IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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KODY HARLAN
Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.Ct. No. 80318

D.C. No. C333318

APPELLANT'S PETITION FOR REHEARING

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ARGUMENT

I. N.R.A.P. 40 ALLOWS THE REHEARING OF A SUPREME COURT ORDER

Rule 40 of the Nevada Rules of Appellate Procedure provides that a party in an appellate case before the Nevada Supreme Court may move for rehearing if the Supreme Court has overlooked or misapprehended a material fact or matter of law. In the discussion that follows, Harlan argues that this Court has overlooked or misapprehended both matters of fact and questions of law. Harlan respectfully submits that these misapprehensions are material, and that a correction of the factual and legal errors that follow warrants reversal of all the convictions in this case.

II. Caruso Never Made Statements Accusing Harlan Of Or Implicating Harlan In The Murder Or Robbery

The crux of Harlan's severance argument in his direct appeal was that the numerous statements and actions of Caruso would have been inadmissible against Harlan in a separate trial and that admitting Caruso's statements and actions against Harlan in a joined trial was extremely prejudicial to Harlan. Opening Brief ("OB") 13-17.

This Court affirmed the district court's denial of Harlan's Motion to Sever for two reasons: 1) because both Harlan and Caruso were charged with murder and robbery with the use of a deadly weapon under theories that they participated as

principals, aided and abetted and conspired to commit the crimes; and 2) "Caruso's statements indicating that he and appellant murdered and robbed someone would have been admissible as they were made in appellant's present and were of such a nature that dissent would have been expected if the communications were incorrect." Order of Affirmance "OA" 1-2 (internal quotations and citations omitted) *citing to* Maginnis v. State, 93 Nev. 173, 175, 561 P.2d 922, 923(1977) and NRS 51.035(3)(b)(providing that an adoptive admission of a party does not constitute hearsay).

First, simply charging two individuals as principals, aiders and abettors and co-conspirators is not dispositive of the issue of whether or not two defendants should be severed. In fact, it is not even the most important factor. "**The decisive factor in any severance analysis remains prejudice to the defendant**." Marshall v. State, 118 Nev. 642, 646-647 (2002) *cited* to at OB 13. A court must consider not only the possible prejudice to the defendant but also the possible prejudice to the State resulting from expensive, duplicative trials. Marshall, 118 Nev. at 646-647. "Joinder promotes judicial economy and efficiency as well as consistent verdicts and is preferred as long as it does not compromise a defendant's right to a fair trial." Marshall, 118 Nev. at 646-647 cited at OB 13.

Second, neither Maginnis nor NRS 51.035(3)(b) apply to Caruso's statements because **Caruso never said that "we" murdered or robbed anyone**

nor did he ever say Harlan murdered or robbed anyone. Furthermore, Harlan and Caruso never discussed or planned a robbery together.

In Maginnis, "in the presence of each other and other witnesses, **each appellant made extra judicial out-of-custody statements** wherein **each discussed the homicides** in detail and **implicated the other as well as himself.** 175. This Court cited to People v. Preston, 508 P.2d 300 (Cal. 1973) in its order of affirmance in Maginnis. In Preston, appellant's co-defendant spoke to the daughter of one of the victims in a small room with Preston and a fourth person present. The co-defendant explained to her what happened when they broke into her mother's trailer, that they came in and there was an accident, and that they wouldn't talk. Late at trial it came out that co-defendant also said that her "father walked in and saw [appellant]; "if he wouldn't seen [appellant], everything would have been all right"; and "It was either them or us." Preston, 508 P.2d at 304.

This Court cites to no portion of the appendix or briefs where witnesses testified that Caruso allegedly indicated that he and Harlan murdered and robbed someone. Therefore, Harlan will address the testimony of all witnesses who testified about Caruso's and Harlan's statements (or lack thereof) prior to and after the murder.

Kymani Thompson ("Thompson") testified that he remembered the word "lick" vaguely mentioned in the house; he did not know who mentioned it; and did

not know who the target of this lick was. 11 AA 1044-45; OB 6. He testified that while he was not sure who actually said the word lick, Harlan was falling asleep on the couch when it was said. 11 AA 1044-45; 11 AA 1057: Reply Brief ("RB") 2. Thompson also testified that Minkler's name was brought up one time and it was **during a separate conversation** regarding who wanted to bring more marijuana to the party. 11 AA 1034; OB 26; 11 AA 1044-45;11 AA 1057; RB 2. **Thompson testified that Minkler's name was never brought up with regarding to robbing someone or a lick**. 11 AA 1058; OB 26.

