IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDDY A. MARTINEZ, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 49608

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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ISSUES PRESENTED FOR REVIEW

I. MR. MARTINEZ CANNOT BE CONVICTED OF TWO CRIMES FOR A SINGLE TRANSACTION.

II. DURING CLOSING ARGUMENTS, THE PROSECUTION COMMITTED MISCONDUCT BY IMPROPERLY DENIGRATING A DEFENSE THEORY, WHICH DEPRIVED APPELLANT OF HIS RIGHTS UNDER STATE AND FEDERAL LAW AS WELL AS THE NEVADA AND UNITED STATES CONSTITUTIONS.

III. THERE WAS INSUFFICIENT EVIDENCE PRODUCED AT TRIAL TO SUSTAIN THE KIDNAPPING CONVICTION AGAINST FREDDY MARTINEZ.

STATEMENT OF THE CASE

The Judgment of Conviction in this case, filed March 31, 2007, reflects that Freddy Martinez was convicted by a jury of: Count I – Burglary while in Possession of a Weapon; Count II – Battery with the use of a Deadly Weapon; Count III – First Degree Kidnapping with use of a Deadly Weapon; and Count IV – Found Not Guilty.

This case was initiated when the State filed an Indictment that charged Mr. Martinez with the crimes of Burglary while in Possession of a Deadly Weapon; Battery with Use of a Deadly Weapon; First Degree Kidnapping with use of a Deadly Weapon; and Sexual Assault

with use of a Deadly Weapon. Mr. Martinez was tried in Department VII, before the Honorable Stewart L. Bell.

Pursuant to the jury verdict, Mr. Martinez was sentenced as follows: Count I – To a maximum of one hundred eighty (180) months with a minimum parole eligibility of sixty (60) months; Count II – To a maximum of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months; Count III – To life with the minimum parole eligibility of sixty (60) months, plus an equal and consecutive term of life with the minimum parole eligibility of sixty (60) months for the use of a Deadly Weapon; Counts I, II, and III to run concurrent. Mr. Martinez was given two hundred eighty-one (281) days credit for time served.

STATEMENT OF THE FACTS

On the morning of August 16, 2006, Freddy Martinez showed up at the home that Bianca Hernandez shared with Jose Quiroz-Castillo and her son, 16-year-old Franklin Martinez. (Vol. I – p. 71)

Bianca Hernandez had been involved with Freddy Martinez's older brother David. The relationship had been long term. (Their relationship appeared to be a common law marriage.) In fact, David was the father of Bianca's son Franklin. (Vol. I – p. 68)

Freddy had lived with Bianca and David when they were together. He continued to live with Bianca and Franklin after David moved out. After David moved out, Freddy and Bianca lived together in a mobile home on Lake Mead Boulevard for nearly three years. (Vol. I – p. 69) (The nature of their relationship was unclear. Freddy told the police that he and Bianca had an intimate relationship. Bianca denied that.)

At some point, Jose Quiroz-Castillo came into the picture. He met Bianca Hernandez four years prior to August 2006. (Vol. I – p.57) He became Bianca's boyfriend, even though Bianca continued to live with Freddy in the mobile home. Bianca moved out of the mobile home about four months prior to August 2006 and moved in with Jose Quiroz-Castillo. Jose and

Freddy, both believing they were exclusively involved with Bianca, begin to suspect she was seeing some else. (Vol. I – p. 60)

On the morning of August 16, 2006, Freddy Martinez waited at Bianca's home to confront her and get the truth. Bianca was taking Jose to work and was in her car waiting for him. (Vol. I – p. 73) As Jose came out of the home, he saw Freddy get in the passenger side of Bianca's car, and Bianca drive off. (Vol. I – pp. 54-5)

During the drive, there were struggles between Freddy and Bianca. Bianca testified that she tried to get the attention of people around her, including a police car, but was unable to do. At some point, she was stabbed in the leg. (Vol. I – pp. 74-6)

Ultimately, the drive took them northbound on I-15. Around Logandale, they pulled off the road, parked, and engaged in sexual intercourse. (Vol. I – pp. 77-8) Afterwards, they got back onto I-15 and drove for a few more minutes before they stopped at a gas station. Freddy put gas in the car from a gas can and they continued on to Mesquite. (Vol. I – pp. 79-80)

In Mesquite they stopped at an apartment complex. (Vol. I - 81) There was a construction site there. Freddy had worked there. Apparently, he was looking for some friends. Eventually Bianca gets the attention of someone who called the police for her. Freddy was arrested without incident as he returned to the car.

