IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES DAEVON MANNING,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

No. 65856

E-File

REPLY TO FAST TRACK RESPONSE

ARGUMENT

I. The lost video surveillance

"A conviction may be reversed when the State loses evidence if: (1) the defendant is prejudiced by the loss: **or** (2) the evidence was lost in bad faith by the government." Sparks v. State, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988) (emphasis added). Respondent acknowledges the State possessed images from the CAT bus video surveillance but argues the State never possessed the actual video from the bus. FTR 6. Accordingly, Respondent claims Appellant was not entitled to dismissal or a negative inference jury instruction. Id.

1. Possession

Emby testified that the stills were uploaded to Metro's station briefing log. AA III 466. The briefing log is a Metro owned and operated database where officers can share information on wanted suspects.

Because the stills were in the log Emby assumed Steinbach also impounded the video. Id. In fact Emby called the vault to retrieve the video after noticing the stills in the log. Id. There cannot be stills if there was no video and the stills could not be in Metro's log without a metro employee uploading them. Therefore the State possessed the video.

2. Bad faith

Respondent makes the fallacious argument that "[e]ven if the State possessed the video" the video wasn't "lost in bad faith" because "the State was not in possession of the video."[1] FTR 6. Essentially, "we had the video but didn't lose the video in bad faith because we never had the video." Bad faith loss of evidence presupposes possession of the evidence. Respondent cannot argue the State's loss did not amount to bad faith by merely asserting the State never possessed the video. Notably, Respondent makes no further argument as to how Steinbach's actions did not amount to bad faith.

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[1] Respondent suggests the video was only lost after the bus company merged with another company. FTR 6. However, if true there's no explanation for how the stills made it to Metro's briefing log which occurred prior to the merger.

3. Prejudice

To establish prejudice the defendant must show "that it could be reasonably anticipated that the evidence would have been exculpatory and material to the defense." Sparks, 104 Nev. at 319, 759 P.2d at 182. Respondent argues Appellant cannot establish prejudice because he "cannot show the video would have been exculpatory if provided." FTR 6. Specifically, Respondent suggests Appellant's claim that the video would not have shown him reaching into Berg's pocket is "pure speculation...belied by Mr. Berg's and Ms. Borely's testimony." Id. at 7.

Appellant testified at trial that he did not reach into Berg's pocket[2] and the jury believed him. Respondent does not suggest Appellant lied at trial. Nevertheless, Respondent requests Appellant do the impossible and prove the video, which no longer exits due to Metro's behavior, does not show him reaching into Berg's pocket. The fact that Appellant testified and the jury believed his testimony establishes the video's exculpatory value.

4. Failure to collect evidence

Respondent argues if the police merely failed to collect the video Appellant cannot show the failure violated his Due Process rights because

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[2] AA III 494.

Appellant cannot show the video was material. FTR 8. Evidence is material if "there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). Additionally, Respondent argues that assuming the video was material, Metro's failure to collect it was, "at most" negligent. FTR 9.

Accepting Respondent's argument and placing the onus on defendants to prove a negative encourages law enforcement to not collect evidence. If police refuse to collect evidence and it becomes lost, the State will continue to argue the defendant cannot prove the evidence was exculpatory. Moreover, in rare cases where a defendant can meet the insurmountable challenge of proving materiality when he does not have the evidence, the State will argue the officer's conduct was merely negligent. If Respondent's view of Sparks and its progeny is accurate then Appellant requests this court overrule Sparks and replace it with a new rule which gives police incentive to fully investigate cases and defendants a legitimate chance defend their cases after crucial evidence is lost by the State.

II. Bad Acts

Respondent does not address Appellant's argument that the district court erred by admitting bad act evidence by merely finding the evidence

relevant. *See* FTS 19-20. Likewise Respondent doesn't address the fact that the district court noted the evidence wasn't being admitted pursuant to NRS 48.045(2). Id. at 18, fn. 9. Moreover, at trial the prosecutor never argued the evidence was admissible pursuant to NRS 48.045(2). Instead, Respondent argues for the first time on appeal that the evidence was admissible pursuant to NRS 48.045(2) to prove motive or common scheme or plan. FTR 10. Appellant notes the "failure to raise an argument in the district court proceedings precludes a party from presenting the argument on appeal." Mason v. Cuisenaire, 122 Nev. 43, 48, 128 P.3d 446, 449 (2006). Accordingly, this Court should not entertain Respondent's argument.

