IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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ROUTING STATEMENT

Alfred Harvey's case is not presumptively assigned to the Court of Appeals because his appeal arises from a criminal jury trial involving a category B felony conviction: robbery. NRAP 17(b)(2). Additionally, he challenges more than the sentence imposed or sufficiency of evidence. NRAP 17(b)(2). He raises several issues involving structural error as well as issue of public importance.

JURISDICTIONAL STATEMENT

NRS 177.015 gives Court jurisdiction to review the direct appeal of a final judgment from a jury verdict and the denial of a motion for a new trial.

District court filed the final judgment of conviction on 03/17/17 and Alfred filed his notice of appeal on 04/10/17, within the 30 day time limit established by NRAP 4(b). II:322-27.

The district court filed the order denying his motion for a new trial on 05/04/18. VI:1666-68. Alfred filed his notice of appeal on 05/16/18. VI:1671-73.

On 07/26/18, Court issued an order consolidating both appeals. Case 72829 involves the direct appeal while the appeal of the denial of the motion for a new trial is Case 75911.

ISSUES PRESENTED FOR REVIEW

I. STATE FAILED TO PROVE ROBBERY BEYOND A REASONABLE DOUBT.

II. COURT CREATED STRUCTURAL ERROR BY PREJUDGING ALFRED'S CHALLENGE TO THE VENIRE.

III. STRUCTURAL ERROR MANDATES REVERSAL OF ALFRED'S CONVICTION BECAUSE THE COURT DENIED ALFRED HIS CONSTITUTIONAL RIGHTS BY LIMITING THE CONTENT OF HIS RESERVED OPENING STATEMENT.

IV. TRIAL COURT ERRORS DEPRIVED ALFRED OF THE RIGHT TO A FAIR TRIAL.

V. REVERSIBLE ERROR OCCURRED WHEN JURY SENT TRIAL COURT A NOTE, TRIAL COURT NEVER NOTIFIED THE PARTIES, MARSHALL SPOKE TO JURY, AND TRIAL COURT SENT A RESPONSE TO THE DELIBERATING JURY WITHOUT CONSULTING PARTIES.

VI. CUMULATIVE TRIAL ERROR.

VII. COURT CREATED REVERSIBLE ERROR BY NOT ALLOWING THE TRIAL JUDGE TO HEAR ALFRED'S POST-TRIAL MOTIONS; BY REFUSING TO RECONSTRUCT THE RECORD; AND BY DENYING ALFRED'S MOTION FOR A NEW TRIAL.

STATEMENT OF THE CASE

After Alfred's arrest on 03/30/16, State filed a criminal complaint alleging Alfred took clothing items from a TJ Max (TJM) store by committing a robbery with a deadly weapon, a knife.[1] Justice court held his preliminary hearing on 04/18/16 and bound the case to district court for trial.[2]

State filed the Information on 04/19/16.[3] I:030-31. At his initial arraignment on 04/20/16, Alfred pled not guilty, invoking his right to a speedy trial. II:355-58;*Minutes*-II:328. However, at his calendar call on

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[1] Criminal Complaint filed on 04/01/16. I:001; booking sheet at I:025.*****

[2] I:002-24. Justice Court minutes at I:026-29.

[3] On 11/16/16, during trial, State filed Amended Information. I:184-85; III:513-14;687.

06/15/16, Alfred waived his speedy trial right when seeking a continuance. II:384-87;*Min.*-II:333. The next trial date on 11/02/16 was vacated due to State being unable to proceed. II:417-36;*Min.*-II:338-40. Court rescheduled the trial to begin on 11/14/16.

Prior to the trial, Alfred filed numerous motions.[4]

The trial began on 11/15/16 and lasted 4 days, concluding on 11/18/16.[5] The jury returned a guilty verdict for robbery but found Alfred not guilty of using a deadly weapon. V:980-87;*Min.*-II:350; Verdict-II:282.

On 03/08/17, Court sentenced Alfred to a term of 36 to 144 months in prison.[6] I:323;V:998-1021;*Min.*-II:353-54.

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[4] Alfred filed: (1) Motion to compel discovery (I:033-43; State Responded at I:043-58; Court ruled at II:372-82-*Minutes*-II:331-32);

(2) Motion to suppress show-up identification and subsequent in court identification (I:091-112; State's Opposition at I:113-36; Hearing on 11/02/16 at II:420-27 and court granted in part at II:427-30; discussed at III:515);

(3) Motion to dismiss or request for curative instruction and addendum (I:067-90; State's Opposition at I:137-47; Court ordered evidentiary hearing on 11/02/16 at II:420-27; Evidentiary hearing on 11/09/16 at II:437-84 and court denied motion at II:478-81);

(4) Motion to cover face tattoos (I:148-63; State's Opposition at I:164-69 but later State had no opposition at V:516; court denied motion at hearing on 11/02/16 but later granted on 11/15/17 at II:430-34; V:516).

(5) Defendant's Motion in Limini (I:173-82; court granted in part by stipulation and denied remaining at II:481-83; discussed again at V:514-150).

[5] DAY 1: 11/15/16 (III:500-688-*Minutes*-II:343-45); DAY 2: 11/16/16 (IV:689-917;*Min.*-II:*346-47*); DAY 3: 11/17/16 (V:918-79;*Min.*-II:348-49); DAY 4: 11/18/16 (V:980-87;*Min.*-II:350).

On 04/05/18, Alfred filed a motion to reconstruct the record after finding a jury note written by the jury foreperson during deliberations. The note found within the court exhibits was not discussed in the transcripts or court minutes and the trial attorneys indicated they had never been told about the note. VIII:1464-1554. Alfred asked that the hearing on the motion be held before the trial judge.

On 04/05/18, Alfred also filed a motion for a new trial based on the grounds of newly discovered evidence (the new jury note) and sought an evidentiary hearing before the trial judge. VI:1022-1117.

State opposed both motions, Alfred replied, and he filed a supplemental reply.[7]

District court held two hearings on the motions, denying both motions and declining to allow the trial judge to hear the matters.[8]

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[6] The initial sentencing date on 01/04/17 was continued when Alfred contested information included in his pre-sentence report. V:988-98:Min.-II:351-52. Prior to sentencing, Alfred filed a sentencing memorandum. II:283-309. Although State filed prior convictions seeking habitual criminal adjudication, court denied State's request. V:1019.

[7] State opposed both motions: VI:1555-1563(reconstruct); VI:1118-1356(new trial). Harvey filed replies and a supplemental motion: VIII:1564-1645 (reply to reconstruct); VIII:1646-1665 (supplement to reconstruct); VII:1357-1444 (reply to new trial); VII:1445-1463 (supplement to new trial).

[8] Hearings: 04/16/18 at VI:1683-88l; 04/30/18 at VI:1689-99; *Minutes*-1679-82; Order at 1666-68.

STATEMENT OF THE FACTS

Julian Munoz, a security officer for TJM, watched closed circuit television surveillance while seated in TJM's security office. IV:693-785. He zeroed in on Alfred Harvey as Alfred entered the store. IV:693-785.

With two children in tow, Alfred went directly to the children's department. IV:699-702. Munoz claimed Alfred erratically picked up items then put them down without looking at the price tag - he interpreted this as a signal indicating Alfred was going to steal. IV:699-702.

Next, Alfred went to the men's department where Munoz said Alfred continued to act erratically. IV:702-3. While Munoz watched Alfred on camera in the men's department, he saw Alfred place a wallet into his coat and head towards the restroom with two other wallets in hand. IV:702-03;710-15. Alfred set aside the two wallets prior to entering the restroom. IV:703. When Alfred left the restroom, Munoz saw him pick up the two wallets and conceal them inside his coat. IV:703.

After this, Munoz saw Alfred walk to the fragrance department, pick up a jar of face cream, and place it in his front left pocket. IV:703-4;715;749

Munoz left the security office, exited TJM, and waited outside the store for Alfred to leave. IV:716. Shawn Bramble, another TJM security

officer, took over observation of the security cameras when Munoz left. IV:717. Bramble and Munoz kept in contact by cell phone. IV:756.

Even though he could not observe the closed circuit television after leaving the store, Munoz explained what he later observed on the video. Munoz said Alfred picked up a green box, then selected a black box, and then selected a lighter box. IV:716-8. With the items in hand, Alfred went to check out; and, according to Munoz, Alfred concealed again but he could not identify what was taken. IV:718-19;783-84. Munoz said the video showed Alfred dumped the fragrance box he was holding and other items into a shopping cart and exited the store. IV:718. Also, one of the children dropped a box into the cart before leaving. IV:719. The shopping cart of items remained in the store. IV:724;765.

