

COURT OF CRIMINAL APPEALS NO. \_\_\_\_\_

# APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

CIRCUIT COURT NO. CC92-2313 thru 2315

CIRCUIT JUDGE FERRILL D. McRAE

Type of Conviction / Order Appealed From: ATTEMPTED MURDER, ROBBERY, 1st, BURGLARY, 1st  
92-2313.-Pen for 20 yrs, 92-2314.-Pen for 20 yrs concurrent with 92-2313 & 2315, 92-2315.-  
Sentence Imposed: pen for 20 yrs concurrent with 92-2313 and 2314

Defendant Indigent:  YES  NO

RODNEY KARL STANBERRY

NAME OF APPELLANT

Kenneth A. Nixon

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(Appellant's Attorney)

(Telephone No.)

P.O. Box 2301

(Address)

Mobile, Alabama 36652

(City)

(State)

(Zip Code)

V.

STATE OF ALABAMA

NAME OF APPELLEE

(State represented by Attorney General)

NOTE: If municipal appeal, indicate above, and enter name and address of municipal attorney below)

(For Court of Criminal Appeals Use Only)

NOVEMBER 10, 1993

(The Defendant being present in court with his attorney, Mr. Kenneth R. Nixon, and the assistant district attorneys, Mr. Joe Carl Jordan and Mr. Thomas Harrison, the following occurred before the Hon. Ferrill D. McRae:)

THE COURT: All right, for the record, these are the cases of the State of Alabama v. Rodney Karl Stanberry, attempted murder, and that's case No. 92-2313; 92-2314 is robbery in the first degree; 92-2315 is burglary in the first degree.

We have a number of motions filed by the State and that is most unusual, but those motions are as follows: Motion for Protective Order filed by the State. I don't know what that is, but I'm going to hear it. Number two, Motion in Limine filed by the State.

You have the floor, Mr. Prosecutor.

MR. JORDAN: Your Honor, initially the motion in limine, I want to take this pre-trial because when we start to trial we've got a lot of matters that will take care of themselves and I wanted Your Honor to hear this prior to trial so we'd have some time to argue it.

I expect that there is a lot of hearsay testimony that may be available to the Defense in this case and I would ask that he be restricted from discussing any of those matters in opening

1 > statements or during the course of the trial unless or until --

2 THE COURT: You better tell me what we're talking about.

3 MR. JORDAN: This case involves an attempted murder case  
4 where a woman was at home and two people came to the house, shot  
5 her in the head, and she survived. She is in a wheelchair.

6 There are -- after it happened the Defendant did a lot  
7 of things as to telling the police who supposedly did it. Sup-  
8 posedly two guys out of New York and then the Defense investigator  
9 came up with a guy confessing to the murder on video tape and  
10 cassette recording, which the two guys from New York I don't  
11 expect are going to be here to testify on behalf of the Defense.  
12 The guy who's confessed to the attempted murder, if he takes the  
13 stand and testifies, well, then I will impeach him and cross  
14 examine him. However, I expect they may try to introduce either a  
15 cassette recording or a video tape without putting that witness  
16 on. And they may refer to some things like that without putting  
17 that witness on.

18 , And there is also a friend of the Defendant -- I named the  
19 five people in the motion in limine. Tyrell Moore is first named.  
20 He's the supposed person that's confessed to this crime. There's  
21 a guy named Taco Jones, who's a friend of the Defendant and who  
22 was involved with the Defendant after this incident occurred. The  
23 Defendant himself, who has given several statements, which I have  
24 a right to use in my case in chief, but I may or may not use  
25 those, and he cannot use them unless the Defendant testifies. So,

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1 > I don't want him making comments about that, about what the  
2 Defendant would say, blah, blah, blah, and then the Defendant not  
3 testify. And then the other two people mentioned in the motion in  
4 limine are the two people from New York supposedly, a Rene or  
5 Rennie Whitecloud and an Angel Melindez. I'm not vouching that  
6 any of these people exist or do not exist, because there are  
7 serious questions about that as well.

