IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS S. WESLEY

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Nevada Supreme Court Case No.: 52127

District Court Case No.: C232494
District Court Dept. No.: XXIV

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction and Sentence in the Eighth Judicial District Court)

DAN M. WINDER, ESQ.
Nevada Bar #1569
Arnold Weinstock, Esq.
Nevada Bar No: 000810
3507 W. Charleston Blvd.
Las Vegas, Nevada 89102
(702) 474-0523

Counsel for Appellant

DAVID ROGER
CLARK COUNTY, NEVADA
DISTRICT ATTORNEY
Nevada Bar #2781
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155
(702) 671-2500

CATHERINE CORTEZ-MASTO
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 486-3420

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS S. WESLEY

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Nevada Supreme Court Case No.: 52127

District Court Case No.: C232494
District Court Dept. No.: XXIV

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction and Sentence in the Eighth Judicial District Court)

DAN M. WINDER, ESQ.
Nevada Bar #1569
Arnold Weinstock, Esq.
Nevada Bar No: 000810
3507 W. Charleston Blvd.
Las Vegas, Nevada 89102
(702) 474-0523

Counsel for Appellant

DAVID ROGER
CLARK COUNTY, NEVADA
DISTRICT ATTORNEY
Nevada Bar #2781
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155
(702) 671-2500

CATHERINE CORTEZ-MASTO
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 486-3420

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF NEVADA

NARCUS S. WESLEY Appellant, v. THE STATE OF NEVADA, Respondent.	Nevada Supreme Court Case No.: 52127 District Court Case No.: C232494 District Court Dept. No.: XXIV

STATEMENT OF THE ISSUES

A. Did the Trial Court's Admission of the Statements of Delarian Wilson violate Narcus Wesley's Right to a fair trial?

B. Was the admission of Delarian Wilson's guilty plea during Narcus Wesley's trial reversible error?

C. Did Narcus Wesley's counsel commit fatal error which mandates this Court to sua sponte reverse Wesley's conviction?

D. Was the trial court's failure to grant Narcus Wesley's Motion to Suppress clear error?

E. Was sufficient evidence presented to the jury to support the conviction of Narcus Wesley beyond a reasonable doubt?

F. Was the sentence imposed upon Narcus Wesley cumulative and excessive?

INTRODUCTION

Appellant, Narcus Wesley was convicted of eighteen (18) counts, ranging from five (5) counts of sexual assault with use of a deadly weapon to two (2) counts of conspiracy. His conviction was obtained in a trial that was in violation of the fundamental fairness guaranteed by the United States and Nevada Constitutions because he was convicted primarily based upon the statements and actions of his co-defendant, Delarian Wilson, who was not tried with Wesley due to his prior plea to three (3) counts. Wesley was deprived of his right to adequate assistance of trial counsel due to his counsels unauthorized activities in admitting Wesley's guilt to the jury. Numerous other clear constitutional errors occurred during Wesley's trial. Based upon all those errors Wesley's Judgment of Conviction must be revered and Wesley must be granted a new trial. In addition, there was insufficient evidence to sustain the convictions and Wesley's Judgment of Conviction must be vacated.

STATEMENT OF THE CASE

On or about February 23, 2007, a criminal complaint was filed in Justice Court, Henderson Township charging Delarian K. Wilson (hereinafter referred to as "Wilson") and Appellant herein, NARCUS S. WESLEY (hereinafter referred to as "WESLEY") in a 16 count complaint over an incident which allegedly occurred on or about February 18, 2007. (See Appellant's Appendix (hereinafter referred to as "A.A.")pg 1-7). On or about April 17, 2007, that complaint was amended by adding two additional counts. (See A.A. 8-15).

After a Preliminary Hearing in Henderson Justice Court, both defendants were bound over to District Court, and on or about April 20, 2007 an Information was filed in Department 24 before the Honorable Judge James Bixler charging each defendant with 18 counts. (See A.A. 16-24). Both defendants were arraigned and entered not guilty pleas to all counts. On March 6, 2008, a Motion to Sever Defendants was filed by Appellant WESLEY and granted by the Court. (See A.A. 25-29).

