IN THE SUPREME COURT OF THE STATE OF NEVADA

STELLA LOUISE SINDELAR,
Appellant,

vs.

STATE OF NEVADA,
Respondent.

DOCKET NO. 68789

FAST TRACK RESPONSE

Respondent has considered NRAP 17, and sees no reason why this case should not be routed to the Nevada Court of Appeals.

1. Name of party filing this fast track response:

State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

MICHAEL A. WHEABLE, ESQ.
White Pine County District Attorney
801 CLARK STREET, SUITE 3
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(775) 293-6565

3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as trial counsel.

4. Proceedings raising same issues. List the case name and docket number of

all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal:

None known.

5. Procedural history. Briefly describe the procedural history of the case only if dissatisfied with the history set forth in the fast track statement:

Appellant's procedural history is satisfactory.

6. Statement of facts. Briefly set forth the facts material to the issues on appeal only if dissatisfied with the statement set forth in the fast track statement (provide citations for every assertion of fact to the appendix, if any, or to the rough draft transcript):

The following additional facts may be helpful to the Court in its analysis of the issues: It is unknown whether, at the time Deputy Sumrall stopped Appellant's vehicle, if the center stop lamp on Appellant's vehicle was operable, because Deputy Sumrall could not then recall if it was operable. Appellant's Appendix Volume 2 (hereinafter "AA2") 200. The statute giving rise to appellant's mid-trial Motion to Suppress Evidence is NRS 484D.125, titled "Stop Lamps." For the purposes of the motion, the Court assumed the middle stop lamp was operable. AA2 200. The trial court denied the Motion, finding that the plain reading of NRS 484D.125 required vehicles manufactured after 1969 (as was the case here) to have two or more stop lamps, which pursuant to subsection "c" must be activated upon

activation of the brake. AA2 200. The trial court rejected the notion that the statute's "plain language" allows for only 2 out of three lamps to be operable, and denied Appellant's Motion to Suppress. AA2 200. For what it was worth clarifying these facts, Appellant did not raise this particular issue in her appeal.

Appellant, in their version of the facts, alleges that Deputy Sumrall was "purposely deceptive" in administering the Field Sobriety Tests upon Appellant, yet Appellant does not cite to the record. Appellant's Fast Track Statement (Herein "AFTS"), 4:7-9. Respondent is unaware of any facts in the record indicating Deputy Sumrall was deceptive, intentionally or otherwise. Further, the series of facts Appellant alleged about Deputy Sumrall's "deception," again are clearly irrelevant to the issues before this Court on Appeal.

Similarly, Appellant included in an inflammatory attempt, distorted facts regarding Appellant's Miranda rights, and the nature in which Appellant's blood sample was obtained. AFTS 4:17-23. All of which again are irrelevant as to the issues before this Court. These issues were both properly litigated and resolved outside of the jury's presence and do not pertain to the legality or effect of Appellant's previous Felony Conviction, or the issue of Prosecutorial Misconduct: The issues on Appeal. Appellant's Appendix Volume 1(hereafter "AA1") 71-93.

Appellant alleges that "at trial and again at sentencing, Stella [Appellant] objected to the constitutionality of a prior felony driving under the influence

conviction from Utah…" AFTS 5:1-2. Appellant's felony history was never discussed during trial, nor did Appellant cite to any point in the record in which she objected to its introduction, nor was the jury permitted to hear any evidence of her criminal history. In-fact, Appellant's prior felony was only considered by the Court at Appellant's sentencing hearing, after being properly submitted by Respondent in pleading form for the purposes of enhancement pursuant to NRS 484C.400(2). AA2 118, AA1: 95.

Prior to the instant Felony offense, the Appellant was formally charged with Felony DUI arising out of an incident in Utah on December 28, 2002. AA1 14-15. Utah defines a DUI as a felony offense if an individual has two prior DUI convictions within the previous 10 years. Utah Code 41-6-44. During the litigation of Appellant's Utah Felony DUI, Appellant was represented by Utah Attorney, Rudy Bautista. AA2 119. Pursuant to a plea agreement, Appellant pled guilty to the Felony DUI. AA2 119. Appellant's criminal history reflects that in 2004, Appellant received a **felony** conviction for Driving Under the Influence arising out of this charge. AA2 118.

Finally, facts relating to Appellant's prosecutorial misconduct claims: Respondent denies ridiculing the defense during closing argument. AFTS 6:18-19, AA2 219-221. Respondent never "characterized" Defense counsel as a dog handler. This is a label Appellant's Counsel has fabricated.

Respondent never "advised" the jury that Defense Counsel "was tricking" the jury. Again this was fabricated by Appellant's Counsel and inserted to inflame this Court. Appellant's trial counsel did draw on the rural jury panel's mistrust of the federal government when counsel pervasively referred to State's trial counsel as the "Government", both systematically and with toned inflection. AA2 217-219. Respondent concedes that during the second closing, the State made a reference to this behavior as "entertaining," but did not argue to the jury that such a reference was "improper or laughable." AA2 220, AFTS 7:10-11.

