IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNESTO MANUEL GONZALEZ,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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No. 64249

PETITION FOR REHEARING

COMES NOW, the State of Nevada and seeks rehearing of this case and reversal of the Opinion at 131 Nev. Adv.Op. No. 99. This Court has misapprehended or overlooked several material matters. Those include: the Opinion applies an analysis of error concerning admission of evidence to which there was no objection without application of the "plain error" standard, and; relying on a newly announced rule is inappropriate in a "plain error" analysis, and; the Court misapprehended the analysis of "cumulative error" by lumping together errors with differing evaluative standards, and; finally, and most glaringly, the Opinion overlooked evidence corroborating the existence of the conspiracy.

I

It seems appropriate to begin with the most clear omission: the evidence in corroboration of the conspiracy. The State contends that this Court has

overlooked material facts in the record. As the Court noted in the Opinion, the issue of the instruction concerning the accomplice turns on the question of whether there was corroboration to the testimony of the accomplice. This Court has never before required that specific parts of the testimony be corroborated. All that has been required in the past is evidence sufficient to connect the defendant to the crime. *See e.g., Heglemeier v. State*, 111 Nev. 1244, 903 P.2d 799 (1995). The holding that some specific aspect of the testimony of the accomplice must be corroborated is unprecedented and unworkable. In addition, however, the State would point out that the record does, indeed, provide corroboration of the existence of the conspiracy.

The Answering Brief pointed out the existence of the video but this Court ruled that the video was only corroboration of the murder, but not of the conspiracy. That, the State contends, is incorrect. The video does not merely show the murder. The contents of the video shows people apparently acting in concert. The jury could review that video and find that it shows circumstantial evidence of the existence of a conspiracy.

A conspiracy is rarely corroborated by direct evidence for the simple reason that those with personal knowledge of the conspiracy tend to be the conspirators. People do not generally form their conspiracies in the presence of uninterested witnesses. For that reason, the existence of a conspiracy is

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almost always corroborated by circumstantial evidence. *See Cheatham v. State*, 104 Nev. 500, 761 P.2d 419 (1088). Here, the corroborating circumstances are not just the existence of the video, but the contents. The contents of the video would allow the jury to conclude that when the Vagos lined up in the casino, to form a gauntlet, they were doing so because of an agreement and not just by random movements. The State would refer to the relatively modern phenomena of the "flash mob." A person reviewing a video of such a flash mob can quickly and firmly conclude that the participants have agreed to their actions. A video of such a flash mob, like the video of the gauntlet, allows the conclusion that the participants are acting pursuant to an agreement, and are not just milling about aimlessly. The video also showed that when Pettigrew (a Hells Angels member) showed up at the Oyster Bar in the Casino, his arrival was quickly followed by a dozen or more of Vagos showing up at the same locale. That tends to show coordinated activity. It may not be proof beyond a reasonable doubt of the existence of a conspiracy, but it is corroborating evidence that the jury could consider as some evidence that the participants were acting in concert, by agreement.

The video shows one of the Vagos putting on gloves inside the casino on that summer night, just seconds before the fight began. A jury could consider that as evidence that at least one of the Vagos anticipated the fight that followed seconds later, and that is circumstantial evidence of the conspiracy.

The rapidity with which the fight began and escalated is also evidence that the participants mentally rehearsed the beginnings of the fight. That, too, tends to corroborate the existence of the agreement.

Finally, the video shows that just before the fight started, the shooter, Gonzalez, freed up his hands by putting down his drink. He thus was able to retrieve his gun from under his shirt to kill Pettigrew. That is not all that significant unto itself, but together with the other circumstances shown by the video, his anticipation of the fight supports the testimony that there was a plan and the plan was unfolding even as he put down his drink and prepared for his own deadly portion of the agreement.

This Court should grant rehearing because the Court overlooked that the video showed people acting in concert and that tends to corroborate the testimony of a conspiracy.

II

The State also contends that this Court erred when it determined that the gang enhancement should have been bifurcated, but the Court made that ruling without reference to plain error. The Court undoubtedly created a new rule of law and that enters into the analysis of prejudice. First, it is necessary to distinguish the *decision* on the enhancement from the *evidence*. The defense did not object to any specific evidence on the subject in the trial court, and the appellant did not identify any specific evidence in the Opening Brief

in this Court, and this Court mentioned no specific evidence in the part of the decision dealing with the enhancement. Still, certainly there can be no prejudice from having the jury make the decision on the enhancement. Instead, the assertion of prejudicial error, if it is to exist at all, must come from the *evidence* that was admitted. As noted in the briefs, there was no contemporaneous objection in the trial court to any of the evidence related to the enhancement. Certainly, the pre-trial litigation resulted in no ruling on the subject as the Court indicated that any ruling would await the presentation of the evidence. *See* 11 AA 2554-2560.

