

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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**No. 82918**

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Elizabeth A. Brown  
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**SHELBE RIVERA**

Appellant,

vs.

**THE STATE OF NEVADA**

Respondent.

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Appeal from Guilty Verdict  
Eighth Judicial District Court, Clark County  
The Honorable, District Court Judge Michelle Leavitt  
District Court Case No. C-18-333893-1

**APPELLANT'S OPENING BRIEF**

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JESS R. MARCHESE, ESQ.  
Nevada Bar No. 8175  
601 Las Vegas Blvd. South  
Las Vegas, NV 89101  
702-385-5377  
[Marcheselaw@msn.com](mailto:Marcheselaw@msn.com)  
*Attorney for Appellant Shelbe Rivera*

STEVEN B. WOLFSON  
Clark County District Attorney  
200 Lewis Ave. 3rd Floor  
Las Vegas, NV 89155

AARON D. FORD  
Attorney General  
100 North Carson Street  
Carson City, NV 89107  
*Counsel for Respondent*

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I.

**ROUTING STATEMENT**

Pursuant to NRAP 17(b)(2), direct appeals from a conviction based on a jury verdict are presumptively assigned to the Court of Appeals where they “do not involve a conviction for any offenses that are category A or B felonies” or where the direct appeal challenges only the sentence imposed or the sufficiency of the evidence. Because this case appeals a judgment of conviction including Category A felonies (Second Degree Murder) it is not presumptively assigned to the Court of Appeals, and should be retained by the Supreme Court of Nevada.

II.

**JURISDICTIONAL STATEMENT**

Appellant brings this direct appeal asking this Court to reverse the jury verdict and resulting judgment of conviction entered against him. Nevada law permits a direct appeal from a final judgment entered against a defendant in a felony criminal case. See NRS 177.015. A jury verdict is a final judgment upon the filing of the judgment of conviction; the verdict against Appellant was filed on March 5, 2021. AA 596. The Judgment of Conviction was filed on May 11, 2021. AA 597. Appellant filed a timely Notice of Appeal on May 12, 2021. AA 600.

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3 **III.**

4 **ISSUES PRESENTED FOR REVIEW**

- 5  
6 **A. Whether there was sufficient evidence to convict the Defendant.**  
7 **B. Whether the prosecution committed prosecutorial misconduct**  
8 **warranting reversal.**  
9 **C. Whether cumulative error warrants reversal.**

10 **IV.**

11 **STATEMENT OF THE CASE**

12 This is an appeal from a conviction following a verdict following a five-day  
13 jury trial. Appellant Rivera challenges the sufficiency of the evidence and argues  
14 that the conviction should be reversed for prosecutorial misconduct and cumulative  
15 error.  
16

17 Rivera was not initially declared competent for the purposes of standing  
18 prosecution. AA 1. Rivera was indicated to be incompetent, and thus diverted for  
19 treatment, as of August 24, 2018. AA 1. Rivera was ordered committed to receive  
20 psychological and mental illness treatment, with the aim that he would attain  
21



1 competency to stand trial. AA 4. Findings of Incompetency and a Second Order of  
2 Commitment were entered on July 7, 2019. AA 5.

3       Rivera was ultimately found to be competent via a Findings of Competency  
4 filed on January 13, 2020. AA 9. Rivera was thus incompetent to stand trial, and  
5 receiving mental health services, for approximately fifteen (15) months before he  
6 became competent to stand trial. An Order of Competency and Remand was filed  
7 January 17, 2020. AA 11.

8       The Criminal Information was eventually filed against Rivera on May 21,  
9 2020. AA 14. Rivera was charged with Murder with Use of a Deadly Weapon for  
10 the killing of Juan Rincon on or about July 1, 2018. AA 14. Rivera entered a Notice  
11 of Entry of Plea of Not Guilty by Reason of Insanity and Intention to Seek a Verdict  
12 of Guilty but Mentally Ill if convicted by the jury. AA 17.

13       The case proceeded to trial on March 1, 2021. AA 19. The State's witnesses  
14 at trial were Debbie Andrews, Gayle Johnson, Jamelle Shannon, Christina  
15 Martinez, Megan Madonna, Amanda Wright, Tracy Bish, Eric Ravelo, Dr. Lisa  
16 Gavin, and Dr. Herbert F. Coard. AA 20. The defense called Dr. Mark Chambers as  
17 an expert witness. AA 21. The State then re-called Dr. Coard as a rebuttal witness.  
18  
19  
20 *Id.*  
21  
22

1 At the conclusion of trial, the jury returned a verdict of Guilty but Mentally  
2 Ill of 2nd Degree Murder with Use of a Deadly Weapon. AA 596. Rivera was  
3 sentenced to a term of 10 years to 25 years for Second Degree Murder, with a  
4 consecutive count of 5 years to 15 years for Use of a Deadly Weapon, with 1,033  
5 days served. AA 598. Appellant filed a timely Notice of Appeal on May 12, 2021.  
6 AA 600.  
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11 V.

12 **STATEMENT OF THE FACTS**  
13

14 Both sides agree that on July 1st, 2018, Appellant Rivera stabbed Juan  
15 Rincon to death with a knife. AA 210-211; 216. Both sides agreed that Rivera  
16 suffered from mental illness, including schizophrenia, which was influencing him at  
17 the time of that event. AA 216, 524, 530. Both sides agreed that Rivera stabbed  
18 Rincon because Rivera feared that Rincon intended to harm him or presented a  
19 danger to Rivera. AA 534; 506.  
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1 The central disagreement was whether Rivera's condition met the second  
2 prong of Nevada's insanity test, which asks whether the defendant was capable of  
3 understanding that his conduct was wrongful when he stabbed Rincon. AA 400.  
4 The contested facts at trial centered on the competing expert testimony of the  
5 defense's expert witness, Dr. Mark Chambers, and the State's expert witness, Dr.  
6 Herbert Coard. Dr. Chambers testified to his expert opinion that Rivera was  
7 incapable of perceiving the wrongfulness of his conduct at the time of the incident,  
8 while Dr. Coard testified that Rivera understood the wrongful nature of his conduct.  
9

