BRENDAN JAMES NASBY,)
Appellant,)
v.) CASE NO. 35319
THE STATE OF NEVADA,)
Respondent.)

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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 Defendant's conviction should be reversed because it was based, in part, on testimony elicited at trial from accomplices.

2. Whether there was corroborating evidence to support the accomplice testimony.

3. Whether the trial court erred by failing to give the jury a cautionary instruction regarding accomplice testimony.

4. Whether the trial court erred by not separately instructing the jury on "willfulness, deliberation and premeditation."

5. Whether the trial court erred by denying Defendant's motion for a mistrial.

STATEMENT OF THE CASE

On November 9, 1998, an information was filed that charged Brendan James Nasby ("Defendant") with one (1) count each of Conspiracy to Commit Murder (Count I) and Murder With Use of a Deadly Weapon (Count II) for the death of Michael Beasley ("Michael") on or about July 16, 1998. (Respondent's Appendix (RA),

pp.001-003). After a jury found him guilty on both counts, the District Court sentenced Defendant on November 29, 1999 to a maximum term of one hundred twenty (120) months in the Nevada Department of Prisons with a minimum parole eligibility after forty-eight (48) months served on Count I and to life in the Nevada Department of Prisons with the possibility of parole for the murder plus an equal and consecutive term of life in the Nevada Department of Prisons with the possibility of parole for the use of a deadly weapon on Count II. (RA, pp. 004-005). The District Court ordered that Count II was to run consecutively to Count I and that Defendant be given four hundred eighty (480) days credit for time served. (Id.). The Judgment of Conviction was filed on December 2, 1999. (Id.).

STATEMENT OF THE FACTS

During its case-in-chief, the State presented overwhelming evidence of Defendant's guilt. This evidence included testimony that Defendant had murdered Michael execution style, that Defendant made admissions to two (2) different people and that Defendant voluntarily, and without provocation, led police to the location of the murder weapon within Defendant's house. Furthermore, the State offered evidence from Defendant's accomplices to detail the premeditated manner in which the homicide took place.

The State called the three (3) accomplices that joined Defendant in the killing of Michael. (Reporter's Transcript Volume III (RT III), p. 63; RT V, pp. 86, 118). The first accomplice, Jeremiah Deskin ("Jeremiah"), testified that he knew Defendant as a member of the gang L.A. Crazy Riders and that Defendant was the gang leader. (RT III, pp. 69-72). Jeremiah told the jury that Tommie Burnside ("Tommie") and his brother Jotee Burnside ("Jotee") were also members of the gang. (RT III, pp. 75-76). Jeremiah said that one (1) month prior to the July 16, 1998 killing of Michael, Defendant met with Jeremiah, Tommie, Jotee and another male gang member to discuss whether Michael should be killed. (RT III, pp. 76-78). Jeremiah specifically recalled that Defendant was soliciting opinions as to whether Michael should be killed

because Michael was allegedly trying to take Defendant's role in the gang. (Id.). Jeremiah also related that the general consensus from the other gang members at that meeting was that Michael should not be killed. (RT III, p. 79).

Jeremiah further testified that on the night of the murder he was at Defendant's house when Defendant called him into the garage. (RT III, p. 80). There inside the garage with Tommie, Defendant told Jeremiah to go pick up Michael so that they could take him to the desert and shoot him. (RT III, pp. 80-81). Jeremiah then went with Tommie and Jotee to Michael's residence. (RT III, pp. 81-82, 85-91). Upon returning to Defendant's home, Defendant displayed his Browning 9mm handgun that he had purchased from an individual named David. (RT III, pp. 91-92). Jeremiah explained that the "plan" was to go to the desert to shoot guns and smoke weed, but that no one had any weed on them. (RT III, p. 94).

After driving out into the desert, Jeremiah recalled that he stopped his car near the edge of a wash. (RT III, pp. 97-98). Jeremiah told the jury that all five (5) men got out of the car to look amongst the garbage and debris for something to use as a target. (RT III, p. 97). He also said that he kept the lights of his car on to illuminate the area. (Id.). At this time Defendant asked Jeremiah to move his car closer to the edge to brighten the area of the wash where old refrigerators were strewn about. (RT III, pp. 98-99). After he got out of the car, Jeremiah observed Defendant approach Michael from behind as Michael continued looking into the wash for something to use as a target. (RT III, 100-101). From closer than ten (10) feet away, Defendant then raised the handgun and shot Michael in the upper back. (RT III, pp. 101-102). Having never seen Defendant approach him from behind, Michael grabbed his neck/shoulder area while dropping down onto one (1) knee. (RT III, pp. 102-103). Defendant then stepped forward and fired another shot at Michael's neck/head area which caused Michael to fall forward and roll over onto his back. (RT III, p. 103).

