IN THE SUPREME COURT OF THE STATE OF NEVADA

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KODY HARLAN

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.Ct. No. 80318
D.C. No. C333318-2

APPELLANT'S REPLY BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

KODY HARLAN Appellant, vs. THE STATE OF NEVADA, Respondent.	S.Ct. No. 80318 D.C. No. C333318-2

ARGUMENT

I. THE STATE MISSTATES AND MISCHARACTERIZES THE TESTIMONY GIVEN AT TRIAL SO AS TO SUPPORT ITS ANSWER TO HARLAN'S CLAIMS ON APPEAL

Just as it did at trial, in its Answering Brief the State has repeatedly misstated, misrepresented and mischaracterized testimony presented at trial so as to support the theory of its case and the continuing inaccurate catch all assertion that there was "overwhelming evidence" against Harlan presented at trial, as well as to support its opposition to Harlan's claims raised on appeal.

In its Answering Brief, the State claimed that Thomson heard Harlan and Caruso "planning a 'lick'—slang for robbery—to obtain money for more marijuana." State's Answering Brief ("AB") 5. The State cited to 11AA 1017-21.

Additionally, the State claimed Thompson's robbery theory (that Caruso and Harlan planned the robbery of Minkler) "stemmed from hearing Harlan and Caruso talking about doing a 'lick' and mentioning Minkler's name during that conversation." AB 6. The State cited to 11 AA 1044; 11 AA 51-21. [1]

First, it is clear from Thompson's *entire* testimony, including the very portions of said testimony cited to by the State, that he did **not**, in fact, hear anyone "planning a lick," that he only heard the word "lick" vaguely mentioned, he did not know who mentioned it nor whom it was directed to (if anyone) and that Harlan was out of it and falling asleep on the couch. 11 AA 1044-45; 11 AA 1057.

Second, Thompson testified that Minkler's name was **not** mentioned during the conversation where someone mentioned doing a "lick" and instead, Minkler's name was mentioned in a completely separate and prior conversation wherein Caruso was talking about who had marijuana to "match" with (share and hang out), a conversation the State conveniently omits from its entire Answering Brief. 11 AA 1044-45; 11 AA 56.

Third, with respect to Thompson's robbery theory, his actual testimony was that this robbery theory of his was **"just a guess"** that stemmed from "**what [he]**

[1] Although the state cited to 11 AA 51-51, which is Jury Instruction Nos 2 and 3, Harlan assumes the State intended to cite to 11 AA 1051-52, which is Thomson's testimony.

read on the news and the comments on those news articles." 11 AA 1144.

In its Answering Brief, the State also misrepresented Methvin's testimony in characterizing Caruso's statement about wanting to do a lick as being directed to Harlan and Harlan alone. AB 6. The State further mischaracterized the facts by dovetailing the alleged one-on-one conversations about a lick between Caruso and Harlan into the assertion that Caruso and Harlan then left twenty minutes later to go get Minkler. AB 6.

The reality is that there were **five** people present when Caruso mentioned wanting to "hit a lick"—Harlan, Thompson, Oliver, Osurman and Methvin. 11 AA 1019. There was absolutely no testimony presented that Caruso was speaking only to Harlan. In fact, there was testimony given by three witnesses that Harlan was laying down "not all there" and falling asleep on the couch at the time Caruso made the statement. 10 AA 903; 912-13; 11 AA 1044; 12 AA 1124. One witness described Harlan as so out of it that "he was awful to the point where he couldn't even comprehend what was going on." 12 AA 1176. Arguably, Harlan did not hear Caruso make the statement about a lick and it was only the other four who heard so. Moreover, the characterization of Harlan and Caruso leaving to get Minkler shortly after Caruso's comment is skewed given that the State has chosen to completely omit the fact that **Minkler called Caruso three times before Caruso**

called him back and during that conversation Caruso and Minkler talked about matching marijuana. 9 AA 890; 10 AA 911-12; 926; 11 AA 1044-45; 13 AA 1248. It was after this conversation that Caruso and Harlan left to go pick Minkler, came back to the party and shared marijuana with no animosity or violence. 9 AA 890; 10 AA 911-12; 926; 11 AA 1044-45; 13 AA 1248.

The State states in its Answering Brief that Meadows testified that "[Harlan] and Caruso told Meadows that Caruso shot Minkler and they needed to move the body." AB 8. The State then cites to 11 AA 1161-62. Although Meadows initially said, "*they* told me what happened," after the State asked a couple more detailed it became clear that only Caruso talked and Harlan said nothing.

