IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR A. STANLEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

ORIGINAL

FILED

Case No. 39775

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RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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Appeal from Judgment of Conviction
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STATEMENT OF THE ISSUES

1. Whether the District Court improperly denied the Defendant's Motion to Suppress Confession.
2. Whether the District Court provided an incorrect response to a jury question regarding the State's burden of proof.
3. Whether the District Court erred in denying trial counsel's request to ask its pre-submitted voir dire questions.
4. Whether a Batson violation occurred when the State used a peremptory challenge to dismiss a black juror.
5. Whether a Batson violation occurred when the District court dismissed a black juror who arrived fifteen minutes late on the first day of trial.
6. Whether the District Court violated the defendant's rights by allowing a jury verdict of guilty on both Battery with Substantial Bodily Harm and Mayhem.

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STATEMENT OF THE CASE

On December 31, 2001, OSCAR STANLEY, hereinafter Defendant, was charged by way of Information with a total of eleven counts: two counts of Robbery, Larceny from the Person, Grand Larceny Auto, two counts of Burglary, Attempt Murder With Use of a Deadly Weapon, Battery With a Deadly Weapon With Substantial Bodily Harm, Mayhem, Attempt Robbery Victim 65 Years of Age or Older, and Attempt Grand Larceny Auto. There are four different victims named in the Information: Billy Barba, Diane Baptist, Jojina Ball and Carl Williams. All eleven counts relate to four incidents that occurred on the same day, October 25, 2001.

The Defendant entered a plea of not guilty with respect to all charges and a jury trial began on March 4, 2002. At the conclusion of the trial, the jury returned verdicts of guilty to two counts of Robbery, one count of Attempt Robbery, Victim 65 Years of Age or Older, one count of Mayhem, one count of Larceny from the Person, one count of Battery With a Deadly Weapon With Substantial Bodily Harm, one count of Unlawful Taking of Vehicle, and one count of Attempt Unlawful Taking of an Automobile.

The Defendant filed post-trial motions, whereby the Court dismissed the Unlawful Taking of Vehicle and Attempt Unlawful Taking of an Automobile counts. Additionally, the District Court dismissed the age enhancement for the Attempt Robbery conviction.

On May 10, 2002, the Court sentenced Defendant as a habitual criminal as follows: on Count 1, life without the possibility of parole; on Count 2, a maximum term of forty-eight (48) months with a minimum parole eligibility of twelve (12) months, and $500 restitution; on Count 6, a maximum term of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months and pay $600,000 restitution; on Count 7, a maximum term of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months; on Count 9, Life

without the possibility of parole and $522 restitution; and on Count 10, a maximum term of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months and pay $4,000 restitution. All counts are to run consecutive to each other. The Defendant received 197 days credit for time served.

The Judgment of Conviction was entered on June 4, 2002. On June 7, 2002, the Defendant filed a Notice of Appeal.

STATEMENT OF THE FACTS

On October 25, 2001, at approximately 2:30 p.m., at the Chevron station located at 333 South Main Street, the Defendant grabbed victim Billy Barba's wallet containing $500 from his left hand, and fled on foot. (Trans. 3-6-02, Part 2, p. 46-47). Mr. Barba followed the Defendant in his vehicle, a 1986 Toyota van, to the location of First and Clark, at which time the Defendant pulled Mr. Barba out of his van, punched Mr. Barba in the face, and drove off in Mr. Barba's van. (Trans. 3-6-02, Part 2, p. 47-48).

On October 25, 2001, at approximately 6:50 p.m., at the High Hat Regency Motel located at 1300 S. Las Vegas Boulevard, the Defendant got into a verbal altercation with victim Diane Baptist, who was working in the office of the High Hat Regency Motel. (Trans. 3-6-02, p. 39). The Defendant doused Mrs. Baptist with gasoline or some other flammable liquid, lit a match and threw it at Mrs. Baptist, setting her on fire. (Trans. 3-6-02, p. 39). Her husband, Manuel Baptist, observed her on fire as she ran out of the office screaming. (Trans. 3-6-02, Part 2, p. 11). When Officer Matthew Wilson arrived, he observed Mrs. Baptist still smoldering, her clothes and her skin burned. (Trans. 3-6-02, p. 7). She was unconscious for a month and a half and required the use of a respirator. (Trans. 3-6-02, p. 53). Her left lower leg and foot were amputated as a result of the Defendant's actions. (Trans. 3-5-02, p. 39).

