IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNESTO GONZALEZ,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 64249

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction, following a jury verdict by which appellant Gonzalez was found guilty of several crimes stemming from his fatal shooting of a member of the Hells Angels gang at John Ascuaga's Nugget in Sparks. It is undeniable that Gonzalez is a member of the Vagos motorcycle gang and that he personally shot Jethro Pettigrew in the back and that Pettigrew died as a result.

There was fairly extensive pre-trial litigation. Some of that will be discussed below. On the eve of trial, one of the conspirators, Rudnick, pleaded guilty and ended up being a witness in the trial of Gonzalez.

The charges were: Conspiracy to engage in an affray; Challenge to fight resulting in death with the use of a deadly weapon; Carrying a concealed

weapon; Discharging a firearm in a structure; Murder in the Second Degree; Murder with a deadly weapon, and; Conspiracy to commit murder. Volume I, Appellant's Appendix, at 56-64 (1 AA 56-64).[1]

The jury found Gonzalez guilty of each charge. The court ruled that some of the charges were lesser included charges that would merge into the greater, and thus imposed only a few sentences. 23 AA 5576. This appeal followed.

II. STATEMENT OF THE FACTS

There was a great deal of evidence in this trial and what follows is but a summary. Jethrow Pettigrew, a high ranking member of the Hells Angels motorcycle gang, was shot five times in the back by Ernesto Gonzalez, a member of the Vagos motorcycle gang. The crime occurred during the annual "Street Vibrations" event in Northern Nevada. Two different groups ended up at John Ascuaga's Nugget in Sparks – some Hells Angels and hundreds of Vagos. As might be expected, that resulted in a series of confrontations, culminating in the death of Pettigrew.

Much of the testimony of witnesses was supported by video recordings from the many security cameras found in the Nugget. The surveillance

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[1]The appellant's Appendix is labeled with Roman Numerals, instead of Arabic numbers, but the version furnished to the State has some volumes with two parts, the second one unlabeled. In contrast, the Opening Brief cites to the appendix with the volumes identified by Arabic numbers. The State will follow suit, and use Arabic numbers, in the attempt (however misguided) to avoid confusion.

supervisor from the Nugget was able to put together a compilation of recordings that allowed the jury a visual record of the events. 11 AA 2657.

The first altercation was at the Nugget's Oyster Bar. Around 10:30 that night, Security Supervisor George Messina saw that a fight was nigh at the Oyster Bar and he put in a call for assistance to the Sparks Police Department. 12 AA 2782-83. It seems that Rudnick, aka Jabbers, was having antagonistic words with Jethro Pettigrew. Several witnesses to the altercation anticipated a violent outcome. 12 AA 2856-60. Jimmie Evanson tried to calm the situation and eventually Rudnick left the Oyster Bar. 12 AA 2859. Once that died down, perhaps 20 to 30 minutes later, several Hells Angels members gathered their belongings and started heading down the pathway known as the "yellow brick road" toward the area of the Nugget that included Trader Dick's Bar. The Vagos had arrived there first. 12 AA 2764, 12 AA 2790-92. The security supervisor saw around 30 of Vagos lingering in the area where the yellow brick road passed in front of Trader Dick's, along the way to the bank of elevators. 12 AA 2788, 2790-92. Those Vagos had been waiting for some time. They appeared to have formed a sort of gauntlet when the contingent of Hells Angels arrived. 12 AA 2810. The new arrivals stopped and engaged in what appeared to be a heated argument with some of the Vagos. One witness heard Pettigrew say "you want shot, motherfucker?" 13 AA 3140. That initial contact was with Rudnick again. Pettigrew threw the first punch. Rudnick

claimed he ran away. 16 AA 3767. Then, some Vagos responded by hitting some Hells Angels over the head with bottles and seconds later Pettigrew and another Hells Angels member, Villagrana, pulled pistols and started shooting. 12 AA 2791, 13 AA 3206.

Robert Wiggins, a Vago from Orange County, testified that he fell when he was pushed by a crowd coming out of a restaurant door in response to the sound of gunfire. 14 AA 3415. That changed a bit and he claimed that he fell some time after leaving the restaurant when his friend knocked him down. 14 AA 3435. He claimed that someone was kicking him, and that the gunfire came after he was on the ground and being kicked. 14 AA 3438-39. Appellant Gonzalez was later to use that alleged kicking as the cornerstone of his defense. Wiggins claimed that he remained on the ground until handcuffed. 14 AA 3444. He apparently forgot that little part as he also claimed that an officer threatened to use a taser if he didn't get down on the ground. 14 AA 3445. That seems an odd thing to say to someone who was laying on the ground.

