IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 69139

GENARO PERRY
Appellant,

vs.

STATE OF NEVADA
Respondent.

Appeal from a Judgment of Conviction

Eight Judicial District Court, Clark County

The Honorable Elissa F. Cadish, District Court

FAST TRACK STATEMENT

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IN THE SUPREME COURT OF THE STATE OF NEVADA

GENARO PERRY, Appellant, vs. THE STATE OF NEVADA, Respondent.	**Supreme Court No.: 69139** **District Court No.: C298879** **District Court Dept. No.: 6**

STATEMENT OF JURISDICTION

This is a direct appeal from a Judgment of Conviction entered on or about October 1, 2015 against Appellant Genaro Richard Perry by the Honorable District Court Judge Cadish after a bench trial. Pursuant to NRAP 17(b) "[t]he Court of appeals shall hear and decide only those matters assigned to it by the Supreme Court. The following case categories are presumptively assigned to the Court of Appeals: … any direct appeal from a judgment of conviction based on a jury verdict that does not involve a conviction for any offenses that are category A or category B felonies;…"

NRAP 17(b)(1). As discussed below, Perry was convicted of five Category B felonies, one Category C felony, and one Category D felony at bench trial. Accordingly, the following Fast Track appeal should be assigned to the Supreme Court.

FAST TRACK STATEMENT

1. **Name of party filing this fast track statement: GENARO PERRY**

2. **Name, law firm, address and telephone number of attorney submitting this fast track statement:** TRAVIS E. SHETLER, Esq., Law Office of Travis E. Shetler, 844 E. Sahara Avenue, Las Vegas, Nevada 89104, phone number 702-866-0091.

3. **Name, law firm, address and telephone number of appellate counsel if different from trial counsel:** TRAVIS E. SHETLER, Esq., Law Office of Travis E. Shetler, 844 E. Sahara Avenue, Las Vegas, Nevada 89104, phone number 702-866-0091.

4. **Judicial district, county, and district court docket number of lower court proceedings:** Eight Judicial District Court, Clark County, Department VI, District Court No. C-14-298879-1.

5. **Name of judge issuing decision, judgment, or order appealed from**: District Court Judge, Elissa F. Cadish, Department VI.

6. **Length of Trial. If this action proceeded to trial in the district court, how many days did the trial last?** Three (3) days, from September 29, 2015 to October 1, 2015.

7. **Conviction(s) appealed from:** Verdict of guilty on Count 1 – Robbery with Use of a Deadly Weapon, Count 2 – False Imprisonment with Use of a Deadly Weapon, Count 3 – Grand Larceny Auto, Count 4 – Assault with a Deadly weapon, Count 5 – Coercion, Count 6 – Battery Resulting in Substantial Bodily Harm Constituting Domestic Violence, Count 7 – Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution. (AA 00407-AA00409)

8. **Sentence for each count:** Defendant was adjudged guilty of said offenses, and in addition to the $25.00 Administrative Assessment Fee, and $35.00 Domestic Violence Fee, $250.00 Indigent Defense Civil assessment Fee, Restitution in the amount of $18,103.28, and a $150.00 DNA Analysis Fee including testing to determine genetic markers, plus a $3.00 DNA Collection Fee, the Defendant was sentenced to the Nevada Department of Corrections (NDC) as follows: AS to COUNT 1 – to a Maximum of One

Hundred Twenty (120) months with a minimum parole eligibility of Thirty-Six (36) months, plus consecutive term of One Hundred Twenty Months Maximum with a Minimum Parole Eligibility of Thirty-Six (36) months for use of a deadly Weapon; As to COUNT 2 – To a Maximum of Sixty (60) months with a Minimum Parole Eligibility of Eighteen (18) months, Count 2 to run Concurrent with Count 1; As to COUNT 3 – To a Maximum of Ninety-Six (96) months with a Minimum Parole Eligibility of Twenty-Four (24) Months, Count 3 to run Consecutive to Counts 1 & 2; As to COUNT 4 – To a Maximum of Sixty (60) months with a Minimum parole Eligibility of Eighteen (18) Months, Count 4 to run Concurrent with Count 3; As to COUNT 5- To a Maximum of Sixty (60) Months with a Minimum Parole Eligibility of Eighteen (18) months, Count 5 to run Concurrent with Count 4; As to COUNT 6 – To a Maximum of Forty-Eight (48) Months with a Minimum Parole Eligibility of (18) Months, Count 6 to run Concurrent with Count 5; as to COUNT 7 – to a Maximum of Thirty-Six (36) Months with a Minimum Parole Eligibility of Twelve (12) Months, Count 7 to run Concurrent with Count 6; with Five Hundred Ninety-Seven (597) Days credit for time served. Defendant's Aggregate total sentence is Three

