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

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Elizabeth A. Brown
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ABEBAW KASSA,
Appellant

Vs.

STATE OF NEVADA,
Respondent

Docket No. 76870

District Court No. C-16-317365-1

Appeal from a Judgment of Conviction
of the Eighth Judicial District Court
in Clark County, Nevada

The HON. MICHELLE LEAVITT, presiding

# Appellant's Opening Brief

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# Appellant's Opening Brief

## JURISDICTIONAL STATEMENT

As this is an appeal of a final judgment of conviction in a criminal case that was before a Nevada District Court, the Supreme Court of Nevada has Statutory jurisdiction.[1] The judgment of conviction was entered on June 18, 2018. A Notice of Appeal was timely filed on August 29, 2018, and docketed in the Supreme Court on September 15, 2018.[2]

## ROUTING STATEMENT

[1] NRS 177.015(3) (providing for appeals "from a final judgment or verdict").
[2] NRAP 4(b)(1)(A) (providing 30 days for the filing of a notice of appeal after the entry of judgment).

Under the Nevada Rules of Appellate Procedure, Rule 17(b)(1), this matter is presumptively before the Court of Appeals.

## ISSUES PRESENTED FOR REVIEW

1. Whether the District Court abused its discretion when it denied Mr. Kassa's motion to vacate the guilty verdict and find him not guilty by reason of insanity.
2. Whether the District Court abused its discretion by giving Voluntary Intoxication Instruction (No. 20) with insufficient evidence and adding language to the instruction beyond the actual statutory language.

## STATEMENT OF THE CASE

The Appellant, Abebaw Kassa, herein challenges the District Court's order denying Mr. Kassa's motion to vacate the guilty verdict and find him not guilty by reason of insanity. He further challenges jury instruction No. 20 for insufficient evidence and the insertion of additional language beyond the statutory instruction for Voluntary Intoxication.

The State of Nevada, by way of Amended Criminal Complaint filed August 11, 2016, charged Mr. Kassa with one count of Murder[3], and one count of First - Degree Arson.[4] The defense, on behalf of Mr. Kassa, filed a Request for Evaluation for Competency on August 17, 2016. The Commitment and Order was entered and a hearing was scheduled on September 9, 2016. Pursuant to NRS 178.425(1), Mr.

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[3] Category A Felony, NRS 200.010, 200.030.
[4] Category B Felony, NRS 205.010.

Kassa was conveyed to the Administrator of the Division of Public and Behavioral Health of the Department of Health and Human Services.

Following a medical evaluation and consistent with the presented report, a Finding of Competency to Stand Trial pursuant to NRS 178.460 was entered on March 10, 2017. Thereafter, Mr. Kassa was detained in the Clark County Detention Center pending trial. On December 27, 2017, in compliance with NRS 174.035(5) and NRS 175.533 respectively, Mr. Kassa properly filed notice of his intent to plead Not Guilty by Reason of Insanity (NGRI) and to seek a verdict of Guilty but Mentally Ill as to any offense for which he was found guilty(App 000005-000006). On notice that the defense was pleading NGRI, the State requested that Mr. Kassa be independently evaluated by a psychiatrist, Dr. Zuchowski (App. 00007-000010).

A jury trial began on June 12, 20l8 (App 000012). Although the State presented witnesses at trial describing the alleged event on July 27, 2016, the State did not call Dr. Zuchowski as a witness. Mr. Kassa, however, in his defense presented not only the expert testimony of Dr. Zuchowski, but also that of Dr. Brown. After thorough evaluation of Mr. Kassa and review of his medical history, both psychiatrists independently concluded that he was insane on the date in question and believed that he met the elements for an NGRI under Nevada law (App, P000684, L3-19, P595-597, L.25-6). Although the State conducted a cross examination of both doctors, nothing brought out on cross-examination changed their opinions and no expert witnesses on behalf of the State testified, contradicted, or rebutted the defense evidence.

Proposed jury instructions were offered by the State with general agreement by the defense. The parties and the Court agreed that the case was one of first-degree arson and felony murder arising from that arson. The State requested a voluntary intoxication instruction arguing that any possibility of substance abuse by the defendant on the day in question was reasonable to rebut an insanity defense. Mr. Kassa argued that, not only would the suggestion of voluntary intoxication vitiate the specific intent required for arson, and, thereby, the felony murder, but also that the proposed voluntary intoxication instruction was improperly drafted. Voluntary Intoxication instruction No. 20 impermissibly went beyond the statutory language and added "temporary insanity" language taken from a 1937 case, the likely effect of which would be to confuse the jury (App 000837). The Court gave the instruction as proposed by the State.