When Alfred exited the store, Munoz approached him, identified himself as security, and asked for the unpaid merchandise. IV:724;765. Munoz said: "He claimed that he had put the merchandise back down in the store, which is when I told him that I need the wallets out of his coat and [he] handed two of them to me." IV:725;765-66.

Munoz asked Alfred to step inside the store to go to the security office and Alfred refused. IV;725;727;767;777-78. Munoz claimed Alfred pulled out a knife and Munoz backed away, letting Alfred leave. IV:728-29.

Munoz called 911 as he watched Alfred walk to a U-Haul with his children and drive off. IV:729;731;764;793-5.

At trial, Munoz testified he observed Alfred take the items from the store, as depicted in Exhibit 2: picture of a Tommy Hilfiger wallet, two fragrances, and cream. IV:737. However, Munoz indicated the fragrance in the picture was similar to items he later viewed on the surveillance video. IV: 736-37. However, while watching the surveillance camera inside the store in real time, he only saw Alfred conceal three wallets and a face cream. IV:749;767.

Bramble did not testify to his observations on the closed circuit televisions but discussed what occurred after Munoz stopped Alfred. IV:786-810. Bramble said Munoz looked shocked when he saw him outside; Munoz told him Alfred pulled a knife on him. IV:792-93. However, Bramble never saw this occur. IV:793. The jury found Alfred not guilty of committing a robbery with a deadly weapon.

Bramble said Alfred was inside a U-Haul truck, backed up, and drove away. IV:793;796. Bramble took a photo of the truck on his cell phone but later deleted the photo without showing it to the police. IV:793;802-05. He indicated the truck was parked in front of the Dollar Tree Store. IV:802.

Tara Harvey, Alfred's wife, was seated in the passenger side of the U-Haul when Alfred and the children entered. IV:882-911. Tara said Alfred and the kids were inside the store for twenty minutes before returning to the U-Haul. IV:890. Tara saw men run out of the store after Alfred, taking pictures of the truck. IV:893-94. When Tara asked Alfred what was going on, Alfred told her the security thought he had done something but he did not do anything. IV:908-11. Tara never saw Alfred with a knife. IV:887.

Errol Appel, the husband of the TJM store manager, was waiting outside TJM when he heard commotion. IV:814-40. He saw three people exit TJM: 2 white males and 1 black male. IV:837. He asked what was going on and one told him "We just got held up by knife point." IV:816.

Appel followed the U-Haul in his car as it left the parking lot and called 911, explaining the direction the U-Haul was headed. IV:818-24. He felt the U-Haul was being driving recklessly before it stopped at the main entrance of a school. IV:820-24. He saw a man get out of the driver's side of the U-Haul, run towards the school, and then back to the van. IV:824.

Several units responded to the 911 calls including air detail. IV:868.

Officer Nelson was the first arrive at TJM. IV:841-57. He spoke to the security officers, reviewed the surveillance video from inside the store,

and determined that the suspect was a light skinned black or Hispanic. IV:842-44.

Officer Humphreys was one of several officers who arrived at the school parking lot – Desert Torah Academy. IV:858-74. Humphreys detained Alfred and searched his person and the U-Haul. No knives were found at the scene, on Alfred's person, nor in the U-Haul. IV:857;861. The items he impounded were identified in Exhibit 2 and 3. IV:862;852-53. He also recovered Alfred's wallet and identification. IV:866.

SUMMARY OF THE ARGUMENT

Alfred's case addresses several issues of structural error involving: a challenge to the jury venire, the denial of the right to counsel in opening by the court placing unfair restrictions on the defense opening statement, and whether structural error applies when the trial court does not inform the parties about a jury note when the jury seeks legal guidance on an element of the crime. Additionally, the evidence was insufficient to convict Alfred of robbery, and the trial court erred in making decisions on a tainted identification, lost evidence, and jury instructions. Case also involves the denial of a motion for a new trial and motion to reconstruct the record.

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ARGUMENT

I. STATE FAILED TO PROVE ROBBERY BEYOND A REASONABLE DOUBT

A. Standard of review.

"Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt..." NRS 175.201; *Hightower v. State*, 123 Nev. 55 (2007); U.S. Const. amend. V; amend. XIV; Nev. Const. art. 1 § 8.

Under the sufficiency of evidence test, Court decides "whether jury, acting reasonably could have been convinced to that certitude [of beyond a reasonable doubt] by the [direct and circumstantial] evidence it had a right to consider." *Wilkins v. State*, 96 Nev. 367, 374 (1980). Court does not reweigh evidence but determines if *competent evidence* exists to prove each and "every element of a crime," and "every fact necessary to prove the crime" beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000); *In re Winship*, 397 U.S. 358, 364 (1970); NRS 175.191; NRS 175.201.[9] Court considers evidence in light most favorable to the

[9] *Stephans v. State*, 262 P.3d 727 (Nev. 2011) incorrectly concluded Court need not distinguish competent from incompetent evidence by relying on federal habeas case. Insufficiency claims face "a high bar in federal habeas proceedings because they are subject to two layers of judicial deference" before getting to federal habeas proceedings. *Coleman v. Johnson*, 132 S. Ct. 2060, 2062 (2012).

prosecution. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

B. Robbery.

NRS 200.380(1) defines the crime of robbery in pertinent part as:

> ...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...

State charged Alfred with robbery with a deadly weapon as follows:

> ...on or about the 30th day of March, 2016...did willfully, unlawfully, and feloniously take personal property, to wit: *miscellaneous clothing items*, from the person of Julian Munoz, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of Julian Munoz, with use of a deadly weapon, to-wit: a knife, defendant using force or fear to obtain or retain possession of the property, to prevent or overcome resistance to the taking of the property, and/or to facilitate escape.

Jury Instruction 3; II:252; Amended Information-I:184-85 (Emphasis added).

1. No evidence Alfred took miscellaneous clothing items.

State presented no evidence that Alfred took personal property as identified as "*miscellaneous clothing*" in the charging document. IV:749. Therefore, the evidence presented was insufficient to convict Alfred of robbery.

2. Nothing was taken from or in the presence of Munoz by Alfred using force or violence or fear of injury.

"Presence," with respect to a robbery, means the item taken was within the reach of, observation of or control of the alleged victim when taken. *Guy v. State*, 108 Nev. 770, 775 (1992). Because Munoz was in a room watching a security monitor when Alfred allegedly took three wallets and lotion, the taking of the wallets and lotion did not occur in Munoz's presence and did not occur with the type of force needed for a robbery. IV:703.

However, despite the alleged taking occurring at a distance and not in the presence of Munoz, a "taking" by using "force" may also occur in one's "presence" when a shoplifter attempts to leave the store with the merchandise and uses force when confronted. This comports with the definition of "force" within NRS 200.280(1).[10]

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[10] NRS 200.380(1) defines force relating to a robbery as:

> A taking is by means of force or fear if force or fear is used to:
> (a) Obtain or retain possession of the property;
> (b) Prevent or overcome resistance to the taking; or
> (c) Facilitate escape.
>
> The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the

If a store employee observes a shoplifter at a distance place a bottle of liquor down his pants, the actual "taking" does not occur at this time. Instead, the "taking" in one's presence occurs when the store employee stops the shoplifter at the door, demands the property, and the shoplifter strikes the store employee before leaving with the merchandise. *Barkley v. State*, 114 Nev. 635 (1998).

But if the shoplifter drops the item when stopped by the store employee and starts fighting, the subsequent use of force is insufficient to elevate a larceny to a robbery. *Martinez v. State*, 114 Nev. 746 (1998). The reason for this is that "[t]he element that distinguishes larceny from robbery is the use of force" when taking the personal property. *Id. at* 748.

Here, Munoz exited the store and confronted Alfred outside. Munoz approached him on the sidewalk, identified himself as loss prevention, and asked for the merchandise. IV:724. Munoz said Alfred: "...claimed that he had put the merchandise back down in the store, which is when I told him that I need the wallets specifically out of his coat, and at that point he...took

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person from whom taken, such knowledge was prevented by the use of force or fear.

the wallets out of his coat and handed two of them to me." IV:725. Munoz did not further ask Alfred to return any other property.

Munoz then asked Alfred to step back inside the store to go to his office. IV:725-7. Munoz said:

> [H]e's telling me that he's not walking back into the store...and I'm like it's not a big deal, just walk back in with me, we don't have to do this in front of these people out here. And at that point he reached into his pocket and takes out a knife...I heard the snap of the knife...I can't see it, but then he comes all the way up like this for a second and comes back down with it and tells me, we're not doing this today. IV:727.

Munoz stopped walking and took out his cell phone to call 911 while Alfred walked away. IV:727;763-64.