Because there was no objection to the admission of evidence of the gang activities (perhaps because nearly every bit of it would also be admitted as evidence to explain the motive of Gonzalez), any analysis would have to be based on "plain error." *McLellan v. State*, 124 Nev. 263, 182 P.3d 106 (2008). That analysis, in turn, requires that the error by the district court be detectable by a casual inspection of the record. *Burnside v. State*, 131 Nev. Adv. Op. No. 40, 352 P.3d 627 (2015)(concerning evidence relating to the gang enhancement). The basic contention of the State is that a proper analysis, under the guise of plain error, is inconsistent with application of a rule of law that did not exist at the time. Plain error should be based only on clear and well-settled law. Otherwise, it is not "plain" error.

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There are several approaches to the notion of "plain error." Federal courts require a fairly extensive four-prong analysis before the Court even addresses the question. *See Henderson v. United States*, ___ U.S.___, 133 S.Ct. 1121 (2013)(construing Fed.R.Crim.Pro. 52(b)). In contrast, California has few apparent exceptions to the general rule requiring a contemporaneous objection. *See People v. Redd*, 229 P.3d 101, 152 (Cal. 2010)(excusing lack of objection only where an objection would be futile). The California approach would clearly lead to affirmance in this case because the trial court specifically invited objections prior to the trial and yet none were presented.

Nevada has never been very detailed about when it might review an error under the guise of plain error, when there has been no objection in the trial court. The State contends that where the issue is admission of evidence, and there is no objection, there can be no error, plain or otherwise, when the trial court fails to interpose an objection on behalf of the defendant. This Court, although generally reticent on the subject of when a plain error analysis is appropriate, has clearly ruled that the purpose of the rule requiring contemporaneous objections is to give the trial court a chance to rule in the first instance and perhaps afford a remedy that falls short of an entire new trial. *Ringle v. Bruton*, 120 Nev. 82, 95, 86 P.3d 1032, 1040 (2004). That would seem to suggest that the notion of plain error means that the error, the duty to intervene, must exist at the time of the trial.

This Court touched on the subject in *Richmond v. State*, 118 Nev. 924, 59 P.3d 1249 (2002). In discussing a "new rule," the Court held that it would apply a new rule retroactively to cases not yet final, but only where the issue has been preserved. The Court went on to hold that the issue could be preserved by pre-trial litigation resulting in a definitive ruling. In the instant case, there was no definitive ruling on any of the relevant evidentiary issues and the trial court invited the defense to raise an objection at the appropriate time during the trial. That would seem to indicate that a plain error approach, under Nevada law, should apply only where the rule of law was in force at the time of the alleged error.

The Texas approach is interesting and may warrant consideration. In that state, the party can be relieved of the duty of contemporaneous objection only where the duty at issue, the decision at issue, cannot be waived. *See Garza v. State*, 435 S.W.3d 258 (Texas Crim. App. 2014). As there is nothing in the evidence code that cannot be waived, where the claim is that the Court erred in admitting evidence, there must be an objection in order for the Court to consider the claim of error. Indeed, trial lawyers may make a specific and conscious decision not to object for tactical reasons. Hypothetically, counsel in the instant case could have decided not to object in order to draw the distinction between the gang as a whole and the specific defendant, to present

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a variation of the empty-chair scenario. *See Lara v. State*, 120 Nev. 177, 87 P.3d 528 (2004). Surely, the district court would not have the obligation to overrule that decision and to make a different tactical decision. Indeed, a duty by the Court to override tactical decisions would be inconsistent with the right to have counsel make tactical decisions.

There is some additional indication that Nevada law is akin to the Texas rule. That is, NRCP 28(e)(1) requires that when one asserts error in the admission of evidence, the brief must specifically point out the page of the record at which the evidence was identified, offered and received or rejected. There is no other sort of alleged error that has such a specific rule. That rule, along with the cases indicating that the objective of the rule requiring an objection is to give the trial court a chance to rule and to solve a problem before the appeal, would seem to indicate that the concept of "plain error" means that, in order for error to be plain, there must be a clear and settled rule of law in effect at the time, that defense counsel has no power to waive, and that imposes a clear duty on the trial court to act *sua sponte*. As applied, the rule requiring bifurcation of the gang enhancement did not exist at the time of the trial. Therefore, the law at the time of the trial did not require the trial court to exclude whatever evidence is now at issue. Therefore, there was no "plain error" and therefore, reversal on a plain error theory is inappropriate.

