

ORIGINAL

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CLERK OF SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICK M. BROWN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT NO. 47856

CASE NO. C189658
DEPT NO. XIV

FILED

APR 17 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Ruben*
CHIEF DEPUTY CLERK

APPELLANT'S FAST TRACK STATEMENT APPEAL FROM JUDGMENT OF
CONVICTION

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ATTORNEYS FOR RESPONDENT

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FAST TRACK OPENING

1. Name of party filing this fast track statement:

ERICK M. BROWN, Defendant below and Appellant.

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:

Michael V. Cristalli, Esq., Cristalli & Saggese Ltd., 732 S. Sixth Street, Suite 100, Las Vegas, Nevada 89101 Phone: (702) 386-2180.

3. Name, Law Firm, Address, and Telephone number of Appellate Counsel if different from trial counsel:

Same counsel.

4. Judicial District, County and District Court Docket Number of lower Court proceedings:

Eighth Judicial District Court, Clark County, Nevada, Department XIV, Case No: C189658.

5. Name of Judge issuing decision, judgment, or order appealed from:

The Honorable Judge Donald M. Mosley.

6. Length of trial. If this action proceeded to trial in the District Court, how many days did the trial last?

June 26, 2006-June 30, 2006.

7. Conviction(s) appealed from:

Judgement of Conviction entered on August 16, 2006, before the Honorable Judge Donald M. Mosley.

8. Sentence for each Count:

Count 1 (Burglary while in possession of a firearm)-a maximum term of 120 months with a minimum parole eligibility of 26 months; Count 2 (first degree

1 kidnapping with use of a deadly weapon victim 65 years of age or older resulting
2 in substantial bodily harm)-a maximum term of 40 years with a minimum parole
3 eligibility after 15 years plus an equal and consecutive maximum term of 40
4 years with a minimum parole eligibility after 15 years for victim over 65 years of
5 age or older to run concurrent with count 1, and; Count 3 (first degree
6 kidnapping with use of a deadly weapon resulting in substantial bodily harm)-a
7 maximum term of 40 years with a minimum parole eligibility after 15 years plus
8 an equal and consecutive maximum term of 40 years with a minimum parole
9 eligibility after 15 years for the deadly weapon enhancement to run consecutive
10 to count 2 and pay \$143,327 restitution and; Count 4 (robbery with use of a
11 deadly weapon victim 65 years of age)-a maximum term of 120 months with a
12 minimum parole eligibility of 26 months plus an equal and consecutive maximum
13 term of 120 months with a minimum parole eligibility of 26 months for victim 65
14 years of age or older, to run concurrent with count 3; and Count 5 (robbery with
15 use of a deadly weapon)-a maximum term of 120 months with a minimum parole
16 eligibility of 26 months, and plus an equal and consecutive term of 120 months
17 with a minimum parole eligibility of 26 months for use of a deadly weapon, to run
18 concurrent with count 4, with 1,349 days credit for time served.

19 **9. Date District Court announced decision, sentence or order**
20 **appealed from:**

21 August 8, 2006.

22 **10. Date of entry of written judgment or order appealed from:**
23 Judgment of conviction entered on August 16, 2006.

24 **(A) If no written judgment or order was filed in District Court,**
25 **explain the basis of seeking appellate review.**

26 N/A

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1 **11. If this Appeal is from an order granting or denying a petition for**
2 **a writ of habeas corpus, indicate the date written notice of entry of**
3 **judgment or order was served by the court:**

4 N/A

5 **(A) Specify whether service was by delivery or by mail:**

6 N/A

7 **12. If the time for filing the notice of appeal was tolled by a post-**
8 **judgment motion; N/A**

9 **(A) Specify the type of motion, and the date filing of the motion,**
10 **and; N/A**

11 **(b) Date of entry of written order resolving motion**

12 N/A

13 **13. Date notice of appeal was filed:**

14 August 11, 2006.

15 **14. Specify statute, rule governing the limit for filing the notice of**
16 **appeal:**

17 NRAP 3C.

18 **15. Specify statute, rule or other authority which grants this court**
19 **jurisdiction to review the judgment or order appealed from:**

20 NRAP 3B; NRS 177.015-177.305.

21 **16. Specify the nature of disposition below:**

22 Appeal from judgment of conviction.

23 **17. Pending and prior proceedings in this Court. List the case**
24 **name and docket number of all appeals or original proceedings presently**
25 **or previously pending before this court which are related to this appeal:**

26 None.

1 **18. Pending and prior proceedings in other Courts. List the case**
2 **name, number and Court of all proceedings in other Courts which related**
3 **to this appeal:**

