

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE FERNANDO MONAY-PINA,)
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
_____)

DOCKET NUMBER: 74199

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APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are person 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.

Attorney of record for Appellant: Matthew Lay, Esq.

Corporation: Nguyen & Lay.

There are no parent corporations involved in the instant appeal.

Dated this 24th day of September, 2018.



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ROUTING STATEMENT

NRAP 28(a)(5) mandates that an appellant's brief contain a routing statement setting forth the following:

whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and citing the subparagraph(s) of the Rule under which the matter falls.

NRAP 17(b) provides that the Court of Appeals "shall hear and decide only those matters assigned to it by the Supreme Court." NRAP 17(b)(1) further provides that "[a]ny direct appeal from a judgment of conviction based on a jury verdict that does not involve a conviction for any offenses that are category A or B felonies" is presumptively assigned to the Court of Appeals.

The foregoing Appellant's Opening Brief should be assigned to the Nevada Supreme Court, because Mr. Monay-Pina is appealing from a Judgment of Conviction, and was convicted of numerous category B felonies.

Dated this 24th day of September, 2018.



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STATEMENT OF JURISDICTION

This Court has jurisdiction over the present appeal pursuant to NRS 177.015. This appeal arises from the district court’s entry of a Judgment of Conviction (Jury Trial) on October 20, 2017. Appellant’s Appendix, Volume I, pages 74-77 (hereinafter referenced “[Volume Number] AA [Page Number]”).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

- I. **THE DISTRICT COURT SHOULD HAVE PROTECTED MONAY-PINA’S RIGHT TO A FAIR TRIAL BY DECLARING A MISTRIAL SUA SPONTE BECAUSE COMMENTS MADE BY THE STATE DURING ITS REBUTTAL ARGUMENT AMOUNTED TO IMPERMISSIBLE BURDEN-SHIFTING, WHICH PREJUDICED MONAY-PINA AND PREVENTED HIM FROM RECEIVING A FAIR TRIAL.**

STATEMENT OF PROCEDURAL HISTORY

On March 04, 2016, the State of Nevada filed an Information charging the Appellant, Jose Fernando Monay-Pina, with the following: one (1) count of Conspiracy to Commit Robbery, a category B felony in violation of NRS 200.370 and 199.480; two (2) counts of Burglary while in Possession of a Firearm, a category B felony in violation of NRS 205.060; two (2) counts of Robbery with Use of a Deadly Weapon, a category B felony in violation of NRS 200.380 and 193.165; four (4) counts of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm, a category B felony in violation of NRS 200.481; one (1) count of Attempt Murder with Use of a Deadly Weapon, a category B felony in violation of NRS 200.010, 200.030, and 193.165; one (1) counts of Battery with Intent to Commit a Crime, a category Be felony in violation of NRS 200.400; one (1) count of Aiming a Firearm at a Human Being, a Gross Misdemeanor in violation of NRS 202.290; and, one (1) count of Coercion with Use of a Deadly Weapon, a category B felony in violation of NRS 207.190. I AA 1-7.

On March 15, 2017, following a three (3) day jury trial, a jury convicted Mr. Monay-Pina of all charges, except for Counts 9 and 10, where the jury convicted him of a lesser included charge of Battery with Use of a Deadly Weapon. I AA 66-69, 106-111.

STATEMENT OF FACTUAL HISTORY

Richard DeCamp

Richard DeCamp testified that on January 12, 2016, he worked the graveyard shift at the 7-Eleven located at 5700 West Charleston in Clark County, Nevada. III AA 145-46. He was the only person in the store. III AA 147.

DeCamp testified that, around 3:00 am, two men entered the store. III AA 147. DeCamp described one of the men as “little” and “short,” and the other man as “tall.” Id. According to DeCamp, both men were wearing masks. III AA 147. DeCamp described the men as wearing “dark coats” with “hoods,” and “black gloves.” III AA 164-167. Both men had firearms. Id. Additionally, DeCamp described the firearms as “a .45.” III AA 167.

The men pointed their firearms at DeCamp. III AA 150. The tall man asked DeCamp “for the money.” III AA 147. DeCamp gave the men approximately one hundred and thirty dollars (\$130.00) from the store’s registers. III AA 148-149. The tall man also asked DeCamp for his wallet. III AA 151. DeCamp showed the tall man that his wallet was empty. III AA 151. The men told DeCamp to lie on the floor until they were gone. III AA 150. The two men left the store together. III AA 151. DeCamp lied on the floor for a couple of minutes, and then called 9-1-1. III AA 152.

