Nevada Supreme Court

Trandon Green, Appellant

v.

State of Nevada, Responden.

Docket Number 81563

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 disqualification or recusal.

Jeannie Hua, Esq., Attorney of record for Appellant, Trandon Green

Clark County District Attorney's Office for the State of Nevada

Table of Contents

Table of Authorities

Jurisdictional statement

The basis for the Supreme Court's or Court of Appeals' jurisdiction is NRS 177.015(3), NRAP 4(c)(1)(A)and(B).

The Judgment of Conviction was filed on February 27, 2019. The Notice of Appeal was filed on July 30, 2020.

The appeal is from a jury verdict in Eighth Judicial District Court.

Routing Statement

Per NRAP 17(b)(2)(A), "appeals from a judgment of conviction based on a jury verdict that do not involve a conviction for any offenses that are category A or B felonies are presumptively assigned to Court of Appeals." Since this case involves Category B felonies, this case is not presumptively assigned to Court of Appeals.

Relevant Issues

I. The State violated constitutional and statutory discovery requirements, prejudicing the defense and violating Green's rights to due process, effective assistance of counsel, and a fair trial under the Fifth, Sixth, and Fourteenth Amendments, and the Nevada Constitution.

II. Cumulative error requires reversal.

Statement of the Case

State filed an Information on July 14, 2017 including Battery Constituting Domestic Violence, Burglary, two counts of First Degree Kidnapping, Battery with Intent to Commit Sexual Assault, Sexual Assault, Battery with Use of Deadly Weapon Resulting in Substantial Bodily Harm Constituting Domestic Violence, Assault with A Deadly Weapon, Child Abuse, Neglect, or Endangerment with Use of a Deadly Weapon, and Preventing or Dissuading Witness from Testifying or Producing Evidence. (AA. Vol. 1, p. 1-6). At felony arraignment, Trandon Green's (Green) trial counsel made a motion for discovery and it was granted. (AA. Vol. 1, p. 7). Jury Trial took place on June 25, 2018. (AA. Vol. 1, p. 9). Jury arrived at a verdict on July 3, 2018. (AA. Vol. 6, p. 1272-1276). The jury found Green not guilty of Battery Constituting Domestic Violence (Cat. C felony), Burglary, two counts of First Degree Kidnapping, Battery with Intent to Commit Sexual Assault, Sexual Assault, and Assault with Use of a Deadly Weapon. The jury found Green guilty of misdemeanor Battery, Battery Constituting Domestic Violence, Child Abuse, Neglect, or Endangerment, and Preventing or Dissuading Witnesses From Testifying or Producing Evidence. (Id.).

Green was sentenced on August 22, 2018. (AA. Vol. 6, p. 1277-1279). Judgment of Conviction was filed on August 29, 2018. (Id.) Green asked his trial counsel to file a Notice of Appeal. However, trial counsel neglected to do so. So

Green filed a Petition for Writ of Habeas Corpus on Mary 29, 2019. (AA. Vol. 6, p. 1280-1291). Notice of Appeal and Case Appeal Statement were filed on July 30, 2020. (AA. Vol. 6, 1272-1276).

Statement of Facts

Samantha Weston (Weston) testified that she was in a relationship with Appellant Green. (AA. Vol. 3, p. 725). On May 28, 2017, Green asked Weston to leave their apartment because he wanted to bring over another woman. (AA. Vol. 3, p. 732). When Weston refused, Green hit her in the face, arm and leg. (Id.). Weston admitted on cross examination that she didn't mention to police about being hit on arm and leg and lied about being pregnant. (AA. Vol. 4, p. 788).

Weston testified on direct examination that on June 17, 2017, Green broke through Riley Weston's (Riley) window. (AA. Vol. 3, p. 741). Riley Weston was Samatha Weston's daughter. (AA. Vol. 3, p. 726). Weston testified that Green told Riley, Weston's daughter to sit on the sofa in the living room and told Weston to go into the bedroom with him so they can talk. (AA. Vol. 3, p. 742). Once in the bedroom, Weston and Green started arguing. (AA. Vol. 3, p. 742). At one point, Green hit Weston with a piece of wood on the head, arm, stomach, and leg (AA. Vol. 3, p. 749). On cross, Weston admitted that she didn't tell the officers who responded to the scene that she was hit in the legs or stomach. (AA. Vol. 4, 798).

