IN THE SUPREME COURT OF THE STATE OF NEVADA

WILBURT HICKMAN, JR. A/K/A William Hicks, Appellant, vs. THE STATE OF NEVADA, Respondent.	Supreme Court Case No. 64776 (District Court Case No. C278699)

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction (Jury Trial))

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JURISDICTIONAL STATEMENT

(A) This is a timely appeal of the denial of Appellant's Judgment of Conviction (Jury Trial) in the Eighth Judicial District Court.

(B) The Judgment of Conviction (Jury Trial) was filed on January 2, 2014, in the Eighth Judicial District Court. A Notice of Appeal was filed on January 6, 2014.

(C) This appeal is from a final judgment filed by the District Court and is subject to the Nevada Supreme Court's jurisdiction pursuant to NRAP 4(b)(1)(A).

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING DEFENSE'S REQUEST FOR JURY INSTRUCTIONS IN SUPPORT OF MR. HICKMAN'S THEORY OF DEFENSE.

II. APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENTS BY MISSTATING THE LAW ON WHAT CONSTITUTES A DEADLY WEAPON.

III. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SUSTAIN APPELLANT'S CONVICTIONS FOR BATTERY RESULTING IN SUBSTANTIAL BODILY HARM.

IV. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SUSTAIN APPELLANT'S CONVICTIONS FOR ASSAULT WITH USE OF A DEADLY WEAPON.

V. THE APPELLANT'S SENTENCE CONSTITUTES ABUSE OF DISCRETION BECAUSE THE DISTRICT COURT GAVE AN OVERLY HARSH SENTENCE UNSUPPORTED BY THE RECORD.

A. MR. HICKMAN'S SENTENCE WAS BASED ON IMPALPABLE OR HIGHLY SUSPECT EVIDENCE.

B. THE RECORD DOES NOT SUPPORT HABITUAL CRIMINAL TREATMENT FOR THIS APPELLANT.

VI. THE DISTRICT COURT ERRED IN ALLOWING THE JURY TO ACCEPT LEGALLY INADMISSIBLE EVIDENCE FROM THE TESTIMONY OF LAY WITNESSES.

VII. MR. HICKMAN'S CONVICTIONS MUST BE REVERSED BASED UPON A CUMULATIVE EFFECT OF THE ERRORS DURING TRIAL.

STATEMENT OF THE CASE

WILLBURT HICKMAN, JR., (hereinafter referred to as "Mr. Hickman" or "Appellant") was charged by way of an Information filed on January 11, 2012, as follows: eight (8) counts of Attempt Murder with Use of a Deadly Weapon (Felony) (Counts 1-8), one (1) count of Battery with Use of Deadly Weapon

(Felony) (Count 9), one (1) count of Battery with the Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony) (Count 10), six (6) counts of Assault with a Deadly Weapon (Felony) (Counts 11-16), one (1) count of Burglary (Felony) (Count 17), and one (1) count of Malicious Destruction of Property (Felony) (Count 18). (AA[1] I, 1-6.) The State filed an Amended Information on April 3, 2012 and subsequently a Second Amended Information, dropping Count 18 – Malicious Destruction of Property. (AA I, 7-12; 16-21.) The State filed a Notice of Habitual Criminality on August 23, 2013. (AA I, 13-15.) Prior to trial, Mr. Mitchell Posin, Esq., substituted the Clark County Public Defender's Office as new counsel.