According to DeCamp, the police arrived approximately ten (10) minutes after he called 9-1-1. III AA 153. A police officer asked DeCamp to “take a ride down the street.” III AA 153. DeCamp testified that the officer drove him in a police car about nine (9) blocks. III AA 153, 172.

The officer showed DeCamp one (1) person wearing a jacket and asked him if “that’s the jacket the guy had on” III AA 153, 168. DeCamp identified the jacket as belonging to one of the people who robbed him. III AA 154. However, DeCamp was not able to identify the person detained by police as someone who robbed him because the perpetrators wore masks. III AA 155.

Isaiah Simmons

Isaiah Simmons is employed by the Las Vegas Metropolitan Police Department as a patrol officer. III AA 174. On January 12, 2016, at 3:52 AM, Simmons responded to the 7-Eleven located at 5700 West Charleston. III AA 174-75, 181. Simmons testified that, when he arrived, the suspects were gone. III AA 174. According to Simmons, the suspects took one hundred and thirty-nine dollars (\$139.00) from the 7-Eleven. III AA 176.

Simmons testified that suspects in the robbery were “two Hispanic males that enter in the building brandishing long firearms, dark clothing, gloves, [and] masks.” III AA 177. Simmons clarified that DeCamp described the firearms as large handguns. III AA 188.

Abraham Aguirre

Abraham Aguirre is employed as a sergeant with the Las Vegas Metropolitan Police Department. III AA 191. Aguirre testified that, on January 12, 2016, he responded to the 7-Eleven located at 5700 West Charleston. III AA 191.

Later, at 4:22 am, Aguirre responded to another, “high priority” call located approximately three (3) blocks away from the 7-Eleven, at 504 Brush Street. III AA 193, 193, 196. According to Aguirre, the details of the call stated that, “two Hispanic males wearing dark clothing had forced their way into ... [a] home and were pistol whipping the uncle, and the person that was calling was the niece that lived in the actual main home.” III AA 194.

Aguirre testified that, when he arrived at 504 Brush Street, he observed a “bloody axe” near the entrance to the carport, and “a lot” of blood in a bedroom. III AA 197.

Aguirre learned that another officer located two (2) suspects in the back yard of a nearby home. Id. Aguirre responded to 510 Brush Street, where officers took two (2) suspects into custody. III AA 199-204. Aguirre identified the two suspects as Monay-Pina and his co-defendant. III AA 204-05, 207-208.

According to Aguirre, officers located a wallet and “a wad of money” near where Monay-Pina was apprehended. III AA 204. Aguirre also testified that officers recovered the victim, Javier Colon’s wallet from the area where the

Monay-Pina was apprehended. III AA 206-07. Additionally, Aguirre testified that officers recovered a “black ski mask.” III AA 206. Further, Aguirre testified that officers recovered “two knives, a phone, and a set of keys.” Id. Aguirre testified that officers recovered “a few knives, like hunting knives in their sheaths, as well as [a] set of red gloves” from the area where Venegas was apprehended. III AA 208. Additionally, Aguirre recalled, officers recovered “another ski mask” and “two handguns or replicas” from the area near where Venegas was apprehended. III AA 209.

Javier Colon

On January 12, 2016, Javier Colon lived with his sister, Adriana Colon, and her three (3) children, at 504 Brush Street. III AA 232-33. Colon testified that he lived in the garage. III AA 233.

According to Colon, he was sleeping when two men entered the garage. III AA 235. Colon recognized one of the men, Venegas, because he had previously worked with Venegas. III AA 236. Colon testified that Venegas was screaming, “Javier, get up, get up.” III AA 235-36. Colon further testified that Venegas hit him in the head with a pistol. III AA 238-329. Colon also identified Monay-Pina in court. III AA 237. Colon knew Monay-Pina because he had worked with him before this incident. III AA 266, 275-76.

Colon testified that the other man aimed his pistol through a window at Colon's family. III AA 239-240. The other man was wearing a "coal black" colored coat, black and red colored gloves, and a green bandana. III AA 273, 274. Colon testified that he recognized the gloves because they were the same color as the gloves provided by the landscaping company he worked for with Venegas and Monay-Pina. III AA 277. According to Colon, Venegas screamed at Ariana Colon that, "don't do anything, we're going to kill you, too." III AA 246.

