IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK NEWELL Appellant, v. THE STATE OF NEVADA, Respondent.	CASE NO: 66552

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada

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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None.

5. Procedural history.

On October 11, 2012, a Criminal Complaint was filed charging Patrick Newell ("Appellant") with the following: Count 1 – Attempt Murder With Use of a Deadly Weapon; Count 2 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm; Count 3 – Assault With a Deadly Weapon. 1 Appellant's Appendix

("AA") 1-2. An Amended Criminal Complaint was filed on November 26, 2012, adding Count 4 – Performance of Act in Reckless Disregard of Persons or Property in addition to the above counts. 1 AA 3-4. A preliminary hearing was held on November 26, 2012. 1 AA 12. After the hearing, the Justice Court found that all of the charges were supported by probable cause and Appellant was bound over to the District Court. 1 AA 25-169.

On November 30, 2012, the State filed an Information charging Appellant with: Count 1 – Attempt Murder With Use of a Deadly Weapon; Count 2 – Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm; Count 3 – Assault With a Deadly Weapon; and Count 4 – Performance of Act in Reckless Disregard of Persons or Property. 1 AA 5-7.

Appellant's jury trial commenced on June 16, 2014. 3 AA583. After deliberation, the jury found Appellant not guilty of Count 1, and guilty of Counts 2-4. 3 AA 360-361. Appellant was sentenced on August 21, 2014, as follows: Count 2 – a 72 to 80 months in the Nevada Department of Corrections; Count 3 – 24 to 60 months, concurrent with Count 2; Count 4 – Dismissed. 3 AA 362-363. Appellant filed a Notice of Appeal on September 19, 2014. 3 AA 364-365.

6. Statement of Facts.

On the evening of October 9, 2012, Theodore Bejarano ("Bejarano) walked from his home to the Circle K on the corner of Richmar and Las Vegas Boulevard

to gamble. 5 AA 886. After Bejarano finished gambling he left the Circle K. 5 AA 888. Appellant arrived at the Circle K at approximately 12:30 AM on October 10, 2012. 6 AA 1107. Appellant went into the store to purchase gasoline and candy. 6 AA 1107-1108. When Appellant returned to his truck Bejarano asked Appellant for a ride home. 5 AA 888-889. Appellant refused. 6 AA 1112. Bejarano asked Appellant for a ride home several more times, but Appellant refused. 6 AA 1112-1113.

Appellant then went back inside the Circle K and asked that the cashier call the police. 6 AA 1116. Appellant returned to his truck and began to pump gas. Bejarano once again asked Appellant for a ride home. 6 AA 1117. Bejarano never threatened Appellant or made any type of physical contact with Appellant. 6 AA 1128. Appellant sprayed Bejarano with gasoline. 6 AA 1118. At some point during this altercation Appellant pushed Bejarano to the ground. 5 AA 928. After being sprayed by gasoline, Bejarano exclaimed "he sprayed gas on me." 5 AA 787. Appellant sprayed gasoline on Bejarano a second time. 6 AA 1119. Appellant pulled a lighter out of his pocket and threatened to burn Bejarano. 5 AA 788. Appellant flicked the lighter two to three times. 5 AA 788. Appellant then walked up to Bejarano flicked the lighter on Bejarano's shirt and set him on fire. 6 AA 1130.

Bejarano began screaming and removing his clothes in an attempt to extinguish the flames. 5 AA 789. As Bejarano lay on the ground, Appellant walked up to him and began denigrating his penis. 5 AA 790. Appellant threatened to cut Bejarano's penis off while waiving a knife in the direction of Bejarano's genitals. 5 AA 789-790. An off duty security officer then told Appellant to wait on the sidewalk until police arrived. 5 AA 790. While sitting on his truck, Appellant threatened to cut another person who was walking by. 5 AA 791. Appellant was subsequently arrested. 6 AA 1042.

7. Issue(s) on appeal.

1. Whether the District Court did not err by instructing the jury that Appellant's use of force must be reasonable and necessary and that deadly force cannot be used unless the person battered poses a threat of serious bodily injury.

