IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEVEN TURNER,
Appellant,
v.
THE STATE OF NEVADA
Respondent.

CASE NO: 76465

RESPONDENT'S PETITION FOR REHEARING

COMES NOW, the State of Nevada, Respondent, by STEVEN B. WOLFSON, Clark County District Attorney, through his Deputy, JOHN NIMAN, and submits this Petition for Rehearing pursuant to Rule 40 of the Nevada Rules of Appellate Procedure (NRAP). This pleading is based on the following memorandum and all papers and pleadings on file herein.

Dated this 19th day of October, 2020.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ John Niman*
JOHN NIMAN
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ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

This Court's Opinion, filed October 1, 2020, overlooks or misapprehends a material fact or question of law. NRAP 40(c)(2)(A). Specifically, this Court, respectfully, is not in a position to determine bad faith in the first instance, much less when the district court and Court of Appeals each did not find error. Further, this Court appears to be announcing a new rule regarding the noticing of expert witnesses; as such, this Court's specific dicta regarding an individual prosecutor's failure to follow that rule is inappropriate, as the prosecutor could not be expected to follow a rule that did not exist at the time of trial in the underlying case.

Pursuant to NRAP 40(c)(2), this Court considers rehearing when it has overlooked or misapprehended a material fact or question of law. Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 606, 608, 245 P.3d 1182, 1184 (2010). This Court also entertains a petition for rehearing where it has overlooked, misapplied, or failed to consider directly controlling legal authority. Id.

This Court, in its Opinion, came to the right conclusion regarding Appellant's claim of prejudice. Opinion at 22 n.12 (finding that cumulative error did not warrant reversal "in light of the evidence against Turner."). However, in its reasoning regarding the State's firearms expert, this Court misapprehended a question of law – specifically, whether this Court was in a position to determine bad faith in the first instance. Id. at 16 (characterizing the State's "stippling" questioning as "trial by

ambush.") This Court also, improperly, deviated from its legal analysis to name and criticize a prosecutor, when this Court's analysis did not turn on that prosecutor's actions. See id. at 18 n.6.

I. THIS COURT WAS NOT IN A POSITION TO DETERMINE BAD FAITH

The United States Supreme Court has emphasized that appellate courts are "court[s] of *review*, not of *first view*." Cutter v. Wilkinson, 544 U.S. 709, 718 n.7, 125 S.Ct. 2113, 2120 n.7 (2005) (emphasis added). Accord., United States v. Oakland Cannabis Buyers' Co-op, 532 U.S. 483, 121 S.Ct. 1711 (2001) (declining to consider claims in the first instance upon review, when those claims were not addressed by the lower court); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 124 S.Ct. 2359 (2004) (declining to address arguments that were not considered by the Court of Appeals). Indeed, this same point was raised by Justice Gibbons of the Nevada Supreme Court, in a dissenting opinion. City of N. Las Vegas v. Eighth Judicial Dist. Court, 401 P.3d 211, 2017 WL 2210130 (Nev. 2017) (unpublished disposition), (Gibbons, J., dissenting) ("This court is not a fact finder and it is necessary for the district court to make factual findings together with the conclusions of law. Indeed, as an appellate court, 'we are a court of review, not of first view.'" (*Citing* Cutter, 544 U.S. at 718 n.7, 125 S.Ct. at 2120 n.7)).

Pursuant to NRS 174.234(3), "[t]he court shall prohibit an additional witness from testifying if *the court* determines that the party acted in bad faith…" (emphasis

added). As NRS 174.234 specifically addresses noticing witnesses prior to trial, applying the canon of statutory construction *noscitur a sociss* ("it is known by its associates"), it is clear that the Nevada Legislature intended for "the court" to specifically refer to "the [trial] court." See, Scott v. First Judicial Dist. Court, 131 Nev. 1015, 1026, 363 P.3d 1159, 1167 (2015) (recognizing *noscitur a sociis* (internal citation omitted)); see also, Mitchell v. State, 124 Nev. 807, 819, 192 P.3d 721 (2008) (explaining that, if the *district court* finds bad faith, the *district court* "must not allow the expert witness to testify"). Therefore, by specifically entailing a finding of bad faith as within the purview of the trial court, the Nevada Legislature has effectively precluded appellate courts from making such a determination in the first instance.

