IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	No. 72829, 78541

REPLY TO STATE'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED C. HARVEY, Appellant, v. THE STATE OF NEVADA, Respondent.	)	No. 72829, 75911

REPLY TO STATE'S ANSWER TO PETITION FOR REVIEW

COMES NOW Appellant ALFRED C. HARVEY, by and through Chief Deputy Public Defender SHARON G. DICKINSON, and with the permission of this Honorable Court, files a Reply to State's Answer to the Petition for Review. This Reply is based on the following Memorandum of Points and Authorities and all papers and pleadings on file in this case.

Dated this 23 day of January, 2020.

Respectfully submitted,

DARIN F. IMLAY,
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By: */s/ Sharon G. Dickinson*
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REASONS REVIEW IS WARRANTED

A. Issue I, subsection B (1): material variance between allegations and evidence presented.

State incorrectly contends Alfred failed to cogently argue the insufficiency/variance issue. APR:3. State argues the arguments raised in Alfred's Petition for Review should be ignored unless they directly mirror what was written in his Opening and/or Reply Briefs. State does not dispute that the same arguments were in Alfred's Petition for Rehearing or that the arguments were raised in district court.

A Petition for Review addresses the decision and reasoning of the COA in its order affirming or reversing a conviction. NRAP 40(B). By its very nature, an Opening Brief or a Reply Brief, will not contain the exact same arguments and authorities as those addressed by the COA in its order because the COA had not yet ruled.

Moreover, the same arguments were raised in all briefs and in district court. In the Opening and Reply Briefs, under Issue I Alfred argued the evidence was insufficient to convict based on what was pled in the Information and what was presented as evidence. OB:11-16;REPLY:2-6. State understood Alfred's argument involved a variance between the evidence and pleadings, never claimed the argument was not cogently presented, and never sought to strike Alfred's argument. RAB:9-13. State

also never filed an NRAP 28(c) motion to strike Alfred's Reply. In Alfred's Reply, he identified State's arguments as discussing a variance in the evidence and disputed State's assertions by presenting argument and citations. State raised variance when contending the jury could make a reasonable inference that non-clothing items were clothing items. State never objected to Alfred's Reply, never claimed he was presenting new matters, and never said Alfred misunderstood the State's argument.

The arguments raised in the pending Petition for Review were also raised in Alfred's Petition for Rehearing. State never objected to any language or argument presented in his Petition for Rehearing which COA denied.

There is no rule allowing the State to complain, after the fact and months later, that it now has decided it wants to object to Alfred's Opening and Reply Briefs. State's contentions are waived.

Also, despite State's efforts to claim Appellate Counsel is incompetent, COA never said Issue I was not cogently presented by Appellate Counsel as State now infers. COA identified Issue I as a sufficiency and a variance issue: "The variance between the information and evidence was immaterial, and sufficient evidence supports the finding that Harvey took the items." Order:4. COA acknowledged that Alfred raised the

sufficiency/variance issue before trial. Order:5. Thus, State incorrectly claims the issue variance/sufficiency of the evidence issue was not before the COA and not sufficiently briefed.

State also incorrectly argues that the legal authority and arguments Alfred presented in his Petition explaining how the COA erred are "false" because the COA analyzed this issue correctly. RAP:4-5.

However, COA rested its decision on cases never cited by either party: *Simpson v. Eighth Jud. Dist. Court*, 88 Nev. 654, 661 (1972) and *Alford v. State*, 111 Nev. 1409, 1415 (1995). Even though COA said it was addressing this portion of Issue I as a sufficiency/variance issue, it used tests under due process notice as found in *Simpson* and *Alford v. State*, 111 Nev. 1409, 1415 (1995) – cases Alfred and the State never relied on. The normal standard COA mentioned in is Order is the standard used on appeal when a defendant objects to the sufficiency of the notice in the Information pre-trial or post-trial. It is not a sufficiency of the evidence standard as State now argues. APR:5. Thus, the argument was not bare and naked as State suggests because COA clearly understood Alfred's assertions. But it used the wrong cases which led to the wrong conclusion. By comparing the cases Alfred cited in his Petition for Review with the *Simpson* and *Alford* cases, Court can see the difference in how these issues are reviewed.

COA never said the variance between the Information and the evidence presented was harmless as State infers. ARP:6. COA used the word "immaterial." This means State's harmless error analysis in I Section C, page 6-7, is irrelevant. In this section, State is attempting to challenge the district court ruling against the State when it sought to amend the Information before trial. That ship has passed. State never challenged the district court's ruling prior to trial and thus is barred from challenging it now.

State further claims cases cited by Alfred do not allow this Court to grant review. APR:7-9. In *Jezdik v. State*, 121 Nev. 129, 140-41 (2—5) this Court sua sponte addressed problems with State's proof of facts when compared to the allegations in the Information – i.e variance. The variance was that State alleged the defendant fraudulently used a credit card at Vons but introduced a receipt from Smiths. Fraudulent use of a credit card does not require State to prove what items were taken, only that the card was used. Here, what property was taken is an element of the crime of robbery. See *Hayes v. State*, 65 So.3d 486, 490-92 (Ala. Crim. App. 2010). Here, State alleged Alfred took miscellaneous clothing but no clothing was taken.

Likewise, *Stirone v. United State*, 361 U.S. 212 (1960) indicates it is improper for a defendant to be convicted of a crime by a method not listed in

the Indictment. Here, Alfred was convicted of taking clothing but no clothing was taken. Again, what was taken is an element of robbery which requires State to prove Alfred used force when taking personal property.