Jeremiah testified that Tommie, Jotee and Defendant then ran back to the car after Defendant had shot Michael for the second time. (RT III, p. 104). Before

Jeremiah was able to start the car to leave, Defendant jumped out, ran over to Michael and shot once more at Michael's head as Michael lay there on his back. (RT III, pp. 104-107). Jeremiah recalled that when Defendant returned to the car, he muttered something like, "Try to take me off my own set" which Jeremiah understood to mean that Defendant believed Michael was trying to remove Defendant from the gang. (RT III, pp. 108-109).

Jeremiah further testified that on the way back to Las Vegas, Defendant threatened Jeremiah and the Burnside brothers if any of them spoke of the killing. (RT III, p. 109). Jeremiah explained to the jury that he had also been charged in the death of Michael, but agreed to plead to a lesser charge in exchange for his testimony against Defendant. (RT III, pp. 115-116). The Burnside brothers, Tommie and Jotee, testified that they had been at Defendant's house on the night of the murder and that Defendant had shot Michael out in the desert. (RT V, pp. 86-91, 118-128). They also explained that they too had been charged with the death of Michael, but had agreed with the State to testify against Defendant. (RT V, pp. 91, 126-127).

Two women next testified for the State -- Tanesha Banks ("Tanesha") and Crystal Bradley ("Crystal"). Tanesha related that she was the mother of Michael's son and had been involved in a three (3) way conversation over the telephone with Crystal and Defendant on July 17, 1998. (RT IV, pp. 11-16). Tanesha stated that Defendant sounded "panicky" when she incorrectly mentioned that she had seen Michael earlier in the morning of July 17, 1998. (Id.). Tanesha also told the jury that she had been beaten by a friend of Defendant purportedly because Tanesha had been telling people she believed Defendant was responsible for Michael's death. (RT IV, pp. 20-22). Tanesha later explained that once Defendant had been arrested, she received a threatening call from him when he was being held at the Clark County Detention Center ("CCDC"). (RT IV, pp. 23-24).

Crystal next testified that she had been familiar with Defendant from the L.A. Crazy Riders gang and that she had stayed in contact with the gang. (RT IV, pp. 38-

39). She also recalled the three (3) way telephone conversation with Tanesha and Defendant in which Defendant abruptly told her that he needed to speak with only Crystal. (RT IV, pp. 41-42). Crystal then testified that during this conversation, Defendant admitted to murdering Michael, and he planned on attempting to make it look like another gang had committed the killing. (RT IV, pp. 43-44, 46). Crystal revealed that while she didn't believe Defendant at first, she later called Secret Witness when she confirmed that Michael was indeed dead. (RT IV, p. 48).

Brittney Adams ("Brittney") testified that she had talked to Defendant about Michael's death and that she thought Defendant was "covering something up." (RT V, pp. 153-154). Brittney also said that Defendant had told her Crystal and Tanesha were involved in Michael's death and that he wanted Brittney to kill Tanesha because Tanesha was blaming him for the death. (RT V, pp. 155-156). Brittney explained that she drove over to Tanesha's house with her cousin and Defendant to get Tanesha's side of the story. (RT V, pp. 157-158). Defendant offered Brittney a hammer to use in the assault of Tanesha telling her, "You can just hit her between the eyes and kill her; just kill her, cuz; just kill her." (RT V, p. 159). Brittney told the jury that she refused Defendant's offer to use the hammer, but did get into a fight with Tanesha while Defendant remained inside the car. (RT V, pp. 159-163). Brittney recalled that when they left Tanesha's house, Defendant repeatedly said to her, "You should have killed her, cuz, you should have killed her." (RT V, p. 163).

Jomeka Beavers ("Jomeka"), Michael's aunt, testified that she was living with Michael on the day he was murdered. (RT III, p. 222). She related that Michael had received a telephone call early in the evening on the night he was killed. (RT III, pp. 225-226). Michael then asked Jomeka to watch his infant son while he went out with his friends. (RT III, p. 227). Jomeka specifically remembered that Michael got into a car with Jeremiah, whom she knew as Woodpecker, but that Charles Damion Von Lewis a.k.a. Sugar Bear was not present. (RT III, pp. 227-228).