Prior to Trial, on March 1, 2008, WESLEY filed a Motion to Suppress Fruits of an Illegal Search. (A.A. 30-57). This Motion was opposed by the State (A.A. 58-79). Thereafter, defendant

Wilson changed his plea and entered a guilty plea to two counts of Robbery with Use of a Deadly Weapon and one count of Sexual Assault. (A.A. pg 90-102). Upon Wilson's plea, on April 10,2008 the State filed a Second Amended Information charging WESLEY with committing all 18 counts alleged. (A.A. 103-112).

Since Wilson entered his plea, leaving WESLEY as the only defendant, and since the court had not ruled on WESLEY's Motion to Suppress Fruits of an Illegal Search, on March 25, 2008, WESLEY filed a Motion to Continue Trial. (A.A. pg 113-115). Nonetheless, on April 9, 2008 WESLEY's trial began with a Franks hearing. The Trial concluded on April 18, 2008 and at 2:53 p.m. on that date, a jury returned with a verdict finding WESLEY guilty on all 18 counts. (A.A. pg. 116-121).

On July 3, 2008, WESLEY was sentenced by Judge Bixler as follows: Count One Conspiracy to Commit Burglary, Twelve months in the Clark County Detention Center (CCDC); Count Two Conspiracy to Commit Robbery, Seventy-Two - One Hundred Eighty months in the Nevada Department of Corrections (NDC); Counts Three and Eleven, Burglary While in Possession of a Deadly Weapon, Seventy-Two to One Hundred Eighty months in NDC; Counts Four, Six, Seven, and Nine, Robbery With Use of a Deadly Weapon, Sixty to One Hundred Eighty months in NDC with a consecutive Sixty to One Hundred Eighty months for Use of a Deadly Weapon; Counts Five and Eight, Assault With a Deadly Weapon, Twenty-Four to Seventy-Two months in NDC; Count Ten, First Degree Kidnaping, Seventy-Two to One Hundred Eight months at NDC with a consecutive term of Seventy-Two to One Hundred Eight months; Counts Twelve, Thirteen, Fourteen, Fifteen and Seventeen, Sexual Assault With Use of a Deadly Weapon, Ten to Life at the NDC with a consecutive Eight - Twenty years for Use of a Deadly Weapon; Count Sixteen Coercion With Use of a Deadly Weapon, Twenty-Four - Seventy-Two months at the NDC with a consecutive Twenty-Four to Seventy-Two months for the Use of a Deadly Weapon and Count Eighteen, Open and Gross Lewdness With Use of a Deadly Weapon, Twelve months at the CCDC. All sentences were ordered to run concurrent and WESLEY received credit for One Hundred Eighty-Five days

served. (A.A. pg. 122-126).

Unhappy with that sentence, the State appealed Judge Bixler's sentence alleging that the sentences in Counts Twelve, Thirteen, Fourteen, Fifteen and Seventeen were improper. On September 23, 2008, pursuant to the States Motion to Correct an Illegal Sentence, the Court amended its sentences on Counts Twelve, Thirteen, Fourteen, Fifteen and Seventeen giving WESLEY five additional sentences of Ten to Life in lieu of the Court's original sentences of Eight to Twenty years for Use of a Deadly Weapon. (A.A. pg. 127-132). The instant Appeal followed.

STATEMENT OF FACTS

On April 9, 2009, WESLEY's Trial began with a Franks hearing outside the presence of the jury in support of WESLEY's Motion to Suppress the Fruits of an Illegal Search. (A.A. pg. 133-248). The State called Detective Curtis Weske of the Henderson Police Department. Detective Weske was investigating a crime which had occurred on February 18, 2007. Ultimately as part of his investigation, Detective Weske developed the name of Delarian Wilson as one of the possible suspects in a crime. (A.A. pg. 150). Mr. Wilson was subsequently found at Circus Circus arrested, and questioned by the Henderson Police Officers. (A.A. pg. 157). Mr. Wilson allegedly admitted that he was at the crime scene and gave the name NARCUS as the person who was with him. (A.A. pg. 160). The next day, it was determined that Wilson was referring to NARCUS WESLEY, who allegedly lived at 2372 Valley Drive in Las Vegas. (A.A. pg. 162). Detective Weske called Nevada Power and was told that power at Valley Drive had been turned off and re-turned on at 4232 Gay Lane. Detective Weske went to Gay Lane and filled out an Affidavit for a Search Warrant. (A.A. pg. 165). SWAT entered the residence and brought NARCUS WESLEY out. (A.A. pg. 166). WESLEY's father was also there, asked for a copy of the Search Warrant, and noticed that the Warrant was wrong since the power was in his name, Narbiz, not NARCUS'. (A.A. pg. 169). Despite that fact, NARCUS was arrested and booked. It was not until the next day that Detective Weske noticed that the Subpoena had an asterisk and stated "Please note. Individuals first name is different from your request." (A.A. pg. 170, see also A.A. pg. 1203).