According to Colon, he was lying in bed when Venegas picked up an axe located next to Colon's bed. III AA 240. Venegas began hitting Colon with the axe. III AA 240. Venegas first hit Colon in leg and ribs. III AA 241. Then, Venegas attempted to hit Colon in the head. III AA 241. Colon blocked the hit with his hand, but the axe cut his hand. III AA 241. Colon testified that the suspects ran away once the police arrived. III AA 242. Colon was taken to the hospital in an ambulance. III AA 245.

Colon testified that the suspects took his wallet, a camera, an "MP3," and several knives. III AA 246. Colon identified one of wallets and the knives recovered from the area where officers apprehended Venegas and Monay-Pina as his. III AA 251.

Adriana Colon

Adriana Colon testified that, on January 12, 2016, she lived at 504 Brush Street. III AA 278. At approximately 4:00 am, Adriana Colon heard her brother scream that, “someone was threatening him.” III AA 280. Adriana went to the window. She observed two men outside. The men told Adriana to “shut up” or they would “break me.” III AA 280. The men pointed pistols at the windows of the residence. III AA 281. Adriana does not think the men could see her, because “it was so dark.” III AA 281.

The men told Javier Colon to “stand up.” III AA 281. Adriana believed she heard the men beating Javier Colon. III AA 282. Adriana’s daughter called the police. III AA 283.

Justin Spurling

On January 12, 2016, Justin Spurling was employed with the Las Vegas Metropolitan Police Department as a patrol officer. III AA 337-338. Spurling and his partner, Ivan Duron, responded to a call for service at 504 Brush Street. III AA 338. According to Spurling, the details of the call were that “somebody was being beaten by two men with handguns.” III AA 338.

Once he arrived at 504 Brush Street, Spurling heard screaming coming from the side of the house. III AA 338. Spurling followed the screams to a room off of the carport. III AA 339. Spurling observed a “gentleman on the bed bleeding pretty

badly from his face, as well as blood spatter on the wall behind him.” III AA 340.

Spurling testified that the man appeared to be in pain and was crying and screaming. III AA 340.

Spurling then attempted to locate anyone else who was involved in the incident. III AA 341. Duron stayed with the man. III AA 365.

Spurling located an individual, later identified as Monay-Pina, in the backyard of a residence approximately two houses away. III AA 342, 352-53. According to Spurling, Monay-Pina was wearing a “black stocking cap. III AA 342.

Additionally, Monay-Pina allegedly ducked down as soon as he saw Spurling. III AA 342. Spurling apprehended Monay-Pina. III AA 346-47. According to Sperling, Monay-Pina stated, “you don’t understand. We were a victim, I believe, tire slashing, and we made a report, but you guys didn’t listen.” III AA 351.

Sperling testified that he located a “wad of cash” and Javier Colon’s wallet from the bushes near where he located Monay-Pina. III AA 372. Sperling also located a “replica firearm,” and a knife and sheath near where Monay-Pina was apprehended. III AA 355-56.

As he was apprehending Monay-Pina, Spurling spotted a second subject lying, later identified as Venegas, underneath a shed in the back yard. III AA 347, 358. Spurling testified that other officers apprehended the second subject. III AA 350. Sperling observed another replica firearm and another sheath and knife near

where Venegas was located. III AA 356. Sperling testified that officers located gloves from underneath the shed where Venegas was located. III AA 357.

Sperling testified that he stood next to Venegas at the show up with DeCamp. III AA 358-59.

SUMMARY OF THE ARGUMENT

The district court should have protected Monay-Pina's right to a fair trial by declaring a mistrial sua sponte because the State shifted the burden of proof to Monay-Pina.

ARGUMENT

- I. **THE DISTRICT COURT SHOULD HAVE PROTECTED MONAY-PINA'S RIGHT TO A FAIR TRIAL BY DECLARING A MISTRIAL SUA SPONTE BECAUSE COMMENTS MADE BY THE STATE DURING ITS REBUTTAL ARGUMENT AMOUNTED TO IMPERMISSIBLE BURDEN-SHIFTING, WHICH PREJUDICED MONAY-PINA AND PREVENTED HIM FROM RECEIVING A FAIR TRIAL.**

STANDARD OF REVIEW

“As a general rule, the failure to object or request an instruction will preclude review by this [C]ourt.” Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990). There is, however, an exception to the general rule in instances where “the errors are patently prejudicial and require the court to intervene sua sponte to protect the defendant's right to a fair trial.” Id. (quoting Downey v. State, 103 Nev. 4, 7, 731 P.2d 350, 352 (1987)). “In order for error to be reversible, it must be

prejudicial and not merely harmless.” Ross, 106 Nev. at 928, 803 P.2d at 1106.

