IN THE SUPREME COURT OF THE STATE OF NEVADA

ORIGINAL

ASHLEY WILLIAM BENNETT,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 39864

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

1. Whether the court committed reversible error in failing sua sponte to prohibit the State from introducing evidence of witness intimidation.
2. Whether the court committed reversible error in failing to hold a Petrocelli hearing and giving a limiting instruction sua sponte regarding witness intimidation.
3. Whether the court committed reversible error in limiting hearsay testimony from Lakiesha Reed and Reginald Fobbs.
4. Whether the court committed reversible error in limiting the cross-examination of Pamela Neal.
5. Whether the court committed reversible error in instructing the jury with respect to malice.
6. Whether Defendant's conviction should be reversed for cumulative error.

7. Whether the Defendant's conviction should be reversed for the State's failure to provide defense counsel with a copy of Gantt's pre-sentence report and plea canvass.

STATEMENT OF THE CASE

On March 3, 2001, Joseph Williams (aka Doughboy) was shot and killed by several individuals, including (among others) Ashley Bennett (aka Face) (hereinafter the Defendant) and Anthony Gantt. Gantt subsequently entered a guilty plea and agreed to testify against the Defendant.

At trial, the Defendant claimed an alibi defense, which the jury rejected, returning a verdict of guilty of First Degree Murder with Use of a Deadly Weapon on February 4, 2002.

Thereafter, Defendant filed his first Motion for New Trial on February 11, 2002 which was denied on February 21, 2002 and a second Motion for New Trial around June 6, 2002 which was denied on June 18, 2002.

Defendant was subsequently sentenced to life without the possibility of parole in the Nevada Department of Corrections plus an equal and consecutive term of life without the possibility of parole for the use of a deadly weapon on June 18, 2002.

On June 20, 2002, a Judgment of Conviction (Jury Trial) was filed. This appeal followed.

STATEMENT OF THE FACTS

At trial, Anthony Gantt testified that the Defendant was one of several persons (including himself) who shot and killed Doughboy (aka Joseph Williams), who was unarmed at the time. (Appellant's Appendix, hereinafter AA, 546-551).

The deputy medical examiner, Dr. Gary Telgenhoff, testified that the victim sustained 14 gunshot entrance wounds (AA, 699). Another eyewitness, Pamela Neal, also testified that the Defendant shot the victim. (AA, 237). At trial, the defense called several witnesses to support an alibi defense, all of whom had a pre-existing

relationship with the Defendant. The Defendant chose not to testify. During closing argument, defense counsel attacked the credibility of witness Gantt and Neal (AA, 962-974) stating quite bluntly, "We have two conflicted and inconsistent liars with motives to lie." (AA, 974).

The jury had ample opportunity to evaluate the credibility of the various witnesses. Based on their guilty verdict, it's apparent the jury did not share the same opinion of witness Gantt and Neal asserted by defense counsel.

ARGUMENT

I

THE COURT DID NOT COMMIT REVERSIBLE ERROR IN FAILING SUA SPONTE TO PROHIBIT THE STATE FROM INTRODUCING EVIDENCE OF WITNESS INTIMIDATION

First, contrary to Defendant's contention (Opening Brief, page 18, line 13) there is no indication in the record that the State made "repeated and unfounded references to witness intimidation and threats." Factually, the matter was referenced briefly when (to explain the witness' earlier refusal in front of the jury to testify (AA, 528) and his prior inconsistent statements) the witness was asked on *redirect* examination (AA, 634):

Q: "And in fact, Mr. Gantt, wasn't there a point at which this defendant basically threatened you with your own family?

A: Yes.

Q: Didn't he basically tell you, I'm going to bring your family in here to watch you testify?"

Thereafter, a defense objection as to "leading" was overruled and the witness answered "Yes," then further testified that his father was an "original gangster" in the Gerson Park Kings gang to which the Defendant belonged.

