

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 82798

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Elizabeth A. Brown
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TROY WHITE

Appellant,

v.

THE STATE OF NEVADA

Respondent.

Appeal from the denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County
The Honorable Ronald Israel, District Court Judge
District Court Case Nos. C-12-286357-1

APPELLANT'S REPLY BRIEF

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I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

NONE

Attorney of Record for Troy White:

/s/ Christopher R. Oram

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1 IV. ARGUMENT

2 1. The District Court abused its discretion by not finding Trial Counsel
3 ineffective for failing to conduct a proper forensic investigation and
4 analysis on Mr. White's cellular phone.

5 The United States Supreme Court and this Court have unequivocally held
6 that effective defense counsel has a duty to conduct reasonable investigations or to
7 make reasonable decisions that make particular investigations unnecessary.
8 *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674
9 (1984); see also, *State v. Love*, 109 Nev. 1136, 865 P.2d 322 (1993).

10 Here, Trial Counsel had a duty to investigate Mr. White's cell phone records
11 in order to gain the material necessary to impeach Mr. Averman at trial. To
12 demonstrate Trial Counsel's ineffectiveness, Mr. White needed to show the
13 following in the District Court proceedings:
14

- 15 (1) Counsel's performance is deficient, such that counsel made errors so
16 serious he ceased to function as the "counsel" guaranteed by the Sixth
17 Amendment, and
18 (2) The deficiency prejudiced the defendant such that the result of the trial is
19 rendered unreliable.

20 *Strickland v. Washington*, 466 U.S. at 687–88; *McConnell v. State*, 125
21 Nev. 243, 252, 212 P.3d 307 (2009); *Lozada v. State*, 110 Nev. 349, 353, 871 P.2d
22 944, 946 (1994).
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1 In the Answering Brief, the State argued that the District Court properly
2 denied Mr. White's claim of ineffective assistance of counsel. The State asserted
3 that Mr. White misconstrued the District Court's findings because he did not
4 provide "specific facts" to support the "allegation that his cell phone would contain
5 impeachment material." Respondent's Answering Brief ("RAB") at 21. The State
6 further asserted the following:
7

8 Appellant could have simply told his attorney that he did not send any
9 threatening messages to Mr. Averman or what impeachment material
a forensic analysis would have uncovered.

10 RAB, at 21.

11 This is precisely the issue of why Trial Counsel was ineffective. Mr. White,
12 in and of himself, was not in the "best position" to assert that he did not send the
13 threatening messages. Mr. White needed Trial Counsel to order the forensic
14 examination so the defense could have tangible proof to offer as impeachment
15 against Mr. Averman. Without testifying, Mr. White would have had no other
16 way to put the information in front of the jury. Since Mr. White exercised his Fifth
17 Amendment right not to testify, Trial Counsel should have sought the information
18 from the phone to impeach Mr. Averman at trial. Instead of seeking the evidence,
19 Trial Counsel ignored the potential impeachment evidence. Accordingly, Trial
20 was ineffective, and the District Court should have granted Mr. White's claim.
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1 Next, the State asserted that the District Court correctly determined that
2 Trial Counsel made a reasonable strategic decision not to conduct a forensic
3 examination on the cell phone. RAB, at 22. The State further argued that
4 impeaching Mr. Averman with this information would not have impacted the
5 outcome of the trial. RAB, at 25.
6

7 Contrary to the State’s assertions, Trial Counsel did not make a reasonable
8 strategic decision. See, *Strickland*, 466 U.S. at 691. In fact, Trial Counsel’s
9 decision can hardly be considered strategic. As Trial Counsel explained during the
10 evidentiary hearing—and as the State recognized in the Respondent’s Answering
11 Brief—Trial Counsel did not consider having a forensic analysis done. A.A. Vol.
12 11, pg. 1773. Given that fact, the State cannot argue that Trial Counsel made a
13 strategic decision or that impeaching Mr. Averman would not have impacted the
14 trial.
15

16 Had Trial Counsel investigated this issue, Trial Counsel could have used the
17 cell phone records to impeach Mr. Averman and undermine the murder charge. It
18 also would have supported the defense theory of manslaughter. Thus, the result of
19 the trial would have been different if the jury heard evidence contradicting Mr.
20 Averman’s assertions that Mr. White made multiple prior threats. In other words,
21 impeaching Mr. Averman’s testimony would have undermined the State’s case that
22 Mr. White formed the requisite intent for murder. By not having good evidence of
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1 the alleged prior threats, there is a reasonable probability that the jury would only
2 have found Mr. White guilty of manslaughter.

