SUPREME COURT OF THE STATE OF NEVADA

DANIEL JAMES RODRIGUEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.
_____/

No. 71920

APPELLANT'S APPENDIX

MARTIN H. WIENER, ESQ.
NBN 2115
316 South Arlington Avenue
Reno, Nevada 89501
(775) 322-4008
mw@pinecrest.reno.nv.us
ATTORNEY FOR APPELLANT

APPENDIX

ALPHABETICAL TABLE OF CONTENTS

Stamped Page #

APPENDIX

CHRONOLOGICAL TABLE OF CONTENTS

Stamped Page #

IN THE SECOND JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEFORE THE WASHOE COUNTY GRAND JURY

-oOo-

4189

IN THE MATTER OF: Case No. CR16-0567

DANIEL JAMES RODRIGUEZ / Dept. No. 15

PROCEEDINGS

WEDNESDAY, APRIL 13, 2016

3:30 P.M.

APPEARANCE:

For the State: MATTHEW LEE, ESQ.
PATRICK MANSFIELD, ESQ.
Deputy District Attorneys
Washoe County Courthouse
Reno, Nevada

Reported By: RANDI LEE WALKER, CCR #137
NEVADA/CALIFORNIA CERTIFIED
REGISTERED PROFESSIONAL REPORTER
Computer-Aided Transcription

I N D E X

THE FOREPERSON: Thank you.

GEORGE PLEASANT,

called as a witness by the State,

who, having been first duly sworn, was examined

and testified as follows:

EXAMINATION

BY MR. LEE:

Q Sir, do you see the picture right in front of you, as Exhibit Number 1?

A Yep.

Q Do you recognize that individual?

A Yes, I do.

Q Is that Mr. Rodriguez?

A Yep.

Q Did you see him do something to Mr. Dufrisne?

A Yes, I did.

Q What did he do?

A He came out of his apartment and attacked Glen with a screwdriver.

Q Did you see the screwdriver?

A Sure did.

Q Can you describe it for us?

A The handle was about two inches long. The blade was about -- regular standard screwdriver, three-to-four inches long.

Q What did Mr. Rodriguez do after he did that?

A After he stabbed him?

Q Yes, sir.

A Had a calm look on his face, turned and walked to the sidewalk, turned left and headed downtown.

MR. LEE: Mr. Foreperson, that's all the questions I have.

THE FOREPERSON: Does anyone have any questions?

Mr. Pleasant, the proceedings before the Grand Jury are secret. You may not disclose evidence presented to the Grand Jury, any event occurring, or statement made in the presence of the Grand Jury, any information obtained by the Grand Jury, or the results of the investigation being made by the Grand Jury.

However, you may disclose the above information to the District Attorney for use in the performance of his duties.

You also may disclose your knowledge concerning the proceeding, when directed by a court, in connection with judicial proceedings, or when otherwise permitted by the court, or to your own attorney.

DA #15-12768

RPD RP15-021677

FILED

APR 13 2016

JACQUELINE BRYANT, CLERK
By: DEPUTY CLERK

CODE 1795
Christopher J. Hicks
#7747
P.O. Box 11130
Reno, NV 89520
(775) 328-3200

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

DANIEL JAMES RODRIGUEZ,

Defendant.

_____/

Case No.: CR16D567

Dept. No.: D15

INDICTMENT

The defendant, DANIEL JAMES RODRIGUEZ, is accused by the Grand Jury of Washoe County, State of Nevada, of the following:

BATTERY WITH A DEADLY WEAPON CAUSING SUBSTANTIAL BODILY HARM AGAINST A PERSON 60 YEARS OF AGE OR OLDER, a violation of NRS 200.481(2)(e) and NRS 193.167, a felony, committed as follows:

That the said defendant, on or about the 29th day of September, 2015, or thereabout, within the County of Washoe, State of Nevada, did willfully and unlawfully use force or violence upon the person of Glen Dufrisne, a person over the age of 60, at or near 195 W. 2nd Street, Washoe County, Nevada, with a deadly weapon, to wit:

///

a screwdriver, by stabbing the victim in the neck, resulting in substantial bodily harm.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 13th day of April, 2016.

CHRISTOPHER J. HICKS
District Attorney

By _____
MATTHEW LEE
10654
DEPUTY District Attorney

PCN RPD1510277C-RODRIGUEZ

The following are the names of witnesses examined before the Grand Jury:

GLEN JOHN DUFRISNE
GEORGE CLAYTON PLEASANT

"A TRUE BILL"

FOREMAN

"NO TRUE BILL"

FOREMAN

2315
MARTIN H. WIENER, ESQ.
NBN 2115
316 South Arlington Avenue
Reno, Nevada 89501
(775) 322-4008
Attorney for Defendant

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

vs.