On October 25, 2001, at approximately 8:00 p.m., at the Budget Inn located at 301 South Main Street, the Defendant got into a verbal altercation with victim Jojina

Ball, who was working at the front desk of the Budget Inn. (Trans. 3-7-02, p. 11-12, 15). The Defendant kicked the door, punched the glass window, and jumped over the desk, at which time he punched Ms. Ball in the face and broke open the cash register drawer and took money. (Trans. 3-7-02, p. 17-19).

On October 25, 2001, at approximately 8:05 p.m., at the location of Main Street and Carson, the Defendant approached victim Carl Williams, who is 83 years old and was sitting in the driver's seat of his 2001 Mercury Sable. (Trans. 3-7-02, p. 5-6). The Defendant opened the driver's door, told Mr. Williams to get out of the car, and attempted to pull him out of his vehicle. (Trans. 3-7-02, p. 6). Mr. Williams resisted and the Defendant's attempt was unsuccessful. (Trans. 3-7-02, p. 7).

Officer Lisa Crane apprehended the Defendant soon thereafter. (Trans. 3-7-02, p. 124-125). Once the Defendant arrived at the jail, Officer William Wilson gave the Defendant his Miranda rights. (Trans. 3-5-02, p. 27). The Defendant provided a voluntary confession. (AA, p. 25-51). At the end of the statement, the Defendant reiterated that he had received and waived his Miranda rights. (AA, p. 50-51).

On March 1, 2002, the District Court ruled on the Defendant's Motion to Suppress. (Trans. 3-1-02, p. 2). After hearing argument, the District Court denied the Defendant's Motion. (Trans. 3-1-02, p. 17).

Additionally on this date, defendant's counsel presented proposed voir dire questions to the Court. (Trans. 3-1-02). Before the trial began, the District Court decided it was not going to use the proposed questions. (Trans. 3-8-02, p. 73). During the trial, outside the presence of the jury, a record was made of the proposed questions and Court's reasoning in refusing to ask the questions. (Trans. 3-8-02, p. 72-86).

On the first day of trial, March 4, 2002, one juror was absent, Venetia Hymes. (Trans. 3-4-02, p. 3, 11, 17-20). Ms. Hymes, an African-American woman, arrived in court approximately fifteen minutes late. (Trans. 3-4-02, p. 7, 11). After a brief discussion, Ms. Hymes was sent back down to the jury room to be assigned to a new

jury. (Trans. 3-4-02, p. 7). This issue was addressed in open court, outside the presence of the jury, on March 8, 2002. (Trans. 3-8-02, p. 68-70). The District Court Judge ruled that he exercised his discretion in dismissing the potential juror instead of repeating everything solely for her benefit. (Trans. 3-8-02, p. 70).

During jury selection, the State exercised a peremptory challenge to excuse an African-American potential juror, Pina Washington. (Trans. 3-5-02, p. 85). A record was made on March 8, 2002, concerning a potential Batson violation. (Trans. 3-8-02, p. 70). At that time, the State provided its race-neutral reasons for dismissing the juror, and the trial court found there was no Batson violation. (Trans. 3-8-02, p. 70-72).

During deliberations, the jury sent a question to the Judge. (Trans. 3-12-02, p. 2-3). The note asked, "Related to Count II (larceny from a person), Is it necessary for the jury to agree that both the money and the wallet were taken from Billy Barba to be considered guilty?" (Trans. 3-12-02, p. 3). The question arose during the morning Motion and Law calendar. There was one prosecutor and one defense attorney from the trial present, and the judge discussed the note with both attorneys. The Court advised counsel that it thought that the answer should be no, and that was the response provided to the jury. (Trans. 3-12-02, p. 3-4).

Among his numerous charges, the defendant was convicted of Battery with a Deadly Weapon causing Substantial Bodily Harm, a violation of NRS 200.481 (2)(e)(2), and Mayhem, a violation of NRS 200.280.

ARGUMENT

I

THE DEFENDANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WERE NOT VIOLATED DURING THE JURY TRIAL PHASE OF THE PROCEEDINGS

A. The District Court Did Not Commit Error When It Denied Defendant's Motion to Suppress.

On March 1, 2002, District Court Judge Donald Mosley ruled that statements

made by defendant Stanley were admissible despite the defense's objections that the defendant's Miranda rights were violated. The evidence presented by the defendant in support of his argument centers around the detectives failure to obtain a written waiver of Miranda rights from the defendant, and the failure to record the waiver. These arguments do not support the defendant's argument that his rights to due process and against self-incrimination were violated.

