In the Supreme Court of the State of Nevada

Jemar Demon Matthews,

Appellant,

v.

The State of Nevada,

Respondent.

Supreme Court Case No.: 77751

Appeal from Judgment of Conviction of Eighth Judicial District Court, Clark County, in Case No.: 06C288460-2

Appellant Jemar Matthews's Reply Brief

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NRAP 26.1 Disclosure

As required by NRAP 26.1, undersigned certifies that there are no persons or entities as described in 26.1(a) that must be disclosed.

Introduction

Jemar Matthews appeals his conviction for the 2006 murder of Mersey[1] Williams and related charges following his 2018 retrial for those offenses. A jury first convicted Matthews in May of 2007, but a federal court vacated that conviction ten years later based on prosecutorial misconduct during closing argument and rebuttal—misconduct that was not harmless because the state's case against Matthews "had obvious weaknesses and was far from overwhelming," unlike that against co-defendant Pierre Joshlin.

As set forth in the opening brief, reversal is required based on: (1) the state's racially motivated strike of prospective Juror No. 342 and the district court's failure to properly analyze it under the three-step *Batson* framework, OB 19–30; (2) Sergeant Overson's unnoticed and improper expert testimony, OB 30–33; (3) the district court's preclusion of a newly discovered defense witness, where the

[1] The jury trial transcripts refer to the victim interchangeably as "Mersy," and Mersey." *Compare* 1 AA 76, *with* 4 AA 781, while the state's amended information spells her name "Mercy," 1 AA 14. Undersigned apologizes if the above spelling is incorrect.

defense did not act in bad faith and the state did not show prejudice (and the court did not find either), OB 33–39; (4) prosecutorial misconduct during closing argument and rebuttal, including the prosecutor's personal assurance that its key witnesses were telling the truth, OB 39–42; and (5) the cumulative effect of these errors, OB 42.

The state responds that: (1) this Court should decline to review the *Batson* issue because Matthews did not include the full voir dire transcript, AB 7–8, 14; (2) the *Batson* claim fails on the merits because Juror No. 342 was hesitant and equivocal about her own ability to be fair and impartial and the fairness of the criminal-justice system, while the other empaneled jurors were not, AB 8–17; (3) Sergeant Overson did not testify as an expert witness or on the ultimate issue of guilt and, even if he had, Matthews was not actually prejudiced, AB 18–21; (4) the district court did not abuse its discretion by precluding the newly discovered defense witness given the late disclosure, the prejudice to the state, and the lack of prejudice to Matthews, AB 22–26; (5) the state's closing and rebuttal arguments were proper, and none affected Matthews's substantial rights, AB 26–31; and (6) the cumulative-error claim fails because there were no errors and the issue of guilt was not close, AB 32–34.

Reply

I. The district court erred by failing to properly apply the three-step *Batson* framework, resulting in the improper denial of Matthews's *Batson* challenge.

A. This Court should review Matthews's *Batson* claim.

Seeking yet another summary denial of Matthews's *Batson* challenge, the state repeatedly urges this Court to decline to consider it at all. AB 8, 14. The state points out that Matthews's appendix omitted the "pages" where the district court ruled on the *Batson* challenge and the voir dire of the comparative jurors. AB 8. Despite citing and quoting it in the opening brief, Matthews did inadvertently omit the page containing the district court's ruling—"[s]o at this time, the objection's overruled"—from his appendix. 1 OB 23; 2 RA 488. Matthews did provide the comparative jurors' responses to questions about the fairness of the criminal-justice system, though not to every voir dire question. AB 15 (citing 1 RA 166–77, where Juror No. 271 indicated he had been a defendant in another jurisdiction). Regardless, this Court now has the entire voir dire transcript (which the state generously provided) and has all portions of the record necessary to decide this claim on the merits. 1 RA; 2 RA.

B. The district court never conducted the sensitive inquiry in step three, failing to allow meaningful, let alone deferential, review.

