IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDALL LEE DAHL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 83489

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. ROUTING STATEMENT

This is an appeal from a judgment of conviction based upon a jury verdict finding Appellant Randall Lee Dahl ("Dahl") guilty of Second Degree Murder, a category A felony. Joint Appendix ("JA"), Volume I, pp. 49-50. Because the conviction is for a category A felony, this appeal is not presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(2)(A). Nor is it presumptively assigned to the Supreme Court under NRAP 17(a). As a result, this case may either be retained by the Supreme Court or assigned to the Court of Appeals pursuant to NRAP 17(b) ("Except as provided in Rule 17(a), the Supreme Court may assign to the Court of Appeals any case filed in the Supreme Court.").

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II. STATEMENT OF THE ISSUES

A. Did the prosecutor commit misconduct during closing arguments warranting reversal?

III. STATEMENT OF THE FACTS

The State accepts the facts as set forth in the Opening Brief and will supplement them as necessary throughout this brief.

IV. STANDARD OF REVIEW

> When deciding whether prosecutorial misconduct is prejudicial, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process. We examine the context of the statements, and we will not overturn a conviction solely because of the comments unless the misconduct is clearly demonstrated to be substantial and prejudicial. Generally, the failure to object to prosecutorial misconduct precludes appellate review. However, we will consider prosecutorial misconduct under plain error review, if the error either: (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings.

Rose v. State, 123 Nev. 194, 208-09, 163 P.3d 408, 418 (2007) (cleaned up). "We must consider the context of such statements, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." Morales v. State, 122 Nev. 966, 972, 143 P.2d 463, 467 (2006) (cleaned up).

"The level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt. If the issue of guilt

or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial." Gaxiola v. State, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005) *citing* Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002).

V. DISCUSSION

A. Unobjected-to allegations of prosecutorial misconduct.

"To establish plain error, 'an appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights.'" Flowers v. State, 136 Nev. 1, 8, 456 P.3d 1037, 1045 (2020) *quoting* Jeremias v. State, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).

1. Asking the jury to do its job and "make justice happen for John Gardner, and the people of this community…."

Dahl claims that the prosecutor committed misconduct in closing argument by inviting "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.'" Opening Brief, p. 12. It is necessary to consider the full context of the statement made by the prosecutor. Rose, *supra*.

/ / /

The prosecutor explained that "[e]veryone here in the courtroom has a job." 3JA 363. He explained the different roles of the prosecutor, the defense attorney, and the judge, before telling the jury:

> But the most important job of all is your job. Because what you say and what your decision is is the truth of this case. Now, it's your turn, it's gonna be your turn to do your job and make justice happen for John Gardner, and the people of this community who say you can't just cold-bloodedly murder somebody and get away with it. What you say will be the truth in this case.

Id.

The prosecutor went on to offer an anecdote wherein another attorney told him that "a jury is never wrong." 3JA 363-64. Even in instances where the prosecutor disagreed with a jury's verdict, "the more I thought about it, he was exactly right because what you say, that is the truth of the case." 3JA 364. "Your verdict will be the final statement of the truth, whatever you say is what's right." *Id.*

Dahl takes this statement to mean that the prosecutor urged the jury to ignore the evidence and return a verdict acceptable to the community. Dahl cites to Haberstroh v. State as an example where a prosecutor committed misconduct by referring to the jury as "the conscience of the community." 105 Nev. 739, 742, 782 P.2d 1343, 1345 (1989). However, the Nevada Supreme Court has also held that a prosecutor does not commit misconduct by telling the jury that it must be "accountable" and to "do the

right thing." Domingues v. State, 112 Nev. 683, 698, 917 P.2d 1364, 1375 (1996).

Under plain error review, it is not at all clear that the prosecutor's statement is an error. The context of the statement, which must be considered pursuant to Rose, clearly shows that the prosecutor did not tell the jury that they were the "conscience of the community," but instead that it was their turn to do their job and that their verdict, "whatever you say is what's right." 3JA 364. The prosecutor did not improperly suggest that the jury should disregard the evidence in this case and convict Dahl of first degree murder because that's what the community expected. He exhorted the jury to do their job and told them that they had the final say.

Even if the Court disagrees and finds that the prosecutor's argument was prejudicial, Dahl is not entitled to any relief because of the strength of the State's case, as explained more fully in the harmless error analysis below.