> STATE: Okay. When they came to the court – or I'm sorry, when they came into this room, what did they do?
> **WITNESS: They told me what happened.**
> STATE: Okay. What did they tell you happened?
> **WITNESS: That they – that [Caruso] killed the dude.**
> STATE: Okay. Was [Caruso] speaking?
> **WITNESS: Yes.**
> *STATE: All right. Did [Harlan] say anything*?
> ***WITNESS: No.***
> STATE: Okay. And then after [Caruso] said he had killed the dude, what did he say needed to happen?
> **WITNESS: To move the body.**
>
> 12 AA 1162 (emphases added).

As can be seen by the trial transcript, Meadows did not testify that Harlan said anything about shooting anyone or moving a body. According to Meadows, it

was Caruso alone who made these statements. 12 AA 1162. Additionally, Meadows testified that Caruso said it was an accident. 12 AA 1174.

With respect to Harlan allegedly spray painting, initially Meadows testified that Harlan spray painted "Fuck Matt" above the closet where Minkler's body was found and "RIP' on the floor but later when confronted with his prior statement to police shortly after the homicide, Meadows agreed that **he only saw Harlan with a can of spray paint in his hand but never actually saw him spray paint anything and did not even see *what* was spray painted**. 12 AA 1177-80. Notably, Meadows spray painted in the home as did several other kids. 12 AA 1179-80. The State cited to Respondent's Appendix ("RA") in support of the assertion that Harlan spray painted these words. AB 8. Respondent's Appendix shows the spray painting but does not to show *who* did the spray painting. RA 5-14.

The State also cited to trial Exhibits 147 and 149 in support of the argument that Caruso and Harlan were acting in concert saying that Exhibit 147 shows that Harlan is with Caruso "engaged in the same activities as Caruso." AB 8-9, fn. 1. The "activities" the State speaks of do not including talking about, planning or committing a robbery or murder. The State claims that Caruso "filmed a video of himself and [Harlan] bragging about having "caught a body." AB 20. In fact,

Harlan does not say anything about "catching a body" in this video. 10 AA 950; See Exhibit 147 and 149. The State claims that Caruso and Harlan Face Timed several people to brag about Minkler's murder. AB 21. In fact, *Caruso* called and *Caruso* talked saying HE had killed Minkler. Harlan is not mentioned nor does Harlan call anyone. 11 AA 1027; 12 AA 1125-26. The State claims that Harlan and Caruso then went to a party and "continued bragging about catching a body." AB 21.In fact, it is unknown who said he "caught a body" at the party because there was no reliable or admissible testimony presented regarding said statement, discussed *infra* in section III.

The State uses all of the above referenced inaccuracies to argue that the State did not commit prosecutorial misconduct and that the district court did not err in denying Harlan's Motion to Sever. The State's arguments are based on speculation and outright misstatements of facts.

A. Prosecutorial Misconduct

The State argued that Harlan's assertion in his Opening Brief that the State committed prosecutorial misconduct when it argued facts not in evidence at trial is "belied by the record" because the State did not argue said facts not in the record. AB 33. The State then confusingly quotes a portion of the State's closing argument wherein the State says, "We hear from Kymani that both [Caruso] and [Harlan]

mentioned wanting to rob someone and wanting to do a lick." AB 33. Cleary, the State argued exactly what Harlan claims it improperly argued—that Harlan made statements about wanting to do a lick, rob someone and that Minkler's name was brought up in this conversation. The State also argues that this was not prosecutorial misconduct because Methvin and Thompson testified that Harlan and Caruso discussed a lick. As discussed *supra*, this is not accurate. The witnesses ultimately made it clear that Harlan did **not** discuss doing a lick. Caruso stated he wanted to do a lick in front of several people. Also, there was no testimony that Minkler's name was brought up in the mention of doing a lick, discussed *supra*. By asserting these facts during closing that were not in evidence, the State committed prosecutorial misconduct and this was prejudicial to Harlan. Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) *citing* Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985).

