IN THE SUPREME COURT OF THE STATE OF NEVADA

TONY HOBSON	)	SUPREME COURT NO. 71419
	)	
Appellant,	)	
	)	
vs.	)	**APPEAL**
	)	
STATE OF NEVADA,	)	
	)	
Respondent.	)	DISTRICT COURT NO. C-303022
	)	
	)	

APPELLANT'S REPLY BRIEF

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HOBSON offers the following by way of reply to the State's Answering Brief filed on August 24, 2017. An enlargement of time to October 9, 2017 to file the Reply Brief was granted on September 12, 2017.

I

FACTUAL DISCREPANCIES

The following assertions made by the state are not supported by the portions of the record cited by the state or any other portions which HOBSON is able to locate.

> **The three men were apprehended on November 25, 2014, in a silver Dodge Charger in a Taco Bell parking lot, before they were able to rob the Taco Bell. 14 AA 3216, 3220.[1]**

The men were apprehended in a parking lot between the Taco Bell and Fresh and Easy, not the Taco Bell, parking lot.[2] They…were just sitting in the car listening to music for about 20-30 minutes.[3]

> **Surveillance footage showed that [Jesus] Dorame was in the restaurant while the robbers were there. 14 AA 3368, 3371.[4]**

This is absolutely untrue. The footage establishes that he was not there. The testimony was as follows [referring to time stamps on the video footage.]

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1 Ans.Brf./10.
2 HA/14/3220.
3 HA/16/3704.
4 Ans.Brf./11.

Q. I'm going to skip ahead to about 14:38. Does that appear to be the two suspects leaving?
A. Yes.[5]

- - -

Q. …And, I'm going to skip ahead to about 15 minutes and 27 seconds in. Is this the area where the front door would be located?
A. Yes.
Q. Is that Jesus bringing in the delivery?
A. Yes.[6]

So, we see from the time stamps on the video footage that the suspects left the store at time stamp 14:38, and Jose did not arrive until almost a full minute later at time stamp 15:27. Jesus was not in the store while the robbery was taking place. Moreover, no one ever testified that Jesus was in the store while it was being robbed or that he had any interaction whatsoever with the robbers. Jesus did not testify at trial.

One of the assailants held a gun to Marroquin's head…[7]

The testimony was that one of the assailants was holding a gun to Jesus's girlfriend (Noemy Marroquin).[8] There was no testimony that the gun was ever held to her head; just that it was pointed in her direction.

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5 HA/14/3371.
6 HA/14/3370-3371.
7 Ans.Brf./12.
8 HA/13/2913.

II

ARGUMENT ISSUES

A. NO NOTICE OF GRAND JURY INDICTMENT (COUNTS 33-36)

The state argues on appeal as it did at trial, that since the state alerted HOBSON in the original Marcum notice and in the transcripts from previous grand jury hearings that it would seek additional indictments at some unspecified date in the future, that was sufficient notice of those future grand jury hearings. However, that notice was insufficient under NRS 172.241 because it did not advise HOBSON that he had to submit a written request to testify.

B. JURY VENIRE NOT REPRESENTATIVE

The state claims that "[w]hether the jury venire representation was 'fair and reasonable' is of no import where an appellant cannot make out a case of systematic discrimination."[9] This is an impossible hurdle to clear as it is basically an intent standard, which allows courts in the extreme to consistently draw only from all-white venires and claim no intent to discriminate. In this case, in the entire venire of 65 jurors there were only two African Americans. And, that is the exact claim that the state is making – that no intent to discriminate has been shown. The venire, itself, is suggestive of the intent.

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[9] Ans.Brf./25.

