

IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH ALEXANDER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Oct 12 2016 10:42 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
Docket No. 70214

APPELLANT'S FAST TRACK STATEMENT

Routing Statement: This matter is presumptively assigned to the Court of Appeals because it is a direct appeal from a conviction for felonies other than category A. NRAP 17(b)(1); NRS 193.330, 200.380, 205.060.

1. Name of party filing fast track statement: Ralph Alexander.

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:

John P. Parris, Law Offices of John P. Parris.

324 S. 3rd St. #200, Las Vegas, NV 89101, (702) 382-0905

3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel: Same.

4. Judicial district, county, and district court docket number of lower court proceedings:

Eighth Judicial District Court, Clark County, Nevada, C-15-308719-1.

5. Name of judge issuing order appealed from: Michelle Leavitt.

6. Length of trial: Five days.

7. Conviction(s) appealed from: Five counts conspiracy to commit robbery; one count burglary; one count robbery; four counts burglary while in possession of a firearm; nine counts robbery with use of a deadly weapon; two counts attempt robbery with use of a deadly weapon.

8. Sentence for each count: (1) 28 to 72 months; (2) 48 to 120 months, concurrent to 1; (3) 72 to 120 months, concurrent to 2; (4) 28 to 72 months, concurrent to 3; (5) 72 to 180 months, concurrent to 4; (6) 72 to 180 months with a consecutive 72 to 180 months for the weapon enhancement, consecutive to 5; (7) 28 to 72 months, concurrent to 6; (8) 72 to 180 months, concurrent to 7; (9) 72 to 180 months, with a consecutive 72 to 180 months for the weapon enhancement, concurrent to 8; (10) 48 to 120 months with a consecutive 24 to 120 months for the weapon enhancement, concurrent to 9; (11) 72 to 180 months with a consecutive 24 to 180 months for the weapon enhancement, concurrent to 10; (12) 72 to 180 months with a consecutive 24 to 180 months for the weapon enhancement, concurrent to 11; (13) 72 to 180 months with a consecutive 24 to 180 months for the weapon enhancement, concurrent to 12; (14) 72 to 180 months with a consecutive 24 to 180 months for the weapon enhancement, concurrent to 13; (15) 72 to 180 months with a consecutive 24 to

180 months for the weapon enhancement, concurrent to 14; (16) 28 to 72 months, concurrent to 15; (17) 72 to 180 months, concurrent to 16; (18) 72 to 180 months with a consecutive 24 to 180 months for the weapon enhancement, concurrent to 17; (19) 28 to 72 months, concurrent to 18; (20) 72 to 180 months, concurrent to 19; (21) 48 to 120 months with a consecutive 24 to 120 months for the weapon enhancement, concurrent to 20; (22) 72 to 180 months with a consecutive 24 to 180 months for the weapon enhancement, concurrent to 21.

9. Date district court announced decision appealed from:

3/17/2016.

10. Date of entry of written order appealed from: 3/25/2016.

11. Date written notice of entry of order was served by the court:

3/25/2016.

12. If the time for filing the notice of appeal was tolled: No.

13. Date notice of appeal filed: 4/18/2016.

14. Rule governing the time limit for filing the notice of appeal:

NRAP 4(b).

15. Statute which grants this court jurisdiction on review: NRS

177.015(3).

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16. Nature of the disposition below:

Direct appeal from a jury verdict of guilty and resulting judgment of conviction.

17. Pending and prior proceedings in this court: Co-defendant's direct appeal pending in docket number 70139.

18. Pending and prior proceedings in other courts: None.

19. Proceedings pending before this Court raising same issues:

None known.

20. Procedural history:

On August 13, 2015, the grand jury returned an indictment against Appellant Ralph Alexander and co-defendant James Parker for two counts of burglary while in possession of a firearm, three counts of robbery with use of a deadly weapon, one count of conspiracy to commit robbery, one count of attempt robbery with use of a deadly weapon, and one count of assault with a deadly weapon. (1 Appellant's Appendix [AA] 120:6-16, 164-69.) On October 9, 2015, the State filed a superseding indictment adding co-defendant Tonya Martin and charging the defendants with five counts of conspiracy to commit robbery, one count of burglary, one count of robbery, four counts of burglary while in possession of a firearm, nine counts of robbery with use of

a deadly weapon, and two counts of attempt robbery with use of a deadly weapon. (2 AA 180-93.)