Accordingly to Munoz' testimony, Alfred never used physical force to retain any property and never verbally threatened to use force. Because the jury found Alfred not guilty of using a knife, Court may not rely on Munoz' testimony of the knife to conclude there was sufficient evidence to show Alfred used force to compel Munoz to acquiescence to the taking. Thus, unlike the suspect in *Barkley* who hit the store employee while maintaining control of the item, here, Alfred did not use any force to retain other property but simply walked away.

A robbery is a larceny with the use of force. *Martinez at* 748. Because no force was used by Alfred, State failed to prove a robbery beyond a reasonable doubt.

II. COURT CREATED STRUCTURAL ERROR BY PREJUDGING ALFRED'S CHALLENGE TO THE VENIRE

A. Fair Cross-Section objection.

When the jury entered the courtroom, Alfred objected to the venire not containing a fair cross-section of the community. Within the 45 person venire, he identified one person as African-American, two Hispanic, seven as Asian, and 34 as Caucasian; there were no native American jurors. III:524.

State and court did not contest Alfred's assessment of the racial composition of the jurors.

Instead, court responded: "Okay. We'll make a record and the state can respond...We'll let you make a complete record of it..." III:524. Thereafter, trial court began jury selection without further hearing Alfred's objection.

At the noon recess, court allowed Alfred to place his objection on the record. III:582.

Alfred noted that he made an objection to the jury venire prior to court swearing jurors for questioning and he reiterated his prior objection. III:582-83. Alfred asked court for a new venire or to allow him to question the Jury Commissioner regarding the process used to establish his venire. III:583.

State objected, claiming the lack of minorities on the venire was insufficient to show the process was unfair. State further argued the unpublished decision Battle v. State, Case No. 68744, supported its argument. III:584-5. State offered to provide the court with a copy of the Battle decision, a copy of the jury commissioner's testimony in the Battle case, and a copy of the lower court's reasoning. III:585. However, the trial court did not receive the copies offered by the State into evidence and State did not make them part of the record.

Instead, the trial court based his decision on his own experience, saying: "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. Court relied on the case *Afzali v. State*, 130 Nev. 313 (2014) and possibly Afzali v. State, WL4005727, unpublished (7-22-16). Court did not rely on Battle, indicating he had never read the case. III:586.

Court concluded:

> ...we've seen a lot of jury pools and sometimes...the makeups different every time. But the generalized selection process is – does not provide for, in the Court's opinion, any kind of selection exclusion process...your request to get...a different panel is denied. III:586

Thus, court relied on his own personal experience with jury venires to decide that Alfred's right to a fair and impartial jury was not violated.

B. Standard of review.

Court reviews de novo trial court's response to a challenge to the jury venire. *Morgan v. State*, 416 P.3d 212, 221 (Nev. 2018) citing *Buchanan v. State*, 130 Nev. 829 (2014). The selection of a jury in violation of the Equal Protection Clause or the fair cross-section guarantee is a structural error that allows a defendant relief without a showing of prejudice. *United States v. Rodriguez-Lara,* 421 F.3d 932, 940 (9th Cir. 2005).

C. Test.

The right to a fair and impartial jury, chosen from a fair cross-section of the community, is guaranteed by the United States Constitution under the Fourteenth Amendment's Due Process and Equal Protection Clauses, and the Sixth Amendment's fair cross-section requirement, as well as by the Nevada Constitution. U.S. Const. amend. VI; amend. XIV; Nev. Const. art 1, sec. 1; art. 1, sec. 8; *Ballard v. United States*, 319 U.S. 187, 192 (1946)

citing Thiel v. S. Pac. Co., 328 U.S. 217, 220 (1946)("the American tradition of trial by jury...in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community"); *State v. McClear*, 11 Nev. 39 (1876). Potential jurors have an equal protection right during the jury selection process. *Walker v. State,* 113 Nev. 853, 867 (1998) *citing J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 128 (1994).

A prima facie violation of the Sixth Amendment's fair cross-section is shown when jurors of a specific race: (1) are a "distinctive" group in the community; (2) representation of this distinctive group in the venire is unfair and unreasonable when compared to the number of persons of this race in the community; and, (3) under representation is due to systematic exclusion of this racial group in jury-selection process. *Williams,* at 940; *Evans v. State*, 112 Nev. 1172, 1186-1187 (1996); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *Duren v. Missouri,* 439 U.S. 357 (1979).

1. Distinctive Group.

Court made no decision under Step 1.

The United States Census Bureau Quick Facts lists the racial demographics of minorities for Clark County, Nevada, in 2017 as: African-American 12.5%; Asian-Americans 10.5 %; Hawaiian and other Pacific

Islanders 0.9%; Hispanic as 31.3 %; and two or more races 4.7%.[11] Accordingly, Alfred fulfilled Step 1 because African-Americans, Hispanics, and Asian-Americans are distinctive groups in the community.

2. Representation not fair and reasonable.

Court made no decision and conducted no analysis under Step 2.

Alfred argued the representation of minorities on his venire was not fair and not reasonable. He noted African-Americans represented 11.5% of the Clark County community and Asian-Americans 9.6%; he said Hispanics were a minority, and Native Americans represented 1.2%. III:524;583.

However, as listed previously, recent demographics show African-American are 12.5% of the population and Hispanics 31.3%.[12]

State admitted African-Americans and Hispanics were "potentially" underrepresented in the venire. III:584.

Determining underrepresentation of a distinctive group requires evaluation of absolute and comparative disparity. *See Williams* at 940, n.9. A comparative disparity over 50% means representation is not likely fair and reasonable in relationship to the number of persons within this group in the community. *Id.*

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[11] https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src.

[12] See prior footnote.

Under recent demographics showing the African-American population as accounting for 12.5% of the community: one African-American juror in a 45 person venire means: (1) only 2.2% of the venire was African-American; (2) these results equaled an absolute disparity of 10.2%; and (3) there was a comparative disparity of 82.4%.

Also, with the Hispanic population amounting to 31.3% of the Clark County population: two Hispanic jurors in a 45 person venire equates to: (1) 4.4% of the venire being Hispanic; (2) an absolute disparity of 26.9% and (3) a comparative disparity of 85.9%.

Accordingly, because there was a comparative disparity above 50% for African-Americans and Hispanics in Alfred's venire, the representation of these minorities was not fair and reasonable as required by the Sixth Amendment.

Moreover, there was more than a "potential" problem as State suggested. In other cases addressing Step 2, the Court based its decision on a challenge to the venire based on one distinctive group being underrepresented. *See Williams, Evans v. State*, 112 Nev. 1172 (1996), Battle (unpublished); *Morgan v. State,* 416 P.3d 212, 221 (Nev. 2018), However, here there were two – each with a comparative disparity rate far beyond the 50% limit; they were at 85.9% and 82.4%. Accordingly, even

without further evidence being presented, Alfred showed a systematic exclusion because of the two large discrepancies in the comparative disparity of two groups in his venire - African-Americans and Hispanics.

3. Underrepresentation due to systematic exclusion.

Court skipped Step 1 and Step 2, going directly to Step 3. Court concluded that based on court's experience, there was no systematic exclusion. III:586. Court based its decision on its own personal observations and *Afzali v. State*, 130 Nev. 313 (2014) and possibly the unpublished Afzali case. Alfred's trial court was the same trial court as in *Afzali.*[13]

However, Alfred told court a new venire was warranted because African-Americans and Hispanics were underrepresented. III:583. He also asked permission to question the Jury Commissioner regarding the randomness of the selection process used to establish his venire. III:583. Court denied his request.

However, the *Afzali* cases actually support Alfred's argument rather than the court's decision.

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[13] Court did not rely on the unpublished Battle v. State, Case No. 68744, or on a document State claimed represented questioning of the jury commissioner in the past which was not entered into evidence.

In *Afzali,* the district court (same district court as here) refused to release any documents regarding the grand jury selection process. On appeal, the *Afzali* Court remanded the case back to district court and ordered district court hand over all documents pertaining to the grand jury selection process for the grand jury that State used to obtain an Indictment against Afzali. The reason for this order was because the defendant sought to challenge the selection process and composition of his grand jury. Thus, the published *Afzali* decision stands for the proposition that a defendant should be given all documentation involving the selection process of jurors so that he can make an argument regarding the systematic exclusion of minorities.

Upon remand from the Nevada Supreme Court, district court provided Afzali with all the documents and held an evidentiary hearing. Thereafter, the district court held that he failed to make a prima facie case that his Sixth Amendment right to a grand jury composed of a fair cross-section of the community was violated.