The jury returned a verdict on June 18, 2018, finding Mr. Kassa Guilty but Mentally Ill on both Counts 1 and 2 (App 000799-000800). Pursuant to sentencing negotiations with the State, Mr. Kassa waived the penalty phase of the trial and sentencing was scheduled for August 9, 2018. On June 22, 2018, in compliance with NRS 175.381, Mr. Kassa filed a Motion to Vacate the Guilty Verdict and Find the Defendant Not Guilty by Reason of Insanity (App 000805-000809). Mr. Kassa filed a supplemental argument in support of his motion on July 2, 2018 (App 000809-000812). The State's objection to the Defendant's motion was filed on July 5, 2018 (App 000813-000817). A hearing was held on August 16, 2018, and an order denying Mr. Kassa's motion was entered on August 17, 2018 (App 000818-000820).

Mr. Kassa was then sentenced on August 23, 2018. The Court ordered, in addition to the $25.00 Administrative Assessment fee, $150.00 DNA Analysis fee including testing to determine genetic markers, $3948.37 Restitution to the victim's family, and $3.00 DNA Collection fee. Mr. Kassa was sentenced in Count 1 to LIFE in the Nevada Department of Corrections (NDC) with MINIMUM PAROLE ELIGIBILITY AFTER TWENTY (20) YEARS. In Count 2, Mr. Kassa was sentenced to A MAXIMUM of FIFTEEN (15) YEARS with a MINIMUM parole eligibility of SIX (6) YEARS; CONCURRENT WITH COUNT 1; SEVEN HUNDRED AND FIFTY-EIGHT (758) DAYS credit for time served. Additionally, pursuant to NRS 176.057(1)(b), the Court found that the Defendant was mentally ill at the time of sentencing and therefore ordered him to receive treatment for his mental illness during the period of confinement in conformity with such treatment as is medically indicated for the Defendant's mental illness (App 000799-000800).

The Court entered an Order of Conviction on August 29, 2018, and Mr. Kassa filed his Notice of Appeal on August 29, 2018. This Appeal follows.

## STATEMENT OF FACTS

On July 29, 2016, the State filed a Complaint charging Abebaw Kassa with First Degree Arson, occurring on or about July 27, 2016, by setting fire to and/or causing to be burned the residence owned by Josefina Adams and located at 1009 Marion Drive, Las Vegas, Clark County, Nevada. Thereafter, on August 11, 2016, the State filed an Amended Complaint additionally charging Mr. Kassa with the

Murder of Alipio Lolita Budiao, on or about July 27, 2016, by perpetrating or attempted perpetration of Arson, by setting fire to and/or causing to be burned the residence located at 1009 Marion Drive, Las Vegas, Clark County, Nevada.

Mr. Kassa filed a notice of intent to seek a defense of not guilty by reason of insanity (App 000005-000006). A jury trial proceeded beginning June 12, 2018, and continuing through June 18, 2018. Pursuant to negotiations, the parties stipulated that the fire on the date in question was classified as incendiary and started on the kitchen range with an open flame and the application of ordinary combustibles. (App 0000414, L.14-22). The parties further stipulated to the admission of exhibits 1 through 92, as well as admission of certified copies of Mr. Kassa's medical records from Sunrise Hospital Medical Center, Southern Nevada Adult Mental Health Services and UMC of Southern Nevada. (App 000414-415 L24-12).

Witness testimony established that, on or about July 27, 2016, Mr. Kassa was residing at 1009 Marion Drive, in Las Vegas, Nevada. The residence was a transitional group home for individuals with various mental illnesses who needed some degree of care with meals and medications during their treatment. Four patients, including Mr. Kassa, were residents of the home. The caregiver, Alipio Lolita Budiao (Lolita), also lived at the residence.

