ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR A. STANLEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 39775

FILED

MAR 21 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

APPELLANT'S REPLY BRIEF

(Appeal from Judgment of Conviction)

MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

DAVID ROGER
CLARK COUNTY DISTRICT ATTORNEY
200 South Third Street
Las Vegas, Nevada 89155
(702) 455-4711

BRIAN SANDOVAL
Attorney General
Nevada Bar No. 003805
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

03-04825

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR A. STANLEY, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 39775

APPELLANT'S REPLY BRIEF

MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

DAVID ROGER
CLARK COUNTY DISTRICT ATTORNEY
200 South Third Street
Las Vegas, Nevada 89155
(702) 455-4711

BRIAN SANDOVAL
Attorney General
Nevada Bar No. 003805
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS CONT.

TABLE OF AUTHORITIES

PAGE NO.

CASES CITED:

TABLE OF AUTHORITIES, CONT.

IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR A. STANLEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 39775

APPELLANT'S REPLY BRIEF

ARGUMENT

I.

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

A. STANLEY'S RIGHT TO DUE PROCESS AND AGAINST SELF-INCRIMINATION WAS VIOLATED WHEN THE TRIAL COURT DENIED APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT.

Appellant again contends that the State did not prove, by a preponderance of the evidence, that Defendant's **Miranda** rights were administered.

The State, in its Answering Brief, states that the Detectives, "in an abundance of caution ... re-questioned the defendant, so that his **Miranda** waiver could be recorded." (See page 6 of Respondent's Answering Brief, hereinafter referred to as "RAB", lines 21-22.)

No matter how the State dresses this up, what OSCAR STANLEY said to the detectives on tape is NOT a valid waiver of **Miranda** rights. The rights themselves were never read onto the tape. (Transcript of this portion of the taped admission is contained on pages 7-8 of Appellant's Opening Brief, starting at line 19.) On

the tape, the **Miranda** rights were alluded to, not reiterated. Thus, we are still left with the unanswered question: did the police obtain a voluntary waiver of **Miranda** rights from OSCAR STANLEY?

Furthermore, the State cites no authority to support its argument that retroactive **Miranda** rights are valid. It is clear from the case law that established **Miranda** that these rights must be given PRIOR to questioning, not after. "At the outset, if a person in custody is to be subjected to interrogation, he must *first* be informed in clear and unequivocal terms that he has the right to remain silent." **Miranda v. Arizona**, 384 U.S. 436, 467-468 (1966), *italics added for emphasis.*

Here, the State violates both the requirement to administer the warnings PRIOR to the custodial interrogation, and to do so in a clear and unequivocal term. Asking the Defendant; "he read you your Miranda rights, remember that?" and "You remember him doin' that?" is not clear and unequivocal. (See Appellant's Opening Brief, p. 7, lines 21-28 and p. 8, lines 1-2)

The State insists that the proper **Miranda** warnings were given before the tape recording started. Again, the Appellant asks, if the police went to the trouble to obtain recording equipment, how difficult would it have been to begin the recording with the recitation of the **Miranda** rights?

The answer is, not difficult at all. The absence of a written waiver, or a tape-recorded waiver prior to the tape-recorded interrogation, creates the presumption that rights were not administered. The burden is on the State to overcome this presumption, and they have not done so. **Miranda**, at 475.

. . .

In light of the trial court's violation of Defendant OSCAR STANLEY's Fifth Amendment rights against self-incrimination, and Fourteenth Amendment rights to due process, the judgment of conviction must be reversed and the case remanded to District Court for the conducting of a new trial.

B. STANLEY'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE COURT RESPONDED INCORRECTLY TO A JURY QUESTION ABOUT WHETHER THE STATE NEEDED TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT TOOK THE WALLET AND LAWFUL MONEY OF THE UNITED STATES AS IT WAS CHARGED IN THE AMENDED INFORMATION.

The State misses the point of this issue in their Answering Brief.

The Defendant does not dispute the language of the statute, **NRS 205.270.** The issue in dispute is the language of the charging document, the Amended Information. It is the elements in the crime that is set forth in the Amended Information, not the statute itself, that the State is charged with proving beyond a reasonable doubt as to the Defendant, OSCAR STANLEY.

The State relies on Jury Instruction No. 12, (Appendix p. 72) the jury instruction that defines larceny from a person. The Appellant believes that Jury Instruction No. 3, the Amended Information, is more on point, for it details the specifics of the crime alleged against Defendant STANLEY.