Later, in the unpublished Afzali decision (after the defendant had been given all documents relating to the selection of his grand jury), the Afzali Court held he failed to present sufficient proof of systematic exclusion. Accordingly, based on both *Afzali* cases, Alfred was entitled to receive documentation regarding the process used in the selection of his venire and

should have been allowed to question the Jury Commissioner. Thus, district court's reliance on *Afzali* to support his conclusion was misplaced.

Although district court did not rely on the unpublished Battle, it did seem to follow the Battle Court's directive. The Battle Court jumped directly to the third step as did district court in this case. Battle v. State, unpublished at 385 P.3d 32 (Nev. 8-10-16). In omitting Step 1 and Step 2, the Battle Court said: "Regardless of whether distinctive groups were underrepresented on the jury, Battle must also demonstrate a systematic exclusion." As such, the unpublished Battle appears to conclude the three part test announced in the published *Williams* case need not be followed.

However, the Battle Court reached its decision by noting that the district court relied on a transcript it provided to the parties – a transcript of the Jury Commissioner's testimony from another case. The Battle Court reviewed the transcript on appeal and concluded "the process explained by the jury commissioner provides no opportunity for systematic exclusion of specific races." *Id.* The Battle Court denied the defendant's challenge to the venire on appeal, contending "he failed to provide any competing evidence in the record." *Id.* Battle Court also seemed to question whether African-Americans were actually underrepresented on his venire.

In contrast to Battle, here, two distinct minority groups were underrepresented, the district court did not rely on a transcript of the Jury Commissioner's testimony, the State did not enter a transcript into the record, and the court prohibited Alfred from placing any testimony from the Jury Commissioner into the record. Accordingly, court created structural error by not allowing Alfred to question the Jury Commissioner because this restriction prohibited him from receiving information on the selection process used for the jurors on his venire and any data on the summoning process.

Another case supporting Alfred's request to question the Jury Commissioner is *Morgan*. In *Morgan*, the trial court initially refused to allow a hearing but later reconsidered when a question arose regarding a juror's qualifications and when the prosecutor discussed the selection methods used. By holding the hearing with the Jury Commissioner, the *Morgan* Court found the trial court did not commit structural error by prejudging the objection.

Trial court's actions here are similar to those in *Brass v. State,* 128 Nev. 748 (2012) where structural error occurred when court removed juror from panel after defendant made a *Batson* challenge and held the *Batson* hearing much later after dismissing remaining jurors. Court's actions here

are also similar to those of the trial court in *Buchanan v. State*, 130 Nev. 829 (2014), where court denied the defendant's challenge to the venire before holding an evidentiary hearing on the challenge. In both instances the trial court prejudged the objection before holding the hearing. Thus, here, a fatal flaw in trial court's decision-making process was that it pre-judged Step 3 thereby committing structural error.

When a defendant has a right to challenge a procedure, the courts must ensure that the defendant can litigate that right because the failure to afford Alfred an adequate opportunity to litigate his fair cross-section claim would in itself violate due process. See *Franks v. Delaware*, 438 U.S. 154, 171-172 (1978).

III. STRUCTURAL ERROR MANDATES REVERSAL OF ALFRED'S CONVICTION BECAUSE THE COURT DENIED ALFRED HIS CONSTITUTIONAL RIGHTS BY LIMITING THE CONTENT OF HIS RESERVED OPENING STATEMENT

NRS 175.141 allows a criminal defendant to reserve his/her opening statement until after the State presents its witnesses and rests its case. The question asked here is whether the plain meaning of NRS 175.141 allows a defendant to give the same type of defense opening statement after State rests it case as the defense would give at the beginning of the trial. Alfred contends it does.

Here, State gave an opening statement and the trial court allowed Alfred to reserve his opening. III:675-76. State did not object.

However, after resting its case, State objected to Alfred giving a typical opening statement, asking the court to limit the content. State contended:

> My understanding is an opening statement is only about what the evidence is going to show. Given that the State has presented its case-in-chief we would simply ask that the opening statement by **the defense be restricted to whatever they believe the evidence that Mr. Harvey will present has shown or will have shown...Otherwise, it would simply be commentary on what the evidence has shown**, which is more akin to a closing statement. (Emphasis added); IV:876-77.

Court agreed in part, directing Alfred to make an opening statement rather than a closing argument. IV:877.

In giving the restricted opening statement, Alfred's counsel told the jury:

> Before I tell you what the evidence actually will show...[I want to say] perception and reality are two different things. The State has the burden of proving that Mr. Harvey stole items with the threat or force to obtain or retain those items. And you need to pay attention to make sure that the evidence does show that. It is their burden to prove each and every element of the crime to the specific detail of the information as it was read. IV:880.

At this point, State interrupted, asking to approach the bench. IV:880-81. Prosecutor argued Alfred could not discuss what the evidence would show in his opening statement. IV:881.

Court agreed in part, directing Defense Counsel to not "reference what's already been presumed as evidence." IV:881. Court allowed Defense Counsel to discuss the burdens of proof but said: "you can't reference what's already been presented..." IV:881. Thus, court prohibited Alfred from mentioning the facts and evidence.

Alfred's attorney followed court's order. Defense counsel said:

> Ladies and gentlemen of the jury, once again, I'm just asking that you listen, that you've taken notes on the evidence already presented, that you listed to the evidence that's about to be presented to you. And I believe if you do that, and also follow the instructions that the judge will give you in following the law, you will render a verdict of not guilty. You will find that Mr. Alfred C. Harvey did not commit a robbery with use of a deadly weapon. And that's all we're asking for verdict of not guilty. IV;881.

Thus, Alfred's defense or the facts of the case were not discussed because of court's decision.

But Nevada's Legislature gave Alfred the right to present a regular opening statement to the jury. NRS 175.141 directs the court to read the charges and plea to the jury and then:

> 2. The district attorney, or other counsel for the State, must open the cause. The defendant or the defendant's counsel may then either make the defendant's opening statement or reserve it to be made immediately prior to the presentation of evidence in the defendant's behalf.
> 3. The State must then offer its evidence in support of the charge, and the defendant may then offer evidence in his or her defense.

The plain meaning of the words in NRS 175.141 do not differentiate and do not limit the scope of a defendant's opening statement if he/she reserves it until after State presents its evidence.

Court uses de novo review for issues of statutory construction and constitutional overlay. *Jackson v. State*, 291 P.3d 1274, 1277 (Nev. 2012) (statutory and constitutional interpretation); *DeStefano v. Berkus*, 121 Nev. 627, 629 (2005)(interpreting statutes); *In re Contested Election of Mallory*, 282 P.3d 73, 741 (Nev. 2012) (interpreting Nevada Constitution).

When interpreting NRS 175.141, Court gives credence to the plain meaning of the words used by the Legislature and the construction of the statute must be construed as a whole so "not be read in a way that would render words or phrases superfluous or make a provision nugatory." *Mangarella v. State*, 117 Nev. 130, 133 (2001) *quoting Charlie Brown Constr. Co. v. Boulder City*, 106 Nev. 497, 502 (1990).

When a statute's language is plain and unambiguous, Court may not look beyond the statute for a different meaning. *Berkus at 630; Nay v. State,* 123 Nev. 326, 331 (2007). A statute is ambiguous if it is capable of at least two reasonable yet inconsistent interpretations. *Hernandez v. Bennett-Haron,* 287 P.3d 305, 315 (2012).

Here, the meaning of the words within NRS 175.141 is plain. NRS 175.141 allows a Defendant to make an opening statement after the State's opening or "immediately prior to the presentation of evidence in the defendant's behalf." It does not limit the content or scope of defense's opening statement when it is reserved.

Reserving opening until after the State rests is not solely grounded on NRS 175.141(2) but also on the Fifth, Sixth, and Fourteen Amendments. In *United States v. Amawi,* 541 F.Supp2d 955 (District Court, N.S., Ohio 2008), the court granted the defendant leave to make an opening statement after State rested its case. The *Amawi* Court explained:

> ...a defendant has the right to elect to postpone his opening statement until he sees what the government has presented. That right is grounded in the constitutional right to put the government to its proof. It is a corollary of the right to remain silent: every defendant can wait to speak or be heard until after the government has laid out its case... To require defense counsel to speak before the government has presented its case would, moreover, lessen the burden placed on it to prove its case without any help from the defendant. This fundamental right would be undercut where, for example, the defense

> attorney, by having to speak before the government's case is in, thereby has to alert the government to weaknesses of which the government is, until then, unaware. (cite omitted). The right to effective representation by counsel may also be implicated in the right to wait to present an opening statement… All of which means that quite often [though not always] the defendant's attorney must wait to see what the government does before finally forming the defense… to require the Defense to give an opening statement prior to State presenting its evidence means Defense Counsel can only speculate as to what the government's witnesses will say or what the evidence will show. *Id. at* 957-58.