Appellant's jury trial began on September 3, 2013. (AA I, 22.) The jury returned a guilty verdict on counts 9-17 on September 9, 2013, after a five (5) day jury trial, but hung on the eight (8) counts of attempt murder. (AA II, 297-301.) On December 18, 2013, Mr. Hickman was adjudged guilty and sentenced under the small habitual statute to the Nevada Department of Corrections ("NDC") as follows: as to Count 9 – a maximum of two hundred fifteen (215) months with a minimum parole eligibility of sixty (60) months; Count 10 – a maximum of two hundred fifteen (215) months with a minimum parole eligibility of sixty (60)

[1] References to Appellant's Appendix are abbreviated "AA" herein, followed by volume and page number(s).

months, Count 10 ordered consecutive to Count 9; Count 11 – a maximum of seventy two (72) months with a minimum parole eligibility of sixteen (16) months, Count 11 ordered concurrent to Count 10; Count 12 – a maximum of seventy two (72) months with a minimum parole eligibility of sixteen (16) months, Count 12 ordered concurrent to Count 11; Count 13 – a maximum of seventy two (72) months with a minimum parole eligibility of sixteen (16) months, Count 13 ordered concurrent to Count 12; Count 14 – a maximum of seventy two (72) months with a minimum parole eligibility of sixteen (16) months, Count 14 ordered concurrent to Count 13; Count 15 – a maximum of seventy two (72) months with a minimum parole eligibility of sixteen months, Count 15 ordered concurrent to Count 14; Count 16 – a maximum of seventy two (72) months with a minimum parole eligibility of sixteen (16) months, Count 16 ordered concurrent to Count 15; and Count 17 – a maximum of ninety six (96) months with a minimum parole eligibility of twenty two (22) months, Count 17 ordered concurrent to Count 16. (AA, #.) Appellant received seven hundred thirty-one (731) days credit for time served. (AA, #.) Counts 1 through 8 – Attempt Murder with Use of Deadly Weapon, to wit: a Cadillac, were dismissed with prejudice. (AA II, 321-324.) The Judgment of Conviction was filed on January 2, 2014. (Id.)

Appellant filed a timely proper person Notice of Appeal on January 6, 2014. (AA II, 342-343.) His Case Appeal Statement was filed on January 8, 2014. (AA

II, 344-345.) On January 22, 2014, Mr. Hickman filed a proper person Notice of Motion and Motion for Reconsideration of Motion for a New Trial Due to Ineffective Assistance of Counsel and Conflict of Interest in district court. (AA II, 325-339.) The court dismissed Mr. Hickman's pending motions on jurisdictional grounds. (AA II, 340-341.)

After this Court had an opportunity to observe the lack of diligence and problems in representation with the trial counsel, that counsel (Mr. Posin) was removed and briefing in this matter was suspended until the undersigned was appointed as appellate counsel. This Opening Brief follows.

STATEMENT OF THE FACTS

On December 18, 2011, a Cadillac crashed into the New Antioch Christian Fellowship Church. (AA I, 96.) Eight (8) members attending services were startled and experienced some injuries as a result of this accident. Behind the wheel of that Cadillac was Mr. Hickman, a senior who had been physically ejected from services. (AA I, 78-79.) On that day, Mr. Hickman had initially politely inquired if his daughter was attending church services inside and whether he could approach her to pray. (AA I, 74-75; 101.) Due to a family quarrel, Mr. Hickman's daughter apparently refused to see him at church. Mr. Hickman was asked to leave. (AA I, 74-75.) On that day, Mr. Hickman was observed to be "drunk," "buzzed," and under the influence of alcohol. (AA I, 113-114.) Other witnesses

observed him "mumbling" his words and found him difficult to understand when he did speak. (AA I, 93.) In fact, three (3) hours after Mr. Hickman was arrested by police, his blood alcohol concentration was 0.168. (See AA II, 314.) The jury heard evidence that the responding officers at the scene cited Mr. Hickman on suspicion that he been driving drunk. (AA I, 208-210.)

Incredulously, the State tried to argue the motive behind this incident was being rejected by his daughter and the church and not allowing him to attend services, so he drove his car into the church in retaliation. (AA I, 238.) The evidence, however, did not convince the jury that Mr. Hickman had any specific intent to kill these church goers (as the jury hung on the eight counts of attempt murder), but rather they believed Mr. Hickman apparently lost control of the vehicle and convicted him of battery, assault, and burglary as outlined above. (AA II, 297-301.)