The government has the burden to prove that the defendant's waiver of his 5th Amendment Miranda rights was made voluntarily, knowingly, and intelligently. Falcon v. State, 110 Nev. 530, 534, 874 P.2d 772, 775 (1994). The State must meet this burden by a preponderance of the evidence. Scott v. State, 92 Nev. 552, 554, 554 P.2d 735, 736-37 (1976) (citing Lego v. Twomey, 404 U.S. 477, 92 S.Ct. 619 (1972).

The State of Nevada met its burden to prove waiver of the defendant's 5th Amendment rights. The question of the admissibility of a confession is primarily a factual question addressed to the district court: where that determination is supported by substantial evidence, it should not be disturbed on appeal. Echavarria v. State, 108 Nev. 734, 743, 839 P.2d 589, 595 (1992). At trial, Detective Wilson testified that he read the defendant his Miranda rights. (Trans. 3-6-02, p.28). The Detective stated that the defendant indicated that he understood his rights and waived them. (Trans. 3-6-02, p.29). By this testimony alone, the State has provided substantial evidence to meet its burden of preponderance of the evidence.

However, in an abundance of caution, the detectives re-questioned the defendant, so that his Miranda waiver could be recorded. (AA, p. 50-51). During this exchange, the defendant stated on the record that his Miranda rights had been read and that he understood them. This was performed even though there is no requirement that the police record the admonishment of Miranda rights provided to a defendant. Jimenez v. State, 105 Nev. 337, 775 P.2d 694 (1989).

Based upon the actions of these detectives, the State has clearly met its burden in establishing that the defendant's waiver of his Miranda rights was made

voluntarily, knowingly, and intelligently. Thus, the District Court's order denying the defendant's Motion to Suppress should be upheld.

B. The District Court Responded Correctly to the Jury Question About Larceny From the Person.

In Count Two of the Information filed December 31, 2001, the Defendant was charged with Larceny from the Person, pursuant to N.R.S. 205.270. NRS 205.270 provides:

> "Every person who, under circumstances not amounting to robbery, shall, with intent to steal or appropriate to his own use, take from the person of another, without his consent, any money, property or thing of value, shall be punished by imprisonment in the state prison for not more than 14 years."

NRS 205.2195 describes property in the context of larceny crimes. The statute defines property as:

> 1. Personal goods, personal property and motor vehicles;
> 2. Money, negotiable instruments and other items listed in NRS 205.260.
> 3. Livestock, domesticated animals and domesticated birds; and
> 4. Any other item of value, whether or not the item is listed in NRS 205.2175 to 205.2707, inclusive.
>
> NRS 205.2195.

In his opening brief, the Defendant alleges that reversible error occurred when the jury found the defendant guilty of larceny from the person without finding that one of the material elements, taking of money, was present. This is an incorrect statement of the law.

Nevada law is settled that, to constitute larceny, "there must exist in the mind of the perpetrator, at the time of the taking, the specific intent to permanently deprive the owner of his **property**." Harvey v. State, 78 Nev. 417, 375 P.2d 225 (1962) [Emphasis added]. Additionally, NRS 205.270 requires the taking of any money, property or thing of value.

In the instant case, the jury was given an instruction that provided a definition of the crime of larceny from the person. AA, p. 000072. That instruction was taken directly from NRS 205.270. During their deliberations, the jury asked a question of

the judge in relation to this instruction. The question specifically stated, "Is it necessary for the jury to agree that both the money and the wallet were taken from Billy Barba to be considered guilty?" (Trans. 3-12-02, p. 3). The Honorable Judge Donald Mosley responded to this question by writing "No" on the piece of paper and having the question returned to the jury. (Trans. 3-12-02, p. 4).

Clearly, based upon the established law of the State of Nevada, this was the correct response to the question. The State is not required to prove that the defendant specifically took money from the victim in this case, as taking of money is not a material element of the crime. The State is only required to prove beyond a reasonable doubt that the defendant took property or any thing of value from the victim.

Accordingly, the District Court responded correctly to the question presented by the jury and did not violate the defendant's right to due process. This claim should be denied.

