IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOSEPH JEFFRIES, Appellant, v. THE STATE OF NEVADA, Respondent.	Electronically Filed Sep 15 2017 01:48 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 68338

ANSWER TO PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, STEVEN S. OWENS, and answers the Petition for Rehearing in the above-captioned appeal.

This answer is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 15th day of September, 2017.

Respectfully submitted,

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

BY */s/ Steven S. Owens*
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MEMORANDUM
POINTS AND AUTHORITIES

On October 22, 2011, Appellant Michael Jeffries ("Jeffries") shot Eric Gore ("Eric") during a party that Jeffries held at the house he shared with his girlfriend, Mandy. 1 AA 121, 208. Mandy's daughter Brittany was staying with Mandy and Jeffries that night. 1 AA 121. As Brittany was walking to her room, she saw Jeffries shoot Eric. 1 AA 140-41. Prior to trial (including statements to police and testimony at the preliminary hearing), Brittany stated that Jeffries punched Eric several times, including after Eric fell to the floor. 1 AA 7-15, 54-86. Brittany then saw Jeffries shoot Eric as Eric was backing up scared. Id. At trial, however, Brittany could not "remember" most of the details and downplayed Jeffries actions the night of the murder. 1 AA 138-142. Prior to trial, Brittany's mother had become engaged to Jeffries and the two were to be married. 1 AA 239.

Following a four-day jury trial, Jeffries was found guilty of Second Degree Murder with Use of a Deadly Weapon. On May 27, 2015, he was adjudicated guilty by the district court and sentenced to a term of Life with the possibility of parole after 10 years. Jeffries appealed. On July 6, 2017, following briefing and oral argument, this Court affirmed the district court's Judgment of Conviction. Jeffries v. State, 397 P.3d 21 (Nev. 2017). On July 25, 2017, Jeffries filed a Petition for Rehearing ("Petition"). The State responds herein.

The Court may consider rehearings when the Court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or when the Court has overlooked, misapplied, or failed to consider a statute, procedural rule, regulation, or decision directly controlling a dispositive issue in the case. NRAP 40(c)(2). Matters presented in the briefs and oral arguments may not be reargued in the petition for rehearing, and no point may be raised for the first time on rehearing. NRAP 40(c)(1).

In his Petition, Jeffries claims that this Court overlooked facts and misapprehended law related to three issues—alleged prosecutorial misconduct during closing argument, juror misconduct during deliberations, and the trial court's failure to give a supplemental jury instruction defining malice aforethought after having already submitted a complete set of instructions to the jury.

I. THIS COURT DID NOT MISAPPREHEND FACTS OR LAW RELATED TO THE STATE'S COMMENTS DURING CLOSING ARGUMENT

Jeffries challenges this Court's application of the law in its consideration of Jeffries' claims of prosecutorial misconduct related to the State's comments during closing argument. In particular, Jeffries claims that this Court misapprehended law by incorrectly applying Williams v. State, 103 Nev. 106, 734 P.2d 700 (1987), when reviewing whether the State committed prosecutorial misconduct by arguing, based

on evidence introduced at trial, that Jeffries had potentially indirectly influenced Brittany. He also challenges this Court's application of a plain error standard of review when considering arguments made by the State about Brittany's credibility, and to which Jeffries did not object. These arguments fail.

A. This Court Did Not Mischaracterize Language Used By The State During Closing Argument

Jeffries claims that "the Panel has mischaracterized, and has thereby overlooked and inaccurately diminished the objective impropriety of the *actual language* employed by the prosecutor[.]" Petition at 3 (emphasis in original). In support of his claim that the Court improperly diminished the language used by the State, Jeffries quotes this Court's decision. In doing so, however, he adds a word that changes the meaning of the quote:

> However, the Panel asserts that "[i]n the State's rebuttal closing argument, the prosecutor [merely] ***suggested*** that Jeffries ***might have*** indirectly influenced Brittany's trial testimony," (Order of Affirmance page 3)

Petition at 3 (emphasis in original).

