IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDALL LEE DAHL, No. 83489

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal from a Judgment of Conviction in Case Number CR15-0747
The Second Judicial District Court of the State of Nevada
The Honorable Scott N. Freeman, District Judge

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment of conviction on August 10, 2021. 1JA 49-50 (Judgment of Conviction).[1] On September 9, 2021, Appellant, Randall Lee Dahl (Mr. Dahl), timely filed a notice of appeal from that judgment. 1JA 51-52 (Notice of Appeal). This Court's jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure (NRAP) and NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case).

II. ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals because it involves a jury-based conviction of a category A offense. See NRAP 17(b)(2)(A) (exempting category A jury-based felony convictions from presumptive assignment to the Court of Appeals). The Supreme Court may, however, assign this appeal to the Court of Appeals under NRAP 17(b), which authorizes the Supreme Court to assign to the Court of Appeals any case filed in the Supreme Court, except those matters

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[1] "JA" stands for the Joint Appendix. Pagination conforms to NRAP 30(c)(1). The number preceding "JA" represents the volume number. Note, the reporter's pages 7 through 177 of the June 7, 2021 trial transcript have not been included in the Joint Appendix because the topic there was jury selection and there are no jury selection issues on appeal.

specifically assigned for disposition to the Supreme Court under NRAP 17(a).

III. STATEMENT OF THE LEGAL ISSUE PRESENTED

Whether instances of prosecutorial misconduct during closing argument —most not objected to—warrant reversal and a new trial.

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction. On May 13, 2015, the State charged Mr. Dahl with one count of open murder, a violation of NRS 200.010, a category A felony. 1JA 1-3 (Indictment). On June 9, 2021, a jury found Mr. Dahl guilty of second degree murder. 1JA 41 (Verdict); 3JA 420-21 (Transcript of Proceedings: Trial).[2] The district court imposed a sentence of life in the Nevada Department of Corrections with the possibility of parole beginning after a minimum of ten years have been served. The district court credited Mr. Dahl 2,435 days in predisposition custody. 1JA 49-50 (Judgment of Conviction). Mr. Dahl appeals his conviction. 1JA 51-527 (Notice of Appeal).

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[2] Multiple competency proceedings took place over the interim. See https://wceflex.washoecourts.com/notify/cmsFullHistory.html?pageAction=QueryCmsFullHist&caseNumber=CR15-0747&companyId=1&courtLocation=&myCaseMode=No (last visited January 26, 2022).

V. STATEMENT OF THE FACTS

Early on the morning of December 10, 2014, Jeffery Hoyt, a police officer for the City of Reno, went to the Reno Event Center in downtown Reno in response to a call of a possible deceased person in a wheelchair. 2JA 93-95, 101.[3] The Reno Event Center is located at the intersection of Fourth and Center Streets. When Officer Hoyt arrived he saw a deceased male sitting in a wheelchair "at the top of the steps leading into the event center." 2JA 95, 101-02. He had no pants or underwear and had a towel over his legs. A jacket was over his right shoulder. His right eye was swollen shut. 2JA 95, 98. REMSA arrived shortly afterwards. 2JA 95-96, 99. Officer Hoyt called the medical examiner's office. 2JA 99. And Officer Hoyt's sergeant, who had arrived after Officer Hoyt, notified the detective division. 2JA 100.

Michael Bergman, a Medical/Legal Death Investigator and Forensic Autopsy Technician at the Washoe County Regional Medical Examiner's Office, arrived in response to Officer Hoyt's call. He

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[3] An Event Center security officer had contacted the police. 2JA 104. See 2JA 140-54 (Ed Flagg, site supervisor for the National Bowling Stadium and Reno Events Center). Mr. Flagg also later turned over security video to the police that depicted Mr. Dahl pushing the person in a wheelchair, leaving the body where it was found, and then walking away, northbound. 2JA 141-42, 144-48.

observed a deceased individual seated in a wheelchair covered with a sheet.[4] He had some "fairly extensive injuries." 2JA 106, 109. By the Mr. Bergman arrived the paramedics had pronounced Mr. Gardner dead and had already left. 2JA 109-10, 124-25. Mr. Gardner's body was transported to the Medical Examiner's Office. 2JA 111-12. An autopsy of Mr. Gardner concluded that the cause of his death was asphyxia due to traumatic compression of the neck and that the manner of death was homicide. 3JA 315, 337.

