IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY STEWART,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT CASE NO. 80084

DISTRICT COURT CASE NO. C-15-305984-1

APPELLANT'S OPENING BRIEF

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Appeal from the Denial of Petition of Writ of Habeas Corpus,
Eighth Judicial District Court, Clark County

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RULE 26.1 DISCLOSURE

Pursuant to Rule 26.1, Nevada Rules of Appellate Procedure, the undersigned hereby certifies to the Court as follows:

1. Appellant Tommy Stewart is an individual and there are no corporations, parent or otherwise, or publicly held companies requiring disclosure under Rule 26.1;
2. Appellant Tommy Stewart is represented in this matter by the undersigned and the law firm of which counsel is the owner, AMD LAW Appellant was represented below at trial and on direct appeal by the Clark County Public Defender.

DATED this 28th day of December, 2020.

AMD LAW, PLLC

By: 

ALEXIS DUECKER, Esq.
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. JURISDICTION

This is an appeal from the denial of a post-conviction petition for writ of Habeas Corpus in State v. Tommy Stewart, Case No. C-15-305984-1. The written judgment of conviction was filed on May 17, 2016. 1 AA 122-123. A timely notice of appeal was filed on January 07, 2020. 3 AA 596-597. This Court has appellate jurisdiction over the instant appeal pursuant to NRS 34.575(1), NRS 34.830, NRS 177.015(1)(b), and NRS 177.015(3).

II. ROUTING STATEMENT (RULE 17)

It appears this matter is presumptively assigned to the Court of Appeals, as it is a post-conviction appeal which arises from a Category B felony. See NRAP 17(b)(1).

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III. ISSUES PRESENTED FOR REVIEW

A. Whether the district court erred by merely copying the State's Opposition in its own Findings of Facts, Conclusions of Law, and Order.

B. Whether the district court erred in dismissing Stewart's pro-per supplements to his Petition for Writ of Habeas Corpus for procedural missteps, and whether postconviction counsel was ineffective for failing to incorporate those claims into the supplement.

C. Whether trial and appellate counsel were ineffective for failing to meaningfully argue the necessity of the lesser-included charges of False Imprisonment and Second-Degree Kidnapping in the jury instructions.

D. Whether the evidence is insufficient to support a First-Degree Kidnapping conviction.

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IV. STATEMENT OF THE CASE

On February 18, 2015, the State of Nevada filed a Criminal Complaint against Appellant Tommy Stewart ("Stewart") alleging the crimes of Conspiracy to Commit Robbery, Burglary While In Possession of a Firearm, Robbery With Use of a Deadly Weapon, First Degree Kidnapping With Use of a Deadly Weapon, and Open or Gross Lewdness. 1 AA 1-4. The preliminary hearing was held on April 16, 2015. 1 AA 5-107. The court dismissed the charge of Open or Gross Lewdness. 1 AA 94.

Stewart was charged by Information on April 16, 2015 with Count 1 - Conspiracy to Commit Robbery, Count 2 - Burglary While in Possession of a Firearm, Count 3 - Robbery with Use of a Deadly Weapon, and Count 4 - First Degree Kidnapping with Use of a Deadly Weapon. 1 AA 108-112.

The Clark County Public Defender represented Stewart at trial. The four-day jury trial began on March 14, 2016. On March 17, 2016, the jury found Stewart guilty on all counts. 1 AA 113-114.

On May 10, 2016, the district court sentenced Stewart to Count 1, a maximum of 60, Count 2, a maximum of 96 months, Count 3, a maximum of

20 years, and Count 4, life. 1 AA 115-121. The Judgment of Conviction was filed on May 17, 2016. 1 AA 122-123.

Direct Appeal

Stewart filed a Notice of Appeal of the Judgment of Conviction and his Case Appeal Statement on May 19, 2016. 1 AA 124-127. The Nevada Supreme Court affirmed the Judgment of Conviction on May 04, 2017. 1 AA 128-138. Remittitur issued June 16, 2017. 1 AA 138.

Petition for Writ of Habeas Corpus (Post-Conviction)

On March 08, 2018, Stewart incorrectly filed a Petition for Writ of Habeas Corpus (Post-Conviction) in the Seventh Judicial District Court. 1 AA 139-150. Then on April 13, 2018, the court correctively transferred the jurisdiction to the Eighth Judicial District Court. 1 AA 151. On April 25, 2018, Stewart filed a Motion for Appointment of Counsel. 1 AA 152-157. The State responded to the Petition for Writ of Habeas Corpus on June 01, 2018. 1 AA 158-173.

