IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL JOSEPH JEFFRIES, Appellant, v. THE STATE OF NEVADA, Respondent.	Electronically Filed Dec 14 2017 12:56 p.m. Elizabeth A. Brown Clerk of Supreme Court CASE NO: 68338

ANSWER TO PETITION FOR EN BANC RECONSIDERATION

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 En Banc Reconsideration 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 14th day of December, 2017.

Respectfully submitted,

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Nevada Bar #001565

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

On July 6, 2017, a panel of this Court issued an Opinion affirming a judgment of conviction pursuant to a jury verdict of second degree murder. Jeffries v. State, 133 Nev. ___, 397 P.3d 21 (2017). The Panel unanimously denied rehearing on September 29, 2017. On October 16, 2017, Jeffries filed the instant Petition for Reconsideration En Banc which this Court has directed the State to answer within 15 days by Order filed on November 29, 2017.

Points and Authorities

En banc reconsideration of a panel decision is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue. NRAP 40A(a). En banc reconsideration is available "only under the limited circumstances" set forth in this rule. Id. Where legal opinions are consistent, en banc reconsideration is unwarranted. Skender v. Brunsonbuilt Const. and Development Co., 123 Nev. ___, 171 P.3d 745 (2007). Matters presented in the briefs and oral arguments may not be reargued in the petition, and no point may be raised for the first time. NRAP 40A(c).

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1. Argument that Defendant Influenced Witness Testimony

First, Jeffries argues that the Panel erred in finding the evidence reasonably supported the prosecutor's argument to the jury that Jeffries and Brittany's mother had indirectly influenced thirteen-year-old Brittany's testimony. At the time of preliminary hearing, Brittany had given testimony that the victim was scared and backing up and said "whoa," when Jeffries held the gun and then fired it at the victim at close range. 1 AA 157. Such testimony would seriously discredit the theory of self-defense used at trial three years later. However, at trial Brittany could not remember most of the details and downplayed Jeffries' actions the night of the murder and had to be impeached with her prior testimony and statements. 1 AA 138-142. The jury then learned that Jeffries and Brittany's mother remarkably got engaged to be married while the murder case was pending. 1 AA 239. Brittany's mother confided in Brittany about her feelings for Jeffries and events in his life as they were awaiting trial. Id. Brittany believed that Jeffries was a good person because of what her mother had told her and she did not want anything to happen to him. 1 AA 146-8.

During its closing argument, the State drew inferences about the influences on Brittany's testimony in order to explain her lack of memory in her trial testimony:

> So we now have three versions of statements from Brittany Ames, And now we're here at trial, and Brittany Ames doesn't remember anything. . . . In 2011, there wasn't this influence that – you know, the eminent [sic] marriage of her mother to the man that she watched shoot Eric Gore dead. That's a huge influence. She hasn't had – back then, during her reliable statement that she did remember, she didn't have the influence of three-and-a-half years of being worked on by mom and – perhaps indirectly, but certainly being worked on – by Mike Jeffries.

3 AA 623. Upon defense objection that there was no evidence to support such an argument, the judge responded, "Let the jury decide what the evidence is," and the prosecutor clarified his argument:

> I have the evidence. I have the evidence. Here's what it is. Brittany Ames sat up here and said they talk all the time about what a great guy Mike Jeffries is. That's the influence I'm talking about. I said indirect. I didn't say that she was talking directly to him. What I said was that for three-and-a-half years she's had to listen to this direct and indirect evidence of Mike Jeffries and her mother. That has certainly influenced her testimony at this trial. This is a good kid who now has this influence. Here's something else that she has to be influenced by, when you think about it. As she sits here, she's thinking, my wife's – or my mother's fiancé. She also has that influence of the potential of having to live in that household. Do you think that that isn't influential on her? Of course, it is. But is it something she didn't think about back when she gave these three other versions? Of course. Those weren't on her mind as they are now. Now, she doesn't remember.