4 None.

5 **19. Proceedings raising same issues. List the case name and**
6 **docket number of all appeals or original proceedings presently pending**
7 **before this Court, of which you are aware, which raise the same issues you**
8 **intend to raise in this appeal:**

9 None.

10 **20. Procedural History. Briefly describe the procedural history of**
11 **the case (provide citations for every assertion of fact to the appendix, if**
12 **any or to the rough draft transcript):**

13 Appellant had entered a plea of not guilty to the crimes of Count 1-
14 Burglary while in possession of a firearm (category B felony) in violation of NRS
15 205.060, 193.165; Count 2-First degree kidnapping with use of a deadly
16 weapon, victim 65 years of age or older resulting in substantial bodily harm
17 (category A felony) NRS 200.310, 193.165, 193.167, 0.060; Count 3-First degree
18 kidnapping with use of a deadly weapon resulting in substantial bodily harm
19 (category A felony), NRS 200.310, 193.165, 0.060; Count 4-Robbery with use of
20 a deadly weapon, victim 65 years of age or older (category B felony), NRS
21 200.380, 193.165, 193.167; Count 5-Robbery with use of a deadly weapon
22 (Category B Felony) NRS 200.380, 193.165; and the matter having been tried
23 before a jury and the Appellant having been found guilty of the crimes of Count
24 1-5; the Defendant was present in court for sentencing with his counsel on
25 August 8, 2006, and sentenced as set forth above (see Judgment of Conviction).

26 **21. Statement of facts. Briefly set forth the facts material to the**
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1 **issues on appeal:**

2 On November 23, 2002, two men entered the Las Vegas Manufacturing
3 Jewelers (LVMJ) for the purposes of robbing the facility. The perpetrators, armed
4 with a gun, forced victim Connelly (Connelly) and victim Golsecker (Golsecker) to
5 the floor of the back room. They tied the victims' hands together, using force, and
6 repeatedly asked where money, keys, and surveillance were located. If the
7 victims did not timely respond, the perpetrators continued to use force in order to
8 ascertain the location of money.

9 In order to remove jewelry and monies from the victims' possession, the
10 perpetrators continued to keep the victims bound by their hands, laying on the
11 ground.

12 Blackwell was convicted of the crimes pertaining to the LVMJ incident. The
13 victims were able to give an accurate description of the "shorter" 5'7 perpetrator
14 (Blackwell), and positively identify Blackwell, at a photographic lineup, at the
15 preliminary hearing, and at trial. Blackwell was referred to, at Appellant's trial, as
16 the "shorter" perpetrator.

17 Appellant Brown was tried as being the "taller" perpetrator, though the
18 description given by the victims was inconsistent with Appellant Brown's person,
19 nor could either victim identify Appellant Brown at a photographic lineup, as
20 Blackwell had previously been identified.

21 Connelly described the "taller" perpetrator as being "tall and thin," younger
22 than 25, and with "longer" hair than the shorter perpetrator. Golsecker described
23 the "taller" perpetrator as having a full head of hair. Connelly described the
24 perpetrators as having been identified by the name of "Cal, Dean, Pete, Greg, or
25 Craig." It was not until Connelly saw a subpoena with Appellant Brown's name
26 that he stated recognition of the name "Erick." The victims' description also
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1 included that the "taller" perpetrator had an earring.

2 Appellant Brown was 33 at the time of trial. He had consistently sported a
3 shaven head, and did not wear an earring.

4 Though an identification was later made at the preliminary hearing, both
5 victims admitted that they could not positively identify Appellant Brown when they
6 were shown a 6 pack photographic lineup. Both victims admitted to having only a
7 few seconds of interaction with the "taller" perpetrator (between 5-15 seconds).

8 Though the victims believed fingerprints were "all over," and samples were
9 indeed taken, no latents matched Appellant Brown's fingerprints.

10 Appellant Brown took the stand and denied involvement with the incident at
11 LVMJ. Though he was in possession of the victims' property, he stated that he
12 was in receipt of the property only for the purposes of selling the property, and did
13 not personally obtain said property from LVMJ.

14 At Appellant Brown's trial, evidence was brought forth that another
15 individual was also found in possession of stolen property relating to the LVMJ
16 incident. Williams closely matched the victims' description of the "taller"
17 perpetrator, standing at 6'1. (Appellant Brown at 6'5, and Williams at 6'1, are
18 both taller than Blackwell). Williams was known to have sported an earring.
19 Finally, Williams also had a criminal history.

20 The victims' description of the "taller" perpetrator was weaker than the
21 victims' description of Blackwell. Moreover, the victims were unable to identify
22 Appellant Brown at a 6 pack photographic lineup, though they were able to
23 identify Blackwell under these circumstances.