II

THE DEFENDANT'S RIGHT TO DUE PROCESS AND RIGHT TO A FAIR TRIAL WERE NOT VIOLATED DURING THE VOIR DIRE PORTION OF THE TRIAL

A. The District Court Properly Exercised Its Discretion By Denying Defendant's Pre-Submitted Voir Dire Questions

The Constitution does not require a judge to use the defendant's preferred screening questions. Mu'Min v. Virginia, 500 U.S. 415, 111 S.Ct. 1899 (1991). The conduct of voir dire necessarily is committed to the sound discretion of the trial court "because the 'determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge.'" Ristiano v. Ross, 424 U. S. 589 (1976)(quoting Rideau v. Louisiana, 373 U.S. 723, 733, 83 S.Ct, 1417, 1423 (1963). "Of necessity," the voir dire examination must be left to the sound discretion of trial judges. Connors v. United States, 158 U.S. 408 (1895); Ham

v. South Carolina, 409 U.S. 524 (1973). As noted in Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981), regulation of voir dire traditionally has been committed to the sound discretion of the trial judge. Part and parcel of deference to the trial court's conduct of voir dire is a reluctance to second-guess the court's decision to refuse inquiry into certain matters. United States v. Lancaster, 96 F.3d 734 (4th Cir. 1996).

In the Defendant's Opening Brief, the defendant argues that the district court's decision to permit only "follow up" questions denies him of his due process right. The law of the State of Nevada directly contradicts this argument. NRS 175.031 states:

> The court shall conduct the initial examination of prospective jurors, and defendant or his attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted.

Clearly, the District Court is allowed to make the opening inquiries of the prospective jurors. The District Court allowed both the State of Nevada and the defendant to explore potential issues after the Court completed its inquiry. The District Court allowed defense counsel to question the jurors individually, even though this examination was supplemental in nature.

Additionally, the District Court reviewed the questions submitted by the defendant and incorporated the issues raised in these questions into the Court's inquiry of the potential jurors. (Trans. 3-8-02, p. 72-86). The record demonstrates that the voir dire conducted by the trial judge was sufficient to ensure that the Petitioner's jury was able to vote impartially on the evidence and the law presented at trial.

The defendant's right to a fair trial and due process were not infringed upon by the District Court's voir dire procedure. Thus, this claim should be denied.

B. The Court Properly Allowed the State of Nevada To Utilize A Peremptory Challenge to Dismiss Prospective Juror Pina Washington

Defendant asserts that the district court erred in allowing the State to make use

of one of its peremptory challenges to dismiss Pina Washington, an African-American venire person. (Trans. 3-8-02, p. 70). Defendant's allegation is without merit.

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1984) and its progeny have developed a three prong test for determining when a objection to a peremptory challenge should be upheld on the basis of racial discrimination. Doyle v. State, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996); Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769 (1995). First, a defendant must make a prima facie showing of racial discrimination. In order to establish this, a defendant must meet a three-part inquiry:

> To establish such a case, the defendant **first** must show that he is a member of a cognizable racial group, (citations omitted), and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. **Second**, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." (Citation omitted). **Finally**, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venire men from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Batson at 96 (emphasis added).

If a prima facie showing is made, the burden then shifts to the party who exercised the peremptory challenge to tender a race-neutral explanation for the strike. Doyle at 887. If such an explanation is provided, the court must then determine whether it is "merely a pretext for purposeful racial discrimination." Doyle at 887.

In the instant case, defendant was unable to establish a prima facie showing that the State excluded jurors based upon their race. Defendant objected to the peremptory

challenge of one juror who was African-American. (Trans. 3-8-02, p. 70). Although Defendant in his opening brief may assert that he has made a prima facie showing by alleging that he is a member of a cognizable group and that the prosecutor dismissed a prospective jury member of this group, the prima facie inquiry does not end there. Pursuant to the test proffered by Batson and its progeny for showing a prima facie case, Defendant must also assert that the use of peremptory challenges are inherently prejudicial and that the circumstances surrounding the peremptory challenge raise an inference that the prosecutor purposefully excluded the African American venire person because of their race. Defendant failed to address this last prong of the test.

