

IN THE SUPREME COURT OF THE STATE OF NEVADA

JESSE NOBLE, JR.,

Appellant,

vs.

THE STATE OF NEVADA,

Appellee.

Electronically Filed
Jun 27 2023 12:10 PM
Case No. 85803
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

JOSEPH Z. GERSTEN, ESQ
The Gersten Law Firm PLLC
Nevada Bar No. 13876
9680 W Tropicana Avenue # 146
Las Vegas, NV 89147
702-857-8777

Counsel for Appellant

STEVEN B. WOLFSON, ESQ.
District Attorney Clark County
200 Lewis Street, 3rd Floor
Las Vegas, NV 89101

AARON FORD, ESQ.
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701
775-684-1265

Counsel for Appellee

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record, on behalf of Appellant JESSE NOBLE, JR., certifies there are no corporations, entities, or additional law firms described in NRAP 26.1(a) which must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 27th day of June 2023.



JOSEPH Z. GERSTEN, ESQ.
Nevada Bar No.: 13876
The Gersten Law Firm PLLC
9680 W Tropicana Avenue # 146
Las Vegas, NV 89147
Telephone (702) 857-8777
joe@thegerstenlawfirm.com
Attorney for Appellant

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	4
II.	JURISDICTIONAL STATEMENT.....	5
III.	ROUTING STATEMENT	5
IV.	STATEMENT OF ISSUES	6
V.	STATEMENT OF THE CASE.....	6
VI.	STATEMENT OF FACTS.....	7
VII.	ARGUMENT.....	9
	STANDARD OF REVIEW	9
	A. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING THAT APPELLANT COMMITTED THE ACTS COMPLAINED OF.....	9
VIII.	CONCLUSION.....	14
IX.	CERTIFICATE OF COMPLIANCE.....	15
X.	CERTIFICATE OF SERVICE	17

I. TABLE OF AUTHORITIES

Cases

<u>Conald v. Sheriff</u> , 94 Nev. 289, 579 P.2d 768 (1968)	13
<u>Edwards v. State</u> , 90 Nev. 255, 524 P.2d 388 (1974).....	12
<u>Gilespey v. Sheriff</u> , 89 Nev. 221, 510 P.2d 623 (1976).....	13
<u>In re: Winship</u> , 397 U.S. 358, 90 S.Ct 1068 (1970)	13
<u>In re: Corey</u> , 41 Cal.Rptr. 397 (1964).....	12
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct 2781 (1979)	13
<u>Lioce v. Cohen</u> , 124 Nev. 1, 20, 174 P.3d 970, 982 (2008)	9
<u>Nix v. State</u> , 91 Nev. 613, 541 P.2d 1 (1975)	12
<u>Oxborrow v. Sheriff</u> , 93 Nev. 321, 565 P.2d 652 (1977).....	13
<u>People v. Brown</u> , 92 P.2d 492, 132 Cal.Rptr. 397 (1939).....	12
<u>Rose v. State</u> , 123 Nev. 194, 202, 163 P.3d 408, 414 (2007).....	9, 12
<u>Sanders v. State</u> , 90 Nev. 433, 529 P.2d 206 (1979).....	9, 12
<u>SIIS v. United Exposition Servs. Co.</u> , 109 Nev. 28, 30 (1993).....	9
<u>State v. Jones</u> , 373 P.2d 116 (Wash. 1961)	13
<u>State v. Luchette</u> , 87 Nev. 343, 486 P.2d 1189 (1979).....	14
<u>State v. Weaver</u> , 371 P.2d 1006 (Wash. 1962).....	13
<u>Woodall v. State</u> , 97 Nev. 235, 627 P.2d 402 (1981)	13

Other References

N.R.S. 1.030	5
--------------------	---

II. JURISDICTIONAL STATEMENT

This Honorable Court has jurisdiction under Nev. Const. art. 6, § 4(1), and NRS 1.030. Petitioner filed a Motion for New Trial (treated as a Petition for Writ of Habeas Corpus), on November 18, 2019, which was supplemented on August 11, 2020. AA0038 & AA0045. On May 17, 2021, the District Court made an erroneous ruling denying Petitioner's Petition without the benefit of an evidentiary hearing. AA0090. On July 2, 2022, this Court filed an Order affirming in part, reversing in part and remanding. AA0098. On November 10, 2022, the District Court held an evidentiary hearing regarding this matter. AA0103. On December 5, 2022, the District Court filed a Decision and Order from the Evidentiary Hearing again denying Appellant's Petition. AA0103.

III. ROUTING STATEMENT

Pursuant to NRAP 17(b)(3), this case is presumptively assigned to the Court of Appeals because it entails a postconviction appeal that involves a challenge to a judgment of conviction or sentence for offenses that are not category A felonies.

IV. STATEMENT OF ISSUES

A. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING THAT APPELLANT COMMITTED THE ACTS COMPLAINED OF.

