No. 75097

SUPREME COURT OF NEVADA

JAVAR ERIS KETCHUM, *Appellant*, vs. STATE OF NEVADA, *Appellee*,	Supreme Court No. 75097 District Court Case No. C-16-319714-1

CORRECTED DEFENDANT-APPELLANT'S REPLY BRIEF

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INTRODUCTION

Mr. Ketchum relies upon the Statement of Facts in the Opening Brief because the version proffered by the State is not helpful to the examination of the case on its merits. Mr. Ketchum was a victim of a violent street thug, Mr. Ezekiel F. Davis, a "jack boy" with a lengthy criminal record. The State failed to present the "best evidence…to the exclusion of hearsay" as required by N.R.S. § 172.135, when it obtained the grand jury indictment. At trial, the district court compounded the harm through a series of asymmetrical evidentiary rulings that excluded evidence central to Mr. Ketchum's defense and deprived him of his right to a fair trial. In attempting to salvage Mr. Ketchum's convictions, the State makes baseless claims of waiver and, when those fail, unconvincingly attempts to distinguish away controlling precedent that requires reversal.

First, the State conflates and collapses the "slight, even 'marginal' evidence," N.R.S. § 172.155(1) standard with the statutory requirement that the grand jury "receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." *See* State's Ans. Br. at 7-13; and N.R.S. § 172.135. The State's approach would render the statutory requirement a nullity because so long as there is "slight, even

'marginal evidence" then the requirement for "best evidence" in N.R.S. § 172.135 could be excused.

Second, the State concedes that Detective Bunn's testimony regarding what he viewed on the SWAN (zoomed in version of the surveillance footage) was not the same as the version presented to the grand jury. *See* State's Ans. Br. at 13. Nevertheless, State argues that Detective Bunn's testimony was not "hearsay" and that it complied with the "best evidence" rule. *Id.* Not so. The State concedes that the video played to the Grand Jury is not the same video that Detective Bunn was testifying to before the Grand Jury because the version Detective Bunn was testifying to is a zoomed in and/or altered (i.e. blown up) version that differed from the version showed to the Grand Jury. *See* State's Ans. Br. at 13; Grand Jury Tr. ("GJT") at 19, 21-29.*Id.*

Third, in attempting to defend the district court's erroneous evidentiary ruling excluding evidence regarding Mr. Davis' prior record of criminal convictions, the State makes the demonstrably false claim that Mr. Ketchum "denied the district court the ability to rule on Appellant's knowledge of specific prior bad acts…" and "never sought to introduce the prior Judgements of Conviction…and never sought the Court's permission to raise the issue." *See* State's Ans. Br. at 25-26.

The State's claim is belied by the record and its own admission contained in its Answering Brief. Mr. Ketchum's trial counsel filed a Motion to Admit Mr. Davis' lengthy prior record of criminal convictions, with attachments including the Judgments of Conviction, and raised the issue repeatedly at trial. *See* Defendant's Reply Appendix ("DRA") (attached to this Reply). Furthermore, the State's Answering Brief concedes that Mr. Ketchum's trial counsel "made a record regarding the prior acts of the victim." *See* State's Ans. Br. at 21. The district court abused its discretion and committed manifest error when it refused to permit Mr. Ketchum to present evidence regarding Mr. Davis' violent past and his previous convictions. Thus, the district court's evidentiary rulings handicapped Mr. Ketchum's ability to present his self-defense theory of the case.

But the flaws in the proceedings below do not end there. Over objection, the State was permitted to present the emotionally charged and distorted testimony of Mr. Davis' fiancée, Bianca Hicks, when she testified that in the three years she knew him, she had not seen Davis with a gun, even though, Mr. Davis had a prior felon-in-possession conviction. Next, during closing summation, the State introduced highly prejudicial evidence not in the record at trial (not previously disclosed to the defense), without any opportunity for rebuttal by the defense. The defense raised its objection and

preserved the argument for appellate review when it raised the issue in its Motion for New Trial, which was denied by the district court.

The Court should therefore reverse Mr. Ketchum's convictions in their entirety—or at a minimum, vacate the convictions and remand for a new trial.

I. DISTRICT COURT ABUSED ITS DISCRETION AND THE DEFENDANT SUFFERED PREJUDICE AS A RESULT

A. The Enhanced Video Was Relevant to the Grand Jury Because It was "Best Evidence" Under N.R.S. § 172.135

The State claims in conclusory fashion that the different versions of the surveillance video was irrelevant to the grand jury because "the State need only show that a crime has been committed and that the accused probably committed it…[by] slight, even 'marginal' evidence." *See* State's Ans. Br. at 8; and *Sheriff v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980).

