IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID CRAIG MORTON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 83884

D. Ct. CR09-5709

APPEAL FROM JUDGMENT OF
THE HONORABLE RICHARD WAGNER

SIXTH JUDICIAL DISTRICT COURT

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The State's answering brief is subtle in its attempt to shift the burden of proof and objection from the State to defense counsel, ignoring the central thrust to Mr. Morton's arguments in the process. The State also heavily relies on the proposition that trial counsel's decisions are "virtually unchallengeable" *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996). However, this principle is only applicable in a post-conviction setting—the present action is an original appeal, as belated as it is.

The following reply brief is not intended to reargue the points made in Appellant's opening brief, but rather to illustrate points of severe disagreement between the parties.

II. ARGUMENT

a. The State's Routing Statement Mischaracterizes NRAP 17.

Appellant correctly identified that the current case is not presumptively applied to the intermediate court of appeals. However, the State argues that because a case does not fall into the enumerated cases assigned to the Supreme Court that it must be presumptively assigned to the Court of Appeals.

The State's position is logically infirm. If a case is not presumptively assigned to the court of appeals under NRAP 17(b)(2), then it should not be assigned absent some extreme circumstance. To presumptively assign a case to the

Court of Appeals when the NRAP on point expressly refuses to do so would be to render the rule null and void—assuredly not this Court's purpose in adopting the NRAP.

b. The State's Argument In Response to Its Failure to Issue Appropriate Jury Instructions Improperly Shifts the Burden to Mr. Morton.

Manslaughter is a lesser included offense for murder. See *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). A defendant has the right to have the jury instructed on his or her theory of the case. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). The State has the burden to prove every element of the case against the Defendant. Indeed, in the case of self-defense, this court has expressly held that instructions imposing a burden of proof on the defendant to negate an element of their defense is improper. See *St. Pierre v. State*, 96 Nev. 887, 890-91, 620 P.2d 1240, 1241-42 (1980).

There was evidence produced at trial to support a finding of manslaughter. Evidence was presented that they had been drinking the night of the incident, that there had been some form of altercation, and that the couple was in talks of divorcing. Given these facts, it is entirely possible that the jury could have come to convict Mr. Morton on the lesser-included crime of manslaughter.

It will be conceded that jury instructions 26 and 28 detail the elements that the State had to prove to convict Mr. Morton on manslaughter.

Jury instruction 26 provides that the State had to prove each element:

1. That the Defendant;
2. On or about the 6th day of August, 2009;
3. In Humboldt County, Nevada;
4. Did kill another person;
5. After having a serious and highly provoking injury inflicted upon himself sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person kill;
6. With the use of a deadly weapon. 4AA 835.

Jury Instruction 28 provided that the State had to prove each of the following items to convict on involuntary manslaughter:

1. That the Defendant;
2. On or about the 6th day of August, 2009;
3. In Humboldt County, Nevada;
4. Did willfully;
5. In the commission of an unlawful act;
6. Or a lawful act which probably might produce such a consequence in an unlawful manner;
7. with the intent to do so;
8. Kill another human being. 4AA 837.

However, the State has cleverly conflated an instruction that the State had to prove provocation with an instruction that the State had an affirmative duty to prove that there was no such provocation. Proof of a thing and proof of the absence of a thing are entirely different logical propositions. It is a much different burden for the State to prove, affirmatively, that Mr. Morton was not adequately provoked by his wife's behavior than to prove that he was provoked by her behavior. These jury instructions do not account for the proper burden.

The State must prove that Mr. Morton acted maliciously. Judge Wagner's discussion with defense counsel Del Hardy let the jury believe that malice was not a required element of murder. The jury could have determined that Mr. Morton committed an unlawful act that was dangerous in the abstract and that Cynthia died because his decision to grab the gun while drunk, and while the gun was loaded, was inherently dangerous. See *Guidry v. State*, 138 Nev. Adv. Op 39, decided June 2, 2022. The evidence of malice was lacking. Mr. Morton was highly intoxicated, naked, had an argument with his wife and was going to kill himself.

The fact that he had been experiencing marital troubles, was mentally handicapped by alcohol, and awoke to his wife hitting and screaming at him may very well have supplied sufficient facts to the jury to support provocation. The burden was on the State to prove a lack of provocation, and the failure of the Court to issue an appropriate jury instruction improperly lowered the State's burden of proof, prejudicing Mr. Morton by rendering a lesser-included charge of manslaughter more difficult to convict. Mr. Morton is entitled to a new, properly instructed, jury.

c. The State Continuously and Improperly Relies on Doleman v. *State* for the Proposition that Strategic Decisions are Virtually Unchallengeable.