Dr. Robert Jordan ("Jordan") testified that he performed the autopsy on Michael who had three (3) bullet wounds, two (2) to the chest and one (1) to the head. (RT III pp. 163-166). Jordan explained that the Michael had one entrance wound to the back, one exit wound to the chest and one entrance wound above the left eye. (RT III, p. 167). Jordan also testified that the only projectiles he recovered during the autopsy were bullet fragments from Michael's skull. (RT III, p. 169).

Las Vegas Metropolitan Police Department ("Metro") homicide detectives James Buczek ("Buczek") and Thomas Thowsen ("Thowsen") testified that they had been the lead investigators into Michael's death. (RT IV, pp. 141-142; RT V, pp. 228-229). Buczek related that he had developed Defendant as a suspect in the murder of Michael after he spoke with Tanesha who told him about the three (3) way telephone conversation she had with Crystal and Defendant. (RT IV, pp. 144-148). Buczek confirmed this information by speaking with Crystal and then proceeded to have a search warrant drawn up to search Defendant's house for evidence. (Id.). Defendant was placed under arrest after the execution of the search warrant and was advised of his Miranda rights. (RT IV, pp. 149-150). As Buczek was transporting him to the police station, Defendant immediately referred to a 9mm handgun as the murder weapon even though Buczek never told Defendant what kind of weapon was used to kill Michael. (RT IV, pp. 151-153). Defendant also told Buczek that the 9mm handgun was back at his house. (Id.). Metro found the 9mm handgun in a bag under Defendant's bed. (RT IV, p. 153). Thowsen testified that he had investigated a September 23, 1998 phone call from CCDC to Tanesha and confirmed that it had come from a phone line within CCDC. (RT V, pp. 228-237). Further investigation by Thowsen revealed that two (2) phone calls had been placed from the section of CCDC where Defendant was being held. (RT V, pp. 256-257). The jury then heard from another inmate of CCDC, John Holmes ("Holmes"), who testified that Defendant had admitted to killing Michael. (RT V, pp. 211-213). Holmes stated that Defendant told

him he murdered Michael because Michael was trying to take his leadership spot in the gang. (Id.).

A number of Metro crime scene analysts testified for the State as well. Kelly Neil ("Neil") testified that he recovered four (4) shiny, new-looking shell casings from the crime scene amidst "hundreds" of expended shell casings. (RT III, pp. 23-24). Neil also recovered three (3) Winston brand cigarette butts and took photographs of footprints. (RT II, pp. 24, 28). Neil explained that three (3) of the four (4) shell casings he retrieved were 9mm cartridges. (RT III, p. 26). Randall McPhail ("McPhail") testified that he collected evidence from Defendant's house after the search warrant had been executed. (RT IV, pp. 71-76). McPhail explained that he recovered a 9mm handgun, took pictures of seven (7) pairs of shoes and collected cigarette butts bearing the brands Kool, Benson & Hedges and a generic brand. (Id.). A further check on the 9mm handgun revealed that it had been reported stolen from North Las Vegas. (RT IV, pp. 83-84).

Fred Boyd ("Boyd") next testified that he had run fingerprint analysis on the recovered shell casings and 9mm handgun, but was unable to get any tangible latent prints. (RT IV, pp. 116-117). Boyd also explained that he could not find a match amongst the photographs of the footprint impression at the crime scene and the photographs of the seven (7) pairs of shoes from Defendant's house. Firearms expert Torrey Johnson ("Johnson") testified that he conducted a test fire on the 9mm handgun recovered from Defendant's house and that the shell casings discovered at the crime scene were three (3) 9mm casings and one (1) .45 casing. (RT V, pp. 18-19). Johnson also told the jury that while he could not positively find that the shell casings had been fired from the 9mm handgun seized at Defendant's house, the casings bore marks consistent with that conclusion. (RT V, p. 20). Moreover, Johnson explained that based on the assumption that the coroner removed bullet fragments from Michael's skull which were the resulting cause of death, the 9mm handgun examined by Jordan was the murder weapon. (RT V, pp. 25-29).