The State's argument implicitly concedes that it failed to present the "best evidence…to the exclusion of hearsay" as required by N.R.S. § 172.135, when it obtained the grand jury indictment. The State's Answering Brief does not dispute and has, therefore, waived any argument that failing to show the Grand Jury the surveillance video with the aid of the SWAN device was not "best evidence" within the meaning of N.R.S. § 172.135(2). Instead, by arguing that "slight, even 'marginal' evidence" is the key factor, the State's argument impermissibly conflates and collapses two separate statutory

provisions: (1) N.R.S. § 172.155(1), which permits probable cause to be supported by "slight, even 'marginal' evidence"; and (2) N.R.S. § 172.135(2), which provides that a "grand jury can receive none but legal evidence ... to the exclusion of hearsay or secondary evidence." N.R.S. § 172.135(2).

The State's preferred reading of N.R.S. § 172.155(1) as permitting the State to obtain an indictment whenever it presents "slight, even 'marginal' evidence," would impermissibly render the requirements for best evidence contained in N.R.S. § 172.155(1) superfluous.[1] *See S. Nev. Homebuilders Ass'n v. Clark County*, 117 P.3d 171, 173 (Nev. 2005) (a statute must be interpreted "in a way that would not render words or phrases superfluous or make a provision nugatory") (internal quotation marks omitted); *Bourne Valley Court Trust v. Wells Fargo Bank*, N.A., 832 F.3d 1154 (9th Cir. 2016. The surplusage canon has deep roots in statutory interpretation and arises out of the recognition that "words cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936). A basic principle of statutory interpretation is that statutes should be construed "so as

[1] The State's response raises a legal argument concerning a matter of statutory interpretation. "Statutory interpretation is a question of law subject to de novo review." *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). The goal of statutory interpretation "is to give effect to the Legislature's intent." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011).

to avoid rendering superfluous" any statutory language: "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoted in *Corley v. United States*, 556 U.S. 303, 314 (2009)); and *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).

As a result of the State's incomplete and altered presentation to the grand jury, the grand jury was deprived of its role as a bulwark between those sought to be charged with crimes and their accusers and, thus, act as an informed body throughout the entire course of the proceedings. *See Sheriff v. Frank*, 103 Nev. at 165, 734 P.2d at 1244; *Sheriff v. Frank*, 103 Nev. 160, 165, 734 P.2d 1241, 1244 (1987) ("The grand jury's `mission is to clear the innocent, no less than to bring to trial those who may be guilty.'") (quoting *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S. Ct. 764, 772-773, 35 L. Ed. 2d 67 (1973)). Violation of a statutory duty that impedes the proper functioning of the grand jury constitutes actual prejudice and, therefore, Mr. Ketchum's convictions should be reversed. *See Ostman v. Eighth Judicial District Court*, 816 P.2d 458 (1991).

B. Detective Bunn's Testimony and the Surveillance Footage Constituted Hearsay Evidence

The State claims that Detective Bunn's testimony regarding an altered version of surveillance video is not hearsay evidence within the scope of N.R.S. § 51.035. *See* State's Ans. Br. at 12-4. In the alternative, the State claims that "a grand jury proceeding may be sustained even though it relies on nothing but hearsay testimony." *Costello v. United States*, 350 U.S. 359 (1956). *See* State's Ans. Br. at 12. The State's reliance on *Costello* is misplaced for one very simple reason: *Costello* is inapposite in this case. In contrast to N.R.S. § 173.135(2), the Federal Rules of Criminal Procedure Rule 5.1(a) makes it clear that a finding of probable cause by a federal grand jury may be based on "hearsay evidence in whole or in part." *See* Fed. R. Crim. P. 5.1(a); and C. Wright, Federal Practice and Procedure: Criminal §80 (1969, Supp. 1971). However, by enacting N.R.S. § 173.135(2), the Nevada legislature has not adopted the federal approach, and made it abundantly plain that hearsay evidence is not sufficient.

N.R.S. § 51.035 defines hearsay as follows:

> "Hearsay" means a statement offered in evidence to prove the truth of the matter asserted…

N.R.S. § 172.135(2) provides in relevant part as follows:

> The Grand Jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence.

See N.R.S. § 172.135(2).

