IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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TERRENCE BOWSER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No. 71516

District Court Case No. C211162-2

APPELLANT'S OPENING BRIEF

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Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County

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RULE 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant Terrence Bowser is the Appellant in Bowser v. State, Nevada Supreme Court Docket #71516.

2. 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. Appellant is represented in this matter by the undersigned and the law firm of which counsel is the owner, Resch Law, PLLC, d/b/a Conviction Solutions. Appellant was represented in the proceedings below by the Clark County Public Defender's Office, Norm Reed, Esq. and Nadia Hojjat, Esq.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: 

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I. JURISDICTION

This is an appeal from a judgment of conviction following a jury trial in State v. Bowser, Case No. C211162-2. The written judgment of conviction was filed on August 31, 2015. 6 AA 1259. A notice of appeal was never timely filed, however; the District Court granted a Petition for Writ of Habeas Corpus which directed the Clerk of Court to file an untimely notice of appeal on Bowser's behalf pursuant to NRAP 4(c). 6 AA 1268. The Clerk of Court filed a notice of appeal on Bowser's behalf on October 13, 2016. 6 AA 1276. This Court has appellate jurisdiction over the instant appeal pursuant to NRS 177.015(3) and NRAP 4(c).

II. ROUTING STATEMENT (RULE 17)

According to NRAP 17, this matter is neither presumptively assigned to the Court of Appeals nor is it presumptively retained by the Supreme Court. Pursuant to Rule 17(b)(1), this is a direct appeal from a judgment of conviction based on a jury verdict, and all convictions are for Category B felonies, thereby exempting the instant case from presumptive assignment to the Court of Appeals. See 6 AA 1260. The Supreme Court should

consider retaining the instant matter given its relative seriousness (i.e. was originally a death penalty case), and the fact this appeal raises issues concerning the improper removal of jurors, which is a recurring argument in criminal appeals.

III. ISSUES PRESENTED FOR REVIEW

A. Whether the district court erred in denying a challenge to the State's peremptory strikes against three jurors.

B. Whether the district court erred by denying a defense request to redact Bowser's statement to remove references to co-defendant Jamar Green.

C. Whether the district court erred by denying a defense request to remove a sleeping juror.

D. Whether the district court erred by refusing to allow into evidence a written toxicology report which supported Bowser's theory of defense.

E. Whether the district court erred by declining to give Bowser's proffered instruction regarding "mere presence" and whether the district court erred by addressing a subsequent note from the jury on that issue without Bowser or his attorney being present.

F. Whether the district court erred by denying a defense motion for mistrial due to prosecutorial misconduct.

IV. STATEMENT OF THE CASE

Appellant Terrence Bowser ("Bowser") was initially indicted on charges of Conspiracy to Commit Murder, Murder with Use of a Deadly Weapon, Conspiracy to Discharge Firearm Out of Motor Vehicle, Discharging Firearm Out of Motor Vehicle, Conspiracy to Discharge Firearm at or into Structure, Vehicle, Aircraft, or Watercraft, and Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft on April 29, 2005. 1 AA 1. The charges stemmed from an incident that occurred on January 31, 2005. 1 AA 1. At his first trial in October 2007, Bowser pleaded not guilty, and was tried and convicted of all charges, including First Degree Murder with Use of a Deadly Weapon. 1 AA 109-110. He was sentenced to Life with eligibility for parole after a minimum of 40 years served. 1 AA 111.

In February 2010, Bowser's convictions were reversed and remanded. 1 AA 118-126. He was granted a re-trial, which commenced on May 18, 2015 and lasted six days. 1 AA 172 – 6 AA 1199. Bowser was found Not Guilty as to Counts 1, 3, and 5. 6 AA 1201. He was found Guilty of Count 2, Voluntary Manslaughter with Use of a Deadly Weapon; Count 4,

Discharging Firearm out of a Motor Vehicle; and Count 6, Guilty of Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft. 6 AA 1201.

On August 19, 2015, Bowser was sentenced to Count 2- maximum of 120 months with minimum parole eligibility after 48 months, plus an equal and consecutive term of 120 months with minimum parole eligibility after 48 months for use of a deadly weapon; Count 4- maximum of 120 months with minimum parole eligibility after 48 months, Count 4 to run consecutive to Count 2; and Count 6, maximum 72 months with minimum parole eligibility after 28 months, to run concurrent with Count 4, with 3852 days credit for time served. 6 AA 1208. Judgment of Conviction was filed on August 31, 2015. 6 AA 1236.

Although no timely notice of appeal was filed on Bowser's behalf, Bowser did indeed wish to appeal his conviction and sentence, and subsequently filed a Petition for Writ of Habeus Corpus (Post-Conviction) on May 20, 2016. 6 AA 1243. Following argument, the court granted Bowser's Petition and permitted him to file an appeal. 6 AA 1274-1275.

The Notice of Appeal was filed on October 13, 2016, resulting in the instant proceeding. 6 AA 1276.

V. STATEMENT OF FACTS

Petitioner Terrence Bowser is an African-American young man who was 19 years old and employed as a house framer for a construction company on January 31, 2005. 1 AA 28-32, 3 AA 649, 3 AA 654, 4 AA 717.

Bowser and Jamar Green were childhood friends. 1 AA 30. On the evening of January 31, 2005, Bowser had finished work and was home making some dinner when he noticed that his friend Jamar Green had called. 1 AA 35-36. After returning Green's call, Bowser got into his mother's Lincoln Towncar and went to Green's mother's house. 1 AA 34-36, 4 AA 819.

Bowser and Green began driving around their neighborhood. 1 AA 38. Bowser was driving the car and Green was sitting in the passenger seat. 1 AA 48, 57, 68, 4 AA 712-13, 4 AA 725. Green had his shotgun with him for protection. 1 AA 38-39. Bowser had brought a box of shells in his car to give to Green. 1 AA 40, 1 AA 89-92, 4 AA 827, 4 AA 847.

At some point, Bowser and Green drove up next to another car. 1 AA 48-49. Green fired the shotgun into the driver's side of the car next to them. 1 AA 48-51. Bowser then made a U turn and drove the car away from the other car. 1 AA 58, 61. A police car immediately drove by, and Bowser attempted to evade the police. 1 AA 58-59, 1AA 89, 4AA 706-707. Bowser drove the car into a cul de sac, followed by police. 4 AA 708-709, 4 AA 818, 1 AA 87, 1 AA 96. Green threw the shotgun out the window. 4 AA 716, 4 AA 732, 4 818, 1 AA 87-88. Bowser and Green were immediately arrested and taken into custody. 4 AA 712-714, 4 894, 1 AA 96.

