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IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD ERNEST LAKEMAN

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Supreme Court No. 64609

District Court No. C265107

APPELLANT'S REPLY BRIEF

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Appellant incorporates by reference the facts identified in his Opening Brief as if fully set forth herein.

CHANGE OF VENUE IS PROPERLY BEFORE THIS COURT

Respondent's only argument regarding this issue is that the "district court never ruled on a change of venue request, as one was never brought." (Respondent's Answering Brief pg. 11) Respondent's argument is misplaced as the following indicates.

> Mr. Wright: Before you excuse them or anything, I intend to make a challenge to the venire as constituted and then make a change of venue motion.
> (Appellant's Supplemental Appendix pg. 5689)
>
> The Court: Mr. Santacroce, do you want to weigh in?
> Mr. Santacroce: I just want to join in.
> (Id. at pg. 5701)

The Court denied the motion for change of venue.

> The Court: And there's no basis for change of venue……
> (Id. at 5704)

This court has previously held in *Polk v. State*, 126 Adv. Op. 19 (2010) that the State's failure to adequately address a constitutional violation raised by the Appellant warranted reversal of the conviction.

The sixth amendment to the US Constitution provides that a defendant is entitled to an impartial jury. The refusal to grant a change of venue is tantamount

to denying the Defendant a fair and impartial jury and violates the Defendant's sixth amendment right.

NRS 13.050(2)(b) provides: "The court, on motion, change the place of trial in the following cases: (b) when there is reason to believe that an impartial trial cannot be had therein."

NRS 174.455(3) provides: "an order in a criminal action changing or refusing to change the place of the trial is appealable only on appeal from final judgment."

Respondents fail to address or refute any of the factors to be considered as set forth in *National Collegiate Athletic Ass'n v. Tarkanian*, 113 Nev. 610, 939 P.2d 1049 (1997) or *Sicor v. Hutchinson*, 127 Nev. Adv. Op. 82, 266 P3d 608 (2011).

The ten factors set forth in *Tarkanian* and *Sicor* were fully briefed in Appellant's Opening Brief and are incorporated by reference as though fully set forth herein.

The State's failure to address the merits of that claim can only be construed as the State's waiver or acquiescence to Appellants argument. The State's failure to address the merits of Appellant's claim warrants reversal.

THE COURT ERRED IN ALLOWING THE JURY TO HEAR THE VIDEOTAPED DEPOSITION OF RODOLFO MEANA

There can be no question that the court erred in allowing the jury to hear and

see the videotaped deposition of Meana when the defendant did not have opportunity to cross-examine. (*Crawford v. Washington*, 124 S.Ct. 1354 (2004).

The State does not address the merits of the *Crawford* violation, but merely argues that because the jury acquitted Lakeman of counts related to Meana, that no prejudice inures to Lakeman even assuming the court erred. (Respondent's Answering Brief pg. 13)

When there is a *Crawford* violation, this Court will review the prejudicial effects of the violation under a harmless-error analysis. Under such analysis if the State can "`show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained no reversal will be warranted. *Medina,* 122 Nev. at 355, 143 P.3d at 476-77 (*See also*, *Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993);(*Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967))); *see also, Ennis v. State,* 122 Nev. 694, 702, 137 P.3d 1095, 1101 (2006).

Appellant argues that the fact that Lakeman was acquitted on charges relating to Meana is not determinative of whether the error in allowing the jury to hear and see Meana's videotaped deposition was harmless.

Lakeman was convicted of sixteen counts. The State cannot show, beyond a reasonable doubt, that the error complained of did not result in Lakeman being convicted of sixteen criminal counts.

We cannot pretend to predict what effect the playing of the inadmissible evidence had on the mindset of the jury. We cannot pretend to predict how the passions of the jury might have been inflamed from the playing of the inadmissible evidence. Nor should we have to attempt to speculate. The fact that a *Crawford* violation of such constitutional proportions occurred should, in and of itself, be enough to warrant reversal.

In *Bruton v. US*, 391US 123 (1968) the court held;

> Because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in the joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

In the instant case there was a substantial risk that the jury looked to the incriminating deposition testimony of Meana to convict Lakeman of other related charges.

While limiting instructions are sometimes adequate to cure the admission of inadmissible evidence, there are some contexts, like the one here, in which "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*.

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THE COURT ERRED IN ALLOWING THE TESTIMONY OF DR. SCHAEFER REGARING LAKEMAN'S TELEPHONIC INTERVIEW.