This case proceeded to trial on December 1, 2015, and concluded after five court days on December 7, 2015. (3 AA 1; 4 AA 1; 5 AA 1; 6 AA 1; 7 AA 1.) After the close of evidence, the jury returned a verdict of guilty on all counts save for counts 23 (robbery with use of a deadly weapon) and 24 (assault with use of a deadly weapon). (7 AA 109-12.) On March 17, 2016, the district court sentenced Mr. Alexander to an aggregate of eighteen to forty-five years in the Nevada Department of Corrections. (*Id.* at 120:16-122:15.) The judgment of conviction entered on March 25, 2016. (*Id.* at 127-32.) Mr. Alexander timely filed his notice of appeal on April 18, 2016. (*Id.* at 133-34.) This appeal follows.

21. Statement of facts:

On the night of June 14 and early morning of June 15, 2015, Anuttiya Painschab was gambling at the Boulder Station Hotel and Casino on 4111 Boulder Highway, Las Vegas, Nevada. (4 AA 114:17-116:11.) That night, she won a \$2000.00 jackpot. (*Id.* at 116:21-25.) At about 3:00 AM, a black man taller than her pushed her to the ground and took her purse. (*Id.* at 120:10-121:23, 125:1-10.)

In the early morning of June 19, 2015, Craig Tunnell was working as a clerk at the Kwik-E Market at 6055 East Lake Mead Boulevard, Las Vegas, Nevada. (*Id.* at 152:10-153:6.) At 2:45 AM, Mr. Tunnell was mopping the floor when two people walked in wearing black; the taller one, about six-foot-three, wore a white mask, while the shorter one, about five-foot-nine and wearing a bandana, pointed a semiautomatic handgun at Mr. Tunnell. (*Id.* at 154:7-9, 155:21-157:5, 191:10-192:11, 174:11-23.) The gunman searched Mr. Tunnell and took his wallet. (*Id.* at 158:6-12.) The two also took about \$160.00 or \$180.00 from the store. (*Id.* at 162:1-10.) Witness Douglas Salter described one of the men as short and thin. (*Id.* at 190:1-16, 197:6-15, 199:10-200:9.)

On June 26, 2015, at roughly 6:00 PM, Angelina Espinoza, Iracema Montes-Cervantes, Iraiis Montes-Cervantes, Angelica Miranda, and Briauna Williams were customers at Las Vegas Nail Spa at 4430 East Charleston Boulevard, Las Vegas, Nevada, when two men entered and demanded the belongings of those present. (*Id.* at 212:10-213:17, 230:5-12, 235:12-236:24, 244:8-245:3, 251:24-252:25, 5 AA 201:2-19.) Lien Nguyen, the owner of the spa, and Cang Tran were working that night as well. (4 AA 229:3-230:1; 6 AA 34:14-36:5.) The two men who entered were black; one wore a skull mask, the other wore a bandana; and they were taller than Ms. Espinoza's five-foot-

three. (4 AA 213:18-25, 214:12-215:7, 238:1-11, 244:24-245:3, 253:1-22; 5 AA 202:18-203:25; 6 AA 36:18-37:5.) One or both of them carried a gun. (4 AA 214:7-11, 230:13-19, 236:17-237:25, 246:20-21, 253:9-22; 5 AA 205:20-206:2; 6 AA 35:19-23.) They took Ms. Espinoza's phone and wallet, (4 AA 218:1-15); Iracema's cell phone, purse, and wallet, (*id.* at 238:12-15); Iraiis's purse, (*id.* at 245:7-21); Ms. Miranda's phone and wallet, (*id.* at 256:2-12); Ms. Williams's wallet, (5 AA 201:20-24); and money from the shop, (4 AA 230:20-231:6, 233:5-15, 236:17-237:7).

In the early morning hours of June 30, 2015, Alma Gutierrez was working at the Rainbow Market at 5075 East Washington Avenue in Las Vegas, Nevada. (5 AA 61:9-25.) That morning, two men came in to rob the store. (*Id.* at 63:22-24.) One of them was Hispanic, wearing a bandana, and carrying a firearm. (*Id.* at 66:1-19.) The other wore a skull hoodie. (*Id.* at 68:5-13.) They took about \$100.00 from the store. (*Id.* at 67:24-68:16.)