2. Whether Attempt Assault is a Crime in Nevada.

8. Legal Argument, including authorities:

I. THE DISTRICT COURT DID NOT ERR BY INSTRUCTING THE JURY THAT APPELLANT'S USE OF FORCE MUST BE REASONABLE AND NECESSARY AND THAT DEADLY FORCE CANNOT BE USED UNLESS THE PERSON BATTERED POSES A THREAT OF SERIOUS BODILY INJURY

Appellant's myopic fixation upon a single sentence in NRS 200.160 ignores the statutory structure that defines what is necessary to justify violent conduct.

"District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. ___, 195 P.3d 315, 319 (2008). This Court reviews the district

court's decision to issue instructions for an abuse of discretion or judicial error; however, this Court applies de novo review when determining "whether a particular instruction . . . comprises a correct statement of the law." Id.

"When interpreting a statute, legislative intent "is the controlling factor." Robert E. v. Justice Court, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). Statutes are to be construed to harmonize them with other statutes. Neil v. Mikulich, 57 Nev. 307, 311, 64 P.2d 612, 613 (1937). Furthermore, statutes are to be interpreted to avoid absurd results. L.V. Sun v. Dist. Ct., 104 Nev. 508, 511, 761 P. 849, 851 (1988).

A battery is justifiable if done under circumstances that would justify homicide.

> In addition to any other circumstances recognized as justification at common law, the infliction or threat of bodily injury is justifiable, and does not constitute mayhem, battery or assault, if done under circumstances which would justify homicide.

NRS 200.275

Justifiable homicide is defined as:

> "the killing of a human being in necessary self-defense, or in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous, tumultuous or surreptitious manner, to enter the habitation of another for the purpose of assaulting or

> offering personal violence to any person dwelling or being therein."

NRS 200.120

Homicide is also justified when committed:

> 1. In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
> 2. In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode in which the slayer is.

NRS 200.160

However, reasonable fear is always required to justify any homicide:

> A bare fear of any of the offenses mentioned in NRS 200.120, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears and not in a spirit of revenge.

NRS 200.130

NRS 200.160 does not address whether the amount of force must be reasonable nor does it state that deadly force can only be used when there is a serious threat of bodily injury. However, there is a "presumption that these statutes are

consistent with the common law." Runion v. State, 116 Nev. 1041, 1047, 13 P.3d 52, 56, (2000); see also Ewing v. Fahey, 86 Nev. 604, 607, 472 P.2d 347, 349-50 (1970) (statutory construction presumption that statutes are consistent with common law); State v. Hamilton, 33 Nev. 418, 426, 111 P. 1026, 1029 (1910) (common law prevails in Nevada except where abrogated).

At common law homicide was justified when the defender was not the aggressor, the defendant was confronted with actual and immediate danger of unlawful bodily harm or he reasonably believed that there was immediate danger of such a harm, and the use of such force was necessary, in a proportionately reasonable amount, to avoid this danger. Runion 116 Nev. at 1046, 13 P.3d at 55. Therefore, the district court's instructions were consistent with the common law requirements of justifiable homicide.

Furthermore, this Court has held that "NRS 200.120 and 200.130 require that in order for homicide to be justified, the defendant's belief in the necessity of using force in self-defense must be reasonable." Hill v. State, 98 Nev. 295, 296, 647 P.2d 370, 370, (1982). NRS 200.160 involves additional cases of justifiable homicide, while NRS 200.120 defines what constitutes justifiable homicide. While Hill did not specifically address NRS 200.160, this Court's ruling would still apply to NRS 200.160, as NRS 200.120 defines all instances of justifiable homicide of which, NRS 200.160 is a subset.

California has also discussed what felonies justify the use of homicide. California Penal Code 197 largely mirrors NRS 200.120 and NRS 200.160, and states that a homicide is justified when:

> 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or,
> 2. committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein."

Cal Pen Code § 197(2)

The California Supreme Court found that "Penal Code section 197 appears to permit killing to prevent any 'felony,' but in view of the large number of felonies today and the inclusion of many that do not involve a danger of serious bodily harm, a literal reading of the section is undesirable." People v. Ceballos, 12 Cal. 3d 470, 485, 526 P.2d 241, 250 (1974). The California Supreme Court also noted that this rule developed at common law and that "killing or use of deadly force to prevent a felony was justified only if the offense was a forcible and atrocious crime." Id. at 478, 526 P.2d at 245. This Court should apply the above rationale and limit the use of deadly force to only the most serious of felonies.