The "definition of hearsay as used in N.R.S. § 172.135(2) is the same as that found in N.R.S. § 51.035." *Gordon v. Eighth Judicial Dist. Court*, 112 Nev. 216, 223, 913 P.2d 240, 245 (1996). N.R.S. § 51.035 defines hearsay as an out-of-court statement offered to prove the truth of the matter asserted. *Id.*

In the present case, the State presented to the Grand Jury audio visual evidence *materially different* from the video about which Detective Christopher Bunn testified. *See* DA-23-33 (GJT at 19-29.) The video played to the Grand Jury from the Swann Recording device was not the same video that Detective Bunn was testifying to (and providing a running commentary) before the grand jury. *Id*. The video that Detective Bunn was testifying about was a zoomed in, i.e. altered version that displays facts, events and/or occurrences that were not visible or seen on the version presented to the Grand Jury. *Id*. and DA-74-85. Consequently, Detective Bunn testified to facts, events and occurrences from a video—a video that was not played to the Grand Jury and where the same facts, events or occurrences were not visible—and his testimony constituted impermissible hearsay. *Id.*

In *United States v. Taylor*, 530 F.2d 639, 640-41 (5th Cir. 1976), the US Court of Appeals for the Fifth Circuit addressed the admissibility of film (and the resulting contact prints) produced by a surveillance camera that bank robbers automatically triggered after they locked bank employees inside a vault during a robbery. Trapped in the vault, the employees were unable to authenticate the images as they did not see what happened during the rest of the robbery. *Id*. at 641. The proponent instead authenticated the images through a witness who "testified as to the manner in which the film was installed in the camera, how the camera was activated, the fact that the film was removed immediately after the robbery, the chain of its possession, and the fact that it was properly developed and contact prints [were] made from it." *Id.* at 641-42.

Here, the surveillance video and Detective Bunn's testimony were not introduced as either descriptive or illustrative evidence but rather as assertive evidence for the truth of the matter. Consequently, by presenting Detective Bunn testimony as to facts, events and occurrences, *i.e.* as a narration of the surveillance video recovered from the Swann device from a video—a video that was not played to the Grand Jury and where the same facts, events or occurrences were not visible to the Grand Jury—the State ran afoul of N.R.S. § 172.135(2) and undermined the purpose and function of the grand jury

which is to assure "that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor, the government or private persons." *United States v. Gold*, 470 F. Supp. 1336, 1346 (N.D.Ill. 1979) (quoting *United States v. DiGrazia*, 213 F. Supp. 232, 235 (N.D.Ill. 1963)). Finally, none of the statutory hearsay exceptions applied to permit the State to present hearsay evidence. *See* N.R.S. § 51.035.

Accordingly, this Court should reverse Mr. Ketchum's convictions.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY PROHIBITING THE DEFENSE FROM INTRODUCING EVIDENCE OF THE VICTIM'S PRIOR CRIMINAL CONVICTIONS AND BAD ACTS EVIDENCE AND THE STATE OPENED THE DOOR WHEN IT SOLICITED CHARACTER EVIDENCE FROM BIANCA HICKS

A. The State's Claim of Waiver Is Without Merit: The District Court Was Not Denied the Ability to Rule on Appellant's Knowledge of Specific Prior Bad Acts And Repeatedly Sought the Court's Permission to Raise the Issue

The State's bald unsupported claim that Mr. Ketchum "denied the district court the ability to rule on Appellant's knowledge of specific prior bad acts…" and "never sought to introduce the prior Judgements of Conviction…and never sought the Court's permission to raise the issue" is belied by the record. *See* State's Ans. Br. at 25-26 and DRA at 1-58. Moreover, the State's own Answering Brief confirms that Mr. Ketchum's trial counsel filed a Motion to Admit Mr. Davis' lengthy prior record of criminal

convictions *and* bad acts generally. The Motion confirms that Mr. Ketchum not only requested a ruling from the Court but also responded to the State's request for a *Petrocelli* hearing and included as attachments with the motion the Judgments of Conviction relating to the criminal convictions that he sought to introduce at trial.[2] In fact, he raised the issue repeatedly at trial and in his post-verdict Motion for Judgment of Acquittal. *See DRA* (attached to this Reply). Furthermore, the State's Answering Brief concedes that Mr. Ketchum's trial counsel "made a record regarding the prior acts of the victim." *See* State's Ans. Br. at 21. Thus, the State claim of waiver is contradicted by the record and lacks merit.[3]

[2] While not an issue raised explicitly by the State, the State fails to cite a single decision of this Court or sister courts that extends *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985) to the factual scenario presented in this case. *Petrocelli* requires the trial court to hold a hearing to determine the admissibility of prior convictions and/or bad acts generally as evidence against the defendant to protect the defendant's right to a fair trial. The rational of *Petrocelli* does not provide any support for the State's argument that it was entitled to a *Petrocelli* hearing and the State makes no attempt to explain how the principles of *Petrocelli* apply to victim's bad acts.