The State references *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1196) no less than six times in its brief for the proposition that strategic

decisions of trial counsel are "virtually unchallengeable" no less than six times in support of its brief.

Not only is *Doleman* a post-conviction action, and therefore of questionable legal relevance in the original appellate context, but this Court in *Doleman* found counsel actively ineffective—expressly evaluating and finding that trial counsel's strategic decisions were improper. Trial counsel's strategic decisions were very much successfully challenged.

Any reliance on *Doleman* as effective authority should be properly circumscribed by this Court.

d. With Regard to the Prior Bad Act Testimony, The State Again Improperly Shifts the Burden to Defendant.

The State argues that Mr. Morton's trial counsel opened the door for prior bad act evidence to be introduced at the trial. It continues to argue that fact, paired with the court's regulation of the subsequent questions asked to the witness, is enough to cure any harm caused by the prior bad act evidence. 1AA 207-08. Again, this argument ignores the respective burdens in this case.

"A presumption of inadmissibility attaches to all prior bad act evidence." *Braunstein v. State*, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). When a court introduces prior bad act evidence, it "should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of the trial reminding

the jurors that certain evidence may only be used for limited purposes." *Tavares v. State*, 117 Nev. 725, 30, 30 P.3d 1128 (2001).

The court did not issue a limiting instruction at the time of introduction. It did not issue a limiting instruction at the end of the trial. It did not provide a limiting instruction in the jury instructions. It did not ask for defense waiver. It did not conduct a *Petrocelli* hearing. The State did not request a limiting instruction despite briefing the matter. *McLellan v. State*, 124 Nev. 263, 269, 182 P.3d 106, 110-11 (2008) (affirming that prosecutors have such a duty). The court did not issue a limiting instruction *sua sponte*. *Id.* (establishing that courts have such a duty). To hold that allowing prior bad act evidence error to be cured by limiting the prosecutor's follow-up question would be to void a substantial amount of precedence on this issue.

Mr. Morton is entitled to another trial at which prior bad act evidence it dealt with properly by the parties burdened by its circumspection.

e. Any Argument that Mr. Morton was in any Condition to Knowingly, Freely, and Voluntarily Waive his Constitutional Rights is Made in Bad Faith.

Critically, this Court applies a totality of the circumstances test to determine the voluntariness of a confession. *Kirksey v. State*, 112 Nev. 980, 923 P.2d 1102, 1109 (1996). An evaluation of the totality of the circumstances in this case establishes that Mr. Morton clearly lacked the ability voluntarily deliver a

confession. Second, to waive a defendant's Miranda rights, a defendant must do so "voluntarily, knowingly, and intelligently." *Miranda v. Arizona*, 384 U.S. 426, 475-77 (1966).

Mr. Morton was not simply "inebriated." He was dangerously drunk when he was taken into custody. Specifically, his BAC was a 0.276, three and a half times the legal limit. 5AA 1103. The State attempted to brush this decisive fact under the table by saying they court decided he was able to waive *Miranda* "when it ruled his statements admissible." This argument could hold water, but for the fact that Mr. Morton's signature on the *Miranda* waiver differs wildly from his normal signature. 4AA 983, 984; 5AA 1081. His inebriated signature demonstrates that his physical and mental condition at the time differed so wildly from his sober, competent state, that he was unable to knowingly waive his *Miranda* rights.

Thus, objectively speaking, there is clear and convincing evidence that Mr. Morton was physically incapable of either giving a confession or waiving his *Miranda* rights. Subjectively speaking, Mr. Morton had just shot his wife, and, although they had their disagreements, she was his high school sweetheart. His conduct at that time, and in the time since, is consistent with deep grief and regret. The idea that he could shoot his wife, while heavily intoxicated, but still possess the emotional state to knowingly, voluntarily, and willfully waive his *Miranda*

rights to give a voluntary confession is, frankly, absurd. The district court's determination, if indeed it made one considering all these factors, was an abuse of discretion that baselessly ignored the facts before the court. In order for *Miranda* to have any meaning, his confession must be struck from the record and prevented from being introduced in subsequent matters.

f. The State's Reliance on *Doyle* in Arguing that 335 Graphic Photographs Were not Prejudicial and Cumulative Evidence is Misplaced.