Appellant's counsel again misleads the Court with its rendition of facts, particularly the State's use of the word "fancy." The State's Counsel did argue from Jury instruction No.4, which in relevant part properly instructed:

> …You are to bring to the consideration of the evidence before you, your everyday common sense and judgment as reasonable men and women, and those just and reasonable inferences and deductions which you as men and women could ordinarily draw from facts and circumstances proven in this case. You are not to ***fancy*** situations or circumstances which you would not draw from the evidence … Jury Instruction No.4, RA 8.

Additionally, contrary to Appellant's version of the facts, State's trial counsel never stated or implied that Appellant's Defense was a "fantasy" AFTS 7:13-14.

Finally, the State's trial counsel did not make improper statements to the jury, but made a proper objection to prevent Appellant's trial counsel from

accidently discussing or eliciting a response from the State's witness pertaining to a potential term of incarceration, for as Defense Counsel put it, an "important case." AFTS 7:15-22, AA2 183.

7. Issues on Appeal. State concisely your response to the principal issues(s) in this appeal:

A.

WHETHER APPELLANT'S PRIOR UTAH FELONY SHOULD NOT HAVE BEEN CONSIDERED FOR ENHANCEMENT PURPOSES BECAUSE IT WAS NOT THE "SAME OR SIMILAR" TO NEVADA'S FELONY "DUI" STATUTE.

B.

WHETHER THE STATE'S TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT, AND IF SO, WHETHER IT AFFECTED THE OUTCOME OF TRIAL.

8. Legal argument, including authorities:

A.

APPELLANT'S PRIOR UTAH DUI FELONY STATUTES ARE SIMILAR ENOUGH TO NEVADA'S DUI PENALTY STATUTE 484C.400(c) TO SUPPORT FELONY SENTENCING ENHANCEMENT PURSUANT TO NRS 484C.410(d)

Utah's DUI statute is sufficiently similar to Nevada's DUI statutes to support the sentencing enhancement in Appellant's case. This is not a novel issue, the Nevada Supreme Court has already ruled on this issue several times, and this Court should follow its precedent. See Blume v. State, 112 Nev. 472 (1996); Marciniak v.

State, 112 Nev. 242 (1996); Jones v. State, 105 Nev. 124 (1989).

The relevant Nevada felony DUI enhancement statute is NRS 484C.410(1)(a) and (1)(d), and it states:

> 1. Unless a greater penalty is provided in NRS 484C.440, a person who has previously been convicted of:
>
> (a) violation of NRS 484C.110 or 484C.120 that is punishable as a felony pursuant to paragraph (c) of subsection 1 of NRS 484C.400;
>
> […]
>
> **(d) A violation of law of any other jurisdiction that prohibits the same or similar conduct as set forth in paragraph (a), (b), or (c) […]**

NRS 484C.400(c) states " […] for a third offense within 7 years, is guilty of a category B felony […], whereas Utah's DUI sentencing provision, amended and re-codified as 41-6a-50, titled "Penalties for driving under the influence violations," states:

> (1) A person who violates for the first or second time Section 41-6a-502 is guilty of a:
>
> (a) class B misdemeanor; or
>
> […]
>
> (2) A person who violates Section 41-6a-502 is guilty of a third degree felony if:
>
> (a) […]
>
> (b) the person has two or more prior convictions as defined in Subsection 41-6a-501(2), each of which is within 10 years of:

> (i) the current conviction under Section 41-6a-502; or
> (ii) the commission of the offense upon which the current conviction is based […]

On appeal, appellant argues that the district court erred in admitting her prior felony, stating that the "look back" provision in Utah was ten years, while the "look back" provision in Nevada is only seven. AFTS 5:3-6. Although not eloquently articulated in her appeal, it can be inferred that Appellant is contending that because the elements of the crimes are different, the Utah felony DUI should not have bene considered for sentence enhancement purposes in Nevada. AFTS 5:8-14.

The Nevada Supreme Court has disagreed with this type of conclusion: In Blume v. State, appellant contended that the previous California conviction could not be used because, at the time of conviction, California's Blood Alcohol Level required for DUI was .08%, whereas, at that same time, Nevada's was .10%. 112 Nev. at 474. The Court, citing Jones v. State and the statutory "same or similar" language from the Nevada Revised Statute, reasoned that the convictions were properly admitted because "'same' need not mean 'identical,' but can refer to conduct of the kind or species." Blume, at 474. According to *Silks v. State*, "same" need not mean 'identical,' but can refer to conduct of the kind or species" 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Here, both state's statutes are targeting the same recidivist behavior common

to perpetrators of driving while under the influence. The Utah legislature deemed Appellant's third DUI as felonious conduct, very similar to Nevada's treatment of DUI recidivist. As explained previously by the Court, the concept of "same or similar" need not be identical, and these two statutes are clearly "similar" in language, purpose, and effect. Therefore, the Court properly relied upon NRS 484C.410 and Nevada case law, thus the judgment of the district court should be affirmed.

B.

THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT, AND EVEN IF THIS COURT FINDS IMPROPER CONDUCT, ANY SUCH WAS HARMLESS BECAUSE IT DID NOT HAVE AN AFFECT ON THE OUTCOME OF THE CASE.

