

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN JAMES NASBY,

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Supreme Court No. 35319

District Court
Case No. C154293

FILED

JUN 07 2000

APPELLANT'S REPLY BRIEF BY

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STATEMENT OF ISSUES

- I. MR. NASBY'S CONVICTION FOR OPEN MURDER AND CONSPIRACY TO COMMIT MURDER MUST BE REVERSED AS HE WAS DENIED A FAIR AND IMPARTIAL TRIAL IN THAT THE STATE USED COERCED TESTIMONY TO OBTAIN THE CONVICTION
- II. MR. NASBY'S CONVICTION FOR OPEN MURDER AND CONSPIRACY TO COMMIT MURDER MUST BE REVERSED BECAUSE THERE WAS NO CORROBORATING EVIDENCE
- III. THE TRIAL COURT ERRED BY FAILING TO PROVIDE A CAUTIONARY INSTRUCTION TO THE JURY REGARDING ACCOMPLICE TESTIMONY
- IV. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON "WILLFULNESS, DELIBERATION AND PREMEDITATION." (INSTR. 12)
- V. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR A MISTRIAL BECAUSE OF THE STATE'S USE OF INADMISSIBLE EVIDENCE IN HIS OPENING STATEMENT

STATEMENT OF THE CASE

Appellant relies upon and incorporates by reference his
Statement of the Case as set forth in his Opening Brief.

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FACTS

Appellant relies upon and incorporates by reference his
Statement of Facts as set forth in his Opening brief.

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ARGUMENT

I. DEFENDANT'S CONVICTION WAS NOT SUPPORTED BY OVERWHELMING EVIDENCE APART FROM THE ACCOMPLICE TESTIMONY WHICH WAS COERCED

The State argues that Defendant fails to show how the State contravened the accepted practice of plea bargaining to secure favorable testimony. (Respondent's Brief, pages 8-9)

The plea bargains in this case cross the line enunciated in Sheriff v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991). While Acuna embraced the rule that any consideration promised by the State in exchange for a witness testimony affects only the weight accorded the testimony, and not its admissibility, the Acuna court did not condone or endorse the practice of coercing witnesses to testify.

The testimony bargained for by the State between Deskin, and the Burnside brothers was not merely consideration in exchange for testimony. Deskin and the Burnside brothers were all either

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1 threatened with contempt or additional charges if they did not
2 testify. (R.T. Vol. III, p. 148-149; R.T. Vol. V p. 113; R.T. Vol
3 V p 139) Each had previously given statements contrary to the
4 testimony they offered at trial (R.T. Vol. III p. 125; R.T. Vol. V
5 p. 109, line 3- p. 110, line 17; R.T. Vol. V, p. 133, line 10-15).
6 Threatened with contempt and additional charges the accomplice
7 testimony at trial conformed to the state theory of the case.

8 In addition, the State offered the testimony of Brittney
9 Adams. Ms. Adams testified that the Appellant asked her to kill
10 Tanesha Banks because Tanesha was "running her mouth. (R.T. Vol.
11 II, page 228, lines 12-21) Adams testified that she went to
12 Tanesha Banks home and after a brief conversation began hitting
13 Tanesha in the head and kicking her. (Id. at page 229, lines 15-
14 22)

15 Brittney Adams was charged with first degree kidnapping,
16 intimidating a witness and battery with intent to commit a crime,
17 regarding the Tanesha Banks incident. (R.T. Vol.II, page 234,
18 lines 7-9)

19 Ms. Adams testified that, "my lawyer negotiated with the D.A.
20 on my case for me to assist in any way I possibly can in this
21 case, in reference to they will drop two of the felony charges and
22 charge the felony battery to commit with -- intent to commit a
23 crime to a misdemeanor battery." Id. at Page 234 and 235.

24 Instead of facing the potential sentence of life without the
25 possibility of parole (NRS 200.230) Ms. Adams was allowed to plead
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1 to one misdemeanor count of battery in exchange for her testimony.