With regard to that last prong, the record shows that the circumstances surrounding Pina Washington being excused from the panel do not lend support to an inference that the prosecutor excluded her solely based upon race. The district court inquired of Ms. Washington whether she had any family members involved in the criminal justice process. (Trans. 3-5-02, p. 72). The prospective juror stated that her older brother was charged with robbery in Nevada, and served more than five years in Nevada State Prison before escaping. (Trans. 3-5-02, p. 73-74). Ms. Washington also stated that she believed her brother's ordeal was unfair because he was not released when he should have been. (Trans 3-5-02, p. 75-76). Additionally, Ms. Washington is employed as a legal secretary at the Las Vegas law firm of Kummer, Kaempfer, Bonner and Renshaw. (Trans 3-5-02, p. 77).

Thus, Defendant's mere assertion that one peremptory challenge exercised was used to strike African Americans does not satisfy the prima facie showing prong of the Batson test. Therefore, no Batson violation occurred.

Moreover, there was an African American juror seated on this jury. If the State were using race as the basis for exclusion of jurors, the State could have exercised a peremptory challenge against that juror. (Trans 3-8-02, p. 71-72).

However, even if this Court were to find that Defendant did establish a prima facie showing, he is still unable to establish a Batson violation. After a prime facie

showing is demonstrated, the burden shifts to the excusing party to provide an explanation for exercising the peremptory challenge. In the instant matter, the State provided race-neutral explanations for excusing the juror.

> The prosecutor stated the following with respect to Ms. Washington:
>
> First of all, she is a paralegal at Kummer and Kaempfer. It has been our experience that sometimes when people know just enough about law, that they try to manipulate the process. So it's our preference not to have lawyers, legal types paralegals on our jury, first of all.
>
> Second of all, and probably the biggest reason, was her expression of how distastefully she felt her brother was handled by the judicial system. He had been sentenced to Nevada Department of Prisons for five years, prosecuted by this very office
>
> The allegation by the potential juror was that he had been retained past his appropriate sentence, that somehow he had escaped and was now being detained again what she felt was inappropriately, and should have never been redetained for an escape and, essentially, prosecuted by our office.
>
> (Trans. 3-8-02, p. 70-71).

Clearly, the State provided race-neutral explanations. Moreover, the prosecutor's explanations will be presumed as race-neutral unless discriminatory intent is inherent in the prosecution's explanation. *See* Purkett, 514 U.S. at 768, 115 S.Ct. at 1771.

Once race-neutral explanations are submitted, the district court must then determine whether the prosecutor's reasons were valid and not pretextual. In this case, since the State provided race-neutral explanations that were not pretextual, the district court correctly denied Defendant's objections based upon a Batson violation.

In reviewing the denial of a Batson challenge, the reviewing court should give great deference to the determining court. Hernandez v. New York, 500 U.S. 352, 364, 111 S.Ct. 1859, 1868-9 (1991). The reasoning for such a standard is the trial court is in the position to best assess whether from the "totality of the circumstances" that racial discrimination is occurring. Id. In the present case, the trial court found no racial discrimination and overruled the objections. Defendant has not come forward to demonstrate that the trial court abused its discretion. Thus, this issue should be dismissed.

C. The District Court Properly Dismissed Venetia Hayes, a Prospective Juror Who Arrived Fifteen Minutes Late On The First Day Of Jury Selection.

In his opening brief, the defendant claims that he was due process of law and a fair trial due to the District Court's dismissal of a prospective juror who arrived fifteen minutes late. However, the defendant presented no substantive law to support this argument. Instead, the defendant argues that it would have less than one minute to restart the entire proceedings for the benefit of this one juror. The State disagrees.

"A criminal trial is, even in the best of circumstances, a complicated affair to manage. The proceedings are dependent in the first instance on the most elementary sort of considerations, e.g., the health of the various witnesses, parties, attorneys, jurors, etc., all of whom must be prepared to arrive at the courthouse at set times." United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 554 (1971).

Although the defendant may in some circumstances have a "right to have his trial completed by a particular tribunal", United States v. Jorn, 400 U.S. at 484, that right must often give way to competing concerns such as the need for judicial efficiency. United States v. Gay, 967 F.2d 322 (9th Cir. 1992).

That concern is exactly what faced the District Court in this case. The District Court had already called the roll of the jury; the State of Nevada had made opening remarks and announced all of the witnesses it may call; defense counsel introduced themselves and their client; and the jury was sworn in before Ms. Hymes walked into the courtroom. (Trans. 3-4-02, p. 3-7). The Court was faced with the decision of having all of this information repeated solely for the benefit of Ms. Hymes, or simply returning the prospective juror to the jury commissioner for reassignment to another department. The Court properly exercised its discretion by dismissing Ms. Hymes.