Hundred Thirty-Six (336) Months Maximum with a Minimum of Ninety-Six (96) Months. (AA 00407-AA00409)

9. **Date district court announced decision, sentence, or order appealed from:** October 1, 2015.

10. **Date of entry of written judgment or order appealed from:** January 22, 2016.

(a) **If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:** N/A

11. **If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the court:** N/A

12. **If the time for filing the notice of appeal was tolled by a post-judgment motion:**

(a) **specify the type of motion, and the date of filing of the motion:** N/A

(b) **date of entry of a written order resolving the motion:** N/A

13. **Date notice of appeal filed:** November 10, 2015. (AA 00428)

14. **Specify statute or rule governing the time limit for filing the**

notice of appeal, e.g., NRAP 4(b), NRS 34.560, NRS 34.575, NRS 177.015, or other: NRAP 4(b).

15. **Specify statute, rule or other authority which grants this court jurisdiction to review the judgment or order appealed from:** NRS 177.015(3).

16. **Specify the nature of disposition below, e.g., judgment after bench trial, judgment after jury verdict, judgment upon guilty plea, etc.:** Judgment after Bench Trial Verdict.

17. **Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (e.g., separate appeals by co-defendants, appeals after post-conviction proceedings):** N/A

18. **Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants):** Appellate counsel is unaware of any other pending and prior proceedings in other courts.

19. **Proceedings raising the 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 you intend to raise in this appeal:** Appellate counsel is unaware of any pending proceedings before this Court which raise the same issues as the instant appeal.

20. **Procedural history. Briefly describe the procedural history of the case (provide citation for every assertion of fact to the appendix, if any, or to the rough draft transcript):**

Appellant Genaro Perry (hereinafter "PERRY") was charged with Robbery with use of a deadly weapon, False Imprisonment with use of a Deadly Weapon, Grand Larceny Auto, Assault with a Deadly Weapon, Coercion, Battery Resulting in Substantial Bodily Harm Constituting Domestic Violence, and Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution on May 1, 2014. (AA 00006-AA 00009) PERRY unconditionally waived his right to a preliminary hearing on June 19, 2014. (AA 00010) PERRY was arraigned in District Court on June 26, 2014 and plead "not guilty". (AA 00005) Jury Trial began on May 6, 2016 with Jury Selection. (AA 00015- AA However, this trial

was continued several weeks because of issues with an essential witness' availability. (AA 00157-AA 00167) PERRY and the State stipulated to a Bench Trial on September 21, 2015 and a Bench Trial was granted. (AA 00405- AA 00406) Trial began on September 30, 2015 and continued until October 1, 2015. (AA 00187- AA 00404) After a finding of guilty by the Judge, PERRY was sentenced by the Court on January 6, 2016 as more fully described in the judgment of conviction. (AA 00407- AA 00409)

21. **Statement of Facts. Briefly set forth the facts material to the issue on appeal:**

On the First day of Trial, Appellant argued Self-Defense and presented evidence of the Victim, Ms. Carpenter's, prior violent actions and Mr. Perry's knowledge of same as a basis for his state of mind and his decision to protect himself. It is Appellant's position that the evidence justified his actions as self-defense and the returned verdict was unsupported by the evidence presented at trial.

Evidence of a violent incident caused by the Victim, of which the Defendant was aware, was introduced at trial to explain the Defendant's state of mind. Ms. Carpenter testified on direct examination, while being

questioned by the State, as to a violent incident that occurred at a T.J. Maxx as follows:

"Q. What happened inside the T.J. Maxx?