Jeffries' addition of the word "merely" to this Court's opinion makes it seem as though the Court viewed the State's argument as a trivial matter. This attempt to paint this Court's understanding of events at trial as a misapprehension of the record by making the excerpt of the Court's decision seem more equivocal than it was is

disingenuous. Jeffries cannot argue that this Court diminished, and therefore mischaracterized, material facts when he finds it necessary to add language to this Court's opinion in order to make it a more suitable fit for his argument that the Court devalued the allegedly improper language used by the State.

This Court's holding in this case did not minimize the impact of the State's argument; rather, it gave the State's argument appropriate weight by viewing the comments in the context in which they were made. See Jeffries, 397 P.3d at 25-26. The prosecutor's statements during closing argument were supported by evidence in the record that Jeffries and Brittany's mother, Mandy (Jeffries' fiancée) could have improperly influenced Brittany's testimony. As such, they were not improper. Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997) ("During closing argument, the prosecution can argue inferences from the evidence and offer conclusions on contested issues."); Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971) (holding that statements made by the prosecutor during argument, when made as a deduction or conclusion from evidence introduced in the trial, are permissible).

As this Court noted in its decision, "[a] prosecutor may not argue facts or inferences not supported by the evidence." Jeffries, 397 P.3d at 26, citing Williams, 103 Nev. at 110, 734 P.2d at 703. In Williams, the Nevada Supreme Court held that the prosecutor had improperly contended that Williams purchased his alibi testimony

although there was no evidence from which to draw such an inference. Id. at 106, 734 P.2d at 703. In contrast, in this case, the State had evidence from which it could draw an inference that Brittany's testimony had been influenced by her mother, and indirectly by Jeffries. This evidence included Brittany's conflicting statements and the fact that Brittany's mother had become engaged to Jeffries in the time between Brittany's statement to police implicating Jeffries in murder and her later testimony that she could not recall what happened. 1 AA 138-42, 146, 148, 153-54, 239.

The Court did not misapprehend facts related to the State's closing argument. Jeffries' argument that this Court diminished and misapprehended the State's actual comments during closing argument rests entirely on a quote from this Court's opinion—a quote to which Jeffries apparently deemed it necessary to add diminishing language to support his argument. Moreover, the State's commentary on facts presented at trial was evidence-based and not improper argument. Therefore, this claim should be denied.

B. This Court Did Not Misapply The Standard Of Review When Considering Jeffries' Claim of Prosecutorial Misconduct

Jeffries further contends that this Court erred in affirming the Judgment of Conviction because, when considering statements made by the State during closing argument—statements that Jeffries alleged constituted improper vouching—this Court applied a plain error standard of review. In particular, Jeffries alleges that this

Court overlooked the fact that "the trial judge took critical notice of the prosecutor's vouching for Brittany Ames *sua sponte*," when it decided to apply a plain error standard of review rather than a harmless error standard. Petition at 6.

"Failure to object during trial generally precludes appellate consideration of an issue." Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001). Even when a party does not object, however, this Court has the discretion to address an error if the error was plain and affected the defendant's substantial rights. Id. Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Id. Thus, when a party does not object to an alleged error at trial, this Court requires that a party demonstrate that the alleged error was plain and prejudicial.

In this case, Jeffries did not object at trial, and therefore presumably did not think there was anything objectionable in the State's comments.[1] Plain error review

[1] Although Jeffries claims that the trial court took *sua sponte* notice of the alleged error—i.e., the State's arguments about Brittany's credibility—the record does not support this assertion. Instead, the record shows that, after closing arguments had ended and the jury was sent to deliberate, during a colloquy with the parties, the trial court told the State, "But you did refer to yourself by saying, I – and referred to something and that – which was was inappropriate on our legal sheet. But that's all right." 3 AA 637-38. It is not even clear from the trial court's comments which particular part of the closing argument the court was referring to, given that the word "I" was used multiple times during the State's closing and rebuttal argument. See generally 3 AA 559-86, 614-36. Such vague commentary by the trial court—made after the jury was sent to deliberate and it was therefore too late to do anything about

is entirely appropriate where, as here, a defendant does not object to an alleged error. Indeed, this is the whole point of plain error review—that a defendant not be encouraged to let errors accumulate without giving the trial court the opportunity to remedy them. By failing to object during the State's closing argument, or even after the State's closing argument, Jeffries did not give the trial court the opportunity to remedy a wrong that he thought should be remedied. Thus, this Court did not act improperly by applying the plain error standard of review. Therefore, this claim should be denied