8           However, I'm opposed to the Defendant creating a theory of  
9 argument or theory of the case in his opening statement based on a  
10 lot of hearsay testimony --

11           THE COURT: In other words, you're going to say he wants to  
12 put in testimony about an alibi to the extent that not only it  
13 wasn't I, but I'm going to tell you who it was.

14           MR. JORDAN: Exactly, through witnesses who may or may not  
15 testify. If the witnesses testify, then I have a right to cross  
16 examine and then I can make direct objections to hearsay. Because  
17 what has happened in this case is after this crime occurred there  
18 was a lot of collusion going on between different parties and they  
19 were all -- like two people made a tape recording, and there are  
20 all these other statements going on, and I'm sure one witness  
21 could stand up here and say, well, he told me such and such did it  
22 and he told me such and such did it and all this other stuff.

23           THE COURT: That won't happen.

24           MR. JORDAN: Well, that's why I'm trying to preclude that  
25 too, as having that come out in opening statement when it will not

1 perhaps come out during the trial.

2 So, that's the basis of the motion in limine.

3 THE COURT: Of course, I think one of the worst things an  
4 attorney can do is stand before a jury and tell them we expect to  
5 prove so and so and then never prove it. You know, that comes  
6 under the heading of not being real bright.

7 MR. JORDAN: I understand --

8 THE COURT: And I've seen thousands and thousands of juries,  
9 as you know. They hold you accountable to what you expect them to  
10 be. Now, why would -- and I'll let Mr. Nixon speak for himself in  
11 a minute. Why would Mr. Nixon go before a jury and say I expect  
12 to show you this and show you this and expect the evidence to be  
13 this when he knows good and well there isn't going to be any  
14 evidence. Why would he do that?

15 MR. JORDAN: Well, specifically there's a cassette tape made  
16 between Stanberry and Taco that he may attempt to introduce and he  
17 may want to refer to in opening statement. There's a cassette  
18 recording from Tyrell Moore and there's a video tape from Tyrell  
19 Moore which he may anticipate trying to get in and may want to  
20 talk about that in his opening statement when at this time --

21 THE COURT: Let's let Mr. Nixon talk, because all that sounds  
22 ludicrous to me.

23 MR. NIXON: Number one, Judge, it sounds ludicrous to me  
24 also. What has happened is Mr. Jordan has filed a motion listing  
25 every conceivable witness that I may call and saying I can't say

1 anything in my opening argument about what they're going to say.  
2 Now, if I subpoena these witnesses, which I do intend to subpoena  
3 the majority of them, I have no reason to believe that any of them  
4 wouldn't testify.

5 In fact, the one that he's talked about has already told  
6 me I did -- the man confessed to being a participant in the crime  
7 and he told who did it and I -- and he told my investigator this  
8 and my investigator took a -- went back and took a taped statement  
9 and a video statement of him and on the statement he even said  
10 that he knew he was going to go to jail and he knew he was going  
11 to serve time for this and that was -- that was it, and he said  
12 who was with him when he did it and it was not my client. It was  
13 another person from out of state. This guy is not out of state.  
14 He's a local guy. But in any event, he has represented that he  
15 would come to court and testify.

16 THE COURT: That's enough.

17 MR. JORDAN: Judge, if I --

18 THE COURT: What's this other motion?

19 MR. JORDAN: If I may be heard on that, he has an attorney  
20 and I expect that he will invoke the Fifth Amendment at trial.  
21 Now, if Ken goes into -- allowed to --

22 THE COURT: If his attorney invokes the Fifth Amendment there  
23 ain't -- and this is not any Freudian slip; I meant to say it --  
24 there ain't going to be no TV cassette played. Now, what else are  
25 you worried about?

1 MR. JORDAN: I'm sorry, there's not going to be any what?

2 THE COURT: I made it about as strong as I could. There  
3 ain't going to be no cassette played unless that man's here to  
4 testify.