10 The defense called Dr. Mark Chambers ("Chambers") as an expert witness on  
11 the fourth day of trial. AA 449. Chambers is a clinical and forensic psychologist. *Id*  
12 at 449:9-11. Chambers testified as to his experience, which included over 20 years  
13 of work as a clinical psychologist, as well as a forensic psychologist. AA 450-452.  
14

15 Chambers evaluated Rivera's mental state at the time of the underlying event.  
16 AA 452:5-7. To prepare that evaluation, he reviewed all available documents in the  
17 case. AA 452:10-17. He also reviewed extensive medical records, primarily  
18 psychiatric records, and documents from various hospitals. AA 452:18-22. He then  
19 conducted an interview with Rivera on August 2, 2018, which was approximately  
20 one month after the underlying incident occurred on July 1, 2018. AA 453.  
21  
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1 Chambers reviewed the psychiatric history of Rivera with him during the  
2 interview. AA 455. Chambers testified that "it became clear that [Rivera] had  
3 mental health problems for a long time." *Id.* In referencing "multiple mental health  
4 hospitalizations," Chambers identified that Rivera had long suffered "various  
5 symptoms indicative of a psychosis, a psychotic psychiatric disorder." *Id.*  
6

7 Ultimately, Chambers testified that Rivera's psychiatric history, and the other  
8 evidence, presented a conclusion which was "consistent with most of the psychiatric  
9 records, [...] that he suffers from schizophrenia." *Id.*

10 Chambers also concluded that Rivera suffered from severe deficiencies in  
11 cognition, identifying those mental troubles began at a young age. AA 456.  
12 Specifically, Rivera had special education services, then dropped out by ninth grade.  
13 He then had one accident, and one fight, which damaged him further. *Id.* Chambers  
14 reviewed reports indicating that Rivera had an IQ in the high 60s, which Chambers  
15 stated as "associated with mild mental retardation." *Id.*  
16

17 Chambers identified that, during the incident, Rivera immediately began  
18 experiencing delusional thinking when meeting the victim. AA 459. Specifically,  
19 Rivera began feeling concerns that, although he had just met the victim for the first  
20 time, the victim knew him, or knew there was a connection between the two of  
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1 them. *Id.* Already experiencing these delusions, Rivera and Rincon then smoked  
2 marijuana together. *Id.* Rincon and Rivera talked about how Rivera was from New  
3 York. *Id.* Then Rincon looked at Rivera with an expression on his face. AA 460.  
4 Because Rivera is schizophrenic, and he was delusional, his chain or reasoning  
5 involved thinking this man he just met knew him, that there was some east coast  
6 against west coast rivalry going on, that this man may be stalking him or spying  
7 him, and that Rincon had some secret plan to do Rivera harm. AA 461.

9 Chambers went on to explain that this manner of delusional thinking was  
10 common to schizophrenics, and it is called "ideas of reference." AA 461. This  
11 causes the paranoid schizophrenic to perceived unrelated, common events, as  
12 "somehow relating to them," that what are in fact normal events create the belief  
13 that "normal, ordinary, neutral kinds of things going on" are actually evidence that  
14 someone is "here to harm me or he's spying on me or following me, in other words,  
15 it's all about him when it's really just a stranger he meets on the street[.]" AA 462.

17 This delusional manner of thinking led Rivera to perceive an imminent threat  
18 of bodily harm that did not really exist. AA 463. Specifically, Rincon asked Rivera  
19 to see Rivera's knife. *Id.* Due to Rivera's heightened paranoia and schizophrenic  
20 thinking, when Rivera went to retrieve the knife, he started to perceive that once he  
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1 got the knife out of the bag, Rincon would do something harmful to him. *Id.* Rivera  
2 was, in other words, overwhelmed by the perception that Rincon would  
3 immediately do Rivera great harm once Rivera obtained the knife, and that the only  
4 way Rivera could prevent this from happening was to kill Rincon before Rincon  
5 could do him harm. *Id.*

6  
7 Chambers then discussed the fact that Rivera, after stabbing Rincon to death,  
8 immediately left all his possessions next to Rincon's body, including various  
9 documents which directly identified Rivera. AA 464-465. Rivera put the knife in a  
10 dumpster next to Rincon's body. *Id.*

11 Rivera then walked a long way away to a Best Buy, in Las Vegas, Nevada. *Id.*  
12 Continuing his schizophrenic delusion, Rivera reported that while going to the Best  
13 Buy store, he passed by a "waterfall." *Id.* Rivera reported that he washed in the  
14 "waterfall" and continued walking. AA 465. Rivera wandered in the roadway, and a  
15 police officer told him to leave the roadway. *Id.*

16  
17 Police later brought Rivera to a shelter, where Rivera continued to experience  
18 delusional schizophrenic thinking. Specifically, he perceived a connection between  
19 the common grey clothes worn by other people at the shelter, and they grey shirt  
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1 Rincon was wearing. AA 466. He also saw a Nicki Minaj (a musician and rapper)  
2 music video, which he perceived to be about himself. *Id.*

3 Chambers also testified that, at the time of the interview, Rivera was  
4 functioning on a higher level than was otherwise reflected in his historical  
5 psychiatric records, which contained evidence of a history of auditory  
6 hallucinations and paranoia. AA 469. Chambers found this to be because, by the  
7 time the interview occurred, Rivera was receiving treatment and was on psychotic  
8 medication. *Id.* The fact that Rivera was presenting as better-functioning during the  
9 interview, than at past times indicated in his medical records, was evidence that  
10 Rivera was not "malingering." AA 469-470. Malingering means faking a mental  
11 illness. *Id.* Chambers indicated that almost no one is good at faking schizophrenia,  
12 and it would be especially hard with someone with Rivera's low IQ to do so. *Id.*

15 Chambers further testified that, at the time of the incident, he did not believe  
16 Rivera was taking medication for schizophrenia. AA 472. Chambers discussed the  
17 fact that Rivera's medical history was very cyclical: Rivera would go off his  
18 medication, be ravaged by mental illness, then he would end up in a hospital or  
19 medical setting, where he would receive treatment that would remedy those  
20 delusions, after which Rivera would be released, and he would then fail to keep  
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1 taking medication, and the process would repeat itself. AA 472-473. Rivera being  
2 homeless, and having no income, would contribute to his repeated failure to stay on  
3 his medication and end up in a delusional state. AA 473.