As this Court noted in Rodriguez v. State, 117 Nev. 800, 32 P.3d 773, 780 (2001), it is the Defendant's "responsibility to provide this court with cogent argument supported by legal authority *and reference to relevant parts of the record.*" [emphasis added].

Second, there is no indication in the record that Defendant made a timely objection to the introduction of this witness intimidation evidence on the proper grounds (the "leading" objection was overruled and not the correct objection to preclude intimidation evidence) (AA, 634-635). In a hearing outside the presence of the jury (regarding the State's request to expel spectators), after witness Gantt initially indicated that he didn't wish to testify, the prosecutor mentioned that not only was a codefendant in the audience, and one of the witnesses' cousins, but that there were letters *from the Defendant* [emphasis added] conveying threats to the witness. (AA, 530).

"The general rule is that failure to object to asserted errors at trial will bar review of an issue on appeal." McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983); See also State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998); Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991). "When an appellant fails to specifically object to questions asked or testimony elicited during trial, but complains about them, in retrospect upon appeal, we [this Court] do not consider his contention a proper assignment of error." Greene v. State, 113 Nev. 157, 175-176, 931 P.2d 54, 65-66 (1997) (reversed on other grounds) (quoting Wilson v. State, 86 Nev. 320, 326, 468 P.2d 346, 350 (1970).

Third, as this Court stated in Cosey v. State, 93 Nev. 352, 355, 566 P.2d 83, 85 (1977), "Appellant contends the court erred by permitting the State to ask one of its witnesses whether she had received any threats regarding her testimony. This contention arose after her credibility was placed in issue because of a prior inconsistent statement she had given to law enforcement officials. Although she testified otherwise, she told the court outside the presence of the jury that threats had

indeed been made. 'The credibility of a witness may be attacked by any party, including the party calling him.' NRS 50.075. Here, the prosecutor's examination was a proper inquiry into matters relevant to the witness's credibility and reasons why she was recanting her prior statement. See Thompson v. State, 541 P.2d 1328 (Okl.Cr.App.1975); People v. Pruitt, 155 Cal.App.2d 585, 318 P.2d 552 (1957); Luker v. State, 23 Ala.App. 379, 125 So. 788 (1930)." Cosey is almost directly on point with the facts of this case.

The credibility of a witness who testifies in an action is *always* relevant. Accordingly, questions directed toward revealing any motive, interest or bias the witness may harbor toward a party are equally relevant. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974); Ransey v. State, 100 Nev. 277, 680 P.2d 596 (1984); Collman v. State, 116 Nev. 687, 709, 7 P.3d 426, 440 (2000).

The relevancy of witness intimidation evidence was explored in depth in a California case, People v. Olguin, 31 Cal.App.4th 1355 (1995) and the rationale remains equally persuasive for witnesses here in Nevada. In *Olguin*, the court stated:

> "Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible (citations omitted). Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible (citations omitted). It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible (citations omitted)...
>
> A witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony. Just as the fact a witness expects to receive something in exchange for testimony may be considered in evaluating his or her credibility (citations omitted), the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. For this purpose, it matters not the source of the threat. It could come from a friend of the defendant, or it could come from a stranger who merely approves of the defendant's conduct or disapproves of the victim. It could come from a person who perceives a social or political agenda to have been advanced by the defendant's actions. It could come from a member of the witness' profession, religion, or subculture, who disapproves of the witness' involvement for some reason. It could come from a zealot of any stripe, large groups of whom seem ready to rally to virtually any cause these days.
>
> Regardless of its source, the jury would be entitled to evaluate the witness' testimony ***knowing*** it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within limits...those facts which would enable them to evaluate the witness' fear. A

witness who expresses fear of testifying because he is afraid of being shunned by a rich uncle who disapproves of lawyers would have to be evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into her house the night before the trial."

In a case such as this, where witness credibility was contested, evidence that the 15 year old witness (AA, 945) is presently fearful, or was previously fearful and consequently gave inconsistent statements, is relevant and probative, particularly if the threats come directly from the Defendant. See AA, 634-635. See also United State v. Lane, 692 F.2d 900 (7th Cir, 1983) [gang membership admissible to explain prior inconsistent statements].

