

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR A. STANLEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 39775

FILED

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APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

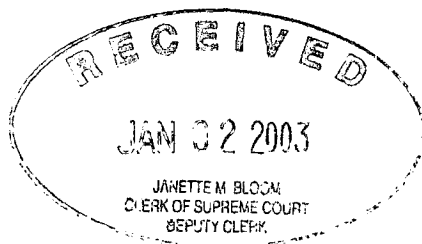
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1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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5 vs.

6 THE STATE OF NEVADA,

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9 **APPELLANT'S OPENING BRIEF**

10 **STATEMENT OF THE ISSUES**

11 I. Was Stanley's right to Due Process and right to a fair
12 trial violated during the jury trial phase of the proceedings?

13 A. Was Stanley's right to due process and against self-
14 incrimination violated when the trial court denied Appellant's
15 motion to suppress his statement?

16 B. Was Stanley's right to due process violated when the Court
17 responded incorrectly to a jury question about whether the State
18 needed to prove beyond a reasonable doubt that Defendant took the
19 wallet AND lawful money of the United States as it was charged in
20 the Amended Information?

21 II. Was Stanley's right to Due Process and right to a fair
22 trial by an impartial jury of his peers violated at the voir dire
23 portion of the trial?

24 A. Was Stanley's right to due process and a fair trial
25 violated when the Court denied Appellant's counsel request to ask
26 its pre-submitted voir dire questions of the jury?

27 . . .

28 . . .

1 B. Was Stanley's right to due process and a fair trial
2 violated when the Court permitted the State to use a peremptory
3 challenge to dismiss a black juror, a Batson violation?

4 C. Was Stanley's right to due process and a fair trial
5 violated when the Court dismissed a black juror who arrived in Court
6 about 15 minutes late on the first day before jury selection began,
7 a Batson violation?

8 III. Was Stanley's right to be protected from double jeopardy
9 violated when the Court permitted the jury's verdict of guilty on
10 both Battery with Substantial Bodily Harm and Mayhem to stand, when
11 they were based on the exact same incident, or, in the alternative,
12 when there was not sufficient evidence presented to support a
13 conviction on Mayhem?

14 STATEMENT OF THE CASE

15 Defendant was charged by way of Amended Information to the
16 following counts: 2 counts of Robbery (Felony - N.R.S. 200.380); 1
17 count Larceny from the Person (Felony - N.R.S. 205.270); 2 counts of
18 Burglary (Felony - N.R.S. 205.060); 1 count Grand Larceny Auto
19 (Felony - N.R.S. 205.228); 1 count Attempt Murder with Use of a
20 Deadly Weapon (Felony - N.R.S. 200.010, 193.330, 193.165); 1 count
21 Mayhem (Felony - N.R.S. 200.280); 1 count Attempt Robbery, Victim
22 over 65 years of age (Felony - N.R.S. 200.380, 193.167, 193.330), 1
23 count Attempt Grand Larceny (Felony - N.R.S. 205.220, 205.222,
24 193.330), 1 count Battery with Deadly Weapon causing Substantial
25 Bodily Harm.

26 After a jury trial, Defendant was found guilty of 2 counts of
27 Robbery, 1 count of Attempt Robbery, Victim over 65 years of age, 1
28 count of Mayhem, 1 count Larceny from the Person, 1 count Battery

1 with a Deadly Weapon causing Substantial Bodily Harm, 1 count
2 Unlawful Taking of an Automobile (a Gross Misdemeanor), and 1 count
3 of Attempt Unlawful Taking of an Automobile, a misdemeanor.

4 After post-trial motions, the Court dismissed the Unlawful
5 Taking of an Automobile and Attempt Unlawful Taking of an Automobile
6 counts, and dismissed the Age Enhancement for the Attempt Robbery
7 conviction.

8 **STATEMENT OF FACTS**

9 On October 25, 2001, Detective Herring of the Las Vegas
10 Metropolitan Police Department interrogated Oscar A. Stanley.
11 (Trans. 3-8-02). Prior to Detective Herring interviewing Oscar
12 Stanley, Las Vegas Metropolitan Police Officer William Wilson gave
13 Stanley his Miranda rights. (Trans. 3-6-02, 1:40 p.m.).

14 On March 1, 2002, the trial court heard Defendant's motion to
15 suppress these statements. (Trans. 3-1-02). A written Motion to
16 Suppress was filed with the Court in February, 2002, and is attached
17 in the Appendix on page 013.