There is another problem with plain error: that is the failure of the appellant to identify any evidence that was not admissible as evidence of the defendant's motive. In an ordinary claim of error in an appeal from a judgment of conviction, errors are presumed to be prejudicial unless the error is shown by the prosecutor to be harmless beyond a reasonable doubt. *Valdez v. State*, 124 Nev. 1172, 196 P.3d 465 (2008). In contrast, where the analysis concerns "plain error," as here, there is no presumption of prejudice and the defendant has the burden of showing that, but for the violation of the duty to act *sua sponte*, there is a reasonable likelihood of a different outcome. *Phenix v. State*, 114 Nev. 116, 119, 954 P.2d 739, 740 (1998). In other circumstances where the defense bears the burden of demonstrating prejudice, a claim of prejudice that requires the assumption that the jury disregarded its instructions is too speculative to warrant relief. "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Strickland v. Washington*, 466 U.S. 668, 695, 104 S. Ct. 2052, 2068 (1984). Under that analysis, only where a jury following its instructions would probably have returned a different verdict if only the trial court had excluded the evidence, would it be appropriate to find that the defendant had shown actual prejudice from the admission of the evidence. Here, the defense did not even identify the disputed evidence in the trial court or in this Court and they

certainly did not demonstrate reason to believe that a different result was likely by a jury following its instructions. Instead, the claim of prejudice is entirely dependent upon the notion that the jury made its decision on some basis other than what would be allowed by the instructions. That sort of speculation is inappropriate in an analysis of plain error.

III

Another detail the Court overlooked is where the Court lumped the plain error with other errors in citing "cumulative error." With an analysis of "plain error," if the plain error is not sufficient unto itself to find prejudice, then it is not plain error at all, and then it is not appropriate to consider it with other errors, including those with presumed prejudice. A claim of cumulative error should only consider errors of like-kind. Nevertheless, the State would point out that the Court did indeed consider cumulative error. Now, with the absence of "plain error" by admission of unspecified evidence, the balance has changed and so the analysis of cumulative error must be re-evaluated.

Each state decides for itself how to analyze harmless error for errors of state law and procedure. *Chapman v. California*, 386 U.S. 18, 21, 87 S.Ct. 824, 826 (1967). It follows that each state should also decide how it will apply the concept of "cumulative" error for errors of state law or procedure. This Court has not often explained how it will apply the concept except to note that

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there is such a thing as cumulative error. *See e.g., Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). The State contends that the concept requires a bit of refinement and that it is only appropriate to consider the cumulative effect of similar sorts of errors. Surely, it would be wrong to consider the cumulative effect of one error in the guilt phase and another in the sentencing phase of litigation. Just as certainly, it would be inappropriate to consider errors cumulatively when each separate error requires a different sort of analysis of prejudice.

As applied, plain error is seen as not being error at all unless it was likely to have affected the outcome. Despite that, this Court has lumped together claims of plain error and claims of preserved error to find cumulative error. As a matter of state law, that sort of analysis ought to be inappropriate. Put another way, error can be plain or preserved, and they can be based on state law or on the constitution. Each has a different evaluative standard and grouping together unpreserved state law error with preserved constitutional error, or any other sort of combination, would be inappropriate. Instead, each sort of error with the same evaluative standard can be combined, but those with differing standards ought not to be combined.

A more clear example might be helpful. A claim of insufficient evidence is either made out or it is not. There are no degrees of prejudice in a claim of insufficient evidence and so it would be inappropriate to consider insufficient

evidence together with any other claim under the guise of "cumulative" errors. Still, the instant case combines preserved state law error with plain state law error, despite the fact that each has a different evaluative standard. Plain error must stand alone, as does a claim of insufficient evidence. Plain error is either sufficient to warrant reversal or it is not error at all. Thus, it is inappropriate to consider plain error within the context of cumulative error.[1]

CONCLUSION

This Court should grant rehearing because the Court overlooked that the video showed people acting in concert and that tends to corroborate the testimony of a conspiracy. The Court improperly found plain error in admitting unspecified evidence when the rule of law calling for exclusion of whatever it was did not exist at the time of the trial. In addition, the Court considered errors that require differing analytical approaches collectively

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[1] The State has elected not to raise a separate argument, but would like to note that the Opinion of this Court recites four times that the district court "refused" to answer questions from the jury. That is incorrect. Judge Steinheimer did indeed respond, and, as noted in the Opinion, she responded correctly. As the Opinion incorrectly describes the conduct of this experienced and respected Jurist, the State suggests that when this Court grants rehearing, it should correct the mis-statement that the court "refused" to answer the questions.

under a "cumulative error" analysis. For those reasons, this Court should grant this petition for rehearing and affirm the judgment of the district court.

DATED: January 19, 2016.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: TERRENCE P. McCARTHY
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Petition for Rehearing complies with the formatting requirements of NRAP 32(a)(4)-(6), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Petition 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 Petition for Rehearing complies with the page- or type-volume limitations of NRAP 40(b)(3) because it does not exceed 2,977 words.

DATED: January 19, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on January 19, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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