DANIEL RODRIGUEZ,

Defendant.
_____/

Case No. CR16-0567
Dept. No. 15

MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE

Defendant DANIEL RODRIGUEZ, through his undersigned counsel, moves to dismiss the Indictment filed herein.

This Motion is based on the following Points and Authorities, and on those contained in attached Exhibit 1.

POINTS AND AUTHORITIES

HABEAS CORPUS GROUNDS ARE INCORPORATED

This Motion is based on the lack of admissible evidence in the grand jury record to support a finding of probable cause to indict Mr. Rodriguez.

These issues have been previously presented to the Court in Defendant's Petition For Writ of Habeas Corpus. **The Points and Authorities submitted to the Court in support of the Petition for Writ of Habeas Corpus are attached hereto as Exhibit 1, and are incorporated herein as if fully set forth.**

///

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

req to g.c
C.A + mother

MOTION TO DISMISS IS PROPER

The Nevada Supreme Court will reverse a conviction if there was insufficient evidence of probable cause to support an information or indictment, even where there is a denial of a pre-trial writ of habeas corpus challenging probable cause, Frutiger v. State, 111 Nev. 1385, 1390, 907 P.2d 158 (1995).

If the Supreme Court can reverse a conviction on this ground, then it can be raised in a district court motion to dismiss. This Motion to dismiss is a proper vehicle to bring these issues before the Court, NRS 174.075(2).

The 4-1 majority decision in Frutiger was actually supported by the dissent, too. The dissent questioned the propriety of considering challenges to probable cause after a conviction. It cited two cases on this issue; however, both cases support the majority decision. First, contrary to the dissent's claim, Snow v. State, 101 Nev. 439, 445, 738 P.2d 1303 (1985) **refused** to preclude post-conviction consideration of whether there was probable cause to force the defendant to go to trial. The Snow court spent at least one-half page discussing the sufficiency of the evidence to support the indictment in that case.

The second case cited in the dissent – but supporting the Frutiger majority – was Etcheverry v. State, 107 Nev. 782, 821 P.2d 350 (1991). The dissent's reliance on that case is a mystery. Etcheverry nowhere precludes post-conviction consideration of the sufficiency of evidence to support probable cause for an indictment. In fact, the Etcheverry Court, 107 Nev. at 785, n. 2, reviews the sufficiency of the evidence and legal instructions presented to the grand jury. Also, see Sheriff v. Middleton, 112 Nev. 956, 920 P.2d 282 (1996), where the Supreme Court engaged in an extensive *de novo* review of a preliminary examination's probable cause determination.

The Defendant's constitutional right to due process will be violated if he is required to stand trial with insufficient admissible evidence in the record to establish probable cause to believe that the Defendant committed the charged offense, United States Constitution, 5th and 14th Amendments, and Nevada Constitution, Article 1, §8.

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

CONCLUSION

The Defendant should not have been indicted based on the evidence in the record that was presented to the grand jury, and the indictment should be dismissed.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that this document does not contain the "personal information" of any person, as defined in NRS 603A.040.

DATED: May 19, 2016.

/s/ Martin H. Wiener
MARTIN H. WIENER
Attorney for Defendant

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

Exhibit 1

Exhibit 1

3665
MARTIN H. WIENER, ESQ.
NBN 2115
316 South Arlington Avenue
Reno, Nevada 89501
(775) 322-4008
Attorney for Petitioner

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

In The Matter of The Application
of DANIEL RODRIGUEZ,
For a Writ of Habeas Corpus.
/

Case No. CR16-0567
Dept. No. 15

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

Petitioner DANIEL RODRIGUEZ, through his undersigned counsel Martin H. Wiener, hereby submits his Points and Authorities in support of his Petition for Writ of Habeas Corpus filed herein.

ALLEGED OFFENSE

Daniel Rodriguez was charged by indictment filed April 13, 2016 one count of battery with three additional elements elevating the alleged offense to a felony: with the use of a deadly weapon; causing substantial bodily harm; and, against a person aged 60 or older, an alleged violation of NRS 200.481(2)(e) and 193.167.

INTRODUCTION

Numerous defects in the grand jury proceedings require dismissal of the indictment: (1) the prosecution's improper failure to include in the grand jury record various instructions, "law", and exhibits that were disclosed to grand jurors and discussed by witnesses; (2) the prosecution's improper reliance on inadmissible evidence to support the Indictment; (3) the lack of any record that the grand jurors

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

jury's legal basis for determining whether the charged offenses were committed is not revealed in the record.

All that we know is that the prosecutor presented a proposed indictment which was accepted without alteration by the grand jury.