A. I chased her. We had a brief argument and I chased her though the store. I think I had a weapon. It was a crowbar and I chased her. What happened was when we had the altercation she did not have the amount of money that she had said she would have. And at that point I was furious. All I could think about is I am so sick, and here it is my daughter had to return to school, and she's led me on a goose chase and I lost my temper. And I went to threaten her. I didn't go to hurt her; I went to threaten her. And when she started running I started chasing her.

Q. Now, Ms. Carpenter, do you take responsibility for that action?

A. Absolutely.

Q. Did you plead guilty to a misdemeanor assault and a misdemeanor carrying concealed weapons?

A. Yes.

Q. Now did you complete the requirements that were outstanding in that case?

A. Yes, I did." (AA 00260- AA 00262)

During cross examination by the Appellant's attorney, the regarding the incident at the T.J. Maxx continued:

"Q. Ms. Carpenter, I want to go back briefly to the T.J. Maxx incident before we go over to the condo. Do you remember what weapon you told the Court you had with you that day?

A. I do. I think I said a crowbar.

Q. Was there another weapon also?

A. There was a knife; yes.

Q. And you told the Court – Mr. Perry know about that incident; is that correct?

A. He did.

Q. Did you – you told the Court that you took responsibility for that incident; correct?

A. Yes, I did.

Q. You said you pled to a misdemeanor case?

A. Yes.

Q. Was that how it was charged originally?

A. It was not charged as a misdemeanor originally.

Q. What was the original charge?

A. I believe there were two charges. There was a charge of an assault with a deadly weapon and I don't know the other charge.

Q. You had mentioned that you'd recently undergone – I believe you said a spinal tap –.

A. Yes.

Q. – shortly before that? And I don't want to take a lot of your time on that and I don't want to pry, but what type of symptomology were you having that required the spinal tap?

THE WITNESS: I don't know. Am – do I answer that?

THE COURT: Yes.

THE WITNESS: Okay. I don't recall exactly. I just know that when I got to the hospital – it was during that time I had a lot of complications, but when I got to the hospital that's the procedure that the ER recommended.

BY MR. SHETLER:

Q. Do you remember how long before the T.J. Maxx incident that was?

A. Two or three days, I believe.

Q. And were those – the complications that you talked about having, were those stemming from an accident of some type?

A. No.

Q. Did any of those complications you were having cause you to have any problems with your vision?

A. No.

Q. Any problems with your teeth?

A. No.

Q. Any problems with insomnia?

A. No.

Q. Any problems with an inability to control your anger?

A. I'm sorry. I don't understand where – what you mean. Are you –

MR. SHETLER: I'll re ask it. And, please, if I do ask a question sometimes I get so excited about my own words just please ask me to repeat it; okay?

BY MR. SHETLER:

Q. The – you said, I believe – I'm paraphrasing, bear with me. You said – talking about the T.J. Maxx incident and the victim in that – what was the victim's name in that case?

A. I don't recall her entire name at this point.

Q. She led you on a goose chase all over town?

A. Yes.

Q. And I don't remember if you said you'd snapped or you just lost it. Do you remember the words you used?

A. I think I said I lost it.

Q. That's what I'm talking about. Did the – did the complication you were having that led up to whatever other procedures were performed, including the spinal tap, were those complication – would they cause you to lose it, or not to be able to control your anger?

A. No, it had nothing to do with the spinal tap. I was agitated at her.

Q. Have you had any other incident where you lost control of yourself in public like that?

A. No.

MS. SUDANO: And, Your Honor, I'm going to – I withdraw that [indiscernible].

THE COURT: Okay.

BY MR. SHETLER:

Q. How did Mr. Perry know about that incident?

A. We shared several things in confidence with each other that we had done in our past." (AA 00266- AA 00300)

This testimony showed that Ms. Carpenter had previously used violence against an individual who owed her money. Ms. Carpenter admits to the Court that she used violence against that victim because "she did not have the amount of money that she had said she would have" (AA 00261). Further, during Cross Examination, Ms. Carpenter admitted that the

Appellant owed her money at the time of the incident, and confirmed this on Redirect Examination. (AA 00301)

At the conclusion of Ms. Carpenter's testimony, the Court, sitting as Finder of Fact as this is a Bench Trial, asked several questions. At the conclusion of the first day of trial, Appellant had not yet made a decision as to testifying in his own defense. The Court further advised him of his Constitutional right not to testify in his own defense, and that the Court, as the trier of fact in this case is not permitted to take that into consideration or draw any conclusions from his choice not to testify.