5 Now, what else are you worried about?

6 MR. JORDAN: The second thing, Judge, is there's a protective  
7 order in the file --

8 (Off the record interruption.)

9 MR. JORDAN: Judge, there is certain inculpatory evidence in  
10 this case that is not discoverable under --

11 THE COURT: Inculpatory or exculpatory?

12 MR. JORDAN: Inculpatory, which is not discoverable under  
13 Brady or under the Rules of Alabama Criminal Procedure. I'm new  
14 to your courtroom, Your Honor, so I didn't know how to go about --

15 THE COURT: Well, I'll tell you the rule in here --

16 MR. HARRISON: And he doesn't want to hear it either.

17 THE COURT: We don't try by ambush. In here it's an open  
18 file and you show him whatever he wants to see. His client is the  
19 one that's going to be going to the penitentiary for life, not the  
20 district attorney's office, if they find him guilty. So, for that  
21 reason I say open file discovery.

22 You know, one day I was standing right where you are on  
23 the other side and we had a D.A. at that time that wouldn't show  
24 you the time of day, let alone anything, and I said if I ever had  
25 the opportunity they'd open up those files, and for 28 years I've

1 > made them open them up.

2 Have I not, Tommy?

3 MR. HARRISON: Absolutely, Judge.

4 MR. NIXON: Judge, if I may, we came down here before Your  
5 Honor several months ago and you ordered -- I can get the exact  
6 date. You said the same thing that you just said today. You  
7 ordered an open file.

8 THE COURT: And I'll say it again tomorrow.

9 MR. NIXON: Mr. Jordan represented to me that he was not  
10 going to give me open file. I subsequently filed a motion --

11 THE COURT: Well, we're not going to argue about that; he is.  
12 Now have you got anything else?

13 MR. NIXON: Yes, sir, Judge. I have some specific Brady  
14 motions. I have about five of them that I would ask the Court to  
15 rule on that have been pending and when you said open file you  
16 didn't rule on the -- my specific Brady motions and here's the  
17 problem that I'm afraid we're going to get into, Judge. I believe  
18 that Mr. Jordan has some information, some exculpatory information  
19 and -- that I'm not being provided with. This stuff is dribbling  
20 on. I get a little bit here and a little bit there ever since  
21 this case has begun.

22 THE COURT: Well, I tell you what you do. When you leave  
23 here in a few minutes, you go up there and look at his file. If  
24 there's anything exculpatory, Brady applies. It applies in  
25 Mobile, it applies in Trenton, New Jersey, it applies in Miami,



1 > Florida. We don't have any special rules down here.

2 MR. HARRISON: Sometimes in California.

3 THE COURT: He says sometimes in California.

4 MR. NIXON: Well, Judge, I've had such a difficult time with  
5 obtaining discovery in this case, what I'm afraid of is --

6 THE COURT: Let me see your motion.

7 MR. NIXON: Is the same thing --

8 MR. JORDAN: Judge, if I may respond to this as well.

9 THE COURT: Oh, my gosh, you got a book there.

10 Now, on the other hand, I'm not going to make the  
11 district attorney's office be an investigator for you. I'm not  
12 going to make the district attorney's office go seek material that  
13 you can get for yourself.

14 MR. NIXON: I understand, Judge.

15 THE COURT: "Comes now the Defendant, Rodney Karl Stanberry,  
16 by and through his attorney, and moves the Court for an order  
17 pursuant to Brady to provide the following exculpatory informa-  
18 tion." And I'm not reading it verbatim. "Any and all evidence in  
19 the possession of the district attorney, the Prichard --" See,  
20 you've already gone too far as far as I'm concerned. "Any and all  
21 evidence in the possession of the district attorney." If he's got  
22 it, you're entitled to it. I'm not going to make him go to the  
23 Prichard Police Department. You can go out to the Prichard Police  
24 Department yourself. I'll give you an order which says you can.

25 MR. NIXON: That would be fine, Judge.