The State's first witness, Kristopher Ramos (Ramos), was a resident of the group home with Mr. Kassa on July 27, 2016. He testified that, in the early morning hours of the day in question, the smoke alarm went off in the house (App 000416, L9). He exited his bedroom and observed Mr. Kassa holding the bathroom door closed and heard Lolita screaming to let her out. (App 000418 L23-24)). Ramos attempted to get Mr. Kassa to let go of the door handle but testified that Mr. Kassa seemed "nonresponsive" and continued to hold tight. (App 000419, L24-25). After observing the fire on the stove in the kitchen, Ramos returned to Mr. Kassa but was again unable to get him to let go of the bathroom door handle. Ramos then awakened the other residents and exited the home (App 000422, L11-14). Ramos testified that he eventually saw Mr. Kassa being carried out of the house by firemen and that it appeared Mr. Kassa had white foam coming from his mouth. (App 000427, L22-23)). He also saw Alipio Lolita Budiao running out the front door on fire (App 000422, L10-12).

Officer Brian Artis of the Las Vegas Metropolitan Police Department testified that he was on patrol on July 27, 2016, and responded to the early morning call at 1009 Marion Drive (App 000476, L4-7). Upon arrival he observed a man, later identified as Mr. Kassa, being removed by firemen (App 000478, L10-11). As the officers took custody of him, Mr. Kassa was described as "fighting with us," and

"screaming, and yelling and hollering, and squirming around." (App 000479 L5-9, pg. 210).

Officer Matthew Terry (Terry), also with Las Vegas Metropolitan Police, further testified that, as Mr. Kassa was handed over to the police by attending firemen, he broke free from their grip and began running toward officers yelling "kill me, kill me." (App 000479 L1-3) Terry described Mr. Kassa as "resisting a lot," and "trying to pull his arms away." (App 000479, L5-9). It took multiple officers to take him to the ground and put him in restraints. (Arr 000484, L 12-13). The State's other witnesses included firemen who attended to and determined the cause of the fire, firemen who attempted to talk to Ms. Budiao prior to her death several days later, as well as the County Coroner who performed the autopsy on Alipio Lolita Budiao.

The defense called Dr. Gregory Peninger Brown (App 000572). He was the first psychiatrist to testify regarding Mr. Kassa's mental illness and recorded multiple schizophrenic episodes. In his professional capacity Dr. Brown testified that schizophrenia is "one of the more severe psychiatric illnesses" which can include a "lack of contact" with the rest of the world, "auditory hallucinations," "delusions," as well as "markedly disorganized thinking." (App 000575-576). With a thorough review of medical reports, competency evaluations and a personal

interview with Mr. Kassa, Dr. Brown testified to the Defendant's numerous psychotic episodes in 2011, 2012, 2013, as well as 2016, which included auditory hallucination (App 000580, L2-3) (voices from his radio), delusional thinking (his mother was dead or that he was dead) (App 000581, L20-21) and disorganized thinking (yelling and screaming incoherently). (App 000581, L17-18).

Dr. Brown made special note of the agreement among multiple evaluators within the admitted records: "[T]here are multiple evaluators who assessed his competence to stand trial ….and virtually all of those individuals diagnosed schizophrenia or schizoaffective disorder, and that is relatively remarkable to have that many health professionals all agree on a basic diagnosis." (App 585-586, L20-1).

In his final analysis, Dr. Brown concluded that Mr. Kassa met the legal requirements for NGRI on July 27, 2016. First, he stated that Mr. Kassa suffered from a mental disease or defect, more specifically schizophrenia. (App 000596, L2-5). Second that, although Mr. Kassa understood that fire burns, "his delusions prevented him, ….. from understanding that the act was wrong, ….. that because Mr. Kassa had a delusion that he was already dead, he believed that he had proved that to himself by being unable to find his own pulse. The voices were telling him that he was already dead, that he had died in a car accident in 2013 and that doctors

were somehow making him breath. He believed he was being controlled by external forces…from other site sources and sites, and these delusions that he was not in control of his own body, that his body was dead and that he had to destroy his already dead body to prevent these people from using his body was what led him to start the fire….." (App 000596-597). Nothing elicited from the State on cross examination changed Dr. Brown's opinion that Mr. Kassa was insane on July 27, 2016.

The next to testify was Dr. Steven Zuchowski, board certified in psychiatry and forensic psychiatry, and employed at the University of Nevada School of Medicine, Reno (App 000672). As an expert in psychiatry, he had testified "perhaps a hundred times" and typically was called as a "sort of friend of the court" and "neutral" in nature. (App 00674, L4-11). In the present case, although originally requested by the State to conduct an evaluation, Dr. Zuchowski was testifying for the defense.