Furthermore, Appellant directs this Honorable Court to Jury Instruction No. 2, (Appendix p. 060), that says, in relevant part,

> If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended ... and none may be inferred by you. For that reason, you are not to single out any certain

> sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The State is failing to follow this instruction, by suggesting that the jury could have relied only on Jury Instruction No. 12, the statutory definition of Larceny from a Person. Obviously, the jury correctly considered Jury Instruction No. 3, as well, to find the specific elements of the crime as they related to Defendant OSCAR STANLEY.

The State, in its Answer, voiced no objection to Appellant's reiteration of Count II from Jury Instruction No. 3, which reads as follows:

> did then and there wilfully, unlawfully, and feloniously, under circumstances not amounting to robbery, with intent to steal or appropriate to his own use, take from the person of another, to-wit: BILLY BARBA, without his consent, personal property, to-wit: wallet and lawful money of the United States. (Appendix, p. 061).

This is the charge that was leveled against Defendant OSCAR STANLEY, not the generic language of the statute. The charging document must give details regarding the means by which the offense was accomplished in order to afford defendant his fundamental right to notice of the crime with which he is charged. **Simpson v. Eighth Judicial District Court**, 88 Nev. 654, 503 P.2d 1225 (1972).

The charging document, an Amended Information, did give the Appellant notice of what he was alleged to have done. It specifically states that OSCAR STANLEY is accused of taking "personal property, to-wit: wallet and lawful money of the United States" belonging to BILLY BARBA. The State cannot, after they

prepare and file the charging document, change the facts they are setting out to prove. The defendant must have notice of what he is on trial for. **Alford v. State**, 111 Nev. 1409, 906 P.2d 714 (1995).

In this case, notice was given to OSCAR STANLEY that he was on trial for, among other things, taking the wallet and lawful money of the United States from the person of BILLY BARBA. He was not on trial for taking the wallet OR lawful money from BILLY BARBA. He was not on trial for taking the wallet AND/OR lawful money from BILLY BARBA. The language is clear - both items must be proved to be taken by OSCAR STANLEY, or else the State has not met its burden.

Therefore, the Court answered the jury's question incorrectly, because in this instant case, the jury had to find that OSCAR STANLEY took both the wallet and the lawful money, not one or the other. Thus, a miscarriage of justice took place when the jury convicted OSCAR STANLEY of Count II, LARCENY FROM A PERSON, when they did not find that he committed all the material elements of the crime. **Woodall v. State**, 97 Nev. 235, 627 P.2d 402 (1981), and **Fullerton v. State**, 116 Nev. 435, 440, 997 P.2d 807, 810 (2000).

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 RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE COURT DENIED APPELLANT'S COUNSEL REQUEST TO ASK ITS PRE-SUBMITTED VOIR DIRE QUESTIONS OF THE JURY.

The State, in its Answer, cites **NRS 175.031** as contradicting Appellant's argument that his right to due process was violated when the judge permitted only follow-up questions.

. . .

The last sentence of **NRS 175.031** supports Appellant's contention, when it says:

"Any supplemental examination must not be unreasonably restricted."

The district court judge, by refusing to allow Appellant's counsel to use any of her pre-submitted questions, unreasonably restricted supplemental examination of potential jurors.

It is well recognized that a random selection of citizens will not necessarily result in an impartial jury. "One of the paths to the impartial jury guaranteed by the Sixth Amendment is the *voir dire* examination." **United States v. Dellinger**, 472 F.2d 340, 366 (7th Cir. 1972). Most courts recognize that *voir dire* "plays a critical role in assuring criminal defendants that their Sixth Amendment right to an impartial jury will be honored." **United States v. Spaar**, 748 F.2d 1249, 1253 (6th Cir. 1984).

"The function of the *voir dire* is to ferret out prejudices in the venire that threaten the defendant's Sixth Amendment right to a fair and impartial jury." **United States v. Howell**, 231 F.3d 615 (9th Cir. 2000), citing **Mu'Min v. Virginia**, 500 U.S. 415, 431 (1991). "Without an adequate *voir dire* the trial judge cannot fulfill his responsibility to remove prospective jurors who may be biased." **United States v. Spaar**, 748 P.2d at 1253, citing **Rosales-Lopez v. United States**, 451 U.S. 182, 188 (1981).

An issue at the trial, and now on appeal, was whether or not the police officers gave the Appellant his **Miranda** rights prior to the Appellant spewing forth a 27 page tape-recorded confession. Had defense counsel had the chance to ask its first pre-submitted *voir dire* question about whether or not jurors would be more or less

likely to believe a police officer's testimony than that of any one else (Exhibit "A"), Appellant could have weeded out jurors with biases to accept police testimony over others.