4 Chambers then testified about his ultimate conclusions in his report:  
5 specifically, whether Rivera was insane (under Nevada's test) at the time he stabbed  
6 Rincon. AA 474-474. Chambers expressed that delusional schizophrenia was  
7 present at the time of the event, as evidenced by paranoid delusions about the stuff  
8 that was going on around him being orientated towards him, including the belief  
9 that others (Rincon) intended him immediate harm. *Id.* Chambers testified as to his  
10 expert belief that Rivera did know the nature of the act, or in other words, that  
11 Rivera knew he was stabbing a human being, rather than doing something else. AA  
12 475.

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14  
15 Next, as to whether Rivera knew his conduct was wrongful, Chambers  
16 testified that Rivera was, at that time, psychotic and had garbled mental processes.  
17 *Id.* This garbled thinking process only permitted Rivera to convey that he perceived  
18 that he was in fear, and that he perceived Rincon was about to do something to him.  
19 AA 476. Rivera told Chambers that Rivera stabbed Rincon, intending to kill him,  
20 because he "needed to kill him to protect myself, those are the words that he used."  
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1 AA 483. Chambers also focused on the fact that there was no rational motive for the  
2 attack, as Rivera thought Rincon was friendly. AA 477.

3 The State's expert witness at trial was psychologist Herbert F. Coard III  
4 ("Coard"). AA 496. Mr. Coard is a forensic psychologist with a background serving  
5 in that capacity for the Federal Bureau of Prisons. AA 389. Coard testified that he  
6 reviewed the subject's interview, the autopsy of the deceased, the records in the  
7 investigation file, as well as the defendant's history of psychiatric hospitalization.  
8 AA 390.

10 In this case, Coard agreed with almost all the conclusions found by Dr.  
11 Chambers. Coard found that Rivera was under a delusion at the time of the event.  
12 AA 504. He further found that the delusion which was occurring at the time of the  
13 event was caused by Rivera's schizophrenia, in agreeance with Dr. Chambers. *Id.*  
14 Coard and Chambers further agreed that Rivera knew what he was doing, i.e., that  
15 he was stabbing a human rather than doing some other physical act. AA 505.

17 However, Coard found that Rivera knew what he was doing was not  
18 authorized by law. AA 506. He based this conclusion on the fact that Rivera put the  
19 knife in the dumpster after the stabbing, and that Rivera left the crime scene, which  
20 Coard took to be evidence of his consciousness of guilt. *Id.*

## 22 VI.

## **LEGAL ARGUMENT**

### **A. Insufficient Evidence.**

"The standard of review for sufficiency of the evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." *Leonard v. State*, 114 Nev. 1196, 1209-10 (Nev. 1998) citing *Kazalyn v. State*, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992). There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Id* citing *Davis v. State*, 110 Nev. 1107, 1116, 881 P.2d 657, 663 (1994) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

Nevada, like several other states, has implicitly considered insufficiency of the evidence challenges, even when raised in relation to a defendant's burden of proving an insanity defense. *Hudson v. State*, 108 Nev. 716, 720 (Nev. 1992)(considering appellant's insufficiency of the evidence argument relating to his claim of insanity). *See also State v. France*, 279 Neb. 49, 56 (Neb. 2009) ("The verdict of the finder of fact on the issue of insanity will not be disturbed unless there is insufficient evidence to support such a finding. *Id.*"); *People v. Castaneda*,

1 B213678, at \*1 (Cal. Ct. App. Aug. 26, 2010). ("This claim is, in actuality, a  
2 contention that insufficient evidence supported the trial court's finding that he was  
3 sane at the time he committed the crimes.").

4 NRS 174.035(6) expressly permits a criminal defendant to enter a plea of  
5 not guilty by reason of insanity. Under this plea, a defendant has the burden "to  
6 establish by a preponderance of the evidence that" he or she did not "[k]now or  
7 understand the nature and capacity of his or her act" or "[a]ppreciate that his or her  
8 conduct was wrong" due to a "delusional state" caused by "a disease or defect of  
9 the mind." NRS 174.035(6), discussed by *Pundyk v. State*, 467 P.3d 605, 607 (Nev.  
10 2020). "Because a finding of criminal liability requires a conclusion that a  
11 defendant's culpable mental state existed contemporaneously with a culpable act, a  
12 successful insanity defense must show the elements of [legal insanity] existed *at*  
13 *the time of the act.*" *Miller v. State*, 112 Nev. 168, 172, 911 P.2d 1183,  
14 1185 (1996).

17 Both sides agree that on July 1st, 2018, Appellant Rivera stabbed Juan  
18 Rincon to death with a knife. AA 210-211; 216. Both sides agreed that Rivera  
19 suffered from mental illness, including schizophrenia, which was influencing him at  
20 the time of that event. AA 216, 524, 530. Both sides agreed that Rivera stabbed  
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1 Rincon because Rivera feared that Rincon intended to harm him or presented a  
2 danger to Rivera. AA 534; 506.