Fourth, the case cited by Defendant, Lay v. State, 110 Nev. 1189, 886 P.2d 448 (1994) actually supports the proposition that this witness intimidation evidence was admissible since it constituted "substantial credible evidence that the defendant was the source of the intimidation." Witness Gantt expressly indicated that the Defendant was the source of the threats. (AA, 651). The failure of either side to prove this collateral matter by a handwriting analysis of the letter is inconsequential.

Fifth, Defendant miscites the record. While his contention that "there was absolutely no evidence of any kind of threats to Mr. Gantt's family" (Opening Brief, page 21, lines 21-22) is correct, it misses the point. The evidence was that the threats came *from* the witness' family, not *to* them. (AA, 646-647). The witness' father and uncle were members of the Gerson gang (AA, 554) which was the same gang the Defendant belonged to (AA, 541). The witness' father and uncle did not want him to take the deal and testify (AA, 646) and the witness actually wrote to the Defendant because he was afraid the Defendant would tell his (Gantt's) uncle (AA, 647) and his initial refusal to testify occurred when his cousins and others entered the courtroom (on redirect, AA, 646). More importantly, Defendant ignores the record the district court made about intimidating gestures from spectators in the courtroom. (AA, 675-677)

In Evans v. State, 117 Nev. 609, 28 P.3d 498 (2001), this Court found that the testimony of a witness that she was reluctant to cooperate with the prosecutors

because the defendant had threatened her twice and she feared him was substantial credible evidence, directly relevant to the question of the defendant's guilt and NRS 48.045(2) was inapposite. This Court also held that the testimony of four other witnesses regarding their fears was irrelevant because the state offered no authority, no reference to the record, and no analysis to support the contention that their testimony was relevant to explain subsequent conduct and inconsistencies in their testimony. Those shortcomings are not present in this case.

Any witness who fears, regardless of whether those fears are real or imagined, or imminent or not, and regardless of the source, that there may be repercussions from their testimony, either before or after they testify, has a motive, interest and bias in the outcome of the proceeding. Their credibility may or may not be enhanced by their fears. In any event, the trier of fact is entitled to hear such fear evidence in order to evaluate the witness's credibility. The jury did so in this case and soundly rejected the Defendant's alibi defense.

Sixth, the cases cited by Defendant (Opening Brief, page 18) aren't relevant to this case because in those cases (unlike the facts of this case) there was no evidence of witness intimidation or threats. United States v. Rios, 611 F.2d 1335 (10th Cir. 1979)[no evidence whatsoever]; United States v. Peak, 498 F.2d 1337 (6th Cir. 1974)[threats "totally unsupported in the record"]; United States v. Hayward, 420 F.2d 142 (B.C. Cir. 1969)["not a scintilla of evidence"]. Moreover, in United States v. Muscarella, 585 F.2d 242 (7th Cir. 1978), the court *affirmed* the conviction

Seventh, Defendant neglects to mention that the issue of witness intimidation arose during the State's redirect examination *after the Defendant "opened the door" to this issue* on cross-examination. (AA, 675-677) The Court noted on the record that Defendant had opened the door and that a witness in the courtroom was making intimidating gestures while Gantt testified (AA, 675-677).

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II

THE COURT DID NOT COMMIT REVERSIBLE ERROR IN FAILING TO HOLD A PETROCELLI HEARING AND FAILING TO GIVE A LIMITING INSTRUCTION SUA SPONTE REGARDING WITNESS INTIMIDATION

Defendant claims that the trial court committed reversible error for failing to hold a pretrial hearing on the issue of witness intimidation, citing Tinch v. State, 113 Nev. 1170, 946 P.2d 1061 (1997) and Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

First, those cases do not stand for that proposition. The passing reference to witness intimidation made during the State's redirect examination after the defense opened the door was relevant to the credibility of witness Gantt, not as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" pursuant to NRS 48.045(2) of anything the Defendant did. There was absolutely no requirement to hold a Petrocelli hearing. Furthermore, the matter of witness intimidation and possible exclusion of spectators was in fact discussed outside the presence of the jury (AA, 528-534).