Ghunnar Methvin ("Methvin") testified that he clearly remembered Caruso saying "he wanted to kill someone that day and/or do a lick." 12 AA 1108-09; OB 6. He also testified that when Caruso said this, Harlan was laying down on the couch. 12 AA 1124; OB 6. Methvin also testified that he received a Face Time call from Caruso wherein Caruso stated that he had killed Minkler. 11 AA 977; OB 8. Caruso did **not** say "we" just killed Minkler, he said "I" just killed Minkler. OB 9. He did not mention Harlans's name at all. 11 AA 1040; 12 AA 1125-27; OB 9.

Alaric Oliver ("Oliver") testified that he did not hear any conversation about wanting to rob anyone. 10 AA 911; OB 8. He also testified that Harlan was falling asleep on the couch high on Xanax. 10 AA 911-12; OB 8.

Traceo Meadows ("Meadows") testified that he left the house prior to the shooting and when he returned, Caruso stated that "he" had killed someone. 12

AA 1161-62; OB 9. It was made very clear during direct examination that Meadows heard **only Caruso talk** and that it was stated that **only Caruso killed someone**. 12 AA 11672; RB 4. Meadows also testified that when they were in the Mercedes, Harlan mentioned Caruso accidentally killed Minkler, Caruso did not disagree or attempt to implicate Harlan in the murder. 12 AA 1170; OB 9. Instead, Caruso boasted about that fact that he did it. 12 AA 1170; OB 9.

The State introduced a video wherein Caruso said, "bro, I just caught a body," and then shows Minkler's dead body. 10 AA 950; Exhibit 147 (transmitted from the district court); RB 5. Again, Caruso does not say "we" caught a body, he says "I" caught a body. 10 AA 950; Exhibit 147 (transmitted from the district court); RB 5. Harlan is not depicted in this video and says nothing. 10 AA 950; Exhibit 147 (transmitted from the district court); RB 5.

Angela Knox ("Knox") was at the party Caruso and Harlan attended after the shooting. She saw a conversation occur between her friend, Patrick, and Caruso and Harlan. At the time Knox was watching this conversation, she was standing "on the other side of the party." 8 AA 789. Knox testified that she was not really paying attention to the conversation nor was she participating in it. 8 AA 798; OB 28; RB 12. She testified that she "thinks" she heard "someone" say "I caught a

body" but she did not hear who said it. 8 AA 798-800; OB 28; RB 12.[1] Knox agreed when asked by the State that she "personally overheard that statement being made" but as discussed, she did not hear who said it. 8 AA 789; 798-800. She never testified that Harlan made the statement as the State incorrectly asserts in its Answering Brief also citing to 8 AA 789. AB 10. Knox's testimony at trial was consistent with her voluntary statement, wherein she told police she did not hear who made the comment about catching a body. 8 AA 795-96; 799-800; OB 28-29.

According to the trial testimony of all of these witnesses, at no point does Caruso ever make any statement implicating Harlan in the killing or robbing of Minkler nor does Harlan make any statements implicating himself.

There was never any statement accusing Harlan of or implicating Harlan in the murder or robbery that he could have corrected, denied, disavowed, dissented from or otherwise spoken out against. Therefore, the exception enunciated in NRS 51.035(3)(b), Maginnis and Preston is not applicable to Caruso's statements as used against Harlan. These statements amount to inadmissible hearsay and they were highly prejudicial to Harlan. Respectfully, this Court has overlooked and misapprehended material facts when it concluded that Caruso made statements

[1] Knox also testified that Patrick told her Harlan said "he caught a body" during this conversation she was neither participating in nor paying attention to. 8 AA 787; OB 28. This is also what she told police. 8 AA 799-800; OB 29. However, this was ruled to be inadmissible hearsay, discussed *infra* in section V of the instant Petition. 8 AA 787.

indicating that he **and** Harlan planned, talked about and/or committed a murder and robbery and misapprehended the law when it determined that NRS 51.035(3)(b), Maginnis and Preston apply to Caruso's statements. Harlan respectfully requests that this Court review the transcripts again and reconsider its affirming of the district court's denial of Harlan's request for severance.

III. Harlan Argued That an Instruction on Lack of Agreement Should Have Been Given and There Was Evidence that He was Merely Present

This Court stated in its Order of Affirmance that Harlan argued in his Opening Brief that pursuant to Garner v. State [2] the district court should have sua sponte instructed the jury that it needed to find appellant engaged in an over act in furtherance of the conspiracy and that appellant could not be found guilty based on his mere presence during the crime." OB 2. This Court then held that the State was not required to prove that appellate committed an overt act under Nevada law. OB 3. This Court further held a mere presence instruction was not supported by the evidence at trial citing to Allen v. State. [3]

First, **Harlan did not argue that the district court should have given an overt act instruction** pursuant to Garner. Harlan argued that the district court did not properly instruct the jury with a negatively worded instruction regarding the

[2] 116 Nev. 770, 6 P.3d 1013 (2000) *overruled on other grounds by Sharma*, 118 Nev. 648, 56 P.3d 868 (2002).
[3] 97 Nev. 394, 398, 632 P.2d 1153 (.