According to Wiggins, the person kicking him at the time of the gunshots was not Pettigrew, but was the "big guy" with a semi-automatic pistol. 14 AA 3474. That was Villagrana, not Pettigrew. Pettigrew was the smaller fellow with the revolver and the prosthetic leg. According to Wiggins, he did not see Pettigrew with a pistol and he saw no reason why anyone would use deadly

force against Pettigrew. 14 AA 3479. Once cops arrived, Robert Wiggins was detained. He refused to comply with orders, responding to orders to get on the floor with the somewhat impolite phrase, "Fuck you, bitch." Therefore he was physically tackled and handcuffed. He did not appear to be injured or hurt in any way, and denied that he was hurt. 13 AA 3050-52, 3088.

Donald Sandy was a witness. He testified that he saw Pettigrew kicking someone but then Pettigrew stopped and walked away before Gonzalez shot him in the back from the darkness of the nearby dance floor. 15 AA 3631-32, 3675. According to Sandy, the kick was really more of a "nudge." 15 AA 3648. After the nudge, and after Pettigrew had stepped away, Gonzalez shot Pettigrew. 15 AA 3631. Pettigrew was no longer displaying a gun when Gonzalez shot him. 15 AA 3632.

Witness Rudnick was initially charged as a co-conspirator but he pleaded guilty to reduced charges and ultimately testified against Gonzalez. He described the day in question. There were several meetings of Vagos during the day. One included officers of the several chapters, including both Rudnick and Gonzalez and many others. Following that general meeting, he described a "little powwow" between the international officers and some of the folks from San Jose. 16 AA 3753. In that meeting, the International President, known as "Ta Ta," authorized those present to kill Pettigrew. Gonzalez said he would do it. 16 AA 3754.

When the Vagos set up the gauntlet near Trader Dick's bar in the Nugget, and awaited the Hells Angels, one of the international officers, known as "Dragon Man," instructed those present not to let the Hells Angels pass by that area and get to the elevators. 16 AA 3764. As the Hells Angels arrived, Rudnick accosted Pettigrew. He planned for a fight to ensue and he was right. 16 AA 3767. Pettigrew threw the first punch. *Id.*

Having started the deadly encounter, Rudnick ran and hid behind some slot machines. 16 AA 3768. From his vantage point, he saw Gonzalez (aka Romey), shoot Pettigrew in the back. 16 AA 3771. According to Rudnick, he saw Gonzalez the next day and Gonzalez said "I did it." 16 AA 3776.

Pettigrew died from four shots in the back and one in the armpit, all from the same gun – the gun that Gonzalez fired. 14 AA 3386, 3394.

Gonzalez testified that there was no meeting and no "green light" and that he did not volunteer to kill Pettigrew. He testified that he was just innocently milling about near Trader Dick's and there was no effort to stop the Hells Angels from passing. Instead, Pettigrew started the fight. Gonzalez testified that he was just going to walk away, like the peaceful fellow that he is, and then decided to get a bottle to use as a weapon. When he got to the bar, he found a gun just sitting on a counter. Lucky him. The origin of that gun has not been explained. He got back into the dispute and claimed he saw Pettigrew kicking someone and so he shot Pettigrew. 19 AA 4642-45. He also

claimed that he could not tell which of the potential targets was doing the kicking, so he fired at both of them. 19 AA 4645. The jury apparently did not believe at least some portions of that story.

III. ARGUMENT

1. The District Court Did Not Err in Its Response to Questions from the Jury.

Responses to questions from a jury are reviewed for an abuse of discretion.

The court received a few questions during jury deliberations. Appellant Gonzalez first contends that there is no discretion involved and that the district court was absolutely required to respond differently to questions from the jury because, he contends, the questions themselves clearly reveal that the panel collectively was confused and that the response could not possibly have cured the confusion.

The first question asked where the jury could find certain evidence that had been admitted. The court and the parties eventually figured it out and informed the jury that the computer the court had provided had no data on it but that the evidence was found on a thumb drive that had been admitted. The thumb drive could then be used with the computer to display the evidence. 20 AA 4923-4927. The suggestion that the court was simply unwilling to answer questions, then, is incorrect.

There were two other questions. The court described the questions

thusly:

> THE COURT: The jury has sent out the following question: Juror number 6: Legal question. Looking at instruction number 17, colon, if a person has no, underlined, knowledge of a conspiracy, but their actions contribute to someone else's plan, comma, are they guilty of conspiracy, question mark.

