impressions and possess the ability to relate them truthfully." Wilson v. State, 96 Nev. 422, 423-24, 610 P.2d 184, 185 (1980). This Court reiterated that inconsistencies in testimony go to the weight to be given the evidence by the jury rather than to the question of competence. Id.

In Fox v. State, 87 Nev. 657, 569-72, 491 P.2d 35, 36-37 (1971), this Court found that a district court did not abuse its discretion in refusing to order a physical examination of the witness and allowing the witness, who admitted to consuming drugs the night before he testified, to testify. In Fox, the district court found that the witness did not appear to be under the influence of narcotics and he handled himself well on cross-examination even though counsel tried to "cross him up" and "throw rapid-fire questions" at him. Id. This is similar to the case at hand where the court found that Harper went "toe to toe" with defense counsel and that he was definitely able to relate what had happened. XI AA 2046-67.

Authority in Nevada for compelling a witness to undergo a psychiatric evaluation is centered mostly on child victims of sexual abuse. The same analysis applies here. In Abbott v. State, 122 Nev. 15, 138 P.3d 462 (2006), this Court overruled prior precedent and returned to factors set forth in Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000), reasserting that a trial judge should order an independent psychological or psychiatric examination of a witness only if there is a compelling reason for such an examination.

Appellant's reliance on Washington v. State, 96 Nev. 305, 307, 608 P.2d 1101, 1102 (1980) is misplaced. In Washington, this Court found that defense must present "compelling reasons" to require a psychiatric examination even when the victim admits to lying to the police and to committing perjury. Id. Harper never

admitted to perjury and the district court found that jurors heard all of his statements, including inconsistent ones, and should make their own decision regarding his credibility. XI AA 2047-48.

The district court, in denying Appellant's request for an evidentiary hearing, found that a witness can suffer a head injury and still be competent. II AA 276. The court found that there was no need for a psychiatric examination and the fact that Harper gave contradictory statements was a cross-examination issue. II AA 277-78. Harper was subjected to extensive cross examination. VII AA 1293-1321. Importantly, over the State's objection, the district court instructed the jury that Harper's testimony needed to be corroborated. X AA 1803, 1884.

IV.
APPELLANT WAS NOT PREJUDICED BY THE MATERIAL WITNESS WARRANT

A. The State Properly Obtained a Material Witness Warrant

Calvillo was properly the subject of a material witness warrant because he failed to appear for court despite being subpoenaed.

Appellant did not preserve this issue for appeal. Appellant objected to relevance and was concerned about Calvillo being informed of his Fifth Amendment Rights, but did not object to the material witness warrant. V AA 854-56. Failure to object during trial generally precludes appellate consideration of an issue. Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997). Despite such failure, this court

has the discretion to address an error if it was plain and affected the defendant's substantial rights. Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 23 P.3d 227, 239 (2001).

Under NRS 178.494:

> "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 Globensky v. State, 96 Nev. 113, 188, 605 P.2d 215, 219 (1980), this Court entertained a claim that holding a witness until trial on a material witness warrant placed the witness "under such pressure … that she was forced to testify against her husband." This Court rejected the contention because "our statute authorizes courts to set bail for material witnesses and allow for these witnesses to be taken into custody if bail cannot be posted[.]" Id.

The record does not present error of any degree of Calvillo testified that while he promised to appear for court, he did not, despite being subpoenaed. V AA 852.

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B. It Was not Prosecutorial Misconduct to Present Calvillo in Custody

When this Court considers a claim of prosecutorial misconduct, it engages in a two-step analysis. Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008). First, the Court determines whether the prosecutor's conduct was improper, and second, if the conduct was improper, the court determines whether it warrants reversal. Id. The second prong is dependent on what type of error it was and whether or not it was preserved. Id. at 1189-90, 196 P.3d at 476-77. When an error is not preserved, this Court employs a plain-error review and asks whether the defendant demonstrated that the error "affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Id. at 1190, 196 P.3d at 477, (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Appellant did not object to the material arrest warrant or that Calvillo was in shackles. V AA 854-56. There was no objection regarding alleged prosecutorial misconduct during Calvillo's testimony. V AA 851-896. Therefore this Court should review the second prong using a plain error analysis.

Appellant did not demonstrate that the shackles were improper, or that any misconduct occurred. The State was concerned that any attempt to obscure Calvillo's custody status could be seen as improper vouching, particularly considering Calvillo's involvement and confession. See, Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997). Appellant's contention that the State attempted to either make

sure Calvillo testified in a way favorable to the state or presented him in a way to bolster his credibility is belied by the record and nonsensical. Calvillo admitted that he did not want to testify. V AA 852-53. No promises or threats had been made regarding his testimony. V AA 928. He was brought to court in shackles because he was in custody, and pursuant to NRS 178.494 he was in custody until the completion of his testimony, regardless of how he testified.

Appellant's contention that the material witness warrant somehow prevented defense counsel from adequately preparing makes no sense and is belied by the record. Calvillo was noticed as a witness by the State in the Indictment filed on March 19, 2010. I AA 5. When Appellant complained to the district court that he had not had an opportunity to interview Calvillo, counsel was given the opportunity to interview him before cross-examination began. V AA 898-99, 935-37. Further, the prosecution suffered the same handicap due to Calvillo's failure to appear since only one interview had been conducted by the prosecutor that very day. V AA 926-27.

Defendant failed to object on the grounds that Calvillo was an accomplice. Defendant inquired as to what Calvillo would testify to and if he needed an attorney. V AA 854-56. Calvillo had not participated in the fight or the shooting, and the State indicated it had no intention of prosecuting him for any crimes. V AA 854-56. Calvillo was not an accomplice, and could not be prosecuted as such as the court

found the statute of limitations had run. V AA 905-07. Defense never requested a jury instruction regarding corroboration of accomplice testimony as they did with Harper. X 1803-07, 1884.