Lakeman contends that the testimony of Dr. Schaefer regarding his telephonic conversation on or about January 2009 should have been excluded. Lakeman's argument challenges the testimony of the entire telephone call and specifically the statement wherein Lakeman allegedly said that he would deny ever speaking with Dr. Schaefer.

The State argues that the conversation indicated his culpability and he knew the risk he was taking by "double dipping." However, nothing in the conversation indicated that Lakeman knew that his conduct was criminal. At best, Lakeman knew the procedure was risky. Lakeman was conveying to the CDC the procedures that were being used at the clinic by all of the CRNA's. Lakeman was not advised that he was subject to criminal prosecution.

The statement that Lakeman allegedly made that he would deny that he had said these things was not an indicia of a guilty criminal mind.

As Dr. Schaefer testified, it was more of a fear of retribution from the employer. (App. 3713) And yet taken out of context, the state argued that such a statement was an indication of Lakeman's guilt.

Dr. Schaefer was not even sure if Lakeman uttered those exact words. (Id.) Yet the court allowed those statements to come in as evidence of Lakeman's guilty mind.

NRS 48.035 provides in part,

> Although relevant, evidence is not admissible if its probative value is substantially outweighed by danger of unfair prejudice, of confusion of the issues or of misleading the jury.

By allowing the telephonic conversation and specifically the statement that Lakeman would deny making those statements come into evidence could only serve to substantially prejudice Lakeman and confuse the jury.

PROSECUTORIAL MISCONDUCT

To determine whether reversal is warranted this court looks to whether the misconduct was of constitutional dimension. If it was, then conviction will be reversed "unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. " If the error is not of constitutional dimension, then reversal is warranted only if the error substantially affects the jury's verdict. *Valdez v. State*, 196 P.3d 465, 476 (Nev. 2008)

The State argues that the acts of prosecutorial misconduct cited in Appellant's Opening brief were harmless error.

1. COERCING A WITNESS TO CHANGE HIS TESTIMONY IS NOT HARMELESS ERROR

NRS 178.598 Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

The State admitted that in the middle of Mathahs' testimony they "advised" his counsel that he's now in violation of his proffer because he testified differently on direct than he did on cross. (App. 2545-2546)

If these actions by the State were not meant to be coercive then why did the State in the middle of Mathahs' testimony take these actions? The only rational explanation was as Mr. Wright stated to the court.

> Mr. Wright: They are threatening him (Mathahs). They are threatening the witnessed because his testimony changed from direct. And that is prosecutorial misconduct to tell the witness if they vary from their direct examination testimony, we are withdrawing the plea bargain….
> (App. 2563)

2. ELICITING PROHIBITIVE TESTIMONY OF A PENDING FEDERAL INDICTMENT IS NOT HARMLESS ERROR

The State further argues that eliciting prohibitive testimony of a pending federal indictment, is also harmless error because the court gave a cautionary instruction to the jury. (Respondent's Answering Brief pg. 18)

While the State doesn't "concede: that the error was not misconduct the court certainly did. In the curative instruction the court specifically advised the jury that the prosecutors conduct "constituted prosecutorial misconduct." (App. 4376)

The State argues that the prohibited inquiry "had nothing to do with Lakeman." The State fails to recognize that Lakeman stood trial with Dr. Desai. The two Defendants were clearly portrayed by the State as joined at the hip. In *Carrillo v.*

State, 591 SW.2d 896 the court held that association with somebody while under indictment is improper to bring up to the jury.

The State seems to suggest that the Court's curative instruction "stopped any prejudice." (Respondent's Answering Brief, pg. 18)

In *Bruton v. US*, 391 US 123 (1968) the court recognized the substantial risk that a jury despite instruction to the contrary would look to the incriminating statements in determining the Defendant's guilt.

In the instant case, so egregious was the violation that the Court advised the jury that it was prosecutorial misconduct. (App. 4376)

3. VIOLATION OF THE GOLDEN RULE ARGUMENT IS NOT HARMLESS ERROR

The State argues that the prosecutor's golden rule argument in rebuttal does not amount to reversible error.