SUMMARY OF THE ARGUMENT

Mr. Hickman's intoxication on December 18, 2011, contributed to his presence at his daughter's church. After being turned away from services multiple times, and finally after being physically forced out of the church, elderly Mr. Hickman got into his Cadillac to drive away. He had a high blood alcohol concentration, and despite many witnesses observing him to be impaired in a drunken stupor, he was directed to get behind the wheel of his vehicle and leave

the church premises. After returning to his vehicle, he apparently lost control of his car, crashing into the church and injuries and/or scaring eight (8) attendees. Despite being upset at being turned away by the church and his daughter, and while drunk, the State saw fit to charge him with attempt murder, even though no evidence supported those charges. Nevertheless, the State secured convictions for Battery With Use of a Deadly Weapon, Assault With Use of a Deadly Weapon, and Burglary based on a number of instances of prosecutorial misconduct, misstatements of the law, and improper argument to the jury and sentencing court. The testimony adduced at trial does not support his convictions. Finally, the district court erred in adjudicating Mr. Hickman guilty as a small habitual offender and because Appellant was denied due process, his convictions must be vacated.

ARGUMENT

Generally, trial errors are subject to harmless error standard of review because these errors may be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt. Patterson v. State, 128 Nev. Adv. Op. 17, 298 P.3d 433 (2013) (quoting Arizona v. Fulminante, 499 U.S. 279, 307-08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). An error is harmless only if the appellate court determines beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Hernandez v. State, 124 Nev. 639, 653, 188 P.3d 1126, 1136 (2008).

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING DEFENSE'S REQUEST FOR JURY INSTRUCTIONS IN SUPPORT OF MR. HICKMAN'S THEORY OF DEFENSE.

If the defense's theory of the case is supported by some evidence which, if believed, would support the corresponding jury verdict, the lower court's failure to instruct on that theory completely removes it from the jury's consideration and constitutes reversible error. Davis v. State, 130 Nev. Adv. Op. 16, 321 P.3d 867 (2014); Williams v. State, 99 Nev. 530, 665 P.2d 260 (1983).

At trial, the defense requested, but was denied, the following two (2) jury instructions in support of its theory of the case:

> Proposed Jury Instruction No. 12. If the jury believes from the evidence that the condition of the Defendant from intoxication was such to show that there was no specific intention to cause the death of an individual, they cannot find the Defendant guilty of attempted murder. NRS 193.220.
>
> Proposed Jury Instruction No. 13. In order to convict the Defendant of attempted murder, the jury must find either the Defendant was in control of his mental faculties and entertaining intent to kill when the crime occurred or that he had formed this intent before he lost control of his faculties. Mere intent to harm or intimate is not sufficient to warrant a guilty verdict for attempted murder. Nothing less than a criminal intent to kill must be shown. Ford v. State, 102 Nev. 136, Keys v. State, 104 Nev. 739.
> (AA II, 294-296.)

Only the State's instruction (no. 16) was offered addressing intoxication as it related to intent:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular intent is a necessary element to constitute a particular crime, the fact of his intoxication may be taken into consideration in determining such intent. (AA II, 280-281.)

This language did not encompass Mr. Hickman's theory of the case, to which he was entitled to have the jury instructed on his theory based on the independent evidence that witnesses observed an odor of alcohol and some impairment. For that reason, the trial court's refusal to permit the defense's proposed instructions 12 and 13 constituted reversible error pursuant to Davis and Williams, supra. Although the jury hung on the attempt murder counts, the trial court's error in refusing to allow the defense's theory of the case, which permeated the remainder of the case, including at sentencing (as set forth more fully below). That error cannot be considered harmless, as the State improperly argued to the jury and to the sentencing court that despite Mr. Hickman's obvious problem with alcoholism, alcohol was not a factor and he must have intended to kill church patrons he did not know in a bizarre retaliatory fantasy.

Therefore, the trial court's refusal to offer the defense's proposed instruction, pursuant to a criminally accused's right to present a jury instruction

consistent with his theory of defense, constituted reversible error. Moreover, the error cannot be considered harmless in light of the State's carte blanche reliance on the mere fact of charged (but not convicted) conduct alleged to reflect a specific intent to kill or inflict serious harm.

