IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES PARKER	)	Electronically Filed Feb 10 2017 03:46 p.m. Elizabeth A. Brown Clerk of Supreme Court
	)	
Appellant,	)	
	)	
vs.	)	CASE NO.: 70139
	)	
THE STATE OF NEVADA	)	
	)	
Respondent,	)	
	)	
_____	)	

APPELLANT'S REPLY BRIEF

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ROUTING STATEMENT – RETAINED BY THE NEVADA SUPREME COURT

The matter is presumptively assigned to the Nevada Supreme Court under NRAP 17(b)(1) as this case is a direct appeal from a judgment of conviction based on a jury verdict that does involve convictions for offenses that are category B felonies. Therefore, this case is presumptively assigned to the Nevada Supreme Court. This statement is made pursuant to NRAP 28(a)(5).

STATEMENT OF THE ISSUES

I. **THE DISTRICT COURT ERRED WHEN IT FAILED TO DISMISS APPELLANT'S CONVICTIONS FOR INSUFFICIENT EVIDENCE.**

STATEMENT OF THE CASE

PROCEDURAL HISTORY

An Indictment was filed August 14, 2015 (A0001-A0006); it was later amended on October 9, 2015 to include sixteen more counts (A0007-A0020). A jury trial was held from December 1, 2015 (A0021) to December 7, 2015 (A0988). A jury verdict was returned on December 7, 2015 (A1096-A1100). A Judgment of Conviction was filed on March 25, 2016, (A1101-A1105) after which a Notice of Appeal was filed on April 8, 2016 (A1106).

Appellant filed his opening brief on December 9th, 2016. The State filed its response on January 10th, 2017. Appellant now submits his reply brief

POINTS AND AUTHORITIES

ARGUMENT

Appellant does not challenge the convictions arising from the Family Dollar Store Robbery. The State failed to provide sufficient evidence to satisfy its burden at trial for the three robberies not including the Family Dollar Store in which Appellant was caught almost immediately thereafter. In the State's reply, the State

failed to demonstrate that the verdict in this case was proper. Accordingly, the jury verdict cannot be sustained and must be reversed.

I. THE DISTRICT COURT ERRED WHEN IT FAILED TO DISMISS APPELLANT'S CONVICTIONS FOR INSUFFICIENT EVIDENCE.

A defendant is entitled to acquittal if the evidence does not support a finding of guilt beyond a reasonable doubt. NRS 175.191. Insufficiency of evidence occurs when "the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based." Mejia v. State, 122 Nev. 487, 134 P.3d 722, 725 (2006) (quoting State v. Walker, 109 Nev. 683, 685, 857 P.2d 1, 2 (1993)).

To determine whether there was sufficient evidence, the inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979))). The Fifth, Sixth and Fourteenth Amendments of the Constitution protect this right of the prosecution to bear the burden of proving its case beyond a reasonable doubt. See generally Jackson v. Virginia, 4443 U.S. 307 (1979).

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt at trial. Batin v. State, 118 Nev. 61, 64, 38 P.3d 880

(2002). By requiring the State to prove each element beyond a reasonable doubt gives "concrete substance to the presumption of innocence." Id. at 65. It also ensures against unjust convictions and reduces factual error in criminal proceedings. Id. Only evidence properly before the fact-finder may be considered in determining guilt beyond a reasonable doubt, and in determining whether there was sufficient evidence to convict. Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448 (1994).

In connection with the Kwik-E Mart, LV Nails, and Rainbow Market robberies, Appellant was convicted of multiple counts of: (1) conspiracy to commit robbery; (2) burglary while in possession of a firearm; and (3) attempt robbery with use of a deadly weapon.

"Nevada law defines a conspiracy as `an agreement between two or more persons for an unlawful purpose.'" Nunnery v. Dist. Ct., 186 P.3d 886 (Nev., 2008).

Robbery is the 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. NRS 200.380.

