

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

WILLIE MASON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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**APPELLANT’S REPLY BRIEF**

**APPEAL FROM JUDGMENT OF CONVICTION IN THE  
EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY**

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**1. LEGAL ARGUMENT**

The State has responded to each of Mr. Mason’s arguments, *see*,  
*generally*, Respondent’s Answering Brief (“AB”), and two of those  
counterpoints will be responded to below. With respect to judicial misconduct,  
and the improper admission of certain testimony of Donovan Rowland, Mr.  
Mason is satisfied that those issues have been adequately briefed already, and  
will not further address them herein.

a. MR. MASON’S DEFENSE WAS IRRECONCILABLE WITH MR. BURNS’,  
AND THE DISTRICT COURT THEREFORE ERRED IN DENYING MR.  
MASON’S MOTION FOR SEVERANCE.

Although the State suggests that the defenses of Mr. Mason and Mr.  
Burns were compatible, AB 12 – 13, the argument fails because it is based on  
a false premise. Mr. Burns suggested that he was not the person who pulled

1 the trigger, and suggested the possibility that an uncharged coconspirator,  
2 Jerome Thomas, a.k.a. Job-Loc, may have been the actual killer. The State  
3 suggests that because Mr. Burns stopped short of actually saying the words  
4 “Mr. Mason pulled the trigger,” while pointing his finger at Mr. Mason before  
5 the jury, the defenses were not mutually exclusive. AB 12 – 13. A fair  
6 consideration necessarily leads to a contrary conclusion.  
7

8  
9 The State presented evidence that only Mr. Burns, Mr. Mason, Ms.  
10 Cousins, and the occupants of the apartment were present at the time of the  
11 shooting. 1 RA 134 – 35. There is no suggestion by any witness or by any  
12 piece of evidence that Ms. Cousins possessed a firearm at any relevant time,  
13 nor that Jerome Thomas, a.k.a. Job-Loc, was present. So, when Mr. Burns  
14 argued to the jury that he was not the shooter, and when the State presented  
15 evidence, although improperly admitted, that suggested the gun was in Mr.  
16 Mason’s hands, AA00448, AA00454 7 – 14, the result cannot be more clear:  
17 Mr. Burns’ argument to the jury, bolstered by the improperly admitted  
18 testimony of Rowland, cannot be reconciled with Mr. Mason’s.  
19

20  
21 The State suggests that Mr. Burns’ defense amounts to a strawman  
22 argument, and that rather than accuse any other person, Mr. Burns merely  
23 stated that it was not he that shot the victims. AB 13. Because the trials were  
24 not severed, the strawman sat before the jury as a co-defendant. The  
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1 suggestion would not be any clearer had Mr. Burns' counsel in fact said  
2 "Willie Mason was the shooter." That those words were not actually uttered  
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4 does not change the fact that the defenses were mutually exclusive; Mr.  
5 Mason argued to the jury that he was there to participate in the purchase of  
6 drugs, AA00919, 19 – AA00920, 3; AA00923, 6 – 10; AA00925, 10 –  
7  
8 AA00926, 2; AA00926, 9 – 14, never having any intention to commit or be a  
9 party to any violence, while Mr. Burns suggested that some other man, who  
10 could only be Mr. Mason, walked in the front door of the apartment and  
11 immediately shot one of the occupants in the face, before chasing a child  
12 through the apartment while firing at her multiple times. These defenses are  
13  
14 logically mutually exclusive. The jury could not believe and reconcile the two  
15 defenses, and acquit Mr. Mason. In *Rowland v. State*, 118 Nev. 31, 39 P.3d  
16  
17 114 (2002), this Court cited to the Ninth Circuit's position in *U.S. v.*  
18  
19 *Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996), in which the Court of  
20 Appeals for the Ninth Circuit explained that defenses are mutually exclusive  
21 when acceptance of one defendant's argument precludes the acquittal of the  
22 other. 118 Nev. at 44, 39 P.3d at 122.  
23