If this Court is inclined to consider Respondent's argument, Appellant asserts his vague references to Thompson's criminal conduct during Appellant's interview with Kavon did not tend to show a common scheme or motive in the instant case. The majority of Appellant's statement refers to Thompson's criminal conduct.

Moreover, assuming Thompson had power over Appellant and forced Appellant to "do things," those "things" were snatching cell phones, not taking wallets. Taking personal property from someone is "common" to all allegations of larceny from the person. Beyond that, there is nothing

common about the manner in which Appellant allegedly took cell phones and how he allegedly took Berg's wallet.

Lastly, assuming Appellant snatched cell phones at the behest of Thompson while Thompson stood by menacingly, Thompson was not present on the CAT bus on the date of the alleged incident. Accordingly, Appellant's fear of Thompson could not be motivation to rob Berg.

III. Lesser included offense jury instructions

Respondent claims Appellant denied any complicity in the crimes of Robbery and Battery with the Intent to Commit Robbery and therefore he was not entitled to a lesser included offense instruction for Battery. FTR 14. Respondent cites Lisby v. State, 82 Nev. 183, 188, 414 P.2d 592, 595 (1966), in support.

In Lisby, the defendant was charged and convicted of sale of a controlled substance. Id. at 185, 414 P.2d at 594. At trial the defendant asserted entrapment as an affirmative defense. Id. at 186, 414 P.2d at 594. On appeal, this Court noted that because defendant admitted to selling controlled substance and relied solely upon an entrapment defense (where he admitted to all the conduct necessary for the sale charge) he was not

entitled to a verdict form allowing for conviction for only possession.[3] Id. at 188, 414 P.2d 595.

Unlike Lisby, Appellant denied committing a robbery or intending to commit a robbery. AA III 494, 523. However, Appellant admitted to aggressively walking into Berg and knocking Berg down.[4] Contrasted with Lisby, Appellant did not argue an affirmative defense but instead readily admitted a lesser included offense.[5] Accordingly, Appellant case is different than Lisby and Appellant was entitled to a Battery lesser included instruction.

Next, Respondent desperately asks this Court to **overrule 40 years of precedent** in order to justify the district court's erroneous refusal to give

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[3] However, the district court in Lisby nevertheless instructed the jury on the lesser included offense of possession of a controlled substance and this Court approved. Id.

[4] Respondent erroneously claims Appellant never admitted to committing a battery (FTR 15) but acknowledges elsewhere in the FTR that Appellant did admit to knocking Berg down. FTR 13.

[5] Respondent also claims that Appellant merely admitted to accidental contact with Berg and not willful contact. FTR 15. In actuality, Appellant admitted Berg was "in the way" and Appellant walked past him "rough." AA III 523. The act of walking past Berg "rough" was the willful and intentional act necessary for the general intent crime of Battery. *See* Byers v. State, 336 P.3d 939, 949, 130 Nev. Adv. Op. 85 (2014)(defendant properly convicted of battery where he "flailed" during a DUI blood draw and struck an officer who was restraining him).

Appellant a mandatory lesser included offense instruction. FTR 15. Respondent cites non-binding, extra-jurisdictional authority in support. Id.

This Court should reject Respondent's request. NRS 175.501 codifies a defendant's common law right to lesser included offense instructions. This Court has routinely affirmed this right. *See* Greenwood v. State, 112 Nev. 408, 915 P.2d 258 (1996); Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2007); McKinnon v. State, 96 Nev. 821, 618 P.2d 1222 (1980); Holbrook v. State, 90 Nev. 95, 518 P.2d 1242 (1974); Sepulveda v. State, 86 Nev. 898, 478 P.2d 172 (1970). If Respondent desires to change the law, it should do so in the legislature, not with this Court.

