IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ALFRED C. HARVEY, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 72829, 75911

PETITION FOR REHEARING

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PETITION FOR REHEARING

COMES NOW Chief Deputy Public Defender SHARON G. DICKINSON, on behalf of the appellant, ALFRED C. HARVEY, and pursuant to NRAP 40, petitions this court for rehearing on the decision filed on 09/18/19 affirming Mr. Harvey's conviction. Petition is timely filed within 18 days from the issuance of the order. NRAP 40(a)(1); NRAP 26(a)(1)(C). Petition is based on the memorandum of points and authorities herein and all papers and pleadings on file in this case.

Dated this 7 day of October, 2019.

Respectfully submitted,

DARIN F. IMLAY
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By: */s/ Sharon G. Dickinson*
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POINTS AND AUTHORITIES

A. NRAP 40

Court will consider a Petition for Rehearing when court:

> (A) ...overlooked or misapprehended a material fact in the record or a material question of law in the case, or
> (B) ...overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case. NRAP 40(c)(2).

B. Issue I, subsection B (1): court misapprehended a material question of law and facts and failed to consider unpublished Manning v. State, 445 P.3d 219 (Nev. 2019).

In Issue I (B) (1), Alfred argued the evidence was insufficient to convict him of robbery because he was charged with taking "miscellaneous clothing items" from Julian Munoz, a security officer at T.J.Max, and there was no evidence that he took clothing.

Court addressed this issue as a variance and "notice" issue rather than as a variance and sufficiency of the evidence issue. Order:4-5. Thus, rather than making a decision as to whether State presented proof beyond a reasonable doubt, Court concluded: (1) the variance between the charges and the evidence was immaterial; (2) Alfred had sufficient notice; and (3) what specific items Alfred took was of little importance. Order: 4-6.

Court's analysis is contrary to *Stirone v. United States*, 362 U.S. 212, 217 (1960) where the court found it was error to permit a conviction based

on factual allegations that were not within the indictment. In *Stirone*, the indictment alleged the defendant violated the Hobbs Act by transporting sand across state lines. During the trial, the government presented testimony regarding the sand and evidence of how the concrete made with the sand provided future interference with steel shipments in interstate commerce. Trial court instructed the jury on both theories. The United States Supreme Court reversed the conviction because it was a significant variance between the pleadings and the evidence, noting allegations and proof must match.

When State presents evidence that is in variance with the charges in the criminal complaint then it fails to prove the crime beyond a reasonable doubt. *Jezdik v. State*, 121 Nev. 129, 140–41(2005)(reversal of one count due to variance - defendant was charged with making three purchases on May 6, 2001, at three stores but evidence showed one receipt was from a different store on April 27, 2001); *State v. Linker*, 309 N.C. 612, 614–15 (1983)(although charged with obtaining or attempting to obtain property under false pretenses there was no evidence defendant falsely represented himself); *Hayes v. State*, 65 So. 3d 486, 490–92 (Ala. Crim. App. 2010)(material variance exists when robbery victim identified the property that was taken from him but that property was not listed in Indictment). In each cited case the variance was material.

A variance is material if the accused is prejudiced because the Information does not: (1) definitely inform him as to the charges, and (2) protect him against double jeopardy. *State v. Jones*, 96 Nev. 71, 74 (1980).

Here, we know the variance between the pleadings and proof was material because the court refused to amend the Information before trial. By declining to grant State's motion to amend without also granting a continuance, district court found the amendment would prejudice Alfred. The trial court said:

> ...defense has prepared based upon notice pleading that the Defendant committed the act of robbery...by stealing clothing items...[but] from the review of the information, there weren't any clothing items stolen, which is their whole defense...– because the State screwed this up and mistakenly alleged something that the facts don't support... – you can't do that hours from trial. III:508-09.

Thus, the trial court acknowledged problems with the proof and pleadings before the trial began and found a material variance between what was going to be proven at trial and the words in the pleadings.

Another case discussing proof, pleadings, and amendments that cause prejudice to a defendant is the unpublished Manning case where the Court recognized the importance of requiring specific pleadings. In Manning, prior to opening statements, the trial court allowed the State to amend the changing document when State realized it could not prove the case as

alleged. On appeal, the Nevada Supreme Court found the trial court erred. Court acknowledged that without the amendment the State could not obtain a conviction under the pleadings because of the variance of the evidence. The Manning defendant had prepared the case for 2 years under the initial theory and was given insufficient notice of the new theory. The difference between Manning and here is that here, the trial court followed the Manning holding and declined to allow the amendment.

However, despite the trial court's concern with the pleadings and refusal to allow an amendment, this court's decision does the opposite. This court's decision constructively amends the pleadings and gives State the amendment it wanted but could not obtain from the trial court. Court's decision also allows other trial courts to issue the type of amendments before trial that the Nevada Supreme Court condemned in Manning. Therefore, court misapprehended the law and material facts when deciding this issue.