24 The State, for the alleged "purpose" of strengthening the victims' ability to
25 identify, paraded Blackwell before the jury, in front a special agent with the FBI,
26 Aimaro, and asked Aimaro to identify Blackwell as the "shorter" perpetrator.

1 Blackwell did not take the stand, nor did the defense have an opportunity to
2 cross-examine him. The State argued that it was not error to parade Blackwell, a
3 convicted felon, in front of the jury because he was simply a piece of "evidence,"
4 to prove accuracy for identification purposes.

5 Appellant Brown was convicted of the crimes relating to the LVMJ incident,
6 as the "taller" perpetrator.

7 **22. Issues on appeal. State concisely the principal issues(s) in this**
8 **appeal:**

9 1. Whether it was error for Defendant to be convicted of kidnapping
10 charges, as any force used was incidental to the robbery.

11 2. Whether it was error for the State to parade Blackwell before the jury
12 because, even if Blackwell was evidence, for which the Defense did not need
13 cross-examination, the probative value of said evidence was substantially
14 outweighed by its prejudicial effect.

15 3. Whether there was insufficient evidence to convict Defendant of the
16 crimes of which he was charged.

17 **23. Legal argument, including authorities.**

18 **1. It was error for Defendant to be convicted of kidnapping charges, as**
19 **any force used was incidental to the robbery.**

20 To sustain convictions for both robbery and kidnapping arising from the
21 same course of conduct, any movement or restraint must stand alone with
22 independent significance from the act of robbery itself, create a risk of danger to
23 the victim substantially exceeding that necessarily present in the crime of
24 robbery, or involve movement, seizure, or restraint substantially in excess of that
25 necessary to its completion. *Mendoza v. State*, 130 P.3d 176, 181 (Nev. 2006).

26 If movement of victim is incidental to the robbery and does not
27 substantially increase risk of harm over and above that necessarily present in
28

1 the crime of robbery itself, it would be unreasonable to believe that the
2 legislature intended a double punishment; only when movement results in
3 increased danger over and above that present in a crime of robbery, a
4 kidnapping charge may also lie. *Wright v. State*, 581 P.2d 442 (Nev. 1978).

5 In *Mendoza*, Defendant entered Canon's residence with guns, tied him up,
6 looted the premises, and robbed Cannon and his family. *Mendoza*, 130 P.3d at
7 178. An employee of Canon, Avilos, arrived at the scene, and Defendant
8 severely beat and robbed him. The criminal information filed included charges
9 of kidnapping of Canon and Avilos. The Nevada Supreme Court determined
10 that the jury verdict, finding Defendant not guilty of kidnapping Canon, and guilty
11 of kidnapping Avilos, would not be disturbed. *Id.*

12 In *Wright*, three men, including Defendant, entered a motel wherein they
13 told the auditor and clerk to go to the back office. *Wright*, 581 P.2d at 443. The
14 men told the auditor and clerk to lie on the floor, and then taped their hands and
15 feet. The victims were threatened while lying on the floor. The robbers then left.
16 *Id.*

17 On appeal, the Court set aside the kidnapping conviction because the
18 movement appeared to be incidental to the robbery, without an increase in
19 danger to the victims, and the detention was only for a short time necessary to
20 consummate the robbery. *Id.* at 444.

21 In the case *sub judice*, Connelly and Golsecker were forced to the ground,
22 for the purposes of detaining them, so that a robbery could be committed. Their
23 hands were tied behind their back, in order to effectuate the robbery. Though
24 they were physically touched, any touching occurred because the perpetrators
25 were having difficulty with the victims responding to their questions regarding the
26 location of money, and keys. Thus, the force being used was directly for the
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1 purposes of continuing the robbery; the force was incidental to the robbery.

2 The present case is similar to *Mendoza*, where Defendant was not guilty of
3 kidnapping Canon when they tied him up, looted the premises, and robbed him.
4 In the present case, the perpetrators tied up the victims' hands, created disarray
5 at the facility and removed property from the victims' persons, while they were
6 tied up.

7 However, the present case is unlike *Mendoza*, where Defendant was guilty
8 of kidnapping Avilos for severely beating him up and robbing him. In *Mendoza*,
9 Defendant had absolutely no stated reason for severely beating Avilos.
10 However, in the present case, the perpetrators used force against the victims in
11 order to effectuate the robbery; the perpetrators used force to get the victims on
12 the floor and tied their hands so that they could remove property from their
13 persons. They used force when the victims were not responding to their
14 questioning regarding the location of money and keys. Here, any force used
15 was purely for the purposes of effectuating the robbery, and thus any force used,
16 was incidental to the robbery.