Before the Defendant's trial began, an evidentiary hearing was held to determine the admissibility of evidence regarding intimidation of State's witnesses. (RT II, p. 4). The State called witnesses Tanesha, Brittney, Holmes, Thowsen and hand-writing expert Jan Seaman-Kelly ("Seaman-Kelly"). (RT II, pp. 6, 30, 57, 206, 223). The hearing was suspended so that jury selection and opening statements could be done. (RT II, p. 65). Once opening statements were completed, defense counsel filed a motion for mistrial to which the State responded that the hearing was not a Petrocelli hearing, but one designed to determine the admissibility of intimidation evidence pursuant to Lay v. State, 110 Nev. 1189, 886 P.2d 448 (1994). (RT II, pp. 199-200). Only during argument did defense counsel shift the focus of the hearing away from introduction of intimidation evidence to an alleged Fifth Amendment violation. (RT II, pp. 201-202). Nevertheless, the trial court noted that a ruling had not yet been made on this matter when opening statements were given and that both counsel were free to state what they believed the evidence would be at trial. (RT II, pp. 203-205). Finding that the prejudice outweighed the probative value, the trial court did ultimately exclude evidence of two (2) documents that Defendant had written to establish an alibi defense and to potentially intimidate State's witnesses. (RT V, pp. 189-199). Accordingly, the prosecutor never referred to these documents during the State's case-in-chief or closing arguments. (RT VI, pp. 16-36, 56-70).

ARGUMENT

I.

DEFENDANT'S CONVICTION WAS SUPPORTED BY OVERWHELMING EVIDENCE APART FROM THE ACCOMPLICE TESTIMONY WHICH WAS NOT COERCED BY THE STATE

Defendant's first argument is that his conviction should be reversed because the State used coerced testimony to convict him. Although he cites to the appropriate case law surrounding this issue, Defendant fails to show how the State contravened the accepted practice of plea bargaining with co-defendants to secure favorable testimony

against a defendant on trial. Moreover, Defendant's contention that the restrictions on the use of accomplice testimony were not followed disregards the evidence that was presented before the jury and thus would be belied and repelled by the record.

Defendant highlights that the current Nevada case law concerning the use of accomplice testimony is encompassed in Sheriff, Humboldt County v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991). In Acuna, this Court specifically overruled the previous decision of Franklin v. State, 94 Nev. 220, 577 P.2d 860 (1978) by holding that:

> we now embrace the rule generally prevailing in both state and federal courts, and hold that any consideration promised by the State in exchange for a witness's testimony affects only the weight accorded the testimony, and not its admissibility. Second, we also hold that the State may not bargain for testimony so particularized that it amounts to following a script, or require that the testimony produce a specific result. Finally, the terms of the quid pro quo must be fully disclosed to the jury, the defendant or his counsel must be allowed to fully cross-examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction.

Acuna, 107 Nev. at 669. Thus the presumption is that such accomplice testimony is admissible and that the disclosure of the terms of the agreement and an opportunity for full cross-examination of the accomplice help to ensure that the jury will see the testimony in light the accomplice's vested interest in testifying for the State. Furthermore, the Court endorsed the use of such accomplice testimony by the State as a means to the truth by ruling that:

> we view as unrealistic the proposition that withholding the benefit of the bargain until after [an accomplice] testifies tends to commit the prosecution to a theory that may be inconsistent with truth or the search for truth....[and]...we are simply unwilling to assume, and therefore base a rule of law upon, the proposition that our prosecutors will sit down with persons vulnerable to prosecution and commit them to testifying perjuriously.

Id. at 668. Therefore, Defendant's reliance upon the "wisdom of Franklin" is misplaced at best and ignores this Court's rationale in reversing Franklin for the more practical and pragmatic rule of Acuna.

In the present case, Defendant devotes much attention in his brief to the cross-examination of Jeremiah, Tommie and Jotee and the instances in which they acknowledge having given inconsistent statements regarding Defendant's culpability for the murder of Michael. (Appellant's Opening Brief, pp. 9-13). Moreover, Defendant cites to the record during cross examination of each accomplice when the terms of their respective plea bargains with the State were revealed. Id. However, not only does this illustration overlook that the State elicited the same testimony from each accomplice about their respective plea bargains, but it also reinforces the notion that the safeguards required by Acuna were followed. (RT III, pp. 115-116; RT V, pp. 91, 126-127). Further still, Defense counsel was very thorough in cross examination of each of these accomplices. (RT III, pp. 122-150; RT V, 91-115, 128-140). Defendant's dissatisfaction with the jury's assessment of this evidence cannot be a means for reversing the conviction based on an alleged failure to follow the proscriptions of Acuna. See Doyle v. State, 112 Nev. 879, 921 P.2d 901, 910 (1996) ("It is the jury's function, not the reviewing court, to assess the weight of the evidence and determine the credibility of witnesses. Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975)"); Tinch v. State, 113 Nev. 1170, 946 P.2d 1061, 1175 (1997)(Supreme Court does not have the prerogative to determine credibility of witnesses in lower court hearing.).