After reviewing voluminous medical records (admitted as exhibits) and conducting a personal interview with Mr. Kassa, Dr. Zuchowski concluded that the most likely diagnosis was schizophrenia. (App 000678, L12-14). He noted the prominent schizophrenic symptoms exhibited by the Defendant were "hallucinations in the form of voices as well as delusions, paranoid delusions, some

bizarre delusions, which are fixed false beliefs…." (App 000678 L17-23). He also noted that "over the years there was not any evidence that [Mr. Kassa] used substances, illicit substances." (App 000679, L12-14).

Dr. Zuchowski testified that, during the evaluation, Mr. Kassa denied use of Spice (App 000680, L10-16). He acknowledged that the University Medical Center (UMC) records compiled following the fire referenced the possible use of Spice, but believed that, while it couldn't be ruled out, his interpretation of the record was that there was a language/communication problem. (App000680, L10-16). Dr. Zuchowski testified that "[Mr. Kassa] had been anointed with some kind of an incense or perfume the day prior at church and that was something they did at his church from time to time, and that may have been misinterpreted as Spice use." (App 000680, L10-16). Significantly, Dr. Zuchowski saw no indication in the voluminous records that Spice use or illegal substances were the suspected cause of any prior psychotic episodes. (App 000680, L17-21).

Specifically, with respect to the fire on July 27, 2016, Dr. Zuchowski concluded that Mr. Kassa was "experiencing auditory hallucinations that were command-oriented hallucinations. In other words, telling him to do things. He felt compelled to do what the voice told him to do……" (App 000683, L7-13). Importantly, Dr. Zuchowski concluded that, not only did Mr. Kassa fail to

understand the nature and quality of his actions, "he did not appreciate the wrongfulness of his actions at the time." "[H]e was so in depth in his psychosis at the time that he didn't realize what he was doing was legally wrong." (App 000683-684, L22-7). Following Dr. Zuchowski's testimony, the defense rested. The State provided no rebuttal evidence contradicting the psychiatrists' conclusions.

Jury instructions were submitted to the Court for review. Mr. Kassa objected to the inclusion of a Voluntary Intoxication instruction in light of the very minimal evidence, the charge of a specific intent crime (arson) and the resulting felony murder (App 000715, L12-21). Further, the defense objected to the confusing language used in the instruction itself which went beyond the statutory language and included language regarding "temporary insanity." (App 000715, L12-21). Without analysis or explanation, the Court gave the instruction as drafted. (App 000716, L17-20).

## SUMMARY OF THE ARGUMENT

The District Court abused its discretion by denying Mr. Kassa's motion to vacate the guilty verdict and find him not guilty by reason of insanity. Further, the District Court abused its discretion by including a Voluntary Intoxication instruction unsupported by the evidence and with language impermissibly beyond the statutory language, likely resulting in confusion by the jury.

## ARGUMENT

**1. <u>The District Court Abused Its Discretion by Denying Mr. Kassa's Motion to Vacate the Verdict and Find Him Not Guilty by Reason of Insanity.</u>**

The District Court had the authority to set aside the jury verdict pursuant to Nevada Revised Statute (NRS) 175.381.

NRS 175.381 states as follows:

Court may advise jury to acquit defendant when evidence on either side closed; motion for judgment of acquittal after verdict of guilty or guilty but mentally ill; subsequent motion for new trial.

1. If, at any time after the evidence on either side is closed, the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound by such advice.
2. The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty or guilty but mentally ill, set aside the verdict and enter a judgment of acquittal *if the evidence is insufficient to sustain a conviction*. The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period
3. If a motion for a judgment of acquittal after a verdict of guilty or guilty but mentally ill pursuant to this section is granted, the court shall also determine whether any motion for new trial should be granted if the judgment of acquittal is thereafter vacated or reversed. The court shall specify the grounds for that determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial is granted conditionally and the judgment is reversed on appeal, the new trial must proceed unless the appellate court has otherwise ordered. If the motion is denied conditionally, the defendant on appeal may assert error in that denial, and if the judgment is

> reversed on appeal, subsequent proceedings must be in accordance with the order of the appellate court.

(Emphasis added).

Mr. Kassa presented a defense of not guilty by reason of insanity and, as such, had the burden of presenting evidence by a preponderance of the evidence that he met the criteria for insanity when the crime was committed. NRS 174.035(6). The statute provides in pertinent part that:

> [T]he burden of proof is upon the defendant to establish by a *preponderance of the evidence* that:
> (a) Due to disease or defect of the mind, the defendant was in a *delusional state at the time of the alleged offense*; and
> (b) Due to the delusional state, he either *did not*:
> 1) Know or *understand the nature and capacity* of his act; or
> 2) *Appreciate that his conduct was wrong*, meaning not authorized by law.