In the order, court also discusses notice, concluding that because Alfred objected prior to trial then the "normal standard" applies. Order:5-6. However, Alfred is challenging the variance between the evidence presented at trial and the words in the charging document rather than simply the words. *Simpson v. Eighth Jud. Dist. Court*, 88 Nev. 654 (1972) and *Alford v. State*, 111 Nev. 1409 (1995) discuss inadequate notice and indefinite pleadings, as

prohibited by NRS 173.015 and the Sixth Amendment – challenging the words. *Simpson* and *Alford* do not address insufficiency of the evidence when the evidence is in variance with the pleadings.

Court's analysis seems skewed by *Jones* – a split decision discussing a variance between the evidence and the words. While the *Jones* majority purported to be looking for a material variance between the pleadings and the evidence, its analysis instead focused on notice requirements. However, the Jones minority correctly concentrated on the variance between the evidence and the Information. The minority voted to reverse a conviction when State incorrectly pled the name of the buyer of narcotics.

Here, despite court concluding that what items were taken was of "little importance," the "unlawful taking of personal property" is an element of the crime. NRS 200.380; Order:6. Thus, the words are a material element of the crime; and, if the alleged property is not taken then no robbery occurs.

The words in the pleadings help protect a defendant from Double Jeopardy. Here, Alfred is not protected from double jeopardy because he was only convicted of taking clothing items and the evidence indicated no clothing items were taken; instead, wallets and face cream. Therefore, the protections from Double Jeopardy do not prohibit State from subsequently

charging him with a robbery by taking wallets and face cream. This means the variance is material.

C. Issue II: court misapprehended a material question of law and fact when deciding Alfred's challenge to the venire.

Court misconstrued Alfred's argument regarding his challenge to the venire. Order:10.

Alfred could not offer evidence of systematic exclusion (as court suggests must occur) because he was prohibited by the trial court from questioning the Jury Commissioner. Order:10. The documents used to formulate juries is maintained and kept by the courts through the Jury Commissioner. Court does not make any of these documents public record, none are placed on the court's web site for purview, and only the Jury Commissioner knows the specifics about the selection process used to formulate Alfred's venire. Therefore, Alfred needed court to allow him to question the Jury Commissioner.

He was prohibited from questioning the Jury Commissioner because trial court prejudged his objection, much like in *Buchanan v. State*, 130 Nev. 829 (2014). The trial court said: "It's -the Court's opinion that there's no reason to question the selection process by the Jury Commissioner's Office in regards to a selective exclusion of a particular race group…" III:585-86. Thus, court stopped Alfred from obtaining the information he needed to

make a more thorough objection. Yet, *Afzali v. State*, 130 Nev. 313 (2014) and the unpublished Afzali v. State, Case No. 54019, WL 4005727 (Nev. 2016) require the district court give jury selection information to the Defense.

The Nevada Supreme Court heard oral argument on a similar issue as addressed here on 07/19/19 in Valentine v. State, Case No. 74468.

D. Issue III: court misapprehended a material question of law and fact when whether deciding Alfred's rights were denied by trial court's limitations on his opening statement.

Court incorrectly concluded that trial court merely prohibited argument. Order:11. Alfred was not merely prohibited from arguing State's evidence, trial court prohibited Alfred from "discussing" the facts, the evidence, and the theory of his case during his reserved opening statement. U.S. Const. amend. V, amend. VI, amend. XIV. Thus, Alfred could not mention any facts that were introduced by the State.

However, NRS 175.141 gives Alfred a substantive right to make an opening statement and to discuss all facts and evidence. See *Whitlock v. Salmon*, 104 Nev. 24, 26 (1988). Thus, the court plainly erred in imposing limitations on topics Alfred could discuss in his opening statement.

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E. Issue V: court misapprehended a material question of law and fact when concluding any error was harmless and that trial court did not abuse its discretion with regard to the jury note.

Court found: (1) trial court erred by not conferring with the parties when the jury sent a note but found the error harmless; and (2) trial court did not abuse its discretion in answering. Order:16-18.

However, the error was not harmless because the jury question showed confusion regarding one element of robbery: force.

The question asked by the jury on the element of force in this case is similar to a question asked in *Jeffries v. State*, 397 P.3d 21, 28 (Nev. 2018). In *Jeffries*, the jury asked: "May we have more clarity/explanation on malice aforethought." Here, jury asked: "Can we have elaboration on the definition by means of force or violence or fear of injury?" V:1021a.

The *Jeffries* Court found the jury question showed the jury was confused and needed further clarification even though they had been correctly and adequately instructed. Likewise, here, by asking for "elaboration" on an element of the crime the jury indicated confusion on the law and needed further clarification.

