IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TERRENCE KARYIAN BOWSER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71516

ORDER OF AFFIRMANCE

Terrence Karyian Bowser appeals from a judgment of conviction, pursuant to a jury verdict, of voluntary manslaughter with use of a deadly weapon, discharging a firearm out of motor vehicle, and discharging a firearm at or into a structure, vehicle, aircraft, or watercraft. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Bowser was driving a car when his passenger fired three shotgun blasts into a car driving in the adjacent lane. The driver of that car was hit and later died from his wounds. A jury convicted Bowser on six counts, but the convictions were reversed on appeal. During a re-trial, the jury convicted Bowser of three of the six counts originally charged.[1] This appeal followed.

Bowser contends that the district court erred by: (1) denying his *Batson* challenge to three jurors; (2) denying his request to redact an interrogation tape recording to remove references to statements made by a co-defendant; (3) refusing to remove a sleeping juror; (4) refusing to admit evidence of the toxicology report of the victim; (5) refusing to modify the State's proffered "mere presence" jury instruction; (6) addressing a jury

[1]We do not recount the facts except as necessary to our disposition.

question in the absence of Bowser and one of his attorneys; and (7) denying his motion for a mistrial based on prosecutorial misconduct during closing arguments. He also argues that the sentences imposed by the court for two of his convictions after his retrial violated the Double Jeopardy Clause and that cumulative error warrants reversal. We disagree.

First, the district court did not abuse its discretion in denying Bowser's challenges to three jurors under *Batson v. Kentucky*, 476 U.S. 79 (1986). The State offered sufficient race-neutral reasons for striking all three jurors, and the court did not abuse its discretion in finding that the State's strikes were not improperly motivated. *Hawkins v. State*, 127 Nev. 575, 577, 256 P.3d 965, 966 (2011) (noting that deference is given to a district court's *Batson* decisions); *Diomampo v. State*, 124 Nev. 414, 422, 185 P.3d 1031, 1036 (2008) ("The race-neutral explanation 'is not a reason that makes sense, but a reason that does not deny equal protection.'" (citation omitted)).

Second, no error occurred when the district court denied Bowser's request to remove a juror he claimed to have been asleep during the trial. The district court questioned the juror on the record and found the juror to be credible when he told the court that he had not been asleep but had only closed his eyes to concentrate. Given this finding and given that the district court did not observe any other evidence indicating that the juror had been sleeping, it did not abuse its discretion in refusing to remove the juror. *See Burnside v. State*, 131 Nev. ___, ___, 352 P.3d 627, 638-39 (2015), *reh'g denied* (Oct. 22, 2015), *cert. denied*, 136 S. Ct. 1466 (2016) (upholding district court's decision not to investigate or remove a juror alleged to be asleep because the district court explained that it had been watching the jurors and had not seen any sleeping).

Third, Bowser argues that the district court erred in denying his request to admit the victim's toxicology report showing the victim's blood contained trace amounts of methamphetamine, but not its counterpart, amphetamine. Bowser asserts that this discrepancy potentially indicated that the results were a false positive. Below and on appeal, Bowser attempts to prevail in this argument from three different angles. First, Bowser claims the report was admissible because it was relevant to uncover the police officer's bias in investigating the case. Second, he argues the report was admissible because it was relevant to support his theory of self-defense—if the victim was on methamphetamine, the victim may have been more likely to engage in a road rage incident—and it was a business record exception to the hearsay rule. Third, Bowser argues that the report should have been admitted under the doctrine of curative admissibility.

As an initial observation, any error in excluding the toxicology report was harmless and can be disregarded, *see* NRS 177.255, since the jury heard the same evidence contained in the report from another witness (the detective) who testified on cross-examination that methamphetamine was found in the victim's body. Consequently, the district court could have excluded the toxicology report as cumulative to other evidence.

Furthermore, any evidence must be relevant to be admitted. NRS 48.025. Although a defendant has a due-process right to introduce evidence to prove its theory of the case, that right is limited by the rules of evidence. *Rose v. State*, 123 Nev. 194, 205 n.18, 163 P.3d 408, 416 (2007) ("Having considered the record, we conclude that the district court did not abuse its discretion in concluding that to the extent that [the defendant's] proffered evidence was relevant, it was inadmissible as it would unduly confuse the issues or mislead the jury."). One such rule is that relevant

evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues or misleading the jury. NRS 48.035(2). Thus, even if the report were probative toward Bowser's defense, a district court nonetheless has discretion to exclude it under NRS 48.035. *Crowley v. State*, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004) ("Trial courts have considerable discretion in determining the relevance and admissibility of evidence." (citation omitted)).