Second, there is nothing in the record to indicate that defense counsel requested any limiting instruction on this issue at any time. Defendant's failure to request such an instruction should bar appellate review.

Third, Defendant fails to cite any authority for the proposition that the court was required sua sponte to give a limiting instruction with respect to witness intimidation evidence. "Contentions unsupported by specific argument or authority should be summarily rejected on appeal." Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000). Defendant's reliance on Tavares v. State, 117 Nev. 725, 30 P.2d 1128 (2001) is inapposite since there was no "bad act" evidence introduced to prove motive or anything else the Defendant did. The intimidation evidence was introduced in response to attacks on the credibility of witness Gantt.

III

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN LIMITING HEARSAY TESTIMONY FROM LAKIESHA REED AND REGINALD FOBBS

Defendant's contention that defense witnesses Reed (AA, 904-906) and Fobbs (AA, 900-904) were limited in their testimony is not supported by any clear citation to the record, although there is passing reference to a sidebar conference (AA, 923). In any event, to the extent that their proposed testimony may have been discussed off the record, the district court clearly indicated that Reed's testimony was "double, possibly triple hearsay." (AA, 923). The matter was argued outside the presence of the jury after Reed and Fobbs testified (AA, 923-924) during which the Defendant himself spoke up and attempted to argue the court's ruling with the Judge (AA, 924-927).

The trial court properly excluded as hearsay any testimony from witness Reed regarding a phone conversation she had with the nontestifying Defendant concerning witness Neal. (AA, 905-906).

In discussing Reed's proposed testimony, something about a conversation Reed overheard between the Defendant and witness Neal regarding statements made by some individual called Tyro that the Defendant was involved in the death of Eric Bass (AA, 923-924), the court stated quite clearly on the record, "I'm not going to let that in, again as being hearsay, number one. Number two, under 48.035 the Court finds it is not relevant as to these proceedings." (AA, 924). The Court also had concerns "as to the truthfulness of this." (AA, 924).

The trial court also properly excluded as unreliable hearsay possible testimony from witness Fobbs, an incarcerated Gerson gang member (AA, 233, 901) about an alleged conversation his sister (witness Neal) may have overheard on some occasion from some unnamed homicide detectives about some matter that might have been relevant. (AA, 903).

The trial court did not abuse its discretion in keeping the trial on track and prohibiting the introduction of evidence that was both irrelevant and based on multiple layers of hearsay.

IV

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN LIMITING THE CROSS-EXAMINATION OF PAMELA NEAL

Defendant contends that he should have been able to cross-examine witness Neal about the specifics of a prior bad act pursuant to Moore v. State, 96 Nev. 220, 607 P.2d 105 (1980).

In a hearing held outside the presence of the jury *prior* to the testimony of witness Neal (AA, 169-174), defense counsel indicated that they wanted to get into certain specifics of a case (which was previously dismissed) against witness Neal to "show Ms. Neal's violence" and that "if she or her family was threatened, she was going to do what she had to do." (AA, 171, lines 12-15). The Court properly determined that some specifics might be admissible to show witness bias or credibility but that "Again, the specific facts are not appropriate." (AA, 172).

In a second hearing outside the presence of the jury *after* the direct examination of witness Neal (AA, 243-250), defense counsel again argued to get into the specifics of the dismissed case because Neal had testified that her case had been dismissed for lack of evidence and defense counsel felt otherwise. (AA, 244). The State responded at length that the case against Neal could not be proven (AA, 244-246 and 249-250) and the Court ultimately stated that "The Court is not going to deviate from its prior position in terms of going into the specific allegations, (a) because it's not appropriate and (b), because it's a waste of time. This trial is not about that. However, as I indicated previously, her credibility or bias is at issue and counsel, because of the statement as to dismissal, can indicate what Mr. Koot told the Court, or more specifically, that it was being dismissed and immunity was being offered, but again, we're not gonna get into the specifics as to what happened, except what she was

originally charged with. And that is what the transcript [of the dismissal of her case] says." (AA, 248).