3 AA 624. In context, the prosecutor was appropriately arguing inferences from the evidence as to what may have influenced Brittany suspiciously to have no memory at trial of a murder which she had witnessed and about which she had given detailed accounts of previously. Jeffries' claim that the prosecutor had accused him of

witness tampering and suborning perjury is belied by the record. Even so, although some may view Jeffries' proposal of marriage to the mother of the eyewitness child who could refute his claim of self-defense in a pending murder trial as innocent and coincidental, a reasonable inference could also be drawn that there may have been an ulterior motive. This Court has long recognized that "[d]uring closing argument, the prosecution can argue inferences from the evidence and offer conclusions on contested issues." Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997). A prosecutor may properly comment upon the evidence adduced at trial. Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971) (statements made by the prosecutor, in argument, when made as a deduction or conclusion from evidence introduced in the trial, are permissible).

The Panel's conclusion that the prosecutor's argument was an appropriate comment on the evidence presented is not just supported by the factual record, it is also consistent with the legal authority Jeffries cites as grounds for en banc reconsideration. For example, in Williams a prosecutor improperly contended that appellant purchased alibi testimony, "although there was no evidence from which to draw such an inference." Williams v. State, 103 Nev. 106, 110, 734 P.2d 700 (1987). Oliver v. Wainwright simply held that a prosecutor "may not suggest that the defendant has suborned perjury where such a suggestion finds no support in the

record." Oliver v. Wainwright, 795 F.2d 1524, 1532 (11th Cir.1986). Likewise, in Henry v. Florida the prosecutor improperly argued that "somebody 'got to' one of the defense alibi witnesses, without any evidence whatsoever of any improper contact with the witness." Henry v. State, 651 So.2d 1267, 1268 (Fla.App.1995). In the present case, however, there was in fact evidence as shown above that Jeffries may have indirectly influenced Brittany's testimony by becoming engaged to the eyewitness's mother. The Anderson case is simply inapposite as the prosecutor there improperly referred to Anderson's post-arrest silence by suggesting that he had years to "cook up a story" and the case says nothing about arguing inappropriate inferences from the factual record. Anderson v. State, 121 Nev. 511, 118 P.3d 184 (2005).

2. Alleged Witness Vouching

Next, Jeffries argues that the Panel's conclusion that any alleged witness vouching was unpreserved and did not amount to plain error, conflicts with the Anderson decision. In Anderson, this Court found plain error in a cumulative assessment of numerous instances of improper arguments, one of which included the prosecutor "offering personal opinions as to the verity of its own witnesses." Anderson v. State, 121 Nev. 511, 517, 118 P.3d 184 (2005). The Anderson opinion does not quote the precise statement which it found to constitute witness vouching. Id. In the present case, the prosecutor argued as follows:

> So we now have three versions of statements from Brittany Ames. And now we're here at trial, and Brittany Ames doesn't remember anything. You know, I—I'm – I really grew to like Brittany Ames during this whole period that I've had this case. You know why? You saw it. Here is a wonderful young lady. She's a wonderful young lady. And think about the influence she had on—had in her life that would influence her testimony . . . .

6 AA 623. There is nothing about this statement that constitutes plain error which did not even catch the attention of defense counsel until the instant appeal. This Court has held that a witness's credibility is a proper subject for argument. Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). Arguments concerning witness credibility are improper when they impermissibly vouch for or against a witness and inappropriately invoke the prestige of the district attorney's office. Id. "Vouching may occur in two ways: the prosecution may put the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997). Neither occurred here.

When the prosecutor commented that he had grown to like Brittany and that she was a wonderful young lady, it was not to vouch for her credibility. To the contrary, Brittany's lack of memory at trial favored the defense and the prosecutor had to impeach Brittany with her prior statements and testimony to incriminate Jeffries. 1 AA 138-142. The prosecutor was not vouching for Brittany's feigned

lack of memory, but suggesting that she was influenced by circumstances involving her mother and Jeffries. Even if it is improper for an attorney to tell a jury that they "like" a particular witness, that is not the same as giving an opinion on their truthfulness and veracity. Furthermore, a claim of "vouching" is not of a constitutional nature and if unpreserved, only warrants reversal if the error substantially affects the jury's verdict. Valdez v. State, 124 Nev. 1172, 1188-9, fn.40, 196 P.3d 465, 476 (2008) (noting that improper vouching for witnesses constitutes an error of nonconstitutional dimension). Any impropriety in the prosecutor's comment does not amount to plain error as the Panel correctly concluded and such decision does not conflict with any legal authority.

