IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON BOLDEN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 79715

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF NEVADA

JASON BOLDEN, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 79715

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ARGUMENT

I. A CERTIFIED PRELIMINARY HEARING TRANSCRIPT SATISFIES NRS 173.035

"[Q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which this [C]ourt reviews de novo." Stevenson v. State, 131 Nev. 598, 602, 354 P.3d 1277, 1280 (2015) (quoting, City of Renvo v. Reno Gazette-Journal, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003)). Initially, this Court will look at the plain language of a statute to determine its meaning. Bigpond v. State, 128 Nev. 108, 114, 270 P.3d 1244, 1248 (2012). However, failure to strictly comply with the plain language of statute is not necessarily fatal. Leyva v. Nat'l Default Servicing Corp., 127 Nev. 470, 475-76, 255 P.3d 1275, 1278-79 (2011).

This Court can apply the doctrine of substantial compliance to "avoid harsh, unfair or absurd consequences." Leven v. Frey, 123 Nev. 399, 407, 168 P.3d 712, 717 (2007) (quoting 3 Norman J. Singer, *Statutes and Statutory Construction* § 57:19, at 58 (6th ed. 2001)). In doing so, this Court considers "the language used and policy and equity considerations." Levya, 127 Nev. at 476, 255 P.3d at 1278. This is accomplished by looking at whether "the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language. Id.

NRS 173.035(2) states:

> If, however, upon the preliminary examination the accused has been discharged, or the affidavit or complaint upon which the examination has been held has not been delivered to the clerk of the proper court, the Attorney General when acting pursuant to a specific statute or the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process must forthwith be issued thereon. The affidavit need not be filed in cases where the defendant has waived a preliminary examination, or upon a preliminary examination has been bound over to appear at the court having jurisdiction.

The purpose of this statute is to "safeguard against egregious error by a magistrate in determining probable cause." Cranford v. Smart, 92 Nev. 89, 91, 545 P.2d 1162, 1163 (1976).

In Lutz v. Kinney, this Court previously considered the essential elements of an affidavit. 23 Nev. 279, 281, 46 P. 257, 257-58 (1986):

> The essential requisites are, apart from the title in some cases, that there shall be an oath administered by an officer authorized by law to administer it, and that what the affiant states under such oath shall be reduced to writing before such officer. The signing or subscribing of the name of the affiant to the writing is not generally essential to its validity. It is not, unless some statutory regulation requires it, as is sometimes the case. It must be certified by the officer before whom the oath was taken.

Lutz, 23 Nev. at 281-82, 46 P. at 258 (quoting Alford v. McCormac, 90 N. C. 151, 152 (1884). Since Lutz, the Nevada Legislature passed NRS 53.045 which allows certain unsworn declarations to be used in lieu of an affidavit. See Buckwalter v. Dist. Ct., 126 Nev. 200, 202, 234 P.3d 920, 922 (2010); State, Dep't of Motor Vehicles v. Bremer, 113 Nev. 805, 811-13, 942 P.2d 145, 149-50 (1997).

An otherwise defective declaration can be remedied by extrinsic evidence. Mountainview Hospital v. Dist. Ct., 128 Nev. 180, 186, 273 P.3d 861, 865 (2012). In Mountainview Hospital, the plaintiffs failed to strictly comply with the statute due to the absence of a properly executed jurat. Id. at 186, 273 P.3d at 865. This Court held that the noncompliance could be remedied by "other evidence that the expert's statements were made under oath or constitute an unsworn declaration made under penalty of perjury." Id.

A prosecutor, rather than a witness with knowledge of the event, attaching their own affidavit does not substantially comply with the statute. Feole v. State, 113 Nev. 628, 631, 939 P.2d 1061, 1063 (1997); Cipriano v. State, 111 Nev. 534, 540, 894 P.2d 347, 351 (1995). Both Feole and Cipriano involve situations where the documents supporting the information upon affidavit came from the prosecutor. Feole, 113 Nev. at 631, 939 P.2d at 1063; Cipriano, 111 Nev. at 540, 894 P.2d at 351. This Court held this was insufficient to support an information by affidavit. Id.

Mountainview Hospital is not inconsistent with the notion that this Court should apply the doctrine of substantial compliance. In Mountainview, the Court's concern was that there needed to be evidence that the statements were made under oath or that unsworn declarations made under penalty of perjury. Unlike here, there were no other substitute documents that provided this same guarantee of veracity. As such, the purpose of the affidavit requirement could not be adequately served without a guarantee to the truthfulness of those statements.