The State argued, "Michael Washington was infected. You saw him. Who among you would want to have a liver transplant regardless of how much money you got…" (App. 5451)

The State attempts to distinguish *McGuire* (*McGuire v. State*, 100 Nev. 153,677 P.2d 1060 (1984) arguing that in *McGuire* the prosecutors made a "plethora of comments that amounted to global persistent prosecutorial misconduct." (Respondent's Answering Brief pg. 22)

The State further argues that Lakeman's objection to the Golden Rule argument was not timely. Lakeman did object at the close of the State's rebuttal. (App. 5507-08)

In *Moser v. State* 544 P.2d 424 (1975) the court held that "Improper argument is presumed to be injurious.

4. CUMMULATIVE ERROR

As set forth in this Reply and the Appellants Opening Brief the record is rife with instances of prosecutorial misconduct. As the court opined when admonishing the prosecution,

> THE COURT: …and as I said misconduct is cumulative….I'm just warning you Mr. Staudaher, don't ask a question unless you know the answer, and don't elicit testimony that may be improper.
>
> THE COURT: ….But you know, I just-you know, going forward, I don't want these issues cropping up again and again, because at some point in time it's cumulative. (App. 4483-4484)

In *McGuire* the court stated,

> It has nevertheless been the solemn responsibility of appellate courts to safeguard the fundamental right of every person accused of criminal behavior to a fair trial, basically free of prejudicial error. This is but a reflection of the high value our nation and state place on an individual life, and the right of each citizen to liberty and the lawful pursuit of happiness. It is the obligation of government to vouchsafe to its citizens a continuing respect for these values. We therefore conclude that it is an intolerable affront to the criminal justice system, the state and its citizens that the type of egregious conduct outlined in part in this opinion be allowed to occur in our courtrooms.
> (McGuire v. State, 100 Nev. 153,677 P.2d 1060 (1984)).

NRS 202.595 IS A LESSER INCLUDED OFFENSE OF NRS 200.495

This court has the discretion to review constitutional or plain error. *Someee v. State*, 187 P.3d 152, 159 (Nev. 2008) (*See also*, *United States v. Davenport*, 519 F.3d 940, 947 (9th Cir.2008)

The State argues that under *Blockberger v. United States*, 284 U.S. 299, 304 (1932) Appellants argument must fail because NRS 202.595 requires "willful and wanton" conduct whereas NRS 200.495 does not.

NRS 202.595 states:

Unless a greater penalty is otherwise provided by statute and except under the circumstances described in NRS 484B.653, a person who performs any act or neglects any duty imposed by law in a willful or wanton disregard of the safety of persons or property shall be punished….

NRS 200.495 states:

1. A professional caretaker who fails to provide such service, care or supervision as is reasonable and necessary to maintain the health or safety of a patient is guilty of criminal neglect of a patient if:
   (a) The act or omission is aggravated, reckless or gross;
   (b) The act or omission is such a departure from what would be the conduct of an ordinary prudent, careful person under the same circumstances that it is contrary to a proper regard for danger to human life or constitutes indifference to the resulting consequences;
   (c) The consequences of the negligent act or omission could have reasonably been foreseen; and
   (d) The danger to human life was not the result of inattention, mistaken judgment or misadventure, but the natural and probable result of an aggravated reckless or grossly negligent act or omission.

While NRS 200.495 does not use the words "willful and wanton" the statue uses words like "aggravated reckless", "grossly negligent". These words are synonymous with and the same as "willful" and "wanton" as used in NRS 202.595.

This court in *Davis v. Butler*, 95 Nev. 963, 602 P.2d 605 (1979) defined willful and wanton conduct as misconduct that is intentional wrongful conduct done either with knowledge that serious injury to another will probably result, or with a wanton or reckless disregard of the possible results.

Under this definition the conduct required in NRS 200.495 is substantially identical to the conduct required in NRS 202.595.

CONCLUSION

Based upon the foregoing and in conjunction with the arguments set forth in the Appellant's Opening Brief, the Appellant prays that this court reverse his convictions.

Dated this 22nd day of April, 2015.

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). This brief has been prepared in a proportionally spaced typeface using Microsoft Word, size 14, Times New Roman font.

2. I further certify that this brief does comply with the page or type volume limitations of NRAP 32(a)(7). The body of the brief is 11 pages and this entire document contains 3,060 words and 427 lines.

3. Finally, I hereby certify that I have read this appellate brief, and 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 the page and volume number, if any, of the transcript or appendix where the matter relied on is 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 22nd day of April, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify this document was filed electronically with the Nevada Supreme Court on April 22, 2015 via Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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Dated this 22nd day of April, 2015

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