While the toxicology report may have supported Bowser's defense theories, the district court did not abuse its discretion in excluding the evidence: the court had reasonable concerns with the reliability of the results, it reasonably believed that admitting the report could give the jury an incorrect impression about whether the victim was under the influence of methamphetamine, and it determined that admitting the report without the aid of expert testimony would require the jury to draw its own conclusions as to the effects of methamphetamine. *See Lucas v. State*, 96 Nev. 428, 432, 610 P.2d 727, 730 (1980) (holding district court did not abuse its discretion when balancing between probative value and prejudicial impact).

Nevertheless, even if the report would have otherwise been admissible under NRS 48.035, it was properly excluded because it constituted inadmissible hearsay: it was an out of court statement offered to prove the truth of the matter asserted, namely, that the victim had methamphetamine in his system.[2] NRS 51.035 (defining hearsay as an out

[2]To the extent that Bowser argues the toxicology report is not hearsay because he introduced it to show police bias in the investigation, we note that Bowser made conflicting statements to law enforcement regarding road rage during the investigation, and at that time, the officer did not know the

of court statement offered to prove the truth of the matter asserted). Furthermore, it failed to meet the "business records" exception to the hearsay rule when both Bowser and the State recognized that it might have been a false positive rather than an accurate result. Thus, the district court did not abuse its discretion in concluding that the contents of the report evinced a lack of trustworthiness required of a "business record." NRS 51.135 ("A memorandum, report . . . in any form, of . . . opinions or diagnoses, . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.").

Bowser next argues that the report should have been admitted because the State opened the door to its admission. However, the record indicates that the State did not introduce the evidence or open the door to it, but rather that Bowser himself elicited the testimony regarding the report. *Taylor v. State*, 109 Nev. 849, 860, 858 P.2d 843, 850 (1993) ("Under the rule of curative admissibility, or the 'opening the door' doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission." (quoting *United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988)); *see also State v. Hemby*, 63 S.W.3d 265, 269 (Mo. Ct. App. S.D. 2001) (stating doctrine but holding it inapplicable because "[t]he state did not introduce or elicit inadmissible evidence").

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results of the toxicology examination. The district court did not determine whether the report was hearsay, but did not abuse its discretion in finding the report to be more prejudicial than probative, justifying its exclusion from the trial.

Fourth, the district court did not abuse its discretion in giving the State's proffered "mere presence" jury instruction. The instruction given was an accurate statement of law, and Bowser failed to provide any authority to show that the instruction was improper. *Walker v. State*, 113 Nev. 853, 869, 944 P.2d 762, 772 (1997) ("It is not error not to give the defendant's proposed instruction on "mere presence" when the actual instruction adequately covers the law."); *Robertson v. Sheriff*, 85 Nev. 681, 683, 462 P.2d 528, 529 (1969) (stating the rule the jury instruction here was derived from).

Fifth, no error occurred when the district court conferred with one of Bowser's attorneys and the State to discuss a note from the jury. Bowser's counsel waived Bowser's presence, and counsel actively participated in crafting the answer to the jury's question. *See* NRS 175.451 (providing that if the jury seeks any information after retiring for deliberation, "the information requested shall be given in the presence of, or after notice to, the district attorney and the defendant *or* the defendant's counsel" (emphasis added)); *Manning v. State*, 131 Nev. ___, ___, 348 P.3d 1015, 1018 (2015), *reh'g denied* (Sept. 25, 2015), *reconsideration en banc denied* (Nov. 6, 2015) (holding a trial court violates a defendant's due process rights when it fails to notify and confer with the parties after receiving a jury note).