18 Defendant contended that the Miranda rights given were
19 incomplete, and that it was doubtful that they were even given since
20 all of the interrogation was taped except for the Miranda warning.
21 Presumably the police turned the tape recorder on after they gave
22 the Miranda warning. Furthermore, the Defendant argued that he
23 could not have voluntarily waived his rights, because he was so
24 impaired at the time from using drugs that he was incapable of
25 making a free and voluntary waiver.

26 Defendant's motion to suppress the statement was denied.

27 Defense counsel presented proposed voir dire questions to the
28 Court that the Defendant wished to use to interview prospective

1 jurors. (Trans. 3-1-02). The Court denied their use, and later,
2 during the trial but outside the presence of the jury, a record was
3 made of the proposed questions and the Court's reasoning for turning
4 them down. (Trans. 3-8-02).

5 A copy of these proposed voir dire questions is attached as
6 Exhibit "A", and incorporated herein by reference.

7 The Appellant, Oscar A. Stanley, is African-American.

8 When the jury attendance roll was called on the first day of
9 the trial, March 4, 2002, one juror was absent, Venetia Hymes.
10 (Trans. 3-4-02, p. 3, ll. 17-20). Ms. Hymes appeared about fifteen
11 minutes later. (p. 7, ll. 1-6). Counsel were called to the bench,
12 and after a brief discussion, Ms. Hymes was sent back down to the
13 jury room to be assigned to a new jury. Venetia Hymes was an
14 African-American woman.

15 At the bench, defense counsel vigorously argued against
16 releasing this potential juror. This was addressed in open court,
17 outside the presence of the jury, on March 8, 2002. (Trans. 3-8-02,
18 pp. 68-70). Defense counsel argued that without Ms. Hymes, there
19 were only two African-Americans in the jury pool. The judge
20 insisted there were more, and that, because Ms. Hymes missed the
21 opening remarks of the Court, and the introduction of counsel, that
22 he was justified in dismissing her instead of repeating everything
23 for her benefit.

24 Another African-American woman potential juror, Pina
25 Washington, was dismissed by the State, through the use of a
26 peremptory challenge. (Trans. 3-5-02, 1:30 p.m., p. 85). Defense
27 counsel approached the bench to indicate that they would be making
28 a record of a Batson challenge later. (Trans. 3-5-02, 1:30 p.m., p.

1 85). This was done, on the record, on March 8, 2002. (Trans. 3-8-
2 02, pp. 70-72). The State gave their race-neutral reason for
3 dismissing the juror, and the trial court found there was no Batson
4 violation.

5 The jury sent out one question while they were deliberating.
6 (Trans. 3-12-02). The note read, "Related to Count II, (larceny
7 from a person), the question reads, Is it necessary for the jury to
8 agree that both the money and the wallet were taken from Billy Barba
9 to be considered guilty?" This question came up during the morning
10 Law and Motion calendar. Since one prosecutor and one defense
11 attorney from the trial were present, the judge called them up to
12 the bench to discuss the note from the jury. The Court advised
13 counsel that it thought the answer should be no, and that was the
14 message that was sent back to the jury. Subsequently, the jury
15 convicted Stanley on Count II, Larceny from a Person.

16 Oscar Stanley was convicted of, among other things, Battery
17 with a Deadly Weapon causing Substantial Bodily Harm, a violation of
18 **NRS 200.481(2)(e)(2)**, and Mayhem, a violation of **NRS 200.280**.

19 **ARGUMENT**

20 **I.**

21 **STANLEY'S RIGHT TO DUE PROCESS AND RIGHT TO A**
22 **FAIR TRIAL WERE VIOLATED DURING THE JURY TRIAL**
PHASE OF THE PROCEEDINGS.

23 A. Stanley's right to due process and against self-
24 incrimination was violated when the trial court denied
Appellant's motion to suppress his statement.

25 B. Stanley's right to due process was violated when the
26 Court responded incorrectly to a jury question about
27 whether the State needed to prove beyond a reasonable
doubt that Defendant took the wallet AND lawful money of
28 the United States as it was charged in the Amended
Information.

1 A. The United States and Nevada Constitutions provide that in
2 a criminal prosecution, an accused may not be deprived of liberty
3 without due process of law. (See, U.S. Const. Amend. XIV; Nev.
4 Const. Art. 1 Sec. 8, Drayden v. White, 232 F.3d 704 (9th Cir.
5 2000)). Furthermore, no person shall be compelled to be a witness
6 against himself. (See, U.S. Const. Amend. V, Amend. XIV, Nev.
7 Const. Art. 1 Sec. 8, Application of Guyette, 338 F.Supp. 1069 (D.
8 Nev. 1972)).