Therefore, Appellant's convictions must be vacated and the matter should be remanded for a new trial.

II. APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THE PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENTS BY MISSTATING THE LAW ON WHAT CONSTITUTES A DEADLY WEAPON.

Mr. Hickman was denied his right to due process and a fair trial guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution by the prosecutorial misconduct. U.S. Const. Amends. V; XIV. A long-established rule of constitutional law provides that misconduct by the prosecutor can, in some instances, result in a due process violation. "[I]mproper remarks by prosecutor could at some point 'so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process.'" Sawyer v. Smith, 110 S.Ct. 2822, 2817 (1990), citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

It is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935); United States v. Dorr, 636 F. 2d 117 (5th Cir. 1981).

An automobile can be a deadly weapon if used as such, but it must be proven that the defendant intended to use his vehicle as a deadly weapon and did not merely attempt to flee the scene. See, e.g., State v. Orlett, 44 Ohio Misc. 7, 10 (1975). In order to preserve for appellate consideration an allegation of prosecutorial misconduct in closing argument, the accused must make a timely objection, obtain a ruling, and request an admonition of the prosecutor and appropriate instruction to a jury. Williams v. State, 103 Nev. 106, 734 P.2d 700 (1987).

Here, trial counsel objected to the State's mischaracterization of the evidence before the jury, namely that just because a car was involved in this incident and it came into contact with people, the mere fact that "a car is something that kills people every day sadly, in accidents or hits pedestrians" does not render the vehicle a deadly weapon for purposes of the charges of assault and battery (as the jury ultimately hung on the attempt murder charges). (See AA II, 228-229.) Over objection, the State was permitted to make this argument, contrary to the law on deadly weapons, to the jury. (Id.)

It was error for the court to overrule this objection, and permit the State to essentially make the argument that a vehicle is per se a deadly weapon for all of the listed charges. Instead, the law requires an analysis on whether an accused intended to use the vehicle as a deadly weapon or whether he merely lost control of it.

III. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SUSTAIN APPELLANT'S CONVICTIONS FOR BATTERY RESULTING IN SUBSTANTIAL BODILY HARM.

It is axiomatic that in a criminal prosecution the State must prove each and every element of the charged offense beyond a reasonable doubt. Watson v. State, 110 Nev. 43, 45, 867 P.2d 400 (1994). The Due Process Clause of the United State Constitution "protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Carl v. State, 100 Nev. 164, 165, 678 P.2d 669 (1984); In re Winship, 397 U.S. 458, 364 (1970).

In Batin v. State, 118 Nev. 61, 38 P.M. 880 (2002), this Court noted that this 'insistence that the State prove every element of a charged offence beyond a reasonable doubt serves an imperative function in our criminal justice system: 'to give "concrete substance" to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding.'" 38 P.3d at 883. To sustain a conviction then, sufficient evidence must be presented to establish the elements of the charged offense beyond a reasonable doubt as determined by a rational trier of fact. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). But, however, "[i]f the evidence, though, gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, [a court] will reverse the conviction, as under those circumstances a

reasonable jury would entertain a reasonable doubt." United States v. Westbrook, 119 F.3d 1176, 1189 (5th Cir.1997)(citation omitted).

NRS 0.060 defines substantial bodily harm as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or ... [p]rolonged physical pain." We have stated that "the phrase 'prolonged physical pain' must necessarily encompass some physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act." Collins v. State, 125 Nev. 60, 64, 203 P.3d 90, 92–93 (2009). "In a battery, for example, the wrongdoer would not be liable for 'prolonged physical pain' for the touching itself. However, the wrongdoer would be liable for any lasting physical pain resulting from the touching." Id. at 64 n. 3, 203 P.3d at 93 n. 3; see also LaChance v. State, 130 Nev. Adv. Op. 29, 321 P.3d 919, 925 (2014).