3 Therefore, Trial Counsel was ineffective, and the Trial Court should have
4 reversed Mr. White's conviction. Mr. White respectfully requests that this Court
5 reverse the denial of his claim and grant him a new trial.
6

7 **2. The District Court abused its discretion by not finding Trial Counsel**
8 **and Appellate Counsel ineffective for failing to object to the State's**
9 **insinuation of prior unknown acts of domestic violence.**

10 The District Court abused its discretion by not finding Trial Counsel and
11 Appellate Counsel ineffective for failing to challenge the prosecutor's line of
12 questioning that related to prior, uncharged bad acts.

13 Nevada law has established under NRS 48.045 that, "[E]vidence of other
14 crimes, wrongs, or acts is not admissible to prove the character of a person in order
15 to show that he acted in conformity therewith." See, *Taylor v. State*, 109 Nev. 849,
16 853, 858 P.2d 843, 846 (1993); *Beck v. State*, 105 Nev. 910, 784 P.2d 983 (1989).

17 A prosecutor may use this kind of evidence to prove motive, opportunity, intent,
18 preparation, plan, knowledge, identity, or absence of mistake or accident. See,
19 NRS 48.045(2). The trial court must use its discretion to determine whether this
20 kind of evidence is admissible. *Cipriano v State*, 111 Nev. 534, 541, 894 P.2d 347,
21 352 (1995) overruled on other grounds by *State v. Sixth Jud. Dist. Court*, 114 Nev.
22 739, 964 P.2d 49 (1998); see also, *Crawford v. State*, 107 Nev. 345, 348, 811 P.2d
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1 67, 69 (1991). Before allowing this type of questioning and admitting evidence of
2 prior bad acts, the prosecutor must request a hearing, during which, a trial court
3 must use its discretion to determine whether the evidence should be admitted.

4 *Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244, 1250 (2012).

5
6 In the Answering Brief, the State argued that the questions presented by the
7 prosecutor to Minister Timothy Henderson and to Ms. Lucas' mother did not
8 constitute evidence of prior bad acts, and were therefore not objectionable. RAB,
9 at 28-29. The State further argued that Trial Counsel had no basis to object, and
10 Appellate Counsel had no ground to raise on appeal. RAB, at 29-30.

11
12 The State's argument is mistaken. At trial, the prosecutor asked questions to
13 Minister Henderson and Ms. Lucas' mother that insinuated that Mr. White had
14 abused Ms. Lucas. In fact, the prosecutor led Ms. Lucas' mother to testify that Mr.
15 White was not a "nice guy." A.A. Vol. 8, at 1254.

16 By guiding the jury to assume the relationship between Mr. White and Ms.
17 Lucas had domestic violence issues, the prosecutor bolstered the case for
18 premeditated and deliberate murder. This train of thought would undoubtedly
19 prejudice the jury into thinking of Mr. White as a violent, brutal man. The
20 prosecutor did not request a prior hearing on the issue, and therefore, it should
21 have been challenged. Therefore, Trial Counsel and Appellate Counsel should
22 have challenged the issue in their respective forums.
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1 In the post-conviction habeas proceedings, the District Court denied this
2 claim without allowing Mr. White to address the issue during the evidentiary
3 hearing. Mr. White explained both the errors and the prejudice in the briefing, so
4 the District Court should have granted him a new trial. At a minimum, the District
5 Court should have granted the evidentiary hearing on the issue. Now, Mr. White
6 respectfully requests that this Court reverse the denial of his claim and grant a new
7 trial. In the alternative, Mr. White requests that this Court reverse the case for an
8 evidentiary hearing on the issue.
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10 **3. The District Court abused its discretion by not finding Trial Counsel**
11 **ineffective for failing to ensure the police obtained a warrant to**
12 **conduct forensic analysis on the phone attributed to Echo Lucas in**
13 **violation of the Sixth, Fourth, and Fourteenth Amendments to the**
United States Constitution.

14 The District Court abused its discretion in finding Trial Counsel effective
15 because trial Counsel failed to challenge the ownership of the cell phone located
16 near Ms. Lucas' body after the shooting.