A district court's decision to replace a juror with an alternate is reviewed for abuse of discretion. United States v. Gay, 967 F.2d 322, 324 (9th Cir. 1992). By making the decision to dismiss Ms. Hymes instead of having fifteen minutes of substantial information repeated, the District Court did not abuse its discretion in

dismissing this juror. Thus, this claim should be denied.

III

DEFENDANT'S RIGHT TO BE PROTECTED FROM DOUBLE JEOPARDY WAS NOT INFRINGED BY THE JURY'S VERDICT

A. The Crimes of Mayhem and Battery With A Deadly Weapon Causing Substantial Bodily Harm Are Not The Same Crime.

Defendant argues that his right not to be twice put in jeopardy for the same offense was violated when the district court permitted a jury's verdict of guilty on battery with substantial bodily harm and guilty of mayhem to stand. The State believes that the convictions should remain legally binding, as the two offenses are different crimes.

The test to determine whether charged offenses are the same for double jeopardy purposes was set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932): "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Blockburger v. United States, supra, at 304, 52 S.Ct. at 182. Nevada follows the Blockburger test for double jeopardy. Williams v. State, 118 Nev.Adv.Op. 56, 50 P.3d 1116 (2002). Under this test, "if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses." Barton v. State, 117 Nev.Adv.Op. 56, 30 P.3d 1103, 1107 (2001).

Battery is defined as "any willful and unlawful use of force or violence upon the person of another." NRS 200.481 (1)(a). If that force is accomplished with the use of a deadly weapon and substantial bodily harm results, the crime committed is Battery with a Deadly Weapon Resulting in Substantial Bodily Harm. NRS 200.481 (2)(e)(2).

It is the state's position that the defendant's actions constituted a battery with a deadly weapon that resulted in substantial bodily harm to Diane Baptist. After the defendant had doused Ms. Baptist in gasoline, he threw a lighted match on her. (Trans. 3-6-02, p. 39). This is clearly an unlawful use of force upon the person of another, thus constituting a battery upon the person of Diane Baptist.

NRS 193.165 supplies the definition for a deadly weapon. The statute provides that a deadly weapon is "Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death." NRS 193.165 (5)(b). In this case, the defendant used gasoline as a deadly weapon to cause the injuries to Ms. Baptist. (Trans. 3-6-02, p. 39).

Substantial bodily harm is defined as "Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or prolonged physical pain." NRS 0.060.

Dr. James Lovett testified that Ms. Baptist "was in quite a bit of pain from the burns. She had second and third degree burdens involving her face and her neck, the front part of her chest, both arms as well as her back." (Trans. 3-5-02, p. 21). Additionally, the jury heard testimony from Ms. Baptist concerning her physical injuries and prolonged pain. (Trans. 3-6-02, p. 52-57).

Based upon this evidence, the State proved Battery with a Deadly Weapon causing Substantial Bodily Harm. The State was not required to prove deprivation or dismemberment of the victim's body to prove this crime beyond a reasonable doubt.

NRS 200.280 provides "Mayhem consists of unlawfully depriving a human being of a member of his body, or disfiguring or rendering it useless. If a person cuts out or disables the tongue, puts out an eye, slits the nose, ear or lip, or disables any limb or member of another, or voluntarily, or of purpose, puts out an eye, that person is guilty of mayhem."

The State of Nevada also proved this separate crime. Dr. Lovett testified that, because of the injuries inflicted by the defendant's conduct, the doctor had to perform "a below the knee amputation." (Trans 3-5-02, p. 39). It is upon this fact that the State was able to prove beyond a reasonable doubt that the defendant was guilty of mayhem.

In proving mayhem, the State was required to prove additional facts that are not required to prove battery with a deadly weapon causing substantial bodily harm. The State proved that the actions of the defendant caused Ms. Baptist's leg to be amputated. Accordingly, the two crimes are separate offenses, and the defendant was correctly convicted of both separate offenses. Thus, this claim should be denied.

B. Defendant Could Be Found Guilty of Both Mayhem and Battery with a Deadly Weapon Causing Substantial Bodily Harm Due to the Legislature's Intent to Provide Multiple Punishment.