"agreement" element of conspiracy. OB 21, 23; RB 10-11. He further agued that this instruction should be consistent with Garner and state "absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiescence in, or approval of that purpose does not make one a party to conspiracy." OB 21, 23. Harlan reiterated in his Reply Brief, "Harlan did not cite to Garner for the argument that her should have received an instruction regarding an overt act," and then argued again that an instruction regarding agreement, or lack thereof, consistent with Garner should have been given. RB 10-11.

While Harlan is aware that the State does not have to prove that there was an overt act committed, that fact that the State does not have to do so **combined with the lack of instruction consistent with Garner (in error) as well as the lack of a mere presence instruction (in error),** allowed the State to convict Harlan of conspiracy and the underlying crime even though the evidence supports the defense theory that Harlan was merely present, discussed supra in section II and discussed below in the instant Petition. Respectfully, this Court overlooked Harlan's entire argument and misapprehended the case law regarding a negatively worded instruction regarding the "agreement" element of conspiracy consistent with Garner. Harlan asks this Court to reconsider its previous ruling on this issue.

Second, the State did not argue in its Answering Brief that the mere presence instruction proposed by Harlan was not supported by the evidence or would have

been improper in any way. Answering Brief ("AB") 17-13; RB 8. It argued that the positive instruction as to the elements of the crime were enough because of 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; RB 8 "The crux of the requested instruction was covered by the other instructions." AB 25; RB 8. The assertion that the mere presence instruction was not supported by the evidence at trial was made *sua sponte* by this Court. Therefore, although Harlan argued in his briefs that he was entitled to a mere presence instruction because this was the theory of his defense and there was evidence to support it (OB 17-23), this is the first opportunity Harlan has had to address this claim that there was no evidence to support such an instruction or to address Allen v. State.

This Court states that the reason the instruction was not supported by the evidence at trial was because appellant discussed a robbery with Caruso, transported the victim to the location where he was killed, rifled through the victim's pockets after the shooting, and then was apprehended after a high speed car and foot chase. OA 3. While these factual assertions make for a great closing argument for the State, this Court should be looking at the evidence that *supports* the mere presence defense at trial, not the evidence that weighs against it.

This Court cites to Allen v. State and quotes, "the test for the necessity of instruction the jury is whether there is any foundation in the record for the defense

theory." This Court also stated the following in Allen:

> "In every criminal case, a defendant is entitled to have the jury instructed on any theory of defense that the evidence discloses, however improbable the evidence supporting it may be. Lisby v. State, 82 Nev. 183, 414 P.2d 592 (1966); Barger v. State, 81 Nev. 548, 407 P.2d 584 (1965); State of Nevada v. Millain, 3 Nev. 409 (1867).
>
> It makes no difference which side presents the evidence, as the trier of the fact is required to weigh all of the evidence produced by either the state or the defense before arriving at a verdict."
>
> Allen, 97 Nev. at 398.

This Court has also stated in Barger:

> "A defendant in a criminal case is entitled to have the jury instructed on his theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may appear to be."

Harlan's defense theory at trial was that he was merely present. There was evidence to support this theory as follows: Harlan did not plan or discuss the murder or robbery (discussed *supra* at section II); he did not pull the trigger; he was asleep on the couch when Caruso was talking about a lick (discussed *supra* at section II); Minkler's name was never brought up in the conversation wherein Caruso mentioned wanting to do a lick (discussed *supra* at section II); Caruso never made any statements implicating Harlan in the murder or robbery; Harlan never "discussed a robbery with Caruso" OA 3 (discussed *supra* at section II); and Harlan never made any statements implicating himself (discussed *supra* at section

II). While Harlan did drive with Caruso to get Minkler and bring him back to the party, evidence was presented at trial that this was done because Minkler called Caruso multiple times and they all wanted to smoke marijuana together. 9 AA 889; 13 AA 1248; OB 7. While there was evidence presented that Harlan took Minkler's wallet after the shooting, the defense theory was that the intent to do this was formed after the shooting. While the State is entitled to present their theory and argue the facts differently, this is not the test for whether or not Harlan was entitled to a jury instruction on **his** defense theory. As enunciated in Allen, Barger and Harris, *supra*, the evidence necessary to support a jury instruction can be weak, incredible and or improbable. Harlan exceeds this threshold and there was certainly a foundation in the record for the defense theory.