In this case, Mr. Hickman was wrongfully convicted of a battery resulting in substantial bodily harm, specifically as to named victim Anyla (a child) in Count 10, who experienced a broken pinky toe, a few days on crutches, and complained of pain for approximately one (1) week. (AA I, 147-148; 153-155.) This pain complained of was not lasting within the meaning of NRS 0.060, as it was not substantial, only affecting her toe, caused no disfigurement, and inconvenienced her mobility rather than causing protracted loss or impairment of her toe. Absent

this type of evidence, the conviction for Battery Resulting in Substantial Bodily Harm in Count 10 cannot stand.

Therefore, Appellant's conviction as to Count 10 must be reversed.

IV. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SUSTAIN APPELLANT'S CONVICTIONS FOR ASSAULT WITH USE OF A DEADLY WEAPON.

"Assault" is unlawful attempt coupled with present ability to commit violent injury on person of another; mere menace is not enough, there must be effort to carry the intention into execution. N.R.S. 200.470; Wilkerson v. State, 482 P.2d 314, 87 Nev. 123 (1971). A defendant cannot be convicted of multiple counts of Assault With Use of a Deadly Weapon in which the circumstances are one (1) action against a group of more than one (1) person. See Powell v. State, 113 Nev. 258, 934 P.2d 224 (1997)(Defendant's conviction for three separate assaults after only discharging a rifle once was reversed because the single act could not be a permitted use of transferred intent to the other victims).

In this case, Mr. Hickman was convicted of Assault With a Deadly Weapon as to eight (8) different victims, including one (1) who sat inside the church and was unaware that the vehicle was approaching the church (Count 15, Sharon Powell)(AA I, 192-193). For that reason, she did not perceive the event as it was happening to her, no evidence suggests that the vehicle was "aimed" towards her or any other particular invididual. Instead, the State was erroneously permitted to

use the doctrine of transferred intent to support these convictions because Mr. Hickman was upset after being turned away from the church three (3) times in a row while trying to contact his daughter inside. The only person who could have logically felt assaulted, in fear of being threatened with harm, was the person who physically escorted him out of the church, or Mr. Hickman's daughter.

Therefore, insufficient evidence supports a separate conviction for Assault With Use of a Deadly Weapon as to these eight (8) individuals. Alternatively, based on the absence of evidence that Ms. Powell was placed in apprehension of the car approaching the church, the conviction for Assault With Use of a Deadly Weapon cannot stand as to her (Count 15). Accordingly, Appellant's conviction must be vacated.

V. THE APPELLANT'S SENTENCE CONSTITUTES ABUSE OF DISCRETION BECAUSE THE DISTRICT COURT GAVE AN OVERLY HARSH SENTENCE UNSUPPORTED BY THE RECORD.

Despite the fact that a sentencing court has wide discretion in imposing a prison term, this Court is free to disturb the sentence if that discretion is abused. State v. Sala, 63 Nev. 270, 169 P.2d 524 (1946). In reviewing a sentence, an appellate court reviews the record to ensure the district court made no procedural errors and then considers the substantive reasonableness of the sentence. Gall v. United States, 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). The reasonableness standard of review is the same as the deferential abuse of discretion

standard, which factors the totality of the circumstances, variance from the sentencing guidelines range, and appropriateness in light of Eighth Amendment protections. Id.; see also U.S. Const. Amend. VIII.

A. MR. HICKMAN'S SENTENCE WAS BASED ON IMPALPABLE OR HIGHLY SUSPECT EVIDENCE.

Gall emphasizes the importance of individualized sentencing. Gall, 552 U.S. at 43, 128 S.Ct. at 592-93. "[A]n abuse of discretion will be found only when the record demonstrates 'prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.'" Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Nevada law further cautions the district court from relying on impalpable or highly suspect evidence that may be submitted at sentencing. See e.g., Goodson v. State, 98 Nev. 493, 495-95, 654 P.2d 1006, 1007 (1982).