After the shooting, the victim's car continued to go straight and subsequently crashed into a wall. 1 AA 59-60, 5 AA 903-904. The driver of that car, John McCoy, was taken to the hospital and died from his injuries the next morning. 4 AA 838, 4 AA 884, 5 AA 898-902.

Police interviewed Bowser the morning of February 1, 2005. 1 AA 28, 5 AA 887, 5 AA 894. During the interview, Bowser mentioned he believed the incident may have stemmed from road rage. 1 AA 53-55. At trial, a detective confirmed that the victim was armed with a loaded handgun

found in the front seat of his vehicle. 4 AA 677. Later, another detective confirmed that during the investigation, information was received that involved an opinion by a former co-worker that the victim had a "quick temper." 5 AA 958. That same co-worker also informed police that she had heard the victim use racial slurs in the past. 5 AA 958. Further evidence showed that the victim may have had methamphetamine in his system at the time of the offense. 5 AA 960.

Other relevant facts are stated and discussed in the argument section of each claim.

VI. SUMMARY OF ARGUMENT

The issue of race unfortunately permeated Bowser's investigation and trial. Three jurors were removed under pretextual circumstances in violation of Bowser's Constitutional rights. One of the Caucasian jurors, kept in place of an excluded juror, would go on to fall asleep during the trial. During closing argument, the State referred to Bowser as an animal, among other inflammatory comments. These errors were of Constitutional dimension, and in the case of removed jurors, should mandate an

automatic reversal of Bowser's conviction. Regardless, the individual and cumulative effect of these errors prejudiced Bowser and reversal of his convictions is appropriate.

Despite these challenges, the defense team was able to present a compelling case that Bowser's alleged confession was coerced and that police failed to investigate information concerning the victim's rash temper and prior use of racial slurs. However, the defense was improperly barred from admitting a toxicology report that showed methamphetamine use by the victim. The trial court's failure to allow this evidence interfered with Bowser's right to present a complete defense and warrants reversal of his convictions.

The close state of the evidence is apparent from both the verdict itself, but also from a note sent during deliberations asking whether guilt may be based on association. The note highlights the trial court's erroneous instruction on the topic, wherein the defense's proposed instruction concerning mere presence was rejected. Worse, neither Bowser nor all of his attorneys were present when the note was discussed and a

course of action decided upon by the trial court. These errors also substantially prejudiced Bowser to the point that reversal of his convictions is required.

VII. ARGUMENT

A. The district court erred in denying the defense challenge to the State's peremptory strikes against three jurors.

During jury selection, the State used peremptory strikes against three male jurors who all were members of recognized ethnic minorities. 3 AA 546. Defense counsel objected under Batson. 3 AA 545-546. The trial court found the defense had made a prima facie case of discrimination and asked the State to present a race-neutral explanation. 3AA 547-548. Upon review of the record and a comparison with questioning of other jurors kept on the panel, the State's race-neutral justification given for striking the jurors was pretextual. The trial court denied the defense attorney's Batson[1]

[1] Batson v. Kentucky, 476 U.S. 79, 100, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), overruled in part on other grounds by Powers v. Ohio, 449 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

objections. 3 AA 556-558. This denied Bowser his right to a fair trial and impartial jury and requires reversal.

Standard of Review

In reviewing a Batson challenge, "'[t]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.'" Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997) (quoting Hernandez v. New York, 500 U.S. 352, 364, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991) (plurality opinion)); Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008).

In Batson, the United States Supreme Court held that the use of peremptory challenges to remove potential jurors on the basis of race is unconstitutional under the Equal Protection Clause of the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Discriminatory jury selection constitutes "structural" error that mandates reversal. Batson, 476 U.S. at 100; see Diomampo, 124 Nev. at 423. Striking a single juror for a discriminatory purpose violates the Fourteenth Amendment and warrants reversal. United States v. Bishop, 959

F.2d 820, 827 (9th Cir.1992); see United States v. Lorenzo, 995 F.2d 1448, 1453-54 (9th Cir.1993).

To determine whether illegal discrimination has occurred, a three-prong test is applied: (1) the defendant must make a prima facie showing that discrimination based on race has occurred based on the totality of the circumstances, (2) the prosecution then must provide a race-neutral explanation for its peremptory challenge, and (3) the district court must determine whether the defendant in fact demonstrated purposeful discrimination. Batson, 476 U.S. at 96-98; Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036 (2008).

"The second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett v. Elem, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). The race-neutral explanation "is not a reason that makes sense, but a reason that does not deny equal protection." Id. At 769. "Where a discriminatory intent is not inherent in the State's explanation, the reason offered should be deemed neutral." Ford v. State, 122 Nev. 398, 132 P.3d 574, 577 (2006) (citing Kaczmarek v. State, 120

Nev. 314, 333, 91 P.3d 16, 29 (2004)). However, "[a]n implausible or fantastic justification by the State may, and probably will, be found [under the third prong of Batson to be pretext for intentional discrimination." Ford v. State, 132 P.3d at 578.

The relevant factors in determining whether a race-neutral justification for a peremptory challenge is merely pretextual are

> (1) the similarity of the answers to voir dire questions given by [minority] prospective jurors who were struck by the prosecutors and answers by [nonminority] prospective jurors who were not struck, (2) the disparate questioning by the prosecutors of [minority] and [nonminority] prospective jurors, (3) the use by the prosecutors of the "jury shuffle," and (4) evidence of historical discrimination against minorities in jury selection by the district attorney's office.

Ford v. State, 122 Nev. 398, 405, 132 P.3d 574, 578-79, citing Miller-El v. Dretke, 545 U.S. 231, 233-34, 125 S.Ct. 2317, 2325-39, 162 L.Ed.2d 196 (2005); Diomampo v. State, 124 Nev. at 422-23 n.18.

In making its determination, the trial court may examine whether the State's proffered justifications make sense and whether the State's reasons could be applied to other non-minority jurors who were allowed to serve on the jury. Miller-el v. Dretke, 545 U.S. 231, 241 (2005). "If a prosecutor's

proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step." Id. at 241. Likewise, the trial or appellate court may conduct a comparative analysis between kept and removed jurors to determine discriminatory intent. Nunnery v. State, 127 Nev. 749, 784, 263 P.3d 235 (2011).