20 AA 4927-4928.

Following that was a fairly extensive discussion, not just the rather curt response suggested in the opening brief. *See* 20 AA 4928 to 4939. In short, the court referred the jury to several instructions.

Interestingly, while the questions are described as coming from "the jury," it appears that they came from one juror in particular. The district court noted that the question was not nearly as clear cut as it seemed and referred the jury to specific instructions and told them to read each instruction in light of each other instruction. 20 AA 4936.

The second question appeared on the same sheet of paper, from juror number 6. It read "And another question: People in here are wondering if a person can only be guilty of 2nd degree murder or 1st. Can it be both." 21 AA at 5019.

The district court mentioned to the parties that the second degree murder was charged as a distinct count, and not just as a lesser-included offense. 20 AA 4938. Accordingly, the court answered the jury that it must return a separate verdict for each count. 20 AA 4936-37. That was correct, although the court also correctly ruled, later, that only one sentence would be

imposed.

On appeal, the issues seem to be limited to the second question, concerning the elements of a conspiracy. Gonzalez contends that the only possible inference is that there was some great confusion among the various member of the jury that could only be answered in one way. That is questionable at best. It seems more likely that the note was exactly what it said it was: a note from a single juror asking about a single instruction. The district court correctly responded that the particular instruction should not be read in a vacuum but together with all the other instructions. Those other instructions collectively and unambiguously revealed that knowledge of the conspiracy was indeed an element of the crime of conspiracy.

This Court has long since ruled that where the instructions given are correct, the court need not supplement them. "The trial judge has wide discretion in the manner and extent he answers a jury's questions during deliberation. If he is of the opinion the instructions already given are adequate, correctly state the law and fully advise the jury on the procedures they are to follow in their deliberation, his refusal to answer a question already answered in the instructions is not error." *Tellis v. State*, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968). Gonzalez now contends that *Tellis* was wrongly decided and that as a matter of law the district court is required to rephrase the instructions whenever any member of the jury might be unclear. He is

incorrect. He relies on *State v. Juan*, 242 P.3d 314 (N.M. 2010). In that case, the question from the jury asked whether it was possible to return no verdict or if they had to continue deliberating indefinitely. The trial court refused to respond in any way. The jury returned a verdict of "guilty" a couple hours later. The reviewing court found the silence of the trial court to be similar to a "shotgun" instruction that coerced the jury into unanimity. There is no such fear in this case as the district court did indeed respond and informed the jury that the answer was in the instructions as a whole. The juror with the question was apparently satisfied as there was no further question from the juror.

In *Bollenbach v. U.S.*, 326 U.S. 607, 66 S.Ct. 402 (1946), the trial court responded to the inquiries of the jury but was wrong. The trial court wrongly informed the jury that possession of bonds shortly after they were stolen gave rise to a presumption that he was guilty of conspiring to transport the bonds in interstate commerce. The conclusion that the response was incorrect need not concern this Court because the response of the trial court in the instant case was indeed correct. Nothing in *Bollenbach* undercuts the decision of this Court in *Tellis*.

Gonzalez also relies on *State v. Campbell*, 260 P.3d 235 (Wash.App. 2011)[2]. In that case, the original instructions were incorrect and the supplemental instructions just referred to the first. It is not surprising that the

[2]The Opening Brief refers to volume 250 of Pacific third. The State suspects that the proper citation is volume 260.

reviewing court found error. The State might note, however, that the decision agrees with this Court in *Tellis,* holding that "Where the instructions given accurately state the law, the trial court need not further instruct the jury." 260 P.3d at 239. Thus, that decision adds nothing to this case.

People v. Hoover, 165 P.3d 784 (Colo.App. 2006), cited by Gonzalez, merely holds that where the defendant participates in drafting the response to the jury, the defendant cannot be heard to complain about it. That does not seem to add anything to this case.

State v. Steiben, 256 P.2d 796 (Kan. 2011) involved a supplemental instruction that intruded on the province of the jury. Again, that does not seem relevant to the instant case.

As this Court held in *Tellis*, where the original instructions are correct, as they were in the instant case, the Court does not err in failing to engage in further discussions with the jury as a whole or with individual jurors. Here, the court responded by reminding the jury that it must read instruction 17 in conjunction with each other instruction. If the jury did that, the answer would be clear. Thus, there was no error.