[3] Even if the State's frivolous argument of waiver on the prior criminal convictions as opposed to bad acts generally were accepted, such arguments are "subsidiary legal arguments" that need not have been exhausted below. *See Gill v. INS*, 420 F.3d 82, 85-86 (2d Cir. 2005).

B. The District Court Erroneously Excluded Evidence of the Victim's Prior Bad Acts and Violent Criminal History

The district court abused its discretion and committed manifest error when it refused to permit Mr. Ketchum to present evidence regarding Mr. Davis' previous convictions for robbing his victims at gunpoint and his prior bad acts. The defense theory of the case was heavily dependent upon Ketchum's belief and knowledge of the victim's specific prior bad acts, which formed the basis of his opinion of the victim's reputation and character for violence. The thrust of Mr. Ketchum's self-defense theory at trial was that (1) he was aware of Mr. Davis' prior criminal history for robbery and that Mr. Davis had been in jail in the past, and (2) Mr. Ketchum knew of Mr. Davis' prior history of violent behavior, namely, robbery. I RA 269-70.

Confusingly, the State claims that "Appellant did not argue that he knew Eekiel [Mr. Davis] had specifically 'attempted to rob victims at gunpoint in a parking lot." *See* State's Ans. Br. at 20. Not so. The State's Answering Brief concedes that Mr. Ketchum testified that Ezekiel had "been in jail – he's been to jail – in and out of jail and he's known as a jack boy." See State's Answering Br. at 21 (citing II RA 269). The term "jack boy" is slang for "a person who is a thief, commits armed robberies." *See* Urban Dictionary (2019), available at <

https://www.urbandictionary.com/define.php?term=jack%20boy> [last accessed 10 January 2019].

The district court precluded the defendant from offering evidence of Mr. Davis' prior robbery convictions and robbery related offenses. As argued in Mr. Ketchum's Opening Brief, "[t]hese offences involved a similar factual scenarios and *modus operandi* where Ezekiel Davis accosted his robbery victims outside in parking lots and eventually robbed or attempted to rob them; this was similar to the facts as alleged by Mr. Ketchum when he took the stand." Also the nature of Mr. Davis' prior robbery conviction occurred under similar circumstances to what Mr. Ketchum testified and supported his theory of self-defense. *Id*. Specifically, Mr. Ketchum testified that Mr. Davis attempted to rob him at gunpoint. *Id.* At the time the trial court considered Defendant's motions to introduce the above-described evidence, the trial court was aware that Mr. Ketchum was asserting that the fatal shooting of the victim was done in self-defense. *Id*. The trial court was also aware that certain specific acts of violence of the deceased were known to defendant Ketchum or had been communicated to him. *Id*.

As a result, the district court handicapped Mr. Ketchum's ability to present his self-defense theory of the case and thus abused its discretion and

committed manifest error. Accordingly, this Court should reverse Mr. Ketchum's convictions and remand for a new trial.

C. The State Opened the Door to the Victim's Prior Bad Acts When It Solicited Evidence Regarding the Victim's Possession of a Gun from Its Witness Bianca Hicks

The State attempts to limit the effect of Ms. Bianca Hicks' testimony by arguing that it had limited the scope of its questioning to the previous three years. *See* State's Ans. Br. at 29-31. The State's argument is disingenuous. Once Ms. Hicks testified regarding Mr. Davis' trait, i.e. that he did not possess a gun in the time that she knew him, a key point in Mr. Ketchum's defense, the State opened the door to evidence of Mr. Davis' character or a trait of his character. The State's Answering Brief makes no attempt to distinguish the cases cited in Mr. Ketchum's Opening Brief. As argued in his initial brief, in a counter-factual scenario, in *Daniel v. State*, 119 Nev. 498 (2003), this Court held that the "Statute which prohibits the admission of evidence of other crimes, wrongs, or acts to prove a person's character was not applicable because defendant placed his character in issue on direct examination, and instead, statute providing that, once a criminal defendant presents evidence of his character or a trait of his character, the prosecution may offer similar evidence in rebuttal governed whether prosecutor's cross-examination of defendant regarding his prior arrests was proper." *Id.* If the State is permitted

to present character evidence where the defendant has presented evidence of his character or a trait of his character, the reverse should be true too. "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan*, 136 S. Ct. 1412, 1418 (2016).