3 The central disagreement was whether Rivera's condition met the second  
4 prong of Nevada's insanity test, which asks whether the defendant was capable of  
5 understanding that his conduct was wrongful when he stabbed Rincon. AA 400. As  
6 such the contested facts at trial centered on the competing expert testimony of the  
7 defense's expert witness, Dr. Mark Chambers, and the State's expert witness, Dr.  
8 Herbert Coard.  
9

10 As noted above, Chambers testimony showed that Rivera lacked an  
11 understanding of the wrongful nature of his conduct. This was because Rivera was  
12 experiencing a psychological delusion in which he perceived the delusional  
13 necessity to immediately kill Rincon, and that if he did not do so, Rincon would kill  
14 him.  
15

16 In support of this conclusion, Chambers testified that Rivera's psychiatric  
17 history, and the other evidence, presented a conclusion which was "consistent with  
18 most of the psychiatric records, [...] that he suffers from schizophrenia." Chambers  
19 also concluded that Rivera suffered from severe deficiencies in cognition,  
20 identifying those mental troubles began at a young age. AA 456.  
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1 Chambers identified that, during the incident, Rivera experienced delusional  
2 thinking when meeting the victim, in that Rivera began to think that they knew each  
3 other, that there was an east coast vs. west coast rivalry, and that Rincon was  
4 stalking him or spying on him. AA 459-461. This delusional manner of thinking led  
5 Rivera to perceive an imminent threat of bodily harm that did not really exist, when  
6 he perceived that Rincon would kill him, unless Rivera killed him first. AA  
7 461-463.  
8

9 The State and its expert, Dr. Coard, wrongly relied upon the fact that Rivera  
10 did not experience delusions of specific subsidiary facts would justify his  
11 conviction that it was necessary to kill Rincon. For example, the State cited the fact  
12 that Rivera did not claim he perceived Rincon had threatened him, or that Rincon  
13 had a weapon, and instead only reported that heh experienced an inexplicable  
14 conviction that it was necessary to kill Rincon in order to preserve Rivera's own  
15 life.  
16

17 This view of the evidence misperceives what is necessary to establish an  
18 insanity defense. The defense was only required to establish that Rivera could not  
19 "[a]ppreciate that his or her conduct was wrong" due to a "delusional state" caused  
20 by "a disease or defect of the mind." NRS 174.035(6). In this case, Rivera could not  
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1 appreciate that his conduct was wrongful because he experienced a schizophrenic  
2 delusion that the only way to save his own life was to immediately kill Rincon. The  
3 fact that Rivera did not imagine Rincon threatening him with a weapon is not  
4 dispositive. While it is true that Rivera imagining Rincon attacking him with a  
5 weapon would establish insanity under NRS 174.035(6), this is not the only type of  
6 delusion which would cause Rivera to fail to identify his conduct as being  
7 wrongful.  
8

9       There appears to be some suggestion in this case that Rivera could not have  
10 experienced the delusional belief that it was necessary to kill Rincon because he did  
11 not claim to have imagined Rincon threatening him with a weapon. The logic seems  
12 to be that reasonable people only perceive the need for self-defense when  
13 confronted with threats and weapons, because normal people would only perceive  
14 actual danger under those or similar circumstances. The problem here is that Rivera  
15 was not a normal reasonable person at the time of this event. He was, in fact,  
16 experiencing a schizophrenic delusion. Part of that paranoid delusion was that  
17 Rincon had the inexplicable ability to immediately end Rivera's life, if Rivera did  
18 not immediately act, even though Rincon apparently lacked possession of a weapon.  
19 This is, in fact, what makes Rivera insane: he perceives the same certainty as to an  
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1 imminent danger that a normal person might perceive because someone is pointing  
2 a gun at them, without having reason to believe someone is pointing a gun at them.

3       The insanity defense should apply where Rivera experiences an  
4 otherwise-indescribable delusion that the *only way* to prevent Rincon from  
5 immediately killing him is to kill Rincon first. Under such circumstances, the  
6 killing would appear reasonably necessary to the person experiencing the delusion,  
7 and thus they could not possibly appreciate the wrongfulness of their conduct. That  
8 the experience of that necessity is delusional, and inexplicable in terms of the actual  
9 circumstances, or inexplicable in terms of ordinary logic, is precisely why the  
10 insane person is insane, and is not able to perceive the wrongfulness of their  
11 decision-making.  
12

13       It must be sufficient for an insanity defense to establish that the defendant  
14 was propelled by a sincerely held delusional belief in the necessity of their conduct,  
15 as no insane person acting under a delusion of necessity could simultaneously  
16 perceive the wrongness of their conduct. The must be overturned for insufficient  
17 evidence on this basis.  
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3       **B.     Prosecutorial Misconduct.**

4               **i.     *Standard of Review.***

5  
6       When considering claims of prosecutorial misconduct, the court engages in a  
7 two-step analysis. *Valdez v. State*, 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77  
8 (2008). First, it must determine whether the prosecutor's conduct was improper. *Id.*  
9 Second, if the conduct was improper, the court must determine whether  
10 the improper conduct warrants reversal. *Id.* Finally, the court will not reverse a  
11 conviction based on prosecutorial misconduct if it was harmless error. *Id.*

12       The proper standard of harmless-error review depends on whether  
13 the prosecutorial misconduct is of a constitutional dimension. *Id.* If the error is of  
14 constitutional dimension, then this Court has stated that it will reverse unless the  
15 State demonstrates, beyond a reasonable doubt, that the error did not contribute to  
16 the verdict. If the error is not of constitutional dimension, we will reverse only if  
17 the error substantially affects the jury's verdict. *Id.*

18  
19       Determining whether a particular instance of prosecutorial misconduct is  
20 constitutional error depends on the nature of the misconduct. *Id.* Misconduct that  
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1 involves impermissible comment on the exercise of a specific constitutional right  
2 has been addressed as constitutional error. *Id.* Prosecutorial misconduct may also  
3 be of a constitutional dimension if, considering the proceedings, the misconduct so  
4 infected the trial with unfairness as to make the resulting conviction a denial of due  
5 process. *Id.* Harmless-error review applies, however, only if the defendant  
6 preserved the error for appellate review.  
7