In Bowser's case, the State used peremptory strikes against three jurors: Mr. Silva, a Hispanic male; Mr. Dalton, an African American male; and Mr. Cano, an Asian male. 3 AA 546. Although there was some question as to the ethnicity of Mr. Silva and Mr. Cano, the court stated that if those jurors were in fact Hispanic and Asian, then the defense had made a prima facie showing of discrimination. 3 AA 555, 3 AA 548. There was no mention of any confusion about the race of Mr. Dalton, who was African-American; presumably his race was obvious to the State and to the court. 3 AA 548. The court concluded the defense had made a prima facie case. 3 AA 548.

Prospective Juror # 478, Mr. Silva

During voir dire, the court asked Mr. Silva the basic introductory questions. 3 AA 537-539. Mr. Silva stated he was a lifelong resident of Las Vegas, he was not married, and had no children. 3 AA 538-39. He said he had completed "most of high school," and when the court asked whether he was employed, he answered "not right now." 3 AA 538. Neither the State nor the defense asked him further questions. 3 AA 539.

In justifying its peremptory strike against Mr. Silva, the prosecutor said that they struck him because he was "unemployed at this particular time," which indicated to the State that he was "somebody who's not as invested in the community." 3 AA 549. They also pointed out Silva did not graduate from high school, and that Silva "did not feel as invested in the process. His answers were flat and narrow and shallow compared to [the other jurors]." 3 AA 549.

The State's justification for using its strike on Mr. Silva was pretextual. First, the prosecutors did not ask Silva any questions, and neither did defense counsel, yet the prosecutor claimed his answers were "flat, narrow,

and shallow." 3 AA 549.

The State remarked that his unemployment indicated he was "not invested in the community," yet Silva stated that he had lived in Las Vegas his whole life. 3 AA 538. It is hard to imagine how a life-long resident would not be "invested in the community." Interestingly, juror #304, Mr. Ali, was not struck from the jury, and he had only lived in Las Vegas for four years after moving here from Chicago. 2 AA 267, 3 AA 558. Ms. Gorski, #437, was not struck, and she had lived in Las Vegas for just six years after moving here from Northern California. 2 AA 287, 3 AA 558. At least one other juror, Ms. Kizer, #441, stated she was unemployed, yet she was not struck from the jury. 3 AA 418, 3 AA 558. In denying the defense's challenge, the court mentioned there were "several other jurors who were retired and not working," but that she "did not recall any other jurors who stated they were unemployed, who wanted to work but were unemployed." 3 AA 556. In fact, neither the court nor counsel asked Mr. Silva whether he was looking for or whether he desired to work. 3 AA 538.

With regard to highest completed level of education, although no

one else on the panel said they did not finish high school, six other jurors- Ms. Kizer, Ms. Gorski, Mr. Salas, Mr. Richardson, Ms. Potter, and Mr. Cortez said they had only completed high school, and yet they were retained on the jury.[2] 3 AA 558-559, 5 AA 1134.

The State's explanation for excusing Silva was pretextual in nature given the State's failure to ask Silva follow-up questions or dismiss other nonminority jurors for the same reasons it gave for removing Silva.

Prospective Juror #344, Mr. Dalton

Mr. Dalton is an African-American male. 3 AA 546. During the court's initial questioning, Mr. Dalton stated he had lived in Clark County for three and a half years after moving from the D.C. area, he had a master's degree in business administration, he worked in the market research field, he was not married, and he did not have children. 2 AA 374. He mentioned he had several friends who were victims of crimes, including burglaries, a stabbing, and a drive-by shooting. 2 AA 372.

[2] This information can be found on the following pages of the record: Ms. Kizer, 3 AA 417-418; Ms. Gorski, 2 AA 287; Mr. Salas, 2 AA 342; Mr. Richardson, 3 AA 463; Ms. Potter, 3 AA 518; Mr. Cortez, 3 AA 523.

The State's justification for striking Mr. Dalton was that when the defense asked him how he would feel if the State cross examined Bowser, should he decide to testify, "[Mr. Dalton's] exact words were, if he takes the stand, he doesn't feel that the prosecutors will be trying to find the truth, but that we will be trying to turn his words against him." 3 AA 550. The State also said, "I clearly cannot take the chance of having a juror who thinks that if I or Mr. Vallani get up and do our job, which is to cross-examine him, that we are only trying to put words in his mouth, *twist his words around* and try to make him - - you know, try to I guess persecute him in some way as opposed to doing our job. Up until then we were perfectly comfortable with him but that to us is lethal, and it completely handicaps us from being able to do our job should the defendant exercise his constitutional right to testify on his own behalf." 3 AA 551 (emphasis added).

A review of the record shows this explanation by the state was clearly pretextual. The defense pointed out that another juror, Mr. Sonerholm, an older white male, gave a very similar answer, and yet was retained. 3 AA

551-552. The record also shows that a third juror, Ms. Matys, a white woman,[3] gave a similar answer and also was retained. 3 AA 436. A comparison of the questioning of the potential jurors reveals the similarity of their answers.

Mr. Dalton, the African-American potential juror, was questioned by the defense as follows:

> MS. HOJJAT: What are your thoughts if Mr. Bowser doesn't testify in this case?
>
> PROSPECTIVE JUROR #344: I think he would be a smart man. You do what your lawyer tells you to do. And essentially I feel lawyers, both the prosecutor and the defense, are paid to do a job. So if Bowser were to get up here and testify, I don't feel like the prosecution would come out here to try to figure out the truth, they would try to turn his words into admitting to the crime. So with him not speaking, I feel that's perfectly fine.

2 AA 382.

As to Mr. Sonerholm, #342, the white potential juror who was retained on the jury, the questioning was as follows:

> MS. HOJJAT: . . . If Mr. Bowser didn't testify, do you think that would be important to you?

[3] The State read a list of minority jurors who would be left on the panel. 2 AA 239. Ms. Matys was not named, so she is assumed to be white.

PROSPECTIVE JUROR #342: I think there is probably a tendency for most people to testify on their own behalf, but I understand very well why many are advised not to and I understand that and I wouldn't hold that against them.

MS. HOJJAT: Why do you think that happens, where somebody who didn't do it doesn't testify?

PROSPECTIVE JUROR #342: I think there are several reasons. I think that one thing is, it's like putting am amateur up against a professional. I mean, it can be intimidating, you're going to be questioned by someone else who's basically professional in that aspect of life and they're going to try to pin you down. I think if I was on trial, I'm not at all sure I would want to testify.