NRS 174.035(6) (Emphasis added).

The State readily acknowledged that Mr. Kassa is schizophrenic and that the only real trial issue was his mental state on the date in question. (App 000406, L5). Accordingly, in an effort that more than carried its burden, the defense presented the jury with voluminous medical records and not one, but two expert psychiatrists, including the expert the State selected to initially examine the mental capacity at the time of the offense for Mr. Kassa, establishing that Mr. Kassa was legally insane on July 27, 2016. While his statutory burden was a mere preponderance, Mr.

Kassa's *unrebutted expert evidence* could easily be characterized as clear and convincing, or even possibly beyond a reasonable doubt.

The State laid out the sequence of events that occurred on July 27, 2016. Significantly, the *only* evidence regarding Mr. Kassa's mental state, was established by the medical records and the psychiatrist retained by the defense, as well as none other than the psychiatrist originally hired by the prosecution itself. The State may not have liked the conclusions drawn by their requested psychiatrist but the evidence was what it was.

The voluminous medical records documented Mr. Kassa's extensive medical history regarding his schizophrenia (See Defense Exhibits A and B). These records consisted of no less than six prior schizophrenic episodes with auditory hallucinations presenting precisely the same affliction that he suffered on July 27, 2016. These incidents ranged from hearing his radio talking to him in Utah to calling 911 on himself because unknown people were yelling at him and trying to hurt him. At one point he was found "swimming" in the rocks and yelling incoherently at the voices in his head.

Drs. Brown and Zuchowski, after review of multiple medical records and meeting with Mr. Kassa, independently concluded that Mr. Kassa was legally insane, suffering from voice controlling hallucinations and bizarre delusions

controlling his behavior all of which prevented him from understanding right from wrong. The Government attempted on cross examination to suggest that Mr. Kassa *might* have consumed Spice on or about July 27, 2016. Even with that possibility, there was no evidence to suggest that the use of Spice would change the opinion of either expert. In fact, when questioned specifically about the matter, Dr. Brown testified that nothing suggested by the prosecution on cross examination regarding possible use of Spice by the defendant would alter his opinion that Mr. Kassa was legally insane at the time the fire was set. Neither was there evidence in the medical records that any drug tests were administered in this case or that Mr. Kassa tested positive for illegal substances in any past episode for which he was hospitalized. (See Defense Exhibits A and B). In fact, the only drug previously noted was benzodiazepine, which the expert testified would have been given to Mr. Kassa to calm him down during a hallucinatory incident. The sole conclusion offered by the only two expert witnesses called by either side was that Mr. Kassa was legally insane on July 27, 2016, pursuant to NRS 174.035.

Given the facts and law presented, the defense met its burden of establishing Mr. Kassa's insanity at the time of the offense. The jury's verdict is against the great weight of the evidence and potentially the result of confusing jury instructions. For that reason, the defense brought its post-trial to motion vacate the verdicts.

In its response to Mr. Kassa's motion to vacate the verdict, the State relies on *Evans v. State,* 112 Nev. 1172, 926 P.2d 265 (1996), for the proposition that the district court may not act as a thirteenth juror and reevaluate the evidence or credibility of the witnesses subsequent to the verdict. That would certainly be the result if the court were to use the incorrect standard based on the motion and relief requested.

In *Evans,* the analysis centered on the defendant's confusal of the standards to be used in deciding whether to grant a new trial under NRS 176.515(4) due to conflicting evidence, or to grant an acquittal based on NRS 175.381(2) as a result of insufficient evidence. *Evans, supra.* at 1193-94. Noting the differences in the motions and the respective standards to be used, the court stated "[i]f the *new trial standard were applied to a motion for an acquittal*, then the trial judge could act as a thirteenth juror, acquit the defendant notwithstanding the jury's contrary verdict and…prevent the State from reprosecuting the defendant." *Id.* at 1194 (Emphasis added). Understandably, that interpretation was rejected.