Sixth, Bowser argues that the district court improperly admitted references to Bowser's co-defendant from a recording of Bowser's statement to detectives that was played for the jury. At trial, Bowser argued the court erred in admitting the statements because they were inadmissible hearsay. However, although the court did not specifically rule on whether the statements were hearsay, it did not abuse its discretion

denying the redactions because the statements were being offered to provide context to Bowser's answers during the interview, and the court gave a limiting instruction prior to the statement being played. *Wallach v. State*, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990) ("A statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as non-hearsay."). Moreover, we conclude that the statements in question were not offered for the truth of the matter asserted and therefore were not hearsay.[3]

Seventh, the refusal to order a mistrial based upon prosecutorial misconduct was not an abuse of discretion. Bowser argues that the prosecutors committed misconduct during closing argument. Although some of the statements made by the State during its closing were not improper, the State committed misconduct when it referred to Bowser as an "animal," and when it disparaged defense counsel's personal beliefs. *See* Jones v. State, 113 Nev. 454, 469, 937 P.2d 55, 65 (1997) (concluding that likening the defendant to a rabid animal was prosecutorial misconduct). Nonetheless, reversal is not warranted because the judge sustained the objections and advised the jury not to consider counsel's statements as evidence. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (determining prosecutor's reference to a "man hunt" was improper but harmless because while a prosecutor may not blatantly attempt to inflame a jury, the statement did not affect the defendant's

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[3]Bowser argues that admission of the statements violated his rights under the Sixth Amendment Confrontation Clause. But because we conclude that statements were not hearsay, the Confrontation Clause is not implicated. *See Crawford v. Washington*, 541 U.S. 36, 60 n. 9 (2004).

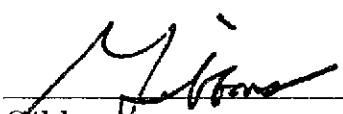
rights). And even assuming error, Bowser fails to demonstrate the improper conduct warrants reversal. *Id.* at 1192, 196 P.3d at 478 ("Although the [prosecutor's] comment was improper, we conclude that there was no prejudice because the district court sustained [the defendant's] objection and instructed the jury to disregard the comment."). Therefore, the district court did not abuse its discretion in denying Bowser's motion for a mistrial.

Eighth, Bowser argues that the sentence imposed after his retrial violates the Double Jeopardy clause because the reasons for the district court's increased sentence for counts 4 and 6 do not affirmatively appear in the record. *Holbrook v. State*, 90 Nev. 95, 518 P.2d 1242 (1974) ("whenever a more severe sentence is imposed after a new trial the reasons for doing so must affirmatively appear"). It is the appellant's responsibility to provide this court with an adequate appellate record. *Greene*, 96 Nev. at 558, 612 P.2d at 688 ("The burden to make a proper appellate record rests on appellant."); *De Santiago-Ortiz v. State*, No. 67424, 2016 WL 699867, at *2 (Nev. Feb. 19, 2016) (denying review of appellant's claim that the district court relied on suspect information in the PSI during sentencing when he failed to include the PSI in the record on appeal). But Bowser fails to present this court with the transcript, PSI, or any other documents related to his first sentencing hearing. He also has not presented this court with the PSI from his retrial sentencing hearing. This court cannot determine whether the reasons for an increased sentence "affirmatively appear on the record" when we lack an adequate appellate record. Therefore, we assume missing portions of the record support the district court's decision, and do not reverse on this basis. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (stating appellant is responsible for making an adequate appellate record, and when "appellant fails to include

necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision"); *see also Thomas v. Hardwick*, 126 Nev. 142, 147, 231 P.3d 1111, 1115 (2010) (discussing an appellant's failure to include the voir dire transcript despite arguing error occurred during voir dire).

Last, although we conclude that some errors occurred, those errors were harmless and the evidence against Bowser is overwhelming. *Rose*, 123 Nev. at 208, 163 P.3d at 417 (noting factors to decide whether there was cumulative error includes: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged" (citation omitted)). Although the third factor tilts in favor of reversal because the crimes are serious in nature, the quantity and the character of the errors tilt more heavily in favor of affirmance. Therefore, Bowser's claim of cumulative error fails. In light of the foregoing reasoning, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons

TAO, J., concurring:

I join the principal opinion, but write separately to further explore the nuances of Bowser's double jeopardy argument.