B. Motion to Sever

With respect to the denial of Harlan's Motion to Sever, the State claims that this was proper because Harlan and Caruso were heard planning a lick; Caruso told Harlan he wanted to commit a lick and kill someone; Harlan and Caruso discussed a robbery; *they* filmed themselves bragging about "catching a body;" *they* Face Timed people to brag about the murder; Harlan spray painted "fuck Mattt" and

"RIP;" and *they* bragged about catching body at a party. AB 19-22. None of these factual assertions are true, discussed *supra*. Ironically, the State briefly contradicts itself in it Answering Brief and admits that Harlan did not actually make any of these statements regarding committing a lick or killing someone. AB 19. Therefore, it was error for the district court to deny Harlan's Motion to Sever and this prejudiced him. State v. Lewis, 50 Nev. 212, 255 P. 1002, (Nev. 1927) *citing* People v. Booth, 72 Cal. App. 160, 236 P. 987; People v. Perry, 195 Cal. 623, 234 P. 890; Commonwealth v. Borasky, 214 Mass. 313, 101 N.E. 377; Gillespie v. People, 176 Ill. 238, 52 N.E. 250.

II. THE STATE FAILS TO ADDRESS THE LAW THAT GIVING A POSITIVE INSTRUCTION AS TO THE ELEMENTS OF THE CRIME DOES NOT JUSTIFY FAILURE TO GIVE A NEGATIVELY PHRASED THEORY INSTRUCTION

In response to Harlan's claim that the district court should have *sua sponte* given the jury a "mere presence" and "mere knowledge of purpose" instruction, the State does nothing more than claim that the positive instructions as to the elements of the crime were enough because if the jury thought Harlan was "merely present," or had "mere knowledge," then it would not have found that the State met the intent element of each crime. AB 25-28. "The crux of the requested instruction was substantially covered by the other instructions." AB 25. In short, the State improperly believes that the positive instructions as to the elements of the crimes

equate to or are “good enough” as negatively worded instructions as to the theory of defense.

The State further argued that Harlan misinterpreted Garner v. State in that Garner did not hold that there had to be proof of acts in furtherance of a conspiracy before a defendant can be found guilty. AB 28.

Finally, the State argued that it would not have made a difference if the jury was given these instructions proposed by Harlan because there was “overwhelming evidence” of guilt presented against Harlan. AB 27.

It should be noted that the State did **not** argue in its Answering Brief that the proposed instructions are improper, an invalid statement of law nor does it argue that there is no evidence to support said instructions. AB 17-23.

First, a positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased defense "position" or "theory" instruction. U.S. v. Manning, 618 F.2d 45 (8th Cir. 1980) is cited by Brooks v. State, 103 Nev. 611, 614 (1987)(reversing conviction and holding it was error to refuse requested mere presence instruction where Brooks’ defense to a charge of possession with intent to sell was that he was merely present in a car he and his brother were both occupying, behind which the police found the controlled substance).

Manning was convicted of illegal possession of a firearm. Manning, 618

F.2d at 46-47. His defense was that he was merely present in the back seat of the car. Id. At trial, he requested a mere presence instruction but this request was denied by the district court. Id. at 47.On appeal Manning argued that, in refusing this instruction, the court ignored his defense that he was at the scene as an unwitting backseat passenger. Id. at 47-48. The United States Eight Circuit Court of Appeals reversed his conviction and remanded the case to the district court for a new trial holding as follows:

> "We recognize that a defendant is not entitled to a particularly worded instruction where the instructions given by the trial judge adequately and correctly cover the substance of the requested instruction. United States v. Brake, *supra*, 596 F.2d at 339; United States v. Brown, 540 F.2d 364, 380 (8th Cir. 1976), cert. denied, 440 U.S. 910, 99 S. Ct. 1220, 59 L. Ed. 2d 458 (1979). In the present case, however, the instructions given by the district court regarding constructive possession cannot be said to have covered the substance of Manning's "mere presence" defense. The court's instructions recommend conviction if the jury could find, beyond a reasonable doubt, that Manning was at the scene with direct or indirect control of the weapon. These instructions appear to give credence to the police officers' version of events, without acknowledging Manning's defense that he was merely a backseat passenger."

Id. at 48.

Although the jury heard positive instructions as to the elements of the crimes the State charged Harlan with, it never heard any negatively worded instructions as to the defense theory for each of the crimes Harlan was charged with. While

Harlan must argue this meets the plain error standard[2], the fact remains that **the State failed to address the legal holding in Manning or the holding that a positive instruction as to the elements of the crime does not equate to a properly worded negatively phrased defense "position" or "theory" instruction anywhere in its Answering Brief.** This constitutes confession of error. [3] Polk v. State, 126 Nev. Adv. Op. 19, ___, 233 P.3d 357, 361 (2010); see also NRS 49.005(3).