Appellant alleges the State committed Prosecutorial Misconduct. After reviewing the record and applying the correct legal standards, this court will see that Appellant's claims are belied by the record and lack merit.

Pursuant to Valdez v. State, "[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." 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (*citing U.S. v. Harlow*, 444 F.3d 1255, 1265 (10th Cir. 2006). The Valdez Court further outlined the law as follows:

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> With respect to the second step of this analysis, **this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error.** The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. If the error is of constitutional dimension, then we apply the Chapman v. California [386 U.S. 18, 87 S.Ct. 824 (1967)] standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. **If the error is not of constitutional dimension, we will reverse only if the error substantially affects the jury's verdict.** Valdez v. State, 124 Nev. at 1188-1189. (Citation and emphasis added)

The Valdez Court further explained the standard of review this Court should apply to this appeal, and how the Court should proceed if Appellant's trial counsel did not object during the proceedings:

> Harmless-error review applies, however, only if the defendant preserved the error for appellate review. Generally, to preserve a claim of prosecutorial misconduct, the defendant must object to the misconduct at trial because this "allow[s] the district court to rule upon the objection, admonish the prosecutor, and instruct the jury." **When an error has not been preserved, this court employs plain-error review. Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.** Id, at 1189. (Emphasis added)

In this case, Appellant did not object to the State's arguments, or any part of the proceedings to which Appellant now contends were improper. Having not preserved the issues, this Court should apply the "plain error" review of the record. In so doing, and in following the Valdez analysis, the Court will first find that the State committed no error, nor were the entire proceedings "so infected […] with

unfairness." Rudin v. State, 120 Nev. 121, 86 P.3d 572 (Nev. 2004). As reference in the factual statement, the State objected to Appellant's trial counsel's comments during cross-examination regarding Liberty interests, so as to prevent discussion of sentencing, *to protect the integrity of the proceedings and Appellant's constitutional rights!* What's more, the trial court agreed with the State's objection, sustained and limited the cross-examination discussion of the vague and troublesome topic of Appellant's "liberty interests." (AFTS 7:15-22, AA2 183). Similarly, the State did not call Appellant's counsel a "dog handler" nor did it say the defense was a "fantasy," "laughable" or "improper." AA2 220, AFTS 7:10-11. These extrapolations are clearly belied by the record herein. Thus the Court need not inquire further and the Judgment should be affirmed.

However, should the Court find improper prosecutorial conduct, the Court should see that Appellant's allegations fall outside the recognized framework of constitutional dimension, therefore as stated in Valdez and pursuant Harlow, "non-constitutional error is harmless unless it had a 'substantial influence' on the outcome or leaves one in 'grave doubt' as to whether it had such effect." 444 F.3d at 1265. (*citing United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (en banc) (*quoting Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).

Appellant has not demonstrated how any of the alleged errors affected her

substantial rights, or how she suffered "**actual** prejudice." Valdez v. State, 124 Nev. at 1189. (Emphasis added). After reviewing the trial transcript, the Court should arrive at the conclusion that any such error was harmless because it had no impact on the outcome of the case whatsoever because this was a straightforward DUI case, with solid scientific evidence and corroborating officer testimony. The Jury would have undoubtedly arrived at a guilty verdict based on the evidence before it. Further, these few benign comments in rebuttal closing, when cumulated, did not infect or taint the entire proceedings, nor could they "substantially influence" the deliberations.

The State's conduct in this case was not improper, and Appellant's trial rights were not compromised. The judgment should be affirmed.

9. Preservation of issues. State concisely your response to appellant's position concerning the preservation of issues on appeal:

Appellant DID NOT preserve the prosecutorial misconduct claims at trial, and DID NOT preserve the issue of the legality of the traffic stop because it was not raised herein, but has preserved all other issues on appeal.

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RESPECTFULLY SUBMITTED this 15th day of December, 2015.

MICHAEL A. WHEABLE, ESQ.
White Pine County District Attorney

By: /s/ MICHAEL A. WHEABLE, ESQ.,
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VERIFICATION

1. I hereby certify that this Fast Track Response 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). This Fast Track Response has been prepared in Times New Roman 14 point font using Microsoft Word 2010.

2. I further certify that this Fast Track Response complies with the page/type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more, and contains 2651 words and does not exceed 13 pages.

3. I recognize that pursuant to NRAP 3C, I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the

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information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated December 15, 2015.

MICHAEL A. WHEABLE, ESQ.
White Pine County District Attorney

By: /s/ MICHAEL A. WHEABLE, ESQ.,
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 15th day of December, 2015. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM PAUL LAXALT, ESQ.
Nevada Attorney General

MICHAEL WHEABLE, ESQ.
White Pine County District Attorney

RICHARD W. SEARS, ESQ.
Attorney for Appellant

and by first class mail postage-paid to:

RICHARD W. SEARS, ESQ.,
White Pine County Public Defender
457 Fifth Street
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DATED this 15th day of December, 2015.

MICHAEL A. WHEABLE, ESQ.
White Pine County District Attorney

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