IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE MASON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No.: 68497

DC No.: C267882

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APPELLANT'S OPENING BRIEF

APPEAL FROM JUDGMENT OF CONVICTION IN THE

EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY

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Docket 68497 Document 2016-04034

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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JURISDICTIONAL STATEMENT

This is an appeal from a Judgment of Conviction entered on June 26, 2015. Mr. Mason filed a Notice of Appeal in the District Court, on July 23, 2015. This Court has appellate jurisdiction pursuant to Nev. R. App. P. 4(b) and Nev. Rev. Stat. 177.015(3).

1. STATEMENT OF THE ISSUES

a. Whether the District Court erred in denying Mr. Mason's motion for severance;

b. whether the testimonial hearsay offered by Donovan Rowland was improperly admitted;

c. whether the District Court made an improper commentary regarding Donovan Rowland;

d. whether the State of Nevada committed prosecutorial misconduct; and

e. whether the cumulative effect of these errors necessitates a new trial.

2. STATEMENT OF THE CASE

Mr. Mason was charged in a criminal complaint, August 13, 2010. The State of Nevada eventually field an indictment September 29, 2010. On October 13, 2010, the State of Nevada filed a Superseding Indictment, alleging that Mr. Mason had committed the following crimes: Count 1 – Conspiracy to Commit Robbery, Count 2 – Conspiracy to Commit Murder, Count 3 – Burglary while in Possession of a Firearm, Count 4 – Robbery with use of a Deadly Weapon, Count 5 – Murder with use of a Deadly Weapon, Count 6 – Robbery with use of a Deadly Weapon, Count 7 – Attempt Murder with use of a Deadly Weapon, Count 8 – Battery with a Deadly Weapon Resulting in Substantial Bodily Harm.

A jury trial began January 20, 2015, before Senior Judge Charles Thompson, who presided over the case following the Honorable Jerry Tao's appointment to the then-new Nevada Court of Appeals. Mr. Mason was tried alongside a co-defendant, David Burns. As to Mr. Burns, the State of Nevada gave notice of its intent to seek the death penalty. During the trial, the State of Nevada and Mr. Burns entered into an agreement under which both parties would stipulate to a sentence of life without the possibility of parole, were Mr. Burns to be found guilty of murder in the first degree following the jury's deliberations. Of course, by that time, both defendants were set to be tried by

a death-qualified jury. The trial spanned 17 days, and concluded February 17, 2015, when the jury returned a verdict of guilty on all counts faced by Mr. Mason.

On June 23, 2015, Judge Eric Johnson sentenced Appellant as follows: as to Count 1 – Conspiracy to Commit Robbery, to a term of 16 – 72 months in the Nevada Department of Corrections, as to Count 2 – Conspiracy to Commit Murder, to a term of 40 – 120 months in the Nevada Department of Corrections to be served consecutively to Count 1, as to Count 3 – Burglary while in Possession of a Firearm, to a term of 40 – 180 months in the Nevada Department of Corrections, to be served concurrent to Count 2, as to Count 4 – Robbery with use of a Deadly Weapon, to a term of 40 – 180 months in the Nevada Department of Corrections, with a consecutive 40 – 180 months for the deadly weapon enhancement, to be served concurrent to Count 3, as to Count 5 – Murder with use of a Deadly Weapon, to life without the possibility of parole, with a consecutive 40 – 120 months for the deadly weapon enhancement, to be served consecutive to Count 4, as to Count 6 – Robbery with use of a Deadly Weapon, to a term of 40 – 180 months in the Nevada Department of Corrections, with a consecutive 40 – 180 for the deadly weapon enhancement, to be served concurrent to Count 5, as to Count 7 – Attempt Murder with use of a Deadly Weapon, to a term of 53 – 240 months

in the Nevada Department of Corrections, with a consecutive 53 – 240 months for the deadly weapon enhancement, to be served consecutive to Count 6, and as to Count 8 – Battery with a Deadly Weapon Resulting in Substantial Bodily Harm, to a term of 40 – 180 months in the Nevada Department of Corrections, to be served concurrent to Count 7. The Court noted that Mr. Mason was, at that time, entitled to 1,743 days of credit for time already served. A judgment of Conviction was entered June 26, 2015, and on July 23, 2015, Mr. Mason timely filed his Notice of Appeal in the District Court.