The test is “whether ‘without reservation . . . the verdict would have been the same in the absence of error.’” Id. (quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988)). See also Medina v. State, 122 Nev. 346, 355, 143 P.3d 471, 477 (2006) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)) (“[R]eversal is not required if the State could show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'”). “The guilty verdict must be free from doubt.” Id. (citing Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988); Yates v. State, 103 Nev. 200, 206, 734 P.2d 1252, 1256 (1987)).

ARGUMENT

An error is of constitutional dimension if it impairs a defendant’s constitutional rights. Martimorellan v. State, 131 Nev. Adv. Rep. 6, 343 P.3d 590, 592 (2015). A criminal defendant has a “Sixth Amendment right to a fair trial by an impartial jury.” Id. (quoting Valdez v. State, 124 Nev. 1172, 1185, 196 P.3d 465, 474 (2008)). An error which violates this right is of constitutional dimension. Martimorellan, 131 Nev. Adv. Rep. 6, 343 P.3d at 592. The presumption of innocence “is a basic component of ‘the fair trial’ guaranteed by the Fourteenth Amendment ‘under our system of criminal justice.’” Watters v. State, 129 Nev. 886, 892, 313 P.3d 243, 248 (2013) (quoting Estelle v. Williams, 425 U.S. 501,

503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). A presumption-of-innocence error is of constitutional dimension. Id. at 892, 313 P.3d at 248.

A district court may grant a mistrial “... where some prejudice occurs that prevents the defendant from receiving a fair trial.” Jeffries v. State, 133 Nev. Adv. Rep. 47, 397 P.3d 21, 25 (2017) (quoting Rudin v. State, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004)).

The prosecution bears the burden of proving all elements of the offense charged. Barone v. State, 109 Nev. 778, 858 P.2d 27, 28 (1993). “[I]t is generally improper for a prosecutor to comment on the defense’s failure to produce evidence ... as such comment impermissibly shifts the burden of proof to the defense.” Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996) (citing Ross, 106 Nev. At 927, 803 P.2d at 1105-06). “Such shifting is improper because ‘it suggests to the jury that it was the defendant’s burden to produce proof by explaining the absence of ... evidence. This implication is clearly inaccurate.’” Id. “The tactic of stating that the defendant can produce certain evidence ... is an attempt to shift the burden of proof and is improper.” Harkness v. State, 820 P.2d 759, 761, 107 Nev. 800 (1991) (quoting Barron v. State, 105 Nev. 767, 783 P.2d 444 (1989)).

Here, during the State’s rebuttal argument, the prosecutor commented on defense counsel’s failure to address “any of the evidence” during closing

argument. Specifically, the following occurred during the State’s rebuttal argument:

MR. SCHWARTZ: ... I do think it’s interesting that we go through all these different pictures, all this evidence, all these things. The defense gets up and talks to you about their closing, right? Their case – they don’t show you any of the pictures, right? They don’t go through any of the evidence.

IV AA 532.

The prosecutor’s comments during the State’s rebuttal argument shifted the burden of proof to Monay-Pina. Specifically, the State’s comments suggested to the jury that Monay-Pina should be found guilty, because his attorney failed to address “any of the pictures” or “go through any of the evidence” during defense counsel’s closing argument. Consequently, the district court sustained the co-defendant’s objection to the prosecutor’s comments and admonished the jury regarding the State’s burden of proof. IV AA 533-34.

Unfortunately, however, trial counsel for Monay-Pina failed to object to the prosecutor’s statements, nor did he ask for a bench conference and a curative instruction to the jury, nor did he request a mistrial. Nevertheless, the district court should have protected Monay-Pina’s right to a fair trial by declaring a mistrial sua sponte because the State shifted the burden of proof to Monay-Pina.

CONCLUSION

Based on the foregoing, this Court should reverse Mr. Monay-Pina's conviction.

Dated this 24th day of September, 2018.

NGUYEN & LAY

A handwritten signature in black ink, appearing to be 'm' followed by a stylized 'J' or 'L'.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.
2. I further certify that this brief does not comply 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 proportionately spaced, has a typeface of 14 points or more, and contains 2,808 words.
3. Finally, 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, in particular 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 on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of September, 2018.



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CERTIFICATE OF ELECTRONIC TRANSMISSION

The undersigned hereby declares that on September 24, 2018, an electronic copy of the foregoing APPELLANT'S OPENING BRIEF was sent via the master transmission list with the Nevada Supreme Court to the following:

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