Thus, any claim by Defendant that the precautions of Acuna were not followed is simply belied and repelled by the record of the case. See Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984)("A defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record."). Accordingly, Defendant's argument that his conviction should be reversed because the State employed coerced testimony is without merit.

II.

DEFENDANT'S CONVICTIONS SHOULD BE UPHELD GIVEN THE SUBSTANTIAL AMOUNT OF CORROBORATING EVIDENCE

Defendant next argues that his convictions should be reversed because no corroborating evidence existed pursuant to NRS 175.291.[1] Once again, however, Defendant's argument is simply belied and repelled by the record of the evidence in this case. The State presented substantial evidence other than accomplice testimony that linked the murder of Michael to Defendant.

This Court has required that independent corroboration exist when a conviction involves accomplice testimony. See Sheriff v. Hilliard, 96 Nev. 345, 608 P.2d 1111 (1980); Sheriff, Clark County v. Gordon, 96 Nev. 205, 606 P.2d 533 (1980). However, the evidence necessary for corroboration need not independently establish guilt, but will satisfy NRS 175.291 "if it merely tends to connect the accused to the offense." Cheatham v. State, 104 Nev. 500, 504-505, 761 P.2d 419 (1988); see also Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985). Moreover, corroboration evidence does not have to be found in a single fact or circumstance, but will sufficiently satisfy the statute if it arises from the circumstances or evidence as a whole. Id. Despite the title of his second section, Defendant only challenges the evidence used to convict him of Conspiracy to Commit Murder. Yet a review of the facts presented to the jury in light of Cheatham reveals that sufficient corroborative evidence existed to convict Defendant.

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[1]NRS 175.291 reads in pertinent part:

> 1. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.
> 2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

In Cheatham, this Court held that the circumstances surrounding the murder of the victim supported Defendant's second degree murder conviction. Cheatham, 104 Nev. at 506. The Court specifically ruled that "a chain of events showing the constant association of [the defendant] and the accomplices throughout the day the crime was committed" proved to be sufficient corroborative evidence. Id. This evidence included the defendant's presence with the accomplices before, during and after the commission of the robbery and murder and evidence that the defendant had money on him immediately after the murder. Id. The Court held that all of the evidence taken together was " supplementary to that already given and tend[ed] to strengthen or confirm it." Id. quoting Black's Law Dictionary 311 (5th ed. 1979).

In the present case, the jury heard evidence that Defendant was present with accomplices Jeremiah, Tommie and Jotee on the evening of the murder. (RT III, pp. 79-95; RT V, pp. 88-89, 120-122). The State then presented evidence that Defendant admitted to the murder to Crystal and that he would attempt to make it look like another gang had committed the murder. (RT IV, pp. 43-44, 46). In fact, Crystal told the jury that Defendant had explained to her how he and the three (3) accomplices lured Michael out into the desert under the pretext of going shooting and that after Defendant shot Michael, he was advised and encouraged by his accomplices to retrieve the shells casings because the police might find fingerprint evidence on them. (RT IV, pp. 43-44). Furthermore, the jury heard evidence that Defendant, without suggestion or provocation by Metro, led the police back to his home where the 9mm murder weapon was recovered. (RT IV, pp. 151-153). Lastly, the State presented evidence that while Defendant was in custody at CCDC, he admitted that he had killed Michael because Michael was trying to "take over his stripes" and because "the rest of the hommies wanted him dead." (RT V, pp. 211-213). Therefore, Defendant's claim that there was insufficient independent corroborative evidence to support his convictions is belied and repelled by the record in view of this Court's holding in Cheatham.

III.

THE TRIAL COURT PROPERLY DID NOT INSTRUCT THE JURY REGARDING ACCOMPLICE TESTIMONY

Defendant's third assertion is that the trial court committed reversible error by failing to give the jury an instruction regarding accomplice testimony. However, because he neglected to raise this at trial, Defendant cannot now raise this issue on appeal. See generally Pray v. State, 114 Nev. 455, 959 P.2d 530 (1998); Quillen v. State, 112 Nev. 1369, 929 P.2d 893 (1996); Klein v. State, 105 Nev. 880, 784 P.2d 970 (1989); Pellegrini v. State, 104 Nev. 625, 764 P.2d 484 (1988).