On cross examination, Detective Weske admitted that his Affidavit for Search Warrant listed the wrong Social Security Number for WESLEY. (A.A. pg. 186). Detective Weske also admitted that he called SWAT before receiving a Search Warrant. (A.A. pg. 189). Finally, in reading Mr. WESLEY his Miranda Rights, Detective Weske admitted that he never asked WESLEY if he waived his Miranda Rights. (A.A. pg. 199).

Mr. Narviez Wesley, NARCUS' father, testified that after SWAT entered his house and NARCUS was taken from his bedroom, Narviez Wesley asked to call his family attorney before anyone talked to the police. (A.A. pg. 226). In response, Narviez testified that Detective Weske told him they did not need an attorney there. (A.A. pg. 226). NARCUS' stepmother, Angela Wesley also testified that she recalled her husband Narviez asking to call their family attorney while NARCUS was sitting beside them, before NARCUS was interrogated. (A.A. pg. 230). Finally, NARCUS WESLEY testified at the hearing that he was present when his father asked to call the family attorney before NARCUS was questioned and the request was refused by Detective Weske. (A.A. pg. 232). Nonetheless, WESLEY's Motion to Suppress was denied by the Court. (A.A. pg 247).

Thereupon, the Trial started with Jury Selection. (A.A. pg. 364-743). Upon seating of the jury, WESLEY's counsel made a Batson challenge regarding the State's striking of proposed juror Stephanie Abernathy, an African-American female. (A.A. pg. 748). Although the State gave several feeble explanations for Ms. Abernathy's excusal, (A.A. pg. 749-750), the judge summarily denied the Batson Challenge and ordered the Trial to proceed. (A.A. pg. 750).

The trial proceeded to opening argument. In his initial address to the jury panel, WESLEY's counsel made the following statement: "As the State said, and they are correct. Danielle Browning was raped. Many of those kids were robbed. One of those kids was kidnaped. They were terrorized for an upwards of two hours. They had guns waived in their faces." (A.A. pg. 802, lines 11-14, *emphasis added*).

The State called numerous witnesses to testify including the following: DANIELLE BROWNING, one of the alleged victims, testified that in February, 2007 she was living in a house

on Great Dane in Henderson, Nevada with her boyfriend Justin and several of his friends. (A.A. pg 816). There was a knock on the bedroom door and the person was told to come in. (A.A. pg. 818). A short, stocky African-American with a gun came in and told Danielle and her boyfriend to go to the living room and lie down on the floor. (A.A. pg. 820). In the living room there was a taller, skinnier African-American. (A.A. pg. 823). Without objection from WESLEY's counsel, Danielle constantly referred to the two African-Americans as "they"not specifically separating the actions from one or the other. (A.A. pg. 818-827).

Danielle testified that the stockier guy took Ryan to an ATM. (A.A. pg. 828). The skinnier guy was told to stay and "make sure that they didn't leave or call the cops." (A.A. pg. 830). While Ryan and the shorter stockier guy were gone, the taller thinner guy "just stood above us, kinda pacing." (A.A. pg. 830). After about twenty minutes, Ryan and the shorter, stockier guy returned and the shorter, heavier guy said they were ninety percent done and the other ten percent was up to Danielle. (A.A. pg. 831). The shorter stockier guy said he wanted Danielle to perform oral sex on her boyfriend. The shorter, stockier guy "took over." (A.A. pg. 832). Her boyfriend could not get hard and the shorter stockier guy "was getting mad." (A.A. pg. 834). Upon questioning by the State, Danielle proceeded to identify WESLEY as the taller, skinnier guy by body type only. (A.A. pg. 850).