This is one of those cases in which reasonable minds can disagree on how the controlling legal principle ought to be fairly understood and applied. One U.S. Supreme Court Justice has described the double

jeopardy clause as "one of the least understood" provisions of the Bill of Rights, and the Court has repeatedly acknowledged confusion and inconsistency in its own jurisprudence, colorfully calling it a "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz v. United States*, 450 U.S. 333, 343 (1981); *see* Lissa Griffin, *Untangling Double Jeopardy in Mixed-Verdict Cases*, 63 SMU L. Rev. 1033, 1033-34 (2010) ("In no other area of criminal procedure has the Supreme Court so frequently overruled its own recently created precedent."). Hence, I can't conclude that either my colleague in dissent or my colleague in the majority are wrong. Neither one of them is wrong; it all comes down to how you choose to read existing precedent, either broadly or narrowly, when none involve factual circumstances identical to the case at hand.

I.

In 2007 a jury found Bowser guilty of six felony charges, including murder, and the district judge correspondingly imposed six sentences running concurrently to each other which aggregated to a life sentence with the possibility of parole after serving 40 years. His 2007 conviction was then reversed on appeal and a new trial ordered. At his re-trial in 2015 before a different district judge, Bowser was acquitted of murder and convicted of voluntary manslaughter instead. The 2015 jury also acquitted him of two of the six counts originally charged, convicting him of three. After this second trial, the district judge imposed a combination of three sentences, two running consecutively to each other and one running concurrently with the other two sentences, which aggregated to a total term of thirty years imprisonment with the possibility of parole after serving twelve years.

Bowser argues that the second sentence violates his double jeopardy rights even though the aggregate sentence imposed in 2015 is considerably less than the aggregate sentence originally imposed in 2007. Bowser notes that some of the sentences corresponding to individual counts were longer than the sentences imposed for those same counts in 2007, and some of the sentences were imposed consecutively in 2015 even though all counts were imposed concurrently in 2015. He argues that the second judge cannot impose a sentence on any individual count that is greater than the first judge's sentence on that same count in 2007. He also argues that because the first judge ran all counts concurrently to each other, the second judge must also do so.

Bowser's argument relies upon three Nevada Supreme Court cases, namely, *Wilson v. State*, 123 Nev. 587, 170 P.3d 975 (2007), *Dolby v. State*, 106 Nev. 63, 787 P.2d 388 (1990), and *Holbrook v. State*, 90 Nev. 95, 518 P.2d 1242 (1974). He argues that, under these three cases, his 2015 sentence is unconstitutional. Bowser is not necessarily wrong. As my dissenting colleague notes, those three cases contain language that seems to say exactly that.

Where I disagree with Bowser is on these two points: first, because Nevada expressly follows federal law on questions of double jeopardy, these three cases are not the entire universe of precedent on the question before us; and, second, even taking these three Nevada cases at face value, I disagree with how he interprets what they say about his particular situation.

II.

Nevada's double jeopardy clause provides that "[n]o person shall be subject to be twice put in jeopardy for the same offense." Nev.

Const. art 1, § 8(1). Nevada's double jeopardy clause tracks the language of the double jeopardy clause contained in the Fifth Amendment to the U.S. Constitution, and the Nevada Supreme Court refers to U.S. Supreme Court precedent interpreting the Fifth Amendment as "controlling authority" on how Nevada's clause should be interpreted. *Holbrook*, 90 Nev. at 98, 518 P.2d at 1244 (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969)). In short, Nevada follows federal constitutional law on any double jeopardy challenge.

The double jeopardy clause of the Fifth Amendment is the oldest edict in the Bill of Rights, and traces its origin back to ancient Rome and Greece and is mentioned the Bible. *See* George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 4 Univ. Ill. L. Rev. 827, 836-37 (1988). As publicly understood at the time of ratification, the clause incorporated the English common law principle of *autrefois acquit* ("formerly acquitted") which forbade a defendant acquitted in one court of competent jurisdiction to be coercively prosecuted more than once for the same crime. *See* Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. Rev. 693, 710-12 (1994) (citing 4 William Blackstone, *Commentaries* 336 (1830) and 3 Joseph Story, *Commentaries on the Constitution of the United States* 662 (1833)).