24  
25 Given the arguments presented, the jury herein could not believe one  
26 defendant and acquit the other, and it was error to fail to sever the trials. A  
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1 new trial is necessary to allow Mr. Mason the protections afford to him by the  
2 Constitution of the United States and of the State of Nevada.  
3

4 The State cites, AB 11, to this Court's decision in *Marshall v. State*, 118  
5 Nev. 642, 56 P.3d 376 (2002), to suggest that Mr. Mason cannot point to any  
6 specific prejudice he suffered, or to any potential infirmity in the jury's  
7 decision in this case. However, the facts in this case are distinguishable in a  
8 critical way: in *Marshall* the co-defendants had both made admissions  
9 indicating their joint involvement in the actual murder. There are no such  
10 admissions here.  
11  
12

13 The facts presented here are far more similar to those in *Chartier v. State*,  
14 in which this Court reversed and remanded for a new trial, finding that the  
15 joinder of the codefendants was unfairly prejudicial and rendered trial so  
16 unfair as to necessitate reversal. 124 Nev. 760, 767 – 78, 191 P.3d 1182,  
17 (2008) (per curiam). As in *Chartier*, Mr. Mason here was presented with the  
18 prospect of picking jurors based on concern with the trial phase, as opposed to  
19 the penalty phase, unlike Mr. Burns. *Id.* Further, Mr. Mason was faced with  
20 the prospect of being prosecuted by counsel for Mr. Burns as well as by the  
21 State, under separate theories, exactly what the Court held in *Chartier* was  
22 prejudicial. The co-defendant in *Chartier* alleged that Chartier had been  
23 present and actually performed the murder, while the State alleged conspiracy.  
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1 *Id.* Here, the State suggests that Mr. Mason was present and guilty either as a  
2 conspirator or under a felony murder theory, while Mr. Burns, through the use  
3 of a strawman, alleges Mr. Mason was the actual shooter. As in *Chartier*, the  
4 joinder here is unfairly prejudicial, and renders the trial unfair.

5  
6 Mr. Mason was ultimately denied the opportunity to confront his accuser,  
7 which in the end was not only the State of Nevada but his codefendant Mr.  
8 Burns. Reversal is therefore required.

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11 b. EGREGIOUS PROSECUTORIAL MISCONDUCT NECESSITATES

12 REVERSAL.

13 Two standards of review are used when examining claims of  
14 prosecutorial misconduct. *Valdez v. State*, 124 Nev. 1172, 1188 – 90, 196 P.3d  
15 465 (2008). If counsel makes a timely objection to the misconduct, then the  
16 misconduct is judged according to a harmless-error standard. *Id.* However, if  
17 counsel chooses not to make an objection, then the misconduct is reviewed  
18 under a plain-error standard. *Id.* Beyond these two standards, the Court then  
19 determines whether the misconduct is of a Constitutional dimension. *Id.*  
20 “Whether these distinctions make a significant difference in the ultimate  
21 analysis of harmlessness may be the subject of some debate, but constitutional  
22 and nonconstitutional errors are, nonetheless, subject to different harmless-  
23 error standards.” *Id.* at 1189. The Court has acknowledged that enough  
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1 nonconstitutional misconduct can eventually become constitutional  
2 misconduct, because the ongoing misconduct “so infect[s] the trial with  
3 unfairness as to make the resulting conviction a denial of due process.” *Id.*

4  
5 Establishing two standards of review for instances of prosecutorial  
6 misconduct leaves defendants and their counsel with a Hobson’s choice: either  
7 they irritate the judge and jury by making a timely objection, or they subject  
8 their client to a much more stringent standard upon appeal. In a system  
9 designed to place the burden of proof on the State, it is incongruous to leave  
10 Defendants with such choices.

