IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON STARR,	)	
#1165964,	)	**CASE NO.: 71401**
Appellant,	)	**E-FILE**
	)	D.C. Case: C-14-303022-2
v.	)	Dept.: XIX
	)	
STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

REPLY TO RESPONDENT'S ANSWERING BRIEF

Appeal from a Judgment of Conviction After Jury Trial

Eighth Judicial District Court, Clark County

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STATEMENT OF ISSUES

I. THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION FOR SEVERANCE.

II. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION CHALLENGING THE RACIAL COMPOSITION OF THE JURY.

III. ADMISSION OF OPINION TESTIMONY ON THE ULTIMATE ISSUE OF IDENTIFICATION WAS ERROR.

IV. THE DEFENDANT'S INSTRUCTION ON LACK OF FLIGHT WAS A CORRECT INSTRUCTION OF THE LAW. IT SHOULD HAVE BEEN GIVEN THE JURY BECAUSE IT WAS PART OF DEFENDANT'S THEORY OF THE CASE.

V. THE SENTENCE OF 444 TO 1,824 MONTHS WAS GROSSLY DISPROPORTIONATE AND VIOLATED THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

VI. CONCLUSION

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ARGUMENT

I.

I. The District Court Erred in Denying Defendant's Motion for Severance.

The State argued that Defendant was not prejudiced by being joined at trial with co-defendant Hobson. The State argued this was true because the admission of Hobson's confession, through the testimony of the informant Donte Johns merely indirectly implicated Starr in the crimes charged and therefore did not affect the Defendant's confrontation rights. See, *Richardson v. Marsh,* 481 U.S. 200, 107 S. Ct. 1702, 95 L.Ed.2d 176 (1987).

The State argued that redacting Hobson's confession was adequate to protect the Defendant's rights under the Sixth Amendment. (RAB, p. 34) Defendant submits this was error.

The complex procedure that was suggested to be followed in *Richardson v. Marsh*, and which the State alleged was performed in this case was inadequate and still left the Defendant prejudiced by the testimony of Donte Johns. Hobson's incriminating statements clearly implicated the Defendant even though there may have been an attempt to redact those admissions. (AA, p. 187-261)

The State in its Responding Brief cited *Lisle v. State,* 113 Nev. 679 (1997), for

the proposition that it is permissible to admit redacted statements that do not "facially incriminate" a co-defendant. (RAB, p. 34). The State however ignores the holding in an analogous case, *Duckworth v. State,* 113 Nev. 780 (1997), where the court recognized that imperfectly redacting testimony by merely not using the defendant's name, but calling him an "unnamed accomplice" was not enough to protect a defendant's rights under the confrontation clause. In this case, as in *Duckworth,* jurors could easily infer from the circumstances who the "unnamed accomplice" was.

Clearly the mere redaction of Donte John's testimony, as occurred here, was insufficient to protect the Defendant's Sixth Amendment right to confrontation in this case. Defendant submits whatever gains to justice that occurred in this case from judicial economy, resulting from the joinder of the defendants in this case, noted by the Supreme Court in *Jones v. State,* 111 Nev. 848, 899 P.2d 544 (1995), were vastly outweighed by the overwhelming prejudice to the Defendant Starr. The denial of severance therefore requires reversal of Starr's conviction.

II.

II. The District Court Erred in Denying Appellant's Motion Challenging the Racial Composition of the Jury.

The Sixth Amendment of the United States Constitution requires a fair and

impartial jury that is a fair cross section of the community. *Taylor v. Louisiana,* 419 U.S. 522 (1975), *Evans v. State,* 112 Nev. 1172 (1996). Defendant submits in this case he met the burden of proof to establish the Clark County jury selection process was unfair because it resulted in an unrepresentative jury panel.

In this Respondent's Answering Brief (RAB), the State conceded that the Jury Commissioner, Mariah Witt, acknowledged that just 4% of the jury pool from which Defendant Starr's jury was chosen were African Americans, while the population of the county was 10% African Americans. (RAB, p. 36) The State however attempted to minimize this large statistical disparity, stating that only 7.8% of the people who actually responded to the Jury Commissioner's questionnaire were African Americans. (RAB, p. 36)

It is respectfully submitted however that the most important statistic to consider in deciding whether Defendant received a fair cross section of jurors is the actual population percentage of African Americans in Clark County, compared with the percentage that were in the actual panel. Defendant therefore submits that he made out a prima facie case of under representation of African Americans in the jury panel. The percentage of African Americans in the jury panel was only 40% of the amount should be statistically expected for their percentage of the whole population.