II. THIS COURT DID NOT OVERLOOK EVIDENCE OR MISAPPREHEND LAW IN RULING ON JUROR MISCONDUCT

A. The Court Did Not Misapprehend The Facts Of The Case In Its Decision

Jeffries claims that this Court misapprehended facts in its opinion because this Court overlooked ample evidence of manslaughter in the record. Petition at 7. In particular, Jeffries takes issue with this Court's use of the word "approach" to explain the victim's movement toward Jeffries before Jeffries shot him, and with the Court's assertion that Brittany's statements to police and testimony at the preliminary hearing undermined Jeffries' defense.

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the allegedly improper comments—does not constitute *sua sponte* notice and objection by the trial court for the purposes of overcoming plain error review.

Jeffries does not explain, in his Petition, how or why this Court's recounting of the historical facts of record constitutes a misapprehension of facts. The record clearly reflects that, immediately prior to the shooting, Jeffries punched Eric several times. 1 AA 153-54. Jeffries then went to the bedroom and got his gun. 1 AA 139-41. Eric approached Jeffries as he came out of the bedroom. 1 AA 061-62. Jeffries then shot Eric. 1 AA 1-6. "It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Jeffries does not do so here. Accordingly, the Court should not consider this claim.

Jeffries also does not explain how, as a result of this Court's alleged misapprehension of the facts he sets forth in his Petition, there was a "potentially plain prejudicial effect of the juror misconduct[.]" Petition at 7-8. The juror misconduct in this case involved a juror researching the consequences of a "guilty plea" [*sic*] and deciding that he "was against the penalty." 3 AA 668. The fact that the juror was against the penalty he researched could well have been beneficial, not unfairly prejudicial, to Jeffries. If, for example, the juror felt that penalty for first-degree murder was too harsh given the facts of the case, this would have benefitted Jeffries. Thus, Jeffries made a strategic decision to re-instruct the jury following the misconduct rather than question the juror who looked up the information, and then

be forced to excuse a juror who was to his benefit.

Moreover, to the extent that Jeffries' claim challenges the sufficiency of the evidence supporting this Court's affirmance of the jury's finding of guilt for murder, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses." Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380; see Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (holding that it is the function of the jury to weigh the credibility of the identifying witnesses). In all criminal proceedings, a jury's verdict will not be disturbed upon appeal if there is evidence to support it. Azbill v. Stet, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972). The evidence cannot be weighed by an appellate court. Id. The Court is not required to decide whether "it believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson, 443 U.S. at 319-20, 99 S. Ct. at 2789. This standard thus preserves the fact finder's role and responsibility "[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id. at 319, 99 S. Ct. at 2789.

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980). Also, the Nevada Supreme Court has consistently held that circumstantial evidence alone may sustain

a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976)).

The jury heard evidence that Jeffries admitted to shooting the victim in a phone call to 911 and to the police during a videotaped statement; additionally, the single eye witness to the murder, Brittany, stated that she saw Jeffries shoot the victim in a manner that was not consistent with self-defense. 1 AA 1-86. Brittany gave four statements prior to trial: one to her father whom she called right after the murder, a second one to the police immediately after the murder, a third one during a taped statement at the police department, and the fourth at the preliminary hearing. 1 AA 7-15, 54-70, 71-86 (preliminary hearing testimony), 200-204 (call to father). During every one of these occasions, Brittany was able to relay in significant detail that Jeffries punched Eric several times, including after Eric fell to the floor. 1 AA 7-15, 54-86. Jeffries stated that he was going to get his gun, got up and went to his bedroom to get his gun. Id. Brittany then saw Jeffries shoot Eric as Eric was backing up scared. Id. This evidence was corroborated by the crime scene analysis conducted by the LVMPD. 2 AA 463, 484-507.