Thus, trial court violated Alfred's constitutional rights when prohibiting him 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.

Trial court's limitations on the content of a reserved opening statement defied the purpose of an opening statement. An opening statement "affords the defense an opportunity to explain the defense theory of the case, to provide the jury an alternative interpretive matrix by which to evaluate the evidence, and to focus the jury's attention on the weaknesses of the government's case." *State v. Pedroza-Perez*, 240 Ariz. 114, 116 (2016) *citing Oesby v. United States*, 398 A.2d 1, 5 (D.C. 1979). An opening statement familiarizes the jury with the nature of the case and addresses admissible evidence so as to make it easier for jurors to understand the testimony that follows. *Watters v. State*, 313 P.3d 243, 247 (Nev. 2013).

Accordingly, Alfred had the right to wait to hear the evidence before presenting a theory of defense which would include a discussion of the facts in his opening statement and evidence brought out during direct.

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). Accordingly, structural error results if the court prohibits a defendant from presenting a closing argument because the right to the assistance of counsel is being denied. *Id.* Likewise, here, the complete denial of an opening statement by restricting the content of the statement also amounts to structural error warranting reversal because Alfred was denied his right to counsel and due process.

IV. TRIAL COURT ERRORS DEPRIVED ALFRED OF THE RIGHT TO A FAIR TRIAL

A. Motion to suppress show-up and in-court identification.

Alfred filed a pre-trial motion to suppress the out-of-court show up identification and any subsequent in-court identification of him by Munoz. I:091-112; 113-36.

A defendant may attack an identification as denying due process if, when considering the totality of the circumstances, the identification procedures were unnecessarily suggestive and conducive to irreparable

mistaken identification. *Stovall v. Denno*, 338 U.S. 293 (1967); *Manson v. Braithwaite*, 432 U.S. 98, (1977); *Jones v. State*, 95 Nev. 613 (1979). Due process is violated if suggestive identification procedures make it all but inevitable that the witness will identify a specific person regardless of whether or not that person is the one who committed the crime. *Foster v. California*, 394 U.S. 440 (1969).

When determining the reliability of an identification, a court weighs the following factors against the effect of the suggestive procedures:

> (1) the witnesses' opportunity to view the criminal at the time of the crime,
> (2) the witnesses' degree of attention,
> (3) the accuracy of the prior description of the criminal,
> (4) the level of certainty demonstrated at the confrontation, and
> (5) the time between the crime and the confrontation.

Gehrke v. State, 96 Nev. 581, 613 P.2d 1028, 1030 (1980) citing *Neil v. Biggers*, 409 U.S. 188 (1972); U.S. Const. amend. XIV; Nev. Const. art. 1 sec. 8.

Here, trial court weighed the factors and determined the out-of-court show up was unnecessarily suggestive. Court granted the motion in part, prohibiting Munoz from testifying to the out-of-court identification of Alfred but allowing him to identify Alfred in court. II:427-30. Court based its decision upon finding the police officer's show-up identification procedure

was unnecessarily suggestive, unreliable, and conducted in a manner that could lead to a mistaken identification. II:429-30.

However, court erred in allowing the Munoz to identify Alfred in court because once it determined the first identification of Alfred was obtained in violation of due process, any further identifications by the same witness would also be tainted.

The circumstances surrounding the in-court identifications in this case are similar to those that were suppressed in *State v. Walker*, 429 So.2d 1301 (Fla. App. 1983). In *Walker,* a man was threatened and robbed by a group of kids late at night, in a dark area. The man gave general descriptions of the kids and told a police officer that he could identify them. Three days later, the police officer showed the man a photographic line-up that contained the picture of the defendant; but, the man was unable to identify anyone. The man explained that he focused his attention on the gun. However, he said that he knew there were three or four black males, but he did not really look at any of them because he was scared. Yet, later, when the man appeared in court, he identified the defendant as one of the robbers.

On appeal, when suppressing the in-court identification, the *Walker* Court used *Foster* for guidance. In *Foster,* the United States Supreme Court held that a defendant was denied due process when a witness was shown

three different photographic line-ups, all of which included a picture of the defendant, and, after seeing the defendant's picture for the third time, the witness finally was convinced that the defendant was the person who committed the robbery. Likewise, in *Walker,* the man's previous inability to identify the defendant, when shown a photographic line-up containing his picture, made the later in-court identification unreliable and inadmissible.

Similarly, in the case at bar, the trial court held that the first show-up was highly suggestive and therefore prohibited witnesses from discussing it. But court erred because the first out-of-court identification tainted the in court identifications and allowed Munoz (IV:699) to identify Alfred.

The error is not harmless because if the court had prohibited Munoz from identifying Alfred then it is likely he would not have been convicted.

B. Lost evidence and denial of jury instruction.

Alfred filed a pre-trial motion to dismiss, alternatively seeking a curative jury instruction regarding lost evidence of photographs taken by Bramble outside TJM after Munoz stopped Alfred. I:067-90; 137-47. Alfred argued the officer did not conduct a thorough investigation and was grossly negligent because if he had done so then he would have learned that Bramble had photographs. II:480-81. Alfred said the photographs would have shown that he did not have a knife in his hands. II:421.

On 11/02/16, trial court held an evidentiary hearing and denied the motion to dismiss and request for a jury instruction. II:478-81. Court concluded police did not act in bad faith nor were they grossly negligent. Court based this in part on the officer's testimony that he had no knowledge that Bramble had taken photographs of Alfred and the U-Haul outside TJM and therefore did not attempt to collect the photographs.

During the trial, Bramble said he had taken photographs which he later deleted because Alfred was in custody. IV:793;802;804-06;811-13.

The two part test for determining if the failure of the police to gather evidence requires a dismissal necessitates a showing of materiality. *Daniels v. State,* 114 Nev. 261, 267 (1998). If the missing evidence was material then the court decides if the police actions in failure to gather the evidence amounted to negligence, gross negligence, or bad faith. *Id.*

Here, the photographs were material to show what occurred outside TJM. Tara testified Alfred did not have a knife and the photographs would have supported her testimony and contradicted Munoz. Thus, the failure of the police to gather this evidence was grossly negligent and court erred in not provided for a jury instruction explaining to the jury how to view the evidence of the missing photographs. Police were grossly negligent because

they should have known that the security officers had the capability of taking pictures on their phones.

C. Denial of proposed larceny jury instruction.

District court has broad discretion when settling jury instructions and Court generally reviews district court's decision under an abuse of discretion or judicial error standard. *Hoagland v. State*, 240 P.3d 1043 (Nev. 2010).

Alfred requested petit larceny instructions and verdict for petit larceny as defined by NRS 205.240. I:194-100; II:275-81.

Alfred argued Munoz testified that the value of the items taken was less than $500 and that if the jury determined he did not use force or violence in the taking then the crime would be a petit larceny. V:924-26.

Court agreed with Alfred's premise but refused to give the instruction, advising Alfred to simply make that argument in closing. V:926

While larceny may not be a lesser included offense of robbery under the elements test (*Barton v. State*, 117 Nev. 686, 694 (2001)), court concluded it was a "lesser vaguely related." V:926.

Although this Court holds the trial court is not required to give lesser-related jury instructions, here, it was error not to give the petit larceny instruction and verdict because court acknowledged larceny was related and allowed Alfred to argue that the State only proved a petit larceny. See *Peck*

v. State, 116 Nev. 840, 845 (2000), *overruled by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006).

The error was not harmless because during deliberations the jury struggled with understanding the element of force needed for a robbery. The jury foreperson sent a note to the court asking: "Can we have elaboration o n the definition by means of force or violence or fear of injury?" V:1021a If jury had been given the definition of petit larceny and the option of returning a verdict on larceny then they would have better understood the use of force needed for a robbery as opposed to a larceny. As discussed in subsequent issues, trial court never answered this question for the jury.

V. REVERSIBLE ERROR OCCURRED WHEN JURY SENT TRIAL COURT A NOTE, TRIAL COURT NEVER NOTIFIED THE PARTIES, MARSHALL SPOKE TO JURY, AND TRIAL COURT SENT A RESPONSE TO THE DELIBERATING JURY WITHOUT CONSULTING PARTIES.

During deliberations the jury foreperson sent a note, asking: "Can we have elaboration on the definition by means of force or violence or fear of injury?" Court responded: "The Court is not at liberty to supplement the evidence." V:1021a. The court never told Alfred's attorneys or the prosecutors about the note. VIII:1481-85.