V. STATEMENT OF THE CASE

On October 24, 2016, Petitioner was convicted of Robbery and Burglary and sentenced to 48 – 120 months and 36 – 120 months respectively in the Nevada Department of Corrections. On December 21, 2017, while serving his sentence, an incident occurred at the High Desert State Prison. Petitioner was charged with Battery by Prisoner. AA0001. Slight or marginal evidence was found at the Petitioner's Preliminary hearing on December 19, 2018. AA0004. Petitioner was bound over to the District Court on the same day. Id.

Petitioner went to trial on the charge that is the subject of this matter on February 11, 2019, and a guilty verdict was rendered on February 12, 2019. AA0037a. Petitioner was sentenced on April 11, 2019, to 28 – 72 months consecutive to C-16-312733-1. AA0043.

Thereafter, Petitioner filed a Motion for New Trial (treated as a Petition for Writ of Habeas Corpus), on November 18, 2019, which was supplemented on August 11, 2020. AA0038 & AA0045. On May 17, 2021,

the District Court made an erroneous ruling denying Petitioner's Petition without the benefit of an evidentiary hearing. AA0090. On June 1, 2021, Appellant filed his Notice of Appeal. AA0095. On July 2, 2022, this Court filed an Order affirming in part, reversing in part and remanding. AA0098. On November 10, 2022, the District Court held an evidentiary hearing regarding this matter. AA0103. On December 5, 2022, the District Court filed a Decision and Order from the Evidentiary Hearing again denying Appellant's Petition. AA0103. On November 22, 2022, a Notice of Appeal was filed. AA0109.

VI. STATEMENT OF FACTS

On October 24, 2016, Petitioner was convicted of Robbery and Burglary and sentenced to 48 – 120 months and 36 – 120 months respectively in the Nevada Department of Corrections. On December 21, 2017, while serving his sentence, an incident occurred at the High Desert State Prison. Petitioner was charged with Battery by Prisoner. AA0001. Slight or marginal evidence was found at the Petitioner's Preliminary hearing on December 19, 2018. AA0004. Petitioner was bound over to the District Court on the same day. Id.

Petitioner went to trial on the charge that is the subject of this matter on February 11, 2019, and a guilty verdict was rendered on February 12, 2019. AA0037a. Petitioner was sentenced on April 11, 2019, to 28 – 72 months consecutive to C-16-312733-1. AA0043.

Petitioner was represented by Kenneth Frizzel, Esq. During the trial, Petitioner’s trial counsel failed to present contradictory and exculpatory evidence. AA0045. This created an ineffective assistance of counsel situation on the part of defense counsel. Id.

Thereafter, Petitioner filed a Motion for New Trial (treated as a Petition for Writ of Habeas Corpus), on November 18, 2019, which was supplemented on August 11, 2020. AA0038 & AA0045. On May 17, 2021, the District Court made an erroneous ruling denying Petitioner’s Petition without the benefit of an evidentiary hearing. AA0090. On June 1, 2021, Appellant filed his Notice of Appeal. AA0095. On July 2, 2022, this Court filed an Order affirming in part, reversing in part and remanding. AA0098.

On November 10, 2022, the District Court held an evidentiary hearing regarding this matter. AA0103. On December 5, 2022, the District Court filed a Decision and Order from the Evidentiary Hearing

again denying Appellant's Petition. AA0103. On November 22, 2022, a Notice of Appeal was filed. AA0109.

VII. ARGUMENT

STANDARD OF REVIEW

The appellate courts review questions of law under a de novo standard. SIIS v. United Exposition Servs. Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993). Under de novo review, the appellate court uses the district court's record but reviews the evidence and law without deference to the district court's legal conclusions. Lioce v. Cohen, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

A. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING THAT APPELLANT COMMITTED THE ACTS COMPLAINED OF.

The evidence was insufficient to support a finding that appellant committed the acts complained of. When reviewing a challenge to the sufficiency of the evidence, the reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (internal quotation marks omitted). In this case,

there was insufficient evidence, after viewing the evidence in the light most favorable to the prosecution, that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

On October 24, 2016, Petitioner was convicted of Robbery and Burglary and sentenced to 48 – 120 months and 36 – 120 months respectively in the Nevada Department of Corrections. On December 21, 2017, while serving his sentence, an incident occurred at the High Desert State Prison. Petitioner was charged with Battery by Prisoner. AA0001. Slight or marginal evidence was found at the Petitioner's Preliminary hearing on December 19, 2018. AA0004. Petitioner was bound over to the District Court on the same day. Id.

Petitioner went to trial on the charge that is the subject of this matter on February 11, 2019, and a guilty verdict was rendered on February 12, 2019. AA0037a. Petitioner was sentenced on April 11, 2019, to 28 – 72 months consecutive to C-16-312733-1. AA0043.

Thereafter, Petitioner filed a Motion for New Trial (treated as a Petition for Writ of Habeas Corpus), on November 18, 2019, which was supplemented on August 11, 2020. AA0038 & AA0045. On May 17, 2021,

the District Court made an erroneous ruling denying Petitioner's Petition without the benefit of an evidentiary hearing. AA0090. On June 1, 2021, Appellant filed his Notice of Appeal. AA0095. On July 2, 2022, this Court filed an Order affirming in part, reversing in part and remanding. AA0098. On November 10, 2022, the District Court held an evidentiary hearing regarding this matter. AA0103. On December 5, 2022, the District Court filed a Decision and Order from the Evidentiary Hearing again denying Appellant's Petition. AA0103.