Again, it should be noted that, although most of the State's argument for this issue on original appeal relies on *Doyle v. State*, 116 Nev. 148, 995 P.2d 465 (2000), a post-conviction action, and should be treated as such. In the context of cumulative evidence, a post-conviction action alleges that allowing cumulative evidence was a fault of the attorney in failing to object. An original appeal action in the same context alleges that the court itself was remiss in allowing the evidence. The standards and evaluations differ between the two actions.

In this original appeal, Mr. Morton alleges that the fact of his wife's death and injuries were not at issue. Those facts could easily have been established with a few dozen pictures, at most. Including 335 gruesome pictures serves only one purpose—to improperly enflame the passions of the jury against Mr. Morton.

The present case differs heavily from the facts in *Doyle*. *Doyle* was a capital case in which the defendant was sentenced to death, was, again, a post-conviction

matter, and critically never discussed the number of photographs admitted. In fact, the only time *Doyle* discusses which pictures are gruesome is when it states "Two of the photographs depict injuries to Mason's head and face, and are gruesome." *Doyle* v. State, 116 Nev. 148, 160 (Nev. 2000)(emphasis added)." *Doyle*, then, as far as can be gleaned from the decision, had two gruesome photographs.

In contrast, Mr. Morton's case is an original appeal, non-capital case with 335 photographs entered into evidence. Counsel is not in possession of the hundreds of photographs, but counsel challenges this court to go to 5AA1106-1122, flip through the pages and go line by line to see the word "photograph." Counsel is confident that, having done so, this court will easily conclude that this many gruesome photographs is cumulative and highly prejudicial. Mr. Morton would also like to note that merely labeling an exhibit "photograph" with no other identifying information is a reversible error by the district court as well as it makes appellate and post-conviction counsel's subsequent review of the record unconstitutionally difficult. Including this many cumulative, gory pictures into evidence was an abuse of discretion. Mr. Morton is entitled to a new trial at which this degree of cumulative evidence is prohibited.

g. The State Ignores the Fact that the District Court Relied on Suspect Evidence in Delivering its Sentence.

The State, in its answering brief, dedicates a substantial amount of its argument to the proposition that, since Mr. Morton's sentence was legal, it was,

ipso facto, proper and constitutional. This proposition fails for three reasons: (1) The district court relied on suspect evidence in delivering its sentence; (2) Although the sentence was legal, it was the absolute maximum sentence permitted for the weapon enhancement; and (3) it is clear that the court was personally opposed to Mr. Morton, believed he was guilty of thirty years of domestic abuse, without any evidence of that, and sought unconstitutionally excessive sentence.

First, the district court relied on suspect evidence in making its determination. None of the character or victim witnesses were sworn in before they gave their presentation. 4AA 866, 898-900. There was nothing legally or morally to prevent them from inventing stories or alleging false facts as there was no penalty for doing so. This is categorically suspect evidence supplied to the court in its sentencing determination.

The primary evidence relied upon by the district court in its determination that domestic abuse was an aggravating factor was a police statement made without a testifying witness. Perhaps most egregious was that the PSR in this case was rife with unnecessarily inflammatory language (e.g. "demoralizing act of hate and rage"). Reliance upon highly suspect evidence supports a finding of abuse of discretion by the district court. See *Blankenship v. State,* 132 Nev. 500, 508, 375 P.3d 407, 412 (2016).

Second, although the sentence in this case was within bounds, it was at the maximum weapon enhancement on one gunshot from an antique weapon with a drunk, naked defendant. There are sentencing ranges for a reason—so that the least egregious examples can get lighter sentences, while the maximum sentence is reserved only for the most reprehensible possible crimes. There are many mitigating factors in this case, and indeed, significant evidence that the firearm discharge was accidental. There was no rational reason for the district court to maximize the weapon enhancement in a case that, Mr. Morton is sure this Court will agree, is easily not the most reprehensible example. The district court's delivery of a maximum enhancement sentence in this matter demonstrates that it was not using a reasoned evaluation but was the result of prejudice against the defendant himself, and as such, is an abuse of discretion.

