

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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RONALD ALLEN,	)	NO. 75329	Electronically Filed Jul 11 2018 02:00 p.m. Elizabeth A. Brown Clerk of Supreme Court
	)		
Appellant,	)		
	)		
vs.	)		
	)		
THE STATE OF NEVADA,	)		
	)		
Respondent.	)		
	)		

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**APPELLANT'S OPENING BRIEF**

(Appeal from Judgment of Conviction)

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**APPELLANT'S OPENING BRIEF**

**JURISDICTIONAL STATEMENT**

- A. Statute which grants jurisdiction to review the judgment: NRS 177.015.
- B. Judgment of Conviction filed 02/16/18; Notice of Appeal filed 03/06/18.
- C. This appeal is from a final judgment entered 02/16/18.

**ROUTING STATEMENT**

- D. Pursuant to NRAP 17, is this matter presumptively assigned to the Court of Appeals? This case is not presumptively assigned to the Court of Appeals under NRAP 17(b)(1) because appellant was convicted of category B felony.

**ISSUES PRESENTED FOR REVIEW**

**I. THE PROSECUTION COMMITTED MISCONDUCT WHEN IT IMPROPERLY DENIGRATED THE DEFENSE THEORY AND DEFENSE COUNSEL DURING REBUTTAL ARGUMENT.**

## **STATEMENT OF THE CASE**

A Criminal Complaint, filed August 11, 2016, charged Ronald Allen with: Count 1 – Battery on a Protected Person with Substantial Bodily Harm (Category B Felony), and Count 2 – Battery Constituting Domestic Violence (Misdemeanor). (App. Vol. I, pgs. 1-2)

A Preliminary hearing in this matter was held on September 22, 2016. At that hearing, the two counts in the Complaint were bifurcated. Mr. Allen was bound over to District Court on the felony count (Battery on a Protected Person with Substantial Bodily Harm), and held to answer on that charge. (App. Vol. I, pg. 8; pgs. 9-80) Accordingly, the Information, filed in District Court on September 23, 2016, contained the sole charge of Battery on a Protected Person with Substantial Bodily Harm. (App. Vol. I, pgs. 81-82) At arraignment, Mr. Allen pled Not Guilty and waived his right to a trial within sixty days. (App. Vol. I, pg. 215)

At some point question arose about Mr. Allen's competency, and on April 14, 2017, the court ordered that he be remanded to the custody of the Administrator of the Division of Mental Health Development Services for evaluation and treatment. (App. Vol. I, pg. 217) After he was evaluated by doctors, the Court found that Mr. Allen was competent and this matter could therefore proceed. (App. Vol. I, pgs. 219-20) Before trial, the State filed a

Notice of Intent to Seek Punishment as a Habitual Criminal on September 22, 2017. (App. Vol. I, pgs. 108-10)

A jury trial was held in Department 18, before the Honorable Mark Bailus. The trial commenced on October 31, 2017 and concluded on November 3, 2017. App. Vol. II, pg. 254 – Vol. IV, pg. 741) The Jury found Mr. Allen guilty of Battery on a Protected Person with Substantial Bodily Harm. (App. Vol. I, pg. 208) He was sentenced by the court under the Small Habitual criminal statute to a maximum of 240 months with a minimum parole eligibility of 96 months, consecutive to C-16-317786-1. He was given 387 days credit for time served. (App. Vol. I, pgs. 209-10)

### **STATEMENT OF THE FACTS**

On August 9, 2016, Officer Karanikolas responded to a call that a male was potentially harassing a female. When he arrived at the scene, he saw a brown Pontiac that had been described in the call. He pulled his marked patrol unit behind the Pontiac. (App. Vol. III, pg. 583)

Officer Karanikolas walked up to the window of the Pontiac, where he saw a black male sitting in the car, reading a newspaper. (App. Vol. III, pg. 584) Officer Karanikolas made contact with this individual, who gave his name as Ronald Allen. (App. Vol. III, pg. 584) Mr. Allen stated that he was there to pick a family member and was waiting in his car. (App. Vol. III, pg.