The critical question in most double jeopardy challenges is whether and when "jeopardy" attaches: "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried not punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003). If jeopardy has either not attached or not terminated, then the clause is not triggered and no Constitutional problem arises. Thus, a retrial after a hung

jury does not trigger the double jeopardy clause because jeopardy never attached in the first place when the jury failed to reach a verdict. *Richardson v. United States*, 468 U.S. 317, 324 (1984).

In general, when a criminal conviction is successfully appealed and reversed, jeopardy is not considered to yet terminate because the first trial and the appeal, as well as any second trial required by the appeal, are all considered to be part and parcel of the same prosecution. *Sattazahn*, 537 U.S. at 106 (citing *Stroud v. United States*, 251 U.S. 15 (1919)). One notable exception to the idea that a conviction and appeal arise from a single prosecution that cannot implicate double jeopardy concerns, rather than from separate prosecutions that could, is the principle that a sentencing court cannot impose a harsher sentence upon a defendant after a successful appeal "with the purpose of punishing a successful appeal." *Pearce*, 395 U.S. at 723-25. In some circumstances, judicial vindictiveness may be "presumed." *Id.* When there has been such vindictiveness or vindictiveness is presumed, the second sentence is constitutionally invalid and the defendant must be re-sentenced to something equal to or less than his initial sentence. This exception doesn't appear to arise from the text or original understanding of the double jeopardy clause, but was judicially created in 1969; nonetheless we must follow it under the doctrine of stare decisis. *See Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, J., dissenting) ("The principle of *stare decisis* [is] most often invoked to justify a court's refusal to reconsider its own decisions [but] applies *a fortiori* to enjoin lower courts to follow the decision of a higher court.").

Originally, the "presumption of vindictiveness" appeared to have been intended to apply broadly. *Pearce*, 395 U.S. at 723-25; *Holbrook*, 90 Nev. at 96, 518 P.2d at 1243. But subsequent cases emphasized that the

exception is not broad: it "does not apply in every case where a convicted defendant receives a higher sentence on retrial." *Texas v. McCullough*, 475 U.S. 134, 138 (1986). The evil is not merely the imposition of an enlarged sentence after an appeal or new trial, but rather the "vindictiveness of a sentencing judge." *Id.* To invoke the exception, there must appear a "reasonable likelihood" that the increase in sentence after appeal "is the product of actual vindictiveness on the part of the sentencing authority." *Alabama v. Smith*, 490 U.S. 794, 799 (1989). This is typically a difficult thing to show. For example, "when a greater penalty is imposed after trial than was imposed after a prior guilty plea," the exception does not apply because "the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge." *Id.* at 801. This is so because "[e]ven when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after trial." *Id.*

Similarly, in a two-tiered system in which a defendant is permitted to seek a second trial de novo following a conviction by a first inferior court, the second court is not presumed to act with vindictiveness if it imposes a more severe sentence than the inferior court did, simply because the second trial represents "a completely fresh determination of guilt and innocence by a court that was not being asked to do over what it thought it had already done correctly." *Colten v. Kentucky*, 407 U.S. 104, 117 (1972).

The critical question is whether the second, harsher sentence was imposed solely due to vindictiveness rather than other legitimate sentencing considerations such as newly discovered information since the first sentence, more detailed information about things already known before

the first sentence, or simply a "fresh determination of guilt" by a new jury or new tribunal.

III.

Bowser argues that the district court violated the prohibition against double jeopardy by imposing a harsher sentence for his 2015 convictions than it imposed in his original 2007 judgment of conviction. He argues that the 2015 sentence must be presumed to have been the product of vindictiveness.

But, as noted in the principal opinion, Bowser has failed to provide us with important portions of the record supporting his contentions, such as the pre-sentence investigation report from either of his sentencing hearings that both sentencing judges reviewed. As everyone in the criminal justice system knows, such reports contain critical information about Bowser, including his personal biography and prior criminal history as well as information provided by the victims of his crimes, and they typically play a central role in the sentencing judge's decision. By failing to provide a copy of either the 2007 report or the 2015 report, we have no idea what those reports said, or even whether they contained the same, or entirely different, information. We thus have no basis to "presume" that the 2015 sentencing judge must have acted out of vindictiveness toward Bowser and nothing else. *See United States v. Lincoln*, 581 F.2d 200, 201 (9th Cir. 1978) (determining that increased sentence after retrial was appropriate based only on the judge placing the presentence report in the record without further comment because it showed negative information, like a continued drinking problem and a careless attitude toward probation procedures).

