IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSTIN BARRAL)
)
Appellant,)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)
)

CASE NUMBER: 64135
(District Court Case No. C269095)

APPELLANT'S REPLY BRIEF

(APPEAL FROM JUDGMENT OF CONVICTION)

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STATEMENT OF THE ISSUES

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ARGUMENT

I. FAILING TO SWEAR IN THE JURY VENIRE PRIOR TO COMMENCING VOIR DIRE WAS A STRUCTURAL ERROR

The State first asserts in its reply that the Appellant waived the issue of whether or not the court below committed structural error because he failed to properly object. *See* State's Reply at p. 11-12. This contention is belied by the record. The record indicates that Counsel for the Appellant did approach the bench shortly after voir dire of the individual jurors had begun and made a record of the district court's failure to properly administer an oath of the jury venire as required by NRS 16.030(5). This objection was made at the bench to avoid calling the court's error to the attention of the entire jury panel. The record below makes clear that the Appellant was objecting to the jury panel not being sworn in. *See* Appellant's Appendix, hereinafter "App" at p. 133-135, Volume I. Moreover, the State's citation to Maxey v. State, 94 Nev. 255, 256, 578 P. 2d 751, 752 (1978) is distinguishable from the case at bar as Maxey dealt specifically with the assertion of the right to a mistrial and not the timing of when an objection must be made.

Assuming arguendo that this Court finds that an objection was not properly made, this Court may address plain errors or issues of constitutional dimension *sua sponte*. *See* Coleman v. State, 111 Nev. 657, 661-662, 895 P.2d 653, 656 (1995).

In conducting plain error review, this Court examines whether there was "error," whether the error was "plain" or clear, and whether the error affected the defendant's substantial rights. Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice. *See* Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (*internal citations omitted).*[1]

As set forth in the Appellant's Opening Brief at p. 8-11, the Appellant submits that the failure of the court below to swear in the jury venire was an error that affected the very structure of the trial itself because there was no guarantee that potential jurors felt obligated to give accurate and truthful responses, which NRS 16.030(5) ensures had it been administered. As this Court is well aware, structural errors belong to that "limited class of fundamental constitutional errors" that "are so intrinsically harmful [to the concept of a fair trial] as to require automatic reversal ... without regard to their effect on the outcome [of the proceeding]." Knipes v. State, 124 Nev. 927, 934, 192 P.3d 1178, 1182 - 1183 (2008), *quoting* Neder v. United States, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The Appellant respectfully urges this Court to hold that a

[1] As set forth below, the record makes it clear that the trial court committed a plain error in violation of statute by failing to swear in the jury as required by statute. Further the error was prejudicial and affected his substantial rights by failing to ensure that the Appellant had a jury venire that understood the gravity of the case before them and the importance of being truthful during jury selection.

court's mishandling of a trial by not swearing in a jury venire is a structural error due to the fact that it renders a criminal trial unfair from its inception. [2]

The State, while acknowledging that Nevada has not addressed whether the failure to swear in a jury venire is a structural defect, cites People v. Carter, 36 Cal. 4th 1114. 117 P. 3d 476 (Cal. 2005) for the proposition that failure to administer an oath to prospective jurors does not require reversal. *See* State's Reply at p. 15. However, the State completely glosses over the fact that in Carter, "prospective jurors each filled out a juror questionnaire that was signed under penalty of perjury, a circumstance that undoubtedly impressed upon the prospective jurors the gravity of the matter before them and the importance of being truthful and thereby ameliorated at least in part the trial court's failure to timely administer the oath..." Carter, 36 Cal.4th at 1177, 117 P.3d at 518. The Carter Court concluded that in light of the questionnaires, the jury understood that it was required to answer truthfully the questions posed during the voir dire examination and concluded that "the court's error in not administering the oath to some of the prospective jurors was not prejudicial to the defendant." Id.

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[2] The Appellant readily concedes that the persuasive law cited to in its opening brief on p. 9-10 was from the intermediate court of appeals of Alabama and Michigan respectively, and any error was unintentional.