Respectfully, this Court has overlooked and misapprehended material facts when it concluded that Harlan discussed a discovery with Caruso and misapprehended the law when, in determining whether Harlan was entitled to a mere presence instruction, it focused only on the evidence weighing against Harlan's theory of defense as opposed to the evidence supporting his theory of defense. Harlan asks this Court to reconsider its previous ruling on this issue.

IV. The State Commited Prosecutorial Misconduct

This Court ruled that the State did not argue facts not in evidence when it

attributed Caruso's words to Harlan because "the challenged comments were supported by the examination of the witnesses to whom they were attributed." No further analysis is done.

In closing the State argued that Thompson testified that Caruso and Harlan mentioned wanting to rob someone and wanting to do a lick, that they kept talking about it and that Minkler's name was brought up in this idea of committing a robbery. 15 AA 1429; OB 24.

As discussed *supra* in section II, Thompson did not testify to this. He testified that someone mentioned a lick, that he did not know who and that Minkler's name was brought up in a separate conversat6ion about who wanted to come smoke marijuana with them and it was not broiugt up when the klick was mentioned. In fact, no one testified that Harlan made any statements about wanting to rob anyone, that it was only Caruso, and that Minkler's name was not brought up with respect to any talk about a robbery, discussed *supra* in section II. In fact, the State conceded in its own Answering Brief that Harlan did not actually make any of these statements regarding committing a lick or killing someone. AB 19; RB 7. Respectfully, this Court has overlooked and misapprehended material facts when it concluded that Thompson testified in the manner the State argued. Harlan asks this Court to reconsider its previous ruling on this issue.

V. Angela Knock Did Not Personally Overhear Who Said What During the Conversation at the Party

This Court held that the district court did not err in permitting Knox's testimony regarding the fact that Patrick told her Harlan said he caught a body" because "although the witness heard about Caruso and appellant's conversation from another individual who did not testify at trial, her testimony indicated that she also personally overheard the conversation." OB 4.

As discussed *supra* in section II, Knox did not personally hear who said, "I caught a body." 8 AA 798-800; OB 28; RB 12. Overhearing parts of a conversation is not the same as hearing specifically who said what. Whether Harlan made the statement or Caruso made the statement is incredibly material to Harlan's guilt or innocence. The only reason Knox *thinks* Harlan made the statement is because Patrick told her. 8 AA 798-800; OB 28; RB 12.

The district court ruled it was inadmissible hearsay, struck the comment, and the State conceded this fact. 8 AA 787; OB 28. Whether or not the statement amounted to inadmissible hearsay was never up for debate and was not the issue Harlan raised on appeal. The argument Harlan made on appeal was that the district court stil allowed the State to elicit said inadmissible and incredibly prejudicial hearsay after the initial question was asked by the State, after defense approached the bench because Knox answered where defense informed the court of the

potential for the hearsay to come out, and showed the court Knox's voluntary statement wherein she states that Patrick was the individual who told her Harlan said he caught a lick and that she never actually heard show made the statement. 8 AA 786-87; OB 27-29; RB 13 fn. 4. The district court made no attempt to prevent the State from eliciting this hearsay with an incredibly leading question on direct, and instead told defense could deal with it during cross examination.

Respectfully, this Court has overlooked and misapprehended material facts and law when it concluded that Knox heard Harlan say he, "caught a body" and that Knox's testimony regarding what Patrick told her did not amount to inadmissible and prejudicial hearsay. Harlan asks this Court to reconsider its previous ruling on this issue

VI. The Jury Improperly Used Prior Bad Act Evidence

This Court held that it was not error to deny Harlan's request for a mistrial because the just was admonished to disregard the testimony about the stolen Mercedes. OA 4. While the jury was admonished, the jury did not listen. They did discuss the stolen and at least one juror used the information to come to the conclusion that the robbery was planned prior to the shoot, thus leading her to find Harlan guilty of all crimes. 16 AA 1529-600; OB 31; RB 14-15. Respectfully, this

Court overlooked this material fact and Harlan requests reconsideration of this issue.

CONCLUSION

Based upon the arguments contained herein, Harlan respectfully requests that this Court closely review the trial transcripts and briefs and reconsider the affirming of his judgment of conviction.

Dated this 17th day March of, 2022.

Respectfully submitted,

/s/ Jean Schwartzer

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DATED this 17th day March of, 2022.

BY: */s/ Jean Schwartzer*

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CERTIFICATE OF SERVICE

I hereby certify that Appellant's Petition for Rehearing was filed electronically with the Nevada Supreme Court on the 17 th day of March, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ALEXANDER G. CHEN, ESQ.

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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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