As a general rule, the instructions should be given once, in writing, and not result in some greater and wide-ranging discussion between the court and the jurors. Furthermore, the court must be careful to avoid the appearance of endorsing some factual proposition. For those reasons, and because the

original instructions were correct, this Court should find no error.

2. The Failure to Give a Theory of Defense Instruction Benefitted and Did Not Prejudice the Defense.

Questions of omitted instructions are reviewed for an abuse of discretion. *Davis v. State*, ___ Nev. ___, 321 P.3d 867 (2014). The omission of a theory of defense instruction is also subject to a harmless-error analysis. Whether a proposed instruction correctly states the law is reviewed *de novo*. *Id.*

The court gave a detailed instruction on self-defense and defense of others. 20 AA 4998-99. The defense proposed an additional instruction, a theory of defense instruction, that informed the jury that the defendant's theory of defense was defense of others and that if the jury concluded that he acted in lawful defense of some other unidentified person, then they could not convict him. The trial court declined to give the instruction, holding that the content was adequately covered by instruction 34.

Gonzalez now argues that instruction 34 was deficient in that it failed to adequately distinguish between self-defense and defense of others. However, the real deficiency in instruction 34 is that, when on the topic of defense of others, it is overly generous to the defense. In *Batson v. State*, 113 Nev. 669, 941 P.2d 478 (1997), the Court ruled that there are limitations on the defense of others. That is, that the accused must stand in the shoes of the person being rescued and may only use force, and only the degree of force, that the person

being rescued could lawfully use.[3] Instruction 34 admittedly had no such limitation but that could hardly prejudice the defense. That is, the instruction as given allowed the defense under some circumstances where the correct instruction would not allow the defense. If the jury were to conclude that the person being rescued was not at that moment being kicked by Pettigrew, and that person being rescued had non-lethal options available, the instruction as given would still require that the jury acquit because it did not require Gonzalez to stand in the shoes of the person being rescued.

A "theory of defense" instruction draws attention to an element of the crime and instructs the jury to acquit if that element is rebutted in some specific way. The instruction proposed in the instant case went a bit beyond that by instructing the jury that the theory was the only theory being proposed. This Court has found that the lack of a theory-of-defense-instruction can be harmless when the other instructions serve the same purpose. *Davis v. State*, *supra*. That is what happened in this case. The comprehensive instruction on self-defense and defense of others surely put the defense squarely in the fore-front. More importantly, the record reveals that the issue was thoroughly argued by counsel for the defense. Even the prosecutor asked Gonzalez if his defense was "defense of others" and the defendant agreed that it was. 19 AA 4653-55. There is no way that this jury could have concluded anything but

[3]The Court may recall that Robert Wiggins testified that he saw no reason to use deadly force simply because he was being kicked.

that the proposed defense was defense of others. That conclusion would then give rise to the windfall of not including the limitation of requiring the accused to stand in the shoes of the party being rescued. It appears, then, that the jury gave it the consideration that was warranted and found that conviction was still appropriate. Perhaps that was because the defendant testified that he was not carrying a concealed weapon but that he just happened to find a loaded handgun laying on a table, just as others were firing their guns. The jury could easily have found that part to be ludicrous and then found that the entire story by the defendant was also false, and that the defendant had willfully and unlawfully shot Jethro Pettigrew in the back, in agreement with others, simply because he was a member of the Hells Angels who had the audacity to stay at the Nugget.

Although it is not necessary, the State also suggests that this Court should reconsider the line of decisions that prefer that the court give a theory of defense instruction. Instructions announcing the theory of defense have the potential to create the impression that the judge finds that the theory is viable. The purpose of closing arguments by counsel, not by the court, is to "sharpen and clarify the issues." *Shawn M. v. State*, 105 Nev. 346, 775 P.2d 700 (1989). If that role falls to defense counsel, then it seems that it ought not to also fall to the court. Requiring the court to amplify the arguments of the defense, but not of the prosecution, seems rather unbalanced and this Court should

reconsider its prior holdings. An instruction on the theory of defense does not seem to be constitutionally required if the instructions actually given allow the defense to argue its theory of the case. *Case of Tweed*, 83 U.S. 504 (1872). There are some instructions that are constitutionally required, and the arguments of counsel will not fill the void, such as the general burden of proof. *See Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930 (1978). However, announcing the theory of defense is not constitutionally required. Thus, it seems that the duty to argue should properly fall to defense counsel, not to the court.