ARGUMENT

I. MR. MARTINEZ CANNOT BE CONVICTED OF TWO CRIMES FOR A SINGLE TRANSACTION.

The State charged Freddy Martinez with a crime for the act of stabbing Bianca Hernandez in the thigh - an act meant to force her to drive away with him. ("he just touched me a little bit to frighten me. Testimony of Bianca Hernandez. Vol. I p. 92) The forcing of Bianca Hernandez to drive with him, the State charged as kidnapping. The factual basis for both crimes

was the fact that Mr. Martinez intimidated Ms. Hernandez to drive with him against her will. Mr. Hernandez was charged with two different crimes for one course of conduct.

The Nevada Supreme Court as well as the United States Supreme Court have clearly stated that a man cannot be convicted of two crimes for a single transaction.

A recent Nevada Supreme Court case on this issue is **Salazar v. State, 119 Nev. Adv. Opn. 26, 70 P.3d 749 (2003)**. In that case Mr. Salazar was convicted of both battery with use of a deadly weapon with substantial bodily harm and mayhem with use of a deadly weapon. In overturning Mr. Salazar's conviction for battery with a deadly weapon with substantial bodily harm, the Nevada Supreme Court has stated the law in the State of Nevada.

> The Double Jeopardy Clause of the United States Constitution protects defendants from multiple punishments for the same offense.1[1] This court utilizes the test set forth in **Blockburger v. United States**,2[2] to determine whether multiple convictions for the same act or transaction are permissible.3[3] "Under this test, 'if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offense.'"4[4]
>
> Battery with use of a deadly weapon with substantial bodily harm and mayhem with a deadly weapon are separate offenses under the **Blockburger** test. However, while the State may bring multiple charges based upon a single incident, we will reverse "'redundant convictions that do not comport with legislative intent.'"5[5] When considering whether convictions are redundant, in State of Nevada v. District Court, 6[6] this court stated:
>
> The issue . . . is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions. "Redundancy does not, of necessity, arise when a defendant is convicted of numerous charges arising from a single act." **Skiba v. State**, 114 Nev. 612, 616, 959 P.2d 959, 961 (1998). The question is whether the material or significant part of each charges is the same even if the offenses are not the same. Thus,

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1[1] Williams v. State, 118 Nev. ____, ____, 50 P.3d 1116, 1124 (2002), cert. denied 154 L.Ed.2d 446, ____ U.S. _____, 123, S. Ct. 569 (2002); U.S. Const. Amend. V.
2[2] 284 U.S. 299, 76 L.Ed, 306, 52 S. Ct. 180 (1932).
3[3] Williams, 118 Nev. At _____, 50 P.3d at 1124 (citing Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001)).
4[4] Id. _____, 50 P.3d at 1124 (quoting Barton, 117 Nev. at 692, 30 P.3d at 1107).
5[5] State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997) (quoting Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987)).
6[6] 116 Nev. 127, 994 P.2d 692 (2000).

> where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant.7[7]
>
> We conclude, under the specific facts of this case, that the gravamen of both the battery with use of a deadly weapon with substantial bodily harm and mayhem with use of a deadly weapon offenses are the same and, therefore, Salazar's convictions for battery and mayhem are redundant. The gravamen of the battery offense, as charged, is that Salazar cut Clark and he suffered substantial harm, which was the nerve damage. The gravamen of the mayhem offense, as charged, is that Salazar cut Clark and he suffered permanent nerve damage. Both arise from and punish the same illegal act-cutting Clark with a box cutter.8[8] "The Legislature never intended to permit the State to proliferate charges as to one course of conduct by adorning it with chameleonic attire."9[9]

Thus the Nevada Supreme Court has indicated that the **Blockburger** test is to be used in the State of Nevada. This test is "if **the elements** of one offense are entirely included within **the elements** of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offense." (Id. at 6 or 751, emphasis added).