Even if this Court determines that battery with a deadly weapon causing substantial bodily harm and mayhem are the same offense, it is still proper to uphold Defendant's convictions for both crimes. In Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986), this Court held that according to the United States Supreme Court, if a defendant is convicted and sentenced under two separate statutes which, pursuant to Blockburger, may be determined to be one offense, multiple sentences will be tolerated where the legislature specifically has authorized it. Id. at 298. This Court then looked to its decision in Koza v. State, 100 Nev. 245, 681 P.2d 44 (1984). In Koza, this Court reviewed whether the defendant's robbery and felony-murder convictions merged. First, this Court opined that the offenses involved each required proof of an additional element that the other did not. Second, this Court found that the defendants sentencing did not offend the Double Jeopardy Clause because separate statutes and offenses were involved. Id. at 256. This Court also noted:

> 'With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. . .

> .Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct ..., a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.'

Id. at 255-256 (quoting Missouri v. Hunter, 459 U.S. 359, 366, 368-369, 103 S.Ct. 673, 678-9 (1983)).

Therefore, in the instant matter, even if this Court determines that NRS 200.280 and NRS 200.481 punish the same conduct, it is clear that the legislature's intent was to allow for cumulative punishment since "separate and distinct" statutes and offenses are involved. Koza at 256. Accordingly, this Court should dismiss Defendant's claim.

C. Sufficient Evidence Exists To Find the Defendant Guilty of the Crime of Mayhem.

In his final argument, the defendant argues that there was insufficient evidence to convict him of Mayhem. This contention is meritless. The State proved, beyond a reasonable doubt, that the defendant was guilty of Mayhem.

The main theory behind this argument by the defendant is based upon his claim that he never touched Ms. Baptist's legs or feet. Instead he argues that the catheter, not the burns, caused Ms. Baptist to lose her leg. Thus, the defendant claims, he should not have been convicted of causing the victim to be deprived of her left leg and foot. This argument is flawed, however, because the defendant's actions proximately caused Ms. Baptist's amputation.

The proximate cause of an injury is a cause which, in natural and continuous sequence, produces the injury without which the injury would not have occurred. Allum v. Valley Bank of Nevada, 114 Nev. 1313, 1320, 970 P.2d 1062, 1066 (1998). A criminal defendant can only be exculpated where, due to a superseding cause, he was in no way the proximate cause of the result. Etcheverry v. State, 107 Nev. 782, 785, 821 P.2d 350, 351 (1991) (citing Trent v. Clark. Co. Juv. Ct. Services, 88 Nev. 573, 577, 502 P.2d 385, 388 (1972)). Thus, an intervening cause must be a

superseding cause, or the sole cause of the injury in order to completely excuse the prior act. Etcheverry at 785.

Dr. Lovett testified that, as a portion of his treatment of Ms. Baptist, he inserted a catheter into her groin. (Trans. 3-5-02, p. 38). This was done to monitor the blood pressure and sample some blood gases to determine the oxygenation of Ms. Baptist's lungs. (Trans. 3-5-02, p. 38). Dr. Lovett also explained why the catheter was placed in the victim's groin.

> "We normally will put a catheter in the artery of the wrist. Since both her arms were burned you couldn't do that and we had to put a catheter in the groin artery. It's standard care and it happens in the trauma unit and the coronary care units, as well.
>
> She developed a clot that that catheter that we were using to monitor her blood pressure and draw the labs and actually clotted off the main artery going down to her leg."

Trans. 3-5-02, p. 38-39.

Undoubtedly, Ms. Baptist would have never required a catheter had it not been for the actions of the defendant. The catheter was inserted by Dr. Lovett solely to assist her recovery from her burns. Based upon this testimony, it is clear that the defendant proximately caused this amputation.

The State of Nevada provided sufficient evidence to prove that the defendant caused the insertion of the catheter and the resulting amputation beyond a reasonable doubt. Therefore, the defendant's claim should be denied.

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CONCLUSION

Based upon the above and foregoing Points and Authorities, the State respectfully requests this Honorable Court to affirm the Judgment of Conviction.

Dated this 28th day of February 2003.

DAVID ROGER
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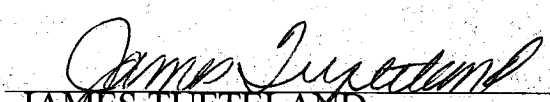
BY 
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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 28th day of February 2003.

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on February 28, 2003.

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