Likewise, a reading of *State v. Jones*, 96 Nev. 71, (1980) and a comparison of the majority and minority decisions explains the difference in evaluating an insufficient evidence/variance and a notice issue.

With regard to double jeopardy, *State v. Koseck*, 113 Nev. 477 (1997) does not support State's assertions that double jeopardy may not be implicated because *Koseck* involves multiple convictions under different statutes arising out of the same act. Here, the only statute is the robbery statute and the acts are different.

B. Issue V and VII: motion for a new trial/evidentiary hearing and motion to reconstruct the record.

State claims review is not warranted because Appellant does not "clearly raise" any issues for this Court to consider.

1. Undisclosed communications between the deliberating jury and the trial judge.

State does not dispute the facts.

2. NRS 175.101: depends on what the meaning of "if" is.

Rather than commenting on COA's interpretation of NRS 175.101 and Alfred's statutory construction analysis of NRS 175.101, State argues

NRS 176.515 is the statute Court needs to review. State raised this argument in its Answering Brief and COA rejected it by only discussing NRS 175.101. RAB:44;Order:19-20. Because State never filed a Petition for Rehearing or Review challenging COA's analysis, it should be prohibited from re-raising this argument now. Also, by not addressing Alfred's NRS 175.101 statutory construction argument, State concedes that his argument is correct. *Polk v. State*, 126 Nev. 180, 185-86 (2010).

State wants Court to look at NRS 176.515 and forget that NRS 175.101 exists. However, Court presumes that when enacting legislation, Legislature does so "'with full knowledge of existing statutes relating to the same subject.'" *DeStefano v. Berkus*, 121 Nev. 627, 631 (2005) *quoting State Farm*, 116 Nev. 290, 295 (2000) *quoting City of Boulder v. General Sales Drivers,* 101 Nev. 117, 118-19 (1985). By reading NRS 175.101 and NRS 176.515 together, the words "the court" means the trial judge or a judge who "is satisfied that he or she [can] perform those duties..." NRS 175.101; *Also see Abbott v. Mandiola*, 82 Cal. Rptr. 2d 808, 809 (1999).

Dieudonne v. State, 127 Nev. 1, 5 (2011) is inapplicable. The *Dieudonne* Court said a defendant did not have an absolute due process right to have the judge who canvassed and accepted his guilty plea to also conduct his sentencing. Here, we are discussing a trial.

Halverson v. Hardcastle, 123 Nev. 245, 261 (2007) specifically discusses a chief judge's authority over other judges. It does not indicate that a non-trial judge may decide a motion for a new trial when a trial judge is available. Moreover, in its response, State admits "a trial court's disposition on a motion for a new trial is discretionary," thereby indirectly acknowledging a trial judge should handle a motion for a new trial. APR:12.

State skips over Alfred's initial arguments in this section and begins by arguing the jury note was not evidence and not grounds for a new trial. APR:13. State's posturing shows Alfred is right in that an evidentiary hearing was needed for his motion for new trial and motion to reconstruct the record because State wants to discuss the limited record first, knowing that it was limited by the lack of an evidentiary hearing.

Tellis v. State, 84 Nev. 587, 591 (1968), is not on point because there is no indication that the court kept the jury note a secret from the parties and the jury question was not about an element of the crime. Here, the jury note centered on a question about an element as in *Gonzales v. State*, 131 Nev. 911 (2015). Also, here, the court did not meet and confer with the parties as required by *Manning v. State*, 131 Nev. 206 (2015), thus denying Alfred the opportunity to provide supplemental instructions to the court as allowed by

Jeffries v. State, 133 Nev. 331 (2017). Thus, COA's order is inconsistent with current authority.

3. No evidentiary hearing and no reconstruction equals error.

In arguing that Appellant's Counsel is ineffective, has a lack of briefing skills, and presents issues that are not cogently argued, State relies on personal attacks against counsel in attempt to gain Court's favor. APR:16. If a prosecutor spoke like this in district court it is likely he would be admonished. For cases on appeal, the briefs are part of the Court's courtroom. Court should not allow this type of unprofessional behavior in its courtroom.

This prosecutor never complained during briefing, never contended Appellant Counsel's arguments were not cogent, and responded to all of Appellant Counsel's arguments regarding reconstruction and the evidentiary hearing. RAB:49-53. Therefore, his argument that Appellant Counsel is inept is belied by the record.

The fact that COA did not understand the argument but the parties understood the argument is telling. However, COA's assertion that the argument was not supported by relevant authority confirms that this is a matter of first impression for this Court to decide.

/ / /

CONCLUSION

Court should grant review based on the above.

Respectfully submitted,

DARIN F. IMLAY,
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this reply to answer to petition for review 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 reply to answer to petition for review has been prepared in a proportionally spaced typeface using Times New Roman in 14 font size;

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[x] Proportionately spaced, has a typeface of 14 points or more, and contains 1,755 words which does not exceed the word limit.

DATED this 23 day of January, 2020.

Respectfully submitted,

DARIN F. IMLAY,
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 23 day of January, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
ALEXANDER CHEN

SHARON G. DICKINSON
HOWARD S. BROOKS

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

ALFRED C. HARVEY
NDOC No. 1174900
c/o Southern Desert Correctional Center
P.O. Box 208
Indian Springs, NV 89018

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