In contrast to Carter, no such admonishment in writing was given to the prospective jurors in this case and at no time during jury selection were jurors informed that they were required to be truthful under penalty of perjury as required by statute. Accordingly, it can hardly be said that prospective jurors herein clearly understood their solemn responsibility to be truthful during jury selection.

The State replies that the Appellant fails to demonstrate beyond mere speculation that the district court's error prejudiced his substantial rights. *See* State's Reply at p. 19. In rebuttal, the Appellant notes that the State fails to address the fact that prospective jurors were evasive in terms of whether or not they could be impartial. *See* App. at p. 131-133, 139, 141, Volume I.

In sum, failing to swear in the jury venire was a structural defect requiring reversal because there was no guarantee that potential jurors felt obligated to give accurate and truthful responses. Accordingly, the very framework of the trial proceedings was affected. Therefore, a new trial is required and this Court should order the same.

II. THE COURT BELOW ERRED BY COMMENTING FROM THE BENCH HOW THE EVIDENCE SHOULD BE INTERPRETED BY THE JURY

The State asserts in its reply that the district court did not impermissibly comment on how the jury should interpret evidence. *See* State's Reply at p. 20. In support of its contention, the State asserts that the district court's comments about

J.C. practicing for her testimony "were nothing more than an explanation for the court's ruling on the State's objection." *See* State's Reply at p. 22. In contrast, the district court's comments "I'm not sure if we could really elicit what practice meant" and "sitting up here seven years old, I would be nervous" clearly constituted the court commenting on the credibility of the witness and the weight to be given to her testimony. *See* App. at p. 646-647, Volume III.

It is noteworthy that the State cites to Gordon v. Hurtado, 91 Nev. 641, 541 P. 2d 533 (1975) in support of its contention that the court below did not comment on the quantity and quality of the direct evidence. *See* State's Reply at p. 21-22. In Gordon, this Court citing to NRS 3.230 stated:

> District judges shall not charge juries upon matters of fact but may state the evidence and declare the law. **In stating the evidence, the judge should not comment upon the probability or improbability of its truth nor the credibility thereof.** If the judge states the evidence, he must also inform the jury that they are not to be governed by his statement upon matters of fact.
>
> Gordon, 91 Nev. at 645, 541 P.2d at 535 (*emphasis added).*

In reversing, the Gordon court found that the district court judge commented on the evidence before the jury, the credibility of testimony and the probability of its truth and probative value. Id. Like in Gordon, the court below commented on the evidence before the jury by directly interjecting its opinion into what interpretation the jury should make about J.C.'s practicing and commenting on her credibility when the court stated "I would be nervous" and "I'm not really sure if

we really could elicit what practice meant." *See* Appellant's Opening Brief at p. 13-14. Given that J.C.'s credibility based on her testimony was arguably the sole evidence by which the jury found the Appellant guilty, the trial court's error in commenting on her testimony was not harmless and like in Gordon reversal is required because a fair jury trial did not occur under the circumstances.[3]

III. THE COURT BELOW ERRED BY DISPARAGING DEFENSE COUNSEL IN THE PRESENCE OF THE JURY

The State asserts in its reply that the Appellant failed to preserve for review the issue of whether or not the court bellow erred by disparaging Counsel during the course of the case. *See* State's Reply at p. 25. It is true that appellate review of judicial misconduct is generally precluded when the aggrieved party fails to object, assign misconduct, or request an instruction from the lower court. *See* Parodi v. Washoe Medical Center, Inc. 111 Nev. 365, 368, 892 P.2d 588, 590 (1995).[4]

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[3] The Appellant also disputes the State's contention in its reply (p. 20) that he did not properly object to the Court commenting on how the jury should interpret evidence as the record makes clear that this was done. *See* App p. 646-647, Volume III. Violations of the constitutional and statutory prohibitions are subject to the rule of harmless error. Gordon v. Hurtado, 91 Nev. 641, 645, 541 P.2d 533, 535 - 536 (Nev. 1975) Whether judicial misconduct occurred at all is subject to *de novo* review. Cf. Lioce v. Cohen, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008) (attorney misconduct presents a legal question subject to de novo review).

