IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE BOWSER, Appellant, vs. THE STATE OF NEVADA, Respondent.	Supreme Court Case No. 71516 District Court Case No. C-211162-2

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APPELLANT'S REPLY BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ARGUMENT 1

A. The State's use of a preemptory strike against Mr. Silva constituted purposeful discrimination 1

B. The toxicology report should have been admitted by the trial court as evidence supporting Bowser's theory of defense. 5

C. It was reversible error for the trial court to address a note from the jury without Appellant and all counsel present. 8

D. The stock jury instruction that advises counsel's statements are not evidence is not a cure-all for prosecutorial misconduct, and Bowser's convictions should be reversed based on the State's repeated inflammatory comments during closing argument. 11

II. CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 ..... passim
California v. Trombetta, 467 U.S. 479 (1984) 6
Chambers v. Mississippi, 410 U.S. 284 (1973) 6
Everett v. State, 789 N.W.2d 151 (Iowa 2010) 9
Gov't of the Virgin Islands v. Petersen, 131 F.Supp.2d 707 (D.V.I. 2001) 7
Harris v. Cotton, 365 F.3d 552 (7th Cir. 2004) 7
Manning v. State, 131 Nev.Adv.Op. 26, 348 P.3d 1015 (2015) 8, 9, 10
McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984) 11
Musladin v. Lamarque, 555 F.3d 830 (9th Cir. 2009) 9
Snyder v. Louisiana, 522 U.S. 472 (2008) 3
State v. Thompson, 2014 UT App 14, 318 P.3d 1221 (2014) 12
United States v. Harris, 192 F.3d 580 (6th Cir. 1999) 4
Valdez v. State, 124 Nev. 97, 196 P.3d 465 (2008) 11
Whorton v. Sheppard, 2010 Nev. LEXIS 72 (2010) 11

Rules

NRAP 36 11

I. ARGUMENT

While Bowser's opening brief presents numerous issues, any one of which is sufficient to entitle him to relief on appeal, this reply focuses on certain key issues. These issues include the elimination of a potential juror, the denial of Bowser's request to admit a toxicology report, the failure of all parties and counsel to be present when the court responded to a jury note, and the repeated instances of prosecutorial misconduct.

A. The State's use of a preemptory strike against Mr. Silva constituted purposeful discrimination.

The opening brief explained that the use of preemptory strikes by the State against three potential jurors, including Mr. Silva, violated the Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986). The improper use of a preemptory strike against even one potential juror is automatic grounds for reversal. Id. at 100.

The grounds for reversal based on the elimination of potential juror Silva are particularly strong. In response, the State argued that any comparative analysis involving Mr. Silva must be limited only to potential

alternate jurors, and that Mr. Silva's "flat, narrow, and shallow answers" were nondiscriminatory reasons to excuse him. Answering Brief, p. 14. The State provided no authority to support its position and other courts have rejected similar arguments.

To briefly recap, Mr. Silva was one of a group of four potential alternate jurors and was the subject of a preemptory strike by the State. In the opening brief, Bowser argued that the elimination of Mr. Silva was discriminatory, chiefly based on a comparative analysis involving his employment status. Opening Brief, pp. 13-14. The State does not address those arguments at all in its response, which instead focused on a second reason allegedly given for striking Mr. Silva concerning the "flat" nature of his answers. Answering Brief, p. 14.

When the Batson challenge was raised, the trial court made findings concerning Mr. Silva that were exclusively related to his employment status. 3 AA 556. That is, no mention was made by the court at all concerning Mr. Silva's demeanor or as the State called it, the contention that he was not "invested in the process." 3 AA 549. The trial court's failure to make any

"first hand observations" of the State's demeanor-based explanation for eliminating Mr. Silva precludes this Court from relying on that basis to justify the strike. Snyder v. Louisiana, 522 U.S. 472, 477 (2008).

Even if Mr. Silva's allegedly "flat" answers were considered as a non-discriminatory basis to justify the strike, the State's analysis would still fail. First, the State does not support its argument that any comparative analysis is limited solely to other potential alternate jurors. Other courts have rejected this type of argument. Addressing a similar Batson challenge in which the prosecution argued that the stricken jurors were mere alternates, the Sixth Circuit Court of Appeals held:

> The only other factor mentioned by the district court was its observation that the two venire panelists who were struck would only have served as alternates even if they had not been struck by the prosecutor. The logic of this statement escapes us as it is clear that the district court, at the time it made its ruling, could not possibly have known whether any of the alternates would be called to serve on the petit jury. Moreover, the harm inherent in a discriminatorily chosen jury inures not only to the defendant, but also to the jurors not selected because of their race, and to the integrity of the judicial system as a whole. See Batson, 476 U.S. at 87-88, 106 S.Ct. 1712. This principle is equally applicable to the selection of alternate jurors. Thus, we hold this factor of alternate status to be irrelevant, leaving the selection of one African-American for the jury as the only

> articulated reason for the district judge's conclusion denying the Batson challenge.