2. Commenting on Dahl's decision not to testify.

"A direct comment on a defendant's failure to testify is a per se violation of the Fifth Amendment." Taylor v. State, 132 Nev. 309, 325, 371 P.3d 1036, 1046-47 (2016) *citing* Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991). "However, an indirect comment violates the

defendant's Fifth Amendment right against self-incrimination only if the comment 'was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify.'" *Id*.

In Harkness, the prosecutor asked, "whose fault is it if we don't know the facts in this case?" 107 Nev. at 802, 820 P.2d at 760. The Nevada Supreme Court noted that such a question, highlighting gaps in the evidence and assigning responsibility for those gaps to the defendant, "is something the jury would 'naturally and necessarily' take to be a comment on the accused's failure to testify." *Id* at 804, 820 P.2d at 761. As a result, the Court found that the prosecutor had violated the defendant's Fifth Amendment right.

In Taylor, the prosecutor said:

> There has to be a rational explanation for the evidence.... I challenge you to come up with a reasonable explanation of the truth if it does not involve the guilt of Donald Lee Taylor....
>
> ... I submit to you that there's at least one person in this room who knows beyond a shadow of a doubt who killed ... Pearson. And I submit to you if you're doing your duty and you're doing your job, you'll go back in that room and you'll come back here and you'll tell that person you know, too.

132 Nev. at 325, 371 P.3d at 1047. There, the Court held that, "[a]lthough the comments by the prosecutor indirectly referenced Taylor's failure to

testify, unlike the comments in Harkness that blamed the defendant for the lack of information about what had happened in that case, neither comment here 'was manifestly intended to be or was such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify.'" *Id* at 325-26, 371 P.3d at 1047 *quoting* Harkness, *supra*.

Dahl claims that the prosecutor indirectly commented on his failure to testify, asserting that "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.'" Opening Brief, p. 13. However, the context of the statement provides more information and fully expresses the prosecutor's line of argument:

> The evidence has proven that this occurred with malice aforethought, either express, express means I'm gonna kill you, I'm gonna 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. But John Gardner's the witness who was in that room, too, even though he's dead, because his body is a witness. And malice can be implied. And when you look at those photographs of the beating he took, and the trauma to his neck, that is an implication, that is implied that he had a murderous intent to do that to another human being. So that's been proven.

3JA 367-68.

The full context of the prosecutor's remarks show that the prosecutor was not seeking to blame Dahl for a lack of information about what happened in the motel room between himself and the victim. Instead, the prosecutor sought to explain that the victim's body, and the injuries it showed, bore witness to Dahl's intent to kill. Although the prosecutor indirectly commented on Dahl's failure to testify, the context of his statements would not have led the jury to "naturally and necessarily take it to be comment on the defendant's failure to testify." Taylor, *supra*. The prosecutor expressly explained that despite the absence of any direct evidence of Dahl's intent, the victim's body could fill that in. As a result, Dahl has failed to demonstrate plain error on this ground.

Finally, the jury was properly instructed on Dahl's right not to testify on his own behalf and juries are presumed to follow their instructions. *See* Summers v. State, 122 Nev. 1326, 1333-34, 148 P.3d 778, 783 (2006). At the start of the trial, the court told the jurors that:

> This is a criminal case, and there are two basic rules you must keep in mind. First, the defendant is presumed innocent unless and until proved guilty beyond a reasonable doubt. The defendant is not required to present any evidence or prove his innocence. The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or introducing any evidence.

2JA 72. And at the end of the trial, the jury was instructed that "[t]he law does not compel a defendant in a criminal case to take the stand and testify, and no presumption of any kind may be drawn, [sic] from the failure of a defendant to testify." 1JA 38. As the jury was properly instructed, this Court can presume that they followed those instructions regardless of any comments made by the prosecutor.

3. Disparaging defense tactics.

"Disparaging remarks directed toward defense counsel 'have absolutely no place in a courtroom, and clearly constitute misconduct.'" Butler v. State, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) *quoting* McGuire v. State, 100 Nev. 153, 158, 677 P.2d 1060, 1063-64 (1984). "And it is not only improper to disparage defense counsel personally, but also to disparage legitimate defense tactics." *Id* (citations omitted).

Dahl asserts that the prosecutor disparaged defense counsel's argument by mischaracterizing a remark made during opening statements. Defense counsel concluded her opening remarks by telling the jury that "at the end of this trial, we're going to ask that you find Mr. Dahl not guilty of first degree murder." 2JA 90.