"When important testimony is anticipated from certain categories of witnesses, whose official or semi-official status is such that a juror might reasonably be more, or less, inclined to credit their testimony, a query as to whether a juror would have such an inclination is not only appropriate but should be given if requested." **Brown v. United States**, 338 F.2d 543, 545 (D.C. Cir. 1964).

Of equal significance, "lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule, as it is in the federal courts." **Rosales-Lopez v. United States**, 451 U.S. 182, 188 (1981).

It therefore seems clear that restrictions placed upon defense counsel during *voir dire* resulted in a violation of the Appellant's right to a fair trial and due process.

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.

Issue II.B. is incorporated by reference as if set forth in full in reply to the Answering Brief filed by Respondent.

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.

Issue II.C. is incorporated by reference as if set forth in full in reply to the Answering Brief filed by Respondent.

. . .

III.

STANLEY'S RIGHT TO BE PROTECTED FROM DOUBLE JEOPARDY WAS VIOLATED WHEN THE COURT PERMITTED THE JURY'S VERDICT OF GUILTY ON BOTH BATTERY WITH SUBSTANTIAL BODILY HARM AND MAYHEM TO 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 OF MAYHEM.

A. THE CRIMES OF MAYHEM AND BATTERY WITH A DEADLY WEAPON CAUSING SUBSTANTIAL BODILY HARM ARE THE SAME CRIME.

Appellant agrees with the State that **Blockburger v. United States**, 284 U.S. 299, 52 S.Ct. 180 (1932), adopted by this Court in both **Williams v. State**, 118 Nev.Adv.Op. 56, 50 P.3d 1116 (2002) and **Barton v. State**, 117 Nev.Adv.Op. 56, 30 P.3d 1103 (2001), sets forth the rule as to whether charged offenses are the same for double jeopardy purposes.

However, the State's conclusion that they are not is at odds with the Defendant's view.

As the State expressed in its Answer, Battery is defined in **NRS 200.481(1)(a)** as "any willful and unlawful use of force or violence upon the person of another." When 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).** 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 of organ; or prolonged physical pain." **NRS 0.060.**

The required elements of Mayhem, however, also require a showing of Substantial Bodily Harm. Mayhem, as the State correctly

observes, is defined as "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." **NRS 200.280.**

Furthermore, a Battery, that is, use of force or violence, is necessary in order to perform any of the acts constituting Mayhem. One cannot conceivably cause the permanent, severe damage required in Mayhem without using force or violence.

NRS 175.501 states that "a defendant may be found guilty of an offense necessarily included in the offense charged."

Thus, Mayhem merges completely into Battery Causing Substantial Bodily Harm. The only element that is missing from Mayhem is any reference to the use of a deadly weapon.

In the instant case, this is superfluous. A jury determined that OSCAR STANLEY caused the permanent disfigurement of DIANE BAPTIST by use of force or violence on only one occasion: October 25, 2001. But he was convicted of two separate crimes, and sentenced to two separate terms of prison.

These two separate convictions violate the Double Jeopardy Clause of the U.S. and Nevada Constitutions. **Blockburger**, at 304, and **Barton v. State**, 117 Nev.Adv.Op. 56, 30 P.3d 1103, 1107 (2001). Therefore, the conviction for Mayhem must be reversed.

. . .

. . .

. . .

. . .

B. THE LEGISLATURE HAS NOT EXPRESSED A CLEAR INTENT TO PROVIDE MULTIPLE PUNISHMENTS FOR THE CRIMES OF MAYHEM AND BATTERY WITH A DEADLY WEAPON CAUSING SUBSTANTIAL BODILY HARM WHEN THE UNDERLYING FACTS ARE THE SAME FOR BOTH CRIMES.

Multiple punishments for the same offense are unconstitutional and violate the prohibition against Double Jeopardy. **Witte v. United States**, 515 U.S. 389, 396 (1995) (quoting **Helvering v. Mitchell**, 303 U.S. 391, 399 (1938), cited in **State v. Lomas**, 114 Nev. 313, 315, 955 P.2d 678, 679 (1998). However, there is an exception. If the legislature has clearly evinced an intent to allow multiple punishments for the same conduct, it is not an unconstitutional violation of the Double Jeopardy Clause. **Brimmage v. Sumner**, 793 F.2d 1014 (1986).