On June 06, 2018, Stewart filed a First Supplemental Petition for Writ of Habeas Corpus. 1 AA 174-215. Stewart raised the following claim:

petitioner's conviction and sentence are unlawful, as he was denied the effective assistance of appellate counsel. On that same day, he filed a Motion to Appoint Counsel and Request for an Evidentiary Hearing. 1 AA 216-220.

On June 14, 2018 Stewart filed a Second Supplemental Petition for Writ of Habeas Corpus. 1 AA 221-223. Stewart raised the following claim: jury was given improper jury instructions on first degree kidnapping.

On July 18, 2018, Stewart filed a Third Supplemental Petition for Writ of Habeas Corpus. 1 AA 224-226. Stewart raised the following claim: trial counsel was ineffective for failing to give a lesser-included offense instruction for Second Degree Kidnapping.

On July 27, 2018, Stewart filed a Fourth Supplement for Petition for Writ of Habeas Corpus. 1 AA 227-229. Stewart raised the following claims: appellate counsel was ineffective for failing to raise the issue that the trial court abused its discretion for not giving a lesser-included offense instruction on First Degree Kidnapping. Counsel confirmed his appointment July 31, 2018. 1 AA 230.

On February 20, 2019, Stewart—through his counsel—filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus. 1 AA 231-242, 2 AA 243-479, 3 AA 480-522. Stewart raised the following claim: trial counsel was ineffective for failing to give a lesser-included offense instruction for Second Degree Kidnapping. The State filed a response on April 03, 2019. 3 AA 523-553. On April 29, 2019, the court denied Stewart's petition "for the reasons set forth by the State in its Response." (Court Minutes, April 29, 2019). 3 AA 554.

Stewart timely filed a Notice of Appeal and Case Appeal Statement, appealing the court's denial. 3 AA 555-559. On December 02, 2019, Stewart filed a Motion for Appointment of Counsel for his postconviction appeal. 3 AA 560-563. Upon request by this Court, on December 23, 2019, the Court filed its Findings of Facts, Conclusions of Law, and Order. 3 AA 564-594. The court denied Stewart's Motion for Appointment of Counsel on January 02, 2020. 3 AA 595. On January 06, 2020, Stewart filed a Notice of Appeal and Case Appeal Statement. 3 AA 596-599. Stewart's then-counsel Travis D. Atkin, Esq. was confirmed as appellate counsel. 3 AA 600. After numerous

extensions to file the Request for Transcripts and Docketing Statement, Stewart's counsel was removed on August 07, 2020. 3 AA 601-610. Stewart's current counsel accepted appointment on August 24, 2020. 3 AA 611-612. The instant brief follows.

V. STATEMENT OF FACTS

During the middle of the night, the victim called 911 to report that two males wearing zip-up hoods had forced themselves into her residence and approached her from behind. 3 AA 525-526. One of the suspects threatened to kill her if she did not cooperate. Once in the apartment, she was told to go to her bedroom and lie face down on the ground. One man guarded her while the other ransacked her apartment looking for items to take. 3 AA 525-526.

The victim remained on the floor of her bedroom while the two men removed several items, including her laptop computer, cellular phone, and camera. 3 AA 525-526. The two men left the victim in the bedroom, told her not to call the police or they would kill her, and then exited the apartment. 3 AA 525-526. A latent print was located on the victim's jewelry box, which

matched Tommy Stewart. 3 AA 525-526. The victim then positively identified Stewart in a photo lineup. 3 AA 525-526.

Nearly a month later, officers located Stewart at a gas station and observed him with a weapon. 3 AA 525-526. They took Stewart into custody and found two firearms in the vehicle. 3 AA 525-526.

The State charged Stewart with conspiracy to commit robbery, burglary while in the possession of a firearm, robbery with use of a deadly weapon, and first-degree kidnapping with use of a deadly weapon. 3 AA 108-112. After a three-day trial, the jury found Stewart guilty on all counts. 1 AA 113-114. The judgment of conviction was entered on May 17, 2016. 1 AA 122-123.