The parties agree that this claim rests on the third step of the *Batson* analysis, where "the court should hear argument and determine whether the opponent of the peremptory strike has proven purposeful discrimination." *Williams v. State*, 429 P.3d 301, 306 (2018) (en banc). This Court has repeatedly "implored district courts to adhere to this three-step analysis and clearly spell out their reasoning and determinations." *Id.* (internal citations omitted). Yet, it "continues to see that analysis not being followed," *McCarty v. State*, 132 Nev. 218, 230, 371 P.2d 1002, 1010 (2016) (Douglas, J., concurring), as district courts "continue to shortchange *Batson* challenges and scrimp on the analysis and findings necessary to support their *Batson* determinations." *Williams*, 429 P.3d at 306. Here, the district court failed to make *any* specific findings or determinations, stating only "the objection's overruled." 2 RA 488.

This Court's recent en banc decision in *Williams v. State* is instructive. There, before the district court determined whether Williams had made a prima facie showing of discrimination, the state offered two race-neutral reasons for the strike, mooting step one. *Williams*, 429 P.3d at 306–07. Immediately after the state provided its race-neutral reasons, the district court stated "I find it was race-neutral. I don't think it was because of race, but I also noticed that you, [defense

counsel], kicked an African American lady off first." *Id.* at 308. Williams then "had to ask for the benefit of the third step of a *Batson* analysis"—something for which this Court made clear "Williams should not have had to ask." *Id.* "Worse, the district court never conducted the sensitive inquiry at step three," stating only "I don't find the State based it on race." *Id.* at 308. This Court found that the resulting record did "not allow meaningful, much less deferential review." *Id.* at 309.

Here, the district court offered even less explanation than in *Williams*. In *Williams,* the district court twice stated its finding that the strike was race-neutral and not "because of" or "based" on race. *Id.* at 308. Here, the district court made no such findings. In fact, the district court's comments prior to ruling indicate an incorrect (and unfortunately common) belief that in order to prevail on a *Batson* challenge, the movant must show a *pattern* of racial strikes: "I'm going to tell you, I don't—it's not—I find it very uncomfortable when I'm asked to determine the racial makeup." 2 RA 485; *Flowers v. Mississippi*, 139 S.Ct. 2228, 2244 (2019) (The Constitution forbids striking even a single prospective juror for a discriminatory purpose). The only ruling the court gave was "the objection's overruled," immediately after offering to make the juror questionnaire (where jurors identify their race) a part of the record and immediately after the state proffered that there were three black jurors in the venire. 2 RA 487–488.

Although the state spends considerable time on the "deferential" standard of review typically accorded to a district court's determination at step three, like the record in *Williams*, this record does not allow "meaningful, much less deferential review." *Williams*, 429 P.3d at 309.

C. The state more likely than not struck Juror No. 342 because of her race.

In *Williams*, the state offered two race-neutral reasons for its strike of an African American juror: (1) that the juror, "who is a physician's assistant in neurosurgery," expressed the opinion that "sometimes science gets it wrong, even though she's a doctor," and (2) that her "demeanor suggested that she would not 'deliberate in the group effectively'; she was 'closed off'; 'her answers were short, [and] she was unwilling to communicate much more than yes or no answers.'" *Id.* at 307–08. As explained above, the district court made no specific findings as to either. Here, the state offered similar reasons for the strike as in *Williams*, one based on Juror No. 342's responses and one based on her demeanor. Neither is supported by the record.

1. The state's non-demeanor argument fails.

In *Williams*, the state argued that the struck juror expressed skepticism regarding science because she acknowledged that "'sometimes science gets it

wrong' and the results of a test using technology, for example a pathology report of a tumor, can be incorrect"—a concern this Court noted "seem[ed] like a reasonable concession." *Id.* at 309. This Court also noted that several other jurors expressed similar, and sometimes stronger, concerns, including several who collectively acknowledged the fallability of science, that "'when there's a human element involved, there's a chance that mistakes can be made,'" chemical flaws and reactions in pregnancy tests can sometimes give an incorrect result, and the fallability of DNA evidence and technological tools. *Id.* at 310.