2 AA 363-64.

Ms. Matys, #448, a white woman who was also retained on the jury, answered the same question in a very similar manner:

MS. HOJJAT: How would you feel if he didn't testify?

PROSPECTIVE JUROR NO. 448: That is his right. He doesn't have to.

MS. HOJJAT: Do you think a small part of you might wonder why he didn't testify?

PROSPECTIVE JUROR NO. 448: Honestly, yeah, it'd be a little interesting to know why he wouldn't want to be like, hey, I'm innocent.

MS. HOJJAT: Right. I appreciate your honesty in that, because that's

the answer I'm used to getting. And I think this jury is just very aware of the 5th Amendment and on it, but I'm used to hearing people say I couldn't help but wonder, I'd be curious. So let me ask you this: Can you imagine circumstances where a person didn't do it, but wouldn't want to testify?

PROSPECTIVE JUROR NO. 448: Yes.

MS. HOJJAT: Tell me about that.

PROSPECTIVE JUROR NO. 448: Words can be mixed around very easily, so he could say something that didn't sound right to somebody else and somebody could twist his words right then and there and so he does have the right to remain silent so that does not happen to him.

3 AA 435-36 (emphasis added).

In its ruling denying the defense's challenge to the peremptory strike, the court acknowledged that some other jurors gave answers similar to that of Mr. Dalton's, "but I do think that the way that Mr. Dalton phrased that was unique and I think it can be a legitimate cause for concern for the State for him to characterize their role in the way that he did." 3 AA 557.

A closer review of the State's questioning of Mr. Dalton reveals that his race was indeed a concern to them:

MS. FLECK: Okay. Any negative feelings generally about law enforcement?

> PROSPECTIVE JUROR NO. #344: Somewhat. I know there are good individuals and there are bad individuals that sign up to be cops or law enforcement, but I feel like eventually you become a product of the system and seeing everything that's going on in the media and social media and *just being a man of color* in this day and age is hard to feel overly positive about law enforcement.

2 AA 375-76 (emphasis added). Shortly after that, the following questioning took place:

> MS. FLECK: So, you know - - and I don't want to, because this is something that you've kind of brought up about that *your race* and the political climate, law enforcement, that's a very real issue for you? Can you sit here and assure the State that *because Mr. Bowser is also an African-American male that you're not going to in some way identify and think, well, you know, other young African-American males may have been targeted by law enforcement, they may have been falsely accused*, something like that, that you will not presume that in this case or hold the State to a higher burden?
>
> PROSPECTIVE JUROR NO. 344: I would definitely want the State to prove to me beyond a reasonable doubt as you're supposed to that he actually committed the crime.

2 AA 378-79 (emphasis added).

The record clearly shows the supposed race-neutral reasoning of the State for striking Mr. Dalton was pretense, given the very similar answers

given to the same question by Mr. Sonerholm, a white older male juror who was retained on the jury, and by Ms. Matys, a white woman who was also retained. Furthermore, the State's blatant line of questioning specific to Mr. Dalton and Mr. Bowser's race shows that Mr. Dalton's race was indeed a factor in his removal from the jury and is further evidence that the State's given reasoning was pretextual in nature.

Prospective Juror # 386, Mr. Cano

Mr. Cano is an Asian male. 3 AA 546. When the court questioned him, Mr. Cano said he worked as a Barista, he had completed some college, and that he was married with one child. 3 AA 447-449.

With respect to Mr. Cano, the State said they struck him because:

> he seemed overwhelmed by the process; in fact, I think that he said that it was overwhelming to him or that it was somewhat scary to him. He strikes me as a person who would have a difficult time making a decision, who would have a difficult time processing something of such a severe and grave magnitude as a murder case.
>
> He likened a jury to – or no, trial to television, and I think said something like that's what he would expect to see or he does expect that. I'm not sure if that's exactly how he meant it, but my sense with him is that he was overwhelmed by the process. He was scared of the process and he wasn't himself entirely

comfortable with sitting as a juror on a case like this.

3 AA 549-550.

Mr. Cano was questioned as follows:

MR. REED: . . . Let's start with this: What did you think about when you came in and they said, hey, you're going to be a juror in a murder case? What were your thoughts on that?

PROSPECTIVE JUROR NO. 386: Overwhelming a little bit.

MR. REED: Tell me why.

PROSPECTIVE JUROR NO. 386: It's just you see things like this in TV shows and movies, and you're here, like, oh, too real, it's like this is something new to me.

MR. REED: Won't be like the TV shows and movies. Does that bother you?

PROSPECTIVE JUROR NO. 386: A little bit.

MR. REED: How so?

PROSPECTIVE JUROR NO. 386: It's just, towards the end, your opinion and what you really think happens could affect this man's future, his life and stuff like that.

MR. REED: It sounds as though you really take it seriously?

PROSPECTIVE JUROR NO. 38: Of course, yes.

MR. REED: That's frightening?

PROSPECTIVE JUROR NO. 386: Somewhat, yeah, you know.

3 AA 450-451.

Two other jurors who were not stricken from the jury gave similar answers to those given by Mr. Cano. First, the defense mentioned that juror #456, Ms. Taylor, a white woman, "similarly said things about the process being very serious requiring a great deal of evidence, that it's important, that this is a big deal," and yet she was not struck from the jury. 3 AA 553. Ms. Taylor was questioned in voir dire as follows:

> MR. REED: . . . Beyond a reasonable doubt, this is the highest legal standard that we have in our criminal justice system. Do you agree with that?
>
> PROSPECTIVE JUROR NO. 456: Yes.
>
> MR. REED: And why do you think that is? Why do you think they have such a high burden?
>
> PROSPECTIVE JUROR NO. 456: Because here in the US you are innocent until proven guilty. And there has to be evidence to support that guilt or you're not held, you're innocent. So my feeling is there has to be a great deal of proof, of evidence. Whether it's in a stolen car situation or a murder, there still has to be that evidence, that proof, the burden of proof.

3 AA 481.

Another white female juror, Ms. Matys, #448, also indicated that the process was stressful for her, yet she was retained on the jury:

> MS. HOJJAT: Let me ask you: Is it nerve wracking for you at all speaking to me right now, being asked questions?
>
> PROSPECTIVE JUROR NO. 448: A little bit, but I'm calming down.
>
> MS. HOJJAT: Trying to relax, trying to be calm. Do you think you'd be more nervous if you were up there and you're being of a serious crime?
>
> PROSPECTIVE JUROR NO. 448: Oh, yeah, I'd be very nervous and I honestly- I wouldn't want to speak either. I'd be like, no.