On cross examination, Danielle testified that the taller guy did nothing and the stockier guy was in charge of the situation, including asking for PIN numbers. (A.A. pg. 852-854). It was the shorter guy that made statements about Danielle and her boyfriend having sex, (A.A. pg. 856), and it got even scarier when the stockier guy said "if someone does not perform, or get it on, someone is going to be killed." (A.A. pg. 860). Finally, Danielle admitted that she didn't know if the skinnier guy had a gun. (A.A. pg. 867).

The State called numerous other witnesses, including all of the victims. All victims testified in similar fashion, with all agreeing that the shorter, stockier guy was in charge throughout the proceedings with the taller skinnier guy remaining quiet throughout most of this incident. (A.A. pg.

893, pg. 980, pg. 1000, pg. 1014, pg. 1023). During the time the short stockier gentleman was gone, the taller skinnier guy did nothing but appear nervous. (A.A. pg.920, pg. 984). All victims testified it was the shorter, stockier guy that was getting angrier and making threats to them. (A.A. pg. 906, pg. 948). None of the victims ever testified to seeing the taller, skinnier guy's face, and they could all only identify him based on his body build. (A.A. pg. 926, pg. 987, pg. 1014, pg. 1020-21). In fact, they all testified that they kept their faces down, and as Ryan Tognotti testified, "Throughout the whole process, he never really got a good look at WESLEY's face at all." (A.A. pg. 99).

The sexual assault nurse who examined Danielle Browning after the incident, LINDA EBBERT, testified that she did not find any trauma upon Danielle. (A.A. pg. 1008). Thereafter, a variety of Henderson Police Officers and Detectives were called. Each police witness talked primarily about their involvement with Delarian Wilson and not NARCUS WESLEY, including KENT TIMOTHY, a latent print examiner who testified to four (4) recovered prints which matched to Delarian Wilson, and none which matched to NARCUS WESLEY. (A.A. pg. 1063).

Detective CURTIS WESKE of the Henderson Police Department testified and identified a photograph of Delarian Wilson taken on February 19, 2007 at the Clark County Jail. (A.A. pg. 1073). Again, there was no objection made by WESLEY's counsel. Detective Weske also testified about his conversation with Donna Lamont of Nevada Power, who told him about an address at 4232 Gay Avenue for NARCUS WESLEY. (A.A. pg. 1074). Again, there was no objection from WESLEY's counsel. Detective Weske also testified as to preparing an Affidavit and obtaining a Search Warrant for the residence on Gay Avenue. (A.A. pg. 1076).

Defense counsel thereupon objected and asked for a hearing outside the jury's presence due to a clear evidentiary violation. There was testimony about a rifle being found during the search of the Gay Avenue address. Defense counsel objected because a clear conflict of interest arose since the rifle belonged to NARCUS' father, Narviel Wesley, who was an ex-felon and had been represented by the Public Defender's Office. (A.A. pg. 1079). The idea that a rifle which was admittedly not used in the crime was seized and that NARCUS resided with an ex-felon who had

been represented by the Public Defender was clearly prejudicial to NARCUS WESLEY's interest. A Request for Mistrial was timely made by NARCUS' counsel. (A.A. pg. 1079). The court denied the Mistrial stating "There's not going to be a Mistrial. You are not going to get off of this case." (A.A. pg. 1081). Detective Weske continued testifying and on cross-examination admitted that during his interview with Delarian Wilson, Mr. Wilson told him of a person named "Christopher" who had committed the crime with him, and that Christopher had a gun. In fact, Wilson said that "he stayed at the house while Christopher went to the ATM." (A.A. pg. 1094).

Thereupon, defense counsel requested the admission of Wilson's Guilty Plea and Plea Agreement before the jury. (A.A. pg. 1096-1101). Defense counsel also wanted to play a CD of Wilson's statements to the police, but the court ordered the first seventy-five pages of that statement redacted. (A.A. pg. 1101). Again, WESLEY was never asked by the court whether he knew of, consented to, or approved of his attorney's tactics. Finally, defense counsel had Detective Weske reiterate all the crimes to which WESLEY admitted to in his interview with Detective Weske. (A.A. pg. 1106).

POINTS AND AUTHORITIES

I.

THE STATEMENTS OF DELARIAN WILSON CANNOT BE USED AS A BASIS UPON WHICH TO CONVICT NARCUS WESLEY

Throughout the Trial, a majority of the evidence presented to the jury involved alleged statements made by Delarian Wilson. Wilson was not present at Trial, and his hearsay statements were presented through various witnesses. However, at the heart of the Confrontation Clause of the United States Constitution is a preference for live testimony and cross-examination. See United States Constitution, Amendment Six; DeRosa v. First Judicial District Court, 115 Nev. 225, 985 P. 2d 157 (1999).

Although at one point, Wilson was WESLEY's co-defendant, Wilson chose to enter a guilty plea to Three (3) counts prior to Trial and would not testify at WESLEY's Trial. If Wilson had not plead out, his statements would not be admissible at Trial against his co-defendant, WESLEY. See

Bruton v. Untied States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

The Nevada Supreme Court has previously held that the right of confrontation prevents the use at a joint trial of a non-testifying defendant's admission if it incriminates another defendant. Rodriguez v. State, 117 Nev. 800, 32 P. 3d 773 (2001). If Wilson's statements could not be used at a joint trial, they certainly could not be used at WESLEY's trial without WESLEY having the opportunity to confront and cross-examine Wilson over those statements. As this Court has stated, "Under Bruton, a defendant's rights are violated when the State introduces a non-testifying co-defendant's confession or statements incriminating a defendant." Franco v. State, 109 Nev. 1229, 866 P 2d 247 (1993); Duckworth v. State, 114 Nev. 951, 966 P. 2d 165 (1998).

In the instant case, a vast majority of the evidence incriminating WESLEY were statements attributed to Wilson. Every victim testified that Wilson was in charge throughout the incident, and that WESLEY rarely said anything. Although several witnesses identified WESLEY at trial, those identifications were suspect at best, since each witness testified that their face was down and that the never viewed WESLEY's face. Absent the statements and confessions of Wilson, WESLEY could never have been convicted beyond a reasonable doubt. Therefore, on that basis alone, a reversal is warranted.

II.

THE ADMISSION OF DELARIAN WILSON'S GUILTY PLEA DURING NARCUS WESLEY'S TRIAL WAS REVERSIBLE ERROR

Trumping the admission of Delarian Wilson's statements and admissions, the Court inexplicably allowed the jury to hear a re-enactment of Delarian Wilson's guilty plea including his factual basis therefore. Such testimony is clearly inadmissable and mandates a reversal of WESLEY's conviction and a Remand for New Trial.

Numerous states have recognized the impropriety of such a practice. The Colorado Appeals Court has held that "A guilty plea or conviction of a co-defendant may not be used as substantive evidence of another defendant's guilt." People v. Brunner, 797 P. 2d 788 (Colo. App. 1990). The Oregon Court has held that a co-defendant's conviction resulting from the same transaction generally

may not be introduced as substantive evidence of a defendant's guilt. State v. Clark, 779 P 2d 215, 98 Or. Ap. 478 (1989). The state of Wyoming has held that the right to a fair trial embraces the right not to be convicted in whole or in part, upon the guilty plea of coconspirators. Capshaw v. State, 11 P. 3d 905, Wyo. (2000); see also Hall v. State, 109 P 3d 499, 2005 Wy. 35 (2005).

The Nevada Supreme Court has previously followed this line of analysis. In Walden v. State, 113 Nev 853, 944 P. 2d 762 (1997), the Court stated that a co-defendant's change of plea statement and penalty hearing statement in which a co-defendant admitted to stabbing the victim were not admissible during the guilt phase of the defendant's murder trial. The Court reversed a murder conviction in that instance.

In the instant case, the Trial Court allowed the verbatim re-enactment of Delarian Wilson's guilty plea to three (3) of the charges to which WESLEY was standing Trial. Wilson plead guilty to two (2) counts of Robbery With the Use of a Deadly Weapon and one (1) Count of Sexual Assault. Not only was the jury advised that the person who had been identified as WESLEY's coconspirator had admitted to being guilty of robbing two of the victims in the matter which was awaiting the jury's decision, but that also Wilson was admitting to aiding and abetting WESLEY in the commission of a sexual assault that they were supposed to decide WESLEY's guilt or innocence of. WESLEY could not confront or cross-examine that evidence. After hearing that Wilson had plead guilty to three (3) of the charges they were to decide upon, what could the jury do but find WESLEY guilty of those charges? Upon finding WESLEY guilty of those charges it was a fait accompli that WESLEY would be guilty on all charges.

Although it is conceded that the issue of bringing Wilson's guilty plea before the jury was initially brought up by WESLEY's trial counsel, it was Judge Bixler's decision to allow that improper and inflammatory information to be presented to the jury. That decision to seek the presentation of Wilson's guilty plea was never discussed with WESLEY and he never consented to the presentation of that evidence to the jury. In effect, WESLEY's attorney's "threw their client under the bus." Jones v. State, 110 Nev. 730, 877 P. 2d 1052 (1994).

III.

THE ERRORS OF WESLEY'S COUNSEL MANDATES THIS COURT TO SUA SPONTE REVERSE WESLEY'S CONVICTION

The Nevada Supreme Court has recognized that the right to defend is given directly to the accused, for it is he who suffers the consequences if the defense fails. Agmon v. State, 121 Nev. 200, 111 P. 3d 1092 (2005). From the beginning, WESLEY's trial counsel were "on a frolic of their own." Without discussing or clearing it with their client, WESLEY's trial counsel told the jury in their Opening Statement "As the State said and they are correct, Danielle Browning was raped. Many of those kids were robbed. One of those kids was kidnaped. They were terrorized for upwards for two hours. They had guns waived in their faces. I'm not disputing that. I'm not disputing that" (see A.A. pg. 802, lines 11-14). In reality, WESLEY's counsel told the jury to find WESLEY guilty of all counts. These admissions were never discussed with WESLEY, nor were they approved by WESLEY.

In Jones v. State, *supra*, the Nevada Supreme Court held that a "finding that counsel had conceded guilt without defendant's consent would mandate reversal irrespective of any strategic or tactical motives for concessions that might be disclosed at any evidentiary hearing." Id. at 737, *emphasis added*. In the instant case, the Trial Court never inquired of WESLEY if he approved of and consented to his counsel's tactics. In fact, that issue was never discussed with WESLEY and he had no option but to accept his counsel's ill-fated tactics. In reality, WESLEY had no chance before the jury once those actions were admitted to the jury. WESLEY's counsel had admitted guilt for him.

When that Court error is coupled with WESLEY's attorneys seeking and allowing Wilson's guilty plea hearing to be reenacted before the jury and his admissions played before the jury, this Court has no option but to reverse WESLEY's conviction and to remand this case for a new trial. As this Court has previously stated, "The Supreme Court may consider sua sponte plain error which affects the defendants substantial rights if the error either: (1) had a prejudicial impact on the verdict when reviewed in the context in the trial as a whole, or (2) seriously affects the integrity or public

reputation of the judicial proceedings." Rowland v. State, 118 Nev. 31,. 39 P 3d 114 (2002). Under either standard, sua sponte action by this Court is mandated.

IV.

THE TRIAL COURT'S FAILURE TO GRANT WESLEY'S MOTION TO SUPPRESS WAS CLEAR ERROR

It is uncontested that material facts were misrepresented in the Henderson Police Department Affidavit in Support of a Search Warrant. This was done in an effort to mislead the issuing court regarding the existence of probable cause. In Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978), the United States Supreme Court recognized the Constitution right to challenge the truthfulness of statements contained in the search warrant affidavit. At the evidentiary hearing pursuant to Garettson v. State, 114 Nev. 106, 967 P. 2d 428, (1998), the testifying witness, Detective Weske, clearly admitted to providing false information in his Affidavit to Support the Search Warrant. The search warrant was issued not withstanding the clear and undisputed fact that NARCUS WESLEY did not have power in his name at 4232 Gay Avenue. It was not even his house. This was advised to Detective Weske prior to the execution of the search warrant. Whether Detective Weske looked at and reviewed the statement prior to it execution is unclear, but the information provided was clearly incorrect.

Just as importantly, it was undisputed that prior to questioning by the police, NARCUS WESLEY's father had requested of the police officers, with NARCUS present, the opportunity to contact the family attorney before any questioning. As such, the defendant's rights pursuant to Miranda v. Arizona, 384 US. 436, 444 (1966), were invoked, but ignored by the Henderson Police Department to be admissible, the State must show by a preponderance of the evidence that the defendant's statements were given freely, voluntarily, and without compulsion or inducement. Allen v. State, 91 Nev. 568 - 570, 540 P. 2d 101 (1975). NARCUS WESLEY was a neophyte in the judicial system, and when he heard his father's request to have an attorney present before any questioning being ignored by the Henderson Police Department, it was obvious to NARCUS that invoking his Miranda Rights would be futile. WESLEY was led into believing that he had no right

to have an attorney present before being questioned. Therefore, based upon those clear violations, any statements utilized by the Henderson Police Department that were received from NARCUS WESLEY are inadmissable. See generally, Wong Sun v. United States, 371 U.S. 471, 478 (1963). As such, the use of the statements by NARCUS WESLEY was improper.

V.

THERE WAS NOT SUFFICIENT LEGAL EVIDENCE PRESENTED TO THE JURY TO SUPPORT A CONVICTION OF NARCUS WESLEY BEYOND A REASONABLE DOUBT

It is axiomatic that the State must prove every element of a crime beyond a reasonable doubt. Baton v. State, 118 Nev. 61, 381 P 3d 880 (2002). Based upon legally admissible evidence, very little evidence was presented to the jury upon which a conviction of WESLEY could be based. Each of the victims in this case testified that since they were lying down with their face on the ground they were unable to view any activities. The victims could only testify as to what they heard, not saw, and certainly no one could legally identify the voice of NARCUS WESLEY. In fact, since no victim observed WESLEY's face, no one could accurately identify WESLEY beyond a reasonable doubt.

It has been recognized that reliability is the lynchpin in determining the admissibility of both in court identification testimony as well as evidence concerning out of court identifications. People v. Reid, 598 P 2d 148, 42 Colo. App. 273 (1979); see also, State v. Cottrell, 968 P 2d 1090, 32 Idaho 181 (1998). In Nevada, the test applicable to identification is whether, in light of the totality of the circumstances, the identification was so unreasonably suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law. Bolin v. State, 114 Nev. 503, 960 P 2d 784 (1998). Additionally, The State of Colorado has held that the People have the burden of establishing by clear and convincing evidence that an in Court identification is based upon the witnesses prior independent observations of the defendant. People v. Monroe, 907 P 2d 690, Colo. App. (1995).

In the instant case, there was no out of court identification of WESLEY by the victims. The in court "identifications" of WESLEY were clearly suspect. Each witness testified that their head

was down and that they never saw WESLEY's face. The only description of the perpetrator was as a taller, skinnier, African-American male. That description must fit thousands of people in Clark County, Nevada. Since WESLEY was the defendant and the only African-American male subject to identification, the identification was clearly suspect.

Moreover, a review of the testimony at trial showed that the majority of the victims testimony referred to the activities as being done by "them" or "they" and not WESLEY. Little, if any, activities were attributed to WESLEY. The only actions clearly testified to by the victims were all actions of Delarian Wilson, not WESLEY. As such, when a party challenges the sufficiency of the evidence on appeal in a criminal case, the standard of review is whether, reviewing the evidence in a light favorable to the prosecution, a reasonable jury could have been convinced of the defendant's guilt beyond a reasonable doubt. Gaxiola v. State, 121 Nev. 638, 119 P 3d 1225 (2005).

Using the standard set forth in Gaxiola, the conviction of WESLEY cannot stand. No viable, undisputed, and legal evidence implicating WESLEY was presented before the jury. When looked at in its entirely, the evidence against WESLEY was clearly insufficient and cannot support his convictions. There was never any evidence of an agreement between WESLEY and Wilson to even support an inference of a conspiracy between them. See Bolden v. State, 121 Nev. 908, 124 P. 3d 191 (2003). As this court stated in Bolden, *supra*, "absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiesce in, or approval of that purpose does not make one a party to conspiracy. Id., at 910. Absent a conspiracy, there was no evidence at all presented to the jury to inculpate WESLEY.

VI.

THE SENTENCE IMPOSED UPON WESLEY IS CUMULATIVE AND EXCESSIVE

WESLEY was sentenced to five (5) separate ten to life sentences with a consecutive ten to life sentence for Use of a Deadly Weapon. Each of those sentences was related to one alleged act of WESLEY digitally penetrating Danielle Browning. Not only is that sentence excessive, it is also cumulative. Braunstern v. State, 118 Nev. 68, 40 P 3d 413 (2002); see also, Crowley v. State, 120

Nev. 30, 83 P 3d 282 (2004). As the Nevada Supreme Court has previously held, "a Court should normally presume that the legislature did not intend multiple punishments for the same offense." Ebeling v. State, 120 Nev. 401, 91 P 3d 599 (2004). Moreover, the Court has held that when a Defendant receives multiple convictions based on a single act, the Supreme Court will reverse redundant convictions that do not comport with legislative intent. Wilson v. State, 121 Nev. 345, 114 P. 3d 285 (2005).

The same rational exists as to WESLEY's sentences of sixty to one hundred eighty months with a consecutive sixty to one hundred eighty months for Use of a Deadly Weapon on four counts of Robbery With Use of a Deadly Weapon. Not only was there no evidence that WESLEY committed any robbery, but those sentences are excessive and cumulative. In reality, if WESLEY's convictions and sentences are not reversed by this Honorable Court, this Twenty-Five (25) year old gentleman with no prior criminal convictions will never get out of prison for an incident that, at best, he was merely present for. Such an unjust result cannot be condoned by this Honorable Court.

VII.

CONCLUSION

A review of NARCUS WESLEY's trial shows that from its beginning WESLEY had no chance to prevail. Prior to trial, the court wrongfully denied WESLEY's Motion to Suppress. Immediately thereafter, WESLEY was denied a jury of his peers. Out of a panel of eighty (80) persons, the district attorney arbitrarily excused one of the two African-Americans eligible for the jury.

Once the trial began, WESLEY's counsel conceded WESLEY's guilt to the jury in his opening statement. This improper practice was done without WESLEY's knowledge or consent. Moreover, as the trial proceeded, WESLEY's counsel did nothing to prevent the jury from hearing improper, and inadmissible statements from WESLEY's co-defendant and his alleged co-conspirator, Delerian Wilson. This was a clear Batson violation. No motions were made, and no objections offered.

All statements offered at trial referred to the activities of "they" or "them," but again, no objections were made. The "identifications" of WESLEY were clearly suspect. No witness ever saw WESLEY's face. He was merely the "taller, skinner, African-American male" who may have been in the house. The "taller, skinnier, African-American male" never robbed any victim, or asked any victim to perform any sex act.

Finally, WESLEY's counsel inexplicably asked to, and were permitted to have WESLEY's co-defendant and alleged co-conspirator's guilty plea to three (3) felonies which were awaiting a jury decision to be reenacted before the jury. If WESLEY's co-defendant and alleged co-conspirator had already admitted his guilt, how could the jury find WESLEY not guilty of the crimes? It was a "no brainer" for the jury. NARCUS WESLEY had no chance.

Any one of these errors fatally flawed WESLEY's trial. The cumulative effect of the clear violations made WESLEY's trial a sham. WESLEY was never afforded the right to a fair trial. As the Nevada Supreme Court has previously held "the cumulative affect of errors may violate a defendant's constitutional right to a fair trial though errors are harmless individually." Hernandez v. State, 118 Nev. 513, 53 P.3d 1100 (2002).

Therefore, either individually or cumulatively the gross errors which occurred in WESLEY's trial mandate the reversal of his convictions and remand for a new trial.

DATED this 21st day of July, 2009.

Respectfully Submitted,
LAW OFFICE OF DAN M. WINDER, P.C.

By: _____
Dan M. Winder, Esq.
Nevada Bar No: 001569
Arnold Weinstock, Esq.
Nevada Bar No: 000810
3507 W. Charleston Blvd.
Las Vegas, Nevada 89102
Telephone: (702) 474-0523
Facsimile: (702) 474-0631
Email: winderdayatty@aol.com
Attorney for Appellant

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. In understand that I may be subject to sanctions in the event that the accompanying brief is not in confirmative with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27th day of July, 2009.

LAW OFFICE OF DAN M. WINDER, P.C.

By: _____

Dan M. Winder, Esq.
Nevada Bar No: 001569
Arnold Weinstock, Esq.
Nevada Bar No: 000810
3507 W. Charleston Blvd.
Las Vegas, Nevada 89102
Telephone: (702) 474-0523
Facsimile: (702) 474-0631
Email: winderdayatty@aol.com
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 29th day of July, 2009, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701

District Attorney
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155

By: _____
An employee of LAW OFFICE OF DAN M. WINDER, P.C.

M:\Criminal\Wesley.Narcus\Appeal Brief.wpd