On the morning of July 9, 2015, Keshawn Richardson was working at the Family Dollar store at 4365 East Lake Mead, Las Vegas, Nevada. (*Id.* at 76:7-23.) Elana Isabel Ojeda Chavarria and Raymond Wold were shopping there separately that morning as well. (*Id.* at 109:9-110:1, 116:7-24.) At 8:30 AM, two men robbed the store, one wearing a skull mask, the other wearing a blue bandana and holding a gun. (*Id.* at 76:24-77:4, 80:7-23, 81:10-15,

110:14-18, 117:1-6, 218:8-24.) The robbers were not able to take any money from the register, but did take Ms. Ojeda's purse. (*Id.* at 85:6-11, 87:8-11, 111:15-112:1.)

The robbery was interrupted by a plainclothes police unit consisting of Las Vegas Metropolitan Police Investigator Damian Walburn and his partner, Officer Blaine Martell, who identified co-defendant James Parker as the mask-wearer and Appellant Ralph Alexander as the gunman. (*Id.* at 85:20-86:4, 210:19-213:9, 220:6-20, 222:11-12; 6 AA 39:2-40:8.) The two fled the store, and Mr. Parker began to shed clothing. (5 AA 224:24-225:11; 6 AA 46:21-47:6.)

Local resident Rafael Ramirez saw people fleeing the Family Dollar, and saw a woman in a brownish-gold sedan waving at the fleeing men. (6 AA 5:22-23, 8:14-9:15.) Mr. Ramirez gave the license plate number 005LNU to the police. (*Id.* at 11:1-8, 25:1-15.) Ms. Richardson later identified Mr. Parker and Mr. Alexander based on their clothing. (5 AA 88:18-91:25.)

Las Vegas Metropolitan Police Officer Anthony Diaz responded to the scene with his partner, Officer Keith Parker. (*Id.* at 119:21-121:8.) They saw co-defendant James Parker fleeing through a neighborhood before taking him into custody. (*Id.* at 123:15-21, 124:12-24.) Detectives Chad Embry and

Sean Hubbard photographed Ms. Ojeda's purse in a black backpack recovered near the scene, as well as one suspect's shirt and a black "Punisher" mask. (*Id.* at 147:5-148:2, 152:2-25, 156:3-23, 159:1-160:4, 161:2-18, 162:18-164:15, 166:8-18, 167:5-168:2.) No firearms or bandanas were recovered. (*Id.* at 177:10-15.) DNA samples from the mask were consistent with samples from Mr. Parker but not with Mr. Alexander. (*Id.* at 187:15-19; 6 AA 220:14-23.) Detective David Miller took a statement from Mr. Alexander in which he admitted to robbing the cashier, but indicated that the firearm was a fake. (6 AA 188:17-193:10.)

Eventually, Las Vegas Metropolitan Police Detective Karl Lorson was assigned to investigate. (4 AA 127:1-5, 128:24-129:5.) On reviewing video, Detective Lorson was able to release still frames of surveillance footage identifying the suspect and an accomplice. (*Id.* at 129:20-130:2, 131:1-5, 132:6-21.) Based on tips received from that release, Detective Lorson began to investigate Tonya Martin. (*Id.* at 133:15-134:1.) Detective Lorson found Ms. Martin's address and arranged to speak to her on July 27, 2015. (*Id.* at 136:1-18; 6 AA 93:3-95:10.) Detective Miller interviewed her afterward about the other incidents. (6 AA 100:23-103:17, 207:5-18.)

Tonya Martin testified at trial pursuant to a guilty plea agreement. (6 AA 77:20-80:23.) At the time, Ms. Martin drove a gold 2002 Ford Taurus

with license plate 005LNU. (*Id.* at 81:18-25.) She testified that she went to Boulder Station on June 15, 2015, with Mr. Alexander, her then-boyfriend. (*Id.* at 83:15-84:8.) They argued about money. (*Id.* at 85:7-15, 86:20-87:19.) Mr. Alexander left Ms. Martin's car after the argument. (*Id.* at 89:4-10.) Mr. Alexander shortly thereafter met up with Ms. Martin at a nearby 7-Eleven. (*Id.* at 89:14-90:14.) He told Ms. Martin that he had gotten "a couple hundred dollars." (*Id.* at 91:3-5.) She testified that she had on another occasion dropped Mr. Alexander off at a salon and driven him home afterward, and that she thought there had been a robbery. (*Id.* at 98:10-99:7.) Ms. Martin never saw a gun. (*Id.* at 99:11-17.) Mr. Parker was with Ms. Martin and Mr. Alexander at the salon, the Kwik-E Market, and the Rainbow Market, (*id.* at 105:2-21, 111:20-113:13, 126:22-128:14), but Mr. Alexander was the only person in the car with Ms. Martin at the Family Dollar incident. (*Id.* at 104:23-105:1, 105:22-25.)