3. STATEMENT OF FACTS

Jerome Thomas is also known as 'Slick,' and also known as 'Job-Loc.' AA00463, 21 – AA00464, 4. Late in the evening of August 6, 2010, or early into the morning of August 7, 2010, Monica Martinez picked up Mr. Mason and Mr. Burns from the apartment of Jerome Thomas. AA00391, 22 – AA00392, 9. From there, the trio travelled to the Opera House. AA00395, 25 – AA00396, 7. From there, the trio travelled to the apartment of Stephanie Cousins. AA00396, 8 – 10. From there, the group travelled to the scene of the alleged murder. AA00397, 9 – 19. The group were travelling to the location of the alleged murder for the purpose of participating in a drug deal. AA00487, 18 – AA00488, 4.

At or around 2:00 a.m., following the evening of August 6, 2010, Devonia Newman heard a knock at the door of her home, and when her mother opened the door, Stephanie Cousins was there. AA00640, 6 – 23; AA00643, 20 – 22. A man then entered the apartment, and shot Ms. Newman's mother in the face. AA00644, 4 – 13. Ms. Newman then ran into her mother's bedroom, and then the bathroom, where her father was, and at that time she was shot in the stomach. AA00644, 25 – AA00645, 21.

Following the alleged murder, the murderer got back into Monica Martinez' car. AA00431, 23 – AA00432, 10. The group then dropped off Stephanie Cousins. AA00418, 25 – AA00419, 2. After dropping off Stephanie Cousins, the group stopped at a Rebel, near the apartment of Jerome Thomas. AA00419, 3 – 4. Later they stopped at the Texas Station hotel and casino, AA00419, 5 – 6, before eventually returning to the apartment of Jerome Thomas, AA00419, 7 – 8. Jerome Thomas' apartment is in a complex called Brittany Pines, located on or near Torrey Pines. AA00459, 16 – AA00460, 9.

At approximately 3:00 to 4:00 in the morning of August 7, 2010, Donovan Rowland attended at the apartment of Jerome Thomas, where Jerome Thomas, Monica Martinez, Willie Mason, and another person were present. AA00464, 13 – AA00465, 12. The unnamed individual present at the

apartment was known to Mr. Rowland as 'D-Shot' or 'D-Shock.' AA00473, 9 – 15.

While at the apartment of Jerome Thomas, Mr. Rowland and Mr. Thomas have a conversation, during which Mr. Thomas asks Mr. Rowland to take a firearm and leave the apartment, and Mr. Rowland does so. AA00465, 20 – 25. In fact, Mr. Thomas asked Mr. Rowland to bury or sell the weapon, because it had been used to shoot a mother and daughter. AA00467, 1 – 17; AA00496, 3 – 5.

4. SUMMARY OF THE ARGUMENT

Mr. Mason moved for severance during the trial, on January 30, 2015, on the basis that if no severance was granted, Donovan Rowland, a witness called by the State of Nevada, was about to offer an unfairly prejudicial hearsay-within-hearsay statement naming Mr. Mason as the gunman in the alleged murder (AA00448, AA00454, 7 – 14). That motion was denied by Judge Thompson (AA00455, 10 – 11), following the argument of the State of Nevada that it would elicit no such testimony (AA00449, 2 – 10).

Following that ruling, Donovan Rowland took the witness stand, and the State of Nevada elicited from him testimony, in the form of a hearsay-within-hearsay statement, that Mr. Mason was the gunman in the alleged murder (AA00486, 11 – 21). This was an extremely and unfairly prejudicial

inadmissible piece of evidence, whose admission was itself error, and which was the basis for the severance of the trials. The denial of the motion to sever, and the admission of this evidence, were both errors requiring reversal.

Mr. Mason was further prejudiced by commentary made by Judge Thompson from the bench, in the presence of the jury. During the testimony of Donovan Rowland, the State of Nevada sought permission of the Court to treat Mr. Rowland as a hostile witness, and the Court granted permission, explaining that "He's obviously identified with the defendants, not with the plaintiff. Strange identification, I must admit [. . .]" AA00514, 14 – 16. This statement was overtly prejudicial to both defendants, but particularly to Mr. Mason, given Mr. Rowland's testimony that it was in fact Mr. Mason who was the gunman in the alleged murder.