3. Juror Misconduct

Next, Jeffries claims the Panel erred in holding that defense counsel failed to adequately develop the record as to whether Jeffries was prejudiced by juror misconduct. Jeffries argues the Panel overlooked 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. Jeffries, 397 P.3d at 26-27. However, Valdez is distinguished because it addressed a challenge to 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.

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 Panel properly applied Meyer in determining that Jeffries had waived his claim to potential juror misconduct by requesting that the trial court reinstruct the jury and have them continue deliberating. After it became apparent that a juror had researched penalties for a "guilty plea," the trial court provided a curative instruction at the request of the parties. 3 AA 668, 673-4. Jeffries did not object, and in fact agreed to the curative instruction. Id. Strategically, the juror's research as to the penalty may have inured to Jeffries' benefit. The note only stated that a juror had looked up the consequences of a guilty plea and was against the penalty. 3 AA 668. This case did not present a guilty plea and the note does not

reveal which charge was researched and whether the juror was against the penalty because it was too harsh or too lenient, or even that the particular penalty was disclosed to or discussed by the other jurors.

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, 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, the Panel correctly held that Jeffries failed to demonstrate the prejudice that would warrant a new trial and nothing in Valdez demands a different result. Id.

A defendant cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct. United States v. Jones, 597 F.2d 485, 488 n.3 (5th Cir. 1979); see also Oakes v. Howard, 473 F.2d 672, 674 (6th Cir. 1973) (failure to object to facts known at trial claimed later to be prejudicial precludes subsequent consideration of such a claim); State v. Hudson, 268 Neb. 151, 159, 680 N.W.2d 603, 610 (2004) (when a party has knowledge during trial of

irregularity or misconduct, the party must timely assert his or her right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error).

Significantly, Jeffries did not seek a mistrial or a hearing on juror misconduct to inquire further into prejudice, but accepted the same risk the prosecutor did in agreeing to simply re-instruct the jurors to disregard penalty and continue deliberating. Suggesting the judge had a sua sponte duty to inquire about the juror misconduct anyway under these circumstances when there was no motion for mistrial ignores the fact that jeopardy attaches once a criminal trial commences and a defendant has a valued right to finish the trial before the same jury. See Arizona v. Washington, 434 U.S. 497, 503, 98 S.Ct. 824 (1978). Only in the most serious and obvious situations would the district court have a sua sponte duty to intervene and make a prejudice inquiry against the wishes of the parties who were content to proceed with the existing jury. See Garner v. State, 78 Nev. 366, 372-373, 374 P.2d 525 (1962).

4. Supplemental Clarifying Jury Instruction

Finally, Jefffries claims the Panel erred in affirming the district court's failure to provide the jury with clarifying instructions in response to jury notes which suggested confusion concerning malice. Specifically, Jeffries argues the Panel

misapplied Gonzalez which held that "in situations where a jury's question during deliberations suggests confusion or lack of understanding of a significant element of the applicable law, the judge has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion." Gonzalez v. State, 131 Nev. ___, 366 P.3d 680, 682 (2015).

During jury deliberations, the jury sent out two questions to the court regarding malice. 3 AA 669-70. The judge did not simply ignore the questions nor refuse to provide an answer. Rather, the judge gave a detailed response and explanation to the jury as follows:

> Ladies and Gentlemen, I've received now two notes from you. The first one asking for clarity on the definition of malice, and the second one asking two things: the first one asking for further understanding between second degree murder and manslaughter. The bottom line is I can't do any more than I've done. The instruct – starting with Instruction Number 9, the instructions come from state statutes and the Supreme Court of Nevada does not allow me to elaborate on those and to further discuss with you. They want the jury to take those statutes and decide based upon those laws, applying them to the facts of the case, what a proper verdict would be. So, I'm not permitted to sit here and just discuss with you some of those definitions. So for example, the one on malice which you specifically talk about is Instruction Number 10. That is the statutory definition of malice. I didn't write it. The legislature wrote it and the Supreme Court says that's what I have to give you. I can't give you anything else. The definition – the distinction between murder and manslaughter is pretty – pretty well explained. I think, in Instruction Number 15. I think that that's pretty clear. I admit some of these Statutes aren't the best in the world, but I didn't write them and I'm not allowed to explain them and I'm not

> allowed to talk about them. I'm just have to give them to you. The one question that you've asked that I also can't answer is: Does a conscious intent to cause death or great harm before committing the crime fall into the criteria of malice? That's for you to decide. That's your decision. Okay? I'm sorry. I wish I could give you more help, but remember I told you at the beginning of the trial, I'm not going to decide this case. You're going to decide it. I only give you the law of Nevada that applies in the case and I've done that and I can't change that. So you got to go back and do the best you can and reach a fair verdict.

3 AA 674-5. If this Court has ever approved and authorized the use of additional instructions on malice different from the ones already given in this case, the State is unaware. 3 AA 640-67; NRS 200.020; see e.g., Nika v. State, 124 Nev. 1272, 1289-1290, 198 P.3d 839 (2008); Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397 (2001) (finding the statutory definition of malice well-established in Nevada). Whether a defendant was animated by malice, express or implied, is within the province of the jury, not the judge. Payne v. State, 81 Nev. 503, 406 P.2d 922 (1965). Malice is a question of fact to be determined by the trier of fact. Thedford v. Sheriff, Clark Cty., 86 Nev. 741, 744, 476 P.2d 25 (1970).

In Tellis, this held that the trial judge has wide discretion in the manner and extent he answers a jury's questions during deliberations and that the refusal to answer a question already answered is not error. Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968). That was the law in effect at the time of the trial in the instant case. However, during the pendency of the instant appeal, this Court in

Gonzalez created an exception to the bright-line rule of Tellis and held that in situations where the jury's question suggests confusion or lack of understanding of a significant element of the applicable law, the trial judge has a duty to answer the question. Gonzalez, supra. The Panel, however, has now "clarified" Gonzalez and held that "a district court does not abuse its discretion when it refuses to answer a jury question after giving correct instructions if neither party provides the court with a proffered instruction that would clarify the jury's doubt or confusion." Jeffries, 397 P.3d at 28.

Unlike in Gonzalez, neither Jeffries nor the State proffered any supplemental instructions aimed at answering the jury's questions regarding malice. On appeal and even now in en banc reconsideration, Jeffries still does not indicate what further instruction the district court should have provided. The judge's duty to eliminate jury confusion necessarily presupposes that such a clarifying answer exists. Where none can be had, there can be no duty. The jury question in Gonzalez asked whether a person with no knowledge of a conspiracy could by their actions alone be guilty of conspiracy. Gonzalez, 366 P.3d at 683. The clear answer to this question was a resounding "no." Id. at 684 ("When a defendant does not know that he or she is acting in furtherance of an unlawful act, there can be no conspiracy"). But in the present case, the jury simply asked for more clarity and understanding of malice

aforethought. 3 AA 669-70. Where neither party provided the judge with a clarifying instruction on malice, this is a significant distinction from Gonzalez. Any attempt to expand upon the approved definitions of malice already given to the jury would have introduced potential legal error into the case and strayed dangerously close to instructing the jury on a question of fact that can only be determined by the jury itself.

WHEREFORE, the State respectfully requests that en banc reconsideration be denied.

Dated this 14th day of December, 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 3,476 words, 281 lines of text and 15 pages.

Dated this 14th day of December, 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 December 14, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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