Here, the state's first non-demeanor reason for striking Juror No. 342 was because "she gave very tenuous responses when asked about being fair and impartial . . . ." 1 AA 59. Also, "when asked any reason why [she] wouldn't be fair and impartial, she kind of sighed and said, no, dot dot dot dot dot . . . ." 1 AA 62. Neither is supported by the record. Juror No. 342 answered no when asked if there was any reason why she could not be a fair or impartial juror, or if there was anything about her prior jury experience that would prevent her from doing so. 1 AA 37, 40. Juror No. 342 later assured "I know I'll be fair. I'll be fair to all the information I receive." 1 AA 55–56. She also confirmed that there was nothing that should cause either side concern; she could decide the case based on the evidence; and she would keep an open mind. 1 AA 55–56. The state's first non-demeanor reason for striking Juror No. 342 thus fails.

On appeal, the state adds that Juror No. 342 was hesitant or equivocal about the fairness of the criminal-justice system (in addition to her own ability to be fair). AB 13–17. The state explains that Juror No. 342 stated that the criminal-justice system is only "pretty fair" and "shaky." AB 14. This also fails.

Juror No. 342 acknowledged that the criminal-justice system as a whole is "pretty fair," and the "best," although not without its problems[2] —a fair statement akin to that made by the struck juror acknowledging the fallibility of science in *Williams*. The state focuses much of its energy on that none of the seated jurors said *exactly* the same thing as Juror No. 342. For example, Juror No. 266 stated that the system was "fair for the most part;" Juror No. 354 stated that it was "about as good as it can get, you know," although "not 100%;" Juror No. 381 stated that it was "kind of fair" depending on the situation, and less so for minorities; and Juror No. 455 acknowledged that he could understand why people in some communities may not want to engage with police officers. AB 14–15. Here, as in *Williams*, none of the comparative jurors said exactly the same thing as the struck juror, but each expressed similar, and sometimes stronger, concerns. The state also points out that several of the comparative jurors rehabilitated their answers. AB 14–18. But so did Juror No. 342. She agreed that the system was "the best" and that she

[2] These exchanges are reproduced in the opening brief at 25–27.

could keep an open mind. 1 AA 55–66. She also expressed, without qualification, that jury trials in particular were "fair." 1 AA 47.

Notably, although Juror No. 342's purported equivocation or hesitation about the fairness of the criminal-justice system is the state's primary argument on appeal, the state did little follow-up below:

> Juror 342: No, I—I was just teasing. Yeah. I think it's pretty fair.
>
> State: Okay, pretty fair, not perfect?
>
> Juror 342: Pretty fair.
>
> State: All right. Anything—that should cause either side concern?
>
> Juror 342: No.

1 AA 46–48.

The state likewise did not follow-up with jurors who voiced similar concerns about the system not being perfectly fair, or simply agreed with their assessment. For example, the state did not follow-up at all on this point with Juror No. 266. 1 RA 163–165. All it said in response to Juror No. 354's comment that the system is "not 100% fair" was "sure," 1 AA 45, much like it's response of "all right" to No. 342.

However, the state *did* follow-up with jurors who expressed more pointed concerns than No. 342. For example, when Juror No. 381 described the system as

"kind of fair" depending on the situation and his view that minorities are sentenced more harshly, the state responded:

> State: I get what you're saying there. Obviously, you know, I'm not disagreeing with you in any way. But we—we need jurors who at least can uphold their duty as a juror in this case . . . We don't want someone who is going to think the prosecutor is prosecuting someone because they're a minority because that would be horrible and ridiculous.
>
> Juror No. 381: Understood
>
> . . .
>
> State: Can you set aside whatever feelings you have about the justice system . . . being kind of fair
>
> Juror No. 381: Yes.