Defendant wanted to get into the specifics of the previously dismissed case in order to portray the witness as a violent hot-head who would do anything to protect her family. The specifics of the dismissed case had nothing to do with her credibility or bias against the Defendant and the district court properly exercised its discretion in controlling cross-examination.

As this Court has recognized, "The scope and extent of cross-examination is largely within the sound discretion of the trial court and in the absence of abuse of discretion a reversal will not be granted." Azbill v. State, 88 Nev. 240, 246, 495 P.2d 1064, 1068 (1972) citing Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748 (1968). "The Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 294 (1985). Even when the bias of a witness is at issue, trial judges retain the right to restrict "inquiries which are repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness." Bushnell v. State, 95 Nev. 570, 573, 599 P.2d 1038, 1040 (1979); Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986). "Trial judges 'retain wide latitude' to restrict such inquiry 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Bridges v. State, 116 Nev. 752, 761, 6 P.3d 1000, 1007 (2000); Leonard v. State, 117 Nev. 53, 17 P.3d 397, 409 (2001).

The trial court properly exercised its discretion in controlling the trial proceedings and preventing a time-consuming, confusing, irrelevant and speculative cross-examination of witness Neal on specifics of a dismissed case that had no bearing on her credibility or bias towards the Defendant.

V

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN INSTRUCTING THE JURY REGARDING MALICE

First, there is no indication in the record that defense counsel made a timely objection to Jury Instructions #8 and #9, the instructions now alleged to have been erroneously given. The Court specifically asked: "Defense is likewise familiar with the proposed instructions. Any instructions that defense wishes to object to at this time?" Ms. Simpkins: No, Your Honor." (AA, 938).

It is axiomatic that failure to object in a timely fashion precludes appellate consideration. Cutler v. State, 93 Nev. 329, 337, 566 P.2d 809, 814 (1977); McCall v. State, 91 Nev. 556, 557 540 P.2d 95 (1975); Clark v. State, 89 Nev. 392, 393, 513 P.2d 1224 (1973); State v. Foquette, 67 Nev. 505, 524, 221 P.2d 404 (1950). This Court has stated that "when a defendant's counsel has not only failed at trial to object to jury instructions, but has agreed to them, the failure to object or to request special instructions precludes appellate consideration... The only exception we have recognized to this otherwise absolute rule is one for plain error." Bonacci v. State, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980). Plain error has been defined as that which is "'so unmistakable that it reveals itself by a casual inspection of the record.'" Patterson v. State, 111 Nev. 1525, 907 P.2d 984, 987 (1995), citing Torres v. Farmers Insurance Exchange, 106 Nev. 340, 345 n. 2, 793 P. 2d 839, 842 (1990), quoting Williams v. Zellhoefer, 89 Nev. 579, 580, 517 P.2d 789, 789 (1973). In Manley v. State, 115 Nev. 114, 125, 979 P.2d 703, 709 (1999), the Court held that if the defense failed to propose a different jury instruction when the court settled jury instructions "then no patently prejudicial error occurred which warrants consideration of this issue on appeal." In McKenna v. State, 114 Nev. 1044 at 1054, 968 P.2d 739, 746 (1998), the Nevada Supreme Court held that the failure to object to a jury instruction precludes appellate review, unless the error is patently prejudicial (citing Flanagan v. State, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996)).

Second, NRS 200.020(2) states that "Malice shall be implied when no considerable provocation appears, or when all of the circumstances of the killing show an abandoned and malignant heart." In Cutler v. State, 93 Nev. 329, 336, 566 P.2d 809, 813 (1977), this Court noted that it is appropriate to give a statute as an instruction to the jury in a criminal case.