Weston testified on direct examination that Riley would interrupt their argument at times by walking into the bedroom and ask for things. (AA. Vol. 3, p. 745). Weston testified that one of the times when Riley went into the bedroom to ask for something, Green put a pair of scissors to her neck and in her mouth. (AA. Vol. 4, p. 758). Green's trial counsel asked on cross for Weston to elaborate on how Green held the scissors again Riley's neck and then in Riley's mouth. Weston responded that he stuck the closed scissors in her mouth then opened the scissors while in Riley's mouth. (AA. Vol. 4, p. 800-801). Green's trial counsel asked if Riley was scared and Weston answered in the affirmative. (Id.).

Weston testified that whenever she or her daughter tried to escape, he would block the door or threaten to hurt them. (AA. Vol. 4, p. 760). Weston testified that Green forced her to have penile vaginal sex. (AA. Vol. 4, p. 761-766). Green fell asleep after sex. (AA. Vol. 4, p. 766). Weston grabbed her phone on the nightstand and went into the bathroom. (Id.). She texted a friend, Leroy and asked him to call 911. (AA. Vol. 4, p. 767).

Weston testified that when she walked out of the bathroom Green took a knife and cut her finger. (AA. Vol. 4, p. 769). After helping her stop the bleeding, Green went to the kitchen to make Top Ramen. (AA. Vol. 4, 772-773). When the police knocked on the door, Green told her that he will always love her. (AA. Vol. 4, p. 773-774). Weston told him to go out the bedroom window. (Id.). She let the

police in and told them where Green went. (Id.). On cross examination, Weston admitted that she told the police that she thought she was pregnant again. (AA. Vol. 4, p. 798-799). On cross examination, Weston admitted that prior to June 17, 2017 she learned on Facebook that Green had gotten another woman pregnant and she was angry about it. (AA. Vol. 4, p. 790-800).

Brianne Huseby, a forensic scientist in the biology detail of the Las Vegas Metropolitan Police Department testified that she collected DNA samples from the blade of the scissors Green allegedly placed on Riley's throat and in her mouth. (AA. Vol. 5, p. 1022-1029). Huseby testified that 78 percent of the samples of the blade was determined to be either daughter or mother of Weston. However, this conclusion was not in Huseby's report furnished to Appellant's trial counsel. (Id.). The follow is pertinent excerpts of Huseby's testimony -

Q: Are you able to determine anything about that 78 percent sample?

A: The 78 perent sample did come out with a nearly complete profile in the STRmix printout, so you do have – it does show you what that person's alleles or types are at each of the locations that we test or nearly all of them.

Q: So if you have a nearly complete DNA profile, do you have the ability of comparing that profile to certain other profiles and making your conclusions as well?

A: Yes, I mean, I can look at the profile and see how it compares to other profiles.

Q: And did you do that with the 78 percent?

A: I did look at it and can see correlations or similarities between that profile and another profile.

Q: And what was that other profile?

A: It does share one allele at every locus for Samantha Weston's profile. So locus means location. I mentioned that we test 21 different locations. So at each of those locations this unknown contributor has one allele in common with Samantha Weston.

Q: Now would it be fair to say that half of a person's allele come from each parent?

A: Yes, we inherit half of our DNA from our mother and half from our father.

[…]

Q: And were you able to make any conclusions or was it consistent with any kind of outcome to have that 78 percent sample sharing an allele at every location with Samantha Weston?

A: Right, I wouldn't make a conclusion about it. But I can definitely say that just based on general biology for someone to share an allele at every location, it's consistent with either a parent or a child of that individual.

[…]

Cross examination of Brianne Huseby -

A: Ms. Huseby, I want to start out with the report that I have, it doesn't have anywhere in here where you made any type of comparison with that 78 percent.

A: It's –

Q: So where's that report?