Once the Defendant had established a prima facie case of under representation on the jury panel, the burden then shifted to the State to rebut the Defendant's allegation that he had been denied a fair cross section of jurors. *Duren v. Missouri,* 439 U.S. 357, 366 (1979).

The testimony of Jury Commissioner Witt clearly did not rebut the allegation of an under representation of African Americans on the jury. (AA, p. 577-585) Her testimony in fact reinforced the claim that the State had denied the Defendant a fair cross-section of jurors. Her testimony established that as the jury commissioner she was not pro-active in seeking to cure the existing disparities that had long existed on Clark County panels, but chose instead to rely on only unrepresentative lists for jury selection pools. Nothing had changed in the jury commissioner's office since the *Williams* case, 121 Nev. 934 (2005). The lists used by the jury commissioner only included the DMV list and the Nevada Energy List. (AA, p. 577-581) These lists were not lists that had an adequate percentage of African American citizens. The failure of the jury commissioner to seek more progressive and more racially inclusive lists was, after the *Williams* decision, the principle reason that this court should find the system did not provide a fair cross section of jurors for the Defendant. Having denied the Defendant his Sixth Amendment right to a fair cross section of jurors without any

good excuse or reason, the case should be reversed and remanded for a new trial. The reversal of this case will hopefully have a salutary effect on the jury commissioner's actions on future cases.

III.

III. Admission of Opinion Testimony on the Ultimate Issue of Identification Was Error.

The State tried to characterize Detective Abell's identification testimony as based upon his own perception (RAB, p. 39). No matter how Abell's testimony may be characterized by the State, it is respectfully submitted that the testimony of Detective Abell regarding photographic identification of Starr was improper opinion testimony, which usurped the function of the jury. NRS 50.265. *United States v. Butcher,* 557 P.2d 666 (9th Cir.1977), *United States v. LaPierre,* 999 F.2d 1460 (9th Cir.1993). There was a timely objection to Abell's testimony. (AA, p. 2465) Defense counsel who objected raised the best evidence rule. The objection based on the best evidence rule was denied. (AA, p. 2466) The judge did not even consider whether the evidence was improper opinion evidence.

The State in Respondent's Answering Brief stated that when the Detective testified: "he watched the surveillance videos <u>many</u> times and concluded that the

same individuals were committing each robbery." (RAB, p. 39) The Detective then testified that "he arrested the people he believed committed the robberies." (RAB, p. 39) The State however tried to argue that this testimony was not the same as Abell testifying that he actually identified the Defendant as one of the perpetrators on the videos he watched. The State argued: ". . . to look for one set of suspects based on his perception of the videos, is a far cry from opining that the defendants in the case were the ones on the video." (RAB, p. 39)

Such an argument is absurd. Clearly the impact of the series of questions by the district attorney was designed to show precisely that Detective Abell was expressing his opinion that he could identify the defendant as one of the participants in the robberies after he viewed the surveillance tapes many times.

The Nevada case, *Rossana v. State,* 113 Nev. 375, 934 P.2d 1045 (1997), admitted opinion testimony of identification based on surveillance footage. The court there stated:

> "Generally, a lay witness may testify regarding the identity of a person depicted in a surveillance photograph " 'if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.' " *United States v. Towns,* 913

> F.2d 434, 445 (7th Cir. 1990) (quoting *United States v. Farnsworth,* 729 F.2d 1158, 1160 (8th Cir.1984)). In *United States v. Barrett,* 703 F.2d 1076, 1086 (9th Cir. 1986), the Ninth Circuit concluded that the opinion testimony of a lay witness would be particularly appropriate where the witness was familiar with the defendant at the time of the crime and the defendant's appearance had changed by the time of trial." *Id*. 380, 381 (Emphasis added)

Rossana however is easily distinguishable from Defendant's case. In Defendant's case Detective Abell had no prior familiarity with the Defendant and therefore had no ability greater than the jury to make an identification. Defendant again submits under these facts it should have been the jury's exclusive responsibility to determine the ultimate issue of guilt or innocence from the photo evidence. *Bennett v. State,* 794 P.2d 879, 882 (Wyo. 1990)

Detective Abell's opinion testimony clearly invaded the province of the jury and the judge should have sustained defendant's objection to the testimony even though based on the "best evidence." (AA, p. 2465-66) As the court noted in *United States v. Robinson,* 544 F.2d 110 (2d Cir. 1976): "The jury may look at bank surveillance pictures and decide the issue for themselves."

