ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

MACK MASON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 37964

FILED

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FACTUAL MATTERS

The rendition of facts provided in the State's Answering Brief omits a full description of the relationship between MASON and Felicia Jackson. The dynamics of their relationship is key to a full understanding of the case and to the defense put forward by MASON at trial. At trial MASON testified that it was Felicia that shot Thomas. (5 APP 699-700) Thus, her credibility was a crucial issue in the case. The State in it's Answering Brief made no reference to any of the witnesses that testified during the defense case, illustrating the one-sided presentation of the facts.

Trial testimony from Felicia was that the only relationship she had with MASON from 1995 to 1999 was that of friends. (3 APP 233) Yet they had opened a savings and checking account together, had done a joint tax return and put money down on an engagement ring. (3 APP 234-235) At the preliminary hearing Felicia had admitted she and MASON were in a relationship in April, 1999 and that she had been over to Flora Mason's house five or six times. (3 APP 238; 242) Renay Matthews verified that she had seen MASON and Felicia hugging and kissing in the month prior to May 10, 1999. (5 APP 631)

The State ignored in it's Statement of Facts the testimony of Theenda Jones that she had seen Felicia with a gun the day before Thomas was killed. (5 APP 601-603) Christopher Jones was able to identify the gun recovered at the Vista Motel as looking like a gun Felicia tried to sell to him. (5 APP 620-

21) Finally, Robert Jones contradicted the testimony of Flora Mason as he recalled that MASON was living at Flora's house at the end of April, 1999 because he delivered MASON'S salary to him at her house.

A full and accurate review of the trial testimony reveals that this was a close case with the crucial issue being the respective credibilities of MASON and Felicia. The closeness of the case is illustrated by the not guilty verdict on Count II, involving the alleged theft of the revolver that was used to shoot Thomas. As the jury was not convinced that MASON had taken the gun, a reasonable doubt must have existed whether Felicia had taken the gun on one of her visits to Flora's house and therefore was the one in possession of the gun when Wolf was shot.

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ARGUMENT

I.

THE MALICE INSTRUCTION GIVEN TO THE JURY WAS VAGUE AND AMBIGUOUS AND VIOLATED MASON'S PRESUMPTION OF INNOCENCE

The State incorrectly recites that the challenged Instruction No. 16 states that "Malice shall be implied". (Ans. Brf. p. 11) The instruction that was given to the jury complies with Cordova v. State, 116 Nev.Ad.Op. 78 (2000), and states that "Malice may be implied...." (1 APP 30) Nonetheless the infirmity of the instruction remains as the language "abandoned and malignant heart" is unconstitutionally vague.

The State fails to respond to the authorities cited by MASON that show that the archaic term "abandoned and malignant heart" are improperly vague, i.e., Victor v. Nebraska, 511 U.S. 1 (1994) and People v. Phillips, 414 P.2d 353 (Cal 1966). Instead the State takes three separate positions, that any instructional error is harmless, that this Court has approved the instruction when read in conjunction with the malice aforethought instruction (No. 15, 1 APP 29), and that the jury may never have reached a decision as to malice because the State also charged felony-murder. Each of the State's arguments is without merit.

As discussed in the preceding section this case was not overwhelming and a great deal of conflicting evidence was presented to the jury. In a close case even a single

instructional error can require reversal of a conviction. In Wegner v. State, 116 Nev.Ad.Op. 120 (2000) this Court found that a presumption of malice instruction required reversal because the case lacked overwhelming evidence of guilt and the case relied almost exclusively on conflicting medical testimony. Similarly, in the case at bar the case was based almost entirely on conflicting witness testimony.

The State accuses MASON of failing to mention Instruction No. 26 which defined the felony murder rule, and then argues that the jury may never had contemplated the distinction between first and second degree murder. (Ans. Br. p. 12) The State is asking this Court to do what a jury is instructed never to do -- speculate. Perhaps the jury only considered premeditated and deliberate murder and never contemplated felony-murder. There was no special verdict form that specified the basis of the first degree murder conviction. Further the jury was allowed to return a verdict without a finding of unanimity required. (See Argument II)

This jury was unconstitutionally instructed on the malice component of first degree murder and the verdict impacted was by the instruction. The conviction must therefore be reversed.

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II.

THE REASONABLE DOUBT INSTRUCTION VIOLATED THE DUE PROCESS CLAUSE OF THE UNITED STATES AND NEVADA CONSTITUTION

MASON respectfully relies upon the arguments and authorities contained in his Opening Brief, and submits that the instructional error requires reversal of the conviction.

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III.

THE UNANIMITY INSTRUCTION GIVEN TO THE JURY VIOLATED MASON'S DUE PROCESS RIGHTS AND RELIEVED THE STATE OF ITS BURDEN OF PROOF

The State correctly cites to Evans v. State, 113 Nev. 885, 944 P.2d 253 (1997) and Walker v. State, 113 Nev. 853, 944 P.2d 51 (1997) in support of it's position. (Ans. Brf. p. 16) MASON would point out, however, the fallacy of an argument that is based on the proposition that a "jury need not be unanimous".

