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Electronically Filed  
Aug 18 2016 11:00 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA  
(Appeal from Judgment of Conviction)

**TOMMY STEWART,**

**Docket No. 70069**

Appellant

v.

Lower Ct. Case No. C-15-305984-1

**STATE OF NEVADA,**

Respondent

APPEAL FROM A JUDGMENT OF CONVICTION

OF THE EIGHTH JUDICIAL DISTRICT COURT

IN CLARK COUNTY, NEVADA

THE HON. VALARIE ADAIR, PRESIDING

**APPELLANT'S OPENING BRIEF**

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## **STATEMENT OF THE ISSUES**

- 1.) Whether the District Court Erred in Adjudicating Mr. Stewart guilty of First Degree Kidnapping When the Kidnapping was Incidental to the Robbery.
- 2.) Whether the District Court Erred When It Found the *Miranda* Warnings Were Sufficient and Subsequently Denied Mr. Stewart's Motion to Suppress Statements.

## STATEMENT OF THE CASE

On April 24, 2015, Mr. Stewart was charged by information with **Count 1** - Conspiracy to Commit Robbery, **Count 2** - Burglary While in Possession of a Firearm, **Count 3** - Robbery with Use of a Deadly Weapon, and **Count 4** - First Degree Kidnapping with Use of a Deadly Weapon, alleged to have been committed on or about January 20, 2015. In anticipation of trial on this matter, the defense filed a Motion to Suppress Statements made by the defendant, arguing that the *Miranda* warnings administered by the investigating detective were insufficient to adequately advise Mr. Stewart of his constitutional rights. (000003-000008) On March 9, 2016, with the prosecution and defendant present, but without the presence of Mr. Stewart's attorney, the Clark County District Court, Department VIII, denied the motion based on the pleadings previously filed. Thereafter, a trial was held before the Honorable Judge Adair and the jury returned a guilty verdict on counts 1-4 but not the use of a deadly weapon enhancement (000001-000002).

On May 10, 2016, Mr. Stewart was present with counsel for sentencing. The Judgment of Conviction dated May 16, 2016, reflects that Mr. Stewart was sentenced as follows: **Count 1** – to a maximum of sixty (60) months with a minimum parole eligibility of thirteen (13) months; **Count 2** – to a maximum of ninety-six (96) months with a minimum parole eligibility twenty-two (22) months, concurrent with Count 1; **Count 3** – to a maximum of twenty (20) years with a

minimum parole eligibility of eight (8) years, concurrent with Count 2; and **Count 4** – life with the eligibility for parole with a minimum parole eligibility of five (5) years, concurrent with Count 3; with four hundred fifty-two (452) days credit for time served. (000001-000002) A Notice of Appeal was timely filed on May 19, 2016.

### **STATEMENT OF THE FACTS**

On January 20, 2015, at approximately 11:00 p.m., as Natasha Lumba was entering the gate to her apartment at 805 Rock Springs Drive, Las Vegas, NV, she noticed two unidentified African American men in dark clothing and hoodies approaching her. (00000128) Ms. Lumba testified that the taller of the two men held a gun and told her to open the door to her apartment. (00000129) The shorter man threatened to kill her if she did not cooperate. (00000128) Once in the apartment, Ms. Lumba testified that she was told to go to her bedroom a short distance from the living room and lie face down in the back of the bedroom (00000131). As she complied, one of the men would guard her while the other ransacked her apartment looking for items to take. (00000131) She further testified that, although they took turns guarding her, the shorter man was the primary guard. (00000134) At one point in their search for valuable items, Ms. Lumba testified that the shorter man groped under her bra and panties for money or items she might have concealed. (00000135)

Fearing for her safety, Ms. Lumba remained on the floor of her bedroom while the two men removed several items, including her laptop computer, cellular phone, and Cannon camera. (000142) Ms. Lumba testified that one of the men asked her what kind of car she drove. (000147) Identifying it as a Jetta, she was told they would let her keep her car. (000147) After approximately 10 to 15 minutes of searching the apartment, the two men left Ms. Lumba in the bedroom, told her not to call the police or they would kill her, and then quietly exited the apartment. (000146) Uncertain whether they had left, Ms. Lumba remained on the floor for a period of time until she thought it was safe to come out of the bedroom. (000146) At that point, very distressed and confirming that her laptop computer, cellular phone and Cannon camera were missing, Ms. Lumba drove to her boyfriend's residence and 9-1-1 was called. (000149)