9 Oscar Stanley's right to due process and against self-
10 incrimination was violated when the trial court denied his motion to
11 suppress his statement to police. This statement was introduced
12 into evidence at trial. This is reversible error.

13 In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court
14 held "that a person questioned by law enforcement officers after
15 being 'taken into custody or otherwise deprived of his freedom of
16 action in any significant way' must first 'be warned that he has a
17 right to remain silent, that any statement he does make may be used
18 against him, and that he has a right to the presence of an attorney
19 either retained or appointed." Stansbury v. California, 511 U.S.
20 319 (1994), quoting Miranda, 384 U.S. at 444.).

21 The **burden is on the government** to show that rights were
22 administered and that the defendant agreed to waive them. Miranda
23 v. Arizona, 384 U.S. 436, 475 (1966), **emphasis added**. Proof of
24 waiver must be by a preponderance of the evidence. Colorado v.
25 Connelly, 479 U.S. 157, 168 (1986). A determination as to waiver
26 must be done based on the totality of the circumstances surrounding
27 the interrogation. Moran v. Burbine, 475 U.S. 412, 421 (1986). The
28 State did not meet this burden at the preliminary hearing stage, at

1 the hearing of Defendant's Motion to Suppress the Statements, nor at
2 trial.

3 At trial, Officer Wilson testified that he did not obtain a
4 written waiver of Miranda rights from Oscar Stanley. He conceded
5 that there was an opportunity to do so, but that he did not.
6 (Trans. 3-6-02, p. 33).

7 He also admits being present during the entire interrogation,
8 but says that other officers had taken charge of the situation,
9 ostensibly preventing him from doing anything further with
10 Appellant. And it still seems incredibly strange that while
11 absolutely every incriminating statement that Oscar Stanley had to
12 say was caught on tape, somehow no one thought to turn the machine
13 on when his Miranda rights were being stated to him.

14 It also appears as if the police did have some concerns that
15 the Miranda rights aspect of the interrogation might be suspect.
16 Thus, the interrogator, Detective Herring, attempted to
17 "retroactively" give Oscar Stanley his rights. The following was
18 introduced at trial, as part of Exhibit 70 (Trans. 3-8-02, p. 42):

19 "Q. I hear ya. Okay. Uhm, I think that's about it. Do you
20 remember when, uh...when you first came in here you were talkin' to
21 Officer Wilson ____ around the corner over there?

22 A. Yeah. I ____.

23 Q. He, uh...he read ya your Miranda Rights, remember that?

24 A. Yeah. He ____.

25 Q. You remember him doin' that?

26 A. Yeah.

27 Q. You understood them. Right?

28 A. Yeah.

1 Q. Okay. And that was when you first came in the County Jail?

2 A. Uh-huh."

3 Here, it appears that Detective Herring is pressuring Defendant
4 STANLEY into admitting that he understood his Miranda rights, but
5 feeding him a statement, and then adding, "Right?" This came at the
6 end of an interview that occupied 27 pages of transcribed testimony.

7 B. The United States and Nevada Constitutions provide that in a
8 criminal prosecution, an accused may not be deprived of liberty
9 without due process of law. (See, U.S. Const. Amend. XIV; Nev.
10 Const. Art. 1 Sec. 8, *Drayden v. White*, 232 F.3d 704 (9th Cir.
11 2000)). Furthermore, it is the State's burden to prove every
12 material element of every charged offense beyond a reasonable doubt.
13 (See, NRS 175.191 et. seq., U.S. v. Bernal, 719 F.2d 1475 (9th Cir.
14 Nev. 1983)).

15 Oscar Stanley's right to due process was violated when the
16 trial court answered the jury's question incorrectly, by saying they
17 could find Appellant guilty of the crime of Larceny from a Person
18 even if the jury found that one of the material elements, taking of
19 money, was absent. This constitutes reversible error.

20 The Court provided the jury with Instruction No. 3 (Appendix p.
21 061) which set out all the charges that Oscar Stanley was accused of
22 committing. Count II, Larceny from a Person, specifically read,
23 "did then and there wilfully, unlawfully, and feloniously, under
24 circumstances not amounting to robbery, with intent to steal or
25 appropriate to his own use, take from the person of another, to-wit:
26 BILLY BARBA, without his consent, personal property, to-wit: wallet
27 and lawful money of the United States."

28 . . .