The element of force or violence used to allege the battery with use of a deadly weapon was part of the course of conduct used by Mr. Martinez to carry out the kidnapping. It would be unfair to have that be the basis for an entirely different and separate crime.

II. DURING CLOSING ARGUMENTS, THE PROSECUTION COMMITTED MISCONDUCT BY IMPROPERLY DENIGRATING A DEFENSE THEORY, WHICH DEPRIVED APPELLANT OF HIS RIGHTS UNDER STATE AND FEDERAL LAW AS WELL AS THE NEVADA AND UNITED STATES CONSTITUTIONS.

It is improper for a prosecutor to ridicule or denigrate a defense theory. **U.S. v. Sanchez, 176 F.3d 1214, 1225 (9th Cir. 1999)** (holding that the prosecutor "committed misconduct in... denigrating the defense as a sham" and reversing the conviction). This Court has continually held that it was improper for prosecutors to ridicule or belittle a defense theory or case. **Earl v. State, 111 Nev. 1304, 1311 (1995)** (reversing the conviction where the

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7[7] Id. at 136, 994 P.2d at 698.
8[8] Cf. Skiba, 114 Nev. 612, 959 P.2d 959 (redundant convictions for battery with a deadly weapon and battery with substantial harm when the convictions arose from single act of hitting victim with broken beer bottle).
9[9] Albitre, 103 Nev. at 284, 738 P.2d at 1309.

prosecuting attorney called the defendant's testimony "malarkey," explaining that "this remark by the prosecutor violated his duty... not to ridicule or belittle the defendant or the case"); **Barron v. State, 105 Nev. 767, 779-80 (1989)** (recognizing a duty not to ridicule the defense theory and condemning the prosecutor for telling the jurors that the defense "tried to hustle you"); **Pickworth v. State, 95 Nev. 547, 550 (1979)** (holding the prosecutor's comment, referring to defense theory as a "red herring," was improper).

The prosecution belittled and ridiculed the defense theory regarding the sexual intercourse between Freddy and Bianca by saying that is "makes absolutely no sense, and it's offensive." (Vol. II – 74) As such, the prosecutor's comment was improper and violated appellant's rights to a fair trial and due process under state and federal law, as well as the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

III. THERE WAS INSUFFICIENT EVIDENCE PRODUCED AT TRIAL TO SUSTAIN THE KIDNAPPING CONVICTION AGAINST FREDDY MARTINEZ.

This Court has jurisdiction to review the evidence presented at trial and determine whether there was sufficient evidence presented to sustain the conviction. **State v. Van Winkle, 6 Nev. 340, 350 (1871)** (the Nevada Supreme Court has jurisdiction "to decide, as a question of law, whether the evidence is sufficient to sustain such a verdict or decision in a criminal case."). "The Due Process clause of the United States Constitution protects an accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. **Carl v. State, 100 Nev. 164, 165, 678 P.2d 669, 669 (1984).**" **Oriegel-Candido v. State, 114 Nev. 378, 382 (1998)**; U.S. CONST. AMEND. V; U.S. CONST. AMEND. XIV. The standard this Court applies when reviewing the evidence supporting a jury's verdict is whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt by the evidence it had a right to consider. **Wilkins v. State, 96 Nev. 367, 374 (1980)**

(citing **Edwards v. State, 90 Nev. 255, 258-59 (1974)**); see also, **Jackson v. Virginia, 443 U.S. 307 (1979)**.

The jury found Mr. Martinez not guilty of the sexual assault. He therefore lacked the intent to commit sexual assault. Accordingly, he should have been found guilty of Second Degree Kidnapping, not First Degree Kidnapping.

CONCLUSION

For the above stated reasons, Appellant's convictions should be reversed.

Respectfully submitted,

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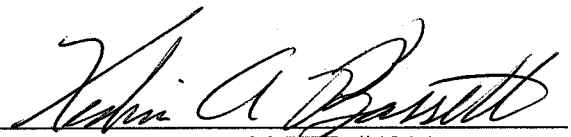
CERTIFICATE OF COMPLIANCE

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 a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30th day of November, 2007.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By 

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Appellant's Opening Brief to the attorney of record listed below on this 30th day of November, 2007.

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