Because district court refused to hold an evidentiary hearing when Alfred filed his Motion to Reconstruct the Record and Motion for a New

Trial, we do not know what the marshall did with the note or what he said to the jury. We know one juror claimed after receiving the court's response the jury quickly reached a verdict. VIII:1659-60. We know court did not tell the trial attorneys and the note was not found until the case was in the appellate stage. VIII:1481-88.

By failing to notify Alfred's attorneys about the jury note and taking it upon himself to craft a response, court violated Alfred's Sixth Amendment right to the assistance of counsel, right to be present at all trial proceedings as codified in NRS 178.388, and NRS 175.415.

A. NRS 175.415.

NRS 175.415 states in pertinent part:

> After the jury have retired for deliberation...if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to, the district attorney and the defendant or the defendant's counsel.

In accord with NRS 175.415, trial court directed the jury in Jury Instruction 23 to submit a written question to the court if the jury wanted further information on any point of the law. II:272. Thus, the jury foreperson followed the correct procedure by submitting a note to the marshall.

However, court did not follow NRS 175.415 because the parties were not notified, court did not obtain input from the parties, the jury was not brought to the courtroom, and Alfred was not in court to hear the note.

B. NRS 178.388 and right to be present.

NRS 178.388(1) states:

> Except as otherwise provided in this title, the defendant must be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence...

Accordingly, trial court violated NRS 178.388 by not bringing Alfred and the jury into court when responding to the jury note.

In *United States v. Martinez,* 850 F.3d 1097 (2017), the Ninth Circuit concluded trial court's failure to notify the parties of a jury note violates the Sixth Amendment and Federal Rule of Criminal Procedure 43(a). Rule 43 is also violated if court does not respond adequately. *Id. at* 1102.

NRS 178.388(1) is comparable to Rule 43(a). Like Rule 43(a), NRS 178.388(1) provides a defendant with the right to be present at every critical stage of the trial – including the discussion of jury notes. *Martinez at* 1100;

C. Sixth Amendment and Due Process.

Court's failure to notify the parties of a jury note and allow input and court's failure to respond to a note adequately also violates a defendant's Sixth Amendment right to the assistance of counsel and his right to due process. *Martinez; Manning v. State*, 348 P.3d 1015, 1019 (Nev. 2015).

In *Manning,* this Court adopted the policies of the Ninth Circuit and the Third Circuit in holding that:

> ...due process gives a defendant the right to be present when a judge communicates to the jury (whether directly or via his or her marshal or other staff). A defendant also has the right to have his or her attorney present to provide input in crafting the court's response to a jury's inquiry. Accordingly, we hold that the court violates a defendant's due process rights when it fails to notify and confer with the parties after receiving a note from the jury.

Id. at 1019. In *Manning*, the jury note discussed the fact the jury was deadlocked.

Manning also follows directives from the United States Supreme Court indicating that jury notes "should be "answered in open court and ... petitioner's counsel should [be] given an opportunity to be heard before the trial judge respond[s]." *United States v. Barragan-Devis*, 133 F.3d 1287, 1289 (9th Cir. 1998) *citing Rogers v. United States,* 422 U.S. 35, 39 (1975).

D. What defense counsel would have done if shown the note.

When shown the jury note, the trial attorney outlined what she would have said to the trial court if she had been notified. Trial Counsel noted:

- This question goes to the crux of the defense regarding whether Alfred had a weapon or if he used force – was it a larceny or a robbery?
- I would have objected to court's typed response as nonresponsive because the jury did not ask about evidence but asked for further explanation on the law as allowed by NRS 175.415.
- I would have asked court to direct the jurors to look at jury instruction 6, 11, and 12.
- I would have asked court to supplement the jury instructions with proposed jury instructions not used at trial, including the petit larceny instruction.
- I would have requested the Crane instruction.
- I would have requested the court give the legal definitions of actual force, fear, and violence from Black's Law Dictionary.

See VI:1483-85.

E. Error not harmless beyond a reasonable doubt or is structural.

When determining if harmful error occurred, court looks at "the nature of the information conveyed to the jury, in addition to the manner in which it was conveyed" and the length of time it took for the jury to render a verdict after receiving the information. *Martinez at 1101 citing Rogers* at 40.

Here, unlike in *Manning*, it is impossible to say the error was harmless beyond a reasonable doubt because the note reflects the jury's struggle over whether or not Alfred committed a robbery by using "force or violence or fear of injury." And, the jury rendered a verdict finding Alfred not guilty of using a deadly weapon.

Manning Court outlined the following test adopted from *United States v. Barragan–Devis,* 133 F.3d 1287, 1289 (9th Cir.1998) and *United States v. Frazin,* 780 F.2d 1461, 1470 (9th Cir.1986):

> (1) "the probable effect of the message actually sent"; (2) "the likelihood that the court would have sent a different message had it consulted with appellants beforehand"; and (3) "whether any changes in the message that appellants might have obtained would have affected the verdict in any way."

Manning at 1019.

1. Probable Effect

"A court's message to a deliberating jury inevitably influences the jury's analysis." *Martinez at* 1105. The way a response is worded may have just as much effect as its contents. *Id.* The probable effect of the message

sent was that it further confused the jury because the court did not respond to the question asked but discussed evidence.

2. Likelihood of a different message

The likelihood that the court would have sent a different response to the jury is great as noted by the trial attorney's list of responses under section D, as listed at VI:1483-85. Trial Counsel would have requested the court direct the jury review other jury instructions and sought additional instructions to further explain larceny and force. See Section D.

3. If changes would affect the verdict

If court would have agreed to the trial attorneys list of responses then it is likely the jury would have returned a verdict for petit larceny because the evidence shows Alfred did not use force or violence of fear to retain or obtain the property.

4. Structural error

In *Martinez*, the Ninth Circuit held that an error of this type could be structural. *Martinez at* 1105. *Martinez* said: "whether the failure to consult counsel about a mid-deliberations jury note is structural error turns on both the nature of the jury's request and the need for counsel's participation in formulating a response." *Id.; see United States v. Yamashiro*, 788 F.3d

1231, 1235-36 (9th Cir. 2015)(deprivation of the right to counsel at sentencing is structural error).

Because court's failure to consult with Alfred's attorneys involved a question from the jury regarding an element of the crime and was the crux of the defense, Alfred asks Court to find structural error involving the deprivation of the right to counsel and right to be present at all trial hearings occurred. Here, trial court denied Alfred the right to give input on the jury note by not consulting his attorney, his attorney would have crafted a different response, and it is likely the jury would have then found him not guilty of robbery.

VI. CUMULATIVE TRIAL ERROR.

If Court finds no singular issue sufficient for reversal then Court analyzes collective effect of other errors. *Big Pond v. State*, 101 Nev. 1, 3 (1985); *Dechant v. State*, 116 Nev. 918, 927-28 (2000); *Valdez v. State*, 124 Nev. 1172, 1195-98 (2008). Reversal is warranted because the robbery conviction is grave, the issue of guilt was not over overwhelming, and the quality and character of errors substantial. *See Valdez citing Hernandez v. State*, 118 Nev. 513, 535 (2002).

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VII. COURT CREATED REVERSIBLE ERROR BY NOT ALLOWING THE TRIAL JUDGE TO HEAR ALFRED'S POST-TRIAL MOTIONS; BY REFUSING TO RECONSTRUCT THE RECORD; AND BY DENYING ALFRED'S MOTION FOR A NEW TRIAL.

A. Motions.

As noted previously, during the appellate process, Appellate Counsel discovered a jury note within the court exhibits that was not discussed on the record. VIII:1487-88;VI:1050-51. None of the trial attorneys knew about the note. VIII:1481-85; VI:1044-48. The jury note said: "Can we have elaboration on the definition by means of force or violence or fear of injury. Michelle Moline." At the top of the note, was a typed response: "The Court is not at liberty to supplement the evidence." V:1021a.

On 04/05/18, Alfred filed a Motion to Reconstruct the Record and Motion for a New Trial, asking for a hearing before the trial judge, and seeking an evidentiary hearing in order to obtain an explanation as to how the jury note became a court trial exhibit.[14]

In his motions, Alfred included a declaration from the trial attorney who explained how she would have responded if she had been told the jury

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[14] *Motion to Reconstruct*: VIII:1464-54; Opposition: VI:1555-1563; Reply VIII:1564-1646; Supplemental Reply: VIII:1646-65. *Motion for a New Trial*: VI:1118-1356; Opposition: VI and VII:1118-1356; Reply: VII:1357-1444; Supplemental Reply: VII:1445-1463. Hearings: 04/16/18 at VI:1683-881; 04/30/18 at VI:1689-99; *Minutes*-1679-82; Order at 1666-68.

submitted a note to the court seeking clarification on the definition of force or violence or fear of injury. VII:1483-85;VIII:1483-85.