The trial court entertained inappropriate argument by the State that Appellant had an intent to kill, despite the jury hanging on this issue, despite the dearth of evidence of any direct or circumstantial evidence of any specific intent, and despite those eight (8) counts being dismissed. It cannot be ignored by this Court that the trial court relied largely on the State's lengthy argument for habitual treatment based upon facts not found by the jury who heard the case. The court accepted argument by the State about uncharged conduct. ("We didn't charge -- we didn't bring her daughter into this case, but certainly she was affected as well.

She [the mother] testified about the fear that her own daughter went through as well.") (AA II, 309.) This injustice cannot be tolerated, as the State's argument at sentencing expanded the conduct charged and ultimately convicted following the trial.

Moreover, the State argued ad nauseum that Mr. Hickman intentionally drove his car into a church intending to kill people, while criticizing the evidence that Mr. Hickman had a 0.168 blood alcohol concentration three (3) hours after the accident at the church and that he was forcibly ejected from the church by security who twisted his arm as they threw him out. (See AA II, 304-306.)

Generally speaking, sentencing requires lower courts to "resolve questions involving 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" Koon v. United States, 518 U.S. 81, 99, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)(quoting Cooter & Gell, 496 U.S. at 404, 110 S.Ct. 2447). Because only generalizations were offered and accepted by the sentencing court, Mr. Hickman's sentence was based upon highly suspect and impalpable evidence.

B. THE RECORD DOES NOT SUPPORT HABITUAL CRIMINAL TREATMENT FOR THIS APPELLANT.

Nevada law creates a liberty interest in sentencing procedures that is protected by due process. Walker v. Deeds, 50 F.3d 670 (1995). This Court has held what is and is not properly considered by a lower court in determining habitual criminal status under NRS 207.010. See O'Neill v. State, 123 Nev. 9, 153

P.3d 38 (2007). It has been stated that the "responsibility on appellate review of a criminal sentence is limited yet important: we are to ensure that a substantively reasonable sentence has been imposed in a procedurally fair way." United States v. Levinson, 543 F.3d 190, 195 (3rd Cir. 2008).

Under the habitual offender statute, considerations of nonviolent nature of charged crimes or remoteness of prior convictions are within discretion of district court. NRS 207.010. Tillema v. State, 112 Nev. 266, 914 P.2d 605 (1996). In Nevada, "[t]he decision to adjudicate a person as a habitual criminal is not an automatic one." Clark v. State, 109 Nev. 426, 851 P.2d 426, 427 (1993). In particular, "[h]aving committed three felonies does not, of itself, a habitual criminal make." 851 P.2d at 427. This Court has emphasized that the simple finding of three prior felonies "is not the same as an adjudication of habitual criminal status" and is inadequate because it "does not clearly disclose that the court weighed the appropriate factors for and against the habitual criminal enhancement." Id. The sentencing judge, therefore, is required to make "an actual judgment on the question of whether it [i]s just and proper for [the defendant] to be punished and segregated as a habitual criminal." Id.; see also Walker v. Deeds, 50 F.3d 670 (1995)(distinguished by Hughes v. State, 116 Nev. 327, 332–33, 996 P.2d 890, 893–94 (2000) stating there does not have to be a utterance of "fair and just" but there needs to be a record as a whole that indicates the sentencing court was

not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication and that the court exercised its discretion").

Here, the record is rather sparse. The court identified three (3) remote felony convictions, acknowledging the staleness of them. (AA II, 318-319.) The court summarily analyzed the remoteness and "nature" of the felonies, and adjudicated Appellant under the small habitual statute. (Id.) The sentencing court overlooked Mr. Hickman's history that reflected pervasive alcoholism, and trial counsel failed to address the individual circumstances surrounding these three (3) offenses. As such, and without any record of the trial court understanding its discretion in this matter, it was inappropriate for the trial court to sentence Mr. Hickman under the habitual criminal statute.