Other relevant facts will be discussed in the argument sections.

VI. SUMMARY OF THE ARGUMENT

The deficiencies during the trial court proceedings on Stewart's Petition for Writ of Habeas Corpus prejudiced Stewart. Stewart filed four pro-per supplements before his postconviction counsel supplemented the petition. Postconviction counsel failed to include the arguments incorporated in

Stewart's pro-per supplements in the supplement counsel filed. As a result of counsel's ineffectiveness for failing to acknowledge that the pro-per supplements would likely not be heard on the merits due to NRS 34.750(5), the district court dismissed the petition without an opportunity for Stewart's claims to be heard on the merits.

The court should have afforded Stewart, who was representing himself without counsel when he filed the initial Petition and the supplements, an opportunity for the claims to be addressed on the merits. Instead, the district court merely dismissed the Petition based on the State's arguments in its Response to the petition. The court merely instructed the State to draft the Findings of Fact, Conclusions of Law, and Order and then signed them, in contravention to Nevada law. 3 AA 564-594. The Findings were nearly identical to the State's filed Response. As a result of the dismissal, Stewart's claim that second-degree kidnapping, as well as false imprisonment, should have been included as lesser-offense jury instructions, a claim with actual merit, was never adjudicated on the merits. As a result of the cumulative

prejudicial errors during the proceedings regarding Stewart's petition, Stewart requests that this court reverse his conviction and sentence.

VII. ARGUMENT

A. The district court erred by merely copying the State's Opposition in its Findings of Facts, Conclusions of Law, and Order.

Initially, the district court failed to make its own findings of facts and conclusions of law. In its minute order, the court merely stated that it denied the petitioner's Writ of Habeas Corpus "for the reasons set forth by the State in its Response." 3 AA 554. This Court then directed the district court to document its findings. 3 AA 554. In a haphazard attempt to comply with this Court's order, the district court nearly identically copied the State's Opposition to Petitioner's Petition for Writ of Habeas Corpus (the "Findings"). 3 AA 564-594.

Other than changing the titles and a few verb tenses about the denial of claims, the Court made no effort to make any "findings."

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1. Standard of Review

Findings of fact and conclusions of law, **supported by substantial evidence**, are reviewed for clear error. Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 486, 117 P.3d 219, 223 (2005) (citing Edwards Indus., Inc. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996)). (emphasis added). If it is not supported by substantial evidence, then it must be clear error. See generally Burlington N., Inc. v. Weyerhaeuser Co., 719 F.2d 304, 307 (9th Cir. 1983).

2. The Findings were not supported by substantial evidence as the Court made no "findings."

The district court improperly adopted the State's Opposition to the petition as its Findings of Fact and Conclusions of Law. See Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1284 (7th Cir. 1977) (a critical view of a challenged finding is appropriate where the findings of fact and conclusions of law were not the original product of a disinterested mind); see also Foley v. Morse & Mowbray, 109 Nev. 116, 123, 848 P.2d 519, 524 (1993). "The mechanical adoption of a litigant's findings is an abandonment of the duty imposed on trial judges, because findings so made fail to reveal the

discerning line for decision." Ramey Const. Co., Inc. v. Apache Tribe of Mescalero Reservation, 616 F.2d 464, 466 (10th Cir. 1980). A trial judge's duty to make formal findings exists not only to aid appellate review, but also seeks "to evoke care on the part of the trial judge in considering and adjudicating the facts in dispute." Id. at 467.

The Nevada Supreme Court has made it clear that this is "an improper delegation of the Court's duty to articulate specific grounds for its ruling before empowering the prevailing party to draft Findings." State v. Greene, 129 Nev. 559, 565, 307 P.3d 322, 325 (2013) (holding that the "district court did not make any express findings in support of its determination and provided no guidance for the prevailing party, and we conclude that this was improper"). As the Court articulated, "the district court should have…either drafted its own findings of fact and conclusions of law or announced them to the parties with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order." Byford v. State, 123 Nev. 67, 70, 156 P.3d 691, 693 (2007).