Mr. Mason was the victim of prosecutorial misconduct. Firstly, the State of Nevada, during the rebuttal argument, referred to the lacking credibility of a number of the witnesses, called by the State, stating "They're not my friends. These are people that are associated with these two defendants. You can't blame us for the quality of the witnesses." AA001009, 7 – 10. This statement, particularly when combined with Judge Thompson's improper statement at the time of Mr. Rowland's testimony, was improper and prejudicial, and requires reversal. Secondly, the State made an improper

argument regarding witness credibility, which misled the jurors as to the law on that matter, and requires reversal. In rebuttal argument, the State told the jury, "But more importantly, it's not about were they telling the truth on the stand completely about that." AA01009, 11 – 12. This statement directly contradicts the law as to witness credibility, well-established, that any witness the jury finds to not be truthful about a particular matter, the jury may disregard their testimony entirely, if they see fit to, law the jury was instructed on. AA01068.

Individually, any of these rulings or episodes of misconduct would necessitate reversal. The cumulative effect is clear: Judge Thompson refused severance, what followed included unfairly prejudicial testimony, upon which the Judge and the State made improper comments, exponentially increasing the prejudicial effect. These factors were only exacerbated by the repeated instances of prosecutorial misconduct during the closing argument and rebuttal, necessitating reversal.

5. LEGAL ARGUMENT

a. STANDARD OF REVIEW

This Court is guided by several well-established standards of review when considering matters on appeal. The district court's decision to admit or exclude evidence is generally reviewed for an abuse of discretion or manifest

error. *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006); *see also Means v. State*, 120 Nev. 1001, 1007, 103 P.3d 25, 29 (2004). Plain error review is generally only employed when an alleged error has not been preserved. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). For improperly admitted hearsay evidence, this Court analyzes whether the error was harmless beyond a reasonable doubt. *See Weber v. State*, 121 Nev. 554, 579, 119 P.3d 107, 124 (2005); *see also Witherow v. State*, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988). In *Dechant v. State*, this Court held that if the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction. *Dechant*, 116 Nev. 918, 927, 10 P.3d 108 (2000) (citing *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

b. THE DISTRICT COURT ERRED IN DENYING MR. MASON'S MOTION FOR SEVERANCE, AND THE CONVICTION MUST, THEREFORE, BE REVERSED.

On the ninth day of trial, January 30, 2015, Mr. Mason moved for severance of his trial from that of David Burns. AA00448, 2 – 13. Mr. Mason requested that severance because a witness, Donovan Rowland, was expected to testify that Mr. Mason was the gunman in the alleged murder, contrary to his previous statement. (*Id.*). This testimony created multiple errors: it created

antagonistic defenses between the co-defendants, necessitating severance, and was admitted in error in this trial, prejudicing Mr. Mason. Ultimately the testimony would become the subject of improper commentary by both Judge Thompson and the State.

Under Nev. Rev. Stat. 174.165, a defendant is entitled to have his trial severed from that of another person if it appears that he will be prejudiced by being tried simultaneously. If it appears that such prejudice will be suffered, by any defendant or by the State of Nevada, a court is entitled to sever the trials, or to tailor other relief.

The burden lies on the defendant to show that the district court abused its discretion in denying his motion for severance. *Rowland v. State*, 118 Nev. 31, 44, 39 P.3d 114, 122 (2002), quoting *Amen v. State*, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990). The court must consider both the prejudice to be suffered by the defendants, if they are tried together, and by the State of Nevada, if the trials are to be severed. *Id.*, quoting *Lisle v. State*, 113 Nev. 679, 688 – 89, 941 P.2d 459, 466 (1997).

If co-defendants present mutually exclusive defenses, they are prejudiced by being tried together. *Id.*, quoting *Amen*, 106 Nev. at 756, 801 P.2d at 1359. In *Rowland*, this Court expanded on the meaning of 'mutually exclusive' in the context of severance of criminal trials:

> The Ninth Circuit has stated that defenses become "mutually exclusive" when "the core of the codefendant's defense is so irreconcilable with the core of [the defendant's] own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant."

Id., quoting *U.S. v. Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996).