The recounting of facts in this Court's decision is supported by the record. While Jeffries lists a series facts from trial testimony, none of those facts take away from the fact that Brittany's statements to police and at the preliminary hearing

undermined the defense's theory of the case that Jeffries acted in self-defense. Additionally, Jeffries ignores that the jury was provided correct, complete instructions for murder, manslaughter, and self-defense. The jury then found Jeffries guilty of the greater offense of murder.

Jeffries fails provide a cogent argument that this Court misapprehended or overlooked any facts in its decision. Therefore, this claim should be denied.

B. This Court's Determination That Jeffries Failed To Establish That He Was Prejudiced By Juror Misconduct Was Not A Misapplication Of Law

Next, Jeffries claims that this Court erred, pursuant to Valdez v. State, 124 Nev. 1172, 196 P.3d 465 (2008), when it held that the district court did not have an obligation to undertake a spontaneous investigation as to whether Jeffries was actually prejudiced by a juror's independent research into the penalty for a guilty plea. Petition at 9; Jeffries, 397 P.3d at 26-27. This claim fails; it is Jeffries who has misapprehended the law and the application of Valdez to this case.

As during briefing, Jeffries relies upon Valdez to support his argument that this Court misapprehended law when it upheld the district court's denial of his motion for new trial. Petition at 10. However, Valdez is distinguished from this case by its procedural history. Valdez challenged the district court's denial of a motion for *mistrial* based on juror misconduct. In this case, as in Meyer v. State, 119 Nev.

554, 80 P.3d 447 (2003), this Court reviewed the district court's denial of a motion for *new trial* based on alleged juror misconduct. Thus, to the extent that the test set forth in Valdez is different from that in Meyer, Valdez is inapposite; this Court therefore correctly relied upon Meyer rather than Valdez in reaching its decision.

Before a defendant can prevail on a motion for new trial based on juror misconduct, he must present admissible evidence to establish (1) the occurrence of juror misconduct and (2) a showing of prejudice. Meyer 119 Nev. at 565, 80 P.3d at 455 "Prejudice is shown wherever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Id.; Zana v. State, 125 Nev. 541, 216 P.3d 244 (2009); Lamb v. State, 251 P.3d 700 (2011).

In this case, this Court properly applied Meyer in determining that Jeffries had waived his claim to potential juror misconduct by requesting that the trial court re-instruct the jury. During deliberations, the trial court received a note from the jury that one of the jurors had "looked up the consequences of a guilty plea and was against the penalty." 3 AA 668. After it became apparent that a juror had researched penalties, the trial court provided a curative instruction. Jeffries did not object, and in fact agreed to the curative instruction. Rather, Jeffries made a strategic decision to have the trial court re-instruct the jury because he believed the juror's research might potentially be to his benefit. (The note stated that a juror had looked up the

consequences of a guilty plea and was against the penalty. 3 AA 668.) Jeffries gambled on a favorable verdict by choosing to reinstruct the jury that punishment was for the Court to consider in the event that Jeffries was found guilty—a gamble that paid off as the jury ultimately found Jeffries guilty of Second Degree murder, and not the First Degree Murder that the State sought. Additionally, as this Court noted, any potential prejudice was cured because the district court admonished the jury before the jury had reached a verdict, thereby remedying any prejudice. Jeffries, 397 P.3d at 27. Accordingly, this Court correctly held that Jeffries failed to demonstrate the prejudice that would warrant a new trial. Id.

In deciding this issue, this Court did not overlook or misapply its holding in Valdez because Valdez is inapposite. Instead, the Court properly applied the test set forth in Meyer, which addresses a district court's denial of a motion for new trial based on juror misconduct. Therefore, this claim should be denied.