Respondent also claims Appellant never asked for a Battery as a lesser included instruction regarding Battery with the Intent to Commit a Crime but, "argued that Battery was the underlying force necessary to commit the Robbery in this case, and was thus a lesser included offense of Robbery." [6] FTR 4 (*citing* AA III 558), 16. Respondent's argument is not

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[6] As noted in his Fast Track Statement, the situation when a defendant is entitled to a lesser included offense instruction versus when he must request one essentially depends upon the evidence adduced at trial. When evidence is presented which absolves a defendant of guilt for the greater offense but supports guilt for the lesser the court must instruct. Lisby v. State, 82 Nev. 183, 187-88, 414 P.2d 592, 595 (1966). Alternately, when there is any

based upon what was actually said on the record but rather its interpretation of what was said. Although the initial discussion regarding jury instructions was not conducted off the record, Appellant later summarized the in-chambers discussion on the record. AA III 558.

In fact, when denying Appellant's request for the lesser included offense instruction the district court's explanation suggests there was a prior conversation where the parties discussed whether Appellant could be sentenced for both charges should he be convicted of both.[7] Once on the record the court obviously conflated this conversation with the conversation regarding lesser included offenses.

Nevertheless, assuming Appellant did not perfectly articulate his request the district court nonetheless bears the ultimate responsibility to ensure Appellant receives a fair trial. *See* Collier v. State, 101 Nev. 473,

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evidence whatsoever, under any "reasonable theory of the case," where the defendant "might" be convicted of the lesser included offense, then the defendant must make request the instruction. Id. Here, Appellant testified he battered Berg, but did not intend to nor take anything from Berg. Accordingly, Appellant presented evidence absolving him of guilt for Robbery and Battery with the Intent to Commit Robbery and therefore was not required to request an instruction. Nevertheless Appellant did so because his testimony also supported his reasonable theory of defense that he battered Berg but did not rob or intend to rob Berg. *See* AA III 584.

[7] Battery with the intent to commit Robbery and Robbery would not necessarily violate the prohibition on double jeopardy. Nevertheless, the district court's concern became moot once Appellant was acquitted of Robbery.

477, 705 P.2d 1126, 1128 (1985). This responsibility includes having a basic understanding of lesser included offenses and Nevada precedent regarding when those instructions must be given. If the district court is not inclined to give an instruction the court should **clearly** state for the record why it is denying the request.[8]

To convict Appellant of Battery with the Intent to Commit Robbery, there must be a Battery, i.e. a use of "force" when the defendant simultaneously intends to commit robbery. Here, Appellant's alleged battery would have been the "underlying force" used during the alleged "intended Robbery." Accordingly, Appellant's explanation makes sense.

Lastly, Respondent erroneously suggests that the failure to properly instruct the jury, when a defendant is entitled to a particular instruction, is subject to harmless error review. FTR 18. In actuality if a district court fails to instruct the jury on the defense theory of the case when, ". . .supported by some evidence which, if believed, would support a corresponding jury verdict, . . . [this omission] constitutes reversible error." Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983); *see also*

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[8] For example, here, if the court thought Appellant was seeking an instruction that Battery is a lesser included offense of Robbery, then the court should have said "I'm denying your request because Battery is not a lesser included offense of Robbery."

Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995) , 6 F.3d 569, 571 (9th Cir.1993)("failure to instruct the jury on the defendant's theory of the case, where there is evidence to support such instruction, is reversible per se and can never be considered harmless error"). Appellant's theory of defense was he committed the lesser offense of battery but did not intend to nor rob berg. Because the district court denied Appellant's theory of defense instructions, reversal is mandated.

IV. Cumulative Error

The errors which occurred at Appellant's trial violated his fundamental right to have a fully informed jury consider his guilt or innocence without hearing he is predisposed to commit crimes. The district court also violated Appellant's right to a fair trial when it allowed the State to introduce irrelevant propensity evidence, refused a negative inference instruction on lost evidence, and refused lesser included jury instructions. The State's evidence against Appellant was not overwhelming as evidenced by the jury's decision to acquit on the Robbery charge. Accordingly, Appellant respectfully requests this Court reverse his conviction.

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CONCLUSION

Based upon the foregoing, Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

Respectfully submitted,

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CLARK COUNTY PUBLIC DEFENDER

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VERIFICATION

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

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

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

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

DATED this 18th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18th day of March, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office