The Las Vegas Metropolitan Police investigated the incident, collecting latent finger prints from the Ms. Lumba's apartment. (000015) Prints were lifted from a jewelry box found in the victim's apartment. (000018-000019) At trial, Heather Gouldthorpe, a forensic scientist from the Latent Print Unit with the Las Vegas Metropolitan Police Department Forensic Lab, testified that the analyzed prints matched those of Tommy Stewart. (000032) Although Ms. Lumba indicated that she only observed the faces of the two men for approximately thirty (30) seconds and that, while they were in her apartment, both men tied their hoodies

making it more difficult to observe their faces, she did observe facial similarities in two suspects included in the photographic lineup she was shown by the investigating detective. (0000131, 0000158-160) Although she saw similarities in the photos, Ms. Lumba was unable to say with certainty that the two photos were the two individuals she encountered in her apartment on January 20, 2015.

(000170)

Pursuant to the description provided by the victim and the finger prints obtained from her apartment, the officers from the Las Vegas Metropolitan Police Department Problem Solving Unit patrolled the identified area for suspects.

(000052-54) On February 14, 2015, plain-clothes patrol officers in unmarked vehicles observed an individual matching the description of Tommy Stewart, together with several other individuals, in the parking lot of Bells Gas Station in Las Vegas, NV. (000055) Mr. Stewart was contacted by the officers and ultimately detained for questioning. (000062) Prior to interviewing Mr. Stewart at police headquarters, Detective Abell advised him of his *Miranda* warnings. The testimony presented at trial indicates that the detective advised Mr. Stewart:

You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to have the presence of an attorney during questioning. If you cannot afford an attorney one will be appointed before questioning. Do you understand these rights?

(000099).

Detective Abell further testified that Mr. Stewart indicated he understood and agreed to talk. (0000100) In response to the detective's questions, Mr. Stewart initially denied contacting the victim or being in her apartment. (000100)

Detective Abell testified that, once confronted with evidence of his fingerprints at the apartment, Mr. Stewart admitted to meeting the victim near the MGM Resort and Casino in Las Vegas and going to her apartment with another individual named Raymond. (000101) During the interrogation, Mr. Stewart explained that he thought the victim was a prostitute and had money. (000101) He stated that he generally remained in her living room while Raymond went with her into the bedroom to have sex. (000102) Mr. Stewart denied being in the bedroom. He admitted to taking small items such as a watch, coins and a ring. (000102) He denied, however, taking any electronics. (000104)

Following the taped interview, Mr. Stewart was formally taken into custody and booked into the Clark County Detention Center. (000105) At the time of trial, the second suspect remained unidentified.

### **ARGUMENT**

#### **1. Mr. Stewart Was Not Guilty of First Degree Kidnapping When the Kidnapping Was Incidental to the Robbery.**

At the conclusion of a jury trial, Mr. Stewart was found guilty of conspiracy to commit robbery, burglary while in possession of a firearm, robbery with use of a deadly weapon, and first degree kidnapping with use of a deadly weapon. The



judgment of conviction was entered on May 17, 2016. The facts presented at trial, however, establish the movement of the victim was incidental to the robbery and, accordingly, do not support a separate charge of kidnapping.

NRS 200.380 (1) defines robbery as:

[T]he unlawful taking of personal property from the person of another, or in the person's presence, against his or her will, by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery. A taking is by means of force or fear if force or fear is used to: (a) Obtain or retain possession of the property; (b) Prevent or overcome resistance to the taking; or (c) Facilitate escape. The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property.