1 RA 230.

The state's lack of follow-up or simple agreement with the similar concerns of Jurors No. 266 and 354 and pointed follow-up with No. 381 suggest that No. 342's comment that the system is "pretty fair" was not the true reason for the state's strike. *See Williams*, 429 P.3d at 310.

2. The cold record does not support the state's non- demeanor argument

Having determined that the state's non-demeanor arguments were pretextual, the *Williams* court next turned to the state's demeanor argument. The Court explained that, "where only part of the basis for the peremptory strike involves the demeanor of the struck juror, and the district court summarily denies the *Batson*

challenge without making a factual finding as to the juror's demeanor," it "cannot assume that the district court credited the State's demeanor argument." *Id.* at 309. Without a finding from the district court, the cold record did not, by itself, support the state's demeanor argument. *Id.* at 310.

Like in *Williams*, here, only part of the basis for the state's strike involved the demeanor of Juror No. 342. Because the district court summarily denied the *Batson* challenge without making a determination as to her demeanor, this Court cannot assume that the district court credited the state's demeanor argument. As in *Williams,* the cold record does not support the state's demeanor argument and instead shows that she was forthcoming and asked everything put to her. Matthews disputed the state's argument below that Juror No. 342 rolled her eyes. 1 AA 62. In the transcript, the state noted during questioning that No. 342 "smirk[ed]," not that she rolled her eyes, and this was in response to the prosecutor's joke, "Uh oh. Was that a loaded question?" 1 AA 47. And the district court made no findings, nor even commented on, Juror No. 342's demeanor. All this suggests that, like the state's non-demeanor argument, its demeanor argument is pretextual.

* * *

The district court failed to conduct the three-step *Batson* analysis. As this Court has explained, "where, as here, the court fails to properly engage in [the

three-step] inquiry, and it appears more likely than not that the State struck the juror because of her race," reversal and remand is required. *Williams v. State*, 429 P.3d at 305.

II. The district court plainly erred by admitting Overson's unnoticed and substantively improper expert testimony.

Only an expert witness may give an opinion based on "scientific, technical or other specialized knowledge." N.R.S. § 50.275. Because Matthews did not object to Overson's testimony at trial, this Court reviews for plain error. *Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008).

The state argues that Overson "testified as a lay witness in describing what he perceived while working with his dog" and did not give his opinion of whether Matthews was involved in the shooting. AB 19–20. Had Overson simply testified that his dog alerted to Matthews in the bush, this would be true. But Overson said much more than that:

> State: Okay. And I failed to ask you this earlier. When you're—when you're talking about your dog alerting, are they trained to alert to just any person or—
>
> Overson: So when we initially train the dogs, we—we train them with just other officers that are coming in to help us. So they learn to find other humans. So they're trained through time to find other humans. It's when we certify them, we get them out on the street and they start to find suspects that they learn to

differentiate through time that suspects actually smell a little bit differently from other humans.

State: What do you mean by that?

Overson: So a suspect will or anybody I should say that has had some sort of traumatic experience—or have a what— I'll say they're running from the police or anybody that's had a dump of adrenaline will emit a chemical in their---in their odor called apocrine.

State: What is it?

Overson: Apocrine.

Overson: Okay. So that the dogs learn through time on the street that a suspect is emitting this apocrine, smells different than a regular human. And obviously that's very difficult to—to replicate that kind of a smell and training, so we can't teach them that in our nightly training. It's not until they get on the street and they actually start to find suspects that they learn that.

But over time you can differentiate with the dog that you've been working for—for some time. Based on their alert you can tell if they're smelling a suspect, if somebody's got their window and they're smelling somebody that's—that's inside their house. And like I said a cat, different odors and thing, just by the way that the dog responds.

State: Okay. You indicated that you had called out—did the helicopter spot him?

Overson: Before we get to that, can I add one more thing?

State: Please.

