

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown  
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DAVONTAE WHEELER,	)	SUPREME COURT NO. 81374
	)	
Appellant,	)	
	)	
vs.	)	APPEAL
	)	
STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	DISTRICT COURT NO. C-17-328587-3
	)	
	)	

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**APPELLANT'S REPLY BRIEF**

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WHEELER offers the following by way of reply to the State's Answering Brief filed on April 29, 2020.

## I

### **FACTUAL DISCREPANCIES**

**Other than that single witness [Solomon]...there was zero evidence presented that...Appellant got on a bus and went home.  
(Ans.Br./5-6, fn 1)**

Solomon was the man who bought tobacco at the convenience store and he testified that there were five men in the car. The state claims this was the only evidence that WHEELER got on a bus and went home on his own, leaving four men in the car, one of which was not him. However, that was not the only evidence that there were five men in the car and that when WHEELER went home on the bus, four other men were left who committed the murder. DeShawn Robinson, who was one of the men and who previously pled guilty pursuant to *Alford*, also originally told police that there were five men in the car. At trial he claimed that initial statement to police was a lie.<sup>1</sup>

The state argues that WHEELER's statement that he took a bus home was not before the jury and should therefore not be considered by this Court. However, it was part of the record, all of which is subject to appeal in this matter. Det. Jaeger testified to the statement at the Grand Jury Hearing, and the statement was

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<sup>1</sup> WA/10/2279, 2312.

offered as proof in WHEELER's Habeas Petition which was denied.<sup>2</sup>

So, as argued by WHEELER in his Opening Brief, there were three people who stated that there were five men in the car, and WHEELER has always contended that he left the group at the convenience store and took a bus home by himself.

## II

### LEGAL ARGUMENTS

#### **A. TEXT MESSAGE FROM CO-DEFENDANT IMPROPERLY ADMITTED**

##### **1. TEXT MESSAGE WAS INADMISSIBLE HEARSAY**

The state argues that the text message from Robertson to DeShawn was admissible non-hearsay because it was made by a coconspirator during the course and in furtherance of the conspiracy.<sup>3</sup> The statement is as follows:

Ask DJ if he [sic] trying to hit a house tonight.  
Me, you, Sace, and him. Sace already said yeah.<sup>4</sup>

There are two statements here that are at issue. One is the statement made by Robertson to DeShawn; the other is the purported statement made by Sace (WHEELER) to Robertson – “Sace already said yeah.” The statement purportedly made by Sace cannot be said to be in furtherance of the conspiracy because we

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<sup>2</sup> WA/2/415.

<sup>3</sup> Ans.Brff./15.

<sup>4</sup> Ans.Brff./16.

don't know when Sace purportedly made that statement. And, Robertson could not be examined about that because he was a co-defendant in the case. We don't know when Sace "already" said he would be down to hit a house. Did he make that statement to Robertson a week ago, a month ago? We don't know. Was he serious, or just agreeing to Robertson's ramblings? How was the idea which Sace purportedly agreed to by saying "yeah," posited? We don't know the answers to any of these questions, so the purported comment by Sace to Robertson cannot be said to be in furtherance of a conspiracy, and it should not have been admitted.

## 2. PREJUDICIAL ERROR

The state further argues that the statement was admissible because there was "sufficient evidence of the conspiracy."<sup>5</sup> This really goes to the issue of whether the error in admitting the evidence was harmless or not. The state evidently claims that it was simply harmless error because it contends there was sufficient corroborating evidence of the conspiracy. That is just not true. There was plenty of evidence that four men committed the murder, and that WHEELER was in the convenience store with three of the perpetrators prior to the murder. The clothes he was wearing in the convenience store were found at his apartment. There was also evidence that WHEELER touched the white vehicle operated by the perpetrators – **while the vehicle was at the convenience store**. But, there was no evidence that WHEELER went to the scene with the four perpetrators, that he was one of the perpetrators, or that his gun was used in the murder.

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<sup>5</sup> Ans.Br.f./18.

In fact, the forensics established that the gun he was carrying as open carry as revealed in the convenience store video, **was not used** in committing the murder.

It is undisputed that WHEELER knew the men and that he went to the convenience store to meet them to discuss buying a gun. They couldn't agree on price and he left and took a bus back home. But, the fact that he was at the convenience store with the men before the murder does not constitute evidence that WHEELER was involved in a conspiracy to rob or murder, especially in light of three witnesses who established that there were five men in the car, so that when WHEELER left there remained the four that the jogger saw near the scene of the crime. And, it needs to be emphasized that those three witnesses (Solomon, Wheeler, and Robinson) all stated early on in the case to police investigating the crime that there were five men in the car. These statements were made at a time when none of these men could have possibly known that there was a jogger who saw four men in the car, making the number of men in the car at the convenience store, a crucial piece of evidence. It was only when that fact was determined to be so crucial, that the stories of Solomon and Robinson started to change. And, now, though a man's life is on the line for murder, the state has the audacity to argue that WHEELER's statement to police should be disregarded by this Court.