In his Supplemental Reply Motions, Alfred included Declarations from three jurors. He obtained these declarations through his investigator who contacted jurors to learn about the jury note. VII:1462-65;VIII:1664.

Juror Change said someone told her the jury foreperson, Michelle Moline telephoned the Marshall during the first day of deliberations regarding a procedural issue. During the second day of jury deliberations, the Marshall entered the jury room, closed the door, and asked if the person with a procedure issue wanted to talk to the judge then the judge would talk to them. However, no one spoke with the Judge. She remembered someone telling her that the jury foreperson contacted the Marshall during the second day of deliberations also. Juror Change remembered a question being asked about a definition but did not remember if it was in written form. However, they received an answer within 5-10 minutes of asking the question. VII:1452-53;VIII:1653-54.

Juror Wortham-Thomas remembered a note being given to the Marshall on the second day of jury deliberations. VII:1455-56;VIII:1656-57.

Jury foreperson, Michelle Moline said that on the second day of jury deliberations, she wrote a note for the Marshall to give to the judge. She

identified the handwritten note which was later made a court exhibit as the note she wrote. Ms. Moline indicated the Marshall returned with a response about an hour. The Marshall told the jury that they could not elaborate and told them this was asked and answered. Shortly after receiving the Marshall's response, the jury returned with a verdict. VII:1458-60;VIII:1659-61.

There were two court hearings on the motions. On 04/16/18, district court indicated he spoke to the trial judge, Judge Bixler, and Judge Bixler did not remember anything about the note. However, district court continued the hearing to allow the State to file an Opposition and to give the Defense a chance to respond. VIII:1683-88.

At the second hearing on 04/30/18, district court denied Alfred's motion to reconstruct the record, denied his request for an evidentiary hearing, denied his request for a hearing before the trial judge, and prohibited Alfred from using the information he learned from three jurors. VIII:1689-98. District Court said:

> No, because I don't think that's fair to go back and say this happened and ask for specific times and stuff. I just don't think that's fair to either - - to justice.
>
> Should that question have been asked? Yeah, it should have.
>
> Did some telephone - cell numbers be given? Yes, I'm sure that happened because all of the marshals have to get their telephone numbers to call jurors in case they don't show up.

I don't see a need to reconstruct it and that motions denied. VIII:1698.

On 05/04/18, district court filed an order denying Alfred's motion to reconstruct the record and motion for a new trial. VIII:1666-68.

B. Request for evidentiary hearing and decision by trial judge.

The trial in this case was handled by a senior judge, Judge Bixler, who would be the person with the responsibility to correct or modify the trial record or to grant a new trial. NRAP 10(c); NRS 176.515. However, the non-trial judge denied Alfred's request, claiming he talked to Judge Bixler and Bixler did not remember the jury note.

NRS 175.101 indicates that if a trial judge is unable to perform the duties of the court after verdict due to "death, sickness or other disability" then "any other judge regularly sitting in or assigned to the court may perform those duties." However, if the substitute judge determines he is unable to perform the duties for any reason then the substitute judge may grant a new trial. NRS 175.101.

Here, Judge Bixler was available. Judge Bixler was not dead, ill, or under a disability that prohibited him from handling court duties. Accordingly, allowing a non-trial judge to decide a NRS 176.515 motion or an NRAP 10(c) motion when the trial judge is available violates a defendant's right to due process as provided by NRS 175.101 which gives

Alfred the right to have his motions decided by the trial judge. *See Whitlock v. Salmon*, 104 Nev. 24, 26 (1988)(statutes confer a substantive right).

Alfred was prejudiced because the non-trial judge lacked an understanding of the facts of the trial and therefore reached an incorrect decision on the merits of the motion. The non-trial judge could not make an informed decision when deciding the NRS 176.515 motion and determining whether or not "a different outcome would have been probable." NRS 176.515.

Although the non-trial judge was unwilling to admit any error occurred, the record is clear that the trial court mishandled the jury note. First, the trial judge did not correctly respond to the question. "[W]here a jury's question during deliberations suggests confusion or lack of understanding of a significant element of the applicable law, the court has a duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion." *Gonzales v. State*, 366 P.3d 680, 682 (Nev. 2015). Second, the trial judge did not contact the parties. Court should contact the parties to gain input on how to respond. See *Jeffries v. State*, 397 P.3d 21, 28 (Nev. 2017), *reh'g denied* (Sept. 29, 2017); *Manning.* Third, the trial judge did not allow Alfred to be present.

Also, the non-trial judge was without a frame of reference to determine the prejudicial impact of the error. Thus, an evidentiary hearing with the trial judge was warranted.

Moreover, what occurred behind closed doors in the judge's chambers should be brought to the surface. It is important for Alfred to know the facts for his appeal. It is important for this Court to know the facts to determine the effect the trial court's response had on the jury and what prejudice ensued from the court not contacting the parties and obtaining input. Hence, because the trial court created the error, it was the duty of the trial court to hold a hearing and correct and clarify the record. It was the district court, not Alfred, who had contact with the jury and created error. As a matter of public policy, the public can have no confidence in a verdict if the judiciary is allowed to withhold information from a defendant during a trial and then later claims on appeal the record cannot be reconstructed or that his argument is insufficient. Thus, an evidentiary hearing before the trial judge was needed to allow Alfred to obtain the information to proceed on this issue under the three step guideline of *Manning* and to adequately address whether the error was harmless or prejudicial or structural.

Not only was an evidentiary hearing needed to determine how the trial court responded, Alfred needed to know how the Marshall responded. A

bailiff's improper ex parte contact with the jury after receiving a jury note may also be newly discovered evidence warranting a new trial. *Lamb v. State*, 127 Nev. 26, 43-46 (2011).

Alfred also needed to know how the jury responded. Even though he obtained affidavits from three jurors explaining the process of the jury note and that a verdict was quickly obtained after the court responded, district court prohibited him from using this information. If the Marshal had been required to testify, he could have explained the timeframe and how the jury received the information.

Alfred was prejudiced because district court refused to allow an evidentiary hearing, did not require the Marshall to respond, and prohibited him from using information obtained from the jurors. Thus, Alfred's hands are tied in making an argument regarding this issue on appeal.

C. NRAP 10 – Correction or reconstruction of the record.

District court denied Alfred's motion to reconstruct the record, saying:

> This Court having found that the Defendant failed to show that it was necessary to reconstruct the record, and that it would be unfair to allow the Defendant to reconstruct the record using the juror affidavits. VIII:1667.

Court did not reference NRAP 10 in his order.

However, Alfred used the correct procedure when learning something was missing from the trial record – a motion pursuant to NRAP 10 – and reconstruction was warranted.

NRAP 10 states in pertinent part:

> (a) The Trial Court Record. The trial court record consists of the papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk.
> ...
> (b) The Record on Appeal.
> (1) The Appendix. For the purposes of appeal, the parties shall submit to the clerk of the Supreme Court copies of the portions of the trial court record to be used on appeal...
> ...
> (c) Correction or Modification of the Record. If any difference arises about whether the trial court record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record conformed accordingly. Questions as to the form and content of the appellate court record shall be presented to the Clerk.

If an objection or argument or exhibit is not recorded or not made part of the record or if the transcript is incomplete, the Nevada Supreme Court allows for reconstruction of the record through NRAP 10. See *Lopez v. State*, 105 Nev. 68, 769 P.2d 1276 (1989) (reconstruction when a portion of the testimony was missing). Reconstruction not only applies to what is said during the trial but may be used to describe what was viewed in the courtroom. Accordingly, in *Philips v. State*, 105 Nev. 631, 782 P.2d 381 (1989), the court suggested that appellate counsel could put together a

statement regarding the race of the prospective jurors when there was an issue regarding a *Batson* claim but the record did not include any reference to the race of the prospective jurors.

In *Quangbengboune v. State*, 220 P.3d 1122 (Nev. 2009), the Court held that the trial record could be modified or corrected when inaccuracies in the interpreter's translations of the defendant's testimony were verified during the appellate process. The *Quanbengboune* Court held that the defendant could bring a motion in district court pursuant to NRAP 10 (c) to correct the record.

In view of this, it was fair and necessary to reconstruct the missing portion of the trial record and hold an evidentiary hearing because the record is silent as to how a question from the jury became a court exhibit, how the court decided to respond to the question, and what the Marshall told the jury. Perhaps, the trial court never saw the note and the Marshall responded on his own. Perhaps the jury returned a verdict shortly after receiving a response – but court refused to allow Alfred to use the declarations/affidavits. Accordingly, Alfred is prejudiced on appeal because district court blocked his ability to uncover the facts involving the jury note.