NEGATIVE INFERENCES FROM PROSECUTION'S SPOILATION OF EVIDENCE

The prosecution should not benefit from its mishandling and misappropriation of the tangible grand jury evidence; and, it will be the prosecution – that acted improperly – that will benefit by depriving Mr. Rodriguez of his constitutional rights to cross-examination.

It violates a long-standing rule of law for the prosecution to have removed grand jury evidence, and for it to then try to argue that **the indictment is supported by the evidence that it removed from the record.** The only inference that this Court can draw from the prosecution's misconduct is that the "exhibits" were unfavorable to its position, PETA v. Berosini, 111 Nev. 615, 626-627, 895 P.2d 1269 (1995); Isola v. Sorani, 47 Nev. 365, 368 (1924), 222 P. 796 (1924) ; State v. McLane, 15 Nev. 345, 369 (1880). See, NRS 47.250(3).

This prosecutorial misconduct merits dismissal because of its impact on the legality of the proceedings, and the impossibility of the prosecutor justifying the Indictment or of this Court reviewing sufficiency of the grand jury evidence.

UNPROVEN: USE OF A DEADLY WEAPON

NOTE: This issue will also be addressed in a motion to dismiss, claiming that the indictment alleging the use of a screwdriver does not charge the crime of battery with a deadly weapon because a screwdriver cannot be a deadly weapon as an element of a battery offense. However, it will also be addressed below in this Petition, claiming that the grand jury should not have determined that a screwdriver met the deadly weapon definition.

There are two competing definitions of "deadly weapon" in our statutes, and the

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

choice of definition depends on the statute which has deadly weapon use as an element: whether it is alleged as an element of an offense (such as in the charged felony battery) or as a basis for sentencing enhancement under NRS 193.165.

First, the sentencing enhancement definition of deadly weapon is inapplicable where use of a deadly weapon is a necessary element of an offense, as it is in this case, NRS 193.165(3).

Second, **the definition of "deadly weapon" is different.** The 1995 legislature (AB 624, p. 1431) amended NRS 193.165 (sentencing enhancement) by adopting both of the two competing definitions of deadly weapons: subsection (5)(a) – the "inherently dangerous" test, and (5)(b) – the "functional" test. Until then, the statute was silent on the definition of deadly weapon.

The "Inherently Dangerous" Test

One definition of "deadly weapon" is the "inherently dangerous" test: was it **designed or manufactured with the intention that its ordinary use is likely to cause serious harm or death?** This definition certainly does not include a hand tool like a screwdriver.

The "inherently dangerous" test was applied to -- and excluded as "deadly weapons" – the following items: steel-toed boots in Zgombic v State, 106 Nev. 571, 577, 798 P.2d 548 (1990); an automobile in Kazalyn v State, 108 Nev. 67, 76, 825 P.2d 578 (1992); scissors in Hutchins v State, 110 Nev. 103, 110, 867 P.2d 1136 (1994); and a hammer in Smith v. State, 110 Nev. 1094, 1102, 881 P.2d 649 (1994). All of those objects failed the "inherently dangerous" test, and none were held to be deadly weapons.

"Inherently Dangerous" Vs. "Functional Test"

The **functional** test is markedly different than the inherently dangerous test. It defines a deadly weapon anything which,

> **"under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm**

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

or death".

NRS 193.165(5)(b). Under this definition, anything that **could** cause death or substantial bodily harm is a deadly weapon: a bucket of water (used for drowning); a pillow (used for smothering); a paper clip (used to puncture an artery); or, an amusing recorded episode of a TV comedy (used to caused falling-down laughter, causing victim to strike his head on a table (another deadly weapon)).

Filling the vacuum caused by the absence of a deadly weapon definition in the sentencing enhancement statute, Zgombic, at 574, specifically overruled the "functional" test that had been adopted by Clem v. State, 104 Nev. 351, 356-57, 760 P.2d 103 (1988).

The 1995 amendment to the sentencing enhancement statute (AB 624, p. 1431) amended NRS 193.165 by adopting Zgombic's "inherently dangerous" test and added the "functional" test that was specifically rejected by Zgombic. The amendment specifically excluded the sentencing enhancement statute's definition of deadly weapon where use of a deadly weapon is a necessary element of an offense, **as it is in this case**, NRS 193.165(3).

The "inherently dangerous" test must apply when "deadly weapon" is an element of the offense:

1. The legislature clearly intended to **not** apply the "functional" test definition of "deadly weapon" to an element of battery or assault. If it intended otherwise, the legislature would have added the "functional" test to NRS 200.481 (battery) as it added it to NRS 193.165(5) (sentencing enhancements). This is a clear expression of legislative intent to allow the deadly weapon's definition to remain as it was defined in Zgombic and its successor holdings in Kazalyn, Hutchins and Smith.

