IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO: 64221

ANSWER TO PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, JONATHAN E. VANBOSKERCK, and submits this Answer to Petition for Rehearing in obedience to this Court's Order filed on July 16, 2015. This answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 20th day of July, 2015.

Respecfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar # 006528

Attorney for Respondent

MEMORANDUM
POINTS AND AUTHORITIES

The Petition for Rehearing should be denied as this Court has not overlooked a material fact, misapprehended a question of law or ignored controlling precedent. Ultimately, Appellant's demand for rehearing warrants rejection because his argument is premised upon the repeatedly rejected belief that the gate keeping role of the judiciary should be expanded to include the evaluation of the credibility of an in-court identification.

Pursuant to NRAP 40(c)(2), this Court considers rehearing when it has overlooked or misapprehended a material fact or question of law. Bahena v. Goodyear Tire & Rubber Co., 126 Nev. ___, ___, 245 P.3d 1182, 1184 (Nev. 2010). Accord, McConnell v. State, 121 Nev. 25, 26, 107 P.3d 1287, 1288 (2005). Additionally, rehearing is warranted where the Court has overlooked, misapplied, or failed to consider directly controlling legal authority. Bahena, 126 Nev. at __, 245 P.3d at 1184.

This Court correctly rejected Appellant's attempt to expand the gate keeping function of the judiciary into a probing inquiry regarding the credibility of an in-court identification:

> Garcia contends that the district court erred in denying his motion to suppress evidence of MG's identification of Garcia at the preliminary hearing on the ground that the identification was not reliable. We review a district court's ruling on a motion to suppress identification testimony for abuse of discretion because it is an evidentiary decision.

> *See Mclellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110 (2008). An in-court identification must be unnecessarily or impermissibly suggestive, creating a risk of irreparable misidentification to warrant suppression under *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967), and this risk is less present when an identifying witness is subject to immediate challenge by cross-examination. *Baker v. Hocker*, 496 F.2d 615, 617 (9th Cir. 1974); *see United States v. Domina*, 784 F.2d 1361, 1368 (9th Cir. 1986) (noting the problem with suggestive pre-trial identifications is that witness later identifies individual in court on basis of prior suggestive identification, rather than from personal recollection); *Baker v. State*, 88 Nev. 369, 374, n.3, 498 P.2d 1310, 1313, n.3 (1972) (observing that other jurisdictions had reversed where a suggestive identification at preliminary hearing tainted witness's trial identification). MG did not identify Garcia at trial as the perpetrator—rather, she acknowledged that she identified the shooter at the 2008 preliminary hearing and stated that she did not recognize him at the 2013 trial—and, accordingly, MG's prior identification did not taint her trial testimony. The district court considered the issue of MG's prior identification moot because she did not identify him at trial. MG's identification of Garcia at the preliminary hearing did not constitute a reversible due process violation when MG was subject to immediate and thorough cross-examination at the preliminary hearing and at trial and did not identify Garcia at trial. We conclude that the district court did not abuse its discretion.

(Order of Affirmance, filed May 18, 2015, p. 2-3).

Appellant attempts to undermine this Court's holding by offering numerous complaints that boil down to the view that a trial court should conduct a preliminary credibility determination before allowing a jury to evaluate the credibility of an identification at a preliminary hearing. Notwithstanding Appellant's self-serving opinion, 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).[1]

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

[1] 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).

> 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.

Appellant's complaint that the evidence was insufficient to support the verdict absent MG's preliminary hearing identification is not supported by the record:

> Numerous witnesses testified that they saw a Hispanic man of Garcia's approximate age wearing a gray hooded sweatshirt shoot Victor Gamboa during a schoolyard brawl. JH testified that he rode in a car with Garcia to the fight, that ML handed his gun to Garcia before getting into the car, that Garcia was wearing a gray hooded sweatshirt that night, that he saw Garcia shoot Gamboa in the back as Gamboa attempted to run away, and that he saw Garcia run into the neighborhood where the gun was found. EC testified that Garcia told him that he shot a boy and that he hid the gun in a toilet. A police officer testified that he found a gun in the tank of a toilet left on the curb as garbage, one block from the school. Latent fingerprint analysis identified two prints on the gun that were matched to Garcia. Cartridge casings from the scene of the shooting matched the gun to Gamboa's shooting.

(Order of Affirmance, filed May 18, 2015, p. 1-2). Notably absent from this list is MG's preliminary hearing identification. Further, Appellant's complaint that JH and EC were accomplices is irrelevant since the remaining evidence supplies any necessary corroboration.