3 AA 436.

The court, in denying the defense challenge, noted that the court didn't sense a "hesitation or question in her own mind about her ability to comply or a fear of going forward and being part of the process" from Ms. Taylor, but that the court did think "there was some of that feeling conveyed by Mr. Cano." 3 AA 557.

The State's justification for striking Mr. Cano was pretextual in nature, considering the similar responses with regard to the seriousness of the situation given by several other nonminority jurors who were retained on

the jury.

Due to the pretextual nature of the State's justifications for its peremptory strikes against Mr. Silva, Mr. Dalton, and Mr. Cano, Appellant was denied his right to a fair trial and an impartial jury, and his conviction must be reversed.

B. The district court erred by denying a defense request to redact Bowser's statement to remove references to statements made by co-defendant Jamar Green.

When police interviewed Bowser the morning after the shooting, detectives told Bowser what his friend Jamar Green supposedly said during their interview with Green. 1 AA 72-74, 1 AA 91-92. At trial, the defense requested Bowser's statement be redacted to remove references to statements made by Green on the basis that those statements were hearsay. 2 AA 184-87; 3 AA 617-36. The State argued the statements were not hearsay because "they were made merely to provide context" and because they were not offered for the truth of the matter. 2 AA 184, 3 AA 633. The court overruled the defense objections and said it would instruct the jury that statements by detectives are not evidence. 3 AA 636. At trial,

an audio tape of the police officers' interview of Bowser was played in its entirety for the jury. 4 AA 894. Before the audio tape was played, the court read a short statement to the jury informing them that the co-defendant's alleged statements in the interview were not being introduced for the truth of the matters asserted. 4 AA 893.

Jamar Green's statements that remained part of Bowser's statement were prejudicial to Bowser. The court erred in overruling defense's request for redactions.

Standard of review

Hearsay statements are reviewed under the federal standard of harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 21-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), overruled on other grounds by Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); Drummond v. State, 86 Nev. 4, 8-9, 462 P.2d 1012, 1015 (1970).

The Confrontation Clause of the Sixth Amendment guarantees the right to cross-examine a witness. The only indicium of reliability sufficient to satisfy constitutional demands is confrontation. Crawford v. Washington,

541 U.S. 36, 68, 124 S.Ct. 1354 (2004). The Confrontation Clause applies to out-of-court statements that are testimonial. Crawford, Id. at 51-52. Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." NRS 51.035. It is inadmissible unless the statement is within an exemption or exception. NRS 51.065. Hearsay has traditionally been excluded because it is not subject to the usual method to test the declarant's credibility, since cross-examination to ascertain a declarant's perception, memory, and truthfulness is not available. Deutscher v. State, 95 Nev. at 684. There is some risk that a jury, despite instructions to the contrary, might not disregard incriminating extrajudicial statements. See Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), abrogated in part by Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987) Even in a situation of a joint trial with co-defendants, redactions can be used to lessen the risk. Bruton at 134, n. 10; Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct 1702, 95 L.Ed.2d 176 (1987).

In this case, the defense objected to introducing and requested redactions of the hearsay statements "Jamar telling us that there was a conversation about using the shotgun, about going and pumping some rounds into a car, before you left the house," on 1 AA 72, and "'Cause he talked to us about maybe needing some more shells, and talked to us about talking to you over this box of shells," on 1 AA 92. 2 AA 184-187.

Despite the fact that it was not a joint trial, it was clear to the jury that Green was a co-defendant. 1 AA 166. Jamar Green's statements that were part of Bowser's police interview were hearsay, and were not part of any exemption or exception. His statements were testimonial in that they were given to police officers during the course of an investigation. Crawford, 541 U.S. at 52. They were out of court statements that inculpated Bowser in the crime. The State's claim that the statements were only "to provide context" and not for the truth of the matter asserted is not convincing, because Green's statements at issue went directly to show a conversation between Bowser and Green that would provide evidence of planning and conspiracy. It is unclear what "context" the State was supposedly attempting to portray.

Bowser's counsel was not permitted to examine Green on those statements. They were not redacted. They should have been excluded from the evidence and from the hearing of the jury.

Allowing the jury to hear the audio tape of Green's hearsay statements without an opportunity to cross examine Green prejudiced Bowser. Reading a limiting instruction to the jury did not alleviate the error, because once the jury heard the statements, the damage was already done. It was error to deny defense's request to redact these statements.

C. The district court erred by denying a defense request to remove a sleeping juror.

During trial, one of the jurors, Mr. Sonerholm, appeared to be sleeping "pretty prolifically throughout the trial." 4 AA 793-95. Several members of the court staff saw this, including the clerk, who "noticed [the juror's] eyes closed" and brought it to the judge's attention. 4 AA 794-95, 4 AA 800. The defense, arguing Bowser would be prejudiced if the court did not remove the juror, moved to have the juror removed and replaced by an

alternate. 4 AA 794-95. The State argued that if the juror was merely resting his eyes, he should not be removed. 4 AA 796, 4 4 AA 800.

The court then separately brought Mr. Sonerholm into the courtroom and questioned him. He stated that he had not been sleeping, but only concentrating, and that he had heard all of the testimony. 4 AA 798. The defense argued that, despite Sonerholm's claim that he had been concentrating and heard the evidence, he had a "very defensive posture" in responding to the court's questions and his answers did not alleviate the defense's concern that Bowser may have been prejudiced due to the sleeping juror likely missing the testimony. 4 AA 799-800.

The court stated they had observed Mr. Sonerholm's eyes had been closed, but saw no "snoring or bobbing head," and the court found the juror's response that he had not been sleeping to be credible. The court overruled the defense objection to remove Mr. Sonerholm. 4 AA 801. The court's failure to remove the sleeping juror violated Bowser's right to a fair and impartial jury.

Standard of Review

The issue of removal of a sleeping juror is reviewed for abuse of discretion. Burnside v. State, 131 Nev.Adv.Op. 40, 352 P.3d 627 (2015); United States v. Springfield, 829 F.2d 860 (9th Cir.1987).

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to a trial by a fair and impartial jury. Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), superceded by statute on other grounds, as stated by Moffat v. Gilmore, 113 F.3d 698, 701 (7th Cir.1997); Burnside, 352 P.3d at 654. Sleeping is considered juror misconduct. See United States v. Sherrill, 388 F.3d 535, 537 (6th Cir.2004). A sleeping juror is a matter of "great concern," Church v. Massey, 697 So. 2d 407, 414 (Miss.1997) that "strikes at the heart of a defendant's constitutional right to a fair trial." Burnside, 352 P.3d at 654 (Cherry, J., dissenting) (quoting United States v. McKeighan, 685 F.3d 956, 973 (10th Cir.2012) ("[a] defendant could be deprived of the Fifth Amendment right to due process or the Sixth Amendment right to an impartial jury if jurors fall asleep and are unable to fairly consider the defendant's case").