Put simply, once the State opened the door, Mr. Ketchum should have been entitled to present evidence or elicit testimony regarding Mr. Davis' prior convictions and character, namely, Mr. Davis previous conviction of ex-felon in possession of a firearm. *See also Jezdik v. State*, 121 Nev. 129 (2005) (where defendant placed his character at issue through testimony that he had never been "accused of anything prior to these current charges" the rules of evidence do not prohibit a party from introducing extrinsic evidence specifically rebutting the adversary's proffered evidence of good character).

Accordingly, this Court should reverse Mr. Ketchum's convictions and remand for a new trial.

III. THE STATE FAILED TO DISCLOSE INCULPATORY EVIDENCE

The State claims that "Appellant has utterly failed to cite anything in the record supporting this claim." *See* State's Ans. Br. at 33. Once again, this claim is belied by the record of the proceedings below. In both his Pretrial Writ of Habeas Corpus and in his Motion for a Judgment of Acquittal and New Trial, he specifically raised this argument, which was denied by the

district court. Thus, the State's claim that defense counsel failed to raise this issue below or cite authority to support the defenses' argument lacks merit.

Turning to substance, the dispute returns to what is visible on surveillance footage *with the aid* of the SWAN device and without the aid of the SWAN device. Moreover, when the initial surveillance footage was shown to counsel, counsel was only shown parts of the video. Counsel had no control of the video while it was played, and law enforcement controlled the surveillance.

During the State's closing summation, the State presented two alleged segments of surveillance undersigned counsel did not previously view and that were not presented during the course of trial that appeared to be "blown up" segments of the video visible with the aid of the SWAN device. *See Rippo v. State*, 113 Nev. 1239, 1255, 946 P.2d 1017, 1027 (1997) (it is improper for the State to refer to facts not in evidence in closing summation). This included video surveillance of the defendant purportedly having a lengthy rap battle outside the Top Notch with the victim and another video of defendant showing off his firearm in the presence of the victim. These two never seen video portions substantially undercut the defense theory, that the victim was unaware defendant had a firearm.

The State's failure to disclose this inculpatory evidence during the evidence viewing, when the original was shown to defense counsel, had a serious detrimental effect on Mr. Ketchum's intended defense similar to what happens when a party is confronted with surprise detrimental evidence. *See Bubak v. State*, No. 69096, Court of Appeals of Nevada, Slip Copy 2017 WL570931 at *5 (Feb. 8, 2017) (citing *Land Baron Inv., Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev.___, ____ n.14, 356 P.3d 511, 522 n.14 (2015) (emphasis added) (stating that "[t]rial by ambush traditionally occurs where a party withholds discoverable information and then later presents this information at trial, effectively ambushing the opposing party through gaining an advantage by the surprise attack[,]" and observing that although the appellants were "already aware of" the arguments and evidence respondents raised, "[t]he trial judge ...took steps necessary to mitigate any damage"). Here, the defense's strategy was undermined by the State's use of the undisclosed evidence (the portions played during closing).

Accordingly, this Court should reverse Mr. Ketchum's convictions.

CONCLUSION

Based on the trial court's erroneous ruling denying Mr. Ketchum's pre-trial Petition for Habeas Corpus and Motion to Dismiss, and the trial court's prejudicial errors in excluding admissible character and prior bad acts evidence of the victim, and the State's failure to comply with its disclosure obligations, the judgment of conviction should be reversed and the case remanded for conducting of a new trial.

Dated: Las Vegas, Nevada
January 11, 2019

/s/

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CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF COUNSEL

I hereby certify that this reply 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 14 pt. Times New Roman type style.

I further certify that 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 3,960 words.

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: Las Vegas, Nevada
January 15, 2019

JAVAR E. KETCHUM
by his attorney,

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2019, I electronically filed the foregoing Defendant-Appellant's Corrected Reply Brief with the Clerk of the Supreme Court of Nevada, which in provides service to all registered parties.

/s/_Melody Phommaly
An Employee of Wooldridge Law