Second, Harlan did not cite to Garner for the argument that he should have received an instruction regarding an overt act. Regardless of whether or there exists an overt act in furtherance of the conspiracy, an agreement must be made to constitute conspiracy. Simply because one individual states he is going to commit a crime (Caruso) and another party (Harlan) is present when this is communicated as well as when the crime is committed, this does not equate to a conspiracy *per se*. Pursuant to Garner, where there is no explicit agreement, as there is none here,

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[2] Harlan fully argued plain error in his Opening Brief on page 20, 23.

[3] *See* Bates v. Chronister, 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984) (treating the respondent's failure to respond to the appellant's argument as a confession of error); *see also* A Minor v. Mineral Co. Juv. Dep't, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was silent on the issue in question, resulting in a confession of error); *see also* Moore v. State, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that even though the State acknowledged the issue on appeal, it failed to supply any analysis, legal or otherwise, to support its position and "effect[ively] filed no brief at all," which constituted confession of error), overruled on other grounds by Miller v. State, 121 Nev. 92, 95–96, 110 P.3d 53, 56 (2005).

simply knowing that someone plans to commit a crime and acquiescing in or approving of that crime does not make one a party to the crime. Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013. This is a correct statement of law, the evidence supports this instruction, and given that Harlan's entire defense was that he was just merely present when Caruso talked about and committed certain crimes, it was plain error for the district court to not *sua sponte* give this instruction. Flanagan v. State, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996); McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 745 (1998); see also Tavares v. State, 117 Nev. 725, 729, 30 P.3d 1128, 1131 (2001).

Third, there was not overwhelming evidence of Harlan's guilt presented to the jury. The State continues to refer to its claim that "[Harlan] and [Caruso] talked about robbing Minkler." AB 29. Again, this assertion is patently false as there was no evidence presented that Caruso and Harlan had any discussion of robbing Minkler, discussed *supra*.

III. THE STATE MISSTATES KNOX'S TESTIMONY

In its Answering Brief, the State claims "Knox testified that she specifically heard [Harlan] state that he caught a body." AB 37. The State further claims that she "made clear" that while Harlan told Patrick he "caught a body," she was near Harlan when he did so and personally heard him state those words. AB 37. The

State cites to several portions of Knox's testimony. 8 AA 788-99. The State argues that because Knox "directly heard" Harlan say "he caught a body," the district court properly admitted the statement as an admission by a party opponent pursuant to NRS 51.035(2)(a). AB 37.

Knox's testimony was anything but clear and was fraught with confusion until both the State and defense counsel clarified the following:

> 1) Knox did **not** actually hear Harlan say that he caught a body. 8 AA 795-96.
> 2) Patrick was talking to both Caruso and Harlan. 8 AA 797.
> 3) Knox was **not** paying attention to the conversation. 8 AA 798.
> 4) Knox only heard "someone" mention "something" about catching a body. 8 AA798.
> 5) Knox did **not** hear who made the comment about catching a body. 8 AA 799-800.

The only reason Knox thought it was Harlan who said he caught a body was because that was what Patrick told her. Knox's testimony that Harlan said he caught a body amounts to inadmissible hearsay because Knox did not actually hear Harlan make the statement, if he made it at all. During trial, Harlan knew this was where the State was going with this line of questioning and despite repeated objections, the State was permitted to elicit the inadmissible testimony from Knox. The State then tried to clean up Knox's testimony so it would not amount to inadmissible hearsay yet failed when Knox's testimony circled back to the original

statement she made to police, which was that *Patrick told her Harlan said* he caught a body, which is inadmissible hearsay. 8 AA 787-88. Therefore, it was an abuse of discretion for the district court to allow the State to continue with the line of questioning over Harlan's initial objection. [4] NRS 51.065; NRS 51.067; Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979).

The State failed to address the prejudice prong of Harlan's argument regarding Knox's hearsay testimony and the failure of the district court to prevent the jury from hearing said hearsay. AB 34-37. Therefore, with respect to this claim, the State has conceded that if the district court did err in allowing improper hearsay evidence, the error was not harmless and Harlan was prejudiced. Polk, 126 Nev. Adv. Op. 19, ___, 233 P.3d at 361; see also NRS 49.005(3).

