IN THE SUPREME COURT OF THE STATE OF NEVADA

CASIMIRO VENEGAS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 74241

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is appropriately retained by the Court of Appeals pursuant to NRAP 17(b)(1) because it involves convictions for Category B felonies.

STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion by denying the motion for mistrial when the State did not shift the burden of proof.

2. Whether the District Court was manifestly wrong when it allowed the child witnesses to testify since they were present at the time of the crime.

3. Whether no cumulative error occurred.

STATEMENT OF THE CASE

On March 4, 2016, Appellant Casimiro Venegas was charged by way of Information with: Count 1 – Conspiracy to Commit Robbery (Category B Felony -

NRS 200.380, 199.480); Count 2 – Burglary while in Possession of a Firearm (Category B Felony - NRS 205.060); Count 3 – Robbery with Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165); Count 4 – Burglary while in Possession of a Firearm (Category B Felony - NRS 205.060); Count 5 – Robbery with Use of a Deadly Weapon (Category B Felony - NRS 200.380, 193.165); Count 6 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony - NRS 200.481); Count 7 – Attempt Murder with Use of a Deadly Weapon (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); Count 8 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony - NRS 200.481); Count 9 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony - NRS 200.481); Count 10 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony - NRS 200.481); Count 11 – Aiming a Firearm at a Human Being (Gross Misdemeanor - NRS 202.290 - NOC 51447); Count 12 – Coercion with Use of a Deadly Weapon (Category B Felony - NRS 207.190, 193.165); and Count 13 –. Battery with Intent to Commit a Crime (Category B Felony - NRS 200.400.2). 1 AA 1 – 9.

Venegas' trial commenced on March 13, 2017. 1 AA 14. On March 15, 2017, the Jury returned a verdict of guilty on all charges. 2 AA 428 – 29. On September 7, 2017, Venegas was sentenced to the Nevada Department of Corrections as follows: Count 1 – 24 to 60 months; Count 2 – 10 to 25 years, concurrent with Count 1; Count 3 – 10 to 25 years, concurrent with Counts 1 and 2; Count 4 – 10 to 25 years, consecutive to Counts 1, 2, and 3; Count 5 – 10 to 25 years, concurrent with Count 4; Count 6 – 24 to 120 months, concurrent with Counts 1, 2, 3, and 5; Count 7 – 10 to 25 years, consecutive to 1, 2, and 3,

concurrent with Counts 4, 5, and 6; Count 8 – 24 to 120 months, concurrent with Counts 1, 2, 3, 4, 5, 6, and 7; Count 9 – 24 to 60 months, concurrent with Counts 1, 2, 3, 4, 5, 6, 7, and 8; Count 10 – 24 to 60 months, concurrent with Counts 1, 2, 3, 4, 5, 6, 7, 8, and 9; Count 11 – 364 days in the Clark County Detention Center, concurrent with Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10; Count 12 – 24 to 60 months, consecutive to Counts 1, 2, 3, 4, 5, and 7 and concurrent with Counts 6, 8, 9, 10, and 11; Count 13 – 24 to 60 months, concurrent with Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, for an aggregate sentence of 22 to 55 years. 2 AA 439 – 42.

The Judgment of Conviction was filed on September 21, 2017. Id. Venegas filed a Notice of Appeal on October 10, 2017. 2 AA 443 – 45. Venegas filed an Opening Brief on April 16, 2018. The State responds herein.

STATEMENT OF THE FACTS

On January 12, 2016, Venegas and Jose Monay-Pina, went to 7-Eleven. 1 AA 30. Upon arrival, they went inside the store and robbed the store clerk, Richard DeCamp, at gunpoint. 1 AA 30 – 31. DeCamp handed over approximately $140 in cash. 1 AA 59. Venegas and Monay-Pina were wearing cloth face masks and big-hooded coats covering their heads. 1 AA 45. They both had black guns. Id. Venegas was also wearing red gloves. Id.