As noted above, it is highly suspect for a district court to nearly verbatim rely on an interested party's findings; however, this here, is even more egregious as the State or whoever prepared the findings copied the State's Response in its entirety. Here, the district court made no express findings in support of its decision to deny Stewart's petition. 3 AA 554. In its minute order, the court merely stated that it is denying Stewart's petition for writ of habeas corpus "for the reasons set forth by the State in its Response" and likely eventually directed the State to draft the Findings. 3 AA 554.

The Findings submitted by the State were nearly identical to the Response it submitted. 3 AA 564-594. In accordance with Nevada law, the district court should have either drafted its own findings of fact and conclusions of law, or it should have announced them to the parties with sufficient specificity as to provide guidance to the prevailing party for drafting a proposed Findings.

The court's decision to merely deny the petition based on the State's response and then have the State propose findings that are, in the end, exactly the same as its own Response is **prejudicial** to Stewart. The Findings

are prejudicial because, even if the trial court may have performed its judicial function, viewing the findings and the record with a critical eye, this Court cannot be sure that it did. See Ramey, 616 F.2d at 467.

The court's lack of effort prejudiced Stewart in that the State's Response presented claims in the alternative. The State first argued that Stewart's pro-per petitions be dismissed because of procedural bars, while in the alternative Stewart's claims lacked merit. 3 AA 523-553. The court's decision to merely adopt the State's response leaves open whether the court believed Stewart's claims were procedurally barred or whether they were meritless. As a result, Stewart is adversely affected in his ability to seek full appellate review.

Moreover, when a district court requests a party to submit proposed findings of facts and conclusions of law, "it must ensure that the 'other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.'" Byford v. State, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007) (holding that it was inappropriate for the court to fail to give the opposing party an opportunity to review the State's proposed

findings of fact and conclusions of law). The basis for this is to "ensure that the proposed order drafted by the prevailing party accurately reflects the district court's findings." Id. And Stewart was not under any obligation to object to the proposed findings and conclusions. Id. at 70, 156 P.3d at 693.

Here, there is no record that the court allowed Stewart to rebut the State's proposed findings of fact and conclusions of law. Under Byford, when the Defendant had no chance to review the State's findings of fact and conclusions of law, this is inappropriate. And it was prejudicial to Stewart because his ineffective counsel failed to object to the court's actions. Because the Findings of Fact, Conclusions of Law and Order were not supported by substantial evidence, the clearly erroneous standard should be applied. As a result, this Court should reverse so that the district court may draft its own findings of fact, conclusions of law, and order.

B. The district court erred in dismissing Stewart's pro-per supplements to his Petition for Writ of Habeas Corpus for procedural missteps, and postconviction counsel was ineffective for failing to incorporate those claims into the supplement.

On March 08, 2018, Stewart filed a pro-per Post-Conviction Petition for Writ of Habeas Corpus in the Seventh Judicial District Court, which was

properly transferred to the Eight Judicial District Court. 1 AA 139-150. Then, at the end of April, Stewart filed a pro-per motion requesting counsel. 1 AA 152-157.

The district court did not grant Stewart's Motion to Appoint Counsel until early July, and counsel was not confirmed until July 31, 2018. 1 AA 230. Between Stewart's initial Motion to Appoint Counsel and counsel's actual confirmation, Stewart filed four Supplements to his Petition for Writ of Habeas Corpus. 1 AA 174-229.

Eventually in February 2019, Stewart's counsel filed a Supplemental Petition for Post-Conviction Writ of Habeas Corpus. 1 A 231-242, 2 AA 243-479, 3 AA 480-522. In its response, the State argued that the court should strike Stewart's four pro-per supplemental petitions because they were filed without leave of the court. 3 AA 523-553. The court ultimately denied the petition in a minute order, "for the reasons set forth by the State in its Response." 3 AA 554. The district court eventually filed its Findings of Facts, Conclusions of Law, and Order on December 23, 2019 (the "Findings"). 3 AA 564-594.

1. Standard of Review

The district court's denial of a petition for writ of habeas corpus is reviewed de novo. Bonin v. Calderon, 59 F.3d 815, 823 (9th Cir. 1995).

2. The district court erred by not liberally construing Stewart's supplements.

The district court erred by dismissing Stewart's pro-per supplements for their procedurally deficiencies. The Nevada Supreme Court has made it clear that a district court has discretion to permit a petitioner to assert claims not previously pleaded at various points during proceedings. Barnhart v. State, 122 Nev. 301, 303, 130 P.3d 650, 652 (2006). In fact, the district court "has the discretion to permit a habeas petitioner to assert new claims as late as the evidentiary hearing on the petition." State v. Powell, 122 Nev. 751, 758, 138 P.3d 453, 458 (2006).