[4] The Appellant also asserts that an objection was made when the Court opined from the bench as referenced in the Appellant's second argument above.

However, this Court has reviewed judicial misconduct, absent the appellant's failure to adequately preserve the issue for appeal, under the plain error doctrine. *See* Id. at 369–70, 892 P.2d at 591 ("failure to object will not always preclude appellate review in instances where judicial deportment is of an inappropriate but non-egregious and repetitive nature that becomes prejudicial when considered in its entirety").

Additionally, as pointed out in the Appellant's Opening Brief at p. 15-16, the Appellant, like in Parodi, was faced with the "Hobson's choice" of either objecting to the misconduct or refusing to assume the risks posed by such objections. Like in Parodi, the Appellant submits that failure to object does not preclude appellate review in the instant case because judicial deportment was of an inappropriate but non-egregious and repetitive nature that became prejudicial when considered in its entirety. Id. at 370, 892 P. 2d at 591.

The State contends that the district court did not disparage defense counsel and that the Appellant's claim "relies on nothing more than a few innocuous statements." *See* State Reply at p. 30. However, Appellant clearly sets forth distinct examples of the court below expressing impatience from the bench against counsel in the presence of the jury. *See* Appellant's Opening Brief at p. 16-18. The Oade Court concluded that "the judge's comments regarding his impatience may have had an adverse impact on the jury's impression of Oade's counsel, which, in

turn, may have adversely affected the jury's acceptance of Oade's defense. Oade v. State, 114 Nev. 619, 623, 960 P.2d 336, 339 (1998). Like in Oade, the comments of the court below, when viewed in their entirety, were clearly erroneous and prejudicial to the Appellant's case and warrant reversal.

IV. ERROR WAS COMMITTED WHEN THE COURT BELOW DENIED THE APPELLANT THE RIGHT TO EFFECTIVELY CROSS EXAMINE THE NAMED VICTIM

In its reply, the State claims that the Appellant's reliance on Summit v. State, 101 Nev. 159, 163-64, 697 P. 2d 1374 (1985) is misplaced because the information that the Appellant sough to admit referred incidents that took place primarily after the allegations in question. *See* State's Reply at p. 32. However, the State glosses over the fact that J.C. did relay to her therapist a sexual touching incident that took place prior to the events in question. *See* App. at p. 34-35, Volume I and Appellant's Opening Brief at p. 20.

This Court has consistently held that "a child-victim's prior sexual experiences may be admissible to counteract the jury's perception that a young child would not have the knowledge or experience necessary to describe a sexual assault unless it had actually happened." Chapman v. State, 117 Nev, 1, 5, 16 P. 3d 432, 434 (2001) *citing* Summit v. State, 101 Nev. 159, 697 P. 2d 1374 (1985). In the present case, the Appellant was denied the opportunity to ask a limited series of questions about the prior allegations that J.C. relayed to her therapist to establish

that she had the prerequisite knowledge and experience to describe a sexual touching.[5] Without this testimony being presented, the jury was left with erroneous impression that J.C. did not have any other experiences whatsoever which could explain the source of her knowledge of the sexual activities described in her testimony.

Accordingly, the Appellant was denied his right to effective cross-examination of the named victim and reversal is warranted.

V. MISCONDUCT WAS COMMITTED WHEN THE STATE MISCHARACTERIZED THE TESTIMONY PRESENTED

The State first asserts that it did not mischaracterize the testimony of Detective Hatchett and instead "followed precisely what had been agreed upon during the break to resolve Detective Hatchett's error." *See* State's Reply at p. 37. This ignores the fact that it was the State not just asking the question again, but instead misstating Detective Hatchett's testimony that no one had touched her privates except mom and dad. *See* App. at p. 697, Volume III and p. 707, Volume III. The record clearly states that Detective Hatchett inadvertently revealed that a sexually based touching had taken place between J.C. and a four year old and

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[5] It is also noteworthy that the court below also denied the Appellant the right to conduct a limited evidentiary hearing outside of the presence of the jury. *See* App. at p. 309-31, Volume II.

instead of simply re-asking the last question, the State attempted to whitewash the answer by misstating the testimony presented.