1 The Court also provided the jury with Instruction No. 4
2 (Appendix p. 064), which read, in relevant part, "The Defendant is
3 presumed innocent until the contrary is proved. This presumption
4 places upon the State the burden of proving beyond a reasonable
5 doubt every material element of the crime charged and that the
6 Defendant is the person who committed the offense." During her
7 closing argument, defense counsel reiterated this instruction,
8 insisting that every material element of each charged crime must be
9 proven by the State for the jury to find Oscar Stanley guilty.
10 (Trans. 3-11-02). When the issue came up before the verdict was
11 read, outside the presence of the jury (Trans. 3-12-02), defense
12 counsel noted that the State could have plead Count II as "wallet
13 and/or contents", not "wallet and contents," as they did. That
14 would imply that both wallet and the contents were material elements
15 of the particular crime.¹

16 When the Court decided, for the jury, that they did not have to
17 find that Defendant took both items from the victim, it was
18 rewriting the Information for the State.

19 This is significant, because nowhere in the record do we ever
20 find that Oscar Stanley had possession of the money that was
21 supposed to be contained in the wallet. Witness Billy Barba states
22 that Oscar Stanley grabbed his wallet. (Trans. 3-6-02 Part 2 P.M.
23 session, p. 45, ll. 21-25, and p. 46, ll. 1-6.) Later in the trial,
24 under cross-examination, he states he never actually saw who took
25 his wallet. (p. 60, ll. 1-6). Billy Barba also says that he got

26
27 ¹
28 The wording in the Information, Count II, actually said "wallet and lawful money of the United States", not "wallet and contents." Appellant contends that both "wallet" and "lawful money of the United States" were thus material elements of the crime.

1 his wallet back, not from Oscar Stanley, but from a gas station
2 attendant. (p. 58, ll. 23-25). And, that when he got his wallet
3 back, there was no money in it. (p. 59, ll. 1-3).

4 Former Police Officer Edwards, the responding officer to the
5 Billy Barba incident, testified that another wallet was found in the
6 van that belonged to Billy Barba. (Trans. 3-7-02). That wallet
7 contained identification belonging to Oscar Stanley, but no money.
8 Officer Edwards also testified that Billy Barba's wallet contained
9 no money.

10 It is clear from the jury's question, plus the evidence adduced
11 at trial, that they did not believe Oscar Stanley ever possessed
12 "the lawful money of the United States" that was alleged in the
13 charging Information.

14 A material element of a crime may be inferred from the
15 evidence. State v. Hall, 54 Nev. 213, 13 P.2d 624 (1932), and
16 Williams v. State, 87 Nev. 230, 484 P.2d 1088 (1971). Here, no
17 inference is necessary, since the contrary was explicitly stated -
18 at no time did Oscar Stanley have the "lawful money of the United
19 States" belonging to Billy Barba. Oscar Stanley, did, at some
20 point, possess the wallet belonging to Billy Barba.

21 When the State fails to prove a material element of a crime
22 beyond a reasonable doubt, but the jury convicts anyway, the
23 conviction must be overturned. Woodall v. State, 97 Nev. 235, 627
24 P.2d 402 (1981), and Fullerton v. State, 116 Nev. 435, 440, 997 P.2d
25 807, 810, (2000).

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II.

STANLEY'S RIGHT TO DUE PROCESS AND RIGHT TO A
FAIR TRIAL BY AN IMPARTIAL JURY OF HIS PEERS
WAS VIOLATED AT THE VOIR DIRE (JURY SELECTION)
PORTION OF THE TRIAL.

A. Stanley's right to due process and a fair trial was violated when the Court denied Appellant's counsel request to ask its pre-submitted voir dire questions of the jury.

B. Stanley's right to due process and a fair trial was violated when the Court permitted the State to use a peremptory challenge to dismiss a black juror, a Batson violation.

C. Stanley's right to due process and a fair trial was violated when the Court dismissed a black juror who arrived in Court about 15 minutes late on the first day before jury selection began, a Batson violation.

A. The United States and Nevada Constitutions provide that in a criminal prosecution, an accused may not be deprived of liberty without due process of law. (See, U.S. Const. Amend. XIV; Nev. Const. Art. 1 Sec. 8, Adams v. Texas, 448 U.S. 38, (1980). Furthermore, the accused shall enjoy the right to a speedy and public trial by an impartial jury. (See, U.S. Const. Amend. VI, Amend. XIV, Nev. Const. Art. 1 Sec. 8, Gray v. Mississippi, 481 U.S. 648 (1987)).