Notwithstanding that flaw in his argument, Defendant still should not prevail as he has misapplied the appropriate case law based on the evidence presented to the jury. As argued above, the jury received a substantial amount of independent corroborative evidence that supported Defendant's convictions. Accordingly, the trial court was not required to give a cautionary instruction regarding accomplice testimony. This Court has previously held that:

> [t]he granting of an instruction such as the one now in question *is required only when an accomplice's testimony is uncorroborated.* Buckley v. State, 95 Nev. 602, 600 P.2d 227 (1979). The Buckley case indicates that a cautionary instruction is "favored" even when the testimony is corroborated in "critical respects" *but that the failure to grant it may not constitute reversible error.* This is especially true when the jury was instructed that it had the duty of weighing the witness' credibility, where there is substantial evidence of guilt and where the witness' motive and possible bias had been explored through cross-examination.

Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986)(Emphasis added). The jury was made well aware of the motives and biases that Jeremiah, Tommie and Jotee had in testifying against Defendant when defense counsel vigorously cross examined each accomplice. (RT III, pp. 122-150; RT V, 91-115, 128-140).

Furthermore, Defendant's reliance upon the dicta of Acuna does not accurately represent that concurring opinion. While he acknowledged the reliability concerns of accomplice testimony relevant to informant testimony, Justice Rose never opined that

a trial court "must" give a specific jury instruction that "calls attention to the character of the testimony of the informer." (Appellant's Opening Brief, p. 19). As such, Defendant's argument that his conviction should be reversed because of a missing accomplice instruction to the jury is without merit.

IV.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON "WILLFULNESS, DELIBERATION AND PREMEDITATION"

Defendant's next argument is that the trial court incorrectly instructed the jury regarding "willfulness, deliberation and premeditation." Although he accurately points out that this jury instruction has recently been revised by the Nevada Supreme Court, Defendant fails to recognize that the new jury instructions regarding these elements of murder are to be applied prospectively and not retroactively and that a review of the facts of this case would show that the evidence would have sustained a first degree murder conviction even under the new jury instructions for murder.

In Byford v. State, 116 Nev. ___, 994 P.2d 700 (2000), this Court reviewed the long standing instruction for "willfulness, deliberation and premeditation" as set forth in Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). Of particular note is that this Court changed the instructions in all cases in the future. At the time that the trial court in the instant case gave the murder instructions, the premeditation instruction was clearly good law. Moreover, the Court recognized that it had expressly informed the district courts in prior opinions that the Kazalyn instruction was proper. Byford, 994 P.2d at 713. Therefore, the trial court's reliance on the express holdings of this Court cannot be viewed as plain error.

In addition, the Court's new instruction is not retroactive as indicated by the language of the opinion itself:

> Because deliberation is a distinct element of mens rea for first-degree murder, *we direct the district courts to cease instructing juries* that a killing resulting from premeditation is "willful, deliberate, and premeditated murder." Further, if a jury is instructed separately on the meaning of premeditation, it should also be instructed on the meaning of deliberation.

Id. at 714. (Emphasis added). Furthermore, the Byford decision never held that the Kazalyn instruction was erroneously given, but only that it should not be given in the future and that new instructions are to be used in future cases.

Where a new rule of criminal procedure is not constitutionally based, that new rule is only to apply prospectively. Gier v. Ninth Judicial District Court, 106 Nev. 208, 212, 789 P.2d 1245, 1248 (1990). The new rule announced in Byford is not a constitutional rule. This Court was concerned that the instructions given may have blurred the distinction between first and second degree murder as set forth in the Nevada Revised Statutes. Id. at 712-714. As such, the Court has determined that the statutory definition of deliberate is different from that of premeditated, and giving an instruction defining "premeditated" and not "deliberate" may emphasize one element over another. Id. The Court never stated in Byford that the new rule was based on any constitutional consideration. Therefore, this new "rule" is only based on the Court's concern that the old instructions did "not do full justice to the phrase 'willful, deliberate, and premeditated,'" and set forth new instructions the Court felt would more clearly define the phrase. Id.