In *Gonzalez v. State*, 366 P.3d 680, 683–84 (Nev. 2015), Court said when a "jury's question suggests confusion or a lack of understanding of a significant element of the applicable law," the trial court "has a duty to give

additional instructions on the law to adequately clarify the jury's doubt or confusion." Accordingly, trial court abused its discretion by not further clarifying the law in response to the jury's questions.

The error was not harmless because Alfred's defense was that he did not use force, thereby making court's response to this question critical to his defense. See closing argument at V:961-62;967-69. Robbery is nothing more than a larceny with force. *Martinez v. State*, 114 Nev. 746, 748 (1998). Therefore, if the jury had received further instruction on force then it is unlikely that they would have returned a verdict of guilty of robbery.

F. Issue VII: court misapprehended a material question of law and fact as to: NRS 175.101 - motion for a new trial – evidentiary hearing – motion to reconstruct

1. No decision on the lack of an evidentiary hearing

Court did not address how the lack of an evidentiary hearing on the jury note affected Alfred's ability to properly present all issues involving the jury note and the motion for a new trial. OB:Issue-VII(B). "This court has long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief." *Mann v. State*, 118 Nev. 351, 354 (2002). If a habeas petitioner is entitled to a

hearing upon presenting specific facts, the same should occur when a defendant files a motion for a new trial based on newly discovered evidence.

Here, Alfred presented more than a naked allegation of error occurring behind closed doors. He presented three declarations from jurors and found a jury note in the district court evidence vault that was never shown to the parties. To add to the secrecy of what occurred during jury deliberations, the district court refused to allow the trial judge who handled the trial to decide the motion for an evidentiary hearing, motion to reconstruction the record that the trial judge presided over, and motion for a new trial. The secrecy surrounding what occurred in the back hallways of the courtroom during deliberations shows that an evidentiary hearing was needed.

Alfred was prejudiced by a lack of an evidentiary hearing because he could not adequately present the facts to support his reasons for a new trial or reversal of his conviction.

2. Same judge

It is difficult to understand court's reasoning indicating that the trial judge – who was available to hear the motions – did not need to decide Alfred's motion for a new trial, motion to reconstruct the record, and motion for an evidentiary hearing. Order:19-21. Court appeared to come to this

conclusion by believing the case was assigned to a different judge. It was not reassigned. Judge Bixler is a senior judge who sat in Judge Smith's courtroom while he was out. Judge Bixler was not dead, disabled, or unable to fulfill judicial duties.

Court also concluded that the judiciary may administer its own affairs – meaning, Judge Smith could hear all motions rather than Judge Bixler.

However, under court's rational, a defendant could have one judge on the first day of trial, another on the second, and a third for the remaining days. A fourth judge could sentence him and a fifth could hear the motion for a new trial. This is exactly what NRS 175.101 prohibits.

NRS 175.101 begins with: "If by reason of absence from the judiciary district...the judge before whom the defendant has been tried is unable to perform the duties of the court after a verdict...another judge regularly sitting ...may perform those duties."

Court only focuses on the word "If" – claiming "if" does not mean "only if." But the word "if" is not dispositive of the issue because there was no evidence that Judge Bixler was "unable to perform the duties of the court after verdict."

There also was no evidence that Judge Smith was able to perform the duties of Judge Bixler because he never certified that he had read the trial

transcripts. Judge Smith had no background in deciding the matters before him and therefore erred in handing the motions.

Alfred was prejudiced because without an evidentiary hearing his motion for a new trial was limited to the pleadings.

3. Motion for a new trial.

Court ruled that Alfred failed to show a different result would have been probable at trial based on the jury note, the court's directive to the jury, and possible juror misconduct. Alfred also raised misconduct on the part of the marshall and his possible interference in the verdict. A bailiff's ex parte communicates with a deliberating jury may be misconduct. *Lamb v. State*, 127 Nev. 26 (2011).

As noted earlier, without an evidentiary hearing, Alfred's arguments are limited to the pleadings. But because Alfred's theory of defense centered on there being no force used to take or keep the property and the jury sought further guidance on the use of force for a robbery, it is more likely than not that a different verdict would have been rendered if the court had called the parties and allowed them to help fashion a response to the jury question.

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CONCLUSION

Based on the foregoing, this Court should grant rehearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

It has been prepared proportionally spaced typeface using Times New Roman in 14 font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it is either:

Proportionately spaced, has a typeface of 14 points or more, and contains 2,734 words which does not exceed the 4,667 word limit.

DATED this 7 day of October, 2019.

Respectfully submitted,

DARIN F. IMLAY
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By: */s/ Sharon G. Dickinson*
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7 day of October, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
STEVEN S. OWENS

SHARON G. DICKINSON
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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c/o Southern Desert Correctional Center
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BY *__/s/ Carrie M. Connolly__*
Employee, Clark County Public
Defender's Office