NRS 200.310 provides that a person is guilty of kidnapping in the first degree who:

[W]illfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person ..... ”

It is well settled law that the Due Process Clause of the Fourteenth Amendment protects a criminal defendant from conviction unless the prosecution proves beyond a reasonable doubt “every fact necessary to constitute the crime with which he is charged.” *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This becomes particularly significant when, such as the case

with robbery and kidnapping, the crimes charged are separate and distinct offenses yet naturally may each involve facts arising out of the same conduct and result in dual culpability. See *Wright v. State*, 94 Nev. 415, 416-18, 581 P.2d 442, 443-44 (1978) (Recognizing the difficulty under the statute of committing a robbery without the necessary confinement required for kidnapping, the court reversed kidnapping convictions and noted that, if movement of the victim is “incidental to the robbery itself, it would be unreasonable to believe that the legislature intended a double punishment.”).

This court in *Mendoza v. State of Nevada*, 122 Nev. 267, 130 P.3d 176 (2006) provided a detailed analysis of cases subsequent to *Wright* involving dual culpability for robbery and kidnapping. It was noted that, while the decision in *Wright* focused on the “increased danger” the criminal conduct imposed on the victim, subsequent decisions focused on the “unnecessary movement or personal seizure” presented by the individual facts. *Mendoza*, at 274. Recognizing the legitimacy of both considerations, this court clarified the analysis and stated:

[M]ovement or restraint incidental to an underlying offense where restraint or movement is inherent, as a general matter, will not expose the defendant to dual criminal liability under either the first- or second-degree kidnapping statutes. However, where the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense .... or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged, dual convictions under the kidnapping and robbery statutes are proper.

*Id.* at 274-75.

*Mendoza* ultimately held that:

[T]o sustain convictions for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion.

*Id.* at 275.

Following this reasoning, Mr. Stewart's conviction for first degree kidnapping is not supported by the evidence when the movement of Ms. Lumba was incidental to the robbery, did not substantially increase the risk of harm to her, nor go beyond that contemplated for completion of the robbery. In the present case, the jury was instructed that:

In order for you to find the defendant guilty of First Degree Kidnapping and an associated offense of robbery, you must also find beyond a reasonable doubt either:

1. That any movement of the victim was not incidental to the robbery;
2. That any incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the robbery;
3. That any incidental movement of the victim substantially exceeded that required to complete the robbery;
4. That the victim was physically restrained and such restraint substantially increased the risk of harm to the victim; or
5. The movement or restraint had an independent significance or purpose. 'Physically restrained' includes but is not limited to tying, binding, or taping.

Instruction No. 27.

Comparing each of these prongs to the evidence adduced at trial, it becomes clear that the conviction for first-degree kidnapping was unsupported and in error.

The testimony at trial established that the robbery took place in Ms. Lumba's apartment and that she was moved only once, a short distance to the bedroom before being instructed to lie on the floor. (000131) There was no testimony to suggest that she was moved to a second floor or remote location, nor was there testimony that she was tied, gagged or otherwise bound. The movement to the bedroom occurred immediately upon entering the apartment and served no other purpose beyond that necessary to facilitate completion of the robbery. Although she was guarded alternatively by both suspects to insure her cooperation, this same conduct would have been necessary had she been told to lie down in the living room when first entering the apartment. (000133) Her location had no independent significance, did not increase the risk of harm, or exceed that required to accomplish a robbery which encompassed the victim's entire apartment. See *Wright v. State, supra* (Movement of the victims to a back office 20-40 feet away while robbing the cash register in a hotel was conduct incidental to the robbery and did not support a charge of kidnapping.); *Cf. Pascua v. State*, 122 Nev. 1001, 145 P.3d 1031 (2006) (Dual convictions for kidnapping and murder were proper. Movement of the victim from the kitchen to the bedroom, after his wallet was

taken and where he was then murdered, could have served the independent purpose of torture, exceeded that necessary for robbery of the victim's wallet, and provided opportunity for further harm to the victim).