Meanwhile, Reno Police Detective Dan Maher, who had watched security videos from the Event Center, decided to contact the manager at the Flamingo Motel (an overnight or weekly downtown motel) since it was located on Center Street just north of the event center, which was the direction the man who parked the wheelchair had headed. 2JA 154-56, 159-61, 162, 163, 185. The manager in turn directed him to Mr. Dahl's room at the motel. 2JA 161-62.

Detective Maher and his partner, Detective Brouker, knocked on the door. Mr. Dahl answered the door and let them in. 2JA 163. 186. The room was small with a bathroom and bedroom. Detective Maher

[4] The deceased individual was later identified as John Gardner, fifty-one years old. 2JA 129.

asked Mr. Dahl about Mr. Gardner. Mr. Dahl initially indicated that he didn't know him but that they had been drinking the day before and that Mr. Gardner had left to get more beer but never returned. 2JA 165-66. Later, after Detective Brouker had discovered "quite a bit of blood staining inside the bathroom," Mr. Dahl told the detective that actually he and Mr. Gardner had been drinking and that they had gotten into a physical fight regarding a person named Glenn who had stayed with Mr. Dahl a few days earlier. Mr. Dahl said that Glenn had been drinking with Mr. Dahl in his motel room. At one point while intoxicated Glenn went into Mr. Dahl's bathroom after defecating in his pants. He then took off his underwear and threw them against a wall. 2JA 169, 172-73. When Mr. Dahl told Mr. Gardner this story, Mr. Gardner called him "a faggot" and that set Mr. Dahl off; he snapped or lost it. 2JA 189. Mr. Dahl said he hit Mr. Gardner "anywhere from three to five times with his fist in and about the head." 2JA 168-70, 172-73, 178, 189.[5] They were both drunk and Mr. Dahl reacted in anger. *Id.*, and 2JA 193-94 (noting that being called "a faggot" had irritated Mr. Dahl and his intoxication level didn't help). Mr. Dahl told that detective

[5] Mr. Dahl did not mention grabbing Mr. Gardner by the throat of choking him. 2JA 177, 180.

that Mr. Gardner "went out" after he hit him and he draped him over the bathtub and left him there. He said he checked on him. When he realized that Mr. Gardner was dead he panicked and didn't know what to do. So he pushed him in his wheelchair to the Events Center and left him there. 2JA 173-74, 189.[6]

At this point Detective Maher gave Mr. Dahl his *Miranda* warnings and Mr. Dahl agreed to continue speaking with the detective. Mr. Dahl was transported to the Reno Police Station for additional questioning. 2JA 174-77, 191. Later, Mr. Dahl was transported back to Center Street to assist other detectives in locating a bag he had discarded in a trash can that had clothing in it. 2JA 181-82, 194, 233-37, 244, 255-60. Several empty alcohol bottles were found in Mr. Dahl's room. 2JA 217-18.

Mr. Dahl told Detective Maher "But I didn't intend any of that to happen." 2JA 197. Mr. Dahl elected not to testify. 3JA 355. The jury found Mr. Dahl guilty of second degree murder. 3JA 420-21.

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[6] Mr. Gardner was using a wheelchair because a few months earlier he had been hit by a car and had incurred broken bones and other injuries. 2JA 128-29; 3JA 286-90.

VI. SUMMARY OF ARGUMENT

The State charged open murder leaving open the possibility of the jury returning a guilty verdict for either first degree murder, second degree murder, manslaughter, or involuntary manslaughter. The jury could also find Mr. Dahl not guilty. The State pursued a first degree murder verdict. Evidence presented at trial supported a verdict far less severe than first degree murder.