The same issue occurred in Feole and Cipriano. The purpose of NRS 173.035(2) is to allow a district court to determine probable cause when a magistrate causes egregious error. Cranford, 92 Nev. at 91, 545 P.2d at 1163. To do so, the district court must look at the evidence provided by a competent witness who could testify regarding their knowledge of the offense. Solely submitting a prosecutor's affidavit does not adequately serve the purpose of the statute. As such, the failure to

include witness statements does not substantially comply with the statute. While this may be the case, it does not mean substantial compliance with NRS 173.035(2) could not occur in other circumstances.

The California Supreme Court encountered a similar issue as to whether grand jury transcripts could be considered when the statute permitted consideration only of affidavits. Sweetwater Union High School Dist. v. Gilbane Building Co., 6 Cal. 5th 931, 434 P.3d 1152 (Cal. 2019). In Sweetwater Union High School Dist., the defendants filed a motion to strike under the California Code of Civil Procedure. Id. at 938, 434 P.3d at 1156. As part of this motion, the court was required to only consider affidavits submitted by each party. Id. at 941, 434 P.3d at 1157. The defendants challenged the court relying on excerpts from grand jury transcripts. Id. at 941, 434 P.3d at 1158. Similar to NRS 53.045, California has a statute allowing for unsworn declarations, made under the penalty of perjury, to serve as substitute for an affidavit Id. at 944, 434 P.3d at 1159. The California Supreme Court reasoned that the statements in grand jury transcripts are made under oath and "would serve to establish personal knowledge and competence in the same manner that an affidavit or declaration would." Id. at 942-45, 434 P.3d at 1158-60. Accordingly, the court held that the grand jury transcripts serve as the equivalent of affidavits and declarations and were properly considered. Id. at 945, 434 P.3d at 1160-61.

Substantial compliance requires analyzing the factual circumstances and determining whether the purpose of the statute is adequately served in absence of strict compliance. While NRS 173.035(2) requires an affidavit, Nevada adopted a statutory scheme permitting certain declarations to serve as equivalents. NRS 53.045. This is identical to the statutory scheme in Sweetwater. Such declarations can be unsworn and only requires a written statement and signature that the declarant agrees the declaration is true under penalty of perjury. NRS 53.045. The purpose of an affidavit or unsworn declaration is to assist the district court in determining whether the magistrate committed egregious error.

A preliminary hearing transcript not only substantially complies with NRS 173.035(2) but is better evidence for the district court to consider than an unsworn declaration or affidavit. During a preliminary hearing, witnesses are sworn in and testify under penalty of perjury. Being sworn in alone is already more substantial than an unsworn declaration. However, transcripts from a preliminary hearing also provide the benefit of cross-examination. This presents a more comprehensive picture than an unsworn declaration. As such, preliminary hearing transcripts adequately serve the purpose of NRS 173.035(2).

Absurd consequences occur as a result of not allowing preliminary hearing transcripts to satisfy NRS 173.035(2). As discussed above, preliminary hearing transcripts are better evidence than an unsworn declaration. It would be absurd to

deny the usage of better evidence that complies with the purpose of the statute. This highlights that disallowing preliminary hearing transcripts only focuses on technical compliance, not whether the purpose of the statute is served by the substance of the transcripts.

Appellant misunderstands the purpose of NRS 173.035(2). Appellant argues that this statute cannot produce absurd results because the existence of the statute is "an act of legislative leniency to the prosecution's initial failure to properly prosecute the case in the Justice Court." Supplemental Brief, at 24. This directly conflicts with this Court's explicit statement that this is "not a device to be used by a prosecutor to satisfy deficiencies in evidence at a preliminary examination." Cranford, 92 Nev. at 91, 545 P.2d at 1163. This statute is not a "second bite" for improperly prosecuted cases, but rather serves as a safeguard to correct egregious error by a magistrate. Id. The absurd consequences that arise from disallowing more substantial evidence is clear.