11  
12 In Mr. Mason’s case, the State made several improper comments in  
13 closing argument. While the State correctly notes that this Court has explained  
14 that prosecutors have a right to address the arguments of defense counsel in  
15 their rebuttal arguments, AB 25 – 26, surely the Court cannot have meant that  
16 anytime a defendant addresses a subject in closing, the State is free to commit  
17 prosecutorial misconduct with regard to its commentary on that subject. If a  
18 prosecutor chooses to address arguments made by the defense, he must still do  
19 so within the bounds of the law and ethical rules.

20  
21 In this case, the State argued improperly, by incorrectly stating the law  
22 regarding credibility to jurors, by commenting to the jury that the State found  
23 certain witnesses to not be credible, and by commenting to the jury that if they  
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1 were unsatisfied with the credibility of any witnesses, the fault lied with Mr.  
2 Mason and Mr. Burns. AA01008, 23 – AA01009, 16.  
3

4 Each of these is an example of improper argument amounting to  
5 misconduct, and the result is that Mr. Mason was deprived of due process.  
6

7 The State suggests that its argument was a correct comment on the  
8 overall testimony, and was not instruction on the law, or at the minimum, not  
9 instruction contrary to the law. AB 27 – 28. However, the record reveals the  
10 truth: the jurors were instructed that if they find a witness to be credible or  
11 not, they may disregard all or part of that testimony accordingly. AA01068.  
12 The State instead suggested to jurors that, although they may find certain  
13 witnesses to not be credible, they should nevertheless find within that  
14 testimony the facts necessary to convict, and convict Mr. Mason upon it.  
15 AA01008, 23 – AA01009, 16; AA01012, 6 – AA01013, 19. This is a clearly  
16 erroneous statement of the law which caused extreme prejudice to Mr. Mason.  
17 Effectively, jurors were told that although the evidence presented to them may  
18 not be credible, they should nonetheless convict: “it’s not about were they  
19 telling the truth on the stand completely about that. Right? It’s not a question,  
20 did what he say, is that we he said, is that true?” AA01009, 11 – 14.  
21

22 Whether the Court were to find that comment to be prosecutorial  
23 misconduct because of the incorrect statement of the law, surely it was  
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1 prosecutorial misconduct for the State to argue to the jury that certain  
2 witnesses were not credible. The State is entitled to examine why a witness  
3 may not be inclined to tell the truth, as this Court, in *Ross v. State*, explained:  
4 “Explaining to the jury *why* [a witness] might be lying is permissible  
5 argument.” 106 Nev. 924, 927 (1990) (emphasis in original). However, the  
6 State commits misconduct when it suggested that one or more witnesses were  
7 not truthful, as the Court went on to explain in *Ross*: “A prosecutorial  
8 statement that [a witness] *is* a liar, both as a fact and as a conclusion . . . is not  
9 proper argument.” *Id.* at 927 – 28 (emphasis in original). The State argued in  
10 this case, “For example, Donovan Rowland, was that guy a real credible  
11 witness? No.” AA01009, 17 – 18. This was a direct statement that a witness  
12 was untruthful, which is misconduct necessitating reversal.  
13  
14

15 Further, the State’s further comments on the credibility of witnesses also  
16 created an element of burden-shifting. Effectively, the State argued that to any  
17 extent the jury quarreled with credibility of witnesses, the blame for that  
18 absence of credibility should be laid at the feet of Mr. Mason, as they were his  
19 compatriots. AA01008, 23 – AA01009, 16. This comment amounts to an  
20 argument firstly of guilt by association, and secondly that Mr. Mason ought to  
21 have presented more credible witnesses in his defense, if he was unhappy with  
22 the credibility of the witnesses against him. This was impermissible burden-  
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1 shifting, as no burden rests on Mr. Mason to do any singular thing in his  
2 defense. *Ross*, 106 Nev. at 928. As ever, the burden rested entirely on the  
3 State, and any attempt by the State to shift any amount of that burden to Mr.  
4 Mason by any means is prosecutorial misconduct. *See, e.g. Ross*, 106 Nev. at  
5 927 (“suggest[ion] to the jury that it was the defendant’s burden to produce  
6 proof by explaining the absence of witnesses or evidence. This implication is  
7 clearly inaccurate.” Citing *Barron v. State*, 105 Nev. 767, 778, 783 P.2d 444,  
8 451 (1989), citing *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *In re*  
9 *Winship*, 397 U.S. 358 (1970)).