In Bowser's case, multiple people in the courtroom, including the court staff, saw the juror with his eyes closed and believed him to be asleep. 4 AA 794-95. In fact, the clerk was concerned to the point that the clerk brought it to the judge's attention. 4 AA 800. The juror did not close his eyes for only a moment, but did so "prolifically throughout the trial." 4 AA 793-94. When the court questioned the juror, he became defensive. 4 AA 799-800. All of these facts strongly indicate that the juror had, in fact, been sleeping throughout the trial, and the decision to not remove and replace him with an alternate juror was error. The trial court abused its discretion by not replacing the sleeping juror.

D. The district court erred by refusing to allow into evidence a written toxicology report which supported Bowser's theory of defense.

At trial, the defense sought to present a toxicology report that showed the presence of methamphetamine in the victim's blood to support the defense's theory that the shooting was a road rage incident. 4 AA 865-881. The State argued that the testimony at the first trial showed the methamphetamine result was not reliable, that there was a lack of

trustworthiness in the result, and that the report was not relevant. 4 AA 879. The defense argued that the presence of methamphetamine was probative to whether it was a road rage incident because someone who is high on methamphetamine might be more likely to engage in a road rage. 4 AA 877. The defense did not have a witness to testify that someone on the drug might be more likely to engage in a road rage, but felt the jury could draw from its own knowledge and common sense to make that determination. 4 AA 877-78. The defense further argued the toxicology report was relevant to support its theory that the detectives did not thoroughly investigate whether road rage occurred. 4 AA 878; 3 AA 640-42, 3 AA 649-50, 4 AA 655-56. The court sustained the State's objection to the admission of the report on the basis of the reliability of the result, the absence of a witness to testify to effects of methamphetamine, and the lack of trustworthiness. 4 AA 880-881.

Later, on the fourth day of trial, during cross-examination, the defense questioned the State's detective as to whether he was aware that the victim had methamphetamine in his system. 5 AA 960. The detective

mentioned the existence of the toxicology report. 5 AA 960-61. The defense argued that the State's witness opened the door to admitting the report, and that the toxicology report should be admitted. 5 AA 988-89, 5 AA 992-93. The court reiterated that it was denying the defense's request to admit the report for the same reasons. 5 AA 994.

Standard of Review

A court's decision of whether to allow evidence is reviewed for abuse of discretion. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Id.

NRS 48.025 provides that "[a]ll relevant evidence is admissible, except … [a]s limited by the Constitution of the United States or of the State of Nevada." NRS 48.025(1)(b). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Even if relevant, evidence "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of

confusion of the issues or of misleading the jury." NRS 48.035.

A defendant has a Constitutional right to present his theory of defense. California v. Trombetta, 467 U.S. 479 (1984). The defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, "no matter how weak or incredible that evidence might be." Brooks v. State, 103 Nev. 611, 613, 747 P.2d 893, 894 (1987); Adler v. State, 95 Nev. 339, 594 P.2d 725 (1979); Barger v. State, 81 Nev. 548, 552, 407 P.2d 584, 586 (1965).

Here, the toxicology report was clearly relevant to show that the victim might have been under the influence of an illegal substance, however slight, and that may have contributed to a possible road rage situation. It was also relevant as evidence of the defense's theory that the police did not sufficiently investigate whether it was a road rage incident, despite several pieces of evidence to support that a road rage occurred.

Moreover, the State's witness Detective O'Kelley's testimony opened the door to introducing the report when he mentioned it on cross-examination. Under the rule of curative admissibility, the defense should

have been allowed to admit the report to rebut the false impression that the police investigation was thorough. See Taylor v. State, 109 Nev. 849, 858 P.2d 843, 850 (1993); United States v. Whitworth, 856 F.2d 1268, 1285 (9th Cir.1988). Bowser was entitled to present relevant evidence to support his theory of defense, and he was prejudiced by the court's failure to allow the evidence, as the likelihood of success of Bowser's self-defense theory would have been greatly enhanced with the addition of this evidence.

E. The district court erred by declining to give Bowser's proffered instruction regarding "mere presence" and by addressing a subsequent note from the jury on that issue without Bowser or his attorney being present.

On Day 5 of trial, the court discussed potential jury instructions. 5 AA 1006. The defense objected to the State's proposed mere presence instruction (6 AA 1153)[4] and requested that the court use an instruction (5

[4] The State's instruction that was used at trial read as follows:
"Mere presence at the scene of a crime or knowledge that a crime is being committed is not sufficient to establish that a defendant is guilty of an offense, unless you find beyond reasonable doubt that the defendant was a participant and not merely a knowing spectator.
However, the presence of a person at the scene of a crime and companionship with another person engaged in the commission of the crime and a course of conduct before and after the offense are

AA 1135-36) which included the first paragraph but not the second paragraph of the State's proposed instruction. 5 AA 1009-1010. The defense specifically objected to the paragraph that read "However, the presence of a person at the scene of a crime and companionship with another person engaged in the commission of the crime and a course of conduct before and after the offense are circumstances which may be considered in determining whether such person aided and abetted the commission of that crime." 5 AA 1010-1011, 6 AA 1153. The defense objected to using the second paragraph because the first paragraph was "the instruction that has been routinely given" and was "clear and concise and accurate," and because it was not necessary to instruct on "every nuance of what constitutes mere presence." 5 AA 1010-11. The court stated it was appropriate to let the jury know mere presence was not enough, but there were other factors the jury could consider, and that it would give the State's proposed instruction. 5 AA 1011.

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circumstances which may be considered in determining whether such person aided and abetted the commission of that crime." 6 AA 1153.

After the jury began deliberating, the jury sent a note to the court, which read, "Can a person be liable for shooting a firearm out of a vehicle by association?" 5 AA 1122-23. At that time, the defendant, Bowser, was not present. 5 AA 1122. The lead defense counsel, Mr. Reed, was also not present because he was in another murder trial. 5 AA 1121, 5 AA 1126-27. The court conferred with the remaining defense counsel and the State, and agreed to the following response to the jury question: "Please refer to the charges in the Indictment contained in Instruction 3 for the theories of liability under which Mr. Bowser is charged, as well as all of the instructions on the law that applies." 5 AA 1125.