The State next asserts that it did not misstate the evidence concerning the volume control on the baby monitor because "the jury could reasonably infer from the State's argument that Barral could have manipulated the volume of the baby monitor in Josh's room to turn down the volume in Barral's bedroom." *See* State's Reply at p. 38. In support of this contention, the State asserts that J.C.'s aunt clarified that the volume could only have been turned down from the unit in the parent's room. Id. However, by arguing, "you could manipulate the monitor in Josh's room to turn down the volume" without mentioning that this issue was cleared up on cross-examination, (*See* App. at p. 803, Volume IV) the State was clearly mischaracterizing the evidence presented by implying that the Appellant turned down the volume in the baby's room in order to engage in malfeasance with the named victim when the evidence presented did not support the same.

Turning to the analysis required by Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008), the first prong of Valdez is met as to the above instances of prosecutorial misconduct because testimony was knowingly misstated by the State. The second prong of Valdez is also met in both instances because but for the misstatements, the jury would not have been left with mischaracterizations of

evidence as to Detective Hatch's recitations of J.C.'s statements and Megan Barral's statements regarding the baby monitor respectively.

Accordingly, it can hardly be said that these errors were harmless as they were key points of contention between the parties for the jury's consideration that had a substantial effect upon their verdict.

VI. THE COURT BELOW ERRED BY FAILING TO GRANT THE APPELLANT'S MOTION FOR AN ACQUITTAL

The State declares in its reply that there was not absence of evidence that the Appellant digitally penetrated J.C's vagina and anus because the fact that J.C. used age appropriate language (dug, dig, digged and sinking) to describe vaginal and anal penetration beyond a reasonable doubt. *See* State's Reply at p. 42. This argument ignores the fact that this Court has held that "the victim must testify with some particularity regarding the incident in order to uphold the charge." Lapierre v. State, 108 Nev. 528, 531, 836 P. 2d 56, 58 (1992). Given the fact that the named victim did not definitively clarify whether or not penetration actually occurred, it can hardly be said that the State established the minimum threshold of evidence as required by law and reversal is required. *See* Evans v. State, 112 Nev. 1172, 1193, 926 P. 2d 265 279 (1996).

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VII. THE COURT BELOW ERRED BY FAILING TO GRANT THE APPELLANT'S MOTION FOR A NEW TRIAL

In it's reply, the State contends that the evidence was not conflicting because "testimony regarding the baby monitor was insignificant and was in no way evidence that Barral did not dig into J.C's private and butt." *See* State's Reply at p. 45. This argument must fail because the testimony of J.C. as depicted in her video interview states that the Appellant was vocal with her in the room as she was telling him to stop. Further, the Appellant also purportedly stated: "I want to do it again and again." *See* Appellant's Opening Brief at p. 34 and St. Ex. 2. In contrast, Megan Barral testified that she did not hear anything strange or unusual on the baby monitor while the Appellant was in the room with J.C. *See* App. at p. 594-595, Volume III and Appellant's Opening Brief at p. 33-34.[6]

The State resolves this conflict with rampant speculation by asserting that the Appellant "could have easily turned down the volume on the baby monitor so that she (Megan Barral) would not have been able to hear any potential commotion." *See* State's Reply at p. 44. The more logical inference is that the jury resolved this significant conflict by believing J.C.'s testimony over Megan

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[6] With regards to the conflict of evidence between the Appellant's recitation of events as relayed through Megan Barral and J.C.'s version of events, (*See* Appellant's Opening Brief at p. 33-34) the Appellant submits on the record based on arguments previously made.

Barral's version of events that she heard nothing over the monitor. In accordance with State v. Walker, 109 Nev. 683, 685-686 857 P. 2d 1, 2 (1993) there was a clear conflict of evidence and the court below erred by not granting a new trial based on an independent evaluation of the evidence.