In his closing argument the prosecutor committed four acts of unobjected to misconduct by inviting the jury to speak for (or be the conscious of) the community; by indirectly commenting on Mr. Dahl's election not to testify; by disparaging defense tactics; and by suggesting that the presumption of innocence no longer applied. Additionally, the prosecutor committed one act of objected to misconduct by suggesting that the jury need not be unanimous in its second degree verdict if it came to that.

Although these instances of misconduct may not, when considered individually, warrant a new trial, collectively they do in order to provide Mr. Dahl a fair trial and proper verdict.

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VII. ARGUMENT

Several instances of prosecutorial misconduct during closing argument —most not objected to—warrant reversal and a new trial.

Additional Facts

During his closing argument the prosecutor:

- Invited the jury to speak for (or be the conscious of) the community—the jury's "job" is to "make justice happen for John Gardner, and the people of this community who say you can't just cold-bloodedly murder someone and get away with it." 3JA 363;
- Indirectly commented on Mr. Dahl's election not to testify—"The evidence has proven that this occurred with malice aforethought, either express, express means I'm going to kill you, I'm going to choke you to death, you hear some evidence. You didn't hear any of that because the only thing we know about what happened in that room, the only witness that's here is the defendant. Live witness." 3JA 367;
- Disparaged defense tactics by misstating her opening statement—"I will remind you that the defense in their opening statement, Ms. Bradley, said 'This isn't murder in the

first degree', that's what she said. I wrote it down. Notice she didn't say it wasn't murder. Because it is. She didn't say it wasn't manslaughter, or was manslaughter, she just said 'this wasn't murder in the first degree.'" 3JA 371, and 377 ("But don't ever forget the defense in their opening statement didn't deny this was a murder");

- Mislead the jury on concept of "unanimity."—"You start with first degree murder. If you all agree to that, you just sign that verdict guilty, and you're done. If you can't all agree to that, but you agree it's a murder, then you look at second degree murder and the definition. If half of you believe it's first and half of you agree it's second and you can't come to a determination, he's still guilty of murder and then you would have to find him guilty of second degree murder." 3JA 376-77;[7] and,

[7] Defense counsel objected that the prosecutor had misstated the law because "[t]he requirement is unanimity." The district court sustained the objection. 3JA 377. In his closing argument defense counsel discussed the step-down instruction and noted that the open murder charge included murder and manslaughter concepts and commented that "you don't call a 50/50 split" a verdict "has to be agreed to by all 12." 3JA 406-07. In giving the case to the jury the district court advised,

- Suggested that the presumption of innocence no longer applied—"[Y]ou're presumed innocent until proven guilty. But when you hear the evidence in a case, it's that evidence that pulls that cloak off that person presumed innocence, and what's underneath that cloak, in this case a man guilty of first degree murder. That's what the evidence showed." 3JA 377-78 (paragraph break omitted).

Standard of Review

When considering claims of prosecutorial misconduct this Court must first determine "whether the prosecutor's conduct was improper" and, if so, must then "determine whether the improper misconduct warrants reversal." *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (footnote omitted). Preserved claims of prosecutorial misconduct are reviewed under a harmless-error standard. "When an error has not been preserved, this court employs plain-error review." *Id.* at 1190, 196 P.3d at 477 (footnotes omitted).

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"You must come to a unanimous verdict, that means each one of you must agree." 3JA 515.

Discussion

Inviting the jury to make justice for the victim and for the community

In *Haberstroh v. State*, 105 Nev. 739, 742, 782 P.2d 1343, 1345 (1989), this Court found that the prosecutor had committed prosecutorial misconduct by referring to the jury as "the conscience of the community." The Court did not find prejudice because the district court admonished the jury to "disregard the statement." See also, *Snow v. State*, 101 Nev. 439, 447, 705 P.2d 632, 638 (1985). No such admonition was given in this case after the prosecutor invited the jury to do its "job" and make justice happen for the victim and "the people of this community who say you can't just cold-bloodedly murder someone and get away with it." Stated differently, the prosecutor asked the jury to return a verdict acceptable to "the people of the community" and not based on the evidence. See *State v. Reynolds*, 95 A.3d 973, 983 (Vt. 2014) ("A call for justice may be acceptable when it is directed to the jurors' duty to do justice in a general sense. However, an appeal to the jurors to do justice on behalf of the victim or the local community is generally viewed as unprofessional and improper.") (citations omitted); *State v. Schumacher*, 322 P.3d 1016, 1024 (Kan. 2014) ("... we reiterate

that a prosecutor cannot ask the jury to convict a defendant in order to give the victim justice.") (citations omitted).