V.
IT WAS NOT PROSECUTORIAL MISCONDUCT TO PROCEED TO TRIAL WITH THE GANG ENHANCEMENT

There was no prosecutorial misconduct in proceeding to trial with a gang enhancement.

When this Court considers a claim of prosecutorial misconduct, it engages in a two-step analysis. Valdez, 124 Nev. at 1189, 196 P.3d at 476. First, the Court determines whether the prosecutor's conduct was improper, and second, if the conduct was improper, the court determines whether it warrants reversal. Id.

The prosecutor's conduct was not improper. Under the original Case No. (C226218), Appellant filed a Petition for Writ of Habeas Corpus challenging the gang enhancement on February 17, 2009. RA 77-82. The court denied this Writ on March 3, 2009 pursuant to a hearing, stating that the bar at a preliminary is slight, and authorizing the State to move forward with the gang enhancement. RA 83. Following the grand jury presentment, Defendant filed a second Petition for Writ of Habeas Corpus challenging the gang enhancement, which was denied on May 25, 2010, again authorizing the State to move forward with the gang enhancement. RA 84-100, 102. On June 4, 2010, Manuel Lopez, who was charged in connection to the

same incident, filed a Petition for Writ of Habeas Corpus challenging the gang enhancement. RA 103-12. On June 22, 2010, pursuant to a hearing, the Court denied the writ as untimely, but also ruled that the State had presented adequate evidence to move forward with the gang enhancement as the State had shown: 1) that Appellant knew he was going to get into a fight with a rival gang; 2) Puros Locos could enhance its reputation by fighting Brown Pride; 3) Appellant's fellow gang member, Garcia, requested Appellant's assistance to fight; and 4) Appellant has a large tattoo on his chest of Puros Locos. RA 114. Furthermore, the Court found that the trier of fact determines if the gang enhancement should be applied. RA 114. [4]

The gang enhancement was a viable charge until Appellant successfully argued that the State should be precluded from calling a gang expert to testify. VII AA 1361. Without the gang expert, the State could not proceed with the gang enhancement Origel-Candido v. State, 114 Nev. 378, 956 P.2d 1378 (1998) (finding that evidence the defendant was in a gang but no evidence regarding felonious activity as a common act does not constitute sufficient evidence for a gang enhancement). However, the district court found that the State had proceeded in good faith and that the loss of the enhancement was due to changes in the testimony

[4] The transcripts of the hearings regarding all three of Appellant's Petitions for Writs of Habeas Corpus are not part of the record, and thus it is presumed that the transcripts support the findings of the district court. Sasser v. State, 130 Nev. __, __, 324 P.3d 1221, 1225, footnote 8 (2014).

of witnesses and new information not available to the State when the case was charged. VII AA 1353-57.

NRS 193.168(1) states that "a criminal gang enhancement may be added for "any person who is convicted of a felony committed knowingly for the benefit of, at the direction of, or in affiliation with, a criminal gang, with the specific intent to promote, further or assist the criminal gang." Based on discovery, the State had reason to believe that Appellant shot Victor as a result of a gang dispute between Brown Pride and Puros Locos. Statements from Harper led the State to believe that Calvillo, Appellant, Lopez, Garcia, and Salvador Garcia were in Puros Locos. RA 69. At the preliminary hearing Harper testified that they were going to fight Brown Pride. RA 7. In a recorded statement on March 30, 2006, Lopez also stated that Appellant ran with Puros Locos and was a member of a gang. RA 68.

Appellant argues that because no one in the gang had actual felony convictions, that there was not a gang. However, NRS 193.168(8) defines a criminal gang as:

> As used in this section, "criminal gang" means any combination of persons, organized formally or informally, so constructed that the organization will continue its operation even if individual members enter or leave the organizations, which:
> (a) Has a common name or identifying symbol;
> (b) Has particular conduct, status and customs indicative of it; and

(c) Has as one of its common activities engaging in criminal activity punishable as a felony, other than the conduct which constitutes the primary offense.

There is no requirement that the felonious conduct must be proven by way of actual convictions, as opposed to other forms of evidence. In Origel-Candido, 114 Nev. at 383, 956 P.23 at 1381, this Court discussed the sufficiency of testimony by a gang expert regarding whether the activities the gang engaged in were felonious activities of the gang as a whole. This Court did not require that the State prove prior felony convictions in order to establish the requisite felonious activity. Id.

The prosecution brought the gang enhancement in reliance on NRS 193.168(7), which permits the admissibility of expert testimony to show "the types of crimes that are likely to be committed by a particular criminal gang . . . ." Furthermore, the prosecution had been told by the Court, not once, but twice, through the denial of Appellant's pre-trial Writ of Habeas Corpus that there was sufficient evidence to move forward with the gang enhancement. But when the court ruled that the State could not present the gang expert, the State no longer had the ability to prove the gang enhancement and thus did not proceed. VII AA 1361-62.

VI.
ANY ALLEGED ERROR WAS HARMLESS

NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Constitutional error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would

have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001) (quoting Neder v. United States, 527 U.S. 1, 3 (1999)). Non-constitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

Any potential error was harmless. The State presented ample evidence that Appellant committed the crimes with which he was charged. See Supra I.

CONCLUSION

Based on the foregoing, the State respectfully request that this Court affirm the Judgment of Conviction.

Dated this 7th day of October, 2014.

Respectfully submitted,

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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 2003 in 14 point font of the Times New Roman style.
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 of more, contains 7,550 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. 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 7th day of October, 2014.

Respectfully 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 7th day of October, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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