8 Generally, to preserve a claim of prosecutorial misconduct, the defendant  
9 must object to the misconduct at trial because this "allow[s] the district court to  
10 rule upon the objection, admonish the prosecutor, and instruct the jury." When an  
11 error has not been preserved, this Court employs plain-error review. *Id.* Under that  
12 standard, an error that is plain from a review of the record does not require reversal  
13 unless the defendant demonstrates that the error affected his or her substantial  
14 rights, by causing prejudice or a miscarriage of justice. *Id.*  
15

16 **ii. *Instances of Prosecutorial Misconduct.***

17 It is well settled that prosecutors have a duty to avoid engaging in conduct  
18 which might deprive defendant of a fair trial and should be "unprejudiced,  
19 impartial, and nonpartisan" *Valdez v. State*, 124 Nev. 1182, 1192, 196 P.3d 465, 478  
20 (2008).  
21  
22

1 Prosecutorial misconduct occurs whenever a conviction is pursued “outside  
2 the bounds of acceptable advocacy.” Peter J. Henning, *Prosecutorial Misconduct*  
3 *and Constitutional Remedies*, 77 Wash. U. L.Q. 713, 720 (1999). “The line  
4 separating acceptable from improper advocacy is not easily drawn; there is often a  
5 gray zone. Prosecutors sometime breach their duty to refrain from overzealous  
6 conduct by commenting on the defendant's guilt and offering unsolicited personal  
7 views on the evidence.” *United States v. Young*, 470 U.S. 1, 7 (1985).  
8

9 It is, for instance, improper for a prosecutor to insinuate to the jury the  
10 existence of evidence not in the record. *Donnelly V. Dechristoforo*, 416 U.S. 637,  
11 651, 94 S.Ct. 1868, 1875 (1974).  
12

13 Where a defendant is accused of murder, the State must prove to the finder of  
14 fact, during a trial, that the defendant is guilty of murder and that a murder took  
15 place. For this reason, it is improper for the prosecution to repeatedly refer to the  
16 death of the alleged victim as a “murder” prior to the finder of fact determining that  
17 a “murder” occurred. California, for example has held that a “killing” should not be  
18 “characterized as ‘murder’ in advance of a verdict so finding.” (*People*  
19 *v. Garbutt* (1925) 197 Cal. 200, 209 (*Garbutt*); see *People v. Price* (1991) 1 Cal.4th  
20 324, 480 (*Price*) [“Although it would be improper for a prosecutor to use the term  
21  
22

1 'murder' in questioning a witness about an unadjudicated killing, a prosecutor is of  
2 course free to argue to the jury, after all the evidence had been presented, that it  
3 should find that a killing was murder."].)

4 Prosecutors are also prohibited from vouching for a witness (or other  
5 evidence) by offering their personal opinion of a witness's testimony, or suggesting  
6 that information exists outside the record that verifies the witness's  
7 truthfulness. *United States v. Alcantara-Castillo*, 788 F.3d 1186, 1191 (9th Cir.  
8 2015). Vouching compromises the integrity of the trial and denies the defendant  
9 due process because the "prosecutor's opinion carries with it the imprimatur of the  
10 Government and may induce the jury to trust the Government's judgment rather  
11 than its own view of the evidence." *Id.*

12  
13  
14 This Court will look to whether "the flavor of misconduct must sufficiently  
15 permeate an entire proceeding to provide conviction that the jury was influenced  
16 by *passion* and prejudice in reaching its verdict." *Lioce v. Cohen*, 124 Nev. 1, 14,  
17 174 P.3d 970, 978-79 (2008). Emphasis added.

18 Prosecutors must also avoid inviting the jury to convict the accused by  
19 flaming personal fears, by arguing that society requires the accused to be locked up  
20 and off the streets or appealing to grounds for conviction which extend beyond the  
21

1 constitutionally limited confines of the evidence and the law of the case. As a  
2 result, it is improper where “[t]he prosecutor's comment in [...] draw upon  
3 widespread community fears about [crime], and implies that those fears can or  
4 should inform the process of assessing [the accused’s] guilt.” *United States v.*  
5 *Gainey*, 111 F.3d 834, 835-36 (11th Cir. 1997). “In other words, [such] references  
6 [invite] the jury to judge the case upon standards and grounds other than the  
7 evidence and law of the case, and is thus objectionable and improper.” *Id.*

8  
9 Thus courts “caution counsel from employing arguments immaterial to the  
10 defendant's guilt or innocence, especially when they appear calculated to "shift the  
11 emphasis from evidence to emotion." *Id* citing *United States v. Doe*, 284 U.S. App.  
12 D.C. 199, 903 F.2d 16, 25 (D.C.Cir.1990). For example, it is improper to ask the  
13 jury to consider the ramifications of turning the accused “loose on society” if they  
14 accept his theory of the case. *Gall v. Parker*, 231 F.3d 265, 315 (6th Cir. 2000).

15  
16 Here, in Rivera's case, the prosecution made several comments throughout  
17 trial which are consistent with the above methods of committing prosecutorial  
18 misconduct. First, the prosecutor impermissibly referred to the killing as a  
19 "murder" prior to proving that a murder occurred, on four occasions, including one  
20 occasion following a defense objection:  
21  
22

1 " Q So we've been talking about this a little bit, but I want to  
2 clarify it further. So this is that photograph where we had  
3 talked about how the red thumbtack is **the murder scene** at  
4 418 West Mesquite. I then see -- see a yellow thumbtack that  
5 I'm going to come back to in a little bit, but I see a green one  
6 down here that says 100 North City Parkway. Are you familiar  
7 with that area?