Thus, I agree with and join the principal opinion. But I would go a step further and conclude that, even if copies of the reports had been

provided, and even if they proved to contain identical information, this isn't the kind of case where I would presume vindictiveness. Just about everything related to the 2015 sentencing differed from the 2007 sentencing. A different judge presided over the second trial and imposed the second sentence. The prosecutors in the two trials and two sentencing hearings were different. At least one of Bowser's defense attorneys in 2015 was not his attorney in 2007. The second sentence followed a re-trial in which the prosecutors tried the case differently, Bowser himself mounted an entirely different defense, and his own attorneys presented different arguments to the jury in mitigation of guilt – and successfully so, since the second time around Bowser was totally acquitted of two counts and convicted of voluntary manslaughter instead of murder. The second jury thus convicted him of a different set of crimes that carried with them significantly different permissible sentencing ranges. Indeed, the aggregate sentences imposed in 2015 were considerably shorter than they had been in 2007, with Bowser being eligible for parole after 12 years imprisonment instead of only becoming eligible after 40 years imprisonment under his 2007 sentence. Moreover, the 2015 sentencing judge did not impose the maximum possible sentences for which Bowser was eligible; one would think that a judge operating from pure vindictiveness would have done precisely that.

Under these circumstances, I would conclude that there is simply no reason to presume that the second (notably shorter) sentence must have been the product of judicial vindictiveness rather than simply a reflection of so much about the case being so different on re-trial. There may be cases where we might have reason to suspect a sentencing judge's motives. But this is not one of them.

IV.

Bowser nonetheless argues that a presumption of vindictiveness is mandated by the Nevada Supreme Court decisions in *Dolby, Wilson,* and *Holbrook.* But I don't agree with how he reads those cases.

None of the three cited cases asked whether a court could impose a different or increased sentence following a retrial before a different trial judge, different jury, and different sentencing judge. Rather, *Dolby* involved a sentencing correction initiated sua sponte by the district court, 106 Nev. at 65, 787 P.2d at 389, and *Wilson* involved a resentencing mandated on appeal after the defendant's conviction was partially vacated, 123 Nev. at 589–90, 170 P.3d at 976. In situations like that, the Nevada Supreme Court has held that "when a court is forced to vacate an unlawful sentence on one count, the court may not increase a lawful sentence on a separate count." *Wilson,* 123 Nev. at 594, 170 P.3d at 979 (quoting *Dolby,* 106 Nev. at 65, 787 P.2d at 389). But that holding has nothing to do with Bowser's situation. All of Bowser's sentences were vacated on appeal, and his second trial was very different from his first. Bowser's second sentence followed a "fresh determination of guilt" by a new jury, indeed, a new jury who acquitted him of murder and two other counts.

Holbrook also involved a district court's own sentencing correction: the defendant initially pleaded guilty and was sentenced, but then the district court granted his motion to withdraw his guilty plea and imposed a longer sentence following a jury trial. 90 Nev. at 96, 518 P.2d at 1243. Moreover, the 1974 holding of *Holbrook* appears flatly inconsistent with the later decision in *Alabama v. Smith*, 490 U.S. 794, 799 (1989), which involved parallel facts (a guilty plea that was withdrawn or reversed,

followed by a greater sentence imposed after jury trial) and therefore a serious question exists whether *Holbrook* is still good law or may have been overruled *sub silentio*. Either way, whether still good law or not, *Holbrook* did not involve a reversal on appeal but rather, like *Dolby* and *Wilson*, involved a district court's self-correction of its own actions. *Holbrook* simply doesn't govern Bowser's situation.

Consequently, I would conclude that the sentences imposed by the district court following retrial represented an entirely new set of sentences rather than an unconstitutional increase of an existing lawful sentence for the same crimes. *Cf. Nelson v. State*, no. 65012 (Order of Affirmance, July 21, 2015, 2015 WL 4507715 (Nev. 2015) (unpublished); *Meegan v. State*, 127 Nev. 1159, 373 P.3d 942 (2011) ("... the constitution does not prohibit the possibility of appellant receiving a greater sentence of life without the possibility of parole upon reconviction."). Nothing in *Dolby, Wilson,* and *Holbrook* prohibit what the district court did here. I would conclude the 2015 sentence was constitutionally permitted quite simply because it was not constitutionally barred by anything in the text of the Constitution or by any judicial precedent to which we must adhere under principles of stare decisis.