Commenting on election not to testify

In *Harkness v. State*, 107 Nev. 800, 820 P.2d 759 (1991), this Court said: "[t]he United States Constitution states that a defendant shall not be compelled in any criminal case to be a witness against himself. A direct reference to the defendant's decision not to testify is always a violation of the fifth amendment. When a reference is indirect, the test for determining whether prosecutorial comment constitutes a constitutionally impermissible reference to a defendant's failure to testify is whether 'the language used was manifestly intended to be or was of such character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify. The standard for determining whether such remarks are prejudicial is whether the error is harmless beyond a reasonable doubt." 107 Nev. at 803, 820 P.2d at 761 (quotations and citations omitted).

Here, the prosecutor argued that the jury did not hear from Mr. Dahl as a "live witness" even though he was "the only witness that's here." As noted above, Mr. Dahl elected not to testify. The jury was

instructed that a defendant may not be compelled to "take the stand and testify" and that no inference may be drawn from the fact that a defendant does not testify. 1JA 38 (Jury Instruction No. 32). The prosecutor's indirect comments constituted an improper reference to Mr. Dahl's election not to testify. The State may argued that the prosecutor was only commenting on the evidence. But as noted in *Harkness*, "the test is whether the prosecutor "manifestly intended" it *or* whether "the jury would naturally and necessarily" take it to be a comment on the accused's failure to testify." *Id.* (italics in the original, citations omitted). Taken in context—characterizing Mr. Dahl as the only living (and non-testifying) witness—it is clear that "the jury would have taken the prosecutor's comments to be references to appellant's silence." *Id.*

Disparaging defense counsel and tactics

"Disparaging remarks directed toward defense counsel have absolutely no place in a courtroom, and clearly constitute misconduct. And it is not only improper to disparage defense counsel personally, but also to disparage legitimate defense tactics." *Butler v.*

State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) (quotations and footnotes omitted).

"Randall Dahl did not mean to kill anyone." So began defense counsel's opening statement. See 2JA 88. After covering what she expected the evidence to show, including that Mr. Dahl, who had been drinking for days, "was approached and followed by a man who called him a faggot, and he [rashly] reacted," counsel said "at the end of the trial. we're going to ask that you find Mr. Dahl not guilty of first degree murder." 2JA 89. Because the State had charged open murder the jury could find Mr. Dahl not guilty of any crime or guilty of first degree murder or of any lesser included offense of first degree murder. The jury was adequately instructed on this point. See 1JA 24-36 Jury Instructions No. 21 through 29). While defense counsel argued against a verdict of first degree murder, she did not argue for a verdict of second murder. Yet, that is precisely what the prosecutor told the jury she had done. "I will remind you that the defense in their opening statement, Ms. Bradley, said 'This isn't murder in the first degree', that's what she said. I wrote it down. Notice she didn't say it wasn't murder. Because it

is. She didn't say it wasn't manslaughter, or was manslaughter, she just said 'this wasn't murder in the first degree.'"

The prosecutor's blatant mischaracterization of defense counsel's argument was meant to disparage it while, at the same time, serving to mislead the jury away from any consideration of the verdicts for manslaughter (voluntary or involuntary). Given evidence of Mr. Dahl's rash drunk reaction to being called a faggot, heat of passion, as defined in Jury Instruction 28, 1JA 32-33, was certainly in play as were the manslaughter verdicts. Yet, the prosecutor's mischaracterization of the defense argument invited the jury to view this case as only a murder case with the heavy implication that defense counsel were in agreement with that assessment when they were not. *Cf.* 1JA 42-48 (unused verdicts).