This Court has ruled many times on the subject of the theory of defense instruction. An example is *Brooks v. State*, 103 Nev. 611, 747 P.2d 893 (1987). That case relies on *Adler v. State*, 95 Nev. 339, 594 P.2d 725 (1979). That case, in turn, relies on *Barger v. State*, 81 Nev. 548, 552, 407 P.2d 584, 586 (1965). Reading that decision we find that the Court relied on *People v. Carmen*, 228 P.2d 281 (1951). There, we find not the modern proposition that the court must instruct on the theory of the defense, but instead the indisputable proposition that the court must instruct on lesser included offenses if the defendant's theory is that he is only guilty of that lesser offense. *Carmen*, *supra*. It is from that correct proposition that both Nevada and California, and others, have altered the proposition to where it stands today: that the district court must give emphasis to an element in an instruction to assist the defense

in making a closing argument. The State contends that the modern rule is not warranted and that the duty to "sharpen and clarify the issues" should fall to the lawyers and not to the trial court. Therefore, this Court should find that the district court did not err in failing to amplify the arguments of defense counsel in his efforts to sharpen and clarify the issues.

3. The District Court Did Not Err in Declining to Give an Instruction That Included Unwarranted Factual Findings.

Questions of omitted instructions are reviewed for an abuse of discretion. *Davis v. State*, ___ Nev. ___, 321 P.3d 867 (2014). Whether a proposed instruction correctly states the law is reviewed *de novo*. *Id.*

Gonzalez proposed an instruction on the subject of accomplices. The court declined to give the instruction. The State contends that the instruction was defective in several respects. First, Gonzalez insisted on an instruction that included the factual finding that the unnamed accomplice gave his testimony "in the expectation that he would receive favored treatment from the government." 21 AA 5122. Although Gonzalez tried to argue that when Rudnick testified he was still hoping to get some additional benefit from the State, Rudnick himself denied that allegation. 15 AA 3601, 16 AA 3814. Thus, the proposed instruction would have intruded on the role of the jury by informing the jury that as a matter of fact, Rudnick was still expecting something favorable from the government.

In addition, the instruction was defective in that it did not merely advise

the jury that it could evaluate credibility, it demanded that they view the testimony of the unnamed accomplice "with greater [something] than that of other witnesses." 21 AA 5122. Instructions on the subject of accomplices ought not to be that definite. No constitutional problem is posed when the judge instructs a jury to receive the prosecution's accomplice testimony "with care and caution." *See, e.g., United States v. George*, 319 F.2d 77, 80 (CA6 1963). *Cf. United States v. Nolte*, 440 F.2d 1124 (CA5 1971). However, the ultimate issue of credibility to reserved to the jury and this particular instruction demanded that the jury approach the testimony differently than that of others. The jury is free to decide how it will evaluate testimony and the court ought not to interfere. Therefore, the proposed instruction was properly rejected.

Finally, it is well established that the usual instruction is required only where the testimony of the proposed accomplice is uncorroborated. *Howard v. State*, 102 Nev. 572, 577, 729 P.2d 1341, 1344 (1986). The instant case had plenty of corroboration, including the video record of Gonzalez firing the fatal shots. So, Gonzalez seems to contend that every word of the testimony of an accomplice must be corroborated. There is no such rule. It is sufficient that there is evidence that the testimony of the accomplice is corroborated in some part. *Gallego v. State*, 101 Nev. 782, 711 P.2d 856 (1985). Therefore, the instruction was not mandatory, although defense counsel was free to present

argument concerning the credibility of the various witnesses, whether they were accomplices or not. The court, however, was under no obligation to bolster that argument.

4. The District Court Did Not Err in Allowing Unidentified Evidence to Be Admitted, Relating to the Enhancements.

Decisions regarding the admission of evidence are generally addressed to the discretion of the district court. *Fields v. State*, 125 Nev. 776, 782, 220 P.3d 724, 728 (2009).

Gonzalez next argues that the conviction must be reversed because the district court entered an order allowing all evidence relevant to the gang enhancement to be admitted in the trial. There was no such order. Instead, the pre-trial ruling of the district court made it very clear that it was not ruling wholesale on some general class of evidence. The pre-trial ruling merely announced the standards that the court would use should evidence be offered and should there be some objection. *See* 11 AA 2554-2560. The court ruled that "there cannot be a bright line rule regarding evidence that could be considered gang enhancement evidence." 11 AA 2556. The court went on to note that the characterization of evidence as being relevant to the enhancement or as *res gestae* "may depend on how it is presented, what is elicited, and its relationship to other evidence." 11 AA 2556. The court ruled that evidence admissible to show the enhancement may or may not be excluded under NRS 48.045. The court noted that "*if* the State seeks to admit

specific prior conduct of . . .Gonzalez, the evidence would be subject to a Petrocelli analysis." 11 AA 2557 (emphasis added). The court refused to find that evidence relevant to the enhancement is necessarily *res gestae* evidence. 11 AA 2557. The court noted that information about the rivalry between the two gangs *"may* provide more context to the Nugget incident and help explain the motive of the individuals involved.. ." 11 AA 2557. The court did not, however, categorically rule pre-trial that all evidence relating to the enhancement would or would not be admitted.