United States v. Harris, 192 F.3d 580, 587-88 (6th Cir. 1999).

The opening brief sufficiently explained the comparative nature of Mr. Silva's responses as it related to employment, and the fact the State's reliance on employment was pretext for purposeful discrimination. Opening Brief, pp. 13-14. A comparison between all jurors was appropriate, as quite eloquently explained in Harris, there was no way of knowing if alternate jurors would be needed so early in the trial process.

Second, even if a comparative analysis were limited solely to potential alternates, and examination of the State's justification for striking Mr. Silva was expanded to include flat and shallow answers (whatever that means), this Court could still readily conclude the bases given for striking Mr. Silva were pretextual.

Bowser can only presume the State's objection to Mr. Silva's demeanor involved his penchant for one-word answers. 3 AA 538-39. Certainly, the State did not ask Mr. Silva any questions, so the issue must be limited to Mr. Silva's responses to the trial court. 3 AA 539. After Mr. Silva

was questioned, the very next juror was Ms. Enniss, who also made frequent use of one-word answers. 3 AA 539-542. Ms. Enniss would go on to serve as an alternate juror. 5 AA 1134.

The State's demeanor-based challenge to Mr. Silva finds no support in the record, no support based on Mr. Silva's status as an alternate, and no support under a comparative juror analysis. The trial court erred by overruling the Batson challenge to Mr. Silva's elimination from the jury pool and this Court should grant relief by reversing the judgment of conviction herein.

B. The toxicology report should have been admitted by the trial court as evidence supporting Bowser's theory of defense.

Next, Bowser contended that a toxicology report should have been admitted as evidence during the trial to support Bowser's theory of defense, which was self-defense. Opening Brief, p. 31. In response, the State provided this Court a response which primarily suggested trial counsel's efforts to establish the report as non-hearsay were in error. Answering Brief, pp. 22-23.

The State's focus on alleged hearsay elements of the report is a non-sequitur. The trial court's ruling that the report would not be admitted effectively assumed the defense had overcome the hearsay objection. 4 AA 880. The basis for the trial court's rejection of the report, and the issue this Court is asked to consider, concerns the trial court's finding of unreliability. 4 AA 880.

The issue here is that the trial court's reliance on state evidentiary rules to exclude the report violated Bowser's right to Due Process, i.e. the right to present his theory of defense. California v. Trombetta, 467 U.S. 479 (1984). Even assuming the report to be potentially suspect in its conclusion, the correct outcome here was to admit it and allow the State to introduce whatever evidence it had to explain why the result may not have been reliable. Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense").

This error prejudiced Bowser, notwithstanding any testimony about the report by a detective. Gov't. of the Virgin Islands v. Petersen, 131

F.Supp.2d 707, 714 (D.V.I. 2001) (Failure to admit toxicology report was error notwithstanding testimony about it because appellant entitled "to establish the full extent of the victim's physical and mental impairment as early in the case as possible"); Harris v. Cotton, 365 F.3d 552, 556 (7th Cir. 2004) (trial counsel ineffective for not introducing victim's toxicology report because "an affirmative defense of self-defense against a drunk and cocaine-high victim stands a better chance than the same defense against a stone-cold-sober victim").

The exclusion of the report on state law evidentiary grounds should have yielded here to the important and well-established Due Process right to present Bowser's theory of defense. The fact a detective talked about the report is no substitute for admission of the actual report. Because the failure to admit the toxicology report prejudiced Bowser, his convictions must be reversed.

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C. It was reversible error for the trial court to address a note from the jury without Appellant and all counsel present.

The opening brief also contended that the trial court erred when it addressed a note from a juror without Bowser or all of his counsel present. Bowser was represented by counsel and co-counsel at trial, and only the co-counsel was present when the note was addressed. In response, the State argued "all parties were represented when the court discussed the jury note," and that Appellant's personal presence was waived by counsel. Answering Brief, p. 25. The State's position is exclusively based on its reading of this Court's decision in Manning v. State, 131 Nev.Adv.Op. 26, 348 P.3d 1015 (2015).

The State's reading of Manning is too narrow. There is nothing contained within the decision that limits the right to be present to less than all counsel who represent the defendant. Put another way, Manning did not hold that Due Process is satisfied merely because the defendant had *any* representation in response to a jury question. Rather, "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 weight that jurors give a judge's words." Manning, 348 P.3d at 1018, quoting Musladin v. Lamarque, 555 F.3d 830 (9th Cir. 2009).