Appellant's next complaint is that the lower court's decision to deny his motion to suppress MG's preliminary hearing identification was error because the identification was weak and the court misapprehended the record related to the

presence of other defendants when MG saw him. (Petition, p. 4-5). Appellant complains that the preliminary hearing identification was "bad" because "(1) it did not match up with the witnesses contemporaneous description of the shooter and (2) Appellant was the only person in the courtroom in custody." (Petition, p. 4). However, according to the United States Supreme Court, Appellant's first ground is a credibility evaluation assigned to the jury. Perry, ___ U.S. at ___, 132 S.Ct. at 728-29.

As to Appellant's second ground, it is belied by the record. Nothing in this record indicates whether other defendants were present when MG observed and recognized Appellant just prior to the preliminary hearing as he was sitting in the front row of the jury box. (I Appellant's Appendix (AA) 66). Appellant contends that the lower court assumed there were other defendants present and offers citation to volume 2, page 253 of the record to substantiate his belief. (Petition, p. 7). However, a review of that page shows that the lower court made no such finding.[2] The Court merely noted that Appellant was "in the box." (II AA 253). Even if the lower court made the assumption that others were in the box with Appellant there still is no basis for reversal. If Appellant wanted to dispute this alleged assumption, he needed to make a record below that he was the only defendant in the box at the time MG recognized him and his failure to do so is fatal

[2] Appellant cannot dispute this contention of fact as he made the very same argument. (Appellant's Reply Brief, filed December 9, 2014, p. 2).

to his complaint since a silent record is presumed to support the decision below. Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996); M&R Investment Company, Inc. v. Mandarino, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987); Raishbrook v. Bayley, 90 Nev. 415, 416, 528 P.2d 1331, 1331 (1974); Kockos v. Bank of Nevada, 90 Nev. 140, 143, 520 P.2d 1359, 1361 (1974).

Appellant next complains that this Court's conclusion that there was no violation because MG was subject to cross-examination at both the preliminary hearing and trial is a misapplication of Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967), Baker v. Hocker, 496 F.2d 615 (9th Cir. 1974), and United States v. Domina, 784 F.2d 1361 (9th Cir. 1986). (Petition, p. 6). However, the only analysis Appellant offers is to note that "all these cases are concerned that … a bad pre-trial identification is problematic, and a due process violation because it can lead to a bad trial identification." Id. As this Court correctly noted, the evil that Appellant admits these cases are aimed at preventing never occurred because MG did not identify Appellant at trial. (Order of Affirmance, filed May 18, 2015, p. 2-3). More importantly, Appellant's argument ignores Perry. Appellant complains that "the fact that the preliminary hearing identification was subject to immediate and thorough cross-examination is not dispositive … when that cross-examination … revealed that it was a bad, inadmissible and suggestive identification." (Petition, p. 6). The point of Perry is that where an identification is not arranged

by police any alleged defects in that examination go to credibility not admissibility. Perry, __ U.S. at __, 132 S.Ct. at 720, 723, 728-30. Appellant's failure to even address Perry should be dispositive of his demand for rehearing. Polk v. State, 126 Nev. __, __, 233 P.3d 357, 360-61 (2010).

Perhaps recognizing his inability to effectively address this Court's conclusion that cross-examination precluded a due process violation, Appellant oddly argues that this Court's holding somehow suggests that if MG had identified him that there would have been a due process violation. (Petition, p. 7). Appellant does not explain the significance of his illogical leap. Regardless, it is irrelevant because this Court does not offer advisory opinions. NCAA v. Univ. of Nev., 97 Nev. 56, 57, 624 P.2d 10, 10 (1981).

Appellant then returns to his primary contention, that due process requires a preliminary judicial determination of the reliability of an identification by arguing that "[t]he toxic identification was still delivered to the jury and it is of no moment that the prior identification was immediately and thoroughly cross-examined because the jury isn't charged with considering admissibility[.]" (Petition, p. 7). Again, this argument utterly ignores Perry even though Perry directly rejects Appellant's position. The entire point of Perry is that the jury gets to decide whether an identification is reliable. This Court's conclusion that cross-

examination cured any potential due process violation is ratified by the United States Supreme Court's analysis and holding in Perry.

Ultimately, Appellant admits that his argument really is about weight and credibility and not admissibility when he complains that an allegedly overly suggestive in-court identification runs the risk that "it may be misused by the State … in a weak case[.]" (Petition, p. 8). However, the United States Supreme Court has clearly concluded that the proper method to safeguard against such abuses is not the expansion of due process to require a preliminary judicial determination of reliability:

> 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.

Appellant's request for rehearing must be denied because it is premised upon the fundamentally erroneous view that a judge must seize control over credibility

questions from jurors. The District Court correctly did not invade the province of the jury and this Court properly affirmed that wise decision.

CONCLUSION

For the foregoing reasons, the State respectfully requests that Appellant's Petition for Rehearing be denied.

Dated this 20th day of July, 2015.

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 proportionately spaced, has a typeface of 14 points or more, contains 2,472 words, 234 lines of text and 10 pages.

Dated this 20th day of July, 2015.

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 July 20, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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