8 A Yes." AA 298.

9 And again later with that same witness:

10 " Q Okay. And when does this happen? If **the murder** occurs  
11 on July 1st, when did we get to the Molasky video  
12 surveillance?

13 A I believe we pulled it on the 9th." AA 299(Emphasis  
14 added).

15 Although defense counsel sought to avoid drawing attention to these  
16 improper comments, the prosecutor again called the killing a murder in the form of  
17 a question for a third time, forcing the defense to object:

18 "Q And he had no pink backpack?

19 A Correct.

20 Q Okay. So I know we kind of jumped around on some dates.  
21 We have **the murder date** of the 1st --

22 MR. MARCHESE: I'm going to object as to classification and  
calling it a murder.

THE COURT: I'm sorry, you're -- the objection is to?

1 MR. MARCHESE: Classification as a murder rather than a  
2 homicide.

3 THE COURT: The objection --

4 MS. MOORS: I mean, I can rephrase. I'm not trying to --

5 THE COURT: Pardon?

6 MS. MOORS: I can rephrase.

7 THE COURT: Okay.

8 MS. MOORS: I'm not trying to cause any issues.

9 THE COURT: Thank you." (Emphasis added).

10  
11 Even after this objection was noted, and the prosecutor indicated they would be  
12 more careful, the prosecutor again went on to refer to the killing as a murder within  
13 a witness question, for a fourth time:

14  
15 "Q I want to touch on that last sentence you just said, you said  
16 there was no other explanation for what you could make sense  
17 out of why the defendant **murdered** the victim; is that  
18 correct?

19 A I did say that, yes." AA 493 (Emphasis added).

20 This method of repeatedly injecting the phrase "murder" into questioning witnesses  
21 subverted the presumption of innocence by implying to the jury that the State had  
22 already proved that a murder occurred. As other courts have realized, this is

1 improper, as it wrongly suggests that a murder occurred "in advance of a verdict so  
2 finding." *Garbutt* at 209; *Price*, at 480.

3 In addition to being a reference to a legal conclusion which has not yet been  
4 rendered, these repeated references to the "murder" impermissibly suggest to the  
5 jury the prosecutor's opinion of the case. "Such an injection of personal beliefs into  
6 the argument detracts from the "unprejudiced, impartial, and nonpartisan" role that  
7 a prosecuting attorney assumes in the courtroom." *Collier v. State*, 101 Nev. 473,  
8 480 (Nev. 1985). "Prosecutors therefore must not express their personal beliefs."  
9 *Id.* While it is true that this Court has approved statements of opinion as to the  
10 defendant's guilt when "made as a deduction or a conclusion from the evidence,"  
11 such opinions deduced from the evidence are usually approved of for closing  
12 argument, not interjecting such opinions into the questioning of witnesses. *Parker*  
13 *v. State*, 109 Nev. 383, 392 (Nev. 1993) (approving of deductive opinions where  
14 statements were made in a closing argument).

15 In another instance, during closing argument, the prosecution argued as  
16 follows:

17 "And what I think is also important is Dr. Chambers'  
18 argument that if there's a lack of rational motivation, that's not  
19 part of your analysis. It's simply not. I understand that as  
20 humans we want to know why someone might kill another  
21 human, but I can tell you this, in ten years of being a D.A., I  
22

1 have never been able to answer that question when I handle a  
2 murder case." AA 546.

3 Counsel for Rivera objected, and the Court sustained the objection. *Id.*  
4 Nevertheless, the jury heard this statement, and once made, the sustaining of the  
5 objection did not 'unring the bell.' *See*, for example, *Williams v. State*, 715 So.2d  
6 1152, 1153 (Fla. 3d DCA 1998) (reversal required even though objections to  
7 counsel's improper statements were sustained, because "[t]he die was cast — the  
8 damage was done").

9  
10 This statement by the D.A., asking the jury to draw upon his "ten years of  
11 being a D.A." when analyzing the importance of motive (or lack thereof) in Rivera's  
12 case, improperly injected another instance of the prosecutor's opinion. *Collier* at  
13 480.

14 Furthermore, the prosecutor asked the jury to rely upon the *prosecutor's*  
15 *experience in other cases* to minimize the relative importance of a lack of motive  
16 for Rivera. In other words, the prosecution was effectively submitting his  
17 experience as testimonial evidence: that he has ten years of doing these kinds of  
18 cases, and he never learns why the killing took place, therefore, it is not unusual  
19 that there is no proof of motive in Rivera's case. The problem with this logic are  
20 obvious; it acts to inject the prosecutor's personal experience to impermissibly  
21  
22



1 bolster the State's case against one of the defendant's main arguments in favor of his  
2 defense, specifically, that the totally irrational and unmotivated act the defendant  
3 committed could only have been a result of his legal insanity.

4       Second, this instance of misconduct meant that, because the prosecutor  
5 injected what was, in essence, his personal-experience testimony during closing  
6 argument, Rivera was attacked with a piece of evidence (the prosecutor's experience  
7 that motive is allegedly never proven in other cases) but was denied any opportunity  
8 to confront that evidence or cross-examine the person making the assertion.

9  
10       The Sixth Amendment's Confrontation Clause provides criminal defendants  
11 the right to confront the "witnesses against [them]" and to cross-examine such  
12 witnesses who "bear testimony" against them. *Crawford v. Washington*, 541 U.S. 36,  
13 51, 124 S.Ct. 1354, 1364, 158 L.Ed.2d 177 (2004) (internal quotation marks and  
14 citation omitted). The elements that comprise the right of confrontation, i.e.,  
15 "physical presence, oath, cross-examination, and observation of demeanor by the  
16 trier of fact," ensure "the reliability of the evidence against a criminal defendant by  
17 subjecting it to rigorous testing in the context of an adversary proceeding before the  
18 trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845-46, 110 S.Ct. 3157, 3163, 111  
19 L.Ed.2d 666 (1990).