The state cites to the unpublished decision of this Court in *Battle v. State*,[10] for the proposition that there was no showing through testimony of the jury commissioner that the underrepresentation was due to systematic exclusion of a group. **First of all**, we do not know what the jury commissioner's testimony was in the *Battle* case. **Secondly,** in *Battle* there were four African Americans out of 60 jurors. In the case at bar, there were two out of 65.[11] These two cases together tend to show that the selection process in Clark County is not producing venires even close to representative of African Americans in our community. **Thirdly,** HOBSON assumes that *Battle* was not published for a reason, and it may be that this Court wants to see more cases on this issue. HOBSON recognizes the Court's footnote in *Battle,* which states that *Williams*[12] does not **require** that a jury pool be drawn from three sources, and that that was merely a recommendation by the Nevada Jury Improvement Commission. We now have four cases – *Battle, Williams,* this case, and the case discussed in *Battle*, where within the past decade the claim has been made over and over that the jury venires are not fair for African Americans. No doubt, this Court has seen many more come before it. The Nevada Jury Improvement Commission has conducted a study and made recommendations

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10 *Battle v. State,* 385 P.3d 32, 2016 WL 4445494 (2016).

11 10% of the population of Clark County are African Americans. In *Battle*, there were four black jurors and should have been six. In this case, there were two black jurors and should have been six.

12 *Williams v. State,* 121 Nev. 934, 942 n.18 (2005).

for fairer jury selection. HOBSON urges this Court to adopt the Nevada Jury Improvement Commission's recommendation to require that three sources be used in creating our jury venires, and that this case be remanded for a new trial consistent with that requirement.

C. STATE PRE-TRIAL INTERFERENCE WITH WITNESS

The state met with Dante Johns many times before trial, and though Dante Johns was amenable to talking to defense attorneys, his attorney recommended against it. The state argues that, "[a]t no point did Cottner, the State, or Johns suggest that the State ever directly or indirectly prevented Johns from speaking with the defense attorneys." That is not true. The Dante Johns plea agreement specifically precluded Johns from talking to HOBSON or STARR, and by implication, their attorneys,[13] and HOBSON pointed that out in his Opening Brief.[14] Further, Johns attorney told him that since Johns wanted to please the state, he did not want him to meet with HOBSON or STARR, certainly suggesting that if he did so that would not please the state. That was also pointed out in the Opening Brief.[15]

As argued in the Opening Brief, this situation could have been simply remedied by the trial court taking a short break in the proceedings to allow the

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13 HA/16/3848.
14 Op.Brf./20.
15 Op.Brf./21.

defense attorneys to speak with Johns and that in doing so it would not be viewed as a violation of the plea agreement.

D. NO EVIDENCE OF KIDNAPING-RELATED CHARGES

First, HOBSON notes the state's Footnote No. 6 where it indicates that Hobson was convicted on Count 67 of Attempted First Degree Kidnapping with use.[16] He was not.[17] The Verdict form indicates that the jury found him not guilty of that offense.[18] Moreover, he was never sentenced for that offense.[19] Jamie Ward who was the victim which was the subject of the charge set forth in Count 67 was an employee of Taco Bell. He slipped out of the store past the robbers as they entered.[20]

The gravamen of the kidnapping argument is that the state contends that pulling persons who were trying to escape, back into the stores, constituted kidnaping because such acts increased the risk of harm to those individuals and were not incident to the robberies. HOBSON contends that such acts were incident

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16 Ans.Brf./32.

17 The portion of the Appendix to which the state referred was the portion of the Amended Judgment Of Conviction where the Court set forth all the charges that HOBSON had pled not guilty to. Later in the JOC, the Court goes through the sentencing for each offense. He skipped Count 67 because HOBSON was not convicted on that count. Nevertheless, HOBSON thanks the state for being straightforward in pointing out what it believed was an oversight by the defense in this very complicated 82-count case.