III. THIS COURT APPROPRIATELY DETERMINED THAT AN ADDITIONAL, SUPPLEMENTAL INSTRUCTION WAS NOT REQUIRED

The trial court has wide discretion in deciding the manner in which to answer jury questions. Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968); see also Scott v. State, 92 Nev. 552, 555, 554 P.2d 735, 737 (1976). If the instructions already given by the trial court are adequate, correctly state the law and fully advise the jury

on the procedures they are to follow in their deliberation, the court's refusal to answer a question already answered in the instructions in not error. Id.

Subsequently, in Gonzalez v. State, 131 Nev. __, 366 P.3d 680 (2015), the Nevada Supreme Court established an exception to the general rule from Tellis. The Gonzalez Court held that when the jury's question suggests confusion or lack of understanding of a significant element of an applicable law the court may not refuse to answer the question. Id. at __, 366 P.3d at 683-84.

In considering the facts of this case, this Court considered Gonzalez, but distinguished it on a critical fact. In Gonzalez, during deliberation, a juror sent two questions to the district court judge. Id. at __, 366 P. 3d at 683. Both the State and defense counsel agreed that the answers to both questions were simple and straightforward. Id. Nevertheless, the district court refused to provide an answer and instead stated that it was improper for the court to give additional instructions on how to interpret jury instructions. Id. Here, in contrast, there was no such clear answer the trial court could have given to the jury to address their confusion other than to advise them that they must read and follow the provided instructions. Even Jeffries, who claims he should have received a supplemental instruction, could not articulate what should have been in that instruction: during briefing, Jeffries did not suggest a potential instruction; at oral argument, when pressed on what alternative

instruction the trial court could have provided, Jeffries could not provide a sample instruction. Appellant's Opening Brief at 35-40; Oral Argument[2] at 7:32-7:51.

By claiming that this Court erred when it held that an additional supplemental instruction on malice aforethought was not required, Jeffries asks this Court to adopt an impracticable standard. In Gonzalez, there was a clear answer to the jury's question, and both parties agreed on the language that should be used. This is in clear contrast to the situation here, and this Court was therefore correct when it ruled to not expand Gonzalez. Jeffries' inability to state what he was asking for highlights the appropriateness of this Court's decision—the requested "instruction" was so nebulous that even the person asking for it could not say what should be in it. Accordingly, this Court did not misapprehend the law when it applied Tellis and Gonzalez to hold that the trial court did not abuse its discretion regarding jury instructions.

This Court did not misapply Gonzalez—rather, the Court explained its holding in Gonzalez and distinguished it from the facts of this case. That this Court did not reach the result that Jeffries believed it should have reached when it undertook its analysis to distinguish Gonzalez does not constitute a misapplication

[2] Available at http://nvcourts.gov/uploadedFiles/courts.nv.gov/Content/Supreme/Arguments/Recordings/041317-68338.MP3

or misapprehension of the law. Therefore, this claim should be denied.

IV. THIS COURT DID NOT OVERLOOK FACTS IN DETERMINING THAT THERE WAS NO CUMULATIVE ERROR

Jeffries alleges that this Court overlooked the prejudicial cumulative effect of alleged errors, and that his Petition for Rehearing should therefore be granted. However, the cumulative error doctrine applies where the Court finds multiple errors that, although harmless individually, cumulate to violate a defendant's constitutional rights. Byford v. State, 116 Nev. 215, 241 (2000). By definition, a finding of cumulative error requires that there be more than one error in a given case. McConnell v. State, 125 Nev. 243, 259 (2009).

During briefing and at oral argument, Jeffries did not assert even one meritorious claim of error, much less multiple claims, and, as such, there was "nothing to cumulate." Id. Accordingly, this Court did not overlook cumulative error in its decision affirming the Judgment of Conviction. Therefore, this claim should be denied.

WHEREFORE, the State respectfully requests that rehearing be denied.

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Dated this 15th day of September, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing/reconsideration or answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points and contains 3,839 words, 322 lines of text and 17 pages.

Dated this 15th day of September, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 15, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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