In closing argument, the prosecutor told the jury:

> Now, when you're considering whether it's first degree or second degree murder, 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 this 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'. No denial this is a murder so you have to decide whether this is a first or second degree murder.

3JA 371.

The record plainly shows that the prosecutor restated defense counsel's statement that "we're going to ask that you find Mr. Dahl not guilty of first degree murder," as "[n]o denial this is a murder...." At worst, this is a mischaracterization, but it is hardly disparaging. Dahl has failed to identify any authority that suggests that a misstatement of defense strategy rises to the level of disparagement.

Comparing the prosecutor's remarks to previous examples of disparagement illustrate the difference. In Butler, the Court held that "the State used many adjectives and analogies in these remarks that portrayed Butler's presentation of mitigating evidence and defense tactics as a dirty technique in an attempt to fool and distract the jury, implying that Butler's counsel acted unethically in his defense - this was a form of disparagement of counsel." 120 Nev. at 898, 102 P.3d at 84. In McGuire, the prosecutor made a comment for which the Court "can discern no purpose for the

statement other than as an attempt to belittle defense counsel in front of the jury." 100 Nev. at 157, 677 P.2d at 1064.

The prosecutor's statement here does not rise to the level of suggesting that defense counsel had acted unethically, underhanded, or showing that the prosecutor sought to belittle defense counsel. Instead, it was a comment pointing out that the defense strategy appeared to be aimed only at defending against first degree murder. In fact, in their closing argument, defense counsel agreed that the prosecutor was "correct that we were explicit in opening statement this is not a first degree murder case." 3JA 396. Therefore, Dahl has failed to demonstrate plain error.

4. Presumption of innocence

"A prosecutor may suggest that the presumption of innocence has been overcome; however, a prosecutor may never properly suggest that the presumption no longer applies to the defendant." Morales v. State, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006).

Here, Dahl claims that the prosecutor improperly suggested that the presumption of innocence "no longer exists." Opening Brief, pp. 17-18. The prosecutor's comments regarding the presumption of innocence, in full, were:

> Now, Ms. Bradley indicated to you in her opening statement that the defendant is cloaked in innocence. And that's the way

> it is in every trial, that's the way our system is, you'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, [sic] and what's underneath that cloak, in this case a man guilty of first degree murder. That's what the evidence showed.

2JA 377-78.

The prosecutor did not argue that the presumption of innocence did not apply to Dahl or that it no longer applied to Dahl. Instead, he argued that the evidence that had been presented had overcome the presumption of innocence. That type of argument was specifically acknowledged as permissible in Morales.

Again, the jury was properly instructed on this point and they are presumed to follow their instructions. *See* Summers v. State, 122 Nev. 1326, 1333-34, 148 P.3d 778, 783 (2006). At the beginning of the trial, the court told the jury that "[t]his is a criminal case, and there are two basic rules you must keep in mind. First, the defendant is presumed innocent unless and until proved guilty beyond a reasonable doubt. The defendant is not required to present any evidence or prove his innocence." 2JA 72. And at the end of the trial, the jury was instructed that "[e]very person charged with the commission of a crime shall be presumed innocent unless the contrary is proved by competent evidence beyond a reasonable doubt. The burden rests upon the prosecution to establish every element of the crime

with which the defendant is charged beyond a reasonable doubt." 1JA 14. Thus, Dahl has failed to demonstrate plain error.

B. Objected-to allegation of prosecutorial misconduct.

Preserved instances of prosecutorial misconduct are reviewed under harmless-error review and "this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error." Valdez v. State, 124 Nev. 1172, 1188-90, 196 P.3d 465, 476-77 (2008).

Dahl argues that the State misstated the rule regarding unanimous jury verdicts. The State agrees. However, the error was immediately objected to, with an explanation from defense counsel that "[t]he requirement is unanimity." 3JA 377. Moreover, after the parties concluded their closing arguments, the trial court told the jury that it "must come to a unanimous verdict, that means each one of you must agree." 3JA 415. And the jury was given the appropriate transition instruction that informed them that they must unanimously agree to convict Dahl on a degree of homicide and that if they do not, they should proceed to consider the next offense. 1JA 35-36; *see also* Green v. State, 119 Nev. 542, 80 P.3d 93 (2003) (approving the "unable to agree" instruction used in this case). Because the jury was properly instructed, the error in the prosecutor's statement was harmless.