22. Issues on appeal:

- I.** The district court abused its discretion when it permitted the State to ask leading questions of its star witness Tonya Martin.
- II.** The evidence was insufficient to support a jury verdict of guilty on the charges relating to the Kwik-E Market, Las Vegas Nail Spa, and Rainbow Market robberies.

23. Legal argument, including authorities:

I. **The District Court Abused its Discretion When it Permitted the State to Ask Leading Questions of its Star Witness Tonya Martin.**

Prior to hearing testimony from defendant-cum-state's witness Tonya Martin, the State asked the Court for leave to treat her as an adverse witness for the purposes of asking leading questions. (6 AA 68:15-69:9.) Defense counsel raised concerns about defining Ms. Martin as adverse and the potential for loss of control if limited to open-ended questions. (*Id.* at 69:11-71:8.) The trial court elected to permit leading questions from both parties. (*Id.* at 71:25-72:20.)

Nevada Revised Statute 50.115 grants the district court wide latitude in controlling the interrogation of witnesses and presentation of evidence. *See also Barcus v. State*, 92 Nev. 289, 291, 550 P.2d 411, 412 (1976). Subsection 3 generally prohibits leading questions on direct examination absent permission of the court, while subsection 4 permits a party to call an adverse party and employ leading questions, thereby limiting the opposing party to open-ended questions as if the witness were testifying on direct. Erroneous evidentiary rulings affecting the fundamental fairness of the trial process constitute a due process violation. *Coningford v. Rhode Island*, 640 F.3d 478, 484 (1st Cir. 2011) (citing *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996)); *but*

see Leonard v. State, 117 Nev. 53, 70, 17 P.3d 397, 408 (2001) (pre-*Crawford* case noting that violation of rules regarding method of questioning not generally grounds for reversal).

A defendant is entitled to a full and fair presentation of a case to an unbiased jury. *See* U.S. Const. amends. V, VI; *State v. Bourdlais*, 70 Nev. 233, 256, 265 P.2d 761, 772 (1954). The Sixth Amendment right to confront and cross-examine witnesses is fundamental to a fair trial. *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *City of Las Vegas v. Walsh*, 121 Nev. 899, 904, 124 P.3d 203, 207 (2005) (quoting *Pointer v. Texas*, 380 U.S. 400, 401 (1965) and *Drummond v. State*, 86 Nev. 4, 6, 462 P.2d 1012, 1013 (1970)). This right is particularly important when the witness is an informant receiving some benefit from his or her testimony. *See Harris v. United States*, 371 F.2d 365, 366 (9th Cir. 1967).

The confluence of the rights to confrontation, to cross-examination, and to an unbiased jury culminate in such a way that, where a witness is put forward by the State in a criminal action, and that witness is benefitting from that testimony, the defendant – and just as importantly, the jury – is entitled to hear the witness’s testimony unfettered by the State’s leading questions. That Ms. Martin is an adverse witness is questionable: her testimony indi-

cated absolute willingness to cooperate with the State since before the inception of the case. (*See id.* at 79:1-81:1, 93:12-94:10, 95:11-99:23, 100:23-102:15, 103:10-104:4, 116:7-117:17, 118:6-119:13, 120:19-124:19 (also for examples of leading questions).) No, here the State was constitutionally obligated to put its case on without the allowance of telling its key witness how she needed to answer. That benefit absolved the State of its burden to prove the case beyond a reasonable doubt.

For these reasons, this Court should hold that the trial court's grant to the State of leave to lead Ms. Martin constituted an abuse of discretion. Moreover, this was an abuse of discretion that led to a conviction in an already tenuous case. *See infra* section II. This abuse implicated substantial constitutional rights, and thus calls for reversal.

II. The Evidence Was Insufficient to Support a Jury Verdict of Guilty on the Charges Relating to the Kwik-E Market, Las Vegas Nail Spa, and Rainbow Market Robberies.

A defendant is entitled to an acquittal if the evidence does not support a finding of guilt beyond a reasonable doubt. NRS 175.191. Evidence is insufficient when “the prosecution has not produced a minimum threshold of evidence upon which a conviction may be based.” *State v. Walker*, 109 Nev. 683, 685, 857 P.2d 1, 2 (1993). To determine whether there was sufficient evidence, the Court looks to “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.” *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 to the Constitution codify this right and incorporate it to state courts.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt at trial, so as to give “concrete substance to the presumption of innocence” and to prevent unjust convictions and factual error. *Batin v. State*, 118 Nev. 61, 64-65, 38 P.3d 880 (2002). 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. *See Lay v. State*, 110 Nev. 1189, 1192, 886 P.2d 448 (1994).

