

IN THE SUPREME COURT OF THE STATE OF NEVADA

TED MICHAEL DONKO,

Appellant,

VS.

THE STATE OF NEVADA,

Respondent.

NO. 81075

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APPELLANT’S REPLY BRIEF

(Appeal from Judgment of Conviction)

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES.....	i-iv
ARGUMENT.....	1
I. The court violated Donko’s federal and state due process rights under the Fifth, Sixth, and Fourteenth Amendments by admitting an unconstitutionally unreliable in-court identification.....	1
II. The Court violated Donko’s protections from double jeopardy by improperly increasing his sentence.....	3
III. The court erred in retaining jurisdiction over restitution without legal basis.....	6
IV. The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by rejecting proposed defense jury instructions.....	7
V. The State committed misconduct, violating the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.....	8
VI. The State failed to prove beyond a reasonable doubt that appellant committed these crimes.....	9
VII. Cumulative error warrants reversal of this conviction under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution..	10
CONCLUSION.....	11
CERTIFICATE OF COMPLIANCE.....	12
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

PAGE NO.

Cases

<i>Berger v. United States</i> , 295 U.S. 78, 88 (1935)	8
<i>Bisch v. Las Vegas Metro. Police Dep't</i> , 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013)	6
<i>Botts v. State</i> , 109 Nev. 567, 569, 854 P.2d 856, 857 (1993)	7
<i>Browning v. State</i> , 104 Nev. 269, 274, 757 P.2d 351, 354 (1988)	1
<i>Bryant v. State</i> , 114 Nev. 626, 629 (1998)	9
<i>Carl v. State</i> , 100 Nev. 164, 165 (1984)	9
<i>Carter v. State</i> , 121 P.3d 592 (2005)	7
<i>Channel 13 of Las Vegas, Inc. v. Ettlinger</i> , 94 Nev. 578, 580, 583 P.2d 1085, 1086 (1978)	4
<i>Crawford v. State</i> , 121 Nev. 744, 754, 121 P.3d 582, 588 (2005)	7
<i>Daniel v. State</i> , 119 Nev. 498, 78 P.3d 890 (2003)	10
<i>Estes v. State</i> , 122 Nev. 1123, 1144, 146 P.3d 1114, 1128 (2006)	9
<i>Gaxiola v. State</i> , 119 P.3d 1225 (2005)	8
<i>Harkness v. State</i> , 107 Nev. 800, 804-805, 820 P.2d 759, 761-762 (1991) ...	8
<i>Honeycutt v. State</i> , 118 Nev. 660, 56 P.3d 362, 368 (2002)	7
<i>In re Humboldt River Sys.</i> , 77 Nev. 244, 248, 362 P.2d 265, 267 (1961)	4

<i>Johnson v. State</i> , 131 Nev. 567, 574–75, 354 P.3d 667, 672–73 (Ct. App. 2015).....	1
<i>Lindsey v. Smith</i> , 820 F.2d 1137, 1151 (11th Cir. 1987)	3
<i>Lioce v. Cohen</i> , 149 P.3d 916, 929 (Nev. 2006).....	8
<i>Martinez v. State</i> , 115 Nev. 9, 974 P.2d 133 (1999).....	6
<i>McNair v. State</i> , 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).....	1
<i>Miranda v. State</i> , 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998).....	5
<i>Neil v. Biggers</i> , 409 U.S. 188, 198 (1972).....	2
<i>Parker v. State</i> , 109 Nev. 383, 388-89, 849 P.2d 1062, 1065-66 (1993)	3
<i>Roe v. State</i> , 112 Nev. 733, 917 P.2d 959 (1996).....	6
<i>Rudin v. State</i> , 120 Nev. 121, 144, 86 P.3d 572, 587 (2004)	3
<i>Smith v. State</i> , 112 Nev. 871, 873, 920 P.2d 1002, 1003 (1996).....	7
<i>State v. Rodriguez</i> , 31 Nev. 342, 346, 102 P. 863 (1909).....	9
<i>Sullivan v. State</i> , 120 Nev. 537, 540-42, 96 P.3d 761, 763-65 (2004)	3
<i>Taylor v. State</i> , 132 Nev. 309, 322, 371 P.3d 1036, 1045 (2016)	2
<i>U.S. v. Kartman</i> , 417 F.2d 893, 894, 898 (9 th Cir. 1969).....	10
<i>U.S. v. Rivera</i> , 900 F.2d 1462, 1470 (10 th Cir. 1990)	10
<i>United States v. Evanston</i> , 651 F.3d 1080, 1091 (9th Cir. 2011).....	2