The critical concern of jury voir dire is to discover whether a juror "will consider and decide the facts impartially and conscientiously apply the law as charged by the court." Adams v. Texas, 448 U.S. 38; 45 (1980), cited in Witter v. State, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996).

Oscar Stanley's rights to due process and a fair trial were violated when the trial court refused to permit defense counsel to ask any of its pre-submitted questions to the proposed jurors during

. . .

1 voir dire. These questions were properly submitted in advance
2 pursuant to the **Eighth Judicial Court Rule 7.70.**

3 The Court did, however, permit the State to ask its one
4 question that they submitted early, one about anyone being
5 particularly sensitive to graphic photographs. (Trans. 3-8-02).
6 The defense tendered no objection to that question. The State
7 misstated, on the record, that it was a question jointly submitted
8 by the State and the defense. It was not. It was not part of the
9 list of questions submitted by the defense. (See Exhibit "A.")

10 Generally, it is this particular trial court's policy to permit
11 only "follow-up" questions to those asked by the judge.

12 For example, if someone tells the judge that he works at Nellis
13 Air Force Base, counsel is permitted to say something like, "So you
14 work at Nellis? Do you work with people of different races and
15 ethnic backgrounds there?"

16 By contrast, if the same juror did not tell the judge where he
17 or she worked, or responded by saying they had never worked, counsel
18 could not ask a question about whether or not this juror interacted
19 with people of different races or ethnic backgrounds.

20 Appellant contends that the Court's practice of limiting
21 questions to only "follow-up questions", and by categorically
22 denying the chance to ask any questions wherein counsel could learn
23 whether a juror would consider and decide the facts impartially and
24 conscientiously apply the law as charged by the court, denies him of
25 his due process right to a fair trial and impartial jury.

26 In preserving this objection, defense counsel asked for the
27 proposed questions to be put on the record outside the presence of
28 the jury. This was done. Additionally, the Court, outside the

1 presence of the jury, went through all of defense counsel's proposed
2 questions, summarily ridiculing and dismissing them. (Trans. 3-8-
3 02).

4 The scope of jury voir dire is within the sound discretion of
5 the trial court and will be given great deference by the Supreme
6 Court. Cunningham v. State, 94 Nev. 128, 575 P.2d 936 (1978).
7 However, a decision to permit defense to ask no questions unless
8 they relate to one the judge asked previously goes beyond sound
9 discretion and violates a defendant's constitutional right to a fair
10 trial. Furthermore, ridiculing defense counsel, even outside the
11 presence of the jury, evinces abuse of judicial discretion.

12 B. The United States and Nevada Constitutions provide that in
13 a criminal prosecution, an accused may not be deprived of liberty
14 without due process of law. (See, U.S. Const. Amend. XIV; Nev.
15 Const. Art. 1 Sec. 8, Adams v. Texas, 448 U.S. 38, (1980).
16 Furthermore, the Equal Protection Clause of the United States
17 Constitution forbids utilizing a peremptory challenge to exclude a
18 juror on the basis of race or gender. (See, U.S. Const. Amend. VI
19 and XIV, Nev. Const. Art. 1 Sec. 8, Batson v. Kentucky, 476 U.S. 79
20 (1986), J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994),
21 Washington v. State, 112 Nev. 1067, 922 P.2d 547 (1996).

22 In Purkett v. Elem, 514 U.S. 765, 767 (1995), cited in King v.
23 State, 116 Nev. 349, 353, 998 P.2d 1172, 1174-75 (2000), the United
24 States Supreme Court outlined the steps required for a Batson
25 challenge. First, the opponent of a peremptory challenge must
26 demonstrate a prima facie case of racial discrimination. Second,
27 the burden shifts to the proponent of the challenge to express a
28 race-neutral explanation for the challenge. Third, the district

1 court must determine whether the explanation was a mere pretext and
2 whether the opponent successfully proved racial discrimination. If
3 these issues are resolved in favor of the proponent, the
4 constitutional attack on the peremptory challenge is rejected.
5 Hernandez v. New York, 500 U.S. 352, 359 (1991), cited in King, at
6 353.

7 Here, these steps were followed. Outside the presence of the
8 jury, on March 8, 2002, the defense noted its objection to the State
9 using its peremptory challenge to dismiss Juror Pina Washington.
10 (Trans. 3-8-02, p. 70). The State countered that Ms. Washington was
11 a paralegal for the law firm of Kummer & Kaempfer, and that often
12 those with legal backgrounds tend to "manipulate the process."
13 (Trans. 3-8-02, pp. 70-71.) The State never explained just how they
14 expected a juror to "manipulate the process", or what "manipulate
15 the process" actually meant.