Third, as in Hernandez v. State, 118 Nev. Adv. Op. No. 55, 50 P.3d 1100, 1111 (2002), Defendant failed to preserve the issue for appeal or demonstrate plain error. In Hernandez, this Court stated, "as to whether implied malice is defined in impermissibly vague, archaic terms, this court considered and rejected this argument last year." citing Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001).

Fourth, Defendant's contention (Opening Brief, page 29, line 24) that the "abandoned or malignant heart" language is not used by any other state and violates due process is factually and *recklessly* incorrect even if couched in equivocal terms. A cursory and non-exhaustive search reveals that the "abandoned and malignant heart" language is used in both statutes and cases from several states to include California, Georgia, Wyoming, Idaho, Michigan, Utah, Arizona and Illinois.[1]

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[1] Section 187 of the California Penal Code provides in pertinent part: "(a) Murder is the unlawful killing of a human being with malice aforethought." and Section 188 provides: "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an *abandoned and malignant heart*." See also People v. Martinez, 31 Cal.4th 673, 684, 74 P.3d 748, 755, 3 Cal.Rptr.3d 648, 657 (2003); Keats v. State, 64 P.3d 104, 110 (Wyo.,2003)["malice may be implied or inferred from any deliberate and cruel act against another, or his property, which shows an *abandoned and malignant heart*."]; Johnson v. State, 570 S.E.2d 309, 312 (Ga.,2002)["After charging the jury on express malice, the trial court charged that 'malice may, but need not, be implied where no considerable provocation appears and all the circumstances of the killing show an *abandoned and malignant heart*.'"]; Hill v. State, 555 S.E.2d 696, 700 (Ga.,2001)["Under OCGA § 16-5-1(b), express malice is the deliberate intention unlawfully to take a life, manifested by external circumstances, and malice may be implied where no considerable provocation appears and where the circumstances of the killing show an *abandoned and malignant heart*."]; State v. Luke, 1 P.3d 795, 802 (Idaho,2000)["There is express intent which contains a manifest intention, and implied intent which entails killing with an *abandoned or malignant heart*." citing State v. Buckley, 953 P.2d 604, 605 (1998)]; People v. Goecke, 579 N.W.2d 868, 880 (Mich.,1998)["Another way to conceptualize this mental state is to recognize that because malice is implied when the circumstances attending the killing demonstrate an *abandoned and malignant heart*,"]; Fenstermaker v. State, 912 P.2d 653 (Idaho App.,1995)["Crime of second degree murder requires intent to kill or mental state of having an *abandoned and malignant heart*."]; State v. Fontana, 680 P.2d 1042, 1045 (Utah,1984)[This interpretation is consistent with our own

Finally, as this Court noted in Scott v. State, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976), when the jury returns a verdict of murder in the first degree, they must have found beyond a reasonable doubt that the Defendant murdered deliberately, willfully and with premeditation. Since the jury found express malice, implied malice played no part in the Defendant's conviction.

The instructions at issue are not unconstitutionally vague and ambiguous and are not patently prejudicial.

VI

THE DEFENDANT'S CONVICTION SHOULD NOT BE REVERSED FOR CUMULATIVE ERROR

This Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Big Pond, 101 Nev. at 3, 692 P.2d at 1289. The doctrine of cumulative error "requires that numerous errors be committed, not merely alleged." People v. Rivers, 727 P.2d 394, 401 (Colo. App. 1986); see also, People v. Jones, 665 P.2d 127, 131 (Colo. App. 1982). Evidence against the defendant must therefore be "substantial enough to convict him in an otherwise fair trial and it must be said without reservation that the

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case law, which has referred to second degree murder as being indicated "when the circumstances attending the killing show an abandoned and malignant heart." citing State v. Wardle, 564 P.2d 764, 765 n. 1 (Utah,1977)]; State v. Lacquey, 571 P.2d 1027 (Ariz.1977)["Malice is implied when no considerable provocation appears or when circumstances attending killing show abandoned and malignant heart. A.R.S. § 13-451[B]."]; People v. Massey, 364 N.E.2d 933, 938 (Ill.App. 1977)[Malice may be implied when all the circumstances surrounding a homicide show an *abandoned and malignant heart* on the part of the assailant. People v. Jones, 186 N.E.2d 246. (Ill.1962)"]

verdict would have been the same in the absence of error." Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988).