Finally, and most telling, the district court was so emotionally prejudiced against Mr. Morton that it could never have delivered a reasoned and appropriate sentence. The district court informed Mr. Morton that he was not permitted to maintain his innocence in direct contravention of applicable authority. See *Mitchell v. United States*, 526 U.S. 314 (1999); 4AA 885.Mr. Morton was sentenced to maximum sentence on the weapon enhancement despite the fact that the district court found mitigating factors. To acknowledge the existence of mitigating factors but fail to depart downwards in any fashion demonstrates that

the court wanted to give Mr. Morton a maximum sentence on the weapons enhancement, regardless of what he was able to prove or argue at sentencing.

The district court's decision was based upon suspect evidence and emotion rather than evidence and reason. The sentence in this case is excessive, not "sufficient, but not greater than necessary" to accomplish sentencing goals. *United States vs. Vasquez-Landaver*, 527 F.3d 798, 804-05 (9th Cir. 2008). It was an abuse of discretion. Mr. Morton is owed a new sentencing before a neutral officiant.

a. The Offenses Charged by the State in this Case Weighs the Third *Valdez* Factor in Mr. Morton's Favor.

In evaluating cumulative error claims, three factors are determinative: (1) whether the issue of guilt was close; (2) the quantity and character of error; and (3) the gravity of the crime charged. *Valdez v. State*, 124 Nev. 1172, 196 P.3d 468 (2008).

In this context, the appellate court should review the actions of Judge Wagner, when he dressed down defense counsel in front of the jury over the definition of homicide, when in fact defense counsel Hardy was correct on the definition and the sitting judge was wrong. Judge Wagner's commentary allowed this jury to sit through the trial without a correct understanding of the definition of homicide. This reduced the State's obligation to prove that Mr. Morton's actions were malicious. This case is fraught with cumulative error.

With regard to the first factor, the State's actions speak louder than its words. Mr. Morton was charged with two crimes in this matter, Murder with a Weapons Enhancement, and Discharging a Weapon in a Home, an interesting facet that has been pointedly ignored by the State. The State knew that the facts behind the two crimes are materially the same. Yet they chose to charge Mr. Morton with both crimes. If the issue of guilt was clear and simple, there would have been no reason to charge Mr. Morton with the discharge crime at all. The State knew, and Mr. Morton proved at trial, that the issue of guilt in this case was close *ab initio*.

Mr. Morton has brought forth *Miranda* waiver, voluntary confession, sentencing abuse, sufficiency of the evidence, improper jury instruction, prior bad act evidence, denigration of counsel, and cumulative and prejudicial evidentiary issues. If even one of these issues fails to be remedied, the quantity and character of the remaining errors is surely sufficient to meet *Valdez's* requirement.

Lastly, again, the State's conduct must properly be evaluated to determine the gravity of the crime charged. Apparently, the State had little faith in its Murder charge, so it also brought an allegation of firearm discharge. Had the State truly believed that Mr. Morton's crime deserved the gravity given to the Murder charge, it would not have diluted the case by adding a firearm discharge charge. Thus, the third prong of *Valdez* is met for Mr. Morton and he is entitled to a new trial free of the errors identified herein.

III. CONCLUSION

The State's Answering Brief improperly attempted to shift the burden from itself and the State to Mr. Morton. It insisted on claiming a strong case for Second Degree Murder, but in the same breath alleged a firearm discharge claim. The infirmity of their case was demonstrated at trial, and absent the errors introduced that have been identified in briefing, a different verdict would have been rendered. He is entitled to a different trial at which a new verdict will be rendered. Mr. Morton's rights to due process, a fair trial before an impartial tribunal, and to maintain his innocence have been violated.

Mr. Morton would like to conclude by noting that any argument in the State's Answering Brief not expressly argued against should be considered as properly briefed, not conceded. This Court should vacate the conviction, remand the matter for a new trial. Alternatively, this Court should vacate the conviction and remand this matter for a new sentencing hearing before a different Judge.

DATED this 17th day of June, 2022.

By: _____

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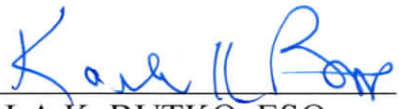
CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, entitled, "APPELLANT'S REPLY 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 Rule of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal.

I further certify that this brief complies with the page- or type- volume limitation of 32(a)(7)(A)(i) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 15 pages .

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. The document was prepared in Word. There are 15 typed pages, 3,641 words in this brief and 367 lines of type. The Brief has been prepared in Word, proportionally spaced type, 14 point Times New Roman with 2.0 line spacing.

DATED this 17th day of June, 2022.

By: 

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

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