[4] The State asserts that "[w]hile [Harlan] acknowledged that the district court sustained his objection to the testimony, [Harlan] still accuses the district court of error…" AB 34. While the district court sustained the second objection *after* the hearsay was already admitted (8 AA 787), it did not sustain the initial objection made by Harlan *before* the hearsay was admitted. 8 AA 786. Due to the bench conference wherein the court was able to view Knox's statement to police, the court knew that there was the potential that prejudicial hearsay would come out during Knox's testimony. 8 AA 787. the district court could have handled this in a way that did not allow the hearsay to come forward. The court could have directed the State to first lay foundation for *how* Knox knew what was said before getting into *what* was said. However, the court did nothing other than to say that defense could deal with it on cross-examination. 8 AA 787. This was an abuse of discretion, which prejudiced Harlan.

IV. DETECTIVE NICHOLS WAS NOT RESPONDING TO DEFENSE CROSS-EXAMINATION WHEN HE MENTIONED THE STOLEN MERCEDES

The State claims that Nichols' statement about the stolen car "was spontaneously uttered while [Harlan's] counsel challenged the thoroughness of his investigation and insinuated that he should have analyzed Minkler's wallet for fingerprints." AB 43. The State further argues that "the record is clear that Nichols referenced the stolen car because counsel was pressuring him into agreeing that testing Minkler's wallet for fingerprints was crucial, and Nichols was explaining why he disagreed with that sentiment." AB 43. The State then contends that the error was cured by the court informing the jury that the car was not, in fact, stolen and that even if it was error, it was harmless due to the alleged overwhelming evidence presented against Harlan. AB 43-44.

First, the State contradicts itself. The statement about the stolen car cannot be both a spontaneous utterance and also an intentional explanation for why Nichols disagreed with "the sentiment" that analyzing the wallet for fingerprints was crucial. It's either an accidental utterance or a intentional statement but not both.

Second, the State fails to explain how the identity of who took Minkler's wallet out has anything to do with whether or not Harlan was in a stolen car. The

fact is, the two are completely unrelated. Harlan's line of questioning did not call for an answer that related to the ownership status of the car. Nichols was (presumably) admonished not to mention the fact that the car was stolen prior to trial yet chose to talk about it during his testimony anyway. Moreover, there was not even a pending question when Nichols made the statement. 14 AA 1311.

Third, the curative instruction given by the court clearly did not work given the fact that at least one juror used the fact that the car was stolen to come to the verdict of guilty thinking if he was riding around in a stolen car, it was more likely that he committed a robbery. 16 AA 1529-600. Moreover, Nichols is not a layperson. As the detective investigating the case, he is an arm of the State, which means that his statement is tantamount to a reference to criminal activity solicited by the prosecution making any statement by the court less curative. See Sterling v, State, 108 Nev. 391, 394 (1992).

Fourth, all parties agreed prior to trial that any testimony related to the fact that the car was stolen was prejudicial and would not be admitted. 8 AA 704-706. For the State to now claim that it was not prejudicial is incredibly disingenuous and belied by the record.

Throughout its Answering Brief, the State continues to allege that all errors, including the testimony about the stolen vehicle, were miraculously cured by the

alleged overwhelming evidence of guilt presented against Harlan at trial and therefore, there was no prejudice. The fact is, the evidence against Harlan was so weak that the State had to resort to relying on hearsay and prejudicial evidence, joining one extremely culpable defendant with Harlan who was merely present, the use of one sided jury instructions, and misstating testimony in closing argument. Now on appeal, the State continues to claim Harlan committed acts and made statements that he, in fact, **did not**. It is one thing for the State to impute the statements of one defendant to a co-defendant for admission of statements or to argue that one defendant is liable for the actions of a co-defendant under a felony murder or conspiracy theory. It is prosecutorial misconduct to factually claim that one defendant committed acts and made statements which, in fact, were actually committed and said **only** by the co-defendant. Williams, 103 Nev. at 110, 734 P.2d at 703 *citing* Collier, 101 Nev. 473, 705 P.2d 1126. The State repeatedly did the later at trial and in its Answering Brief so as to bolster its theories of liability with respect to Harlan. There was not overwhelming evidence presented against Harlan and all errors committed were prejudicial.

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CONCLUSION

Based upon the arguments herein, *supra*, KODY HARLAN'S convictions should be REVERSED.

Dated this 27th day of September, 2021.

Respectfully submitted,

/s/ Jean Schwartzer

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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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Edition in Times New Roman 14 point font; or

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2. This brief exceeds the 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:

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[ ] Does not exceed 15 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 27th day of September, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on the 27th of September, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

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