<i>Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cty. of Clark</i> , 136 Nev. 155, 158, 460 P.3d 976, 982 (2020)	6
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<i>Witherow v. State</i> , 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988)	9
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<i>Witter v. State</i> , 135 Nev. 412, 414, 452 P.3d 406, 408 (2019)	6
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STATUTES

NRS 176.035(2)(b)	5
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NRS 176.105(1)(c)	6
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APPELLANT’S REPLY BRIEF

I. The court violated Donko’s federal and state due process rights under the Fifth, Sixth, and Fourteenth Amendments by admitting an unconstitutionally unreliable in-court identification.

The State cites *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992), for the general proposition that appellate courts will not reweigh determinations made by juries regarding witness credibility. (State’s Answering Brief [AB], 16). However, *McNair* does not directly address whether a defendant’s in-court identification was unconstitutionally and “unnecessarily suggestive and likely to have resulted in a mistake.” *Johnson v. State*, 131 Nev. 567, 574–75, 354 P.3d 667, 672–73 (Ct. App. 2015). The State also cites *Browning v. State*, 104 Nev. 269, 274, 757 P.2d 351, 354 (1988), for the conclusion that an in-court identification was admissible

despite being made after the witness failed to identify the defendant during a pretrial lineup. (AB, 17). However, the *Browning* decision upheld the admission of the in-court identification in a conclusory single sentence without conducting any substantive analysis of the likelihood of irreparable misidentification under *Neil v. Biggers*, 409 U.S. 188, 198 (1972). Thus, *McNair* and *Browning* do not meaningfully support the trial court's admission of Ramos's mid-trial identification under the factors enunciated in *Biggers* and adopted by the Nevada Supreme Court. *Taylor v. State*, 132 Nev. 309, 322, 371 P.3d 1036, 1045 (2016).

Although the State claims that any prejudice was ameliorated by a vigorous cross-examination (AB, 18), the State ignores the fact that Donko's entire defense hinged on mistaken identity, as noted during the defense Opening Statement. (III 541). Even if the State lacked foreknowledge of Ramos's change in opinion, the trial court should have recognized the significant and unforeseen damage to Donko's defense and granted the defense motion for a mistrial. Courts must be careful to avoid rulings that carry significant risks of "undermining the defendant's due process rights to a fair trial." *United States v. Evanston*, 651 F.3d 1080, 1091 (9th Cir. 2011). While the prosecutor may have also been surprised by the change in Ramos's opinion, the State does not suffer the same prejudice as the defense

from the admission of an impermissibly suggestive mid-trial identification of the defendant. The court erred in denying the defense mistrial motion and forcing the defense to proceed under these circumstances, warranting reversal. *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004); *Parker v. State*, 109 Nev. 383, 388-89, 849 P.2d 1062, 1065-66 (1993); *Lindsey v. Smith*, 820 F.2d 1137, 1151 (11th Cir. 1987).