In this case, Mr. Mason presented a case that although he had intended to attend at the scene of the alleged murder, he had not done so for the purpose of participating, conspiring in, or being an accomplice to any robbery, but for the purpose of purchasing illicit drugs. AA00919, 19 – AA00920, 3; AA00923, 6 – 10; AA00925, 10 – AA00926, 2; AA00926, 9 – 14. Such conduct would not make Mr. Mason liable for any murder committed while the crime he was a participant in was ongoing. On the other hand, and in direct contradiction with the defense of Mr. Mason, was Mr. Burns defense, which augured that not only was Mr. Mason present at the murder, but that an uncharged co-conspirator, Jerome Thomas, a.k.a. Job-Loc, was present and was likely the one who had actually pulled the trigger. AA00927 – AA01005; These defenses are mutually exclusive, the jury could not believe both defenses and acquit both defendants. This is because, if Job-Loc was in attendance as was argued by Mr. Burns, then Mr. Mason's suggestion that there was a plan to purchase drugs only, could not be believed. If Job-Loc was

present, he was present for the purpose of committing a robbery. Severance was, therefore, necessary, and it was error for the District Court to deny it.

It is important to note that, having informed Judge Thompson, in the presence of counsel for both defendants, that he would not do so (AA00449, 2 – 10), the State then intentionally proceeded to elicit the very testimony he indicated he would not. The specific testimony that Judge Thompson allowed, was the explanation for why Mr. Rowland was to dispose of the gun ("Q: Okay. Why is it that you needed to [do] something with the gun? A: That it was used in a murder." (AA00486, 15 – 17)). The State then continued: "Q: Okay. Do you remember any of the – anything else that he told you during that conversation? A: That G-Dogg had shot someone[.]" (Id., 18 – 21.) Putting aside for the moment the fact that this was clearly testimonial hearsay, inadmissible under *Crawford v. Washington*, 541 U.S. 36 (2004), in fact, hearsay-within-hearsay, it provided the very basis for the defense Mr. Burns employed, and therefore the exact prejudice Mr. Mason sought to avoid immediately came to life. When Mr. Rowland stated that Mr. Mason was the murderer, unlike his previous statements that Mr. Burns was, Mr. Burns was free to point the finger at alternate theoretical suspects. In this case, Mr. Mason warned the District Court that his Fifth, Sixth, and Fourteenth Amendment rights were on the verge of being violated by the continued joint

trials, and the admission of testimonial hearsay. The District Court, denied the motion for severance, Mr. Mason was prejudiced in the result, and reversal is required.

Furthermore, as mentioned previously, as to Mr. Burns, Mr. Mason's co-defendant, the State sought the death penalty. As a result, Mr. Mason was tried by a death-qualified jury. Mr. Mason is aware that the issue of bias in death-qualified juries has been examined by this court, *see, e.g.*, *McKenna v. State*, 101 Nev. 338, 343 – 44, 705 P.2d 614, 618 (1985), and by the United States Supreme Court, in *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906 (1987). However, this case appears to be a ripe time for re-evaluation of the decisions, given that ultimately, Mr. Mason and Mr. Burns were both tried by a death-qualified jury, in spite of the fact that by the time of deliberation, neither faced the death penalty.

c. THE TESTIMONY OF DONOVAN ROWLAND WAS IMPROPERLY ADMITTED TESTIMONIAL HEARSAY

Witnesses for the State of Nevada may not offer inculpatory evidence in the form of statements made to them by a non-testifying person. *Taylor v. Cain*, 545 F.3d 327, 335 (5th Cir. 2008).[1]

[1] Indeed, this Court recently referenced *Taylor* when examining this issue, in an unpublished decision. *Santana v. State*, 2015 Nev. Unpub. LEXIS 576, 2 – 3, May 18, 2015, Nevada Supreme Court Case No. 65514. ("[E]vidence that only serves to identify the

Indeed, the District Court in this case understood and warned the parties of that fact, during the argument over Mr. Mason's motion to sever. *See* AA00448, 21 (At which point, the District Court, having been informed that Mr. Rowland will testify that Mr. Mason was the 'shooter,' and that he received that information from Jerome Thomas, a.k.a. 'Job-Loc,' responds: "I can't let him testify to that."). In response, the State told the Court that ". . . he won't be testifying at least on our direct as it relates to that[.]" AA00449, 7 – 8.