After robbing 7-Eleven, Venegas and Monay-Pina went approximately 1 mile down the road to 504 Brush Street. 1 AA 115. Inside 504 Brush Street, Javier Colon was sleeping. 1 AA 118. His sister, Adriana Colon, and her three children, Lizbeth

Avina (17 years old), Samantha Avina (15 years old), and Cesar Avina (11 years old), were sleeping. 1 AA 163. Venegas and Monay-Pina broke into Javier's room and started attacking him—beating him, pistol whipping him, and robbing him. 1 AA 121 – 22. Venegas and Monay-Pina took Javier's wallet, some collectible knives, and other items. 1 AA 129. They also picked up an axe and started swinging it at Javier's head and hitting him. 1 AA 123 – 24. Adriana was awoken by Javier's screams for help, and she yelled at Venegas and Monay-Pina to stop. 1 AA 163. They then pointed the guns at her and threatened to kill her and her children if she called 9-1-1. 1 AA 164. Fortunately, Lizbeth called 9-1-1, and the police arrived shortly after. 1 AA 166. This caused Venegas and Monay-Pina to flee into the neighbor's yard at 510 Brush Street, which is where they were eventually apprehended. 1 AA 125.

Venegas was found hiding under a shed. 1 AA 92. In that vicinity, officers found two black handguns, which ended up being BB guns. 1 AA 92 – 93. Officers also found a collectible knife, cloth face mask, and bright red gloves. Id. On the other side of the yard, Monay-Pina was found hiding in some bushes. 1 AA 87. There officers found a cloth face mask, a black glove, another black BB gun, collectible knife, $140 in cash, and Javier's wallet. 1 AA 87 – 90.

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SUMMARY OF THE ARGUMENT

Venegas argues that the State improperly shifted the burden of proof. AOB 7 – 8. The District Court did not abuse its discretion by denying the motion for mistrial when the State did not shift the burden of proof. This single comment Venegas complains of does not warrant a reversal of Venegas' conviction. The State's comment was not improper. As discussed at the bench, the State was merely making argument related to what Venegas said in his closing argument. 2 AA 416. The State was not shifting the burden and was not commenting on Venegas' failure to present evidence or failure to testify—merely his failure, during his closing, to acknowledge the evidence that was presented. Id. Even assuming *arguendo*, that the State's comment was improper, Venegas cannot show prejudice. Moreover, the District Court immediately gave a curative instruction. Thus, the error was harmless and any potential prejudice was cured.

Venegas appears to argue that the District Court erred by allowing the child witnesses to testify. AOB 8 – 10. The District Court did was not manifestly wrong when it allowed the child witnesses to testify since they were present at the time of the crime. Here, the District Court's decision was not manifestly wrong. Lizbeth, Samantha, and Cesar testified at trial. 1 AA 189; 1 AA 201; 1 AA 214. All 3 children were asleep in the home, when Venegas and Monay-Pina entered Javier's room. As they were present at the time of the robbery, their testimony is clearly relevant under

NRS 48.015. Moreover, Venegas fails to identify any reason why the probative value of their testimony is substantially outweighed by the danger of unfair prejudice, under NRS 48.035. AOB 9 – 10. Venegas fails to even allege any improper misconduct by the State. AOB 8 – 10. Further, the testimony was not inadmissible hearsay as the District Court correctly ruled that the State laid proper foundation and allowed the testimony as an excited utterance, under NRS 51.095.

Venegas argues that "the combination of errors in this case warrants a reversal. . ." AOB at 11. However, no cumulative error occurred. First, Venegas has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*.") (emphasis added). Second, there was more than sufficient evidence to support Venegas' convictions and, therefore the issue of guilt is not close. Finally, even though Valdez was convicted of attempt murder, the other two factors do not weigh in his favor. Therefore, Venegas' claim of cumulative error has no merit and his conviction should be affirmed.

Accordingly, Venegas is not entitled to relief and his Judgment of Conviction should be affirmed.

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ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE MOTION FOR MISTRIAL WHEN THE STATE DID NOT SHIFT THE BURDEN OF PROOF

Venegas argues that the State improperly shifted the burden of proof. AOB 7 – 8. However, "it is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Venegas only cites to Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989), to support his position. However, Venegas fails to show how Barron supports his position and fails to provide cogent argument. AOB 7 – 8. Based on Venegas' lack of specificity, this Court is not even required to address the issue since it is a generalized claim of error unsupported by relevant authority. State, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are summarily rejected on appeal). However, even if this Court elects to consider the issue on the merits, Venegas is not entitled to relief.

Venegas appears to argue that the State engaged in prosecutorial misconduct and thus the District Court abused its discretion in denying the motion for mistrial. AOB 7 – 8. During rebuttal, the State began to argue:

> 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.