In Barnhart, the defendant filed a pro-per petition for writ of habeas corpus, which was supplemented by counsel. 122 Nev. at 303, 130 P.3d at 652. However, counsel raised an additional claim for the first time at the evidentiary hearing, which the court dismissed because it was not presented in any of the pleadings and counsel provided no explanation as to why it

could not have been pleaded in the supplemental petition. Id. Although the Supreme Court agreed with the district court, it did conclude that it is within the discretion of the district court to allow a petitioner to raise new issues at an evidentiary hearing **so long as the State has an opportunity to respond**. Id. (emphasis added). The district court could allow petitioner and the State to file supplemental briefing after the evidentiary hearing on the new issues, at which point, the court can decide the additional issues in the final order disposing of the petition. Id. The goal of this procedure is to "promote finality by furthering the policy of resolving all available claims for relief in a single proceeding." Id.

At the case at hand, the court should have exercised its discretion in allowing Stewart's pro-per claims to be heard on the merits because Stewart raised the claims well before the evidentiary hearing. The State had plenty of opportunity to respond to these supplements, which it eventually did when it filed its Response. It objected to all of the claims both due to procedural defaults and lack of merit. The district court can exercise discretion under Barnhart to allow new claims to be raised as late as the evidentiary hearing,

so it should have allowed Stewart's pro-per claims, which were filed well in advance of the evidentiary hearing, to be heard on the merits. Unlike Barnhart, where counsel lacked an explanation for not raising the claims previously, here, Stewart had raised the claims in his pleadings, and therefore followed the procedure under Barnhart. Striking the pleadings is not a remedy discussed anywhere in Barnhart, especially where the procedure was followed.

Although NRS 34.750(5) states that no further pleadings can be filed without leave of the court, a court should construe a pro se litigant's pleadings liberally. Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007); see Brown v. Walker, 293 F. Supp. 2d 1184, 1193 (D. Nev. 2003). Pro se petitioners are entitled to liberally construed pleadings because, "however unartfully pleaded," pro se petitioners are held "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972).

When a court fails to consider a petitioner's pleadings due to procedural missteps, the district court fails "to effectuate [Petitioner's]

apparent intent." See Brown v. Attorney Gen. for Nevada, 613 F. App'x 608, 609 (9th Cir. 2015).

Here, the court erred by dismissing Stewart's pro-per supplements for the reason of failing to request leave from the court. The district court should have held—and this Court should hold—Stewart to a less stringent standard than lawyers because Stewart was then proceeding pro-se, as Stewart submitted all the supplements before confirmation of counsel. Thus, Stewart did not have the advice of counsel to aid him with the navigation of his petition.

Nor did the State object to Stewart's supplements at any time before it responded, despite having plenty of time to do so. Had the State objected at any point, Stewart would have understood his procedural misstep and the court could have afforded Stewart the opportunity to correct his mistakes.

Because Stewart was entitled to liberally construed supplements, the district court erred by dismissing his supplements.

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3. Postconviction counsel was ineffective for failing to incorporate Stewart's supplemental petitions by reference so that the court could review the supplements on the merits

Stewart's postconviction counsel, Travis Akin, Esq., was ineffective by failing to raise the issues Stewart presented in his pro-per supplements in the Supplemental Petition filed by counsel.

Ineffective assistance claims present mixed questions of law and fact and are subject to independent review. State v. Love, 109 Nev. 1136, 1139, 865 P.2d 322, 323 (1993); Kirksey v. State, 112 Nev. 980, 923 P.2d 1102, 1107 (1996).

The Sixth Amendment guarantees a defendant the right to effective assistance of counsel. A claim of ineffectiveness of counsel requires a showing that (1) counsel acting for the defendant was ineffective, and (2) that the defendant suffered prejudice as a result – defined as a reasonable probability of a more favorable outcome. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

To prove ineffective assistance of appellate counsel, a petitioner must show that counsel's performance was deficient in that it fell below an

objective standard of reasonableness and resulting prejudice so that the omitted issue would have a reasonable probability of success on appeal. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102 (1996).