On this second day of trial, the Defense represented to the Court that the Appellant had chosen not to testify at trial. Further, the defense made an offer of proof as to possibly calling the Security Guard on duty at the aforementioned T.J. Maxx incident. The Defense represented that they wished to present this evidence so as to paint a more complete picture of Ms. Carpenter by giving additional detail of the violent actions that occurred at the T.J. Maxx. The Court, sitting as trier of fact in this case, stated that they would "only [allow] information about that incident to the extent that it affected your client's... state of mind... that day. So unless he talked to the

security guard I don't' see how that would be pertinent to that issue." (AA 00370- AA 00372)

At this time, because the Appellant, Mr. Perry, chose not to testify, and the Court disallowed the Security Guard's testimony, the Defense rested.

On the third day, the Parties and the Court discussed Jury Instructions. Originally, the Jury Instructions included an instruction on Self-Defense. However, the State objected to those being included as it was their opinion that there was no evidence to support the giving or including of self-defense instructions in this case. However, the Defense requested that they remain. The Court ruled in there was no evidence of self-defense, and struck the jury instructions pertaining to self defense. (AA 00376- AA 00381) At closing, the Defense is not permitted to comment on the Appellant's State of Mind at the time of the incident, as those facts are not in evidence. At closing, the State argued that none of the events that happened at the T.J. Maxx were properly presented to the Court, because the Appellant was unable to present any evidence of self-defense. The State argued that what happened at the T.J. Maxx was not a material fact to this case. (AA 00381- AA 00402) The Court adjourned to Chambers to deliberate, and returned one hour later with a verdict of guilty on all counts against the Appellant, Mr. Genaro Perry.

(AA 00403- AA 00404)

21. **Issues on appeal. State concisely the principal issue(s) in this appeal:**

A. Whether the District Court improperly prevented PERRY's introduction of testimony necessary to establish the Appellant's State of Mind.

B. Whether the District Court improperly excluded Self-Defense Jury Instructions for the Trier of Fact to consider prior to deliberations.

C. Whether the District Court returned a verdict unsupported by the evidence.

22. **Legal Argument, including authorities.**

A. The District Court Improperly Prevented PERRY's introduction of testimony necessary to establish the Appellant's State of Mind.

The Defense's case in chief relied on testimonial evidence from a gentleman who worked as a Security Guard for T.J. Maxx. This Security Guard was present and involved in an incident during which Ms. Carpenter pulled out a knife and began chasing another woman around a T.J. Maxx retail store. The Security Guard would have been able to describe, in detail, the violent incident that occurred on that day. Although Ms. Carpenter had recounted the events of this incident to the Appellant, this testimony would

have been used to provide additional details of the incident, and clarify the Appellant's State of Mind at the time of the events surrounding this case. Ms. Carpenter's previously violent act would have shown why Mr. Perry could have acted in self-defense, as he was aware of Ms. Carpenter's tendency to use violence against another individual, in a public setting, when she is owed money. The Court ruled that because the victim herself, Ms. Carpenter, acknowledged the event and described what happened during her testimony, it was unnecessary for the Security Guard's testimony to be introduced into evidence. (AA 00372- AA 00374) The Court further ruled that because Mr. Perry did not speak to the Security Guard himself at the time of the incident, the Security Guard's testimony does demonstrate Mr. Perry's state of mind at the time of the incident. (AA 00373-AA 00374) It is the Appellant's position, however, that additional, accurate detail of the T.J. Maxx events would have provided a more accurate depiction of Mr. Perry's state of mind at the time of their altercation. (AA 00373)

The Supreme Court reviews a District Court's decision to exclude evidence in a criminal case for abuse of discretion. Means v. State, 120 Nev. 1001, 1007-08, 103 P.3d 25, (2004). In this case, the District Court abused its discretion when it excluded testimonial evidence that would have

provided some evidence of self-defense. Without the Appellant's testimony, this witness' testimony was the only method of introducing Mr. Perry's state of mind at the time of the attack. If the Security Guard had been permitted to testify, in detail, as to the violence that Ms. Carpenter was capable of, it would have supported the Appellant's contention that the wounds inflicted on Ms. Carpenter could have been defensive in nature. Since Mr. Perry had knowledge of the T.J. Maxx incident, and had knowledge that the violent actions committed at the T.J. Maxx were due to Ms. Carpenter being owed money, it demonstrated that Mr. Perry feared physical retribution for his inability to repay the debt he owed Ms. Carpenter.