VIII. THE APPELLANT WAS DENIED A FAIR TRIAL BASED ON CUMMULATIVE ERROR

The State claims that the Appellant was not denied a fair trial due to cumulative error because the issue of guilt was not close and there was more than sufficient evidence to sustain the verdict. *See* State's Reply at p. 46. The facts presented at trial do not support this conclusion.

It is well established that "the cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though the errors are harmless individually." Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). If the defendant's fair trial rights are violated because of the cumulative effect of errors, this court will reverse the conviction. DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000). The relevant factors to consider when deciding whether cumulative error requires reversal are "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854–55 (2000). As to the first Mulder factor, the issue of guilt is close because the only evidence against the

Appellant is the testimony of the named victim either firsthand or through the child hearsay exception of NRS 51.385. Second, the cumulative errors in this case worked with one another to deprive the appellant of a fair trial. These errors, which included the failure of the court below to allow effective cross-examination of the named victim, structural errors in failing to swear in the jury venire and misconduct by the state and the errors committed by the court below had the cumulative effect of rendering the Appellant's trial unfair. Finally, the gravity of the charges are great because the Appellant faced a potential life sentence for each count. *See* NRS 200.366. Accordingly, because of the cumulative effects of the above referenced errors, reversal is required.

CONCLUSION

For the reasons stated herein and in the Appellant's Opening Brief, the Judgment of Conviction of the Appellant DUSTIN BARRAL should be set aside and the sentence vacated.

Dated this 16th day of July, 2014.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Appellant's Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and has been prepared in a proportionately spaced typeface using Times New Roman in font type 14.
2. I further certify that I have read this Appellant's Reply Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.
3. Finally, I certify that this brief complies with all applicable rules of the Nevada Rules of Appellate Procedure, particularly NRAP 28(e), which requires every assertion in the brief regarding matters of record to be supported by a reference in the page of the transcript or appendix where the matter relied on is to be found.
4. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

Dated this 16th day of July, 2014.

By:

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing **APPELLANT'S REPLY BRIEF** was made this 16th day of July, 2014 upon the appropriate parties hereto by electronic filing using the ECF system which will send a notice of electronic filing to the following and/or by facsimile transmission to:

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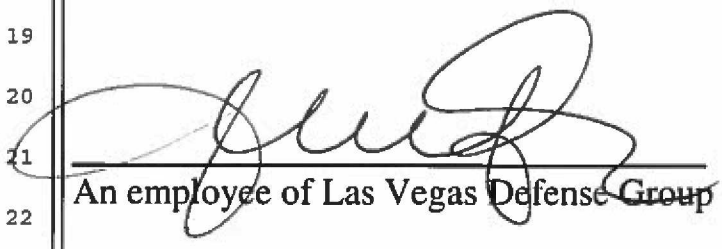

An employee of Las Vegas Defense Group

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Jennifer Aleman, an employee with the Las Vegas Defense Group, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 16th day of July, 2014, declarant deposited in the United States mail, a copy of the Appellant's Reply Brief in the case of State of Nevada vs. Dustin Barral, Case No. 64135, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to DUSTIN BARRAL, #11008615, High Desert State Prison, P.O. Box 650, Indian Springs, NV 89070, that there is a regular communication by mail between the place of mailing and the place so addressed.

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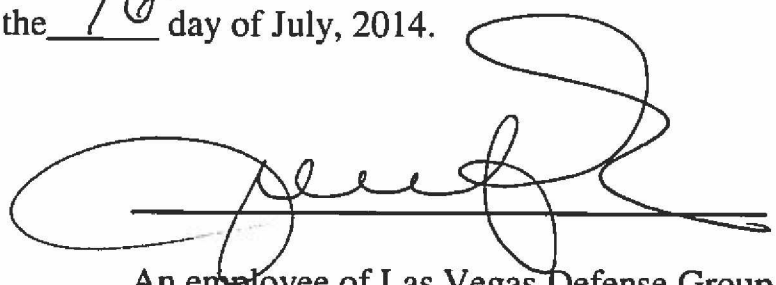
EXECUTED on the 16th day of July, 2014.



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