The conclusion that Byford should not be held retroactive is supported by the case law underlying the decision. In Byford, the Court heavily relied on State v. Brown, 836 S.W.2d 530 (Tenn. 1992). The Tennessee courts have had repeated opportunities to review the application of Brown and have unanimously determined that the decision is not retroactive. See e.g., State v. Hall, 958 S.W.2d 679 (Tenn. 1997); Harris v. State, 947 S.W.2d 156 (Tenn.Crim.App. 1996); Lofton v. State, 898 S.W.2d 246 (Tenn.Crim.App. 1994). Not only did the Tennessee Supreme Court hold that Brown is not retroactive to post-convictions proceedings, but, additionally, it is not retroactive to direct appeals or motions for new trials. State v. Hall, 958 S.W.2d 679, 711 (Tenn. 1997), cert. denied, Hall v. Tennessee, 524 U.S. 941 (1998)(finding the defendant could not base a motion for a new trial on Brown because Brown was decided two months after the jury verdict).

Tennessee's state rule on retroactivity is similar to that in Nevada. In Tennessee, a new rule which does not implicate a constitutional right is not to be applied retroactively. See State v. Hall, 958 S.W.2d 679, 711 (Tenn. 1997)(citing Meadows v. State, 849 S.W.2d 748, 754 (Tenn. 1993)). The Court then held that the unanimous opinion of the courts that have reviewed the Brown decision have determined that it did not create a constitutional rule, either state or federal. Id. The Court held that the Brown decision did not find the old premeditation instruction had violated a constitutional right, but rather that it would be prudent to abandon the old instruction and give new instructions because of the potential for confusion (the same ruling that was made by this Court in Byford.) Hall, 958 S.W.2d at 711 (citing Lofton, 898 S.W.2d at 249-50). Tennessee's determination that it did not create a new constitutional rule was concurred with by the United State's Court of Appeals Sixth Circuit. Houston v. Dutton, 50 F.3d 381, 384 (6th Cir.1995).

As such, there is no authority for the proposition that Byford should be held to apply retroactively. For over a century, first degree murder in Nevada has been defined as murder which is willful, premeditated and deliberate. See State v. Wong Fun, 22 Nev. 336, 341, 40 P. 95, 96 (1895). In the intervening time, that definition has not changed. Id. at 713-714. The only difference is the manner in which the jury is to be instructed. Moreover, instructions defining deliberation and premeditation are not even required because they mean nothing "other than in their ordinary sense." Id. at n. 3 (quoting Ogden v. State, 96 Nev. 258, 263, 607 P.2d 576, 579 (1980)). As such, any change in instructions is a state law decision not implicating the Constitution. Houston v. Dutton, 50 F.3d 381, 384 (6th Cir.1995). Therefore, Byford is not to be retroactively applied, and Defendant's argument that the trial court committed reversible fails.

Alternatively, the facts of this case would nonetheless meet the requirements of the revised jury instructions announced in Byford. In Byford, this Court specifically delineated three (3) separate definitions for willfulness, deliberation and premeditation.

Byford, 994 P.2d at 714. The Court succinctly held that willfulness simply is the intent to kill with no "appreciable space of time between formation of the intent and the act of killing." Id. Clearly Defendant willfully murdered Michael as evidenced by the prior discussions Defendant had one (1) month earlier to kill Michael and by the execution style in which the homicide occurred. (RT III, pp. 76-78, 100-103).

Regarding deliberation, this Court focused upon a defendant's thought process in "weighing the reasons for and against the action and considering the consequences of the action." Byford, 994 P.2d at 714. The Court highlighted that the deliberate determination must not result from passion or "rash impulse." Id. In this case, Defendant obviously had formed the deliberate intention of his actions in light of a variety of facts. First, Defendant ordered Jeremiah to pick up Michael so that they may take him to the desert and kill him (RT III, pp. 80-81). Next, Defendant entered Jeremiah's car and rode to the desert as the only person armed with a gun. (RT III, pp. 91-94). Finally, after having shot Michael twice in the neck/back area, Defendant got out of Jeremiah's car and shot him a third time in the head. (RT III, pp. 101-107). None of those facts could be interpreted in any other way than Defendant taking deliberate steps to murder Michael.