Overson: The apocrine will also often times cause a dog to act

> more aggressively. So if they smell a regular suspect—a regular human, a lot of times they'll be more investigatory when they come into with them. But when they smell that apocrine, they learn through time that hey that is the suspect that I'm looking for and they feel like they have the green light to go ahead and bite. So that will often time cause them to react even more aggressively.

2 AA 401–402.

The thrust of Overson's testimony was that his dog is trained to alert, and to react more aggressively to, suspects, who smell differently from other humans. This testimony actually prejudiced Matthews, who presented an innocent explanation for his presence in the bushes and whose guilt was far from certain.

III. The district court erred by precluding the newly discovered defense witness because the defense did not act in bad faith and the state did not show prejudice.

The district court made no findings or determinations in precluding Jomesha's testimony "based on lack of notice." 4 AA 768. Matthews therefore analyzed this decision under three possible notice theories: N.R.S. § 174.234 and §174.233(4) and Nevada Supreme Court Rule 4, Section IX, all of which this Court reviews for abuse of discretion. OB 33–39.

Nevada Revised Statute § 174.234(3)(a) requires a court to prohibit an additional witness from testifying only "if the court determines that the party acted in bad faith by not including the witness on the written notice . . . ." Section

174.295 imposes a continuing duty to disclose and permits the court to preclude undisclosed material or "enter such other order as it deems just under the circumstances."

Here, the district court did not find that Matthews acted in bad faith. The state argues that Matthews acted in bad faith because he noticed this witness on the sixth and seventh days of trial and should have found her sooner, particularly given that this case originated in 2006. AB 24. Bad faith is "[d]ishonesty of belief, purpose, or motive." Black's Law Dictionary (11 ed. 2019). The state ignores that the passage of time makes prospective witnesses more, not less, difficult to locate. Matthews's 2007 conviction was not reversed until more than a decade later, and Matthews was litigating appeals and post-conviction petitions during this time, not preparing for trial for 12 odd years as the state suggests. Matthews brought Jomesha—and the substance of her anticipated testimony—to the court's and the state's attention as soon as possible, candidly explaining how he had contacted her and the substance of her testimony. 3 AA 619–622; 4 AA 763–768. The state has offered, at most, an argument that Matthews did not pursue Jomesha as diligently as he could have, not bad faith.

As to prejudice, the state argues that its case-in-chief would have been different if Jomesha had been noticed "because the State had noticed a witness that would have testified about what happened prior to the murder." AB 25. Below

and now on appeal, the state fails to explain exactly how Jomesha's testimony would open the door to precluded evidence of gang membership or a purportedly related gang murder.[3] Because the court did not find, and the record does not show, bad faith on Matthews's part or prejudice to the state, the district court abused its discretion by precluding Jomesha's testimony to the extent it did so under the general witness-notice statute.

The state next argues that the district court properly precluded Jomesha's testimony based on lack of alibi notice and represents that the court "agreed that the witness would be offering an alibi." AB 25–26. This misstates the record. The court said that Jomesha's proferred testimony "seem[ed] to be a little alibi-ish." 4 AA 766. On appeal, even the state qualifies her proffered testimony as "quasi-alibi." AB 25. Jomesha would have testified that Matthews told her that he was going to visit his child's mother on the night of the murder. 3 AA 20. This testimony would not have established where Matthews was at the time of the murder, but would have been offered instead to explain his presence in a different

[3] The state theorized that the gang to which Matthews and Joshlin purportedly belonged was rivals with Maurice Hickman's gang and that the shooting at his home was in retaliation for a shooting the night before. The district court declined to allow the state to explain that police were in the area because they feared retaliation for the gang murder the night before. RA 61–62. The state was permitted to refer to Matthews and Joshlin as "friends" but not "associates," and precluded from delving into their purported gang membership, *see e.g.*, 3 AA 649–652.

location an hour and a half after the murder. Although Jomesha would have been a helpful witness because she would have supported his explanation, along with the TPO, for his seemingly suspicious presence on Jimmy Avenue, she was not an alibi witness because she could not place Matthews away from 1271 Balzar at a specified place at the time of the murder.