The state argues that, "[e]ven if the message implicating all four co-conspirators had not been admitted at trial, officers would have nevertheless been permitted to testify that their investigation ultimately led them to suspect both Appellant and co-defendant



Robertson....”<sup>6</sup> But, there was no way the police could have suspected WHEELER without the text message from Robertson because there were no forensics connecting WHEELER to the crime. Solomon said there were five men in the car, and WHEELER and Robinson corroborated that. WHEELER’s gun was not used to commit the crime even though he was wearing a gun the night of the murder as seen on the convenience store video. That gun was never fired. Without that text message, there was no reason for the police to doubt WHEELER’s contention that he left the group at the convenience store, and went home alone on a bus, leaving the four men in the car who actually committed the crime.

**B. CO-CONSPIRATOR TESTIMONY IMPROPERLY ADMITTED**

WHEELER argues that alleged accomplice’s (Robinson) testimony was improperly admitted. He was not a co-defendant as asserted by the state, as he settled out before trial pursuant to an *Alford* plea. Interestingly, his story changed from what he told police to what he testified to at time of trial – from five men in the car to only four men in the car. WHEELER contends that Robinson’s testimony was improperly admitted because he was an accomplice/co-conspirator and there was no independent evidence to corroborate his testimony.

His testimony which was damning was that he received the text in question from Robertson and that WHEELER was one of the perpetrators. The text was

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<sup>6</sup> Ans.Brff./24.

inadmissible hearsay as discussed above. As to WHEELER being one of the perpetrators who was at the scene the night of the murder, there was absolutely no other evidence to support that. Most of the evidence pointed to by the state in its Answering Brief on this issue is undisputed.<sup>7</sup> However, the state goes on to argue that Solomon's statement to police that there were five men in the car "was not sufficient to establish reasonable doubt."<sup>8</sup> The state's conclusion is flawed. In connection with the issue of the admissibility of the accomplice/co-conspirator testimony, the issue is not whether there was sufficient evidence to prove that WHEELER was **not** involved; the issue is whether or not there was sufficient independent evidence to prove that WHEELER **was** involved. There is no such evidence that the state has pointed to with the possible exception of the inadmissible text message which has already been discussed above.

There was no **admissible** evidence which in any way corroborated Robinson's testimony that WHEELER was involved in the murder, and therefore, since Robinson was an alleged accomplice/co-conspirator, his testimony against WHEELER should not have been allowed.

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<sup>7</sup> Ans.Brf./27-28. None of this "evidence" establishes that WHEELER was involved in the crime.

<sup>8</sup> Ans.Brf./28.



**C. JURY VENIRE NOT REPRESENTATIVE**

The state points out that on the issue of the jury venire which was argued before the district court on WHEELER's motion to strike the jury venire, the Court concluded that "while Appellant met the first two prongs of the test, they had made no showing that the underrepresentation was due to systematic exclusion..."<sup>9</sup>

WHEELER has set forth his arguments in this regard in his Opening Brief and has nothing to add except to note that something may be systematic without being intentional. By its very nature, random selection does systematically result in underrepresentation of African Americans in Clark County.

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<sup>9</sup>     Ans.Brf./34.

### III

#### CONCLUSION

All convictions should be reversed because WHEELER did not commit this crime, there was no admissible evidence presented at trial from which a jury could rationally conclude that WHEELER was a perpetrator, and the jury venire was not representative.

Respectfully submitted,

Dated this 28<sup>th</sup> day of May, 2021.



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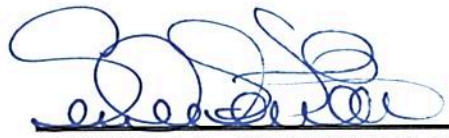
SANDRA L. STEWART, Esq.  
Attorney for Appellant

#### IV

#### CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this reply 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 N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript of appendix where the matter relied on is to be 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. 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 Word 14.4.3 For Mac with Times New Roman 14-point. I further certify that this reply brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it contains only 1,960 words.

DATED: May 28, 2021



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Appellate Counsel for  
DAVONTAE WHEELER

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**CERTIFICATE OF SERVICE**

I hereby certify that I served a copy of the:


**APPELLANT'S REPLY BRIEF**

by mailing a copy on May 29, 2021 via first class mail, postage thereon fully prepaid, to the following:

**DAVONTAE WHEELER  
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and by e-filing the original with the Nevada Supreme Court, thereby providing a copy to the following:

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SANDRA L. STEWART