Later, Mr. Reed returned and explained his position on the jury's note. 5 AA 1126-27. He said that from his perspective, the question the jury asked was whether the jury could find the defendant guilty by association and that "I think the answer to the question simply should have been no, because just like mere presence, mere association is not a crime." 5 AA 1127. The defense counsel stated that although he didn't feel it was wrong for the court to refer the jury back to the instructions, he felt the court

should have specifically referred the jury to the mere presence instruction. 5 AA 1127.

The court erred in declining to give the version of the mere presence instruction that was requested by the defense. The court also erred in discussing the jury's note outside of the presence of all of the parties, but particularly all of the defense counsel.

Standard of Review

The issue of a defendant's right to be present at trial is reviewed *de novo*. See Manning v. State, 131 Nev.Adv.Op. 26, 348 P.3d 1015, 1018 (2015); Jackson v. State, 128 Nev.Adv.Op. 55, 291 P.3d 1274, 1277 (2012). When a district court responds to a note from the jury without notifying the parties or seeking input on the response, the error will be reviewed to determine whether it was harmless beyond a reasonable doubt. Manning, 348 P.3d at 1018. The Ninth Circuit considers three factors to determine the harmlessness of the error in this context: (1) "the probable effect of the message actually sent"; (2) "the likelihood that the court would have sent a different message had it consulted with appellants beforehand"; and (3)

"whether any changes in the message that appellants might have obtained would have affected the verdict in any way." Manning, 348 P.3d at 1019, citing United States v. Barragan-Devis, 133 F.3d 1287, 1289 (9th Cir.1998) and United States v. Frazin, 780 F.2d 1461, 1470 (9th Cir.1986).

A district court's decision to give a particular instruction is reviewed for an abuse of discretion or judicial error. Jackson v. State, 117 Nev. 116, 17 P.3d 998, 1000 (2001); Crawford v. State, 121 Nev. 744, 121 P.3d 582, 585 (2005). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. Jackson v. State, 17 P.3d at 1000.

Bowser had a due process right to be present when the district court discussed the jury note. Manning v. State, 348 P.3d at 1018-19; See Musladin v. Lamarque, 555 F.3d 830, 840-43 (9th Cir.2009); United States v. Barragan-Devis, 133 F.3d 1287, 1289 (9th Cir.1998); United States v. Frazin, 780 F.2d 1461, 1468-69 (9th Cir.1986). A defendant has a due process right to be present when a judge communicates to the jury. Manning v. State, 348 P.3d at 1019. "A defendant has a due process right to have his

attorney present to provide input in crafting the court's response to a jury's inquiry." Id. "The delicate nature of communication with a deliberating jury means that defense counsel has an important role to play in helping to shape that communication." Musladin v. Lamarque, 555 F.3d at 840. "Accordingly, the presence of both the defendant and his or her counsel is required when discussing questions from the jury "because counsel might object to the instruction or may suggest an alternative manner of stating the message – a critical opportunity given the great weight that jurors give a judge's words. The defendant's or attorney's presence may also be an important opportunity to try and persuade the judge to respond." Manning v. State, 348 P.3d at 1018 (quoting Musladin, 555 F.3d at 841). As further noted: "the 'stage' at which the deprivation of counsel may be critical should be understood as the formulation of the response to a jury's request for additional instructions, rather than its delivery. Counsel is most acutely needed before a decision about how to respond to the jury is made, because it is the substance of the response – or the decision of whether to respond or not – that it crucial." Musladin, 555 F.3d at 842.

In the instant case, Bowser was not given the opportunity to be present in court during the discussion about the jury note, and his lead counsel was absent during the critical stage of the formulation of the response to the jury's question. 5 AA 1122, 5 AA 1126-27. When the lead defense counsel returned, he asked to go on the record to state his view on the matter of the jury note and response, which differed from that of Bowser's second chair trial counsel. 5 AA 1126. At a minimum, all of Bowser's defense counsel should have been present when the court conferred regarding the jury note. The error was not harmless, because once the court responded to the jury note, Bowser had already been deprived of the benefit of his counsel's input into the matter. To cure this error, when the lead defense counsel returned, the court should have then pointed the jury to the mere presence instruction, as the lead defense counsel Mr. Reed had requested. The court did not do so.

The defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence. Brooks v. State, 103 Nev. 611, 613, 747 P.2d 893, 894 (1987); Adler v. State, 95 Nev. 339, 594 P.2d 725 (1979);

Barger v. State, 81 Nev. 548, 552, 407 P.2d 584, 586 (1965). The mere presence instruction proffered by the defense supported the defense's theory of the case as disclosed by the evidence.

Moreover, the mere presence instruction proffered by the defense was sufficient, because it correctly stated the law. Brooks v. State, 103 Nev. 611, 613, 747 P.2d 893, 894-95 (1987). There was evidence from which the jury could infer that Bowser was a participant, but there was also credible evidence that Jamar Green solely committed the crime, and that Bowser was merely present at the scene and had no culpability for Green's crime of shooting into another vehicle. The State's version of the instruction added superfluous language that may have confused the jury. See Runion v. State, 116 Nev. 1041, 13 P.3d 52, 58 (2000); Jackson v. State, 117 Nev. 116, 17 P.3d 998, 1003 n. 6 (2001). The correct instruction should have been given to the jury. Because the State arbitrarily added additional unnecessary language to the instruction, the court abused its discretion in giving the State's version.

F. The district court erred by denying a defense motion for mistrial due to prosecutorial misconduct.

During the State's closing and rebuttal arguments, the prosecutors made several impermissible and inflammatory comments, to which defense counsel objected.

First, during the initial closing argument, the State referred to Bowser and Green as "animals." 5 AA 1062. The defense objected, and the court sustained:

> MR. VILLANI: . . . So ask yourselves when you go back to deliberate, was John McCoy reaching for that gun? Probably. Probably after that first shot he might have tried to get that gun. Was he able to get it? It doesn't look like it. No shots were fired. But he probably was reaching for that gun because that's the reason he had the permit is to try to protect himself from animals like this.
>
> MS. HOJJAT: Objection.
>
> THE COURT: Okay. All right. Don't characterize in that way.
>
> MR. VILLANI: I apologize. From the defendant.