17 The present case is also akin to *Wright*, where Defendant's kidnapping
18 conviction was set aside because any force used was incidental to the robbery.
19 In *Wright*, Defendant moved the victims into the back office, got them on the
20 floor, bound their hands and feet, threatened them, and robbed them. In the
21 present case, the perpetrators moved the victims to the back office, got them on
22 the floor, bound their hands, used force against them to determine where money
23 and keys were, and robbed their persons of jewelry and money. Because any
24 force used was in furtherance of the robbery and for the direct purposes of
25 effectuating the robbery, and therefore incidental to the robbery, Appellant's
26 kidnapping conviction should be set aside.

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1 **II. It was error for the State to parade Blackwell before the jury**
2 **because, even if Blackwell was evidence, for which the Defense**
3 **did not need cross-examination, the probative value of said**
4 **evidence was substantially outweighed by its prejudicial effect.**

5 NRS 48.035 states that although relevant, evidence is not admissible if its
6 probative value is substantially outweighed by the danger of unfair prejudice, of
7 confusion of the issues or of misleading the jury.

8 In the case at bar, the victims' description of the "taller" perpetrator was
9 weaker than the victims' description of Blackwell. Moreover, the victims were
10 unable to identify Appellant Brown at a 6 pack photographic lineup, though they
11 were able to identify Blackwell under these circumstances.

12 Thus the State, for the alleged "purpose" of strengthening the victims'
13 ability to identify, paraded Blackwell before the jury, in front a special agent with
14 the FBI, Aimaro, and asked Aimaro to identify Blackwell as the "shorter"
15 perpetrator. Blackwell did not take the stand, nor did the defense have an
16 opportunity to cross-examine him.

17 The State argued that it was not error to parade Blackwell, a convicted
18 felon, in front of the jury because he was simply a piece of "evidence," to prove
19 accuracy for identification purposes. Though its relevance is arguable, what is
20 clear in this case is that the court should not have allowed the State to parade
21 Blackwell, in front of the jury, as he was a convicted felon, who had pled guilty to
22 the crimes regarding the LVMJ incident.

23 Even if displaying Blackwell as a "piece of evidence," was relevant for the
24 purposes of asserting the victims' accuracy for identification purposes, displaying
25 Blackwell, a convicted felon, was substantially more prejudicial to Appellant
26 Brown than any probative value attributed to this display.

27 For the jury to see Blackwell, who had already been convicted of crimes
28 related to the LVMJ incident created the effect of bootstrapping another

1 defendant's criminal conviction with the evidence before the Appellant's jury to
2 improperly bolster their weak identification evidence.

3 The State's action unfairly influenced the jury; the State was essentially
4 demonstrating that one perpetrator had already been successfully, and correctly
5 "put away."

6 To show that one perpetrator charged had already been convicted, at the
7 trial of the alleged second perpetrator created a substantial danger of misleading
8 the jury that again, the State had already been "correct" once before, in a prior
9 proceeding.

10 **III. There is insufficient evidence to convict Appellant of the crimes**
11 **charged.**

12 The standard for reviewing the sufficiency of the evidence is not whether
13 this Court is convinced of the Defendant's guilt beyond a reasonable doubt, but
14 whether the jury, acting reasonably, could have been convinced to that certitude
15 by the evidence it considered. *Rossana v. State*, 113 Nev. 375, 383 (Nev. 1997).
16 Whenever there are no witnesses presented to place the Defendant in the vicinity
17 of the crimes, and no evidence found to connect the Defendant to the crimes,
18 there is insufficient evidence to convict the Defendant of the crimes charged. *Id.*
19 at 384.
20
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22 In the case at bar, the description given by the victims was inconsistent
23 with Appellant Brown's person, in terms of age (he was 33 at the time of trial, and
24 the description stated he was "under 25), and in terms of hairstyle (Appellant
25 Brown kept a shaven head, the victims stated that the "taller" perpetrator had
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1 longer hair than Blackwell). The victims' description stated that the "taller"
2 perpetrator sported an earring. Appellant Brown does not wear an earring.
3 Furthermore, neither victim identify Appellant Brown at a photographic lineup, as
4 Blackwell had previously been identified.
5

6 Connelly described the perpetrators as having been identified by the name
7 of "Cal, Dean, Pete, Greg, or Craig." It was not until Connelly saw a subpoena
8 with Appellant Brown's name that he stated recognition of the name "Erick."
9