In fact, a brief period of time later, the State of Nevada, during direct examination, intentionally elicited that very testimony:

> Q: Okay. Do you remember any of the – anything else that he told you during that conversation?
>
> A: That G-Dogg had shot someone and that was pretty much it.

This testimony, intentionally elicited by the State, and allowed by the District Court, was a clear and prejudicial violation of *Crawford*, and of Mr. Mason's Sixth Amendment rights, specially his right to confront witnesses against him under the Confrontation Clause. The District Court noted immediately before that such testimony was inadmissible, and then allowed it into evidence.

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defendant as the guilty party violates the Confrontation Clause[.]" citing *Taylor*, 545 F.3d at 335.)

This hearsay, was offered by an alleged co-conspirator, and as will be discussed later, a witness that both the District Court and the State was not harmless beyond a reasonable doubt. It was improperly admitted, as the District Court mentioned immediately before allowing it into evidence, and would necessitate reversal, even in the absence of the improper commentary that augmented its effect.

d. MR. MASON SUFFERED PREJUDICE BY VIRTUE OF AN IMPROPER COMMENT BY THE DISTRICT COURT WITH REGARD TO DONOVAN ROWLAND.

As this Court has explained, because judges hold such an esteemed position in the mind of laypersons and jurors, judges must take caution not to make comments that could prejudice the thoughts of the jurors ("What may be innocuous conduct in some circumstances may constitute prejudicial conduct in a trial setting, and we have earlier urged judges to be mindful of the influence they wield." *Parodi v. Washoe Med. Ctr.*, 111 Nev. 365, 367, 892 P.2d 588, 589 (1995)), since even comments that may seem inoffensive or unimportant to the judge can prejudice jurors.

> "The average juror is a layman; the average layman looks with most profound respect to the presiding judge; and the jury is, as a rule, alert to any remark that will indicate favor or disfavor on the part of the trial judge. Human opinion is ofttimes formed upon circumstances meager and insignificant in their

> outward appearance; and the words and utterances of a trial judge, sitting with a jury in attendance, are liable, however unintentional, to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby."

Parodi, 111 Nev. at 367 – 68, 892 P.2d at 589 – 90, quoting *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 416 – 17, 470 P.2d 135, 140 (1970). Federal courts have stated similar positions: ". . . a trial judge must always remain fair and impartial," *Duckett v. Godinez*, 67 F.3d 734, 739 (9th Cir. 1995), citing *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 709 (9th Cir. 1989), and ". . . 'must be ever mindful of the sensitive role [the court] plays in a jury trial and avoid even the appearance of advocacy or partiality.'" *Duckett*, 67 F.3d at 739, quoting *U.S. v. Harris*, 501 F2d 1, 10 (9th Cir. 1988), *cert. denied*, 492 U.S. 906, (1989).

In this case, following the erroneously admitted hearsay testimony discussed above, the District Court made the following comment, during the course of an objection and the argument that followed, regarding whether the State could treat Mr. Rowland as a hostile witness: "He's obviously identified with the defendants, not with the plaintiff. Strange identification I must admit[.]" AA00514, 14 – 16.

This comment from the District Court had the effect of marrying Mr. Mason to the very testimony that indicated his guilt, which was given just

before the comment. The effect is overwhelmingly prejudicial: in the eyes of the jurors, the judge is the person most authoritative on all matters related to the trial, and in this case, the judge told the jurors that although it may be a strange or questionable choice, the witness was associated with the very defendant he had just accused of murder.

In determining whether judicial misconduct was of such a nature or extent as to necessitate reversal, this Court considers the evidence presented by the State as to the defendant's guilt. *Kinna v. State,* 84 Nev. 642, 647, 447 P.2d 32, 35 (1968). "However, even when evidence is quite apparent, misconduct may so interfere with the right to a fair trial as to constitute grounds for reversal." *Id.*, citing *State v. Boyle*, 49 Nev. 386, 248 P. 48 (1926), and citing *People v. Mahoney*, 258 P. 607 (Cal. 1927).[2]

Here the evidence against Mr. Mason was nowhere near 'overwhelming,' or even 'strong.' Mr. Mason was confronted with uncooperative witnesses, who the State itself showed to be inconsistent on multiple relevant areas, and some of whom had received significant benefits in exchange for their cooperation.