18 HA/20/4650.

19 HA/20/4742, HA/20/4800-4801.

20 HA/13/3127.

to the robberies, because the pattern of robberies showed that the perpetrators were interested in getting the contents of the safes and that they needed the store managers to get into those safes because they were traditionally the only ones with the combinations. They pulled the people back into the stores when they first entered because at that point they did not know if those people who were trying to escape were managers or not. Accordingly, the acts of pulling those people back into the store were incidental to the robberies, and the convictions for kidnapping cannot be sustained as to those individuals. There is nothing further to add to the arguments already set forth by the state and HOBSON in the Opening and Answering briefs.

E. NO EVIDENCE OF ROBBERY CHARGES

HOBSON contends that the convictions for robberies of persons in the stores who did not have possession of the items stolen must be reversed because one of the elements of robbery is possession. HOBSON argues that where items were taken from a safe and the manager was the only one with the combination to the safe, the manager was the only one in possession of the items within the safe, so as to those thefts, robbery can only lie as against the store manager. HOBSON has gone through each event in its Opening Brief, and will not reiterate those arguments here.

The general point of contention is that the state argues that everyone in the store had possession of everything in the store, including the contents of the safe, even if they didn't have the combination to the safe, and therefore, robbery should lie as to each person in the store for anything taken from the safe. It states, "[w]hile the money may have been locked in a safe at the time the robbers entered, the lack of physical access does not diminish every employees' possessory interest in the cash."[21] It even claims that a customer in one of the stores had a possessory interest in money stolen from the store.[22] **(Count 39)** However, the state does not cite to one case which supports its position. It cites to many cases which have held that two employees can be in joint possession of a cash register or other items within an establishment that are equally accessible to the employees. HOBSON does not dispute that, and has not challenged the robbery convictions where the perpetrators took cash drawers or other items in the common areas to which all employees had access. It does not, however, agree with the state that items in a locked safe to which only one person had access can be deemed to be in the possession of those persons who had no access.

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21 Ans.Brf./39.

22 Ans.Brf./45.

As to Count 25, HOBSON would reiterate the state's mistaken conclusions regarding the testimony surrounding Jesus Dorame's presence in the store.[23] He clearly was not in the store at the time of the robbery, and in any case, the only thing that was stolen was Idania Sacba's cell phone, over which Jesus would have had no possessory interest in any case.

Accordingly, the improper convictions for robbery counts set forth in HOBSON's Opening Brief should be reversed.

F. NO EVIDENCE OF CONSPIRACY OR ATTEMPT (COUNTS 81-82)

HOBSON claims that there was insufficient action in furtherance of the crime to sustain his conviction for conspiracy or attempted robbery of the Taco Bell on November 25, 2014 where the trio were eventually apprehended. The facts are undisputed. The trio had a conversation about robbing the Taco Bell while driving there. But, when they got there and parked in an adjoining parking lot, they simply sat for about a half hour listening to music. This suggests that they had abandoned their plan, and simply because STARR got out of the car and went to the trunk does not establish that HOBSON (or even STARR for that matter) was planning to go through with their previous discussion about robbing the Taco Bell.

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[23] See discussion at Pages 1-2, above.

III

CONCLUSION

HOBSON's 's convictions should be reversed as set forth in the Conclusion of HOBSON's Opening Brief.

Respectfully submitted,

Dated this 9th day of October, 2017.

/s/ Sandra L. Stewart
SANDRA L. STEWART, Esq.
Attorney for Appellant

IV

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this reply 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 N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript of 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. I further 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 this brief has been prepared in a proportionally spaced typeface using Word 14.4.3 For Mac with Times New Roman 14-point. I further certify that this reply brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it contains only 2,492 words.

DATED: October 9, 2017

/s/ Sandra L. Stewart
SANDRA L. STEWART, Esq.
Appellate Counsel for
TONY HOBSON

V

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

APPELLANT'S REPLY BRIEF

by mailing a copy on October 9, 2017 via first class mail, postage thereon fully prepaid, to the following:

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and by e-filing the original with the Nevada Supreme Court, thereby providing a copy to the following:

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/s/ Sandra L. Stewart
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