V.

Like everything else in the Bill of Rights, the touchstone of the double jeopardy clause is the protection of individual liberty from government oppression. The difficulty inherent in the clause is that it strives to balance three competing interests: the state's interest in prosecuting crime, the defendant's right to be free of repetitive and harassing multiple prosecutions for the same conduct, and society's interest in the finality of criminal prosecutions.

But the ultimate evil targeted by the clause is one that isn't implicated here: the depredations of a Javert-like prosecutor malevolently bringing the coercive power of the state to bear on a hapless citizen over and over again out of a desire for revenge rather than a sense of justice. *See* Victor Hugo, *Les Miserables* (1862). The harm target by the *Pearce* exception was something similar: the arbitrary power of a judge to punish a defendant for embarrassing him through successful motions and appeals. It's hard to see how Bowser's sentence implicates anything like this in the remotest sense. I would therefore affirm his conviction for all of the reasons set forth in the principal order, and would also conclude that his 2015 sentence did not violate the double jeopardy clause.

_____, J.
Tao

SILVER, C.J., concurring in part and dissenting in part:

I agree with the majority regarding most of the issues raised on appeal, but write separately on two issues.

First, I believe the district court abused its discretion by precluding Bowser from presenting in his case-in-chief the deceased victim's toxicology report, which showed the victim had methamphetamine in his body at the time of his death. This evidence was relevant; the custodian of records of the toxicology lab had been actually noticed and witnessed as a State's witness ten years before; and even if the State believed that the presence of methamphetamine was a false positive, the weight to be given to that evidence should have been decided by the jury. In fact here, the State was not prejudiced by the report as it could have easily presented the coroner's prior testimony from the first trial in its rebuttal case to contest

the defense's claim of a road-rage incident. And most importantly, we can see from the verdict in the second trial that this evidence was obviously relevant and probative because the jury in the second trial found Bowser guilty of the lesser charge of voluntary manslaughter instead of first-degree murder.

Nevertheless, because Bowser's attorney cleverly provided the jury with this evidence through cross-examination of the detective, and later emphasized in closing argument that the victim had methamphetamine in his system during a road-rage incident, I believe the error was harmless under these facts. I am not convinced, as the majority is, that just because the defense theory shifted from the first trial to the second, that somehow this evidence should have been excluded, particularly as the evidence had little, *if any*, prejudicial effect on the State's case under these facts.

Next, I believe this court is constrained to remand this matter back to the district court to resentence Bowser on the remaining two counts involving Discharging Firearm Out of Motor Vehicle and Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft. I readily acknowledge that a different district court judge presided over the second trial, which occurred approximately 10 years later, and that the record is devoid of any vindictiveness on the part of the district judge at sentencing. Here, Bowser was prosecuted a second time for the same six counts that he was tried for in the first trial. But, unlike the first trial, the prosecution was only successful in convicting Bowser of three of the six charges, and the jury found him guilty of the lesser charge of voluntary manslaughter. At the second sentencing hearing, the district court not only sentenced Bowser to an increased sentence on the remaining two counts, the judge also ran

the two sentences consecutive as opposed to concurrent—completely different from the first sentencing hearing.

The reasons for the increased sentences and consecutive time do not affirmatively appear in the record in this case, nor does the record "show identifiable conduct by the defendant occurring *after the original sentence* which would justify a more severe sentence." *Holbrook v. State*, 90 Nev. 95, 98, 518 P.2d 1242, 1244 (1974) (emphasis added). Because the district court failed to make a record of the reasons it pronounced a greater sentence or for imposing consecutive sentences at the second sentencing hearing, I believe that this court is constrained to reverse the district court and remand with instructions to resentence Bowser in conformance with established Nevada jurisprudence regarding the law of double jeopardy. *See Wilson v. State*, 123 Nev. 587, 170 P.3d 975 (2007).

Silver, C.J.
Silver

cc: Hon. Elissa F. Cadish, District Judge
Resch Law, PLLC d/b/a Conviction Solutions
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk