

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 FRANKIE ALAN WATTERS,)

No. 59703

4 Appellant,)

5 v.)

6 THE STATE OF NEVADA,)

7 Respondent.)

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Apr 11 2012 04:32 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

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9 **REPLY TO FAST TRACK RESPONSE**

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11 **I. The Court violated Watters' federal and state Constitutional rights by**
12 **permitting display of a prejudicial photo and undermining the presumption of**
13 **innocence.** "[I]t is the duty of the trial court to prevent situations from arising during
14 the trial which would prejudice the accused in the minds of the jury.' And courts must
15 be alert to factors that may undermine the fairness of the fact-finding process."
16 *Hightower v. State*, 123 Nev. 55, 59, 154 P.3d 639, 642 (2007). Although the State
17 contends that no prejudice ensued from the use of Watters' photo with the word
18 "GUILTY" emblazoned upon it, this Court should reject this contention. Where
19 multiple witnesses identified Watters, the State had no need for the photo, and the
20 presence of the word "GUILTY" on a booking photo employed at the outset of trial
21 undermines the presumption of innocence an in unconstitutional fashion. Jurors were
22 likely to conclude that Watters had remained incarcerated during trial; had posed such
23 a danger that he could not be released on bail; or, worse, had suffered prior
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1 convictions separate and apart from the instant offenses. "An accused, whether guilty
2 or innocent, is entitled to a fair trial, and it is the duty of the court and the prosecutor
3 to see that he gets it." *Garner v. State*, 78 Nev. 366, 372-73, 374 P.2d 525, 529
4 (1962). Because this photo implied that Watters was not cloaked in the presumption of
5 innocence at the outset of trial, this Court must find reversible error.
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7 **II. The Court erred in providing misleading and prejudicial jury instructions.**
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9 The defense merely sought to define the word "stolen" in the full context of the
10 crime. A "stolen" vehicle has, at some point, been taken with the intent to
11 permanently deprive the owner, making the proposed instruction relevant and
12 accurate. This Court requires trial Courts to provide clear and unambiguous jury
13 instructions, and does not expect jurors to be legal experts. *Culverson v. State*, 106
14 Nev. 484, 488, 797 P.2d 238, 240 (1990). Similarly, where the evidence revealed no
15 intent to permanently deprive the owner of the Chrysler, the Court should have
16 instructed on the lesser offense of unlawful taking under NRS 205.2715. This Court
17 should expand Nevada jurisprudence to mandate instruction on lesser related offenses
18 under the guiding principle of *Rosas v. State*:
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22 The Nevada Constitution declares that "[t]he right of trial by Jury shall be
23 secured to all and remain inviolate forever" and provides that "[j]udges shall not
24 charge juries in respect to matters of fact." And this court has held that if there
25 is any evidence to support a lesser-included offense, the trial court should
26 instruct on it, "leaving the jury to determine all questions of fact about which
27 there might be any controversy among reasonable men."
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1 *Rosas v. State*, 147 P.3d 1101, 1108-1109 (Nev. 2006). This logic applies equally to
2 lesser related offenses. Finally, the facts in this case did not warrant a flight
3 instruction. Where evidence of flight is equivocal at best, this Court has found
4 prejudicial error in the provision of a flight instruction. *Tavares v. State*, 117 Nev.
5 725, 735 (2001). Here, where flight is an actual element of a charged crime, the Court
6 erred in providing this instruction because it alleviated the State's burden of proof.
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9 **III. The Court erred by denying the defense motion to remand to Justice Court.**

10 The evidence was ambiguous regarding the nature of the preliminary hearing waiver.
11 (I 77, 4-5). The State admits that the waiver was conditional to the extent that Watters
12 could withdraw his waiver were the offer "unfairly" revoked by the State. (State's Fast
13 Track Response [FTR], 13). Thus, where the record is incomplete regarding the time
14 and the circumstances under which the offer was actually revoked, the Court should
15 have erred on the side of remanding the case for the preliminary hearing. At
16 minimum, the Court should have conducted an evidentiary hearing into the facts and
17 circumstances surrounding the waiver of the hearing and the revocation of the offer.
18 Thus, reversal is warranted.
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22 **IV. The State failed to present sufficient evidence to sustain these convictions.**

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24 Because the evidence was just as consistent with Watters being apprehended
25 simply because he was confronted by police and bitten by a police dog, this Court
26 should overturn these convictions for insufficient evidence: ". . . [T]he relevant
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1 question is whether, after viewing the evidence in the light most favorable to the
2 prosecution, any rational trier of fact could have found the essential elements of the
3 crime beyond a reasonable doubt. . . . The criterion thus impinges upon 'jury'
4 discretion only to the extent necessary to guarantee the fundamental protection of due
5 process of law." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[T]he standard must
6 be applied with explicit reference to the substantive elements of the criminal offense
7 as defined by state law." *Brown v. Farwell*, 525 F.3d 787, 794 (9th Cir. Nev. 2008).
8 Because the State failed to prove Watters' involvement in these crimes beyond all
9 reasonable doubt, reversal is warranted.
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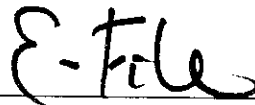
13 **CONCLUSION**

14 Based upon the foregoing and on Appellant's Fast Track Statement, which is
15 hereby incorporated by reference as though fully set forth herein, appellant
16 respectfully asks this Court to reverse his convictions.
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18

19 Respectfully submitted,

20
21 PHILIP J. KOHN
22 CLARK COUNTY PUBLIC DEFENDER

23 By



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1 VERIFICATION

2 1. I hereby certify that this fast track reply complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the
4 type style requirements of NRAP 32(a)(6) because:

5 This fast track reply has been prepared in a proportionally spaced
6 typeface using Times New Roman in 14 font size;

7 2. I further certify that this fast track reply complies with the page or
8 type-volume limitations of NRAP 3C(h)(2) because it is either:

9 [XX] Proportionately spaced, has a typeface of 14 points or more, and
10 does not exceed 5 pages.

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

18
19 DATED this 11th day of April, 2012.

20 PHILIP J. KOHN
21 CLARK COUNTY PUBLIC DEFENDER

22
23 By E-File
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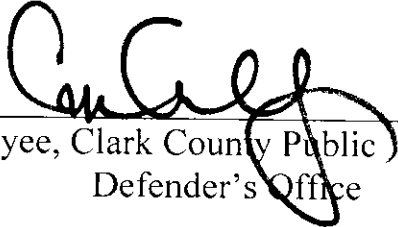
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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

FRANKIE ALAN WATTERS
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

BY _____


Employee, Clark County Public
Defender's Office