Even if Jomesha were an alibi witness, a trial court should exercise its discretion to allow the presentation of alibi evidence if a defendant demonstrates good cause for non-compliance. *Williams v. State*, 97 Nev 1, 3, 620 P.2d 1263, 1265 (1981). Good cause exists where prejudice to the state could be cured and where the alibi "ha[s] such substance as to have probative value to the defense." *Id.* (internal citations and quotations omitted). Here, good cause exists because Jomesha's testimony was probative of Matthews's explanation for his presence on Jimmy Avenue and any prejudice to the state was curable. Again, all the state offers to show prejudice is a conclusory assertion that its case-in-chief would have been different. AB 25. As explained above, Jomesha's testimony would not have magically opened the door to already precluded gang evidence. Even if it had, this would have prejudiced Matthews and not the state and would have been curable because the trial court could have simply allowed the state to call whatever additional witnesses it desired.

There is a dearth of caselaw discussing a district court's authority to deny telephonic testimony that is untimely disclosed under Rule 4, but the rule itself is primarily concerned with preserving the rights of the defendant. It provides that witnesses and parties must appear in person unless: (1) the parties stipulate to allow the party or the party's witness to appear telephonically, the defendant expressly consents, and the court approves the stipulation, or (2) the court makes an individualized determination, based on clear and convincing evidence, that permitting the witness to testify telephonically is necessary and that all of the other elements of the right of confrontation are preserved. Here, Matthews gave a compelling reason why it was necessary for Jomesha to testify telephonically, there would have been no confrontation clause concerns, and the state does not explain why it could not have examined Jomesha telephonically.

Like the *Batson* issue, the district court made no specific findings or conclusions, but simply denied Matthews's motion. This Court should find that the district court abused its discretion when it precluded Jomesha's testimony "based on lack of notice," where the defense did not act in bad faith and the defendant was prejudiced while any prejudice to the state could have been cured.

IV. The state improperly vouched for its lead witnesses in closing argument and rebuttal.

The way this Court reviews preserved prosecutorial-misconduct claims depends on whether the misconduct is of a constitutional or non-constitutional dimension. *Valdez v. State*, 124 Nev. 1172, 1188–89, 196 P.3d 465, 476 (2008). This Court reviews all unpreserved prosecutorial-misconduct claims for plain error and will reverse if the defendant shows that the error caused "actual prejudice or a miscarriage of justice." *Id.* at 1190, 196 P.3d at 477. This Court has long recognized that prosecutors should not inject his personal opinion or beliefs into the proceedings and may not vouch for the credibility of a witness. *Collier v. State*, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985), *modified on other grounds by* 106 Nev. 713, 800 P.2d 175; *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

In closing argument and rebuttal, the state repeatedly vouched for its lead witnesses, Officers Cupp and Walter, and encouraged the jury to believe their testimony simply because they are police officers. The prosecutors told the jury to believe these witnesses because they are "police officers" with "actual training and experience chasing bad guys." 4 AA 797. The prosecution further vouched that they were not the "type of officers" who would want to put away the wrong person. 4 AA 799. In rebuttal, the prosecutor personally assured the jurors that if

Officers Cupp and Walter "had any doubt in their mind that it wasn't him, they'd be the first to say it. This was a big deal to them. They don't want the wrong guy going away. They want the right guy. I mean, if they had any doubt, they would say it." 4 AA 827. The prosecutor also personally assured the jury that "[i]f Mr. Matthews had gotten away and they were trying to find him then I can assure you Officer Cupp and Officer Walter would have said I know where he is." 4 AA 831.