As the court noted in *United States v. LaPierre,*998 F.2d 1460 (9th Cir. 1993):

> "Lay opinion testimony of the type given by Miller is of dubious value. The jury, after all, was able to view the surveillance photos of *LaPierre* and make an independent determination whether it believes that the individual pictured in the photos was in fact *LaPierre*. Miller's testimony therefore runs the risk of invading the province of the jury and unfairly prejudicing *LaPierre*. For these reasons we have held that while lay opinion testimony of this sort is sometimes permissible, 'the use of lay opinion identification by policemen or parole officers is not to be encouraged and should be used only if no other identification testimony is available to the prosecution.' *United States v. Butler,* 557 F.2d 666, 670 (9th Cir.1977). *Id*. *LaPierre* 1465. (Emphasis added)

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Following the reasoning of *LaPierre*, the court should have sustained Defendant's objection to Detective Abell's improper opinion testimony. This was prejudicial error that requires reversal.

IV.

IV. The Defendant's Instruction on Lack of Flight Was a Correct Instruction of the Law. It Should Have Been Given the Jury Because it Was Part of Defendant's Theory of the Case.

The State cites an unpublished opinion, *Frazier v. State,* 2016 Nev. Unpub.

Lexis 603 (RAB, p. 41), suggesting that giving an inverse flight instruction is incorrect as a matter of law. Defendant respectfully requests the court disregard the *Frazier* opinion, which was unpublished, giving it the weight unpublished opinions should be given.

There currently exist no published Nevada case law either affirming or denying the giving of an inverse flight instruction. Defendant submits therefore that the proper analysis is simply to consider what is logical in a particular case to decide if giving an inverse flight instruction was appropriate. In Appellant's Opening Brief he cited *Weber v. State,* 121 Nev. 554 (2005), a case which made clear that flight is more than merely going away. "The essence of flight is consciousness of guilt." *Id*. 582 Since the Nevada Supreme Court so strongly emphasizes consciousness of guilt as an evidentiary predicate for admission of a flight instruction, Defendant urges this Honorable Court that when consciousness of innocence is made clear by the factual circumstances of non-flight, there should conversely be an inverse flight instruction.

Logic compels the giving of such an inverse flight instruction because it is more likely that someone who chooses not to flee under the circumstances, when a guilty man would likely flee, is more likely to be innocent of the criminal charges.

. . .

V.

V. The Sentence of 444 to 1,824 Months Was Grossly Disproportionate and Violated the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution.

The United States of America has the highest incarceration rate of any country on earth. Although the Defendant was convicted of very serious charges, it is respectfully submitted that the sentence he received was grossly excessive.

The State argued: "any sentence within statutory limits is not cruel and unusual unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate as to shock the conscience." *Allred v. State,* 120 Nev. 410, 92 P.2d 1246, 1253 (2004) (RAB, p. 42). Defendant does not argue that the statutory punishment is unconstitutional per se however Defendant submits that the 36 years to 156 years sentence, as applied to the Defendant under all the facts and circumstances in this case, is shocking to the conscience and disproportionate. Because Defendant was denied his right to a fair sentence under the Eighth Amendment, the case should be remanded for a lesser sentence that does not violate the cruel and unusual punishment clause of the Eighth Amendment.

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VI. CONCLUSION

The Defendant urges this Honorable Court to reverse and remand his case for a new trial, holding that Defendant's case should now be severed from the co-defendants. The Court should issue such further orders that are necessary to ensure a fair trial including ordering the district court to consider the paramount importance of the Defendant having a jury made up of a fair cross section of jurors. The Court must also instruct the district court on all necessary legal matters such as the impropriety of allowing opinion evidence that invades the province of the jury, as well as the necessity of giving the necessary proposed defense theory of the case instruction regarding lack of flight.

Alternatively, Defendant urges this Court to hold the sentence he received, of 36 years to 156 years, was grossly disproportionate and in violation of the Eighth Amendment's cruel and unusual punishment clause and that sentence should be reduced to a proportionate and non-excessive sentence that does not violate the Eighth Amendment cruel and unusual punishment clause.

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DATED this 27th day of October, 2017.

Respectfully submitted,

//s// *Terrence M. Jackson*

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the type-face 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 WordPerfect X7 in Times New Roman style and in size 14 font with 3.0 spacing for the Brief and 2.0 spacing for the citations.

2. I further certify that this Reply 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:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 2,369 words, which is within the word limit, and this brief is within the 15 page limit.

3. Finally, 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 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.

DATED this 27th day of October, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., am a person competent to serve papers and not a party to the above-entitled action and on the 27th day of October, 2017, I served a copy of the foregoing: Reply to Respondent's Answering Brief, as follows:

[X] Via Electronic Service to the Nevada Supreme Court and to the Eighth Judicial District Court, and by U.S. mail with first class postage affixed to the Petitioner/Appellant as follows:

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