16 In fact, Ms. Washington advised the Court that her law firm,
17 where she is a legal secretary, not a paralegal, is involved in
18 civil matters only, not criminal law. (Trans. 3-5-02, 1:30 p.m., p.
19 77, ll. 10-25.) She, herself, works in the gaming and securities
20 division. (Trans. 3-5-02, 1:30 p.m., p. 77, l. 20.)

21 The State added that because Ms. Washington also expressed
22 dissatisfaction with the way her brother had been prosecuted by the
23 Clark County District Attorney's office, she would not be fair to
24 the State. (Trans. 3-8-02, p. 71, ll. 5-17). The State declared
25 that this was their biggest reason for using their peremptory
26 challenge on this juror. (Trans. 3-8-02, p. 71, ll. 5-6).

27 . . .

28 . . .

1 The District Court determined that those were race-neutral
2 reasons, and not a pretext for dismissing a juror based on race.
3 (Trans. 3-8-02, p. 72).

4 The defense disagrees. There were precious few minorities
5 present in the jury panel. In fact, the exact number was in
6 dispute. On page 69 of the March 8, 2002 transcript, defense
7 counsel noted that there were only three African-Americans in the
8 entire group of potential jurors sent up to the District Court from
9 the jury room. The district court judge disagreed, saying the three
10 sitting behind defense counsel, in addition to the ones seated in
11 the box.

12 Whether there were three or four, the fact remains that this is
13 a small percentage of the "sixty-odd"² people who are dispatched to
14 the Courtroom at the start of the trial. Therefore, when the only
15 jurors who are of the same race of the defendant are dismissed, it
16 should demand heightened scrutiny.

17 The State dismissed an educated, skilled African-American woman
18 who worked as a secretary for the gaming and securities division of
19 a large, civil law firm in Las Vegas. They did not say that she was
20 unable to deliberate. They did not say that she was unable to
21 understand the evidence that would be presented at trial.

22 Defense believes that the State violated Appellant Oscar
23 Stanley's Sixth and Fourteenth Amendment rights by using a
24 peremptory challenge to eliminate Pina Washington, an African-
25 American venireperson, on the basis of race.

26

27

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28 This is the number of prospective jurors, according to the District Court judge, who were
already in the Courtroom (Trans. 3-8-02, p. 69, lines 10-11).

1 C. The United States and Nevada Constitutions provide that in
2 a criminal prosecution, an accused may not be deprived of liberty
3 without due process of law. (See, U.S. Const. Amend. XIV; Nev.
4 Const. Art. 1 Sec. 8, Adams v. Texas, 448 U.S. 38, (1980).
5 Excluding jurors on the basis of race violates the **Sixth** and
6 **Fourteenth Amendments. Batson v. Kentucky**, 476 U.S. 79 (1986).

7 One female African-American juror, Venetia Hymes, was dismissed
8 from the venire in this case even before the peremptory challenges
9 began. (Trans. 3-4-02, p. 7, ll. 1-6, and 3-8-02, pp. 68-69). The
10 State did not strike her using a peremptory challenge; the Court
11 did. Thus, there is no need use a Purkett analysis of the steps
12 required for a Batson challenge.

13 As was pointed out earlier, there were only three or four
14 African-Americans in the group of 60 or so potential jurors. When
15 one is dismissed out of hand, without ever even getting the
16 opportunity to submit questions to her or discover her background,
17 it unfairly limits Appellant Oscar Stanley's ability to obtain a
18 jury of his peers.

19 All that had transpired prior to Ms. Hymes arriving in the
20 Court was an introduction of counsel and Defendant, the State
21 providing an explanation of the nature of the charges and its
22 proposed witnesses, and the venire being sworn in. (Trans. 3-4-02,
23 pp. 3-7). No questions had yet been posed of anyone.

24 Ms. Hymes had missed less than ten minutes of the process,
25 although the State said it was more like 15 minutes. (Trans. 3-8-
26 02, p. 68, lines 14-16.) No explanation was ever offered as to her
27 lateness. No one knows if she received erroneous directions to the
28 . . .

1 Courtroom by a Court official, or if she was in the restroom, or
2 what the reason was.

3 The charges against the Appellant would be read in Court again
4 prior to the start of the trial, as indeed they were on March 5,
5 2002 (Trans. 3-5-02, pp. 106-110). It would have taken less than
6 one minute to read a list of the State's proposed witnesses, the
7 names of participating counsel, and the name of the defendant, and
8 to have those people stand.