The court gave a general ruling on the subject of police officers as potential experts on the subject of criminal gangs, but went on to rule that "each proposed expert will be assessed by the Court in light of Hallmark . . . prior to providing opinion testimony." 11 AA 2559.

Clearly, then, the court was not giving an in limine ruling that would meet the requirements of *Richmond v. State*, 118 Nev. 924, 59 P.3d 1249 (2002). That decision holds that a pre-trial ruling in limine allowing evidence is sufficient to preserve an objection for appeal only where the issue is fully briefed and the court's ruling is "definitive." Here, the court clearly envisioned a further objection at trial and simply announced the general form of analysis that would be applied later, when Gonzalez voiced an objection.

So, we turn to the brief to find out what specific evidence Gonzalez is now contending was improperly admitted, and we find nothing. The argument

includes no reference to any evidence or any ruling of the district court, other than the general order made before trial. If this was a simpler record, the State might be willing to wade through the record to try to hazard a guess at what specific evidence forms the basis of the argument. However, the State elects not to undertake the burden of pleading for the appellant in the instant case. This Court, likewise, should feel no need to try to guess at the precise nature of the argument or to guess at what ruling of the district court is being attacked in this appeal. NRAP 28(e) provides in part: "A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected." The only such reference in the Opening Brief is to the very general pre-trial ruling and so this court has no basis for evaluating any other ruling of the district court.

Gonzalez makes reference to a part of the pre-trial ruling concerning admission of a photograph depicting him and other members of the gang with handguns. The court did not definitively rule but held only that the photo would generally be admissible unless some other evidence rule applied. 11 AA 2573. That hardly seems like a definitive ruling. Whether the photograph was offered in trial and whether there was an objection and whether there was a ruling is not mentioned in the Opening Brief and certainly not with the specificity required of NRAP 28(e). Therefore, there does not seem to be

anything for this Court to review.

Within the discussion of the unidentified evidence is a more general discussion about bifurcation. Gonzalez seems to contend that there was some evidence that was relevant to the gang enhancement, but not relevant to any of the charged crimes, and that the district court was required to order that evidence excluded until a separate sentencing hearing. Again, he identifies no such evidence and so the argument is generic and based on the unsupported assumption that there was some evidence that should not have been heard until after the jury returned its verdict. Assuming the existence of such evidence, the State disagrees.

The State could concede that a court has the discretion to bifurcate, or not, by way of its general authority to control the presentation of evidence, under NRS 50.115. Even if that concession were made it would not alter this case. The question of whether bifurcation is mandatory is quite another question. Some enhancements must be bifurcated because the legislature has demanded it. *See e.g.*, NRS 207.016 (describing procedures for determining the habitual criminal enhancement); NRS 484c.400(2)(procedures for determining enhancement for recidivist drunk drivers). In contrast, the gang enhancement, NRS 193.168(4)(b), specifically requires that the factual allegations be presented in the charging instrument and determined by the

trier of fact – the jury.[4]

So, we turn to the question of whether some other source of law demands that the enhancement be bifurcated. The leading case on the subject is *People v. Hernandez*, 94 P.3d 1080 (Cal. 2004). There, the court compared the analysis to severance of charges. The court held that there is no abuse of discretion when much of the evidence would be cross-admissible in the trial on the charges, even without the enhancement. The court was careful to distinguish the unique prejudice that attends allowing a jury to hear of a prior conviction. Indeed, other courts have also held that prior convictions are uniquely prejudicial. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63 (2000)("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. (Emphasis added). *See also*, *Edwards v. State*, 122 Nev. 378, 132 P.3d 581 (2006)(nature of prior conviction unduly prejudicial where the defendant offers to stipulate to the fact of the prior conviction).[5] The instant

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[4]That statute will also come in to play in responding to the contention that the evidence that the Vagos are a criminal gang should not have been presented to the grand jury.