Even analyzing the evidence in the present case in a light most favorable to the prosecution, it remains clear that reasonable jurors could not find that Ms. Lumba's movement to the bedroom resulted in a substantially increased risk exceeding that normally presumed in a robbery, nor that it served any other purpose beyond that necessary to the search of the premises. The evidence establishes that the robbery suspects did not limit their search to the living room but also included the victim's bedroom and person. Her movement and location were clearly intended to facilitate the robbery and, as such, were nothing more than actions incidental to completion of that task. Accordingly, conviction for first-degree kidnapping was unsupported by the evidence and improper.

**2. The District Court Erred When Finding the *Miranda* Warnings Sufficient and Denying Mr. Stewart's Motion to Suppress His Statements. The Warnings Administered Did Not Comply with the Warnings Mandated Both By *Miranda* and Subsequent Case Law Which Detailed the Rights that Must Be Conveyed and Protected.**

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself..." U.S. Const. Amend. V. Prior to questioning by the police, an individual, therefore, must be advised of his Constitutional protections and a waiver of those rights must be shown to have been

made voluntarily and knowingly. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602 (1966). The well recognized general provisions of *Miranda* include that an individual must be advised “he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning.” *Id.* at 479. The government carries the heavy burden of proving the defendant was aware of these fundamental protections and, as such, must overcome the judiciously guarded presumption that the defendant desired to invoke his Constitutional rights. *United States v. Garibay*, 143 F.3d 534, 536 (9<sup>th</sup> Cir. 1998).

It is well recognized that warnings given to a suspect need not be measured against a “talismanic incantation” to be characterized as adequate. *California v. Prysock*, 453 U.S. 355, 359, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981). Neither does the court have to examine the warnings “as if construing a will or defining the terms of an easement.” *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989). While the Supreme Court has not articulated the exact formulation of the warnings necessary to satisfy the Constitutional protections ensured by *Miranda* and its progeny, the clear intent is to guard against compulsory self-incrimination. The analysis, therefore, must determine that the

warnings did reasonably “conve[y] to [a suspect] his right as required by *Miranda*.” *Id.* at 203, quoting *Prysock*, at 361.

Stating that the presence of counsel during questioning is “indispensable to the protection of the Fifth Amendment privilege,” the court in *Miranda* sought to insure that a citizen’s right to choose whether or not to speak to the police remained “unfettered throughout the interrogation process.” *Miranda*, 384 U.S. at 469. Accordingly, a “mere warning given by the interrogators [would] not alone [be] sufficient to accomplish that end.” *Id.* at 470. The court, however, did not stop there. The decision recognized that, in addition to protecting against self-incrimination, the presence of counsel *throughout* the interrogation process provided corollary functions, including the reduction in possible coercion, protection against untrustworthiness, and the assurance of a “fully accurate statement.” *Id.* at 470 (emphasis added).

The protected right of consulting with an attorney is significant both before and during questioning. “[W]e hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer *and to have the lawyer with him during interrogation* under the system for protecting the privilege we delineate today.” *Miranda, supra* at 471. (Emphasis added). Clear, unambiguous warning that an individual has the right to consult with an attorney both before and during questioning “is an absolute prerequisite to interrogation.”

*Id.* at 471; *See also, United States v. San Juan-Cruz*, 314 F.3d 384, 389 (9<sup>th</sup> Cir. 2002) (To be sufficient, *Miranda* warnings must be provided in a manner that is clear and unambiguous); *Florida v. Powell*, 559 U.S. 50, 60, 130 S.Ct. 1195, 175 L.Ed.2d 1009 (2010) (Knowledge that an attorney may be present prior to and during questioning is “an absolute prerequisite to interrogation”); *People of the Territory of Guam v. Snaer*, 758 F.2d 1341, 1343 (9<sup>th</sup> Cir. 1985) (emphasizing that a full and clear warning allows an individual to make an informed decision whether or not to speak and, further, which questions to answer and how to answer them).

Over the fifty years since the Supreme Court first articulated the warnings in *Miranda*, case law has sought to clarify procedural safeguards and ensure that constitutional protections are taken seriously by law enforcement. To that end, the warnings provided must be expressed clearly and unequivocally such that the defendant understands that he has the right to counsel before and during questioning. *Duckworth v. Eagen*, 492 U.S. 195, 203 (1989).