A: It's not a report but it's just something that, you know, I can visually observe in my case file and –

Q: Okay, So it's in your case file?

A: Uh-huh.

Q: Did you provide –

THE COURT: Is that yes?

THE WITNESS: Yes, I'm sorry.

Q: - did you provide that to the State?

A: I don't handle discovery so I don't know what was provided to the State.

Q: He obviously had that information, you would agree with me, because he was able to ask you that question, correct?

A: Probably.

Q: Okay. So it would seem to reason that someone provided that information to the State at some point?

A: Probably, yes.

Q: Okay. But it's not in the report, which is the only report I have, you would agree with me, that part about that 78 percent and you doing the comparison?

A: Correct.

Bench Conference -

Mr. Rose: […] So it was yesterday morning that I got the text message from Ms. Huseby indicating that she had just the day before, gone and relooked at some of what was already in the file. I don't believe that any additional testing or comparisons were done, but she then went and said, I have something to tell you. We called her on the work phone and that's when she told me about the fact that she'd gone back, looked at it, and could say that it's at least consistent with a relative either, you know, kind of one generation apart, either mother or daughter, cannot say which one it is, does not have a reference sample from Riley Weston.

The Court: Right.

Mr. Rose: That's when I learned that information. It was just an hour or two before we came back to court and picked up with Samantha.

[…]

The Court: So just so I'm clear, are you asserting that one of the discovery statutes was violated or is it like due process, or, you know, what's the basis for –

[…]

Ms. McNeill: - it's easy to skirt that by doing what happened here. She texts and says I have some information and then they made a phone call. So it makes it easy to skirt that. So I don't know that it technically complies with the discovery statute. So I would say that it's a due process violation. I would say – Brady says evidence related to exculpatory as well as guilt and punishment. So I would say that the – that Brady and its progeny, as well as due process. And he's now put in the position of having ineffective counsel.

The Court: Okay. So – you know what – what would have been different in your preparation then?

Ms. McNeill: I probably wouldn't have cross- examined Samantha the way I did about the blades going into Riley's mouth. I probably would have kind of left it alone instead of trying to point out how absurd it was to say that these things were done and point that out even more to the jury had I known it was going to come out that that might be her DNA on those scissors. And so just highlighted that area, now where I probably would have left it alone.

The Court: Okay. So.

[…]

Ms. McNeill: - and I would say that if you look at the, the statute, 174.234, and you go down to subsection 3(b) where it says: any information relating to an expert witness that is required to be disclosed, they should provide this information as

soon as practicable after the party obtains that information. I read that as sort of giving an ongoing duty to, as new stuff comes up, because that does happen with experts sometimes. I mean, I've gotten reports where – when they changed over to STRmix, they had to redo some of their reports. And so, yesterday when he got the information would have been the time to tell me. I mean, it would have been too late in some sense then, depending on if Samantha had already testified.

[…]

Mr. Rose: The text I got at – the first text that I got was at 8:16 a.m.

The Court: And then you called her is when you actually got the information?

Mr Rose: Right. I called at approximately 8:24 a.m. yesterday morning.

The Court: Right.

Ms. McNeill: And that would have been prior to Ms.Weston's testimony, which again, had I had it would have made a difference in how I cross examined her.

[…]

Ms. McNeill: Well, and the other issue is, your Honor, another line of questioning that I could have engaged in, without this information , would be that they didn't collect a reference sample from Riley, and that goes to bad police work, potentially if this is what they've told them. (AA. Vol. 5, p. 1022-1058).

Trial court found that defense didn't suffer enough prejudice to necessitate a mistrial and denied defense's motion. (AA. Vol. 5, p. 1054-1055). The jury found

Green not guilty of Battery Constituting Domestic Violence (Cat. C felony), Burglary, two counts of First Degree Kidnapping, Battery with Intent to Commit Sexual Assault, Sexual Assault, and Assault with Use of a Deadly Weapon. The jury found Green guilty of misdemeanor Battery, Battery Constituting Domestic Violence, Child Abuse, Neglect, or Endangerment, and Preventing or Dissuading Witnesses From Testifying or Producing Evidence. (AA. Vol. 6, p. 1272-1276).