For premeditation, this Court emphasized the necessary design or determination to kill to substantiate this element of first degree murder. Byford, 994 P.2d at 714-715. Undoubtedly, the State presented overwhelming evidence that the murder of Michael was premeditated. Defendant held a meeting with other gang members one (1) month prior to the shooting. (RT III, pp. 76-78). The "plan" concocted to murder Michael included the ruse of going to the desert to shoot guns and smoke "weed," but no one but Defendant had a gun and no one had any "weed." (RT III, pp. 91-94). In the desert, Defendant got Jeremiah to position his car closer to the edge of the wash presumably so that he would have an illuminated view as he shot Michael. (RT III, pp. 97-99). Furthermore, Defendant approached Michael from behind to shoot him so that Michael would have no way of knowing he was about to be murdered. (RT III, pp.

100-103). Certainly, these facts illustrate Defendant's scheme to execute Michael in a precise fashion.

Additionally the facts of this murder are strikingly similar to those of the Byford case in which this Court found "evidence...clearly sufficient to establish deliberation and premeditation." Byford, 994 p.2d at 712. In Byford, as in this case, there had been previous talk of killing the victim. Id. Moreover, the defendants in Byford first shot the victim "in the absence of any provocation, confrontation, or stressful circumstances of any kind" and then shot the victim again as she "helpless on the ground." Id. at 712-713. In the present case, Defendant shot Michael twice before he got out of Jeremiah's car to finish him off with a third shot to the head. There can be no clearer evidence than this of Defendant's deliberate determination and premeditated plan to murder Michael. Thus, even though the trial court did not give the new jury instruction required by Byford for first degree murder cases, the error was harmless at best in light of the hauntingly similar facts.

V.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL BASED ON THE PROSECUTOR'S OPENING STATEMENT

Defendant's last contention is that the prosecution made inappropriate remarks during the opening statement including the alleged display of a three (3) page document written by Defendant. Defendant further alleges that the prosecutor made these comments contrary to the trial court's instruction. However, a review of the record illustrates that the trial court had not yet ruled on the admissibility of the document and the prosecutor never did present the document to the jury.

During the opening statement, the prosecutor referenced a letter Defendant had written that was to be a script for a potential defense witness. (RT II, pp. 189-191). The prosecutor never mentioned anything about intimidation nor any other acts by Defendant that would constitute prior bad acts. Defense counsel objected at the time the statement was made, but the trial court correctly overruled the objections. (RT II,

pp. 190, 199-205). The trial court astutely noted that a ruling had not yet been made and that both the prosecutor and defense counsel were free to tell the jury what they believed the evidence would be at trial. (RT II, p. 203). Furthermore, the prosecutor stated that in fact he had not shown the jury the actual letter, but was using his trial notes as a prop. (RT II, p. 204).

Nevertheless, assuming that the statement was an inappropriate remark, prosecutorial misconduct is harmless error when there is overwhelming evidence of guilt presented to the jury. Jones v. State, 107 Nev. 632, 817 P.2d 1179 (1991)("[T]his court will not reverse a verdict on the basis of prosecutorial misconduct when the defendant failed to object, there was overwhelming evidence of guilt, and the offensive remarks did not contribute to the verdict."); Barron v. State, 105 Nev. 767, 783 P.2d 444 (1989); Snow v. State, 101 Nev. 439, 705 P.2d 632 (1985).

The harmless error test is whether there is a reasonable possibility for a more favorable result absent the alleged error. Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991). In this case, the evidence of Defendant's guilt was clear. Even if the prosecutor never made the statements complained of, it is reasonably probable that the result would have been the same. Thus, if there was prosecutorial misconduct in this case, which the State contends there was not, it was harmless error, and would not justify reversal.

Defendant's attack on his conviction because of comments made by the prosecutor during the opening statement is without merit, and the conviction should be upheld.

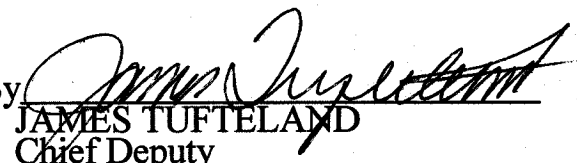
CONCLUSION

In the final analysis, the Defendant's appeal should be denied. Defendant fails to set forth any viable bases for overturning a valid conviction under the current law.

Thus, the State respectfully requests this Honorable Court DENY the Defendant's appeal.

Dated this 22nd day of May, 2000.

STEWART L. BELL
Clark County District Attorney
Nevada Bar No. 000477

By 
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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 22nd day of May, 2000.

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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 this 22nd day of May, 2000.

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