Burglary occurs when a person who, by day or night, enters a structure with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses, is guilty of burglary. NRS 205.060.

An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime. NRS 193.330.

The facts in this case make it abundantly clear that the State failed to "produc(e) a minimum threshold of evidence upon which a conviction may be based" for the Kwik-E Mart, LV Nails, and Rainbow Market robberies. Mejia v. State, 122 Nev. 487, 134 P.3d 722, 725 (2006) (quoting State v. Walker, 109 Nev. 683, 685, 857 P.2d 1, 2 (1993)).

TONYA MARTIN

Appellant repeats that, outside of the testimony of Tonya Martin (A0817-A0927), there was no independent corroboration of physical evidence or eye-witness identification of Appellant in the Kwik-E Mart, LV Nails Salon, or Rainbow Market robberies to convict Appellant beyond a reasonable doubt. See NRS 175.291. Martin was only sentenced after her testimony, thus the State held prison time over her head. (A0820). Ms. Martin was a mother raising her kids, and the State used fear of taking away her kids to elicit the testimony that it wanted. (A0825-0826).

At first, Martin only spoke of Boulder Station, Nail Salon, and Family Dollar. (A0838). She testified that she never saw a gun. (A0839). She testified that Appellant was not at the Family Dollar Store robbery, when that was the only robbery admits to being at. (A0851, A0868, A0899-900). Only after being led by police did she testify as to the Kwik-E Mart and Rainbow Market robberies. (A0851-0853). The police held her kids as hostage to secure her testimony. (A0860, A0903-0904). Police made arrangements for everything for the children and to protect her parenting rights so that she could provide the testimony that the State sought. (A0861).

The plea deal offered her an own recognizance release. (A0863). She only testified pursuant to her guilty plea agreement, not by choice. (A0864). She sought a good deal in exchange for providing the information that the State wanted her to present. (Id.). By testifying, the State agreed to drop 23 counts various counts down to one count of conspiracy to commit robbery. (A0865, A0907).

Her story evolved over the course of multiple interviews to better suit the desires of the police to fit Appellant into the Kwik-E Mart and Rainbow Market robberies. (A0880, A0900). She never offered any statements prior to being questioned by police. (A0887-0889). Her testimony of events involving the Family Dollar Store was inconsistent and self-serving and, therefore, questionable.

(A0893-0895). She admits to lying to the police. (A0897-0898). Only when she was threatened to be locked up away from her kids did she testify. (A0907).

The State fails to address Martin's credibility. The State obviously does not wish to discuss the issue of Martin's credibility in light of all of these facts, so the State decided to ignore Appellant's arguments. Ms. Martin was pressured by the police, her story changed, and she received favorable treatment from the State. Therefore, her testimony is simply not credible.

KWIK-E MART

The State unsuccessfully attempts to corroborate Tonya Martin's non-credible testimony. The State's argument is: Tonya Martin and two man were at the Kwik-E Mart. (Appellant's Brief at p. 14-15).

The State fails to address Appellant's assertions in his opening brief. The Kwik-E Mart cashier could not identify the individuals who robbed him (A0389-0391), a patron only described one of the perpetrators as "short and thin" (A0406), and no physical evidence was recovered at the scene. (A0423-0424). Although a mask that was used in this robbery appeared to be like the mask recovered from Appellant after the Family Dollar Store robbery, the State's DNA expert testified that other people had worn the mask in question and could not identify those persons. (A0678). Therefore, there is proof that other persons had worn the mask prior to Appellant.

The State fails to corroborate Tonya Martin's testimony regarding the Kwik-E Mart. The State uses Tonya Martin to corroborate herself; no independent corroboration exists. The only evidence that ties Appellant to this robbery is the testimony of a mother who was facing criminal liability and the threat of the State taking away her kids; said testimony was inconsistent from the initial interviews with police, and Martin's entire testimony is questionable as it appears that the police dangled special treatment in exchange for testimony against Appellant.

