

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID BURNS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
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Supreme Court Case No. 80834

APPELLANT'S REPLY BRIEF

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Appeal from Judgment of Conviction  
Eighth Judicial District Court, Clark County  
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I. ARGUMENT

Burns would submit that all of his claims for relief are meritorious and this Court could grant relief on any or all of them. Even so, this reply has three brief points to make to aid in the Court's review of this matter.

A. The State remains hung up by what it believes to be a complete waiver of appellate claims. But as this Court previously found, Burns never waived his entire direct appeal. As a result this Court should hear the merits of his claims.

When this case was last before this Court, the State vehemently argued that Burns had waived "all" direct appeal claims. The only natural reading of this Court's prior decision is that it disagreed, because it granted Burns leave to file a belated direct appeal. See Answering Brief, p. 17. At that time, this Court noted what Burns has always argued: That he only waived "all appellate claims arising from the guilt phase of his trial pursuant to a stipulation with the State to a sentence of life without the possibility of parole..." Answering Brief, p. 17; see also 14 AA 2821.

The State properly cites Sparks v. State, 121 Nev. 107, 110 P.3d 486 (2005) as authority which may illuminate this issue, but it neglected to

mention the important part of that case. Answering Brief, p. 18. As this Court explained, “When the State enters into a plea agreement, it ‘is held to the most meticulous standards of both promise and performance’ with respect to both the terms and the spirit of the plea bargain. Id. at 487, citing Van Buskirk v. State, 102 Nev. 241, 720 P.2d 1215 (1986).

The following highlights the general rule about construction of plea agreements:

But where the parties' bargaining power is unequal, as in criminal plea agreements, the analysis is different: If an undefined term in a plea agreement remains ambiguous -- that is, if the State and the defendant each have differing but objectively reasonable interpretations of the term -- the court is required to construe the ambiguity against the State, because the State is the party with the greater bargaining power.

Anthony v. State, 329 P.3d 1027 at n. 6 (Alaska Ct. App. 2014) (collecting cases).

The agreement isn't ambiguous. It states “Defendant agrees to waive all appellate rights stemming from the guilt phase of the trial.” 8 AA 1724. The State's constant retort to Burns' waiver of “all” direct appeal claims is as exhausting as it is incorrect. If the State wanted to say, “Burns waives his

entire direct appeal” it surely could have done that when it negotiated the agreement. It didn’t. If there is any confusion about this point, which there shouldn’t be, the agreement must be construed against the State.

Burns has presented his direct appeal with a series of claims which do not arise during the State’s case-in-chief, the “guilt” phase of the trial.

Thus, none of the claims are barred and this Court should decide them on their merits.

B. The Answering Brief reworks the supposed justifications for excluding Juror 91, but does little to explain the State’s responses to the trial court about the juror’s dismissal.

In the Opening Brief, Burns argued that the dismissal of Juror 91 violated Batson v. Kentucky, 476 U.S. 79 (1986). This was so largely because the reasons given by the State for the juror’s dismissal had no support in the record, and because there was substantial similarity between the excused juror’s responses and the very next prospective juror seated.

Burns met the first step of the Batson inquiry because the comparison of answers between the excused juror and the very next juror examined reveal strong similarity in responses, with one major difference being the

race of the jurors. While trial counsel wasn't especially artful in presenting this argument below, there's little question a Batson challenge was not just preserved, but fully litigated to include the State's explanation for excusing the juror.

That explanation, which the Answering Brief merely touches upon, was significantly more detailed when the State gave it to the trial court. To address the points in the Answering Brief first, purported differences between the juror's answers in a written questionnaire and answers in court are a thin basis for a peremptory strike. The State stated as much when told the court and juror that discrepancies happen a lot. 1 AA 124.

The only other basis the Answering Brief addresses is the supposed difficulty the juror would have had imposing a sentence of death. But the very next juror examined expressed some of the same, natural hesitations any normal juror would express towards the death penalty. 1 AA 160.

But any claim that the excused juror had trouble voting for the death penalty is the State's own creation. The evidence was, from the excused

juror himself, that he had “no hesitation” voting for the death penalty as a punishment. 1 AA 128, 130.

The State’s responses to the trial court are much more telling, as those are the justifications used when it actually excused the juror, and they are not supported by the record. Opening Brief, p. 19. Taken as a whole, and in comparison with the responses of the very next juror, the State’s excusal of Juror 91 violated Batson and justifies granting Burns a new trial.

C. Providing JAVS video of a witness to the jury for its review violated Burns’ constitutional rights and unduly emphasized the testimony of the State’s crucial witness.

Next, Burns contends that giving the jury a video of Monica Martinez’s testimony was error. There’s two overarching problems with this. The video itself was not evidence, and, giving the jury a single, highly-damaging witness’ testimony to review violated Burns’ right to confrontation.

The Answering Brief seems to find no issue with any of this, apparently because Burns could cross-examine the witness when she testified, and because the video was the testimony of a witness which itself

what was the jury was "supposed to consider while deliberating."

Answering Brief, p. 31.

Neither of the arguments from the State resolves this issue. The "evidence" was Monica's testimony, not a later-made, unadmitted video of her testimony. She was also not the only witness. The totality of the evidence was the complete evidence presented during a 16-day trial. Here, the presentation of the video to the jury, which was not evidence, prejudiced Burns because it violated his rights and placed exclusive emphasis on Monica's testimony to the exclusion of all other trial testimony.

The State's confusion about this issue should not distract from the important rights at issue. There's a reason the jury isn't just given a recording of every entire trial that takes place. The jury is supposed to view the evidence in totality. Giving the jury a video of all the evidence would be risky on its own, but here, the Court only gave the jury the video of the State's key witness; something other courts have readily found to be error.

United States v. Binder, 769 F.2d 595, 601 (9th Cir. 1985), People v. Jefferson, 2017 CO 35, 44, 393 P.3d 493 (2017).

It's beyond reasonable dispute that Burns' counsel cross-examined Monica when she testified. But the issue here is that the video of her testimony, which is something other than the jury's recollection of her live testimony, was not something Burns was present to see or able to challenge. The jury was not given video of any other witness' testimony. Because Burns had no chance to respond to the video testimony, such as by providing a statement, explanation, instruction, or video of testimony that would have contradicted Monica, Burns' confrontation rights were violated. Gaxiola v. State, 121 Nev. 633, 119 P.3d 1225 (2005).

The decision to give Monica's video testimony to the jury should simply be noted for what it was – the "easy" way out of having to call the jury and parties in for a readback. But handling it that way placed the State's crucial evidence in the hands of the jury for as much review as they preferred, with the testimony of no other witness given such preferential treatment. Whether framed as a violation of the Confrontation Clause, or

evidentiary error based on the undue emphasis placed upon Monica's testimony, the error was serious enough to warrant a new trial.

II. CONCLUSION

Burns believes that any issues raised in the opening brief but not addressed here are adequately presented for the Court's review and would support a reversal of his sentences and convictions.

For all these reasons and those in the opening brief, Burns requests this Honorable Court grant relief on his claims and order that the convictions and sentences be reversed.

DATED this 27th day of October, 2020.

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RULE 28.2 ATTORNEY CERTIFICATE

1. 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, including 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 upon is 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.
2. I further 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 2016 in 14-point font of the Ebrima style.
3. I further certify 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 proportionally spaced, has a typeface of 14 points or more, and contains 1,482 words.

DATED this 27th day of October 2020.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 27, 2020. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
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A handwritten signature in blue ink, appearing to be 'J. M.', is written over a horizontal line.

An Employee of RESCH LAW,
PLLC, d/b/a Conviction Solutions