II. The Court violated Donko's protections from double jeopardy by improperly increasing his sentence.

The State contends that this issue should not be considered on the grounds that the Court had yet to formally amend Donko's conviction, and that no amended judgment had been filed as of the State's submission of the Answering Brief. (AB, 22). However, on May 25, 2021, an amended judgment of conviction was filed in the district court. (VI 979). The Nevada Supreme Court has held that an amended judgment of conviction is appealable only to the extent to which it amends the original judgment of conviction. *Sullivan v. State*, 120 Nev. 537, 540-42, 96 P.3d 761, 763-65 (2004). Here, the amended judgment of conviction adopts the language of the lower court's minute order on November 24, 2020, as discussed in the Opening Brief. Because the Opening Brief substantively challenges the legality of the language ultimately included in the amended judgment of

conviction, this Court should evaluate this claim on the merits. (I 217A-217B; VI 979). However, counsel also submitted a second Notice of Appeal, Supreme Court Case No. 83037, to preserve appellant's rights regarding appeal of the sentence modification. (VI 985). On June 17, 2021, this Court denied appellant's subsequent motion to consolidate the appeal in Case No. 83037 with the instant appeal. Should this Court agree that this issue should not be addressed in the instant appeal due to the late filing of the amended judgment of conviction, this matter can be addressed in Case No. 83037.

On the merits, the State argues the district court did not violate double jeopardy by re-sentencing Donko to an additional term in prison because the court merely corrected a "clerical error." (AB, 23). The State is incorrect. A clerical error is a copying, editing, or writing mistake or omission that does not result from the exercise of a judicial function. *Channel 13 of Las Vegas, Inc. v. Ettlinger*, 94 Nev. 578, 580, 583 P.2d 1085, 1086 (1978). "In other words, a clerical error is one which cannot reasonably be attributed to the exercise of judicial consideration or discretion." *In re Humboldt River Sys.*, 77 Nev. 244, 248, 362 P.2d 265, 267 (1961). Here, the district court's original imposition of sentence amounted to an exercise of judicial consideration or discretion; the court articulated an aggregate term that did not match the sentences imposed in the individual counts when Counts 1 and

2 were imposed consecutively to Counts 3, 4, and 5, although the aggregate term was consistent with the court's oral statement that *only* Counts 3, 4, and 5 would run consecutively. (I 194-96). Thus, the resulting sentence was facially illegal because the individual sentences varied from the required aggregate sentencing calculations under the controlling sentencing statute. NRS 176.035(2)(b).

To correct this facial illegality, the court improperly increased the minimum and maximum sentences where a less severe option was available: the court could have corrected the sentence by imposing 24-60 month sentences on Counts 1 and 2, to run concurrent with the 48-126 month sentences on Counts 3, 4, and 5, for a total legal sentence of 144-378 months, as reflected in the original judgment of conviction. This term would have been consistent with the court's statements at sentencing when the court repeatedly noted an intent to impose an aggregate calculation of 144-378 months, and with the court's explicit statement that only Counts 3, 4, and 5 would run consecutively. (I 194; V 974-76; VI 979). *Miranda v. State*, 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998). Because the sentencing correction improperly increased the severity of the sentences, the correction violated the Double Jeopardy Clause of the Nevada Constitution and should be reversed.

III. The court erred in retaining jurisdiction over restitution without legal basis.

As noted in the State's response to appellant's motion to consolidate these appeals, the amended judgment of conviction filed on May 25, 2021, no longer includes language regarding the retention of jurisdiction over the restitution amount. (VI 979). Thus, the State is correct that this issue has been rendered moot as to the instant appeal. However, this Court "may consider [an issue] if it involves a matter of widespread importance that is capable of repetition, yet evading review.' *Id.* The party seeking to overcome mootness must prove "that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 136 Nev. 155, 158, 460 P.3d 976, 982 (2020), quoting *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013). Because the improper retention of jurisdiction over restitution meets these exceptions, this Court should decide this issue on the merits and find that district courts may not retain discretion over a case in this manner. NRS 176.105(1)(c); *Roe v. State*, 112 Nev. 733, 917 P.2d 959 (1996); *Martinez v. State*, 115 Nev. 9, 974 P.2d 133 (1999); *Witter v. State*, 135 Nev. 412, 414, 452 P.3d 406, 408 (2019), citing *Botts v.*

State, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993); *Smith v. State*, 112 Nev. 871, 873, 920 P.2d 1002, 1003 (1996).

IV. The Court violated the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution by rejecting proposed defense jury instructions.