D. Motion for New Trial.

When deciding a Motion for a New Trial based on newly discovered evidence, district court determines if the evidence was:

1. newly discovered
2. material to movants defense
3. such that it could not with reasonable diligence have been discovered and produced for the trial
4. not cumulative
5. such as to render a different result probable upon retrial
6. such that it does not attempt only to contradict a former witness or impeach or discredit him, unless the witness to be impeached is so important that a different result must follow and
7. that these facts be shown by the best evidence the case admits.

McLemore v. State, 577 P.2d 871 (1978); NRS 176.515(3).

Court denied Alfred's motion, holding: the jury note was not newly discovered evidence, Judge Bixler did not recall the jury note or if he discussed it with the attorneys, that the court's response was a proper and legal response to the question asked, and Alfred failed to show a different outcome would be probable. VIII:1666-67.

Based on the following and as addressed in Issue V and above, the non-trial judge erred in denying Alfred's motion.

1. The note was newly discovered.

Alfred's trial and appellate attorneys presented affidavits or declarations to attest that they never were advised of the jury note. State did not disagree.

2. Jury notes discovered after the verdict are new evidence.

Juror misconduct or court errors involving jury notes discovered after the jury verdict are within the definition of newly discovered evidence under NRS 176.515(3).

In *Brioady v. State*, 396 P.3d 822, 824 (Nev. 2017), *reh'g denied* (Oct. 2, 2017), the Nevada Supreme Court found juror misconduct discovered more than 7 days after verdict was newly discovered evidence falling within the umbrella of a NRS 176.515(3) motion for a new trial. In *Brioady*, a juror failed to answer truthfully when asked if she had ever been a victim of a crime, hiding the fact she was a victim of childhood sexual abuse. Her response was important because the charges were lewdness with a minor. On appeal, the *Brioady* Court held the trial court abused its discretion by not granting a new trial because the juror would likely have been excused for cause if she had answered truthfully or the Defense would have removed her with a peremptory challenge.

A bailiff's improper ex parte contact with the jury may also be newly discovered evidence warranting a new trial. *Lamb v. State*, 127 Nev. 26, 43-46 (2011). In *Lamb*, the trial judge left for the day, leaving the bailiff and another judge to handle the deliberating jury. When the jury sent a note, the bailiff did not inform anyone, taking it upon himself to respond by telling

the jurors to read the jury instructions. The bailiff's actions were in direct violation of NRS 175.391 and NRS 175.451. Defense learned of the bailiff's actions during the penalty hearing of the case and moved for a new trial. The trial court held an evidentiary hearing and denied the motion, finding the ex parte communication to be innocuous and not likely to impact the jury deliberations.

Here, however, court denied Alfred an evidentiary hearing.

In *Manning v. State*, 348 P.3d 1015 (Nev. 2015), the Nevada Supreme Court found constitutional error violating due process when a trial court failed to notify and seek input from the parties after receiving a note from the jury that it was deadlocked. The *Manning* Court found the trial court did not abuse its discretion in denying the motion for a new trial because the error was harmless.

Based on the above, the jury note found in the District Court's Evidence Vault falls within the definition of newly discovered evidence under NRS 176.515(3).

3. Material to movants defense.

The jury note was material because the question focused on the crux of Alfred Harvey's defense. When shown the note, trial counsel put together a list of questions she would have asked and jury instructions she would

have requested if she had known about the note. See Issue V; VI:1483-85:VIII----

Also, Trial Counsel argued to the jury in closing:

> ...there was no fear, no force, or no violence. Kind of rewind, go back to the interaction between Mr. Munoz and Mr. Harvey, and we hear that Mr. Munoz asked Mr. Harvey for the wallets. He freely gave them back. He's not screaming at him. He's not pushing him. He's not throwing those wallets at him. He just gave him the wallets back. Mr. Munoz testified there's no yelling, there's no body contact, there's no force or fear of violence in that interaction. He says at that point Mr. Harvey refuses to turn back to the store...at the end of the day, he's thief, not a violent robber...And I submit to you that here Mr. Harvey is not guilty of robbery with use of a deadly weapon but he's also not guilty of robbery because he didn't use force or violence here. He stole items and refused to come back into the store. Mr. Harvey is also not guilty of robbery.

VII:1423-24. Thus, the jury note focused on the defense closing argument by asking the court to elaborate on the definition of the words "by mans of force or violence or fear of injury." Accordingly, the jury note was material and important to Alfred Harvey's defense.

4. Could not be found with reasonable diligence.

Trial court's decision to not inform the trial attorneys about the note is not a common practice in the courts. Because of this uncommon occurrence along with Jury Instruction 23 that told the jury the court would supplement the law if they were confused, the trial attorneys had no reason to search for

a jury note. The jury note was found with reasonable diligence after verdict. Court exhibits are placed in the District Court evidence vault after trial.

5. Not cumulative.

The trial court not discussing the jury note with the trial attorneys is not cumulative of other issues at trial.

6. Would have rendered a different result probable.

Here, as addressed in Issue V, a different result would have occurred if Defense Counsel had been allowed to submit input on the jury note as allowed by Jury Instruction 23, NRS 175.451, *Gonzales*, and *Manning*.

Initially, Defense Counsel would have objected to the response the trial gave as being nonresponsive to the question and confusing. The jury clearly asked for clarification of the law and the court's response indicated it would not supplement the evidence. See Issue V; VI:1483-85.

Defense Counsel would have asked the trial court give an answer because Jury Instruction 23 told the jury the court would respond to a question on the law. NRS 175.451 required the trial court to discuss the note with the parties and answer the question. VI:1483-85.

Had trial counsel been advised by the court of the jury note, she would have asked the court to direct the jury to review jury instructions 6, 11 and 12 Jury instructions 6 and 11 told the jury that force or fear "must be used to

either: (1) obtain or retain possession of taken property, (2) prevent or overcome resistance to the taking of property, or (3) to facilitate escape with the property." Jury instruction 12 further directed the jury that in order for there to be a robbery, "the taking must be accomplished by force or intimidation." By pointing to these instructions, the trial court would help the jury focus on examples of force and fear and how/when force or fear was used if at all. VI:1483-85.

Trial Counsel would also have asked the court to supplement the jury instructions. Counsel would have requested the trial court reconsider some of the defense proposed instructions that were not used at trial. The defense proposed instruction on page 7 reminds the jury that the State has the burden of proof and again details the three ways in which force or fear must be used for a robbery to be committed. The proposed instruction on page 10 is a lesser instruction which informs the jury that if they are not convinced beyond a reasonable doubt that a robbery occurred, then they may find the defendant guilty of the lesser included offense of petit larceny. VI:1483-85;II:192;194-95.

Trial Counsel would have also requested the court give the jury the *Crane* jury instruction, as submitted in the Defendant's Proposed Jury Instructions and Verdict Form, which instructs the jury how to proceed when

there are two reasonable interpretations, one pointing to guilt and one not. *Crane v. State* 88 Nev. 684, 504 P.2d 12 (1972). VI:1483-85. Given the jury's question, its arguable the jury found two reasonable interpretations of the facts of the case.

Additionally, Trial Counsel would have requested that the Court give the legal definitions of force, fear and violence as defined in Black's Law Dictionary, as these terms are legal terms, which are not defined by Nevada statutes. *Exhibit E.* Specifically these definitions are:

- *Actual force*- force consisting in physical act, esp. a violent act directed against a victim.
- *Fear*- the strong, negative feeling that a person experiences when anticipating danger or harm.
- *Violence*- the use of physical force, usu. Accompanied by fury, vehemence, or outrage; especially physical force unlawfully exercised with the intent to harm.

Black's Law Dictionary (10th ed. 2014). These definitions directly answer the jury's question and Jury instruction 23 allowed the court to inform the jury of these definitions. VI:1483-85.

Based on the above, if Defense Counsel had knowledge of the jury note and had been allowed to submit requests on how the court should respond, it is probable the jury would have found him not guilty. Further

clarification on these words on retrial would render a different result probable.

7. Does not contradict a witness or involve facts shown by the best evidence.

The jury note does not contradict or impeach a witness and does not involve facts shown by the best evidence.

CONCLUSION

In view of the above, Alfred asks this Court to reverse his conviction.

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:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size 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 is either:

Proportionately spaced, has a typeface of 14 points or more and contains 13,209 words which does not exceed the 14,000 word limit.

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 sanctions in

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

DATED this 22 day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 22 day of October, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY */s/ Carrie M. Connolly*
Employee, Clark County Public
Defender's Office