In response to the State's argument that Appellant's personal presence was waived by counsel, it is suggested either that 1) based on Manning a defendant's presence cannot be waived because responding to a jury note is a critical stage proceeding, or 2) any purported waiver here was null because it was occasioned by counsel without asking Appellant if he personally waived his right to be present. Everett v. State, 789 N.W.2d 151, 159 (Iowa 2010) (finding trial counsel ineffective for waiving defendant's presence at hearing on jury note without first consulting defendant). As further noted, "[E]ven if the defendant's presence and input had no effect on the court's response to the jury question, his presence would have, at a minimum, provided him with the opportunity to confer with his counsel and to object to the court's ruling." Id.

Here, Bowser was deprived of the ability to provide any input regarding the jury note – whether that be substantive input as to how to respond, or input concerning his wavier of the right to provide a response. Further, because one of Bowser's attorneys was not present, the right to be present and respond to the jury note was further eroded. The lack of presence of Bowser and all counsel prejudiced Bowser here as demonstrated by the fact the absent attorney subsequently voiced disagreement with the trial court's response to the note. 5 AA 1126-27.

All of the above provides an excellent illustration why any rule arising out of Manning should broadly require the presence of all counsel and the personal presence of the defendant, unless personally waived, when responding to a note from the jury. Had Bowser and all counsel been present in the instant matter, the response to the jury note could have been a simple "no" as proposed by the absent counsel and the result of the proceeding would likely have been different. Manning, 348 P.3d at 1019 (reviewing jury note error for harmlessness beyond a reasonable doubt).

D. The stock jury instruction that advises counsel's statements are not evidence is not a cure-all for prosecutorial misconduct, and Bowser's convictions should be reversed based on the State's repeated inflammatory comments during closing argument.

The opening brief raised three claims of prosecutorial misconduct which occurred during closing arguments. The State now contends that the jury was instructed that arguments by counsel are not evidence and that said instruction inoculates these proceedings from being affected by prosecutorial misconduct. Answering Brief, p. 26, citing "Whorton v. Sheppard, 2010 Nev. LEXIS 72 at *7 (2010)." Assuming the State is referencing this Court's unpublished disposition in Docket No. 54824, said disposition is unpublished, non-precedential, and cannot be cited to this Court as authority. See Nevada Rule of Appellate Procedure 36.[1]

This Court has certainly granted relief in prior published matters on claims that included prosecutorial misconduct. McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984); Valdez v. State, 124 Nev. 97, 196 P.3d 465 (2008). Moreover, the Utah Supreme Court has directly addressed the contention

[1] A pending change to this Rule would not appear to have any effect on a disposition from 2010. See ADKT 504 (March 7, 2017).

that stock jury instructions provide immunity to prosecutorial misconduct claims:

> The trial court did provide an instruction admonishing the jury to "conscientiously and dispassionately consider and weigh the evidence" and "reach a just verdict regardless of what the consequences of such verdict may be," and instructing them not to consider or be influenced by "any statement of counsel as to facts not shown in evidence" or "any statements of counsel as to what the evidence is, unless it is stated correctly." However, this instruction was provided before closing arguments, and trial counsel did not ask the trial court to remind the jury of these obligations during or immediately after closing arguments. [See Id.] While this instruction may be sufficiently curative in some situations, we do not believe that is the case here due to the less-than-over-whelming evidence supporting the verdict, the pervasiveness of the prosecutor's misconduct, and the centrality of the issue of credibility to this case.

State v. Thompson, 2014 UT App 14, 318 P.3d 1221 (2014).

The analysis from Thompson has ready applicability to the instant matter. The jury was not re-instructed after the closing arguments below. 5 AA 1113-1115. The misconduct here was also pervasive in that it was repeated and inflammatory. It was also directed to the central issue in the case, i.e. whether Bowser was "hunting" or acting like an "animal" as the

State contended, or, whether as the defense contended Bowser to some degree acted in self-defense.

Finally, the evidence below was obviously *not* overwhelming, because Bowser was acquitted of the most serious charges. The State's contentions to the contrary are misguided in that they focus exclusively on the *actus reus* of the crime itself and not Bowser's well-credited self-defense argument. On the whole, Bowser may well have received an even better outcome absent the State's misconduct, and said misconduct had a substantial and injurious effect on the jury's verdict.

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II. CONCLUSION

Based on the foregoing, Bowser respectfully requests this Court reverse the lower court's judgment of conviction and grant relief on any and all claims presented on appeal.

DATED this 9th day of May, 2017.

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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 2,467 words.

DATED this 9th day of May, 2017.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on May 9, 2017, electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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