Presumption of innocence

In *Morales v. State*, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006) (alteration in the original), the prosecutor told the jury that "Morales was cloaked with a presumption of innocence at the beginning of trial but, because the State satisfied its burden in demonstrating that he committed the crimes, 'there [was] no presumption of innocence

anymore.'" Defense counsel did not object. Nonetheless, this Court concluded that this error rose "to the level of plain error." Continuing, this Court said while here "this argument, alone, does not compel reversal" it cautioned "Nevada prosecutors that this sort of argument is *always* improper." Adding, "[a] prosecutor may suggest that the presumption of innocence had been overcome; however, a prosecutor may never properly suggest that the presumption of innocence no longer applies to a defendant." *Id.* (italics added, footnote omitted). Indeed, the presumption of innocence carries into the jury room during deliberations. *Pagano v. Allard,* 218 F.Supp.2d 26, 33 (D. Mass. 2002) ("The presumption of innocence, which is afforded to every criminal defendant brought to trial in this country, does not 'come off' during the prosecutor's closing argument, but remains with the defendant until the jury determines that the government has proven each and every element of the charge beyond a reasonable doubt.").

Here the prosecutor acknowledged the presumption of innocence but characterized it as "cloak" that gets pulled off to reveal a guilty defendant, or in this case, "a man guilty of first degree murder" before the jury has begun its deliberations. It is one thing to suggest that the

presumption of innocence "had been overcome" by the evidence, it is quite another to assert it no longer exists.

Unanimous verdicts

Unlike the instances of prosecutorial misconduct discussed above, here defense did object and the district court sustained the objection. And, as noted, the district court also told the jury as it was about to begin deliberations that its verdict had to be unanimous. Generally, jurors are required to be unanimous. Of course, where the State proceeds on alternative theories of first-degree murder (felony murder and willful, deliberate, and premeditated first-degree murder) the jury need not unanimously agree on a single theory of the murder. *Crawford v. State*, 121 Nev. 744, 750, 121 P.3d 582, 586 (2005). But that is not the case where, as here, the State charged one count of open murder. See also 1JA 35-36 (Jury Instruction 30) (a step-down instruction noting necessity of unanimous agreement on any verdict reached whether it is of first degree murder, second degree murder, manslaughter, or involuntary manslaughter). See 1JA 42-48 (unused verdicts).

Inexplicably, the prosecutor started out on the correct foot as to murder in the first degree, stumbled when he got to second degree

murder, stating: "You start with first degree murder. If you all agree to that, you just sign that verdict guilty, and you're done. If you can't all agree to that, but you agree it's a murder, then you look at second degree murder and the definition. If half of you believe it's first and half of you agree it's second and you can't come to a determination, he's still guilty of murder and then you would have to find him guilty of second degree murder."

Although the district court sustained an objection to the prosecutor's argument, this Court should, in light of the other unobjected to misconduct, address this error too. *Cf. Walker v. State*, 78 Nev. 463, 476, 376 P.2d 137, 143-44 (1962) (Thompson, J., dissenting) ("Not every error is cured by a correct ruling and admonition.").

VI. CONCLUSION

In *Wallach v. State*, 106 Nev. 470, 473-74, 796 P.2d 224, 227 (1990), the Supreme Court said that "[a]lthough this court does not sit as a trier of the facts, we have a responsibility to insure that the defendant has received a fair trial."

Collectively, the prosecutorial misconducted occasioned in closing prosecutor's argument warrants a new trial. This Court should reverse and remand for a trial free of prosecutorial misconduct.

DATED this 27th day of January 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 3,791 words. NRAP 32(a)(7)(A)(i), (ii).

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 of the transcript or appendix where the matter relied upon 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 27th day of January 2022.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 27th day of January 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jennifer P. Noble, Chief Appellate Deputy,
Washoe County District Attorney

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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Washoe County Public Defender's Office