2 AA 415. Venegas objected to burden shifting and the parties approached for a bench conference, where the following exchange occurred:

> MR. SCHWARTZ: That wasn't my intention. I was noting what was presented, and I'm going to argue it's our burden still. I wasn't saying that they have to present anything, but what they argued was nothing about the pictures. That's all I said.
>
> THE COURT: [Indiscernible].
>
> MR. GILL: And I'm going to have to move for a mistrial, as well. It's my only recourse.
>
> MR. SCHWARTZ: And I can certainly clean up if that's -- if it was implied that I was burden shifting, I would certainly not imply that to them, and I can make it very clear I wasn't.
>
> THE COURT: What is your objection again, Mr. Gill?
>
> MR. GILL: Burden shifting.
>
> MR. SCHWARTZ: Burden shifting.
>
> THE COURT: Because?
>
> MR. GILL: We don't get up -- we didn't get up and show them any evidence, show them any photographs or anything in our closing arguments, so the State wins.
>
> MR. SCHWARTZ: And I could see if I was saying that they didn't present a case as far as they didn't put on witnesses, they didn't put on evidence. I would understand that objection, but I was merely explaining what they just got up and did as far as closing arguments, which is what I'm supposed to do as rebuttal, rebutting their arguments which were based on the laws –

2 AA 415 – 16. The Court then sustained the objection, denied the motion for mistrial and gave a curative jury instruction. 2 AA 416. The District Court stated, "I remind

the lady -- the ladies and gentlemen of the jury that the burden is on the State, and the defense is not required to present any evidence." Id.

This single comment does not warrant a reversal of Venegas' conviction. This Court applies a two-step analysis to claims of prosecutorial misconduct. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). This Court first determines whether the prosecutor's conduct was improper, and second, whether the conduct warrants reversal. Id. "A prosecutor's comments should be considered in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (quoting United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038 (1985)). Moreover, "this Court will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Valdez, 124 Nev. at 1188, 196 P.3d at 476.

First, the State's comment was not improper. As discussed at the bench, the State was merely making argument related to what Venegas said in his closing argument. 2 AA 416. The State was not shifting the burden and was not commenting on Venegas' failure to present evidence or failure to testify—merely his failure, during his closing, to acknowledge the evidence that was presented. Id.

Even assuming *arguendo*, that the State's comment was improper, Venegas cannot show prejudice. To determine whether misconduct was prejudicial, this Court examines whether the statements so infected the proceedings with unfairness as to

result in a denial of due process. Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). This Court must consider such statements in context, as a criminal conviction is not to be lightly overturned. Id.

Additionally, this Court has held that "the level of misconduct necessary to reverse a conviction depends upon how strong and convincing the evidence of guilt is." Rowland, 118 Nev. at 38, 39 P.3d at 119. If the issue of guilt is not close and the State's case is strong, misconduct will not be considered prejudicial. Id. Here, the evidence against Venegas was overwhelming. Thus, because the issue of guilt was not close, any alleged prosecutorial misconduct was harmless.

Moreover, the District Court immediately gave a curative instruction reminding the jury that "the burden is on the State, and the defense is not required to present any evidence." 2 AA 416. Thus, the error was harmless and any potential prejudice was cured. The comment did not infect the trial with unfairness so as to affect the verdict and did not deny Venegas his constitutional right to a fair trial.

Venegas cites to Barron to support his argument. 105 Nev. 767, 783 P.2d 444. However, his reliance on Barron is misplaced. In Barron, this Court reiterated that "it is a fundamental principle of criminal law that the State has the burden of proving the defendant guilty beyond a reasonable doubt and that the defendant is not obligated to take the stand or produce any evidence whatsoever." 105 Nev. at 778, 783 P.2d at 451 (*citing* Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397

U.S. 358 (1970); Griffin v. California, 380 U.S. 609 (1965); Emerson v. State, 98 Nev. 158, 643 P.2d 1212 (1982)). Barron goes on to discuss the State's reference to a defendant's failure to testify. 105 Nev. at 779, 783 P.2d at 451. Further, in Barron, this Court ultimately stated "viewing the comments about the appellants being able to testify in the total context in which they were made and mindful of the overwhelming evidence of guilt in this case, we hold that such improper comments do not mandate reversal." Id. Accordingly, Barron is distinguishable from this case and does not support Venegas' position.

Finally, a "denial of a motion for a mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal in the absence of a clear showing of abuse." Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993). Here, the District Court did not abuse its discretion by denying the motion for mistrial and choosing to give a curative instruction. The State was merely making argument related to what Venegas said in his closing argument. 2 AA 416. The State was not shifting the burden and was not commenting on Venegas' failure to present evidence or failure to testify. Id. Based on the overwhelming evidence of Venegas' guilt, this single comment did not result in any prejudice and any potential prejudice was adequately cured by the curative instruction. Accordingly, Venegas has failed to clearly demonstrate that the District Court abused its discretion by denying his mistrial motion and is not entitled to relief.