Specifically, the State introduced the following three (3) convictions in support of habitual treatment: a 1985 California Sale of Controlled Substance (Felony), Case No. A772219; a 1999 Nevada Battery Domestic Violence, Third Offense (Felony) Case No. C156759; and a 2000 Nevada, Stop Required on a Police Officer (Felony), Case No. C159356. (AA II, 311-312.) At the time Mr. Hickman was sentenced on December 18, 2013, the felony convictions were so stale that the most recent conviction was thirteen (13) years old.

Of concern to Appellant, trial counsel did not review the Judgments of Conviction accepted by the sentencing court in support of habitual treatment, nor

did trial counsel offer an explanation of the facts and circumstances surrounding any of those convictions. Briefly, trial counsel alluded to Mr. Hickman having a history of drugs and alcohol dependence that led to poor judgment and violence. (AA II, 304; 307.)

Therefore, Appellant was denied the protections of individualized sentencing and was erroneously adjudicated under the small habitual criminal statute, despite the dearth of a record to support such severe treatment. As such, his sentence should be reversed.

VI. THE DISTRICT COURT ERRED IN ALLOWING THE JURY TO ACCEPT LEGALLY INADMISSIBLE EVIDENCE FROM THE TESTIMONY OF LAY WITNESSES.

A district court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Ramet v. State, 125 Nev. 19, 209 P.3d 268, 269 (2009), citing Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). While it is true as a general rule that the failure to contemporaneously object or assign misconduct will preclude review by this Court (see, Garner v. State, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962)), "where the errors are patently prejudicial and inevitably inflame or excite the passions of the jurors against the accused, the general rule does not apply." Sipsas, at 235, citing Garner, 78 Nev. at 373, 374 P.2d at 529. As was the case in Sipsas, there was a *sua sponte* requirement to protect Mr.

Hickman's right to a fair trial. See Garner, supra; McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984).

At trial, the State devised its questions to elicit testimony so that a lay witness, a person inside the church who encountered Mr. Hickman after he lost control of his vehicle and collided with the church, offered a final opinion as to whether alcohol was the cause of the crash:

> Q: So based on your observations from beginning to end, could you tell that alcohol was involved?
> A: Other than the odor, no.
> (AA I, 173.)

While lay witnesses can opine on the degree of someone's intoxication, final determinations of cause and effect are properly within the trier of fact only. Thus, although trial counsel did not object to the question or move to the strike the answer, it was incumbent on the court to strike the lay witness' testimony as patently prejudicial and as invading the province of the jury.

Therefore, in the interests of manifest justice, Appellant's convictions must be vacated.

VII. MR. HICKMAN'S CONVICTIONS MUST BE REVERSED BASED UPON A CUMULATIVE EFFECT OF THE ERRORS DURING TRIAL.

Where the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, the conviction must be reversed. Big Pond v. State, 101

Nev. 1, 3, 692 P.22 1288, 1289 (1985). In deciding whether trial errors are harmless or prejudicial, this Court considers a number of factors, including whether: (1) the issue of guilt or innocence is close, (2) the quantity and character of the area, and (3) the gravity of the crime charged. Id.

In this case, the cumulative errors outlined above, namely the improper admission of certain lay witness testimony, prosecutorial misconduct in closing argument, the denial of the defense's right to a jury instruction consistent with its theory of defense, and the denial of individualized consideration at sentencing and reliance upon impalpable evidence by the sentencing court render Mr. Hickman's convictions unreliable and unconstitutional.

CONCLUSION

Based on the foregoing, the Appellant, WILBURT HICKMAN, respectfully requests that this Court vacate the convictions in this case, and remand the matter for a new trial.

DATED this 20th day of January, 2015.

Respectfully Submitted By:

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 3C(h)(2) because, excluding the parts of the brief exempted by NRAP32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, contains 6,330 total words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of January, 2015.

/s/: Kristina Wildeveld
KRISTINA WILDEVELD, ESQ.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 20th day of January, 2015, the **APPELLANT'S OPENING BRIEF** and **APPENDIX TO APPELLANT'S OPENING BRIEF** were served upon the appropriate parties hereto via the Supreme Court's electronic notification system in accordance to the Master Service List as follows:

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