2 While the accepted practice of plea bargaining to secure
3 favorable testimony is not disfavored such bargaining has crossed
4 the line in the instant case by the state's use of coercion and
5 intimidation.

6 **II. THERE WAS INSUFFICIENT CORROBORATING EVIDENCE TO**
7 **SUSTAIN A CONVICTION**

8 In Sheriff v. Hilliard, 96 Nev. 345, 347 (1980) this court
9 articulated the standard used to test corroborative evidence.

10 This court stated,

11 the sufficiency of corroborative evidence should be
12 measured after eliminating the evidence which requires
13 corroboration. After such elimination, corroborative
14 evidence is sufficient if it tends to connect the
15 defendant with the offense, and is insufficient if it
16 merely casts a grave suspicion upon the accused.

17 (Quoting from Austin v. State, 87 Nev. 578, 491 P.2d 724 (1971))

18 The State argues that there was substantial corroboration to
19 bolster the accomplice testimony. The State cites the testimony
20 of Crystal Bradley and a jailhouse confession that the defendant
21 allegedly made while at the Clark County Detention center.

22 (Respondent's Brief, page 12). The State argues that the jury
23 heard evidence that the Defendant without suggestion or
24 provocation by Metro, led the police back to his home where the
25 9mm weapon was found. (Respondent's brief, page 12)

26 None of this so called corroborative evidence corroborates the
27 accomplice testimony as to the charge of conspiracy to commit
28 murder.

1 III. THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY
2 REGARDING ACCOMPLICE TESTIMONY

3 The State argues that the Trial Court properly did not
4 instruct the jury regarding accomplice testimony. Citing Buckley
5 v. State, 95 Nev. 602, 600 P.2d 227 (1979) the State argues that
6 failure to give a cautionary instruction "may not constitute
7 reversible error.... when the jury is instructed that it had the
8 duty of weighing the witness' credibility" and "where there is
9 substantial evidence of guilt and where witness motive and
10 possible bias had been explored through cross-examination."

11 (Respondent's Brief, page 13)

12 The Buckley court stated that "while the lower court should
13 have given the requested instruction, its failure to do so does
14 not constitute reversible error." Id. at 604-605. The Buckley
15 decision however, did not overrule Crowe v. State, 84 Nev. 358,
16 (1968) and was fact specific to Buckley.

17 In Crowe this court stated that " even when such testimony is
18 corroborated in critical respects we would favor careful
19 instructions in form and substance to call attention to the
20 character of the testimony of the informer, leaving to the jury
21 the ultimate question of value and credibility." Id.

22 Crowe went on to say that, "that the instruction should be
23 beyond the scope of the ordinary instruction that the jury is the
24 sole judge of the evidence and the weight to be accorded to the
25 testimony of the witnesses. " Id.

26 In the instant case the court did not instruct the jury
27 beyond that of ordinary witness credibility. (Jury Instruction 27)

1 Notwithstanding the fact specific ruling in Buckley the court
2 in the instant case was required to give a cautionary instruction
3 to the jury beyond the standard credibility of witness
4 instruction. (See Riley v. State, 110 Nev. 638, 653 (1994))

5 The court's failure to provide the cautionary instruction was
6 plain error and reviewable by this court sua sponte. This court
7 may review plain error or issues of constitutional dimension sua
8 sponte despite a party's failure to raise the issue below. Emons
9 v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991).

10 IV. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY
11 ON "WILLFULNESS, DELIBERATION AND PREMEDITATION."
12 (INSTR. 12)

13 The Appellant argues that the trial court committed
14 reversible error by not instructing the jury on willfulness,
15 deliberation and premeditation as set forth in Byford v. State,
16 116 Nev. ____, 994 P.2d 700 (2000).