In Evans, supra, the Court noted that it would not require unanimity because:

> "In this case, Evans was charged with first-degree kidnapping with the intent to kill or inflict substantial bodily injury. We hold that the Constitution does not require separate instructions or jury unanimity on the alternative theories of premeditated and felony murder in this case because actual intent to kill during the commission of a kidnapping can reasonably be considered the 'moral equivalent of premeditation.'"

Evans, 113 Nev. at 895-896. In the case at bar MASON was not charged with first-degree kidnapping and the victim of the kidnapping was not the person that was killed. Under such circumstances there was no "moral equivalent of premeditation" to kill in the underlying felonies.

This Court should re-examine it's holdings in Evans and Walker and require the juries in Nevada make unanimous findings of guilt and theory of liability before convicting a defendant of first degree murder.

IV.

THE COURT ERRED IN DECLINING
TO INSTRUCT THE JURY
REGARDING CONFLICTING EVIDENCE

MASON respectfully relies upon the arguments and authorities contained in his Opening Brief, and submits that the instructional error requires reversal of the conviction.

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V.

THERE WAS NOT SUFFICIENT EVIDENCE
TO CONVICT MASON OF FIRST DEGREE MURDER

The State asserts that in reviewing a claim of insufficiency of evidence the Court must view the evidence in the light most favorably to the prosecution, citing Oriegel-Candido v. State, 114 Nev. 378, 956 P.2d 1378 (1998). While this may be a correct statement of the standard of review, it does not mean that the Court should only look at the State's rendition and interpretation of the evidence. This is especially true when the State fails to address the evidence presented by the defense at trial.

The State keys in on the testimony of Kevin Brown that MASON came to the door and pulled a gun, pushed it into Brown's abdomen and told him to leave. (Ans. Brf. p. 19-20) The State fails to address that Brown described the gun held by MASON as a 12 inch chrome revolver. (4 APP 431-32) Brown described the chrome as the color of a bumper of a car and never said it was pushed against his stomach but rather pointed at him. (4 APP 431-32)

The rest of the State's version of the facts is based on the uncorroborated testimony from Felicia Jackson, who was shown to have falsified much of her testimony. Two witnesses saw Felicia with the revolver in the days prior to Wolf's death. She had access to steal the gun from Flora as late as the end of April, 1999. Her behavior after the shooting was

not consistent with a witness to a murder who had been kidnapped. To the contrary, it was she that hid under a bed and tried to avoid detection when the police came into the room.

Given all that was presented at trial, the circumstances were equally consistent with MASON'S innocence of the charges. See Woodall v. State, 97 Nev. 235, 627 P.2d 402 (1981). This Court upon review of the record and the acquittal of Count II should reverse MASON'S conviction.

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VI.

IT WAS IMPROPER TO ADMIT THE PHOTOGRAPH OF THE DECEASED LAYING ON A GURNEY AT THE MORGUE WITH A BLOODY FACE WHEN IDENTITY WAS NOT AN ISSUE

MASON agrees with the State that relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probably than it would be without the evidence." NRS 48.015. The problem with the questioned photograph is that it had absolutely nothing to do "any fact that is of consequence to the determination of the action."

The identity of Thomas was not at issue. Neither were the cause and manner of death at issue. Contrary to the argument of the State MASON is challenging the photograph shown to Felicia Jackson not the autopsy photos that were admitted during the testimony of the coroner. At trial MASON explained this to the Court:

> "MR. SCHIECK: Number 13 of Mr. Thomas. We had objected. Our objection was that the photograph had blood on his face. It was a rather gruesome photograph. Although it didn't show open body parts or things like that, there was blood smeared on his face. He's laying on the gurney at the Coroner's Office. Our objection was that it was -- that identity is not an issue in this case, we're not arguing that Dudley Smith - I mean, Dudley Thomas is not the individual that was shot and killed, and that it was being offered, at that point, just to invoke a sympathetic response from Ms. Jackson, which, in fact, when she was shown the photograph, she turned her face away and grimaced as if it was a terrible thing for her to look at. And that was our objection to the admission." (3 APP 297)

In response, the state could articulate to legitimate

reason to show the photograph to Felicia during re-direct examination. The prejudicial effect outweighed any possible probative value and this Court should condemn such action.

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VII.

THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE PENALTY HEARING EVIDENCE IN VIOLATION OF RULE 250

MASON has fairly set forth his position on the interpretation of Supreme Court Rule 250(4)(f), and the State has explained it's contrary view. In this case MASON did not receive the death penalty, however, this Court must either amend the Rule to be more specific or resolve the issue of "evidence in aggravation". The interpretation of MASON is consistent with the full disclosure contemplated by Rule 250.

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CONCLUSION

Based on the authorities herein contained and in the Opening Brief heretofore filed with the Court, it is respectfully requested that the Court reverse the conviction and sentence of MACK MASON and remand the matter to District Court for a new trial.

Dated this 29 day of January, 2002.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF COMPLIANCE

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), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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: January 29, 2002

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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Reply Brief was made this 30 day of January, 2002, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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