585) Because Mr. Allen did not have ID, Officer Karanikolas returned to his car to run the name Ronald Allen through different databases. (App. Vol. III, pg. 585) While he was doing so, a black female ran up to the driver's side of his patrol car. (App. Vol. III, pg. 585)

This female was very agitated and frantic, and began to shove papers into Officer Karanikolas' face. (App. Vol. III, pg. 587) Officer Karanikolas had to instruct her to slow down because he was unable to understand what she was saying. (App. Vol. III, pg. 587)

As Officer Karanikolas interacted with this woman, Mr. Allen quickly got out of his car. (App. Vol. III, pg. 587) Seeing this, Officer Karanikolas got out of his car and directed Mr. Allen to the front of the patrol car, where Mr. Allen consented to being patted down. (App. Vol. III, pg. 588) After patting down Mr. Allen, Officer Karanikolas moved toward the driver's side of his car. As he did this, Mr. Allen broke into a sprint to the passenger's side of the patrol car. (App. Vol. III, pg. 588) Officer Karanikolas reacted to this by calling "it out on the radio to give me a red" and he quickly moved to the back of his car, anticipating that was where Mr. Allen was headed. (App. Vol. III, pgs. 588-89) As Officer Karanikolas moved to cut Mr. Allen off, Mr. Allen sped up before colliding with Officer Karanikolas. (App. Vol.



III, pg. 590) When the two men collided, Officer Karanikolas had to step back in order to gain his balance. (App. Vol. III, pgs. 591-92)

As he stepped back, Officer Karanikolas felt a pop in the back of his leg and immediately collapsed to the ground. (App. Vol. III, pg. 592) He was unable to get back up. (App. Vol. III, pg. 594) Later, Officer Karanikolas learned that he had partial tear in his right Achilles, which required surgery. (App. Vol. III, pg. 599) Apparently, he is still not 100 percent recovered from the injury. (App. Vol. III, pgs. 599-600)

After his collision with Officer Karanikolas, Mr. Allen continued running in the same direction. (App. Vol. III, pg. 596) Believing that the black female was Mr. Allen's primary target, Officer Karanikolas used his Taser against Mr. Allen, which caused Mr. Allen to fall to the ground. (App. Vol. III, pgs. 595-96) Ultimately, Mr. Allen was subdued and taken into custody. (App. Vol. III, pg. 597)

Sergeant Shannon Rohrbaugh, who had responded to Officer Karanikolas' distress call, arrived at the scene after Officer Karanikolas had already been knocked down. (App. Vol. III, pg. 581)

### **SUMMARY OF THE ARGUMENT**

In this case, defense counsel was disparaged by the prosecutor's suggestion that the arguments of defense counsel must be blatantly

nefarious because “defense counsel does this, blames everybody other than the defendant. Right?” (App. Vol. IV, pg. 720) That comment suggested to the jury that defense counsel, in presenting a theory of defense, had flagrantly manufactured an untrue fantasy in an attempt to mislead and deceive the jury.

This statement by the prosecutor, to the jury, encompassed two areas of prosecutorial misconduct, and, as such, denied Mr. Allen his rights to a fair trial, due process, confrontation, and an impartial jury as guaranteed by state and federal law, as well as the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Accordingly, Mr. Allen’s convictions should be reversed.

## **ARGUMENT**

### **I. THE PROSECUTION COMMITTED MISCONDUCT WHEN IT IMPROPERLY DENIGRATED THE DEFENSE THEORY AND DEFENSE COUNSEL DURING REBUTTAL ARGUMENT.**

It is improper for a prosecutor to ridicule or denigrate a defense theory. U.S. v. Sanchez, 176 F.3d 1214, 1225 (9<sup>th</sup> Cir. 1999) (holding that the prosecutor “committed misconduct in... denigrating the defense as a sham” and reversing the conviction). This Court has continually held that it was improper for prosecutors to ridicule or belittle a defense theory or

case. **Earl v. State**, 111 Nev. 1304, 1311 (1995) (reversing the conviction where the prosecuting attorney called the defendant's testimony "malarkey," explaining that "this remark by the prosecutor violated his duty... not to ridicule or belittle the defendant or the case"); **Barron v. State**, 105 Nev. 767, 779-80 (1989) (recognizing a duty not to ridicule the defense theory and condemning the prosecutor for telling the jurors that the defense "tried to hustle you"); **Pickworth v. State**, 95 Nev. 547, 550 (1979) (holding the prosecutor's comment, referring to defense theory as a "red herring," was improper).