10 Though an identification was later made at the preliminary hearing, both
11 victims admitted that they could not positively identify Appellant Brown when they
12 were shown a 6 pack photographic lineup. Both victims admitted to having only a
13 few seconds of interaction with the "taller" perpetrator (between 5-15 seconds).
14

15 Though the victims believed fingerprints were "all over," and samples were
16 indeed taken, no latents matched Appellant Brown's fingerprints.
17

18 At Appellant Brown's trial, evidence was brought forth that another
19 individual was also found in possession of stolen property relating to the LVMJ
20 incident. Williams closely matched the victims' description of the "taller"
21 perpetrator, standing at 6'1. (Appellant Brown at 6'5, and Williams at 6'1, are
22 both taller than Blackwell). Williams was known to have sported an earring,
23 matching the victims' description of the "taller" perpetrator, whereas Appellant
24 Brown did not. Finally, Williams also had a criminal history.
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1 Thus, no witness could positively identify Appellant Brown in a
2 photographic lineup, though they were both able to identify the other perpetrator
3 in a photographic lineup. No witness could give a description consistent with
4 Appellant Brown's person. No evidence was presented to definitively place the
5 Defendant in the vicinity of the crimes. Though he was in receipt of stolen
6 property, there was another individual, Williams, also African-American, in the
7 same age range, "taller" than Blackwell (standing at 6'1, to Blackwell's 5'7 height),
8 and sporting a hairstyle different from Appellant Brown.
9

10 The evidence brought forth at trial was not sufficient to prove, beyond a
11 reasonable doubt, that Appellant Brown was the "taller" perpetrator, and not
12 another individual, such as Williams, who also matched the same description,
13 and was also found in receipt of stolen property.
14

15 **24. Preservation of issues. State concisely how each issue on**
16 **appeal was preserved during trial. If the issue was not preserved, explain**
17 **why this Court should review the issue:**
18

19 Defendant moved, pre-trial, to have the kidnapping charges dismissed.
20 He maintained, throughout the proceedings, that the kidnapping charges were
21 unsupportable.
22

23 Defendant timely objected to the use of Blackwell at trial, and before the
24 jury.
25

26 This Court has held that it must reverse a conviction whenever it
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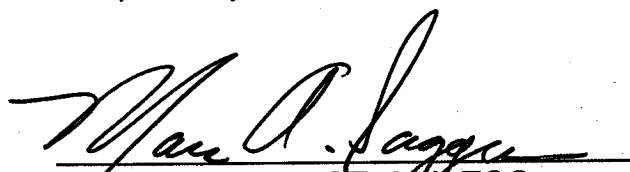
1 determines that a jury, acting reasonably, could not have been convinced of the
2 Defendant's guilt beyond a reasonable doubt. *Rossana v. State*, 113 Nev. 375,
3 383 (Nev. 1997).
4

5 **25. Issues of first impression or of public interest. Does this**
6 **appeal present a substantial legal issue of first impression in this**
7 **jurisdiction or one affecting an important public interest? If so, explain**
8

9 N/A
10

11 DATED this 7 day of March, 2007.
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13

14 Respectfully submitted by:

15 
16

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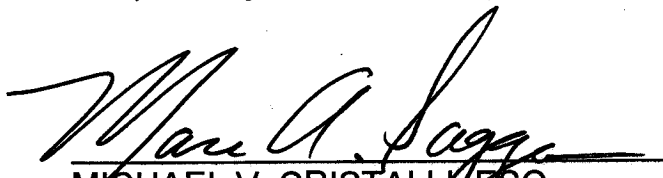
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VERIFICATION

I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with respondent counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 7 day of March, 2007.

Respectfully submitted by:




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DATED this 1 day of March, 2007.

Respectfully submitted by:


MICHAEL V. CRISTALLI, ESQ.

ATTORNEY FOR APPELLANT

1 **CERTIFICATE OF MAILING**

2 I hereby certify that on the 7 day of March, 2007, I deposited a copy
3
4 of the Appellant's FAST TRACK APPEAL in the United States Mail, in a sealed
5 envelope with postage fully pre-paid, addressed to:
6

7
8 DAVID ROGER, ESQ.
9 DEPUTY DISTRICT ATTORNEY
10 200 South Third Street
Las Vegas, Nevada 89155
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11 CATHERINE CORTEZ MASTO, ESQ.
12 NEVADA ATTORNEY GENERAL
13 Criminal Justice Division
14 100 N. Carson
Carson City, Nevada 89701

15 and that there is regular communication between the place(s) so addressed and
16 the place(s) of mailing.
17

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19 
20 An employee of CRISTALLI & SAGGESE, LTD.
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