Unlike *Evans*, however, Mr. Kassa believes this case focuses strictly on the insufficiency of the essential intent element for the crime of arson. The legislature has granted the court the authority to remedy such a deficiency under NRS 175.381(2). He is not asking this Court to choose between two equally supported

theories or to vacate a verdict simply because the evidence was conflicting. *State v. Robison,* 54 Nev. 56, 6 P.2d 433; *State v. Beyers*, 58 Nev. 125, 71 P.2d 1044; *State v. Boyle,* 49 Nev. 386, 248 P. 48; *State v. Millain*, 3 Nev. 409; *State v. Mills*, 12 Nev. 403. Instead he believes that the prosecution has failed to carry its burden and that the defense evidence establishes that "there is not sufficient, or any substantial, evidence to sustain the verdict, or that *one element of the crime has not been proved*." *State v. Fitch*, 65 Nev. 668, 680, 200 P.2d 991, 997 (1948), overruled in part by *Graves v. State*, 82 Nev. 137, 413 P.2d 503 (1966) (Emphasis added).

Clearly, the legislature recognized the possibility that the prosecution may fail to produce the requisite evidence to support a conviction, even if believed by a jury. The Court may obviously correct that injustice under NRS 175.381(2) without concern that it is acting as a thirteenth juror. In doing so the Court must review the evidence in a light most favorable to the prosecution to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *Mitchell v. State,* 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). With that in mind, however, if there is insufficient evidence to convict, the defendant must be acquitted. *State v. Purcell,* 110 Nev. 1389, 887 P.2d 276 (1994).

In the present case, Mr. Kassa was charged with first-degree arson and felony murder arising from the alleged arson. First-Degree Arson is a specific intent crime, requiring proof beyond a reasonable doubt that the defendant "willfully, unlawfully, maliciously, and feloniously [set] fire to, and thereby [caused] to be burned, a dwelling or house…." (App 000820; NRS 205.010). The exclusive evidence is that Mr. Kassa was completely delusional on the day in question and not only failed to understand the nature of his acts but also failed to understand the wrongfulness of the same. With uncontroverted testimony of not one but two psychiatrists, it is hard to imagine an individual less able to form the requisite intent for first-degree arson than Mr. Kassa. Pursuant to NRS 175.381(2), therefore, Mr. Kassa asks that the verdicts be vacated and the Court enter a judgment of not guilty by reason of insanity.

**2. <u>The District Court Abused Its Discretion by Including a Voluntary Intoxication Instruction With Insufficient Evidence Supporting the Instruction and With Language Impermissibly Beyond the Statutory Language and Likely Resulting in Confusion by the Jury.</u>**

**a. <u>There was insufficient evidence to support instructing the jury on voluntary intoxication.</u>**

A decision to give or not to give a particular jury instruction is reviewed for an abuse of discretion. *Ouanberngboune v. State*, 125 Nev. 763, 220 P.3d 1112

(2009). If it is concluded that the trial court erred by giving a particular instruction, a harmless error analysis is then conducted. *Cortinas v. State*, 124 Nev. 1013, 1023-24, 195 P.3d 315, 322 (2008). It is generally accepted that when a defendant proposes instructions relating to the theory of his defense, the instruction should be given even when the evidence may be "weak, insufficient, inconsistent, or of doubtful credibility." *United States v. Lemon*, 824 F.2d 763, 764 (9th Cir. 1987). The instruction is not warranted, however, if there is nothing more than a "mere scintilla" of supporting evidence. *United States v. Morton*, 999 F.2d 435, 437 (9th Cir. 1993); *United States v. Wofford*, 122 F.3d 787, 789 (9th Cir. 1997), as amended (Aug. 21, 1997).

While this issue traditionally focuses on defense proposed instructions and the defendant's theory of his case, it is reasonable to apply the same burden to the prosecution when it is requesting instructions believed to advance a rebuttal theory. When the prosecution drafts an instruction solely intended to rebut a defendant's theory, logic demands that the government be held to the same burden of producing evidence which amounts to more than a "mere scintilla" and which clearly warrants the giving of an instruction. Anything short of that risks erroneous instructions and a miscarriage of justice.

The issue of intoxication and its effect on specific intent in a criminal matter is not new to legal analysis. In fact, it has long been noted that in cases of murder, evidence of intoxication should be "received with caution," particularly when the evidence is such that the weight and sufficiency might be "easily misjudged." In such cases, the jury should be advised of the need for caution. *State v. Jukich*, 49 Nev. 217, 242 P. 590, 597-98 (1926), citing *State v. Streeter*, 20 Nev. 403, 22 P. 758 (1889), further cites omitted.

In *Nevius v. State*, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985), the defendant was convicted of first-degree murder, burglary, robbery and attempted sexual assault. The defendant proposed a voluntary intoxication instruction in an effort to negate the specific intent to kill. The instruction, however, was refused by the trial court. On appeal the court stated that to obtain a voluntary intoxication instruction, "the evidence must show not only the defendant's consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings." *Id.* at 249. See *State v. Bourdlais*, 70 Nev. 233, 265 P.2d 761 (1954) (decided under precursor of NRS 193.220). The evidence produced, instead, was simply that the defendant had consumed alcohol and marijuana. There was nothing, however, to suggest the

amount consumed, the intoxicating effect or the impact it had on the pertinent mental state at the time of the incident. *Id.* at 249.

In the present case, the State, rather than Mr. Kassa, requested the voluntary intoxication instruction to rebut a NGRI defense. The prosecution presented no witnesses to testify to Mr. Kassa being intoxicated. They presented no substantive evidence of exactly what substance was ingested, an amount that was ingested, the effect it had or how it specifically effected Mr. Kassa on July 27, 2016. There were no drug tests performed and none of the testifying officers or firemen, who presumably were familiar with intoxicants in the course of their employment, provided any hint that they thought Mr. Kassa was drunk.

The entirety of the State's evidence in support of the proposed instruction was only elicited on cross examination of the expert psychiatrists and taken from a couple of notations in voluminous medical records. A brief reference to Spice was made days after the fire in University Medical Center records in a differential diagnosis of unspecified psychosis and a need to rule out substance use. (App 000696 L4-7). Dr. Zuchowski explained that a "differential diagnosis" is essentially a list of possible causes but *"[i]n other words they didn't know*." (App 000696 L4-7). (Emphasis added). Clearly it was not intended as a conclusive diagnosis.

Dr. Brown was also questioned on cross examination about the possibility of Spice usage. He explained that hospitals do have tests for Spice, and that while various batches can produce varying symptoms, obvious physical symptoms of substance abuse could be revealed in vital signs, blood pressure, and pupil size. (App 000637, L 6-11). Interestingly, however, none of these expected symptoms were checked or noted in the medical records leading up to and immediately following the incident in question. (App 000637, L 6-11). Ultimately, nothing that was raised on cross examination changed the opinion or diagnosis of Dr. Brown or Dr. Zuchowski. Most significantly, the prosecution never called any witness, expert or otherwise, to testify to spice usage or to challenge the doctors' conclusions regarding Mr. Kassa's insanity.

In *Nevius,* the defendant testified not only to consuming alcohol but also marijuana, and yet that was insufficient to warrant a voluntary intoxication instruction. *Nevius, supra.* In the present case, the prosecution produced even less evidence. There is no reliable evidence as to the exact intoxicant Mr. Kassa was to have used, the amount consumed, the effect of this phantom substance or the resultant effect it conclusively had on his mental state. The only clear uncontradicted evidence is that Mr. Kassa acted as he did on July 27, 2016, because he was insane.

**b. <u>Even if the State is found to have produced sufficient evidence to warrant the voluntary intoxication instruction, the language in the given instruction was impermissibly beyond that provided in the statute.</u>**

Mr. Kassa's case presents an extremely unusual set of circumstances in which the State, rather than the defendant, requested a voluntary intoxication instruction in their effort to rebut a NGRI defense. The standard instruction provides as follows:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent.

NRS 193.220

The District Court, however, at the request of the State and over the objection of the Defendant, gave the instruction as follows:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition. *This is so even when the intoxication is so extreme as to make the person unconscious of what he is doing or to create a temporary insanity.* But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive or intent.

NRS 193.220; See *State v. Fisko,* 58 Nev. 65, 70 P.2d 1113 (1937), overruled in part by *Fox v. State,* 73 Nev. 241, 316 P.2d 924 (1957).

Certainly, the trial court has broad discretion to determine the proper language to be included in a jury instruction. *Crawford v. State,* 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). It is well settled, however, that an instruction which goes beyond statutorily set language is impermissible. See *Garcia v. State,* 121 Nev. 327, 340, 113 P.3d 836, 844, (2005), holding modified on other grounds by *Mendoza v. State,* 122 Nev. 267, 130 P.3d 176 (2006).

When there is clear statutory language defining a term and properly setting out the law, any unnecessary creative crafting by a party runs the obvious risk of confusing the jury. In *Gonzalez v. State,* 131 Nev. Adv. Op. 99, 366 P.3d 680, 685-86 (2015), the jury instructions "on self-defense and defense of others were bizarrely combined into a single instruction in a way that could be confusing to the jury." The court noted that such a combination made the instruction "unwieldy and unnecessarily confusing for the jury who was then expected to untangle the resulting amalgamation." *Id.* at 685-86. The possibility of misleading and "unduly confusing" the jury as to the actual defense made the instruction erroneous. *Id.*

In the present case the prosecution requested a voluntary intoxication instruction in an effort to rebut Mr. Kassa's insanity defense. Over the objection of

the Defense, the State crafted an instruction based on NRS 193.220, but with *additional language* taken from a discussion in *State v. Fisko,* 58 Nev. 65, 70 P.2d 1113 (1937) overruled in part by *Fox v. State*, 73 Nev. 241, 316 P.2d 924 (1957). "[This] is so even when the intoxication is so extreme as to make the person unconscious of what he is doing or to create a *temporary insanity"* (emphasis added) is the sentence inserted in the present instruction and taken from an archaic commentary (Bishop's Criminal Law § 400) briefly noted in *Fisko.* In *Fisko* it was the defense that requested the instruction for the purpose of allowing the defendant to argue for manslaughter rather than murder. Unlike the present case, the testimony in *Fisko* regarding the mental state due to intoxication was fairly equal with an expert for the defense and an expert for the prosecution each concluding differently. *Id.* Ultimately the court in *Fisko* decided not to give an instruction on voluntary intoxication.

The charges, the evidence, the parties' theories, and the arguments on appeal in *Fisko* were vastly different than those before this trial court. Perhaps most significantly, *Fisko* did not involve a defense of insanity. When a jury is being instructed on a NGRI defense, such as here, the addition of any language in a voluntary intoxication instruction *beyond the statute*, and which references

"*temporary insanity*," serves absolutely no purpose other than to confuse the jury and unduly muddle the appropriate law. See *Garcia v. State, supra.*

Arguing for the voluntary intoxication instruction, the State in the present case admitted that "this is a unique situation because of the insanity defense." (App 000668, L 24-25). The Defense tried to remind the trial court that "this is definitely not an ordinary case" and further that the court would be "muddying the waters" by going beyond the statutory language. Mr. Durham stated "temporary insanity I think is just going to confuse the issue." (App 000715, L20-21). The State's immediate response was "[w]ell, your Honor, I think the insanity – this case is confusing in and of itself." (App 000715, L22-23). If both the prosecution and the defense saw this as a unique case and the prosecution itself was having difficulty untangling insanity and intoxication, can anyone reasonably expect that unnecessary and unduly confusing non-statutory language would allow lay persons to come to a just result with correct application of the law? It is clear that giving the voluntary intoxication instruction, particularly as drafted, was erroneous.

## CONCLUSION

Mr. Kassa submits there was insufficient evidence to support his guilty verdicts and that he met his burden of demonstrating by a preponderance of the

evidence a NGRI defense under Nevada law. The two unrebutted expert witnesses (one of which was originally retained by the State), together with the voluminous medical records documenting Mr. Kassa's significant health history of audio-hallucinatory schizophrenia, established more than a preponderance of the evidence to allow finding that he was insane on July 27, 2016.

Additionally, Mr. Kassa believes that the trial court erred by instructing the jury on voluntary intoxication with nothing more than a scintilla of evidence from an unidentified assessor speculating that spice use should be ruled out. Since the prosecution called no witness to testify to intoxication, provided no conclusive evidence as to the substance used or the amount to have been ingested, and offered no evidence of its alleged effect on Mr. Kassa's mental state on the date in question, the State failed to carry its burden for giving the instruction. The instruction was based on little more than weak speculation, and as such was erroneous.

Further, the instruction as given was itself faulty when it impermissibly went beyond the statutory language and included reference to temporary insanity. Read in conjunction with the other instructions and in light of the NGRI defense, the voluntary intoxication instruction, as drafted, resulted in undue confusion for the jury and the obvious result of a wrongfully decided and unjust verdict.

Based on the foregoing facts and legal argument, Mr. Kassa respectfully requests that this Honorable Court reverse the District Court's denial of his Motion to Vacate Guilty Verdict and find Mr. Kassa not guilty by reason of insanity. Alternatively, Mr. Kassa respectfully requests a new trial be ordered should the motion not be reversed but the voluntary intoxication jury instruction be found unduly and unnecessarily confusing and, therefore, erroneous.

Dated this 8th day of March, 2019.

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Dated this 8th day of March, 2019.

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Dated this 8th day of March, 2019

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