The jury essentially State had proven guilt beyond a reasonable doubt on counts that had corroborating evidence, ie. letter from Green to Weston asking her not to testify for Tampering with a Witness, police testimony and photographs of injuries for the battery counts. The corroborating evidence for Child Abuse, Neglect, or Endangerment was the DNA evidence from Huseby's testimony regarding DNA on the blades of the scissors having come from either Weston's mother or daughter. The jury acquitted Green on counts based solely upon Weston's testimony with no corroborating evidence. The jury didn't find Weston's testimony credible on its own.

Summary of the Argument

After trial had started, State elicited testimony from DNA expert regarding conclusion that wasn't included in the expert's report. The State had known of this evidence at least prior to victim's testimony on the stand. This was the

corroborating evidence for the Child Abuse, Neglect or Endangerment count against Green.

The jury ended up finding Green guilty only of counts that had corroborating evidence apart from Weston's testimony and acquitted Green of counts where Weston's testimony was the sole basis. Thus, State's failure to inform Green's trial counsel of Husby's DNA match of the DNA sample on the scissor's blades to Weston's mother or daughter that wasn't included in her report was prejudicial and merited a mistrial. Despite violation of state and federal Due Process rights as well as violation of NRS 174.234, trial court erred by denying defense motion for mistrial.

Argument

I. The State violated constitutional and statutory discovery requirements, prejudicing the defense and violating Green's rights to due process, effective assistance of counsel, and a fair trial under the Fifth, Sixth, and Fourteenth Amendments and the Nevada Constitution.

A. Legal Background

1. *Brady* and its progeny

The United States and Nevada constitutions require the State to provide the defense with all favorable evidence in its actual or constructive possession prior to trial. Failure to do so results in a violation of the Due Process clauses of the Fifth

and Fourteenth Amendments of the United States Constitution, as well as Article 1, Section 8 of the Nevada Constitution. The Fifth Amendment Due Process Clause requires the government to produce exculpatory information to the defense. Prosecutors have a duty to disclose inculpatory information. *Brady v. Maryland*, *363 U.S. 83 (1963); U.S. Const, amend V, XIV; Nev. Const, art. 1, sec. 8, cl. 5.* This duty applies where (1) the State withholds evidence; (2) that evidence is favorable to the accused; and (3) the failure to disclose caused prejudice (or stated differently, the evidence was material). *Mazzan v. Warden*, 116 Nev. 48, 67 (2000).

If the State withholds evidence, the first element is present whether the State acted maliciously or inadvertently. Failure to disclose required evidence "is a *violation* of due process regardless of the prosecutor's motive." Id. at 66. Even where an individual prosecutor did not know about undisclosed evidence, "the state attorney is charged with constructive knowledge and possession of evidence withheld by other state agents." *Jimenez v. State*, 112 Nev. 610, 623 (1996). [1] The State is required to disclose favorable, material evidence " *before trial*" to comply

[1] *See also Kyles v. Whitley, 514 U.S. 419, 437-38 (1995)*. "But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached. This in turn means that the individual prosecutor has a duty to leam of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S. at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."

with due process. *United States v. Nagra*, 147 F.3d 875, 881 (9th Cir. 1998) (italics in original).

The second element, the favorability of undisclosed evidence, must be considered collectively, not piece by piece. "The character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record. " *Mazzan*, 116 Nev. at 66-67. "Favorable" information is not limited to merely exculpatory evidence; it must also be disclosed if it provides grounds for impeachment of witness testimony, police investigations, or to bolster the defense against prosecutorial attacks. *Id.* at 67.