This Court erred in preventing the Appellant from expounding his theory of self-defense through testimonial evidence of a prior violent action to explain his State of Mind. Mr. Perry might have been able to justify the injuries purportedly inflicted on Ms. Carpenter.

B. The District Court Improperly Excluded Self-Defense Jury Instructions for the Trier of Fact.

The District court erred by excluding the proposed self-defense Jury Instructions, and timely argued as to their inclusion. This Court ruled, in

Culverson v. State, 106 Nev. At 487-88, 797 P.2d at 239-40 "a reasonably perceived apparent danger as well as actual danger entitles a defendant to an instruction on self-defense. Only apparent danger, rather than actual danger, is required to become entitled to a Jury Instruction."

At the conclusion of the Parties' cases in chief, the Court, acting as Trier of Fact requested Jury Instructions. Prior to closing statements, the Court was to read the instructions to herself, acknowledge their reading and proceed with her deliberations. The State objected to the inclusion of self-defense instructions, arguing that there was no evidence to support the inclusion of the self-defense instruction. (AA 00378) The Appellant argued that there was evidence to support those instructions. (AA 00378) The Court ruled in the State's favor, stating that "there is no evidence that Ms. Carpenter made any threat or threatened any kind of violence or held a weapon or said she was going to do anything to cause the Defendant harm. So, I think the State is correct that there is not evidence to support the giving o those instructions in this case. I just – there just isn't any evidence of self-defense." (AA 00378-AA00379)

While it was only possible to infer self-defense through the victim's cross examination at this trial, that inference should be sufficient to require a self-

defense instruction. The Court erred in excluding the Self-Defense jury instruction, excluding self-defense as a plausible outcome prior to deliberations.

C. The District Court Returned a Verdict Unsupported by the Evidence.

The State did not present sufficient evidence at trial for a rational trier of fact to find him guilty beyond a reasonable doubt. The returned verdict did not reflect the presented evidence, as it did not take self-defense into consideration during its deliberations. "When determining whether a verdict was based on sufficient evidence to meet due process requirements, this court will inquire 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." Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) Had the Court permitted the introduction of the Security Guard's testimony, the Trier of Fact would have been unable to return a verdict of guilty beyond a reasonable doubt.

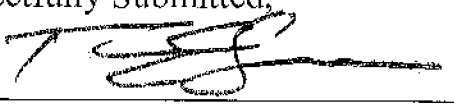
Cumulatively, each of these errors committed by the District Court during Mr. Perry's Bench Trial consist of reversible error. Had the Court permitted testimony from the Security Guard as to Mr. Perry's state of mind

and had the Court permitted the Jury Instructions as to self defense, it could have returned a verdict of "not guilty".

24. **Preservation of issues. State concisely how each enumerated issue on appeal was preserved during trial. If the issue was not preserved, explain why this court should review the issue:** Issues were preserved by Motion, by oral objection and hearings outside of the presence of the jury, as recounted above.

25. **Issues of first impression or of public interest. Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest? If so, explain:** No.

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

1. 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 Corel Word Perfect in font size 14 and a type style of Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of of NRAP 3C(e)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(D), it is either proportionately spaced, has a typeface of 14 points or more and does not exceed 15 pages or 7,000 words and 650 lines of text, that the brief contains approximately 4,070 words and 437 lines of text.

3. Finally, I hereby certify 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 on this 21st day of June, 2016.

LAW OFFICE OF TRAVIS E. SHETLER

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of TRAVIS E. SHETLER, P.C., and that on the ____ day of June, 2016, I caused the Fast Track Statement to be served as follows:

[ ] by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid; and/or

[ ] pursuant to EDCR 7.26, by sending it via facsimile; and/or

[ ] by hand delivery via runner

[X] via electronic service

to the attorneys listed below:

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An Employee of TRAVIS E. SHETLER, PC.