The Kwik-E Market, Las Vegas Nail Spa, and Rainbow Market robberies were committed by masked individuals. Mr. Tunnell and Douglas Salter could not identify the individuals who robbed the store; neither could the customers at the nail salon. The Rainbow Market clerk thought one of the suspects was Hispanic. No physical evidence, including latent fingerprints or

shoeprints, was recovered at any of the crime scenes that conclusively established Mr. Alexander's presence. (4 AA 206:12-17, 207:18-208:24; 5 AA 13:16-16:9, 19:10-20:9, 36:16-45:8; 6 AA 217:10-13.)

As for the testimony of accomplice-turned-witness Tonya Martin, she testified about her displeasure with Mr. Alexander and displayed dishonesty with the investigating detectives in the case; there was no corroborating physical evidence or eyewitness identification of Mr. Alexander in the Kwik-E Market, Las Vegas Nail Spa, or Rainbow Market robberies sufficient to establish Mr. Alexander's involvement beyond a reasonable doubt. Neither were the witnesses consistent in whether one or both men were armed, and without having recovered the firearm(s), the State could not demonstrate beyond a reasonable doubt that the robberies actually involved the use of a deadly weapon. *See* NRS 193.165. The one common thread – the “Punisher” skull mask – was only conclusively worn by co-defendant James Parker, not Mr. Alexander. (5 AA 187:15-19; 6 AA 220:14-23.) The State failed to provide sufficient evidence to satisfy its burden of proof for these three robberies. Accordingly, the jury verdict is unsustainable and must be reversed.

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24. How each enumerated issue on appeal was preserved during trial, or if not, why the Court should review the issue:

- I.** Objections raised by counsel following request by the State to treat witness as adverse. (6 AA 68:15-72:20.)
- II.** Constitutional error requiring no preservation, but argued before the jury. (*See, e.g.*, 7 AA 69:5-20.)

25. Whether this appeal presents a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest: No.

26. Whether this appeal is presumptively assigned to the Court of Appeals, and if so, whether it should be retained by the Supreme Court: This matter is presumptively assigned to the Court of Appeals because it is a direct appeal from a conviction for felonies other than category A. NRAP 17(b)(1); NRS 193.330, 200.380, 205.060.

DATED this 11th of October, 2016.

/s/ John Parris

JOHN P. PARRIS, ESQ.

Nevada Bar No. 7479

LAW OFFICES OF JOHN P. PARRIS

324 S. 3rd St. #200

Las Vegas, NV 89101

(702) 382-0905

Attorney for Appellant

VERIFICATION

This fast track statement complies with the formatting requirements of NRAP 32(a)(4)-(6) and NRAP 3C(h)(2) because this fast track statement has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Georgia font and contains 3562 words.

I recognize that NRAP 3C requires me to file a timely fast track statement and that the Supreme Court of Nevada may sanction me for failing to file a timely fast track statement, to raise material issues or arguments in the fast track statement, or to cooperate fully with appellate counsel. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information, and belief.

DATED this 11th of October, 2016.

/s/ John Parris

JOHN P. PARRIS, ESQ.

Nevada Bar No. 7479

LAW OFFICES OF JOHN P. PARRIS

324 S. 3rd St. #200

Las Vegas, NV 89101

(702) 382-0905

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 11th of October, 2016, I served this document on the following:

Name	Address
Steven B. Wolfson, Esq. Steven S. Owens, Esq. Clark County District Attorney's Office	Via eFlex: 200 Lewis Ave. Las Vegas, NV 89155
Adam Laxalt, Esq. Nevada Attorney General's Office	Via eFlex: 100 N. Carson St. Carson City, NV 89701

/s/ John Parris

JOHN P. PARRIS, ESQ.

Nevada Bar No. 7479

LAW OFFICES OF JOHN P. PARRIS

324 S. 3rd St. #200

Las Vegas, NV 89101

(702) 382-0905

Attorney for Appellant

AFFIRMATION

Pursuant to NRS 239B.030, this document contains no social security numbers.

/s/ John Parris

John P. Parris, Esq.

10-11-16

Date