5 AA 1062.

Next, during its rebuttal argument, the State referred to the beliefs of the defense counsel. 5 AA 1099. The defense counsel objected, and the

court sustained the objection:

> MS. FLECK: . . . There is a full confession from Terrence Bowser that the only person that doesn't seem to believe it is the defense attorneys.
>
> MR. REED: I'm going to object to what the defense attorneys believe, Your Honor. That's impermissible argument.
>
> MS. FLECK: Well, the only –
>
> THE COURT: Okay. Sustained.

5 AA 1099-1100.

Later in the rebuttal, the State characterized the defendant's motive as a "hunt." 5 AA 1112. The defense counsel objected, and the court overruled the objection. The State then alluded to expectations of society, to which defense objected, and the court sustained:

> MS. FLECK: You know, normally motive for a murder could be revenge, could be some sort of grudge that you have against a person. But to just go out and hunt for a person –
>
> MS. HOJJAT: Judge, I'm going to object to the word hunt.
>
> MS. FLECK: He said in his statement that they waited, that they waited for the right opportunity until John McCoy was alone, that they didn't know his age, his race. They didn't know he was a husband, a father. They knew absolutely nothing about him. The motive is nothing more than murder, just to go out and

have fun. There was no value of human life.

MR. REED: Objection, Your Honor. That's impermissible argument. Appellate issue.

THE COURT: Overruled.

MS. FLECK: It was simply John McCoy being in the wrong place at the wrong time. He was being ambushed for doing absolutely nothing. And we live by some sort of unwritten contract, right, with other –

MS. HOJJAT: Judge, I'm going to object.

THE COURT: Yeah. Focus on the case, not society in general.

5 AA 1111-12.

After the jury departed, defense counsel moved for a mistrial based on the State's description of the defendant as an animal and counsel's comment about the defendant being "out hunting for a person." 5 AA 1115-16. The defense counsel argued the State's characterization of the defendant as an animal was a "highly prejudicial, extremely inflammatory comment" that, despite the sustained objection, was "out there" and prejudiced Bowser. 5 AA 1115-16. The defense also argued that the State's use of "out hunting for a person" was also inflammatory and impermissible.

The court concluded that "in the context of argument after repeating instructing – repeatedly instructing the jurors to rely on the evidence and that arguments are not evidence, and I don't think that those comments are prejudicial to the level that would warrant a mistrial." 5 AA 1118.

Standard of Review

A court's denial of a mistrial is reviewed for abuse of discretion. Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980); see Valdez v. State, 124 Nev. 97, 196 P.3d 465, 475 (2008).

When reviewing acts of alleged prosecutorial misconduct, a determination is made whether the prosecutor's conduct was improper. If so, it is reviewed for harmless error, which "depends on whether the prosecutorial misconduct is of a constitutional dimension." Valdez v. State, 196 P.3d at 476. If it is of a constitutional dimension, then the conviction must be reversed unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), overruled on other grounds by Brecht v. Abrahamson, 507 U.S. 619, 623 (1993); Tavares v.

State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001). "If the error is not of constitutional dimension, [the Nevada Supreme Court] will reverse only if the error substantially affects the jury's verdict." Valdez, 196 P.3d at 476; Tavares, 117 Nev. At 732, 30 P.3d at 1132.

A prosecutor may not "blatantly attempt to inflame a jury." Valdez, 196 P.3d at 478. Prosecutorial misconduct can violate a defendant's right to a fair trial. State v. Teeter, 65 Nev. 584, 647, 200 P.2d 657 (1948); Collier v. State, 101 Nev. 473 n.5, 705 P.2d 1126, 1132 n.5 (1985); Chapman v. California, 386 U.S. 18, 25-26, 17 L.Ed.2d 705, 711 (1967), overruled on other grounds by Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). Arguments meant to inflame the passions of the jury are impermissible misconduct. Yates v. State, 103 Nev. 200, 734 P.2d 1252, 1257 n.2 (1987); Darden v. Wainwright, 477 U.S. 168, 180-81, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

The prosecutors' comments during closing argument and rebuttal clearly constituted misconduct. The prosecutor characterized Bowser and Green as "animals," which was clearly inflammatory. Jones v. State, 113 Nev. 454, 937 P.2d 55, 65 (1997); Collier v. State, 103 Nev. 563, 747 P.2d

225, 227 (1987); Pacheco v. State, 82 Nev. 172, 180, 414 P.2d 100, 104 (1966). The prosecutor also characterized the incident as a "hunt," which was improper. Valdez, 196 P.3d at 478. These comments were made to inflame the emotions of the jury and they were highly prejudicial to Bowser; moreover, the prejudicial comments were not "neutralized" by any admonition by the court. See Allen v. State, 99 Nev. 485, 490, 665 P.2d 238, 241 (1983). Indeed, the court did not even sustain the defense's objection as to the State's use of the word "hunt." 5 AA 1111-12. The jury was allowed the hear the comments and the State's characterizations of Bowser, which prejudiced his trial.

Even if the State's inflammatory comments were considered harmless when viewed individually, taken together with all of the other errors made during the trial and the fact that Bowser's conviction was not a certainty, the cumulative effect of the errors was to violate Bowser's right to a fair trial. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Valdez, 196 P.3d at 481, quoting Hernandez v. State, 118 Nev.

513, 535, 50 P.3d 1100,1115 (2002). When evaluating a claim of cumulative error, the following factors are considered: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez, 196 P.3d at 481 quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000); Rose v. State, 123 Nev. 194, 163 P.3d 408, 419 (2007). Bowser's guilt was not a foregone conclusion, given the fact that Bowser was not the shooter and he was acquitted of the conspiracy charges. The errors made during trial rose to the level of violating Bowser's constitutional right to a fair trial. The verdict would not have been the same in the absence of these errors. Accordingly, Bowser's convictions must be reversed.

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VIII. CONCLUSION

Based on the foregoing, Bowser respectfully requests this honorable Court reverse his convictions and sentences.

DATED this 8th day of February, 2017.

RESCH LAW, PLLC d/b/a Conviction Solutions

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RULE 28.2 ATTORNEY CERTIFICATE

1. I hereby certify that I have read this appellate brief, and to 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, including NRAP 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 upon is 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.

2. I further 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 font of the Ebrima style.

3. I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 10,172 words.

DATED this 8th day of February, 2017.

RESCH LAW, PLLC d/b/a Conviction Solutions

By: 

JAMIE J. RESCH
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 8, 2017. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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Counsel for Respondent

ADAM P. LAXALT
Nevada Attorney General

An Employee of RESCH LAW, PLLC, d/b/a
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