The first prong does not require counsel to be errorless but requires counsel's assistance to be "[w]ithin the range of competence demanded of attorneys in criminal cases." Jackson v. Warden, 91 Nev. 430, 432, 537, P.2d. 473, 474 (1975).

The second prong "requires a showing that counsel's deficient performance prevented the petitioner from establishing 'that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State.'" Rippo v. State, 134 Nev. 411, 423, 423 P.3d 1084, 1098, amended on denial of reh'g, 432 P.3d 167 (Nev. 2018).

Appellate counsel is not ineffective for failing to raise every non-frivolous issue on appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). Still, ineffectiveness may be found where counsel presents arguments on appeal

while ignoring arguments that were stronger. Suggs v. United States, 513 F.3d 675, 678 (7th Cir. 2008).

NRS 34.750 allows counsel to file a supplemental petition for writ of habeas corpus once appointed to represent petitioner. NRS 34.750 does not prohibit counsel from incorporating by reference claims raised in the pro-per petition. Owens v. State, 465 P.3d 220 (Nev. 2020) (unpublished disposition).[1]

In Owens, appellate counsel represented petitioner only after he filed a pro se petition and amendment. Appellate counsel filed a supplemental petition, discussing two of the claims raised in the prior petitions and incorporating by reference the other claims in the pro se pleadings. The district court denied the petition concluding that petitioner abandoned the remaining claims in the pro se petition because counsel failed to elaborate

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[1] Owens v. State, 465 P.3d 220 (Nev. 2020) is an unpublished disposition from the Nevada Supreme Court. Nevada Rules of Appellate Procedure 36(3) allows a party to cite an unpublished disposition issued by the Supreme Court on or after January 1, 2016 for its persuasive value. As Owens is a case from 2020, Petitioner cites it for its persuasive value.

on the incorporated claims. The Nevada Supreme Court reversed the district court, holding that petitioner preserved his claims by the mere incorporation.

Stewart's appellate counsel was ineffective for failing to minimally incorporate the claims in Stewart's pro-per supplements in the supplement counsel filed. The State argued that the claims were procedurally barred because the pro-per supplements were filed without leave of the court. 3 AA 523-553. Postconviction counsel should have been aware of the statutory rules about supplemental pleadings, as Stewart was not. Reasonable postconviction counsel would have explained the procedural deficiency to Stewart and then included Stewart's claims from the pro-per supplements in the supplement it filed so that the court could impartially review the claims on their merits.

Stewart did not abandon the claims because his counsel failed to incorporate them into his supplement. Failure to incorporate by reference the claims from the pro-per supplements prejudiced Stewart, who never had the opportunity for his claims to be impartially heard on the merits.

Finally, Stewart was prejudiced as a result of counsel's ineffectiveness because Stewart was unable to show the prejudicial flaws in the original trial court proceedings. Stewart's pro-per supplements contained claims of flaws within the trial court proceedings, and these claims never made it into counsel's supplement so that they could be heard on the merits. 1 AA 174-229. As a result, the court dismissed the supplements and the challenges to Stewart's conviction and sentence were effectively nonexistent. As a result, Stewart was unduly prejudiced.

C. Trial and appellate counsel were ineffective for failing to meaningfully argue the necessity of the lesser-included charges of False Imprisonment and Second-Degree Kidnapping in the jury instructions.

In its closing argument, the State argued that "they did not need to put her in her back bedroom – in her bedroom to rob her." 3 AA 512. For the State to make its case for both robbery and kidnapping, the State needed to distinguish between the two crimes. The State argued that the movement of the victim from the front porch to the bedroom was not for the purpose of robbery. 3 AA 512. Yet Stewart could not have confined the victim under NRS 200.310(1) without the intent of robbing her. The State presented no

evidence of ransom, reward, sexual assault, extortion, killing, inflicting substantial bodily harm, or doing any of these acts to a minor.

1. Standard of Review

A reviewing court reviews the district court's decision to settle jury instructions for an abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

2. Because the State never proffered evidence of independent intent to kidnap, inclusion of the lesser-included charges to First-Degree Kidnapping were mandatory.