10  
11 If the Court continues to recognize that prosecutorial misconduct is  
12 happening regularly in Nevada criminal cases, but fails to reverse convictions  
13 entered in those cases, then there is effectively no penalty for prosecutorial  
14 misconduct, and it will continue to happen. This is the same reality the United  
15 States Supreme Court recognized when creating the exclusionary rule and  
16 fruit-of-the-poisonous-tree doctrine. If there is no penalty for Constitutional  
17 violations, they will continue to happen. Although it may be distasteful to  
18 courts to exclude evidence, it is also likely the single most important factor in  
19 preserving the integrity of the Fourth Amendment. Similarly, reversing  
20 convictions because of prosecutorial misconduct is a critical protection of the  
21 Fifth and Fourteenth Amendments.

1 If prosecutorial misconduct is allowed to go on, whether by means of  
2 disregarding discovery obligations, improper argument, or any other means,  
3 then it rests on the Court to protect Constitutional rights by reversing  
4 convictions won because of, or even in the presence of, such misconduct. Any  
5 other result allows the State to trample the Constitutional rights of those it  
6 deems particularly guilty, because, armed with the knowledge that whatever  
7 misconduct it commits will be ignored in the light of ample evidence,  
8 prosecutors have literally no incentive to comply with the law and ethical  
9 rules that govern their conduct.  
10

11 In the final portion of argument, when the jury has already been  
12 instructed by the judge, and the defense has no opportunity to rebut, the State  
13 mischaracterized the law and jury instruction regarding credibility of  
14 witnesses, then told jurors that certain witnesses were not credible, and that  
15 the defendants were to blame for that lack of credibility. The State  
16 misinformed jurors on the law, improperly commented on the credibility, or  
17 lack thereof, of certain witnesses, and improperly shifted the burden of proof  
18 to Mr. Mason. These were the last things the jurors heard before they retired  
19 to deliberate. To assume that these improper comments had no meaningful  
20 impact on the jury beggars belief. In addition to the need to protect the  
21 Constitutional rights of Mr. Mason, and every other person accused of a crime  
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1 in Nevada, these convictions must be reversed in order to maintain public  
2 confidence in the administration of justice in Nevada courts.  
3

4 **2. CONCLUSION**

5 For all the foregoing reasons, justice requires reversal of the convictions  
6 entered against Mr. Mason.  
7

8 DATED this 21st day of April, 2016.  
9

10 Respectfully submitted by:

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1       **3.     ATTORNEY’S CERTIFICATE**

2               1.     I hereby certify that this brief complies with the formatting  
3  
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5)  
5 and the type style requirements of NRAP 32(a)(6), because this brief has been  
6 prepared in a proportionally spaced typeface using Microsoft Word 2016 in  
7 14-point Times New Roman font.  
8

9               2.     I further certify that this brief complies with the page or  
10 type-volume limitations of Nev. R. App. Pro. 32(a)(7) because, excluding the  
11 parts of the brief exempted by Nev. R. App. Pro. 32(a)(7)(C), it does not  
12 exceed 11 pages.  
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1       3.       Finally, I hereby certify that I have read this appellate brief, and do  
2 the best of my knowledge, information, and belief, it is not frivolous or  
3  
4 interposed for any improper purpose. I further certify that this brief complies  
5 with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R.  
6 App. Pro. 28(e)(1), which requires every assertion in the brief regarding matters  
7  
8 in the record to be supported by a reference to the page and volume number, if  
9 any, of the transcript or appendix where the matter relied on is to be found. I  
10 understand that I may be subject to sanctions in the event that the  
11 accompanying brief is not in conformity with the requirements of the Nevada  
12 Rules of Appellate Procedure.  
13  
14

15       DATED this 21st day of April, 2016.

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