17 Law enforcement officers may not search and seize digital information
18 obtained from cell phones without a warrant. *Riley v. California*, 573 U.S. 373,
19 134 S.Ct. 2473, 189 L.Ed. 2d 430 (2014).
20

21 The State has contended that Mr. White lacked standing to challenge the
22 forensic analysis conducted on the cell phone located near Ms. Lucas at the crime
23 scene. RAB, at 31-39. Furthermore, the State has assumed that Mr. White
24

1 challenged Trial Counsel's effectiveness "for failing to suppress the information
2 from Ms. Lucas's cell phone." RAB, at 31.

3 This issue derives from the premise that the State did not prove ownership
4 of the cell phone. Mr. White has repeatedly acknowledged that upon proof of Ms.
5 Lucas' ownership, this issue would be moot. Without proving ownership,
6 however, the State cannot assert that Mr. White lacked standing to raise a privacy
7 interest in the cell phone. During the District Court post-conviction proceedings,
8 Mr. White asked the District Court to order the State to produce evidence of
9 ownership. The District Court made no such order. Thus, Mr. White had to
10 proceed with litigating the issue under the premise that ownership had never been
11 proven.
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13 The State did not prove ownership at trial, and Trial Counsel did not
14 challenge ownership. Trial Counsel certainly should have challenged the
15 ownership of the cell phone, given the evidentiary value of the contents.
16 Therefore, Trial Counsel was ineffective for not challenging the cell phone
17 evidence.
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19 For these reasons, the District Court abused its discretion by not ordering
20 the State to produce evidence of the cell phone's ownership. The District Court
21 further abused its discretion by not granting an evidentiary hearing on this issue.
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1 Mr. White respectfully requests that this Court reverse the denial of this claim and
2 remand the case for an evidentiary hearing on this issue.

3 **4. The District Court abused its discretion by not finding that Mr.**
4 **White received ineffective assistance of Trial and Appellate Counsel**
5 **for failure to object and raise on appeal improper prosecutorial**
6 **arguments.**

7 The District Court erroneously denied Mr. White's claim that Trial Counsel
8 failed to object to the prosecutor's improper arguments regarding the standard for
9 manslaughter.

10 As explained in the Opening Brief, it is well established that a prosecutor
11 should not misstate a standard in a criminal trial. *See Holmes v. State*, 114. Nev
12 1357, 972 P.2d 337, 343 (1998); *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S.
13 Ct. 2078, 124 L. Ed. 2d 182 (1993) (holding that misstating law and reasonable
14 doubt is so egregious that it is never harmless); *Cage v. Louisiana*, 498 U.S. 39,
15 111 S. Ct. 328, 112 L.Ed.2d 339 (1990), overruled on other grounds by *Estelle v.*
16 *McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

17
18 The State has argued that the trial prosecutor did not misstate the standard
19 for manslaughter. Specifically, the State has argued:

20 Rather than instructing the jury to disregard the jury instructions, the
21 State's closing argument illustrated how Appellant did not possess a
22 provocation sufficient to manifest a passion so "irresistible" that he
could not control himself in the killing of Ms. Lucas. RAB, at 41.

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1 The State further argued:

2 The State's argument that Appellant did not possess "irresistible"
3 passion that overcame his judgment in the killing of Ms. Lucas is
4 nothing more than a paraphrasing of a proper jury instruction and in
no way suggested a different burden of proof. RAB, at 42.

5 Contrary to the State's arguments, the trial prosecutor's arguments
6 constituted a very different statement of the law than the jury instruction given by
7 the trial judge. As Mr. White cited in the Opening Brief, the trial prosecutor
8 defined manslaughter as an "irresistible desire to take human life." A.A. Vol. 9,
9 pg. 1429. The "irresistible desire to take human life" is completely different than
10 an "irresistible passion that overcame his judgment." See, RAB, at 33.