II. THE DISTRICT COURT WAS NOT MANIFESTLY WRONG WHEN IT ALLOWED THE CHILD WITNESSES TO TEFTIFY SINCE THEY WERE PRESENT AT THE TIME OF THE CRIME

Venegas appears to argue that the District Court erred by allowing the child witnesses to testify. AOB 8 – 10. However, he begins his argument with law related to prosecutorial misconduct. Id. It is unclear how this is related to the issue as there is no analysis, but the State will do its best to respond to each argument.

To the extent Venegas is arguing that the District Court abused its discretion in allowing the children to testify, he is not entitled to relief. District courts are vested with considerable discretion in determining the relevance and admissibility of evidence. Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006). Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice . . . NRS 48.035. However, a district court's decision to admit or exclude evidence will not be reversed on appeal unless it is manifestly wrong. Archanian, 122 Nev. at 1029, 145 P.3d at 1016. Here, the District Court's decision was not manifestly wrong.

Lizbeth, Samantha, and Cesar testified at trial. 1 AA 189; 1 AA 201; 1 AA 214. All 3 children were asleep in the home, when Venegas and Monay-Pina entered Javier's room. As they were present at the time of the robbery, their testimony is clearly relevant under NRS 48.015. Moreover, Venegas fails to identify any reason why the probative value of their testimony is substantially outweighed by the danger

of unfair prejudice, under NRS 48.035. AOB 9 – 10. Venegas states that the children cried during their testimony, but makes no argument as to how this was unfairly prejudicial. AOB 10. Accordingly, the District Court's decision to allow them to testify was not "manifestly wrong." Archanian, 122 Nev. at 1029, 145 P.3d at 1016.

Next, Venegas' prosecutorial misconduct argument must fail. As discussed *supra*, this Court must determine if the prosecutor's conduct was improper, and second, if it was improper does the conduct warrant a reversal. Valdez, 124 Nev. at 1188, 196 P.3d at 476. Here, Venegas fails to even allege any improper misconduct. AOB 8 – 10. As the testimony was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice, under NRS 48.035, there was no improper conduct. Accordingly, Venegas is not entitled to relief.

At trial, the State asked Lizbeth what happened on January 12, 2016. 1 AA 190. Lizbeth responded, "I woke up to my mom yelling stop, and I got up, and I asked her what was happening? She said that there is . . ." Id. Venegas objected to this as hearsay. Id. The State responded arguing that the response was an excited utterance. Id. The State laid the following additional foundation:

> Q: Okay. Let's break that down a little bit what you said. You said you woke up to your mom saying something to you. What was the tone of her voice like?
>
> A: I know it was, like, scared. She was just kind of yelling and – for help, I guess, really.
>
> Q: And so what was it that she was saying to you?

A: She wasn't telling me. She was screaming out to her window saying stop, stop.

1 AA 190. The District Court then ruled that the State laid proper foundation and allowed the testimony as an excited utterance, under NRS 51.095. NRS 51.095 provides, "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule." Venegas made the same objection to Samantha's and Cesar's testimony. 1 AA 203 – 07; 1 AA 212 – 13. All 3 of these children were present in the home, asleep, and awakened by their mother screaming because their uncle was being beaten and robbed. 1 AA 189 – 218. Thus, their testimony was admissible as an excited utterance, under NRS 51.095. Accordingly, the District Court's decision to allow them to testify was not "manifestly wrong" and Venegas is not entitled to relief. Archanian, 122 Nev. at 1029, 145 P.3d at 1016.

III. NO CUMULATIVE ERROR OCCURRED

Venegas argues that "the combination of errors in this case warrants a reversal. . ." AOB at 11. This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-5 (2000). Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial. . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (*citing* Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974).

First, Venegas has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*.") (emphasis added). Second, there was more than sufficient evidence to support Venegas' convictions and, therefore the issue of guilt is not close. Finally, even though Valdez was convicted of attempt murder, the other two factors do not weigh in his favor. Therefore, Venegas' claim of cumulative error has no merit and his conviction should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm Venegas' Judgment of Conviction.

Dated this 11th day of May, 2018.

Respectfully submitted,

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BY */s/ Charles W. Thoman*
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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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and 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, contains 3,668 words and does not exceed 30 pages.
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 11th day of May, 2018.

Respectfully submitted

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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 11, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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