NRS 175.501 states that "a defendant may be found guilty…of an offense necessarily included in the offense charged." When determining whether an uncharged offense is considered a lesser-included offense of the charged offense, the courts apply the "elements test," i.e., if all the elements of the lesser offense are included in the elements of the greater offense, then the offense is "necessarily included" in the charged offense. Alotaibi v. State, 133 Nev. 650, 652, 404 P.3d 761, 764 (2017) (citing Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)).

In effect, the offense charged could not have been committed without committing the lesser offense. Id. (citing *Barton v. State,* 117 Nev. 686, 694,

30 P.3d 1103, 1108 (2001), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006)).

If there is "evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding of guilt of the lesser offense or degree," the instruction is mandatory without any request by the defendant for the instruction. Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966) (citing State v. Moore, 48 Nev. 405, 233 P. 523 (1925)).

If the elements of the greater offense include all the elements of the lesser offense because "it is the very nature of the greater offense that it could not have been committed without the defendant having the intent and doing the acts which constitute the lesser offense," it is not error for a trial court to give the lesser instructions on the lesser included offense. Id. However, if there is even slight evidence of any reasonable theory of the case under which the defendant could be convicted of the lower degree or lesser included offense, the court "must, if requested, instruct on the lower degree or lesser included offense." Id.

Where the statute provides other ways to commit an uncharged offense, "the elements of only one of those alternatives needs to be included in the charged offense for the uncharged offense to be lesser included." Id. at 656, 404 P.3d at 766 (citing 6 Wayne R. LaFave, et al., Criminal Procedure § 24.8(e) (3d ed. 2007)). The court must first decide what elements comprise the offense. Id.

Applying the elements test to this case, an instruction of Second-Degree Kidnapping and False Imprisonment should have been included in the jury instructions. NRS 200.310(1) defines First-Degree Kidnapping as:

> A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon the person, or to exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person, and a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree which is a category A felony.

Nev. Rev. Stat. § 200.310(1) (1995).

NRS 200.310(2) defines Second-Degree Kidnapping as:

> A person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person with the intent to keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, or in any manner held to service or detained against the person's will, is guilty of kidnapping in the second degree which is a category B felony.

Nev. Rev. Stat. § 200.310(2) (1995).

NRS 200.460(1) defines False Imprisonment as:

> False imprisonment is an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority.

Nev. Rev. Stat. § 200.460(1) (2003).

All the elements of second-degree kidnapping are also found in first-degree kidnapping, "i.e. seizing, inveigling, taking, carrying away, or kidnapping another person and in any manner holding to service or detaining that person against his or her will." Gazlay v. State, 132 Nev. 971

(2016) (unpublished disposition).[2] All the elements of false imprisonment are also found in first-degree kidnapping. Jensen v. Sheriff, White Pine Cty., 89 Nev. 123, 125, 508 P.2d 4, 5 (1973) ("While kidnapping embraces the elements of false imprisonment the converse is not true…Kidnapping is generally understood to constitute the carrying away of a person for the purpose, such as ransom or the committing of a bodily offense."). The only difference is that first-degree kidnapping specifies that the defendant kidnap the victim with the intent of robbery, ransom, reward, sexual assault, extortion, killing, inflicting substantial bodily harm, or doing any of these to a minor.

As Stewart could not have committed First-Degree Kidnapping without committing Second-Degree Kidnapping or False Imprisonment, Stewart was

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[2] Gazlay v. State, 132 Nev. 971 (2016) is an unpublished disposition from the Nevada Supreme Court. Nevada Rules of Appellate Procedure 36(3) allows a party to cite an unpublished disposition issued by the Supreme Court on or after January 1, 2016 for its persuasive value. As Gazlay was decided on May 12, 2016, Petitioner cites it for its persuasive value.

entitled to the lesser-included kidnapping and false imprisonment instructions.

Because the State argued that the two crimes were unrelated and presented no evidence of independent intent to kidnap, then the evidence did not support a conviction for first-degree kidnapping. 3 AA 512. Yet, this set of facts could support a conviction under second-degree kidnapping or false imprisonment. Under the State's argument that the two crimes were unrelated, and with no alternative explanation as to the intent of kidnapping, a lesser-included instruction was **necessary** as the elements of first-degree kidnapping were not met. As there is no evidence under the State's argument that could support a first-degree kidnapping charge, but that could support a second-degree kidnapping charge, the instruction of the lesser-included offense was **mandatory** without request. Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966).