1 Rivera was not able to, for example, cross-examine the prosecutor, or  
2 confront the prosecutor by showing that the prosecutor really had been involved in  
3 other cases where motive was proven by the State. This comment also occurred  
4 during *closing rebuttal argument*, which deprived Rivera even of an opportunity to  
5 even *argue* against this improperly injected evidence, as it was one of the last things  
6 the jurors heard prior to deliberation.  
7

8 The comment was wildly improper for another reason. The prosecutor  
9 instructed the jurors that the defense argument that a "lack of rational motivation" is  
10 evidence of insanity is "**not part of your analysis. It's simply not.**" AA 546. This  
11 is, of course, false. It is true that the State is not required to prove a motive on the  
12 part of the Defendant to convict for murder. The State not being required to prove  
13 motive does not mean that the absence of a rational motive then plays no part in the  
14 jury's analysis of other elements of the offense, or in this case, the defense of  
15 insanity. Indeed, in relation to insanity, the absence of a rational motive would  
16 be relevant either to prove that the defendant did not know the nature of his  
17 conduct, or that he would not understand his conduct to be wrong or unlawful. The  
18 lack of any rational motive (other than delusional or insane thinking) was a central  
19 theme of the defense. AA 430 (implicitly criticizing Dr. Coard's lack of analysis on  
20  
21  
22

1 the issue of motive); AA 476 (Dr. Chambers' testimony on the lack of rational  
2 motive, and the importance of such evidence for the insanity analysis); AA 493  
3 (State's cross-examination of Dr. Chambers on the issue of motive); AA 536-537  
4 (contrasting the competing expert evidence on motivation during closing argument).  
5

6 It is reversible misconduct to mislead the jury as to their instructions, or their  
7 obligations during deliberation. *See McGuire v. State*, 100 Nev. 153, 159 (Nev.  
8 1984) (finding reversible misconduct where prosecutor's argument acted to mislead  
9 the jury on the presumption of innocence). To the extent the State here instructed  
10 the jury that the absence of rational motive was to be "not part of your analysis" this  
11 clearly mislead and wrongly instructed the jurors as to their obligations when  
12 deliberating one of the defendant's main theories in support of his innocence.  
13

14 The State also confused and misled the jury by conflating the legal standards  
15 for two different possible defenses: a defense of not guilty because of insanity, and  
16 a defense of not guilty because of lawful self-defense. *Id.* The State argued that:

17 "Furthermore, Dr. Chambers' last answer that he indicated to  
18 me was, and I wrote it down, he indicated that if the -- the  
19 defendant had said that if he, the defendant, did not stab the  
20 victim, that the victim was going to stab him, and this is this  
21 instruction. He never said the victim was about to stab him.  
22 He never said, I saw a knife. He's talking about a future event.  
If I had not stabbed the victim, he was going to stab me.  
Self-defense is not a preemptive defense." AA 546.

1 The defense again objected; however, the Court overruled the objection. *Id.* This  
2 improperly misled and wrongly instructed the jury because it conflates and  
3 comingles self-defense and the insanity defense which, while related, do not require  
4 entirely identical analyses by the finder of fact.

5  
6 The crux of the difference is that, to establish self-defense, the defendant  
7 must perceive precursor factual occurrences which give rise to his belief that  
8 self-defense is necessary to prevent imminent harm. For example, if a defendant  
9 claims self-defense because someone else is about to shoot him, the jury will likely  
10 need to consider why the defendant thought the victim was about to shoot him: did  
11 he see a gun? Did the victim raise his arm and point it? Did the defendant have  
12 reason to believe the victim owned a firearm?

13  
14 In contrast, an insane defendant will usually *not* derive his belief about the  
15 danger of imminent harm (and the need for immediate defensive action) from real  
16 precursor factual occurrences. This is, in fact, what makes that person insane: he  
17 perceives the same certainty as to an imminent danger that a normal person might  
18 perceive because someone is pointing a gun at them, without having reason to  
19 believe someone is pointing a gun at them. The insane person experiences the same  
20 urgency to act immediately, without experiencing actual events which would justify  
21  
22

1 that urgency.

2       The prosecutor was correct that Rivera never seeing a knife, or never  
3 claiming that Rincon was threatening him, rebut and possibly preclude a claim of  
4 actual self-defense. But the same logic does not necessarily translate to the insanity  
5 defense. While it would be a defense to say that Rivera experienced a delusion that  
6 Rincon was holding a knife and threatening to stab him, this is not the only way an  
7 insanity defense ought to apply.

8  
9       The insanity defense should also apply where the defendant experiences an  
10 otherwise-indescribable delusion that the *only way* to prevent Rincon from  
11 immediately killing him is to kill Rincon first. Rivera need not also imagine Rincon  
12 holding a knife. He could, for example, simply imagine that Rincon will  
13 immediately kill him by the power of Rincon's thoughts and kill Rincon in response  
14 to that delusional belief. He might also just experience the delusion that if he does  
15 not stab Rincon, this will through some unexplained paranormal mechanism, cause  
16 Rivera himself to die, in which case the killing would be one of defense, or simply  
17 necessity.

18  
19       It ignores the realities of insanity and schizophrenia to attempt to shoehorn  
20 the schizophrenic or delusional experience into simple, easily explained delusions  
21

1 of concrete facts (such as 'Rincon has a knife'). Other more abstract schizophrenic  
2 delusions produce in the schizophrenic the same sincere belief of the immediate  
3 necessity to act for self-preservation, even if they remain inexplicable by reference  
4 to subsidiary delusions of more concrete facts.

5  
6 The prosecutor, in closing argument, erased these distinctions by converting  
7 this nuanced insanity analysis to the realm of mere self-defense. In this manner the  
8 prosecutor misled the jury and thus committed misconduct.