In *United States v. Noti*, 731 F.2d 610 (9<sup>th</sup> Cir. 1984), the court noted the critical importance of an individual knowing he has the right to consult with an attorney both before and during interrogation. Given the likelihood that a defendant who declines counsel before in-custody interrogation may be “[u]naware of his right to counsel once questioning begins,” the court emphasized the



necessity of advising the suspect of this protection. *Id.* at 615. “The right to have counsel present during questioning is meaningful. Advisement of this right is not left to the option of the police, it is mandated by the Constitution.” *Id.* at 615.

In *Duckworth, supra*, the court analyzed the warnings provided to the suspect “**in their totality**” to find they satisfied *Miranda*. *Id.* at 205 (Emphasis added). The waiver form given in *Duckworth*, unlike the warnings provided to Mr. Stewart, included the following language:

You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice **before we ask you any questions, and to have him with you during questioning.** You have the right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, **you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you’ve talked to a lawyer.**

*Id.* at 198 (Emphasis added).

In *United States v. Bland*, 908 F.2d 471 (9<sup>th</sup> Cir. 1990), the court refused to retreat from the reasoning in *Noti*. “[W]e have recognized the ‘critical importance of the right to know that counsel may be present during questioning. .... There are substantial practical reasons for requiring that defendants be advised of their right to counsel during as well as before questioning.” *Id.* at 474 (citations omitted), quoting *Noti, supra* at 614-15. Although Bland was advised that he had the right to

an attorney before questioning, the warnings did not inform him that he was entitled to have that attorney present *during* the interrogation. In accordance with *Noti*, therefore, the warning given Bland was inadequate. As such, the conviction was reversed, the matter remanded for retrial, and the confession was ordered excluded. *Id.* at 473-74.

The warnings given to Mr. Stewart, even read in their totality, failed completely to advise him that he could consult with an attorney *before* and *during* interrogation. Such essential information would clearly have allowed him to make a fully informed decision before beginning to answer any questions or allow him the ability to cease the questioning at any time during the interrogation. At best, Mr. Stewart's warnings simply indicated that he had the right to an attorney, while failing to convey the critical right, directly or indirectly, that he could actively consult with that attorney throughout the questioning.

Clearly protection against forced, coerced, or uninformed self-incrimination is judiciously protected. One need only look to judicial interpretation of the Fifth Amendment and the plethora of cases guarding these constitutional rights to conclude that warnings falling short of *Miranda's* strictures require suppression of all resulting statements. The warnings given to Mr. Stewart were defective. Accordingly, incriminating statements made subsequent to the defective *Miranda*

warnings must be suppressed. *United States v. Botello-Rosales*, 728 F.3d 865, 867-68 (9<sup>th</sup> Cir. 2013).

### **CONCLUSION**

For the above stated reasons, Mr. Stewart's conviction for first-degree kidnapping was unsupported by the evidence and, accordingly, improper. Further, the *Miranda* warnings administered by the Las Vegas Metropolitan Police Department were deficient and failed to adequately advise and protect Mr. Stewart's constitutional rights. Mr. Stewart, therefore, respectfully prays that his case be reversed and remanded back to the District Court to vacate the kidnapping conviction and suppress the statements made in violation of his constitutionally protected rights.

DATED this \_\_\_\_\_ day of August, 2016.

RESPECTFULLY SUBMITTED:  
MARCHESE LAW OFFICES, PC

By:

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief 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) as this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14.4.7 in Times New Roman, 14 points.

2. I further certify that this brief complies with the page- or type- volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and does not exceed 30 pages.

3. Finally, I 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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

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## ROUTING STATEMENT

I hereby certify that pursuant to Nevada Rule of Appellate Procedure 28(a)(5) that this appeal has jurisdiction that is retained by the Nevada Supreme Court as it invokes their original jurisdiction.

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## CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Supreme Court of Nevada efileing system located at:

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I further certify that all participants in this case are registered users of the Supreme Court of Nevada's efileing system, and that service will be accomplished in accordance with NEFCR 9(c) of the Nevada Electronic Filing Rules.

DATED this 16<sup>th</sup> day of August, 2016.

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