The State argues that even if Mayhem is subsumed by Battery Causing Substantial Bodily Harm (with or without the Use of a Deadly Weapon), it is permissible, and not a violation of Double Jeopardy, to allow both convictions and both punishments to stand, as it was the Legislature's intent to permit multiple punishment. However, the State fails to show that the legislature evinced this intent to permit multiple punishments for these two offenses.

It is not enough to cite two statutes, and say that evinces the Legislature's intent to allow multiple punishment. In fact, the law is precisely the opposite. "A court should normally presume that a legislature did *not* intend multiple punishments for the same offense absent a *clear* expression of legislative intent to the contrary." **Talancon v. State**, 102 Nev. 294, 300, 721 P.2d 764, 767 (1986), *italics added for emphasis*. The Ninth Circuit Court of Appeals has made the same finding, that the imposition of cumulative punishments does not violate the Double Jeopardy Clause of the Constitution if

the legislature *clearly* intends that result. **Brimmage v. Sumner**, 793 F.2d 1014, 1016 (1985) (Boochever, C.J., dissenting).

Talancon was decided two years after **Koza v. State**, the other case the State cites in its Answer, and **Talancon** explains the rationale for **Koza**. **Talancon**, at 297, and **Koza v. State**, 100 Nev. 245, 681 P.2d 44 (1984). The State quotes a portion of the U.S. Supreme Court case of **Missouri v. Hunter**, 459 U.S. 359, 366, 368-369, 103 S.Ct. 673, 678-9 (1983) that was cited in **Koza**, and ends its analysis there. The quoted part says that if there are two statutes that prohibit the same conduct, the court need not do a statutory construction analysis of the two crimes and a prosecutor should feel secure in seeking multiple punishments for the two crimes.

However, **Hunter** also stood for the proposition that it is State Supreme Courts, not the U.S. Supreme Court, that should determine legislative intent. **Hunter**, at 368, cited in **Talancon**, at 768.

Thus, it is entirely proper for this Court to look beyond whether or not there are two statutes on the books that call the same set of circumstances two different crimes, and determine whether or not the legislature clearly intended that there be these two separate punishments.

Both **Koza** and **Talancon** deal with the felony murder rule. The felony murder rule, embodied in **NRS 200.030(1)(b)**, specifically states that a murder that occurs while a person is committing any of several other enumerated crimes is intended to be treated as first degree murder and punished accordingly.

By contrast, the statute concerning Battery, including Battery Causing Substantial Bodily Harm and Battery with Deadly Weapon

Causing Substantial Bodily Harm, does not mention Mayhem. Additionally, the statute creating Mayhem does not speak to Battery, Battery with Deadly Weapon, or Battery Causing Substantial Bodily Harm. Finally, the definition of Substantial Bodily Harm contained in **NRS 0.060** does not make any specific references to the crimes of Mayhem and Battery.

Therefore, unlike felony murder, it is NOT clear that the legislature intended for there to be multiple punishments for one conduct that can be defined under two different statutes. The State has not shown that the legislature has evinced a clear intent to allow multiple punishments in the case of Battery Causing Substantial Bodily Harm and Mayhem, and thus OSCAR STANLEY's conviction for Mayhem must be reversed.

C. SUFFICIENT EVIDENCE DOES NOT EXIST TO FIND THE DEFENDANT GUILTY OF MAYHEM.

It is utterly amazing that the State would rely upon, in its Answering Brief, civil cases and civil definitions of proximate causes of injuries. (RAB, p. 17, lines 22-23.)

Allum v. Valley Bank of Nevada is completely inapposite to the case at bar. **Allum** concerns a wrongful termination suit brought by a whistle blower. The portion cited by the State refers to when a discharged employee can recover damages - that the reason for his discharge must be proximately caused by protected conduct, and not by mixed motives. **Allum v. Valley Bank of Nevada**, 114 Nev. 1313, 1319-1320, 970 P.2d 1062, 1066 (1998).

How this relates to a criminal action is a mystery.

The definition of proximate cause that was given to the jury in this case appears in Jury Instruction No. 26, and is found on page

CONCLUSION

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

MARCUS D. COOPER
CLARK COUNTY PUBLIC DEFENDER

By Lauren R. Diefenbach
LAUREN R. DIEFENBACH
NEVADA BAR #5933
DEPUTY PUBLIC DEFENDER
309 SOUTH THIRD STREET, SUITE #226
LAS VEGAS, NEVADA 89155-2610
(702) 455-4685