[5]This defendant, in contrast to the defendant in *Edwards*, *supra*, did not offer to stipulate that the Vagos was a criminal gang. Indeed, they used the same argument as is in the Opening Brief, that they have unidentified physicians and lawyers as members, as though physicians and lawyers cannot belong to a criminal gang. If Gonzalez had offered to stipulate that the Vagos was a criminal gang, the analysis might be different. Of course, he might find himself on the outs with that same criminal gang, but that is not the question

enhancement, in contrast, does not depend upon judgments of conviction and none were entered into evidence. Thus, the State contends that there was no abuse of discretion in failing to order bifurcation because much of the enhancement evidence was cross-admissible and none of the enhancement evidence consisted of the uniquely prejudicial prior convictions.

5. The Evidence Was Sufficient.

There is no recognized standard of review for the sufficiency of the evidence supporting an enhancement that was not imposed.

Gonzalez next makes a somewhat unusual argument. The caption asserts that the evidence of the gang enhancement was insufficient. He acknowledges that the district court did not impose the enhanced sentence but then claims that if the evidence of the enhancement was insufficient by the end of the trial, then the court would have erred earlier, during the trial, in admitting the evidence relating to the enhancement.

The argument is based on the assertion that the "gang" was the specific San Jose chapter of Vagos, not the national gang. That was repelled first by the indictment, which makes no reference to the San Jose branch of the gang, and second by the testimony demonstrating that there is an international organization of the Vagos, with an international president, vice-president, secretary, Sergeant at Arms, and an "International Road Captain." 12 AA

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before this Court.

2844. The International president, known as "Ta Ta" was at the Nugget that night and approved and directed the attack on Pettigrew that led to the death of the Hells Angels member. The Vagos also have a national organization and each member pays dues each month to the national organization. 12 AA 2906. Whether the Hells Angels also have a national organization means nothing. Whether there was a history of enmity between the groups does nothing to negate or prove the question of whether the Vagos is a criminal gang.[6] In fact, the lack of animosity does not negate the conclusion that Gonzalez was acting for the benefit of his gang when he shot the leader of the other gang.

The fact of the matter is that there was indeed testimony that the Vagos met the statutory definition of a criminal gang. *See generally*, the testimony of San Bernardino Detective Bennett at 19 AA 4501-4524.

Finally, to the contention that the alleged insufficiency of the evidence would demonstrate that the court erred earlier, in admitting the evidence, the State has found no court in any state that has adopted such an approach. In general, one cannot know if the evidence is going to be insufficient until *after* the evidence is presented. *See generally*, *State v. Burkholder*, 112 Nev. 535, 915 P.2d 886 (1996). In that case, the district court judge suppressed evidence and then dismissed, anticipating that the evidence would be insufficient. This

[6]If it were necessary as an element of the enhancement to show a history of antagonism between the San Jose Vagos and the Hells Angels, that would be satisfied by the testimony of Jimmie Evanson, at 12 AA 2864, 2925.

Court ruled, *inter alia*, that the dismissal in anticipation of insufficient evidence, before the evidence was presented, was error. That same approach would seem to apply to the instant argument that the alleged insufficiency of the evidence means that the court erred earlier, in admitting the evidence.

6. The District Court Did Not Err in Failing to Dismiss the Indictment Based on the Assertion That the Grand Jury Received Inappropriate Evidence.

The nature of the argument in the Opening Brief is not altogether clear and so the standard of review is likewise not clear. If the argument is that the evidence was insufficient then the correct mode of analysis is to exclude inappropriate evidence, and then review what remains to determine if the remaining evidence allows the indictment. *Detloff v. State*, 120 Nev. 588, 97 P.3d 586 (2004).

Gonzalez seems to argue that his conviction must be reversed because the grand jury heard evidence that the Vagos and the Hells Angels are criminal gangs. As noted earlier, NRS 193.168(4)(b), specifically requires that the factual allegations be presented in the charging instrument. Thus, there does not seem to be any error in allowing the grand jury to evaluate the proposed enhancement.

Gonzalez also seems to argue that the grand jury should have heard a limiting instruction on the evidence. This Court has never required the State to instruct the grand jury on applicable law concerning theories of liability, such as giving the unarmed offender instruction pursuant to *Brooks v. State*,

124 Nev. 203, 210, 180 P.3d 657, 661 (2008), or instructing on aiding and abetting pursuant to *Sharma v. State*, 118 Nev. 648, 658, 56 P.3d 868, 874 (2002), or giving a limiting instruction concerning the significance of evidence provided by a certain witness. *See Schuster v. Dist. Ct.*, 123 Nev. 187, 192, 160 P.3d 873, 876 (2007) ("This court has further held that 'it is not mandatory for the prosecuting attorney to instruct the grand jury on the law." (quoting *Hyler v. Sheriff*, 93 Nev. 561, 564, 571 P.2d 114, 116 (1977))). Thus, if Gonzalez has specifically identified the nature of the proposed limiting instruction, it would not have been an abuse of discretion to deny the pre-trial habeas corpus petition.