In this case, the prosecution belittled and ridiculed the defense theory by stating that "folks, defense counsel comes up here and tells you what, when you have an overwhelming amount of evidence in this case and the defendant is absolutely boxed into a corner, that is what happens. Defense counsel does this, blames everybody other than the defendant. Right?" (App. Vol. IV, pg. 720) The prosecutor's comment was improper and violated Mr. Allen's rights to a fair trial and due process that are guaranteed under state and federal law, as well as the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Furthermore, the prosecutor's rebuttal statement also improperly disparaged defense counsel by making them out to be, in essence, dishonest.

A prosecutor may not disparage or ridicule the defendant's counsel or criminal defense attorneys in general because defendants enjoy "the right to counsel unstained by unfair disparagement." **U.S. v. Rodriguez**, 159 F.3d 439, 451 (9<sup>th</sup> Cir. 1998); *see also*, **U.S. v. Santiago**, 46 F.3d 885, 892 (9<sup>th</sup> Cir. 1995) ("[U]nder the Sixth Amendment, prosecutors may not imply that... all defense counsel are programmed to conceal and distort the truth."), *cert. denied*, 515 U.S. 1162 (1995); **Riley v. State**, 107 Nev. 205, 213 (1991) ("It is also inappropriate for a prosecutor to make disparaging remarks pertaining to defense counsel's ability to carry out the required functions of an attorney."); **Barron v. State**, 105 Nev. 767, 780 (1989) (the prosecutor's "statements were also a violation of a district attorney's duty not to ridicule or belittle the defendant or his case."); **McGuire v. State**, 100 Nev. 153, 157-158 (1984) ("We can discern no purpose for the statement other than as an attempt to belittle defense counsel in front of the jury. Other examples appear throughout the trial transcript. Disparaging comments have absolutely no place in a courtroom, and clearly constitute misconduct. *See, People v. Podwys*, 44 P.2d 377 (Cal.Ct.App. 1935)").

In Rodrigues, the court of appeals ordered a new trial on several counts, in spite of defense counsel's failure to object contemporaneously, where the prosecutor told jurors that after listening to defense counsel, "you all must be feeling somewhat confused... [defense counsel] has tried to deceive you." Rodrigues, 159 F.3d at 449-52. The Ninth Circuit ruled that the prosecutor:

does not speak as a mere partisan. He speaks on behalf of a government interested in doing justice. When he says the defendant's counsel is responsible for lying and deceiving, his accusations cannot fail to leave an imprint on the jurors' minds. And when no rebuke of such false accusations is made by the court, when no response is allowed the vilified lawyer, when no curative instructions is given, the jurors must necessarily think that the false accusations had a basis in fact. The trial process is distorted.

Rodrigues, 159 F.3d at 451.

In this case, defense counsel was disparaged by the prosecutor's suggestion that the arguments of defense counsel must be blatantly nefarious because "defense counsel does this, blames everybody other than the defendant. Right?" (App. Vol. IV, pg. 720) That comment suggested to the jury that defense counsel, in presenting a theory of defense, had flagrantly manufactured an untrue fantasy in an attempt to mislead and deceive the jury.

This statement by the prosecutor, to the jury, encompassed two areas of prosecutorial misconduct, and, as such, denied Mr. Allen his rights to a fair trial, due process, confrontation, and an impartial jury as guaranteed by state and federal law, as well as the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Accordingly, Mr. Allen's convictions should be reversed.

### **CONCLUSION**

Mr. Allen's right to Due Process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as Art. 1, Sec. 8(5) of the Nevada Constitution, was violated by the prosecutorial misconduct committed during his trial, thereby denying him a constitutionally guaranteed fair trial.

Based on this error, the judgment of conviction in this case must be reversed.

Respectfully submitted,

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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 Times New Roman in 14 size font.

2. 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 either:

Proportionately spaced, has a typeface of 14 points or more and contains 10 pages which does not exceed the 30 page limit.

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 10 day of July, 2018.

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## **CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 10 day of July, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT  
STEVEN S. OWENS

KEDRIC BASSETT  
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY /s/ Carrie M. Connolly  
Employee, Clark County Public Defender's Office