“A criminal defendant is entitled to jury instructions on the theory of his case. If the defense theory is supported by at least some evidence which, if reasonably believed, would support an alternate jury verdict, the failure to instruct on that theory constitutes reversible error.” *Honeycutt v. State*, 118 Nev. 660, 56 P.3d 362, 368 (2002), *rev'd in part on other grounds*, *Carter v. State*, 121 P.3d 592 (2005). The Nevada Supreme Court has emphasized that trial courts should exercise diligence in ensuring that jury instructions fit the facts of the case: “[j]urors . . . should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case.” *Crawford v. State*, 121 Nev. 744, 754, 121 P.3d 582, 588 (2005). The proposed defense instructions defined relevant and necessary legal concepts and would have assisted jurors in their deliberations. This Court should find reversible error in the court's refusal to provide the defense instructions.

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V. The State committed misconduct, violating the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

Because criminal cases “involve constitutional issues,” they require “heavy scrutinization of improper comments” by attorneys. *Lioce v. Cohen*, 149 P.3d 916, 929 (Nev. 2006). The constitutional right to a jury trial includes the right to have the jury make an independent determination of the facts. The State’s implication that Donko had failed to explain the existence of certain pieces of evidence intrudes upon that independence and suggests that Donko had the burden to disprove that he committed the crime. *Harkness v. State*, 107 Nev. 800, 804-805, 820 P.2d 759, 761-762 (1991). The prosecutor represents “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935). Where the record reveals a dereliction of that obligation, this Court must reverse the convictions. This Court should find that this is a case where the State’s gamesmanship seriously affected the integrity or public reputation of the judicial proceedings. *Gaxiola v. State*, 119 P.3d 1225 (2005). The State owed appellant the duty to act as an “unprejudiced, impartial, and nonpartisan” public official “bent only on seeing justice done and the law vindicated in

accordance with the rules of law.” *State v. Rodriguez*, 31 Nev. 342, 346, 102 P. 863 (1909). Error is harmless if without reservation, the verdict would have been the same in the absence of error. *Witherow v. State*, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988). Because the State’s misconduct tainted this trial and the jury’s verdicts, this Court must reverse.

VI. The State failed to prove beyond a reasonable doubt that appellant committed these crimes.

“In reviewing evidence supporting a jury's verdict, this court must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by the competent evidence.” *Estes v. State*, 122 Nev. 1123, 1144, 146 P.3d 1114, 1128 (2006); *Bryant v. State*, 114 Nev. 626, 629 (1998) (quoting *Carl v. State*, 100 Nev. 164, 165 (1984) (further internal citations omitted)).

Here, Woods gave widely conflicting and contradictory descriptions of the shooter, and admitted he was not certain of his identification in the photo lineup. (IV 722, 729, 730, 736, 738). Espinoza and Sanchez could not identify the assailant, and gave testimony under oath that directly contradicted each other regarding their prior relationship and history. (III 666; 667-68; 686-688). Ramos was not able to identify Donko until the middle of the trial when he saw Donko sitting with his defense attorneys. (III

702-03; IV 759). Based on this conflicting and inconsistent testimony, this Court should conclude that the State failed to prove these charges beyond a reasonable doubt.

VII. Cumulative error warrants reversal of this conviction under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

Although multiple discrete errors may not warrant reversal when reviewed individually, the cumulative effect of these errors on the trial as a whole warrants relief. *Daniel v. State*, 119 Nev. 498, 78 P.3d 890 (2003). A cumulative-error analysis “aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and . . . analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.” *U.S. v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc). Courts analyze cumulative error by conducting the same inquiry as for individual error: whether the defendant's substantial rights were affected. *U.S. v. Kartman*, 417 F.2d 893, 894, 898 (9th Cir. 1969). The combination of errors in this case warrants reversal even if this Court finds any individual errors harmless.

///

CONCLUSION

Based on the foregoing argument, and on appellant's Opening Brief, hereby incorporated by reference, this Court must reverse these convictions and remand this case for a new trial.

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 Times New Roman in 14 size font.

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:

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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 30th day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of June, 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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BY /s/ Carrie M. Connolly
Employee, Clark County Public
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