9 Appellant Oscar Stanley's constitutional rights were
10 compromised because the Court could not spare an extra one minute
11 with one of the few potential jurors of the same race as the
12 accused.

13 III.

14 STANLEY'S RIGHT TO BE PROTECTED FROM DOUBLE
15 JEOPARDY WAS VIOLATED WHEN THE COURT PERMITTED
16 THE JURY'S VERDICT OF GUILTY ON BOTH BATTERY
17 WITH SUBSTANTIAL BODILY HARM AND MAYHEM TO
18 STAND, WHEN THEY WERE BASED ON THE EXACT SAME
INCIDENT, OR, IN THE ALTERNATIVE, WHEN THERE
WAS NOT SUFFICIENT EVIDENCE PRESENTED TO
SUPPORT A CONVICTION ON MAYHEM.

19 The United States and Nevada Constitutions provide that a
20 defendant has a right to be protected from double jeopardy. (See,
21 U.S. Const. Amend. V; U.S. Const. Amend. XIV; Nev. Const. Art. 1
22 Sec. 8, Benton v. Maryland, 395 U.S. 784 (1969).

23 Oscar Stanley's right to not be twice put in jeopardy for the
24 same offense was violated when the district court permitted the
25 jury's verdict of guilty on battery with substantial bodily harm and
26 guilty on mayhem to stand. This is reversible error.

27 The Double Jeopardy Clause protects against three abuses: (1)
28 a second prosecution for the same offense after acquittal, (2) a

1 second prosecution for the same offense after conviction, and
2 (3) multiple punishments for the same offense. North Carolina v.
3 Pearce, 395 U.S. 711, 717 (1969), cited in State v. Lomas, 114 Nev.
4 313, 315, 955 P.2d 678, 679 (1998).

5 The prohibition against multiple punishments prevents the
6 government from punishing twice ... for the same offense." Witter
7 v. United States, 515 U.S. 389, 396 (1995) (quoting Helvering v.
8 Mitchell, 303 U.S. 391, 399 (1938)). This clause protects against
9 the imposition of multiple *criminal* punishments for the same
10 offense. Hudson v. United States, 522 U.S. 93, 99, 118 S.Ct. 488,
11 493 (1997).

12 Oscar Stanley was found guilty of the offense of Mayhem, a
13 violation of **NRS 200.280**, a category B felony. (Trans. 3-12-02, p.
14 8.) Oscar Stanley was also found guilty of the offense of Battery
15 with Deadly Weapon causing Substantial Bodily Harm, a violation of
16 **NRS 200.481(2)(e)(2)**, a category B felony. (Trans. 3-12-02, p. 8.)

17 Appellant maintains that these are the same crime.

18 Mayhem, the act of unlawfully disabling a person's limb, merges
19 into the crime of "causing substantial bodily harm." It is
20 substantial bodily harm to permanently deprive a person of a leg, as
21 Oscar Stanley was found by a jury to have done.

22 Appellant was sentenced to 180 months in prison, eligibility
23 for parole after 72 months, on Count VI, Battery with Deadly Weapon
24 causing Substantial Bodily Harm. He was also sentenced to 120
25 months in prison, eligibility for parole after 48 months, on Count
26 VII, Mayhem. (Trans. 5-10-02, p. 40). Thus, he was given two
27 criminal punishments for what Appellant contends is the same crime.

28 . . .

1 This violates the constitutional bar on double jeopardy. Hudson, at
2 99.

3 Appellant, alternatively, argues that there was insufficient
4 evidence to sustain the conviction for Mayhem. At trial, Dr. James
5 Lovett testified that victim Diane Baptist had her leg amputated as
6 a result of a catheter. (Trans. 3-05-02, 3:40 p.m., pp 51-52).
7 Oscar Stanley did not insert a catheter into Diane Baptist. There
8 was no evidence at trial that he had anything to do with inserting
9 a catheter into Diane Baptist. Nor was there any evidence at trial
10 that Oscar Stanley cut Diane Baptist's leg off, or even burned it
11 off.

12 He was accused of throwing gasoline and a lighted match on
13 Diane Baptist, and burning her. The testimony elicited from Dr.
14 Lovett was that the catheter, and not the burns, caused Ms. Baptist
15 to lose her leg. Furthermore, it was Dr. Lovett and his surgical
16 staff that cut off Diane Baptist's leg, not Oscar Stanley. (Trans.
17 3-05-02, 3:40 p.m., p. 39.)