Even if the law might sometimes require an instruction prohibiting use of the enhancement as character evidence, that would not be required here where the law defines a criminal "gang" in part by reference to the character and propensity of its members. *See* NRS 193.168(7)(a).

To the extent that Gonzalez is arguing that the grand jury should have been instructed on the elements of self-defense or defense-of-others, this Court has ruled that no such instructions are required. *Schuster v. Dist. Ct.*, 123 Nev. 187, 194, 160 P.3d 873, 877-78 (2007). To the extent that the instant case involves defense-of-others, and not self-defense, the difference is insignificant. As the Court noted in *Schuster*, *supra*, the prosecutor need not instruct the jury "on the legal significance of exculpatory evidence." That

would seem to include variations such as defense of others.

Finally, the State would point out that generally, a trial with proof beyond a reasonable doubt will cure errors before the grand jury. *See Echavarria v. State*, 108 Nev. 734, 745, 839 P.2d 589, 596 (1992) ("Any irregularities which may have occurred in the ... grand jury proceeding were cured when [the defendant] was tried and his guilt determined under the higher criminal burden of proof."). Accordingly, this Court should find that there was no error and if there was some error it was later cured at trial.

7. The District Court Did Not Err at Sentencing.

If the issue is viewed as a double jeopardy issue, it is reviewed *de novo*. If it is seen as a sentencing issue, it is reviewed for abuse of discretion. Appellant does not make clear the nature of the argument concerning sentencing.

The district court imposed no sentences for Count II, (Challenge to fight resulting in death) and count IV (Murder in the second degree), ruling that those counts "merged" with count V, Murder in the first degree. Thus, the court imposed a sentence for first degree murder but no sentences for what the court identified as being lesser included offenses to the first degree murder. Gonzalez now contends that the court erred and that the court should have imposed a sentence for second degree murder, and had the first degree murder merge into the second.

Gonzalez begins with an analysis of "redundant" convictions based on *Albitre v. State*, 103 Nev. 281, 738 P.2d 1037 (1987). That decision, calling for an analysis of the "gravamen" of the offense, has since been overruled in favor of the more correct double jeopardy analysis. *See Jackson v. State*, 128 Nev. ___, .291 P.3d 1274 (2012).

Gonzalez also contends that where a person's conduct constitutes two crimes, the prosecutor must not be given the authority to choose which one to charge. That is 1) irrelevant because the prosecutor did not choose and 2) legally incorrect. *See Ball v. United States*, 470 U.S. 856, 105 S.Ct. 1668 (1985)(where congress enacts multiple statutes governing the same conduct, the prosecutor may charge both, and the jury may return a verdict on both, even though the court may impose but one sentence).

Gonzalez also seems to argue that factually no person can be guilty of both a premeditated murder and murder based on any theory of vicarious liability. That is incorrect. A given set of facts often constitutes multiple crimes, including multiple theories of murder. *See e.g.*, *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491 (1991)(concerning multiple theories of a single murder).

Finally, to the argument that the court should have imposed sentence for the lesser offense of second-degree murder instead of the greater offense of first-degree murder, this Court has rejected that proposition. *LaChance v.*

State, 130 Nev. ___, 321 P.3d 919 (2014)(where a jury finds the defendant guilty of both a greater offense and a lesser offense that is included within the greater, the court should impose sentence for the crime carrying the greater sentence). Therefore, this Court should find no error and affirm the judgment of the district court.

IV. CONCLUSION

Gonzalez shot a man in the back and the crime was caught by video cameras. He was fairly tried and convicted and the judgment of the Second Judicial District Court should be affirmed.

DATED: February 12, 2015.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

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 Corel WordPerfect X3 in 14 Georgia font. However, WordPerfect's double-spacing is smaller than that of Word, so in an effort to comply with the formatting requirements, this WordPerfect document has a spacing of 2.45. I believe that this change in spacing matches the double spacing of a Word document.

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 does not exceed 30 pages.

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 appropriate references 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: February 12, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on February 12, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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