The filing of preliminary hearing transcripts to support a motion under NRS 173.035(2) substantially complies with the purpose of the statute. Preliminary hearing transcripts are better evidence than unsworn declarations. Accordingly, this Court should hold that the State substantially complied with NRS 173.035(2)

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II. APPELLANT FORFEITED ANY ARGUMENT REGARDING NRS 173.035(2)

"The failure to preserve error, even an error that has been deemed structural, forfeits the right to assert it on appeal." Jeremias v. State, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). However, NRS 178.602 allows an appellant to raise a forfeited claim so long as they can establish there are "plain errors or defects affecting substantial rights. The decision by this Court to address plain error is discretionary. City of Las Vegas v. Eighth Judicial Dist. Court in & for County of Clark, 133 Nev. 658, 660, 405 P.3d 110, 112 (2017). To "correct a forfeited error, an appellant must demonstrate that: (1) there was an 'error;' (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." Jeremias, 134 Nev. at 50, 412 P.3d 43, 48. As discussed above, the affidavit substantially complies with NRS 173.035(2). Accordingly, no error occurred and Appellant forfeited any claim.

Appellant also fails to demonstrate that any error is "so unmistakable that it is apparent from a casual inspection of the record." Martinorellan v. State, 131 Nev. 43, 49, 343 P.3d 590, 593 (2015) (quoting Vega v. State, 126 Nev. 332, 338, 236 P.3d 632, 637 (2010)). The history of this case indicates that any error is not apparent from casual inspection of the record. Between the district court's acceptance of the transcripts, Appellant's failure to object to the motion, and the panel affirming the judgment of conviction, any potential error is not unmistakable. If such an error

could be seen from casual inspection of the record, this Court would not have required en banc review or supplemental briefing. Accordingly, Appellant cannot establish the second prong of plain error and his claim is forfeited.

Finally, Appellant fails to establish that any error affected a substantial right. "Plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." Jeremias, 134 Nev. at 51, 412 P.3d at 49 (quoting Black's Law Dictionary 1149 (10th ed. 2014). Appellant has the burden to establish actual prejudice or a miscarriage of justice. Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006). In Jeremias, the district court excluded members of the defendant's family during voir dire. Id. at 49-50, 412 P.3d at 48. This Court recognized that while a defendant has a constitutional right to a public trial during jury selection, the exclusion of his family during voir dire was "unquestionably trivial under the circumstances." Id. at 51-52, 412 P.3d at 49-50.

Actual prejudice or a miscarriage of justice does not occur when a district court corrects a magistrate's egregious error. Appellant should have been bound up on all charges. However, due to a magistrate's egregious error the State had to file an information by affidavit. Like Jeremias, any error Appellant faces is trivial. Appellant does not maintain a substantial right to having a magistrate commit

egregious error. Accordingly, Appellant fails to meet his burden to establish that any error affected a substantial right.

Appellant tries to distinguish this case by arguing that the motion was "inadvertently not opposed." Supplemental Brief, at 27. The record shows that Appellant had sufficient time to respond to the motion. On September 5, 2018, the State filed a Motion for Leave to Amend Information by Affidavit. I AA 33. On September 18, 2018, thirteen days later, the district court noted that Appellant had not filed an opposition. I RA 1. The district court then granted Appellant a continuance to file an opposition. I RA 1. As such, Appellant cannot now claim that his failure to object was not a "knowing, willful, or tactical decision."

Furthermore, Appellant faced no prejudice as he was later convicted on all charges. To the extent the district court did err in granting the State's Motion, such an error did not cause actual prejudice or constitute a miscarriage of justice. This Court has previously held that a conviction at trial cures any earlier error in the initial charging process. See Echavaria v. State, 108 Nev. 734, 745, 839 P.2d 589, 596 (1992); Detloff v. State, 120 Nev. 588, 596, 97 P.3d 586, 591 (2004) (observing that any irregularities occurring during grand jury proceedings were cured when defendant was convicted by jury under higher standard of proof); Frutiger v. State, 111 Nev. 1385, 1393, 907 P.2d 158, 163 (1995) (Steffen, J., dissenting) ("The reason we do not reverse criminal convictions despite arguably deficient indictments

is because indictments do not involve a determination of the innocence or guilt of an accused."); United States v. Mechanik, 475 U.S. 66, 70, 106 S.Ct. 938, 941-42 (1986). As such, any error committed by the district court in granting the State leave to file the charges by affidavit was harmless. Appellant cannot establish plain error and he forfeits any claim regarding NRS 173.035(2).

CONCLUSION

Based on the foregoing the State respectfully requests that this Court affirm the Judgment of Conviction.

Dated this 2nd day of May, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 2,449 words and 11 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 2nd day of May, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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