Indeed, a review of Nevada precedent regarding NRS 174.234(3) demonstrates that there is not a single instance wherein the Nevada Supreme Court has found bad faith in the first instance. See, e.g., Jones v. State, 113 Nev. 454, 471, 937 P.2d 55, 66 (1997) (discussing "bad faith" to support a finding that the State *did not* act in bad faith); see also, Mitchell, 124 Nev. at 819, 192 P.3d at 729 (reviewing the *district court's* finding that the State did not act in bad faith); see also, Chrisman v. State, 437 P.3d 1055, 2019 WL 1440984, Docket No. 75581 (Nev., Mar. 29, 2019) (unpublished disposition) (relying on Jones and Mitchell to provide context for district courts' discretion pursuant to NRS 174.234). Instead, the Nevada Supreme

Court has announced that it will analyze either "[1] a [previous] showing that the State has acted in bad faith, or [2] that the non-disclosure results in substantial prejudice to appellant…" Langford v. State, 95 Nev. 631, 635, 600 P.2d 231, 234 (1979).

At trial, the district court did not find that the State acted in bad faith. See, Opinion at 15 (discussing the district court's allowance of Lester's stippling testimony, necessarily demonstrating that the district court *did not* find bad faith). Instead, the district court determined that Appellant's objection to Lester's testimony was based on her statement that she had "limited experience" in that area:

> THE COURT: …My concern is that she said limited experience. That's my concern. Right?
>
> MS. MACHNICH: Uh-huh.
>
> THE COURT: …I am not clear that what she is about to testify to is medical in nature. I believe that if she is qualified, she can testify as to the area that counsel is questioning. But because she did say limited experience, I'm going to allow some voir dire…

Appellant's Appendix Volume IX ("9AA") at 1869. Upon the defense's voir dire, Lester clarified that as part of her *firearms* training, she was "trained on distance determination from gunshot residue." Id. at 1873. When specifically asked whether gunshot residue and stippling were related, Lester explained:

> Well, the gunshot residue would consist of the powder itself, would consist of chemicals associated with the burned or partially burned powder particles, and also the sooting or the smoke from the vaporous lead. That's what I would consider to be the gunshot residue. The stippling itself would be the marks on the skin.

Id. at 1874. When asked when she received training on stippling, Lester explained that it was part of her general firearms examiner training programs in 2011. Id. at 1875-76. The defense then clarified:

> Q So you -- the area that we're talking about, I guess, is the GSR distance comparison --
>
> A Yes.

Id. at 1878. The prosecution subsequently explained that it was not asking Lester for an opinion; rather, it was seeking to introduce terminology about stippling and the range thereof, based on Lester's training in gunshot residue. Id. at 1880-81; 1885. After voir dire, the district court agreed that the State's notice was sufficient, and further, that the disclosure that Lester had been trained in firearms and gunshot residue was sufficient. Id. at 1885-86.

Upon review by the Court of Appeals, that Court identified Appellant's stipulation to the fact that Lester was a qualified expert in firearms. Court of Appeals Order of Affirmance, filed October 31, 2019 ("Affirmance") at 6. That Court then recounted the district court's analysis that gunshot residue and stippling, generally, fell within Lester's firearms experience and expertise. Id. at 6-7.

The district court made a *factual* determination that the State's notice of Lester's firearms expertise was sufficient to encompass her testimony as to general gunshot residue terminology. The Court of Appeals reviewed that *factual* determination and concluded "stippling is a subcategory of firearms analysis and

specifically relates to gunshot residue." Affirmance at 7. Neither of those courts even reached the question of bad faith, much less found that the State had acted in bad faith in noticing – or failing to notice – expert witnesses. Therefore, the State respectfully submits that bad faith was not subject to review, and should not have been found by this Court in the first instance. See, Round Hill Gen. Imp. Dist. v. Newnlan, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) ("an appellate court is not an appropriate forum in which to resolve disputed questions of fact").

II. THIS COURT'S DETERMINATION DID NOT TURN ON THE ACTIONS OF THE STATE; THEREFORE, ITS DICTA REGARDING A SPECIFIC PROSECUTOR WAS INAPPROPRIATE

In its Order, this Court conducted an analysis regarding Appellant's claim that the admission of Dr. Urban's testimony was improper. Order at 17-19. This Court recognized that the admission of that testimony was only subject to "plain error" review, as Appellant did not object at trial. Id. at 17. This Court proceeded to conclude: "Because Dr. Urban testified to medical records that were already admitted into evidence, her testimony relaying what was already in the medical records did not affect Turner's substantial rights." Id. at 18. Thus, this Court determined that Appellant could not show plain error from the admission of Dr. Urban's testimony. This Court's analysis of plain error did not include any substantive discussion of whether Dr. Urban was properly noticed. Id. at 17-19.

However, this Court included a footnote naming a specific prosecutor and implying that he made a knowing and/or purposeful misrepresentation on the record. Order at 18 n.6. Specifically, this Court accused the prosecutor of "misrepresent[ing]" a medical expert's notice. Id. These comments did not factor into this Court's determination in any way; instead, this dicta serves only to indict the reputation of a specific prosecutor by imputing intentions that are not borne out by the record.