Furthermore, the statutory scheme involving justifiable homicide and self-defense shows that the legislature intended to limit the use of deadly force to violent

felonies. NRS 200.120, which defines justifiable homicide, limits the use of deadly force "against one who manifestly intends or endeavors, by violence or surprise, to commit a felony." The language states that the felony must be accompanied by violence or surprise. At common law the term surprise meant "an unexpected attack -- which includes force and violence…" Ceballos, 12 Cal. 3d at 485, 526 P.2d at 250. NRS 200.200 requires that if someone kills another in self-defense that the killing be done to save the killer's life or to prevent the killer from receiving great bodily harm. NRS 171.1455 limits the use of deadly force to catch a fleeing felon to situations where the felon "[h]as committed a felony which involves the infliction or threat of serious bodily harm or the use of deadly force; or poses a threat of serious bodily harm to the officer or to others." NRS 171.1455. Looking at these statutes together it is clear that the legislature intended to limit the use of deadly force to situations where the one using the deadly force is in danger and believes he could be subject to great bodily harm.

Appellant argues that deadly force may be used to prevent any felony regardless of the danger posed. FTS 12-15. Appellant's interpretation of the statute would lead to absurd results. Appellant's interpretation would allow someone to use deadly force to prevent non-violent crimes such as Bribery of a Judicial Officer (Category C Felony – NRS 199.010), Forgery (Category D Felony – NRS 205.090), or Obtaining Money Under False Pretenses (Category B Felony – NRS 205.380(a)).

It would be absurd to allow the use of deadly force to prevent these types of non-violent felonies.

Appellant's construction also ignores the expansion of what conduct constitutes a felony. The United States Supreme Court addressed the expansion of felonies in Tenn. v. Garner, 471 U.S. 1, 105 S. Ct. 1694 (1985). In Garner the Supreme Court was tasked with determining when deadly force could be used to catch a fleeing felon. Id. The Supreme Court noted that the common law rule allowed for the use of deadly force to apprehend a fleeing felon. Id. at 13, 105 S.Ct. at 1694. The Supreme Court then noted that the distinction between felonies and minor offenses is minor and often arbitrary, and that many crimes classified as misdemeanors, or nonexistent at common law are now felonies. Id. at 14, 105 S.Ct. at 1694. The Supreme Court went on to hold that the use of deadly force "to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." Id. at 11, 105 S. Ct. at 1701.

This Court examined the expansion of felony statutes in the context of the use of force to apprehend a fleeing felon in State v. Weddell, 117 Nev. 651, 27 P.3d 450, (2001). This Court found that the common law rule of using deadly force to prevent a felon from fleeing "was developed at a time when felonies were only the very serious, violent or dangerous crimes and virtually all felonies were punishable by death." Id. at 655, 27 P.3d at 453. This Court also found that "[s]ociety would not

tolerate the use of deadly force to *prevent the commission* of any of these crimes or to apprehend someone suspected of any of these crimes. Id. at 656, 27 P.3d at 453 (emphasis added).

While the above cases involve fleeing felons as opposed to justifiable homicides, the same reasoning should apply here. These cases demonstrate that felonies are now vastly different than they were at common law. Society can no longer tolerate the use of deadly force to prevent the commission of these non-violent felonies. In the instant case Appellant's use of force was extremely disproportionate to the "threat" posed by Bejerano. Bejarano was doing nothing more than annoyingly asking for a ride home. 6 AA 1112-1113. Appellant responded by spraying Bejarano with gasoline and setting him aflame. 6 AA 1130. Society cannot tolerate the use of deadly force in such a situation. This Court should apply the same rationale used by this Court in Weddell, and by the United States Supreme Court in Garner, and limit the use of deadly force to only those felonies that are violent and can result in substantial bodily harm.