C. Harmless error

Even if this Court finds that the prosecutor's statements in closing argument amounted to prosecutorial misconduct, any such error was harmless given the overwhelming evidence in this case. In King v. State, the Nevada Supreme Court recognized that prosecutorial misconduct can be harmless where there is overwhelming evidence of a defendant's guilt. 116 Nev. 349, 356-57, 998 P.2d 1172, 1176-77 (2000).

Here, there was overwhelming evidence of Dahl's guilt. Dahl was seen on video wheeling Mr. Gardner's partially dressed body and leaving it outside the Reno Events Center during the freezing early morning hours of December 10, 2014. 2JA 94-95, 144-45, 147-48, 151, 160, 163. Mr. Gardner had obvious injuries on his face and head. 2JA 103, 149. Officers followed Dahl's path, as seen on the video, back to the Flamingo motel where they contacted him. 2JA 160-163. Dahl was wearing the same distinctive red-orange ski pants as seen on the video. 2JA 163.

Dahl initially denied knowing why detectives were there and said that he had not seen the victim since he allegedly left his room the night before. 2JA 165-66. Dahl also claimed that he had not been out of his room that morning. 2JA 166. Dahl denied knowing anything about video depicting

someone wheeling a man in a wheelchair to the Reno Events Center and leaving him there. 2JA 166-67.

Dahl then changed his story and told detectives that there had been an altercation between himself and the victim in his room before the victim left his room the night before to get more alcohol. 2JA 167. At that point, one of the detectives noticed blood inside the bathroom. 2JA 168. Dahl denied that anyone had been injured in the room. *Id.*

Detectives pressed Dahl to be honest about what had happened, and Dahl said that he'd had a fight with the victim after the victim had derided him about an incident involving another person several days earlier. 2JA 169. Dahl said he became "very angry" after the victim called him a "faggot." *Id.* Dahl struck the victim multiple times in the face and head. 2JA 172. Dahl said that the victim lost consciousness from the blows. 2JA 173. Dahl left the victim draped over the edge of the bathtub where he bled from his head wounds. 2JA 173-74. Dahl said that he checked on the victim periodically before panicking and wheeling him over to the Reno Events Center the next morning. 2JA 174.

Sometime during the night, Dahl undressed the victim and tried to wash the blood from his clothes before throwing them away. 2JA 175. Dahl

later described the area where he had discarded the clothes and identified them when detectives found them. 2JA 180-81.

Dahl denied that he had choked the victim or grabbed him by the throat. 2JA 177. He also did not say that he had struck the victim in the torso or ribs. 2JA 180. Dr. Piotr Kubiczek testified that he conducted the autopsy in this case and that the victim had suffered two broken ribs on the left side of his body, that the wounds were "fresh," and had apparently been inflicted around the time of death. 3JA 295, 328.

Dr. Kubiczek also testified that the victim's neck had injuries consistent with being "compressed against a hard object" or imparted by the edge of an object. 3JA 301-02. Dr. Kubizcek testified that the victim in this case died of "asphyxia due to traumatic compression of the neck." 3JA 315. He also testified that "it takes a few minutes, some sources say it's about four minutes of continuous pressure of the neck, both sides, to kill a person." 3JA 309-10

Detectives noted that Dahl did not appear to have any injuries other than swelling and a laceration on his right hand. 2JA 176-77, 180.

The evidence in this case showed that Dahl became enraged in response to a homophobic slur uttered by the victim. In response to that slur, Dahl admittedly struck the victim several times in the face and head.

The physical evidence showed that he struck the victim in the torso, breaking two ribs. Dahl denied strangling or choking the victim, but the physical evidence showed that the victim died of asphyxia because of traumatic compression of the neck. Dr. Kubiczek testified that death from asphyxiation requires compression for a significant length of time, perhaps as long as four minutes. The evidence also showed that Dahl attempted to cover his tracks by washing the victim's clothes, dumping the body under cover of darkness, and disposing of the bloody clothes. The evidence of Dahl's guilt was overwhelming.

VI. CONCLUSION

Dahl has failed to demonstrate that the prosecutor committed misconduct, that any of the errors amounted to plain error, and that any error resulted in prejudice. Moreover, the evidence overwhelmingly demonstrated that Dahl killed the victim by striking him several times and choking him before trying to cover up his crime. Any prosecutorial error in closing argument was harmless and Dahl's conviction should be affirmed.

DATED: February 25, 2022.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: Kevin Naughton
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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 Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

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

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: February 25, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on February 25, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty, Esq.

/s/ Tatyana Kazantseva
TATYANA KAZANTSEVA