[2] In fact, in an unpublished opinion, this Court reversed a conviction in spite of evidence of guilt it described as "strong," and "overwhelming," having quoted the California case mentioned above, *People v. Mahoney*: "[t]he fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice[.]" *Goodlow v. State,* 2011 Nev. Unpub. LEXIS 1245, 5 – 6, February 3, 2011, Nevada Supreme Court Case No. 54198.

The net effect is that any judicial misconduct by the District Court had a meaningful chance to prejudice the jury against Mr. Mason, did prejudice the jury against Mr. Mason, in a case in which guilt was a close question, and Mr. Mason faces life without the possibility of parole in the result. As the Supreme Court of California discussed in *People v. Mahoney*, an appellate court's primary concern when examining judicial misconduct should be whether a miscarriage of justice may have occurred.

e. THE STATE OF NEVADA COMMITTED PROSECUTORIAL MISCONDUCT THROUGHOUT THE TRIAL, NECESSITATING REVERSAL.

The State committed several instances of prosecutorial misconduct in its closing argument, as well during its case in chief. As this Court has explained, "[w]hen considering claims of prosecutorial misconduct, this court engages in a two-step analysis. First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Valdez*, 124 Nev. at 1188, 196 P.3d at 476 (2008) (citing *U.S. v. Harlow*, 444 F.3d 1255, 1265 (10th Cir. 2006) ("Reviewing claims of prosecutorial misconduct entails a two-step analysis.")). The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. *Id.*, at 1188-89.

Determining whether a particular instance of prosecutorial misconduct is constitutional error depends on the nature of the misconduct, and "misconduct that involves impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error." *Id.*, at 1189.

i. THE STATE IMPROPERLY REFERRED TO THE CREDIBILITY OF CERTAIN WITNESSES AND SUGGESTED THEIR ASSOCIATION WITH THE DEFENDANTS.

As this Court has noted, "[t]he appropriate way to comment, by the defense or the State, is simply to state that the prosecution's case or the defendant is not credible and then to show how the evidence supports that conclusion." *Barron*, 105 Nev. at 779-780, 783 P.2d 444 (1989). It is prosecutorial misconduct to call the defendant a liar. *Ross v. State*, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990) (holding that a prosecutorial statement that a defense witness is a liar is not proper argument); *Rowland v. State*, 118 Nev. 31, 39, 39 P.3d 114 (2002); *see also U.S. v. Francis*, 170 F.3d 546, 552 (6th Cir. 1999) (holding that the prosecutor's calling the defendant "a liar" and "con man" was impermissible).

In this case, the State referred to the credibility of certain witnesses in the case by contrasting them with clergy, suggesting that if the jury found the witnesses to lack credibility, the blame for that should rest with Mr. Mason

and his co-defendant, rather than the State, and went beyond that to suggest that in fact it was the fault of Mr. Mason and his co-defendant that the State did not have more credible witnesses:

> ". . . we should be living in a world in which people who are selling crack out of their house who get murdered happen to have a priest and a nun who's standing there and is part of the witnesses in the case. Or maybe Mother Theresa to tell us who's living in Job-Loc's apartment over at the Brittnae Pines. Those aren't the people that are involved in murders. I don't get to choose these people. There's no doubt that these are these two individuals' friends. They're not my friends. These are people that are associated with these two defendants. You can't blame us for the quality of the witnesses."

These comments are examples of impermissible burden shifting, and impermissible commentary on the credibility of witnesses. Additionally, they are the very kind of invocation of the prosecutor's supposed "greater experience and knowledge," this Court held was misconduct in *Collier v. State*, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985):

> "Such an injection of personal beliefs into the argument detracts from the "unprejudiced, impartial, and nonpartisan" role that a prosecuting attorney assumes in the court-room. By stepping out of the prosecutor's role, which is to seek justice, and by invoking the authority of his or her own supposedly greater experience and knowledge, a prosecutor invites undue jury reliance on the conclusions personally endorsed by the prosecuting attorney.

In fact, within the State's commentary quoted above, are at least three instances of prosecutorial misconduct. The comparison to clergy, the association of witnesses (apparently undesirable, or lacking credibility) to the defendants, and the comment that the people involved in the case were not the sort of people with whom the State would associate itself, are all instances of prosecutorial misconduct. By making such comments, in its rebuttal argument when Mr. Mason could not address them, the State simultaneously injected itself into the trial in an impermissible way, made unfair comments on the credibility of certain witnesses, and then suggested to the jurors that the defendants, Mr. mason one of them, were similarly lacking in credibility by their association. These comments necessitate reversal, as they offend Mr. Mason's Fifth, Sixth, and Fourteenth Amendment rights to be presumed innocent, to not be made a witness against himself, and to confront his accusers.

ii. THE STATE MADE AN IMPROPER ARGUMENT TO THE JURY REGARDING CREDIBILITY.

The State made further improper commentary during its rebuttal, and effectively gave the jury an incorrect instruction on the law regarding witness credibility. AA01009, 11 – 12. Effectively, the State told the jury that it did not need to concern itself with whether or not a given witness was being

wholly truthful. This, in direct contrast to the relevant jury instruction, which provided that, in the event the jury found a particular witness untruthful about a given material fact, they were free to disregard the entirety of that witness' testimony. AA01068.

As discussed earlier, this factor only adds to the previous egregious prosecutorial misconduct, and further prejudiced Mr. Mason; in effect the State told the jury 'These witnesses are liars, because they're associates of the defendants. But, don't concern yourself with the fact that they are liars, because you must still convict these defendants in spite of that.' The prejudice is overwhelming, and reversal is necessary to prevent a miscarriage of justice.

f. THE CUMULATIVE EFFECT OF THESE ERRORS NECESSITATES REVERSAL OF MR. MASON'S CONVICTIONS.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (2008) (quoting *Hernandez v. State,* 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). When evaluating a claim of cumulative error, we consider the following factors: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Id*. (citing *Mulder v. State,* 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)). Most importantly, "[t]his court must ensure that harmless-

error analysis does not allow prosecutors to engage in misconduct by overlooking cumulative error in cases with substantial evidence of guilt." *Id.* (citing *Kelly v. State*, 108 Nev. 545, 559-60, 837 P.2d 416, 425 (1992) (Young, J., dissenting)).

The United States Supreme Court has stated that, "Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Rose v. Clark*, 478 U.S. 570, 578 (1986). Therefore, if any of those features is absent, those ". . . constitutional errors require reversal without regard to the evidence in the particular case." *Id.*, at 577, citing *Chapman v. Cal.*, 386 U.S. 18, 23, n. 8 (1967).

Mr. Mason was charged with the gravest crime known to our system of laws. He was prejudiced by multiple instances of prosecutorial misconduct, as well as an instance of judicial misconduct, which standing alone this Court has found on occasions requires reversal of a conviction even in the face of overwhelming evidence. Here, Mr. Mason faced a marginal case, witnesses described by the State as being of questionable character and credibility. Beyond that, inadmissible, testimonial hearsay, was not only admitted against Mr. Mason, but was married to Mr. Mason to him by improper commentary by both the District Court and the State of Nevada.

The trials ought to have been severed, and weren't. The trial that followed was rife with errors, any of which necessitates reversal, but the cumulative effect of which was overwhelming, particularly because in this case the errors genuinely accumulated one on top of the other; the motion to sever was denied, and inadmissible hearsay was admitted thereafter which provided the basis for antagonistic and mutually exclusive defenses, improper commentary was made both by the District Court and by the State which tied that testimony to Mr. Mason, and the testimony provided the basis for mutually exclusive antagonistic defenses. The result was extreme prejudice to Mr. Mason which calls the result into question, and reversal is the only avenue by which to prevent a miscarriage of justice.

6. CONCLUSION

For all the foregoing reasons, justice requires this Court to reverse the convictions entered against Mr. Mason.

DATED this 7th day of February, 2016.

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7. ATTORNEY'S CERTIFICATE

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 2016 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page or type-volume limitations of Nev. R. App. Pro. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R. App. Pro. 32(a)(7)(C), it does not exceed 23 pages.

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3. Finally, I hereby certify that I have read this appellate brief, and do 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 Nev. R. App. Pro. 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 7th day of February, 2016.

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CERTIFICATE OF MAILING

I hereby certify and affirm that Appellant's Opening Brief was filed electronically with the Nevada Supreme Court on the 7th day of February, 2016, and that a copy was sent by mail, postage prepaid to the following:

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