The third, materiality element depends on whether the defense specifically requested information. If there was a request, evidence is material if there is simply a "reasonable possibility" that disclosure would have led to a different result. If there was no specific request, evidence is material where there is a "reasonable probability" of a different result. Both of these standards require less than a preponderance of the evidence. A reasonable probability is equivalent to a reasonable doubt, and a reasonable possibility requires even less than that. *Mazzan*, 116 Nev. at 66. *Mazzan* is not just a good restatement of *Brady* law; it also provides an apposite set of facts. In *Mazzan*, the prosecutors did not hand over relevant evidence (police reports), but instead "passed on what they considered the gist of those reports." The Court held that this was not enough to satisfy *Brady*,

reasoning that the synopsis "could not have imparted a constitutionally adequate picture to McNabney [defense attorney] simply because the picture was too subtle and complicated to be sufficiently conveyed in oral discussions. Moreover, it is almost inevitable that as prosecutors they did not peruse the potentially exculpatory information with the same incentive or attention that defense counsel would have brought to it." *Mazzan*, 116 Nev. at 69. Because the State's summary failed to satisfy *Brady*, the Court reversed the conviction and remanded for hearings on whether the *violation* barred retrial.

2. Standards of review

Brady violations present a mixed question of fact and law, and so are reviewed by this Court *de novo. Mazzan v. Warden, 116 Nev. 48, 66 (2000)*. However, motions for mistrial and motions for a new trial are reviewed for abuse of discretion. *Sanborn v. State*, 107 Nev. 399, 406 (1991); *Sparks v. State*, 96 Nev. 26, 30 (1980). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 746, 748 (2005). I

In this case, the Court is reviewing the lower court's decisions not to grant a mistrial. These are reviewed for abuse of discretion -i.e., did the lower court act within the bounds of *Brady* law. For *Brady*, that law is interpreted *de novo* by this Court. Thus, this Court's primary task is to conduct a *de novo* review of the

substantive *Brady* issue. A finding that the lower court misunderstood the substantive issue will then satisfy the abuse of discretion standard on the procedural issue.

B. Factual Background

1. Inadmissible expert testimony

At trial, Weston testified that Green placed a pair of scissors on Riley's neck and in her mouth, opening the blades. (AA. Vol. 4, p. 758). Riley took the stand but was unable to testify. (AA. Vol. 4, p. 843-858). Huseby was the forensic scientist from Metro who wrote the report on DNA evidence. (AA. Vol. 4, p. 1016-1017). She testified that 78 percent of DNA sample taken off the blade of the scissors belonged to either the mother or the daughter of Weston. (AA. Vol 4, p. 1028). This conclusion was not in her report. (AA. Vol. 4, p. 1029). Defense moved for mistrial because the State withheld the evidence until direct examination of Huseby. (AA.Vol. 4, p. 1035). Trial court found that defense didn't suffer enough prejudice to merit a mistrial. (AA. Vol. 4, p. 1053).

At the end of the trial, the jury acquitted Green of Battery Constituting Domestic Violence (Cat. C felony), Burglary, two counts of First Degree Kidnapping, Battery with Intent to Commit Sexual Assault, Sexual Assault, and Assault with Use of a Deadly Weapon. The jury found Green guilty of misdemeanor Battery, Battery Constituting Domestic Violence, Child Abuse,

Neglect, or Endangerment, and Preventing or Dissuading Witnesses From Testifying or Producing Evidence. (AA. Vol. 6, p. 1272-1276).

The jury essentially found State had proven guilt beyond a reasonable doubt in counts that had corroborating evidence, ie, letter asking Weston to not testify for Dissuading Witness (AA. Vol. 4, p. 770, 780), officer testimony and photograph of a cut lip for misdemeanor Battery count (AA. Vol. 4, p. 875,), officer testimony and photograph of cut finger for the felony Battery count (AA. Vol. 4, p. 906, 934). The corroborating evidence for Child Abuse, Neglect, or Endangerment was the DNA evidence from Huseby's testimony regarding DNA on the blades of the scissors having come from either Weston's mother or daughter. The jury acquitted Green on counts based solely upon Weston's testimony with no corroborating evidence. The jury found Weston's testimony to not be credible enough to prove guilt beyond a reasonable doubt.

