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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. 80218

D.C. No. C333318-2

APPELLANT'S PETITION FOR EN BANC CONSIDERATION

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ARGUMENT

I. N.R.A.P. 40(A) ALLOWS EN BANC CONSIDERATION

This Court may consider a Petition for En Banc Consideration when:

1) Reconsideration by the full court is necessary to secure or maintain uniformity of its decisions; or
2) The proceeding involves a substantial precedential, constitutional, or public policy issue.

"En Banc reconsideration is appropriate to preserve precedential uniformity or the matter resents issues involving substantial preced ential, constitutional or public policy value." Choy v. Ameristar Casinos, Inc., 128 Nev. 323, 279 P.3d 191, 192 (2012) *citing* NRAP Rule 40(A)(a).

En Banc Reconsideration is warranted because the Panal opinion is inconsistent with prior decisions by this Court and involves substantial precedential issues.

II. THIS COURT'S DECISION REGARDING ADOPTIVE ADMISSIONS OF A CO-DEFENDANT IS INCONSISTENT WITH ITS PRIOR DECISIONS

This Court affirmed the district court's denial of Harlan's Motion to Sever partly because "Caruso's statements indicating that he and appellant murdered and robbed someone would have been admissible as they were made in appellant's presence 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). This Court cited 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). OA 1-2.

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. Id. at 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.

Here**, 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. 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. This is because no witnesses testified that Caruso ever said that Harlan had anything to do with

Minker's homicide or a robbery.

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 Appellant's Appendix ("AA") 1044-45; Opening Brief ("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 only brought up 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 showed 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.

NRS 51.035(3)(b) requires that there be some sort of admission or accusation for the statement to be considered non-hearsay. Maginnis, *supra*. Here, while testimony was presented that Caruso made statements about *himself* catching a lick, killing someone and then, ultimately, admitting to killing Minker, Caruso never made any statement indicating that *Harlan* murdered and robbed anyone,

[1] Knox also testified that **Patrick told her Harlan said** "he caught a body" during this conversation, which 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 ultimately ruled to be inadmissible hearsay but only after the jury heard it over objection by Harlan, discussed *infra* in section IV of the instant Petition. 8 AA 787.

which means there was nothing for Harlan to dissent from, discussed *supra*. Therefore, these statements made by Caruso amount to inadmissible hearsay against Harlan in a separate trial and they were highly prejudicial to Harlan and his trial should have been severed from Caruso's. [2]

This Court's decision in Harlan's case is inconsistent with its decision in Maginnis, 93 Nev. at 175, 561 P.2d at 923 as well as the plain language of NRS 51.035(3)(b). This inconsistent decision, although unpublished, creates precedent that will allow the State and Court to hold a defendant responsible for failing to announce the lack of involvement in or desire to be involved in a crime when there has been no such accusation made. It then follows that this decision creates precedent allowing that defendant to be prejudiced by being tried jointly with a co-defendant who has announced committing a crime or the desire to commit a crime.

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[2] In fact, these statements became increasingly prejudicial when the State argued in closing that Thompson testified that Caruso and Harlan mentioned wanting to rob someone, 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. Harlan argued that this amounted to prosecutorial misconduct because witnesses testified that it was **Caruso alone who made the comment** about wanting to rob someone, **Harlan did not say anything about a robbery nor did he even participate in the conversation** and that **Minklers' name was not brought up** during the conversation wherein Caruso mentioned wanting to commit a robbery, discussed *supra* in section II. However, this Court mistakenly ruled that "the challenged comments were supported by the examination of the witnesses to whom they were attributed" without any further analysis or discussion. OA 3.

Therefore, Harlan requests en banc reconsideration by this Court.

III. THE COURT'S ANALYSIS OF WHETHER THERE IS ENOUGH EVIDENCE TO WARRANT A JURY ISNTRUCTION ON A DEFENSE THEORY IS INCONSISTENT WITH ITS PREVIOUS DECISIONS

Harlan argued that the district court did not properly instruct the jury with a negatively worded instruction regarding the "agreement" element of conspiracy. U.S. v. Manning, 618 F.2d 45 (8th Cir. 1980)(A positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased "position" or "theory" instruction.). OB 21, 23; RB 10-11.

Harlan further argued that this instruction should have been 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. [3] Finally, Harlan argued that the district court should have *sua sponte* given the following mere presence instruction, which is a correct statement of law:

[3] The State mistakenly believed that Harlan argued that it was plain error for the district court not to instruct the jury regarding an overt act as one of the elements of the crime of conspiracy. 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.However, in its Order of Affirmance, this Court mistakenly adopted the State's view that Harlan was asking for an "overt act" instruction, which he was not. OB 2.