18 Finally, other evidence at trial shows that Diane Baptist was
19 not burned on her legs or feet. Dr. Lovett testified that Diane
20 Baptist was burned on her neck, face, back, chest, and arms.
21 (Trans. 3-05-02, 3:40 p.m., p. 23.) There is no testimony from Dr.
22 Lovett about burns being located on Diane Baptist's legs or feet.
23 The testimony of Officer William Wilson, an eye-witness to Diane
24 Baptist's condition, was that she was burned on her upper body, her
25 face, chest, back, and hands. (Trans. 3-06-02, 1:40 p.m., p. 8.)
26 Diane Baptist testified that Oscar Stanley sprayed gasoline on her
27 from a water bottle on her back and front. (Trans. 3-06-02, 1:40
28 . . .

1 .m., p. 43-44.) Ms. Baptist also testified that Mr. Stanley threw
2 a lighted match at her chest. (Trans. 3-06-02, 1:40 p.m., p. 45.)

3 The standard of review for sufficiency of the evidence upon
4 appeal is whether the jury, acting reasonably, could have been
5 convinced of the defendant's guilt beyond a reasonable doubt.
6 Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992),
7 overruled on other grounds by Byford v. State, 116 Nev. 215, 994
8 P.2d 700, cert. denied, 531 U.S. 1016 (2000).

9 Here, it is clear that Oscar Stanley never touched Diane
10 Baptist's legs or feet. Furthermore, the treating physician stated
11 that the reason for the amputation of Diane Baptist's legs was not
12 the burns, which were caused by Oscar Stanley, but by an infection
13 brought about by a catheter, which Oscar Stanley did not insert.
14 Therefore, the jury, acting reasonably, could not have been
15 convinced of Oscar Stanley's guilt as to causing the victim to be
16 deprived of her left leg and foot beyond a reasonable doubt.

17 **CONCLUSION**

18 For all of the reasons argued in this Brief, the Appellant
19 respectfully requests that this Honorable Court reverse the
20 convictions in this case and remand the matter for a new trial.

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VOIR DIRE

1. How many of you are more likely to believe the testimony of a police officer over that of anyone else?
2. True or False: They never would have arrested Oscar Stanley if he wasn't guilty.
3. Is there anyone here who believes that's a true statement?
4. How do you feel about being a juror?
5. Right now, as you sit here, if someone asked you if Oscar Stanley was guilty or innocent, what would you say?
6. Complete this sentence for me: people who steal are ...
7. You know what common sense is, don't you. Do you have common sense? And, if selected as a juror, would you promise that you will use your common sense?
8. True or false: black men are more likely than white men to commit acts of violence.
9. Presuming you're selected to the jury, if you hear a fellow juror, during deliberations, make an argument based on racial prejudice or a racial stereotype, what would you do about it?
10. Would anyone here consider telling the judge if that's what they heard?
11. How many of you, when you walked in here today, glanced over at Mr. Stanley here and thought "well, they have charged another innocent man." ? Why not? Aren't we all presumed innocent until proven guilty?
12. Does the fact that Oscar Stanley is a black man make it more difficult to believe he could be innocent until proven guilty?
13. Do you remember Susan Smith, the woman in South Carolina who drowned her children? Do you remember that at first she blamed the crime on a black man? Why did she say it was a black man who took her car and kidnapped the children?
14. Do you remember the guy in Boston, Charles Stewart, who killed his wife, stabbed himself, and then called the cops from a cell phone to say a black man just attacked them? Why did he choose a black man as his imaginary attacker?
15. With these stereotypic images of black men, how is Mr. Stanley going to get a fair trial this week?

Exhibit A

1
2 CERTIFICATE OF COMPLIANCE

3 I hereby certify that I have read this appellate brief,
4 and to the best of my knowledge, information, and belief, it is not
5 frivolous or interposed for any improper purpose. I further certify
6 that this brief complies with all applicable Nevada Rules of
7 Appellate Procedure, in particular NRAP 28(e), which requires every
8 assertion in the brief regarding matters in the record to be
9 supported by a reference to the page of the transcript or appendix
10 where the matter relied on is to be found. I understand that I may
11 be subject to sanctions in the event that the accompanying brief is
12 not in conformity with the requirements of the Nevada Rules of
13 Appellate Procedure.

14 DATED this 30th day of December, 2002.

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24 RECEIPT OF A COPY of the foregoing Appellant's Opening
25 Brief is hereby acknowledged this 30 day of December, 2002.

26 STEWART L. BELL
27 CLARK COUNTY DISTRICT ATTORNEY

28 By Margie English