2. State's knowledge

State spoke to Huseby prior to trial regarding her report. (AA. Vol. 5, p. 1031). At that time, Huseby said she did not reach any conclusions regarding the profile on 78 percent of the DNA sample from the blades of the scissors. (Id.). After their initial conversation, Huseby reread her report and compared the DNA profile with Weston's profile. (AA. Vol. 5, p. 1032). Huseby sent a text message on the morning Weston was scheduled to testify and told the State the profile

matched either the daughter or mother of Weston's profile. (Id.). The State failed to inform Green's trial counsel of Huseby's findings and waited until after Weston had testified, until the next day when Huseby was on the stand for direct testimony, violating not only Brady, but also NRS 174.234 regarding reciprocal discovery and expert testimony. (AA. Vol. 5, p. 1042).

C. Analysis

Here, the first element required by *Mazzan v. Warden*, 116, Nev 48, 66 (2000) is met when State withheld Huseby's new conclusion of the DNA match to Weston's mother or daughter on the blade of the scissors while trial proceeded. Weston was the State's star witness. All of State's charges against Green rested upon Weston's testimony. The State failed to disclose Huseby's new findings, knowing the importance of Weston's testimony, knowing the Child Abuse count would buttress Weston's testimony regarding Green placing the scissors against Riley's neck and in her mouth, knowing their duty under *Brady* and NRS 174.234, and choosing to disclose the evidence only upon eliciting it from Huseby's direct testimony the next day. Whether the failure to disclose was malicious or inadvertent, failure to disclose required evidence is a violation.

The second element per *Mazzan* is also met here because the State has a duty to turn over favorable evidence. "Favorable information is not limited to merely exculpatory evidence; it must also be disclosed if it provides grounds for

impeachment of witness testimony, police investigations, or to bolster the defense against prosecutorial attacks." *Id.* at 67. Green's trial counsel lost the opportunity to properly cross examine police officers and forensic technicians regarding why a DNA sample wasn't collected from Riley to prevent such a vague finding that served to prejudice Green without providing scientific clarity as to whom the DNA belonged. Green's trial counsel also wouldn't have gone into detail on cross as to how Green held the scissors against Riley and how he inserted the blades into her mouth and opened the blades because Green's trial attorney was going to argue that DNA evidence would've been found if Weston's testimony was true.

The third element of materiality per *Mazzan* has also been met here. Green's trial counsel did request discovery including expert's reports at felony arraignment. Thus, the evidence is material if there is simply a reasonable possibility that disclosure would have led to a different result. This standard requires less than a preponderance of the evidence. *Id.* at 66.

Huseby's DNA finding was material because the jury essentially found the State had proven guilt beyond a reasonable doubt in counts that had corroborating evidence, ie, letter asking Weston to not testify for Dissuading Witness, officer testimony and photograph of a cut lip for misdemeanor Battery count, officer testimony and photograph of cut finger for the felony Battery count. The corroborating evidence for Child Abuse, Neglect, or Endangerment was the DNA

evidence from Huseby's testimony regarding DNA on the blades of the scissors having come from either Weston's mother or daughter. The jury acquitted Green on counts based solely upon Weston's testimony with no corroborating evidence. The jury found Weston's testimony alone did not prove Green's guilty beyond a reasonable doubt. What's even more convincing is that the counts jury acquitted Green on were counts that carried lengthier sentences and more serious elements such as First Degree Kidnapping and Sexual assault. The seriousness of the charges wouldn't have escaped the jury's consideration, despite that, they found Weston's testimony to be not credible enough to prove Green's guilt beyond a reasonable doubt.

Ultimately, reviewed de novo, the record shows that the State withheld information from Husely's comparison match and only sprung it on the defense near the end of the trial. The information was favorable, and its absence materially prejudiced the defense, leading to a worse outcome. This was a violation of ***Brady*** and ***Mazzan***, not to mention Green's due process rights under the U.S. and Nevada Constitutions.

This review of the ***Brady*** issue demonstrates that the lower court was wrong to deny the mistrial. It abused its discretion and acted contrary to law by not doing so. This Court should therefore reverse Green's conviction and remand for a new untainted trial, or whatever other relief it deems appropriate.

II. Cumulative errors

A. Standard of Review

"When evaluating a claim of cumulative error, we consider the following factors (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d at 481(2008).