> "Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant is a participant and not merely a knowing spectator."

Winston v. Sheriff, 92 Nev. 616, 555 P.2d 1234 (1976). OB 17-23.

In its Order of Affirmance, this Court did not address Harlan's argument that he was entitled to a negatively worded instruction regarding the element of "agreement" for the crime of conspiracy. OA 2-3. Instead, this Court focused on whether or not Harlan was entitled to an instruction regarding the need for an overt act for the crime of conspiracy, which was not the argument Harlan raised on appeal. Therefore, Harlan requests en banc reconsideration by this Court of this issue.

This Court further held a mere presence instruction was not supported by the evidence at trial citing to Allen v. State. [4] It is important to note that 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. [5] Answering Brief ("AB") 17-13; RB 8.

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[4] 97 Nev. 394, 398, 632 P.2d 1153 (1981).

[5] The State 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 and that "[t]he crux of the requested instruction was covered by the other instructions." AB 25; RB 8.

This Court stated 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. This Court cited to Allen and quoted, "the test for the necessity of instruction the jury is whether there is any foundation in the record for the defense theory." However, this Court's decisions in Allen and its superseding authority support a more defendant friendly analysis.

> "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:
>
> "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."
>
> Barger, 81 Nev. 548, 552.

At trial, Harlan's defense theory was that he was merely present when a

robbery was discussed and when Minkler was shot. 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 at trial 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, Millain and Lisby, *supra*, the evidence necessary to support a jury instruction can be weak, incredible and or improbable. Therefore, when analyzing whether or not there is

enough evidence presented to warrant a jury instruction as to a theory of defense, this Court should view the evidence in the light most favorable to the defendant. *See* Allen, Barger, Millain and Lisby, *supra*. Here, this Court's failure to do so and instead, looked at the evidence in the light most favorable to the *State's* theory of guilt, is inconsistent with this Court's previous decisions in Allen, Barger, Millain and Lisby. This decision, although unpublished, will create a precedent that will allow the district court to hold a defendant to a unintended high burden with regard to obtaining a jury instruction that would force said defendant to present evidence that outweighs the evidence presented by the State. Therefore, Harlan requests en banc reconsideration by this Court.

IV. THIS COURT'S DECISION REGARDING THE HEARSAY TESTIMONY OF KNOX IS INCONSISTENT WITH PRIOR DECISIONS

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.

At trial, the district court ruled Patrick's statement to Knox 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 allowed the State to elicit said inadmissible and prejudicial hearsay *after* the initial question was asked by the State; *after* defense approached the bench where defense informed the court of the potential for the hearsay to come out; *after* defense showed the court Knox's voluntary statement to the district court wherein she states that Patrick was the individual who told her Harlan said he caught a lick and that she never actually heard who 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 on direct and, instead, told defense he could deal with it during cross examination. 8 AA 787.

This Court's decision that Knox's testimony did not amount to inadmissible hearsay because she "also heard the conversation" is factually incorrect. **Knox did not personally hear who said, "I caught a body."** Knox testified that she ***thought*** she heard "someone" said "something" about how they "caught a body." 8 AA 798. OB 28; RB 12. Overhearing parts of a conversation is not the same as hearing specifically who said what. The only reason Knox *thought* Harlan made the statement is because Patrick told her. 8 AA 798-800; OB 28; RB 12. More important, by finding that Knox's testimony did not amount to inadmissible hearsay because she overheard a conversation (yet did not actually hear who said

what) is inconsistent with Deutscher v. State [6] as well as the plain language of NRS 51.065; NRS 51.067. Although unpublished, this decision creates a precedent allowing witnesses to testify as to specific statements made but others even if they did not hear *who* specifically said *what* specifically. Therefore, Harlan requests en banc reconsideration by this Court.

CONCLUSION

Based upon the arguments contained herein, Harlan respectfully requests that this Court reconsider the affirming of his judgment of conviction.

Dated this 26th day April of, 2022.

Respectfully submitted,

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[6] 95 Nev. 669, 601 P.2d 407 (1979).

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 40 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

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations limitations of NRAP 40 it is either:

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains _2,802_____ words; or

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DATED this 26th day of April, 2022.

BY: _*/s/ Jean Schwartzer*_____
JEAN J. SCHWARTZER, ESQ
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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 26th day of April, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ALEXANDER G. CHEN, ESQ.

AARON FORD, ESQ.

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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