9 These instances of prosecutorial misconduct warrant reversal. These  
10 instances of prosecutorial misconduct are of a constitutional dimension. By  
11 repeatedly injecting the reference to the "murder" when questioning witnesses, the  
12 State undermined the presumption of innocence, and injected the opinion of the  
13 prosecutor, where such opinions were not subject to confrontation or  
14 cross-examination, in violation of the Confrontation Clause rights of the defendant.  
15  
16 Second, the prosecutor impermissibly bolstered the State's case, against a central  
17 theory of the defense, by reference to the experience of the prosecutor. Again, this  
18 submitted evidence to the jury which Rivera was prevented from confronting with  
19 cross-examination or other evidence, specifically the prosecutor's claim that in ten  
20 years, he has not found (in other cases) proof of motive. The prosecution's comment  
21  
22

1 also instructed the jurors not to consider the absence of rational motive in their  
2 analysis, which mislead the finder of fact as to the scope of their deliberation, which  
3 violated Rivera's constitutional right of due process. These instances were thus  
4 individually, and collectively, constitutional in nature.

5  
6 As these are constitutional instances of misconduct, reversal is required  
7 unless the State demonstrates, beyond a reasonable doubt, that the error did not  
8 contribute to the verdict. This case involved two experts, one State and one defense,  
9 where they both agreed that Rivera is a paranoid schizophrenic, and that he was  
10 experiencing delusions caused by that schizophrenia when he stabbed Rincon. They  
11 only disagreed on whether Rivera knew his conduct was wrong. As these instances  
12 of misconduct tipped the scale of the jury on this one remaining question, the State  
13 cannot prove beyond a reasonable doubt that the error did not influence the jury's  
14 verdict.  
15

16 **C. Cumulative Error.**

17 Even if none of the above errors individually warrants reversal, their  
18 cumulative effect requires reversal. The cumulative effect of errors may violate a  
19 defendant's constitutional right to a fair trial even though errors are found to be  
20 harmless individually. *McConnell v. State*, 125 Nev. 243 (2009).  
21  
22

1 Relevant factors to consider in evaluating a claim of cumulative error include  
2 whether “the issue of innocence or guilt is close, the quantity and character of the  
3 error, and the gravity of the crime charged.” *DeChant v. State*, 116 Nev. 918, 927,  
4 10 P.3d 108, 113 (2000). If the collective presence of errors devastates one’s  
5 confidence in the reliability of the verdict, a new trial is required. See *Killian v.*  
6 *Poole*, 282 F.3d 1204, 1211 (9<sup>th</sup> Cir. 2002).

8 When considering cumulative error involving instances of prosecutorial  
9 misconduct, “[t]his court must ensure that harmless-error analysis does not allow  
10 prosecutors to engage in misconduct by overlooking cumulative error in cases with  
11 substantial evidence of guilt.” *Williams v. State*, No. 59779, at \*6-7 (Nev. May 15,  
12 2013), citing *Valdez v. State*, 124 Nev. 1172, 1195 (Nev. 2008).

14 Here, the issue of innocence or guilt was a close question, because there was  
15 agreement to the vast majority of the evidence in this case, and only a limited  
16 dispute as to whether the schizophrenic delusions experienced by Rivera caused  
17 him to misperceive the wrongfulness of his conduct. The quantity of the error (four  
18 references to “murder,” two improper statements in closing argument) was  
19 sufficiently extensive given this was only a four-day trial (with the verdict on the  
20 fifth day). Most importantly, the character of the error was grave, as for the reasons  
21  
22



1 set forth herein, they contravened the constitutional rights of Rivera to  
2 confrontation, and furthermore wrongly instructed the jurors to disregard the lack of  
3 motive evidence in their analysis of the insanity defense.

4 For these reasons, cumulative error warrants reversal and remand for a new  
5 trial at which Rivera's rights will be protected.

7 **VII.**

8 **CONCLUSION**

9 For each of the reasons set forth above, Appellant Rivera respectfully  
10 requests his conviction based upon the guilty verdict be vacated.

11 DATED this 14th day of September, 2021.

12  
13 /s/ \_\_\_\_\_  
14 JESS R. MARCHESE, ESQ.  
15 Nevada Bar No. 8175  
16 *Attorney for Appellant Shelbe Rivera*

17 **CERTIFICATE OF COMPLIANCE**

18 I hereby certify that I have read this appellate brief, and to the best of my  
19 knowledge, information, and belief, it is not frivolous or interposed for any  
20 improper purpose. I certify that this brief complies with all applicable Nevada Rules  
21 of Appellate Procedure, in particular NRAP 28(e)(1), which requires every  
22

1 assertion in the brief regarding matters in the record to be supported by a reference  
2 to the page of the transcript or appendix where the matter relied on is to be found. I  
3 further certify that this brief complies with the formatting requirements of NRAP  
4 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief  
5 has been prepared in a proportionately spaced typeface using Microsoft Word, a  
6 word-processing program, in 14 point Times New Roman.  
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8 I further certify that this brief complies with the type volume limitations of  
9 NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or  
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11 the event that the accompanying brief is not in conformity with the requirements of  
12 the Nevada Rules of Appellate Procedure.  
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14 DATED this 14th day of September, 2021.

15 /s/ \_\_\_\_\_  
16 JESS R. MARCHESE, ESQ.  
17 Nevada Bar No. 8175  
18 601 Las Vegas Blvd. South  
19 Las Vegas, NV 89101  
20 **CERTIFICATE OF SERVICE**  
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20 I hereby certify and affirm that this document was filed electronically with  
21 the Nevada Supreme Court, and that Electronic Service of the foregoing document  
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8 DATED this 14th day of September, 2021.

9  
10  
11 /s/ \_\_\_\_\_  
12 JESS R. MARCHESE, ESQ.  
13 Nevada Bar No. 8175  
14 601 Las Vegas Blvd. South  
15 Las Vegas, NV 89101  
16 *Attorney for Appellant Shelbe Rivera*  
17  
18  
19  
20  
21  
22