The evidence introduced at the evidentiary hearing allegedly found Petitioner guilty of striking a correctional officer during the officer's efforts to control the scene in the quad area. AA0104 lns 5-6. However, as has been introduced by the Petitioner through the course of this matter, there was no video evidence that showed him visiting violence upon any person, at any time. AA0104 lns. 1-4. & 12-17.

Clearly, this evidence is insufficient. There is simply no video of the Petitioner striking anyone. In this case the introduction of the State's video showing at no time was Petitioner involved in the acts which were the subject matter of this case, contradicts the statements of prior witnesses. The introduction of the video in light of these contradictory

statements should have led to a different outcome. AA0056 lns 12 – 16, and AA0057 lns 17 - 24.

Simply put, the video is not sufficient evidence. That is, that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). “A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in the case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to be acquitted.” NRS 175.191. “[T]he test for sufficiency upon appellate review is not whether this court is convinced beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had the right accept.” Edwards v. State, 90 Nev. 255, 524 P.2d 388 (1974). While it is a well-recognized rule that where there is substantial evidence in the record to support the verdict it will not be overturned by the appellate court, Nix v. State, 91 Nev. 613, 541 P.2d 1 (1975); Sanders v. State, 90 Nev. 433, 529 P.2d 206 (1979); it is also well accepted that a conviction must be reversed where the evidence is so weak that it constitutes no evidence at all. In re: Corey, 41 Cal.Rptr. 397 (1964); People v. Brown, 92 P.2d 492, 132 Cal.Rptr. 397 (1939). No

guilty verdict should be upheld merely because some evidence supporting the conviction was offered. The appellate court must determine if there was evidence sufficient to justify a rational trier of fact to find “guilt beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 99 S.Ct 2781 (1979); In re: Winship, 397 U.S. 358, 90 S.Ct 1068 (1970).

While it is possible for a conviction to be sustained based solely on circumstantial evidence, the circumstances proved must be unequivocal and inconsistent with innocence. Woodall v. State, 97 Nev. 235, 627 P.2d 402 (1981); State v. Weaver, 371 P.2d 1006 (Wash. 1962); State v. Jones, 373 P.2d 116 (Wash. 1961). This Court in Woodall held that a jury is obligated to afford the defendant the benefit of all reasonable doubt. Woodall v. State, 97 Nev. 235, 627 P.2d 402 (1981). The standard enunciated in Woodall, was whether a rational trier of fact could reject a plausible explanation consistent with the defendant's innocence. Id. Additionally, it must be determined whether the defendant was inferred to be guilty based upon evidence from which only uncertain inferences may be drawn. Conald v. Sheriff, 94 Nev. 289, 579 P.2d 768 (1968); Oxborrow v. Sheriff, 93 Nev. 321, 565 P.2d 652 (1977); Gilespey v. Sheriff, 89 Nev. 221, 510 P.2d 623 (1976); State v. Luchette, 87 Nev. 343, 486

P.2d 1189 (1979). That is the case here, only uncertain inferences can be drawn from the proffered evidence against Mr. Noble. A lack of sufficient evidence from the video of all the other evidence and altercations should absolve Mr. Noble of the any guilt cast upon him by the State. As a result, the evidence was insufficient to support a finding that appellant committed the acts complained of.

VIII. CONCLUSION

WHEREFORE, this Petitioner prays that this Court grant his Appeal.

Dated this 27th day of June 2023.



JOSEPH Z. GERSTEN, ESQ.
Nevada Bar No.: 13876
The Gersten Law Firm PLLC
9680 W Tropicana Avenue # 146
Las Vegas, NV 89147
Telephone (702) 857-8777
joe@thegerstenlawfirm.com
Attorney for Appellant

IX. ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby 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 365, Century Schoolbook.

I further certify that 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 either:

Proportionately spaced, has a typeface of 14 points or more, and contains **2652** words.

Finally, 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)(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 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.

DATED this 27th day of June 2023.



JOSEPH Z. GERSTEN, ESQ.
Nevada Bar No.: 13876
The Gersten Law Firm PLLC
9680 W Tropicana Avenue # 146
Las Vegas, NV 89147
Telephone (702) 857-8777
joe@thegerstenlawfirm.com
Attorney for Appellant

X. CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELANT'S OPENING BRIEF** with the Clerk of the Court by using the electronic filing system on the 27th day of June 2023.

The following participants in this case are registered electronic filing system users and will be served electronically:

STEVEN B. WOLFSON, ESQ.
District Attorney Clark County
200 Lewis Street, 3rd Floor
Las Vegas, NV 89101

AARON FORD
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701
775-684-1265

By: Joseph Z. Gersten
An Employee of The Gersten Law Firm PLLC