When viewing this minimal and suspect evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of (1) conspiracy to commit robbery; (2) burglary while in possession of a firearm; or (3) attempt robbery with use of a deadly weapon, beyond a reasonable doubt in regards to the Kwik-E Mart robbery.

LV NAILS

Once again, the State uses Martin's testimony to corroborate Martin's testimony. No independent corroboration exists. A patron at the LV Nails Salon testified that one of the suspects had a mask (A0430), which was described later as a skull mask (A0470). Neither of the suspects wore gloves. (A0480-0481). No one saw a face (A0454, A0464, A0776-A0777). While latent prints were recovered at the scene (A0501), none of the prints were attributed to defendant (A0524-A0531). Although a mask that was used in this robbery appeared to be

like the mask recovered from Appellant after the Family Dollar Store robbery, the State's DNA expert testified that other people had worn the mask in question and could not identify those persons. (A0678). Therefore, there is proof that other persons had worn the mask prior to Appellant.

The only evidence that ties Appellant to this robbery is the testimony of a mother who was facing criminal liability and the threat of the State taking away her kids; said testimony was inconsistent from the initial interviews with police, and Martin's entire testimony is questionable as it appears that the police dangled special treatment in exchange for testimony against Appellant.

The State has failed to answer the arguments of Appellant's. Instead, the State uses an uncredible witness to corroborate her own statements. When viewing this minimal and suspect evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of (1) conspiracy to commit robbery; (2) burglary while in possession of a firearm; or (3) attempt robbery with use of a deadly weapon, beyond a reasonable doubt in regards to the LV Nails robbery.

RAINBOW MARKET

Regarding the Rainbow Market robbery, the State simply states that video surveillance shows two men in masks. This argument fails to address the evidence set forth in Appellant's Opening Brief.

At the Rainbow Market, the clerk who was robbed believed one of the suspects was Hispanic. (A0553). He could not see any faces due to both suspects wearing either a bandana (A0553) or a skull hoodie (A0554). One of the robbers had placed his hand on a freshly cleaned counter (A0557), but nothing of evidentiary value from that information was ever produced to the jury. Although a mask that was used in this robbery appeared to be like the mask recovered from Appellant after the Family Dollar Store robbery, the State's DNA expert testified that other people had worn the mask in question and could not identify those persons. (A0678). Therefore, there is proof that other persons had worn the mask prior to Appellant.

The only evidence that ties Appellant to this robbery is the testimony of a mother who was facing criminal liability and the threat of the State taking away her kids; said testimony was inconsistent from the initial interviews with police, and Martin's entire testimony is questionable as it appears that the police dangled special treatment in exchange for testimony against Appellant. The State pointing to a video showing two men in masks does nothing to corroborate this testimony.

When viewing this minimal and suspect evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of (1) conspiracy to commit robbery; (2) burglary while in possession of a firearm;

or (3) attempt robbery with use of a deadly weapon, beyond a reasonable doubt in regards to the Rainbow Market robbery.

CONCLUSION

Appellant asks the court to overturn his convictions related to the Kwik-E Mart, LV Nails, and Rainbow Market robberies. The State failed to provide sufficient evidence to satisfy its burden at trial for these three robberies. The only evidence that Places Appellant at the scene of any of these robberies is the suspect testimony of a desperate mother seeking to stay out of prison and with her children. The State fails to corroborate or present any independent evidence that ties Appellant to these robberies.

Under such circumstances, no reasonable juror could convict Appellant beyond a reasonable doubt of the charges stemming from these three robberies. Accordingly, the jury verdict cannot be sustained and must be reversed.

Dated this 9th day of February, 2017

Respectfully submitted,

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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) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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:

[X] Does not exceed 30 pages.

3. Finally, 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)(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

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of February, 2017.

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the above and foregoing APPELLANT'S REPLY BRIEF was electronically served on February 9th, 2017, addressed to:

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