At trial, based on Lester's testimony, Appellant's counsel sought to have the district court take judicial notice of a certain definition of "stippling," specifically, "Stippling is a spotted condition in the retina in some diseases in the eye or in basophilic red blood cells." 10AA at 1956-59. The State contested that definition, as the stippling referenced in Lester's testimony had to do with firearms, rather than medical conditions related to the eye or blood cells. Id. at 1959. Essentially, Appellant's proffered definition was misleading to the jury and had nothing to do with stippling in the context in which it was used at trial. Id. at 1959. When the district court indicated its inclination to take judicial notice of the unrelated medical definition, the State explained, "--if this is going to happen, we might -- we have medical doctors noticed, so we might need to call somebody now. This is brand new to us." Id. at 1961. This statement was true. In fact, the State had numerous medical

doctors from the same facility[1] noticed – specifically, Dr. Douglas Fraser (UMC), Dr. Naser Hakki (UMC), and the more general "UMC TRAUMA DOCTORS" – all within the State's third Supplemental Notice of Witnesses and/or Expert Witnesses. 3AA at 545-55. The State then explained that it had intended to rest its case, but based on Appellant's intention to introduce a definition that, at the least, was misleading in the context, it contacted Appellant's treating physician, who had indicated that the medical definition of stippling differed from that applicable in the context of a gunshot or fragment ricochet. Id. at 1962-64. After the State expressed that medical experts had been noticed, the district court asked if she was under subpoena. Id. at 1968-69. The State explained that she was not under subpoena, but could be put under subpoena to rebut Appellant's position. Id. at 1969. At no point did Appellant's counsel argue that Dr. Urban was not noticed, nor that she was improperly noticed; rather, Appellant's counsel asserted that the State had "been very forthcoming" throughout the case. 9AA at 1888. Moreover, Appellant's counsel also seemed to be under the same misapprehension as the State – Appellant's counsel herself suggested that the State call Dr. Urban as a witness. Specifically, the State argued "[s]o we're not going to rest until this issue is resolved. We can't rest. We – we have our doctor, she's noticed. So if this is going to be an issue, then we'll

[1] Both the victim-officer and Appellant were transported to the same facility – UMC – for treatment of their gunshot wounds.

call our doctor." Defense counsel then stated: "Okay, They should call their doctor." While the State concedes that Dr. Urban was not specifically noticed, the State did not intentionally mislead the Court in any way. The issue raised by the defense (a misleading definition of stippling) just prior to the State resting its case clearly caused confusion, as evinced by the lengthy back-and-forth on the record. The State did not realize at the time that Dr. Urban herself was not noticed, due to the fact that various other medical doctors from UMC were noticed,[2] and the fact that the parties ***stipulated*** to the admission of Appellant's medical records which contained Dr. Urban's name throughout. Clearly, the State misspoke, but the record reflects that it was not a purposeful or a willful misrepresentation, much less worthy of a reputation-damaging footnote that imputes purposeful deception by the prosecutor in his representation to the Court. As stated *supra*, defense counsel acknowledged the prosecutors' forthrightness in the course of the trial. 9AA at 1888.

The complete context belies this Court's interpretation that the prosecution intended to mislead the district court. Therefore, this Court's naming of a specific prosecutor, only to impute deliberate deception, is improper. Respectfully, the State would urge this Court to revisit footnote 6, and carefully review the context of the

[2] The State's Notice includes in excess of two hundred (200) witnesses, including multiple specific doctors (as named *supra*), the generalized notice of "UMC TRAUMA DOCTORS" (as stated *supra*), and the "CUSTODIAN OF RECORDS; UMC HOSPITAL." 3AA at 545-55.

inadvertent misrepresentation before permanently damaging a prosecutor's reputation for truthfulness.

Because this Court's dicta regarding the specific prosecutor did not factor into this Court's substantive analysis and determination of the issues before this Court for review, and because this Court's interpretation of events is belied by the record, this Court's Order should be amended to remove that dicta. At the least, the specific prosecutor's name should be removed from the opinion's footnote 6.

CONCLUSION

Based upon the foregoing and the record before this Court, the State respectfully requests that this Court grant rehearing and affirm Appellant's conviction, but amend its Opinion to withdraw its discussion of "trial by ambush" and its dicta regarding a specific prosecutor.

Dated this 19th day of October, 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing 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 it 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 petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points and contains 2,392 words and 200 lines of text.

Dated this 19th day of October, 2020.

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 October 19, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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