Insofar as Defendant has failed to establish *any* error which would entitle him to relief, there is no cumulative error. Chief Justice E.M. Gunderson observed in his dissenting opinion in LaPena v. State, 92 Nev. 1, 14, 544 P.2d 1187 (1976), "nothing plus nothing plus nothing is nothing." In the instant case Defendant's claims of error amount to "nothing."

Furthermore, it is important to note that a defendant is not entitled to a perfect trial, but only a fair trial . . ." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114 (1975), citing Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357 (1974). Here, Defendant received a fair trial.

VII

THE STATE DID NOT WITHHOLD DISCOVERY

Defendant's contention that the State withheld impeachment evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) is without merit. More specifically, Defendant contends that the pre-sentence report and plea canvass on witness (and former codefendant) Gantt were not provided and consequently, Defendant is entitled to a new trial.

First, NRS 176.156(5) prohibits the State from providing a copy of a presentence report on a witness to Defendant's counsel. This statute expressly states "Except for the disclosures required by subsections 1 to 4, inclusive, a report of a presentence investigation or general investigation and the sources of information for such a report are confidential and must not be made a part of any public record." Since the subsections are not pertinent to Defendant's case, the State would have been violating the law if it had provided the Defendant with a copy of the presentence investigation in dispute.

Second, as the United States Supreme Court stated in Strickler v. Greene, 527 U.S. 263, 281-282 , 119 S.Ct. 1936, 1948 (1999), "There are three components of a

true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." In this case, there is absolutely no evidence whatsoever in the record that the "evidence" (Gantt's PSI and plea canvass) was favorable to the Defendant, no evidence whatsoever that it was suppressed by the State and no evidence that Defendant was prejudiced as a result. Defendant completely fails to satisfy *any* of the three requirements articulated in Strickler, supra.

Third, there is no evidence that Defendant requested these materials or made any independent effort to obtain them from the State or the court. Nor is there any evidence that the State even possessed a transcribed plea canvass. As this Court noted in Steese v. State, 114 Nev. 479, 960 P.2d 321 (1998), "*Brady* does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Defendant had the ability to obtain these materials directly from the court or pursuant to court order and didn't need to rely solely on the prosecution. More recently, in Evans v. State, 117 Nev. 609, 28 P.3d 498, 511 (2001) this Court rejected the proposition that the State has any affirmative duty to compile information or pursue an investigative lead simply because it could conceivably develop evidence helpful to the defense.

Fourth, there is no evidence that Defendant made a timely objection to the lack of these materials which would clearly have been known to defense counsel before trial. Failure to make a timely objection or a valid claim of newly discovered evidence precludes appellate review. Defendant's bare claim, based solely on speculation, that exculpatory or impeaching evidence was contained in these documents, is insufficient to sustain his claim.

NRS 175.282 provides a mechanism for the Court to review, excise if appropriate, then make available to the jury any agreement to testify. That obligation was satisfied when the State provided a copy of the plea memo and agreement to

testify to defense counsel (AA, 458). Furthermore, the State had the plea agreement admitted as Exhibit 127 (AA, 933).

The Defendant's failure to obtain witness Gantt's presentence investigation report and a copy of Gantt's plea canvass is not attributable to the State and consequently does not constitute *Brady* error.

CONCLUSION

Based on the foregoing, the State respectfully requests this Court to affirm the Judgment of Conviction.

Dated this 19th day of November 2003.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 19th day of November 2003.

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on November 19, 2003.

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