The state responds that none of these statements were improper because they did not vouch for Cupp or Walter's credibility, argue that they should be believed simply because they were police officers, or provide personal assurances that they were telling the truth, and each was a fair comment on the evidence presented. AB 26–31. That the officers testified that they had training and experience in eye-witness identification and that they would have given more detailed descriptions of the suspects earlier on if they had been asked does not excuse the state's vouching, particularly its *express personal assurance*: "If Mr. Matthews had gotten away and they were trying to find him then I can assure you Officer Cupp and Officer Walters would have said I know where he is." 4 AA 831. A prosecutor may not provide personal assurances of witness credibility. *Lisle v. State*, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997) (internal citation and quotation omitted).

Nor does the officers' testimony about the certainty of their identifications of Matthews excuse the state arguing if Officers Cupp and Walter "had any doubt in

their mind that it wasn't him, they'd be the first to say it. This was a big deal to them. They don't want the wrong guy going away. They want the right guy. I mean, if they had any doubt, they would say it." 4 AA 827. This comment both injected the prosecutors "personal opinion or beliefs" that these officers were telling the truth and referred to facts not in evidence by suggesting that the prosecutors knew that these officers were credible based on past experiences.

The state begins and ends its prosecutorial-misconduct analysis at step one and does not explain how Matthews has not shown he suffered "actual prejudice or a miscarriage of justice" as a result of these comments. The issue of guilt was close, and to convict Matthews *required* the jury to believe Cupp and Walter's testimony that he was the person driving the suspect vehicle. The state admitted as much in closing argument: "what it ultimately comes down to is those two officers [Cupp and Walter] who came in here and looked you all in the eye." 4 AA 827. The state's comments improperly invited the jury to do so merely because they were police officers and personally assured the jury that they were telling the truth. These comments were made during closing argument and rebuttal—immediately before the jury retired to deliberate—and no curative instruction was given.

This Court has cautioned that, "[i]f the issue of guilt or innocence is close, if the state's case is not strong, prosecutorial misconduct will probably be considered

prejudicial." *Garner v. State*, 78 Nev 366, 373, 374 P.2d 525, 530 (1962). The above misconduct plainly warrants reversal.

V. The cumulative error was prejudicial in light of the weight of the evidence, the severity of the errors, and the gravity of the crimes.

If the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. *DeChant v. State*, 116 Nev. 918, 927, 10 P.3d 108, 113–14 (2000). "Relevant factors to consider in deciding whether error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." *Id.* (internal citation and quotation marks omitted).

The state now argues that the issue of guilt was close and its case against Matthews was strong. AB 32. The state devotes its argument to the strong evidence that the carjackers that Cupp and Walter chased from Lawry Avenue were also the shooters at Balzar Avenue—a fact defense counsel candidly conceded at trial. 4 AA 807. Matthews's defense was and is that he was not among that group, not that the carjackers and shooters were two different groups of people.

As even the state conceded during closing argument, this case ultimately came down to whether the jury believed that Officers Cupp and Walter correctly identified Matthews as the suspect driver. 4 AA 827. This very much remains a

case where the evidence of guilt is "far from overwhelming." *Matthews v. Neven*, 250 F.Supp.3d 751, 765 (D. Nev. 2017). First-degree murder is the gravest of crimes for which Matthews was sentenced to—and may well remain in—prison for the rest of his life. Each of the trial errors goes to the heart of Matthews's complete defense: that he was not present during the murder (as opposed to, say, that he lacked the requisite intent or was guilty of only the lesser crimes). Thus, even if this Court concludes that these errors do not, standing alone, require reversal, their cumulative effect denied Matthews a fair trial.

Conclusion

The district court's failure to apply the well-established three-part *Batson* framework and its resultant summary acceptance of the state's pretextual reasons for striking an African American juror constitute structural error requiring automatic reversal. Alternatively, the trial errors taken separately and cumulatively deprived Matthews of a fair trial and require reversal and remand.

Dated: October 10, 2019

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3. **I certify** that I have read this reply 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 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 if this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: October 10, 2019

/s/ Todd M. Leventhal

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I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 10, 2019. Electronic Service of this document will cause the document to be served on all participants in this case.

Dated: October 10, 2019

/s/ Todd M. Leventhal

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