12 Trial Counsel most definitely should have objected to the improper
13 commentary and ensured that the jury did not hear a misstated explanation of the
14 law. Had the issue been raised, there is a reasonable probability that the result of
15 the trial would have been different because the jury would have heard proper
16 argument about manslaughter. Likewise, Appellate Counsel should have raised
17 the issue on direct appeal. Had Appellate Counsel raised the issue, there is a
18 reasonable probability that the appeal would have warranted reversal. Therefore,
19 Mr. White received ineffective assistance from both Trial and Appellate Counsel,
20 and the District Court should have reversed Mr. White's conviction.
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1 **5. The District Court abused its discretion by not finding that Mr.**
2 **White received ineffective assistance of Trial and Appellate Counsel**
3 **for failure to object and raise on appeal the District Court's giving of**
4 **Instruction Numbers 27 and 38 in violation of the Fifth and**
5 **Fourteenth Amendments to the United States Constitution.**¹

6 The State argued that Jury Instructions #27 and #38 provided the correct
7 standard of proof as required by Nevada law. RAB, at 43-46. Although these jury
8 instructions have been upheld by courts, Mr. White submits that Trial Counsel was
9 ineffective for failing to object to the instructions at trial. Similarly, Appellate
10 Counsel was ineffective for failing to challenge these instructions on appeal. The
11 wording of these particular instructions minimized the State's burden of proof. Due
12 process requires that the State prove every element against a defendant beyond a
13 reasonable doubt. *Cage v. Louisiana*, 498 U.S. 39, 41, 111 S.Ct. 328, 112 L.Ed.2d
14 339 (1990). Accordingly, this Court should reverse the Appellant's conviction.

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22 ¹ The undersigned has raised this issue to the Nevada Supreme Court numerous
23 times and acknowledges that the Court has always denied the issue. The issue is
24 presented because the Court may reconsider its previous decisions and because this
 issue must be presented to preserve it for federal review.

1 **6. The District Court erred by not reversing Mr. White's conviction**
2 **based on cumulative error.**

3 Mr. White has shown numerous meritorious issues of error that affected the
4 outcome of his trial and appeal. In *DeChant v. State*, 116 Nev. 918, 927, 10 P.3d
5 108 (2000), this Court provided the standard for determining whether the
6 cumulative effect of errors has denied an appellant the right to a fair trial. This
7 Court provided the following factors to consider when determining cumulative
8 error: “the issue of innocence or guilt is close, the quantity and character of the
9 error, and the gravity of the crime charged.” *Id.*

11 The State has argued that “the doctrine of cumulative error should not be
12 applied to ineffective assistance of counsel claims, and the Nevada Supreme Court
13 has stated its hesitance to do so.” Ref., *McConnell v. State*, 125 Nev. at 259.
14 Nevada law has not iterated this standard.

15 Contrary to the State's assertions, the issue of guilt or innocence with
16 respect to the murder count was close. The evidence showed provocation, which
17 could have led to a manslaughter conviction. Next, as demonstrated in the
18 Appellant's Opening Brief, there were numerous errors in this case. Finally, the
19 case involved very grave charges.
20

21 Mr. White has met the threshold for showing cumulative error. This Court
22 should find that cumulative error exists and reverse Mr. White's conviction.
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1 **7. The District Court erred by not allowing Mr. White to address all of**
2 **his issues during the evidentiary hearing.**

3 The State argued that the District Court properly limited Mr. White's
4 evidentiary hearing because Appellant's issues could be resolved without
5 expanding the record. RAB, at 48. To the contrary, Mr. White presented several
6 issues of "colorable claims" of ineffective assistance that required an evidentiary
7 hearing. See, *Smith v. McCormack*, 914 F.2d 1153, 1170 (9th Cir. 1990). For the
8 reasons outlined in the Opening Brief and the instant Reply, Mr. White
9 respectfully requests that this Court reverse the District Court's denial of Mr.
10 White's claims and remand the case for an evidentiary hearing.

12 **V. CONCLUSION**

13 Based on the foregoing, Mr. White respectfully requests that this Court
14 vacate his conviction and order a new trial.

15 Respectfully submitted this 17th day of November, 2021.

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*Certificate of Compliance containing word count continued to page 14.

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1 I further certify that this brief complies with the type volume limitations of
2 NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or
3 more and contains 3,395 words. I understand that I may be subject to sanctions in
4 the event that the accompanying brief is not in conformity with the requirements of
5 the Nevada Rules of Appellate Procedure.
6

7 Dated this 17th day of November, 2021.

8 Respectfully submitted,

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1 **VII. CERTIFICATE OF SERVICE**

2 I hereby certify and affirm that this document was filed electronically with
3 the Nevada Supreme Court on November 17, 2021. Electronic Service of the
4 foregoing document shall be made in accordance with the Master Service List as
5 follows:
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