Stewart was severely prejudiced by the court's error to withhold a lesser-included offense jury instruction because the statutory penalties between first-degree and second-degree kidnapping or false imprisonment

vary significantly. NRS 200.320 provides the penalties for first-degree kidnapping, under which the court sentenced Stewart. The court imposed a life sentence under NRS 200.320. 1 AA 122-123. However, NRS 200.330, which provides the penalties for second-degree kidnapping, prescribes a minimum sentence of not less than two years and a maximum sentence of not more than 15 years. In addition, NRS 220.460(2) prescribes a payment of damages to the victim for false imprisonment; if false imprisonment is committed with the use of deadly weapon, then the sentence is a minimum term of at least one year and a maximum term of not more than six years. There is a significant difference between **life in prison** and no more than 15 or six years. Had the court included the lesser-included offense of second-degree kidnapping or false imprisonment, the jury could have found him guilty of it as a separate offense to robbery.

D. The evidence is insufficient to support a First-Degree Kidnapping conviction.

1. Standard of Review

A conviction must be supported by evidence beyond a reasonable doubt or else the criminal defendant is entitled to be acquitted. NRS 175.191.

The standard of review for sufficiency of the evidence on appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt. Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992), Ewish v. State, 110 Nev. 221, 871 P.2d 306. That is, appellate review must focus on whether the evidence at trial was sufficient to justify a rational trier of fact to find guilt "beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307 (1979).

2. Because the State argued that Kidnapping and Robbery were separate offenses and never proffered evidence of a separate intent for kidnapping, the evidence is insufficient to support the verdict.

Although Stewart denies involvement in all of the offenses at issue, the kidnapping charges should independently be dismissed because they are not supported by evidence beyond a reasonable doubt because any kidnapping was incidental to the robbery charges. As this Court has held:

> "To sustain a conviction for both robbery and kidnapping arising from the same course of conduct, any movement or restraint must stand alone with independent significance from the act of robbery itself, create a risk of danger to the victim substantially exceeding that necessarily present in the crime of robbery, or involve movement, seizure or restraint substantially in excess of that necessary to its completion."

Mendoza v. State, 122 Nev. 267, 275, 130 P.3d 176, 181 (2006).

Further, this Court has also held that moving a victim from one room inside a home to another room, such as during a search for valuables during a robbery, is insufficient to sustain convictions for both kidnapping and robbery. Wright v. State, 94 Nev. 415, 581 P.2d 442 (1978). When a defendant is charged with both robbery and first-degree kidnapping, **reversible error** occurs unless the jury is instructed about the rule set forth in Wright. Langford v. State, 95 Nev. 631, 638-639, 600 P.2d 231 (1979). (emphasis added).

Here, the situation is effectively the same as in Wright. The State presented no evidence that the act of moving the victim to the end of the bedroom was to kidnap her, instead of to rob her. In the State's closing argument, the State explicitly argued that the two crimes were unrelated. 3 AA 512.

More generally, this incident occurred completely inside the victim's apartment, and therefore movement around the apartment could not substantially increase the risk of harm because the public had no ability to

observe the events in the first instance. In this instance, the victim remained stationary throughout the event while one or both intruders searched for valuables. 3 AA 525-526. These facts present the same consideration examined in Wright, and Stewart's conviction for First-Degree Kidnapping, and should therefore be reversed.

Additionally, because the State did not proffer evidence of independent intent regarding the kidnapping charge, the State on its face did not meet the evidentiary burden of establishing guilt on the kidnapping charge beyond a reasonable doubt. For this reason, this Court must vacate this kidnapping charge and its correlative sentence.

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VIII. CONCLUSION

For these reasons, Stewart requests this Honorable Court grant relief on his claims or alternatively, an order remanding this matter back to the district court for clarification on its Findings.

DATED this 28th day of December, 2020.

AMD LAW

By: 

ALEXIS DUECKER, Esq.
Attorney for Appellant

RULE 28.2 ATTORNEY CERTIFICATE

1. 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, including NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied upon is found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

2. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of the Ebrima style.

3. I further certify this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14 points or more, and contains 7,498 words.

DATED this 28th day of December, 2020.

AMD LAW

By: 

ALEXIS DUECKER
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 28, 2020. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
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