17 The thrust of the State's argument is that the Byford
18 instruction is to be applied prospectively and not retroactively.
19 (Respondent's Brief, page 14) The State draws this inference based
20 upon the courts language that "we direct the district courts to
21 cease instructing juries...." However the Byford court did not
22 directly address the issue of whether its decision was to be
23 applied retroactively.

24 In Powell v. State, 108, Nev. 700, 705 (1992) this court
25 held,

26 When a case announces a new rule of law, the application of
27 the rule is prospective unless it is a rule of constitutional law;
28 and then it is only applied retroactively under certain
circumstances. Gier v. District Court, 106 Nev. 208, 212, 789 P.2d

1 1245, 1248 (1990). The factors to be weighed in determining
2 retroactivity are: "(1) the purpose of the rule; (2) the reliance
3 on prior, contrary law; and (3) the effect retroactive application
4 would have on the administration of justice." Franklin v. State,
5 98 Nev. 266, 269 n.2, 646 P.2d 543, 545 n.2 (1982) (citing Tehan
6 v. United States, 382 U.S. 406 (1966)).

7 The first question in determining whether the Byford
8 instruction is to be applied retroactively is whether or not it is
9 a rule of constitutional law. Appellant argues that it is a rule
10 of constitutional law. The Byford court stated that "it is clear
11 from the statute that all three elements, willfulness,
12 deliberation, and premeditation, must be proven beyond a
13 reasonable doubt before an accused can be convicted of first
14 degree murder." Byford, 994 P.2d at ____.

15 In using the Kazalyn instruction, (Kazalyn v. State, 108 Nev.
16 67, 75, 825 P.2d 578, 583 (1992), the state was not obligated to
17 prove each element of willfulness, deliberation and premeditation
18 beyond a reasonable doubt. The Kazalyn instruction violated the
19 defendant's constitutional right to a fair and impartial trial.

20 Even if the Byford instruction were not applicable
21 retroactively this court must review the Appellant's assignment of
22 error anew and in accord with Byford.

23 Trial counsel recognized the problem with the Kazalyn
24 instruction and proposed an alternative instruction.

25 Mr. Sciscento: As to Jury Instruction No. 12, the
26 premeditation, I don't believe that it fully provides the jury
27 instruction as to how to determine what premeditation is. It
28 doesn't show the time frame for forming intent. My belief is, the
way it's written now, the intent is almost simultaneously.

1 I propose Jury Instruction No. defense A....
2 (R.T. Vol. VI page 4, lines 6-17)

3 In analyzing the Appellant's objection to the Kazalyn
4 Instruction this court would be required to draw the same
5 conclusion that it did in Byford which was,

6 Because deliberation is a distinct element of mens rea
7 for first-degree murder, we direct the district courts to
8 cease instructing juries that killing resulting from
premeditation is 'willful deliberate, and premeditated
9 murder.' Further, if a jury is instructed separately on the
meaning of premeditation, it should also be
instructed on the meaning of deliberation.

10 Byford, 994 p.2d at 714.

11 While this court held that failure to give the Byford
12 instruction was not reversible error, in and of itself, this court
13 held that the "cumulative effect of multiple errors may violate a
14 defendant's constitutional right to a fair trial." (Pertgen v.
15 State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994))

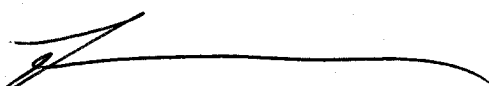
16 Appellant argues that the cumulative error as set forth in the
17 Appellant's Opening and Reply briefs warrant reversal of his
18 convictions.

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CONCLUSION

Based upon the foregoing the Appellant prays this court reverse his convictions.


DATED THIS 2nd day of June, 2000.

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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 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 2nd day of June, 2000.


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CERTIFICATE OF MAILING

I hereby certify that on the 5 day of June, 2000, I mailed a copy of the foregoing **APPELLANT'S REPLY BRIEF**, upon all persons in this action in the U.S. Mail, postage pre-paid, addressed to their last known address as follows:

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