Appellant argues that there must be some distinction between self-defense and justifiable homicide to prevent a felony. FTS 12. However, the similarities between self-defense and the use of deadly force to prevent a felony exist because they are both subparts of justifiable homicide. Justifiable homicide is defined as "… the killing of a human being in necessary *self-defense* or in defense of habitation,

property or person, against one who manifestly intends or endeavors, *by violence or surprise, to commit a felony…*" NRS 200.120 (emphasis added). Thus any similarities between NRS 200.160 and NRS 200.200 are due to the fact that both types of killings are justifiable homicides.

Appellant's reliance on Davis v. State, 130 Nev. ___, 321 P.3d 867 (2014), is misplaced. In Davis the district court erred by not issuing instructions involving justifiable battery. Id. at ___, 321 P.3d at 874. However, Davis is easily distinguishable. Unlike the instant case, the defendant in Davis was faced with the prospect of being shot. Id. at ___, 321 P.3d at 871. Here, the only thing Bejarano was doing was being annoying and asking for a ride home. 6 AA 1112-1113. Furthermore, Davis dealt with the district court refusing to give any instructions regarding justifiable homicide, while the issue in this case is whether the district court properly instructed the jury regarding justifiable battery. In Davis this Court declined to address whether deadly force could be used to prevent a non-violent felony. Id. at ___, 321 P.3d at 875. Davis did not address the use of deadly force to prevent a non-violent felony nor did it deal with a situation where the district court did give instructions regarding justifiable battery. As such, Appellant's reliance on Davis is misplaced.

Finally any alleged error was harmless beyond a reasonable doubt. An instructional error is harmless when it is "clear beyond a reasonable doubt that a

rational jury would have found the defendant guilty absent the error and the error is not the type that would undermine certainty in the verdict." Wegner v. State, 116 Nev. 1149, 1155, 14 P.3d 25, 30, (2000), overruled on other grounds, Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (quoting Neder v. United States, 527 U.S. 1, 13-15, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999)). Here, any instructional error was harmless beyond a reasonable doubt. Appellant set Bejarano on fire simply for being obnoxious or annoying. 6 AA 1130. No jury could have found this use of force reasonable under the circumstances. Furthermore, the evidence does not support the notion that Bejarano committed felony coercion. Bejarano was only asking for a ride home. Appellant admits that Bejarano did not threaten him, that Bejarano did not get physical, and that Bejarano never made any advances towards Appellant. 6 AA 1128. Felony coercion requires that the criminal compel another to do or abstain from doing an act which the other person has a right to do or abstain from doing and that that the criminal uses violence or inflicts injury upon the other person or any of the other person's family, or upon the other person's property, or threatens such violence or injury. NRS 207.190. Here, Appellant admits that Bejarano did not threaten the use of violence or commit any act of violence. 6 AA 1128. As such, no reasonable jury could have found that Bejarano's actions constituted a felony, rendering any instructional error harmless beyond a reasonable doubt.

II. ATTEMPTED ASSAULT IS A CRIME IN NEVADA

Under Nevada law, attempt assault is recognized as a crime. An attempt is defined as "[a]n act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime." NRS 193.330. Nevada defines Assault as follows:

> (a) "Assault" means:
> (1) Unlawfully attempting to use physical force against another person; or
> (2) Intentionally placing another person in reasonable apprehension of immediate bodily harm.

NRS 200.471(a).

"At early common law, 'a criminal assault was an attempt to commit a battery and that only.'" People v. Jones, 443 Mich. 88, 91, 504 N.W.2d 158, 160, (1993) (quoting Perkins, *An analysis of assault and attempts to assault*, 47 Minn L R 71, 72 (1962). In State v. Huber, 38 Nev. 253, 148 P. 562, 565 (1915), this Court found that an assault was a failed battery. Because assault was defined as a failed battery, many courts found that attempt assault was a legal impossibility, in that one cannot attempt an attempt.