B. Argument

It is prosecutorial misconduct for the State to make false or unsupported statements of fact to the jury during closing argument. *See, e.g., Witherow v. State*, 104 Nev. 721, 724 (1988); *Collier v. State* , 101 Nev. 473, 478 (1981). In Morales v. State 122 Nev 966, 972, 143 P.3d 463 (2006), the Court reversed and remand for new trial because several improper statements by prosecutor during closing arguments were cumulative errors. In Sipasas v. State 102 Nev 119, 122-125, 716 P.2d 231 (1986), the Court held that improper admission of photograph per NR 50.125(1)(d) not used to refresh recollection and prosecutor's improper comment regarding a defense witness were cumulative error and required reversal and remand for a new trial.

Here, in rebuttal closing, State repeatedly misstated the evidence. The State claimed that Green's mother testified that Green and Weston were at her house all day and night on June 17th. (AA. Vol. 6, p. 1255). However, Green's mother

testified that she found Weston at her house around 12:00 pm on June 17th and took her home. (AA. Vol. 6, p. 1175-1176).

The State then claimed that Leroy Denten testified that he was at Weston's home on June 17th. (AA. Vol. 6, 1256). However, Denten testified that he couldn't remember the exact date of when he was at Weston's apartment. (AA. Vol. 4, p. 861). The State claimed that Green's trial counsel talked about blood on a stick Green used to hit Weston with. (AA. Vol. 6, p. 1257). Green's trial counsel actually said in closing argument that the stick looked like it had blood but it wasn't blood. (AA. Vol. 5 1241-1242). The State claimed that Green's trial counsel argued that Weston didn't explain how the sexual assault occurred. (AA. Vol. 6, p. 1263). Green's trial counsel actually said in closing that Weston was unable to provide details of the assault. (AA. Vol. 5, p. 1237).

Recognizing that this Court does not typically reverse appellants' convictions on the basis of individual instances of prosecutorial misconduct, Turner asks that all of the above instances of misconduct be considered cumulatively. When considered " in light of the proceedings as a whole, the State's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Valdez*, 124 Nev. at 1189 (emphasis added "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Valdez*, 124 Nev. at 1195-96

(quoting *Hernandez v. State*, 118 Nev. 513, 535 (2002)). When evaluating a claim of cumulative error, this Court will consider: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Id.* (*quoting Mulder v. State*, 116 Nev. 1, 17 (2000)). Considering all the misrepresentations made in rebuttal coupled with the State's use of inadmissible expert evidence and violation of NRS 174, 234 and *Brady*, errors cumulated met the Mulder elements. First, the issue of guilt, especially for the Child Abuse count was close. The jury had found Green guilty only on counts with corroborating evidence. The jury had found Green not guilty on counts where Weston's testimony was not corroborated. Second, the quantity and the character of the errors were prejudicial considering the State's use of inadmissible expert testimony couple with State's misrepresentations during rebuttal closing. Third, the gravity of the crime charged was great. Green will have to live with the prejudice of having such a heinous crime on his record for the rest of his life. Pursuant to the authorities cited above, Appellant should have his convictions reversed and case remanded for new trial because the errors committed by trial court and the State amounted to cumulative errors.

Conclusion

Appellant respectfully request this Court to consider reversing his convictions and remanding the case back to trial court for retrial.

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 for Mac, version 12.3.6 (130206) in 14 point Times New Roman style;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[X] Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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

Dated this 30th day of December, 2020.

/s/ Jeannie N. Hua, Esq.
Nevada Bar No. 5672
Law Office of Jeannie N. Hua, Inc.
5550 Painted Mirage Road, Suite 320
Las Vegas, NV 89149
(702) 239-5715

CERTIFICATE OF SERVICE

I certify that on the 30th day of December, 2020, pursuant to NRAP 25(a)(2)(A)(vi), I electronically transmitted to the court's electronic filing system consistent with NRFCR 8 to

District Attorney's Office
200 S. Lewis Ave.
LV, NV 89101

Dated this 30th day of December, 2020