Whether attempt assault is an offense generally turns upon which definition of assault a jurisdiction has adopted. States such as Georgia, Louisiana, North Carolina, and New Jersey have found that attempt assault is a legal impossibility. See Patterson v. State, 192 Ga. App. 449, 385 S.E.2d 311 (1989); State v. Presley,

758 So. 2d 308 (La. Ct. App. 3d Cir. 2000); State v. Barksdale, 181, N.C. App. 302, 638 S.E.2d 579 (2007); State v. Clarke, 198 N.J. Super. 219, 486 A.2d 935 (App. Div. 1985). However, states such as Alaska, Connecticut, Nebraska, and Michigan have found that attempt assault is not a legal impossibility. See Guertin v. State, 854 P.3d 1130 (Alaska Ct. App. 1993); State v. Scheck, 106 Conn. App. 81, 940 A.2d 871 (2008), cert. denied, 286 Conn. 918, 954 A.2d 979 (2008); State v. Green, 238 Neb. 475, 471 N.W.2d 402 (1991); People v. Jones, 443 Mich. 88, 504 N.W.2d 158, (Mich. 1993).

The cases Appellant relies on focus primarily on the failed battery definition of assault. In Patterson the Georgia Court of Appeals found that the victim was asleep so the apprehension of bodily harm definition of assault was inapplicable. Patterson 192 Ga App. at 453, 385 S.E.3d at 315. The Georgia Court of Appeals then found that the defendant was convicted of an attempt of an attempt, which was a legal impossibility. Id. In Presley, the Louisiana Court of Appeal focused on the failed battery definition finding that a defendant could not plead guilty to "*attempting to attempt* a battery or to place another in reasonable apprehension of receiving a battery with a firearm while using a motor vehicle to facilitate the assault." Presley at 758 So. 2d 309-310, (La. Ct. App. 3d Cir. 2000). In Barksdale the definition of assault was limited to attempts to commit a battery which would

place cause a reasonable person to fear bodily harm. Barksdale 181 N.C. App. at 306, 638 S.E.2d at 582.

In contrast, other courts, who did not focus on the failed battery definition of assault, have consistently found that attempt assault is a legal possibility. The Michigan Supreme Court found that there was "no logical impediment to a conviction for attempted felonious assault where the accused intends, while armed with a dangerous weapon, to cause another to reasonably fear an immediate battery." Jones, 443 Mich. at 101, 504 N.W.2d at 164. Likewise, the Washington Court of Appeals has examined whether attempt assault is a legal impossibility and acknowledged that there can be issues when attempt assault is based on the failed battery version of assault. State v. Music, 40 Wn. App. 423, 432, 698 P.2d 1087, 1093, (Wash. Ct. App. 1985). However, the court went on to note that the reasonable apprehension of bodily harm definition of assault did not involve an attempt and thus there was no logical conflict of charging one with an attempt to put another in apprehension of harm. Id.

Applying the above rationale to the present case, this Court should find that attempt assault is legally possible. Here, there is no logical impediment to finding that Appellant attempted to assault Bejarano. After Appellant set Bejarano aflame, he walked up to Bejarano and threatened to cut his penis off. 5 AA 789-790. Like Washington and Michigan, Nevada's assault statute allows for someone to be

convicted of assault if they intentionally place "another person in reasonable apprehension of immediate bodily harm." NRS 193.330(2). This definition of assault does not involve an attempt. Therefore, there is no logical impediment in finding that Appellant attempted to assault Bejarano. Appellant's actions were not an attempt to attempt. Appellant threatened to cut off Bejarano's penis while waiving a knife towards his genitals. 5 AA 789-780. Bejarano likely could not appreciate the threat because of the extreme trauma he was experiencing when Appellant threatened him. As such, Appellant tried to assault Bejarano but failed because Bejarano was in so much pain that he could not appreciate Appellant's threat to cut his penis off.

Because Nevada's definition of assault includes placing another in another person in reasonable apprehension of immediate bodily harm, this Court should find that Attempt Assault is a crime in Nevada and affirm Appellant's conviction.

9. Preservation of the Issue.

The above issues were fully litigated and properly preserved for appeal.

VERIFICATION

1. I hereby certify that this Fast Track Response 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 Fast Track Response has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the type-volume limitations of NRAP 32(a)(8)(B) because it is proportionately spaced, has a typeface of 14 points and contains 3,940 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 14th day of January, 2015.

Respectfully submitted,

STEVEN B. WOLFSON
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BY */s/ Jonathan E. VanBoskerck*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 14, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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