"Omissions of subject matters from statutory provisions are presumed to have been intentional", State Dep't of Taxation v. Daimler Chrysler, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005).

2. The rules of statutory construction are simple:

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

– If a criminal statute is unambiguous, then it must be given its plain meaning, regardless of the result.

– If a criminal statute is ambiguous, it must be given the interpretation **most favorable to the Defendant.**

The latter rule applies because there is ambiguity from the battery statute's lack of a definition of "deadly weapon". The functional test has a broader definition of deadly weapon than does the inherently dangerous test; this makes it less favorable to defendants. Because **the interpretation most favorable to the defendant is the "inherently dangerous" test, it must be applied to resolve the ambiguity.** Demosthenes v. Williams, 97 Nev. 611, 614, 637 P.2d 1203, 1204 (1981); Buschauer v. State, 106 Nev. 890, 896, 804 P.2d 1046, 1049 (1990); Hughey v. U.S., 495 U.S. 411, 422 (1990).

3. There is a much stronger reason for applying the more defense-favorable "inherently dangerous" test to an element of an offense than any of the reasons for the pre-1995 cases' applying that test to a sentencing enhancement – Zgombic, Kazalyn, Hutchins, and Smith. Here is the reason: the consequences of "deadly weapon" use are **much greater** when it is an element of the offense of battery than when it is merely used as a sentencing enhancement.

The sentencing enhancement statute, NRS 193.165, increases the sentence, but it does not increase the **level** of the underlying offense. In contrast, the "deadly weapon" element of a battery or assault offense turns a misdemeanor (NRS 200.481(2)(a)) into a felony (NRS 200.481(2)(e)).

4. This also leads to another reason for adopting the more defense-favorable "inherently dangerous" test for an element of an offense. The deadly weapon element does not merely double the possible sentence, as does NRS 193.165. It **multiplies the sentence twenty-fold**: A maximum six-month jail sentence, NRS 193.150, for misdemeanor battery, NRS 200.481(2)(a), is transformed into a potential **ten-year prison** sentence for felony battery, NRS 200.481(2)(e)(1).

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

5. Sheriff v Gillock, 112 Nev. 213, 214, 912 P.2d 274 (1996) was a post-1995 decision that applied the "inherently dangerous" test to define a deadly weapon **as an element of a battery offense.** A broken water glass was used to cause "serious cuts to the face", which could have been fatal if they occurred on the throat. Gillock's unanimous decision applied the "inherently dangerous" test in affirming the district court's dismissal of an indictment for battery with deadly weapon – because the water glass **could not be a deadly weapon as an element of battery;** a water glass – like the alleged screwdriver in this case – does not meet the inherently dangerous test because it was not designed or manufactured with the intention of it being used for a deadly purpose.

Thus, a screwdriver cannot be a deadly weapon as an element of the charged felony battery offense in the complaint. As a result, the indictment allegation of use of a deadly weapon must be dismissed because – despite its claim – the use of a screwdriver cannot satisfy the deadly weapon element of a felony battery.

WHEREFOR, Mr. Rodriguez should be discharged, and the Indictment against him must be dismissed in its entirety.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that this document does not contain the "personal information" of any person, as defined in NRS 603A.040.

DATED: May 12, 2016.

/s/ Martin H. Wiener
MARTIN H. WIENER
Attorney for Petitioner

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

2645
Christopher J. Hicks
#007747
P.O. Box 11130
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

DANIEL JAMES RODRIGUEZ,

Defendant.

_____/

Case No. CR16-0567

Dept. No. 15

MOTION TO STRIKE DEFENDANT'S MOTION TO DISMISS; ALTERNATIVELY, OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE

COMES NOW, the State of Nevada, by and through CHRISTOPHER J. HICKS, District Attorney of Washoe County, and MATTHEW LEE, Deputy District Attorney, and hereby moves to strike the defendant's motion to dismiss. Alternatively, should this Court deny the State's motion herein, the State also opposes Defendant's Motion to Dismiss for lack of probable cause filed May 19, 2016. This opposition is made and based upon the attached Points and Authorities.

///

///

///

This is sufficient to qualify as suffering or injury that "lasts longer than the pain immediately resulting from the wrongful act."

2. Deadly Weapon

The defendant contends that a screwdriver, when jabbed into the neck of a victim, cannot possibly qualify as a "deadly weapon" as a matter of law. The State disagrees.

In this proceeding, the grand jury was instructed on the definition of a deadly weapon, which definition was preserved as an exhibit, as follows:

A "deadly weapon" is defined as:

> (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;
>
> (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used or threatened to be used, is readily capable of causing substantial bodily harm or death; or
>
> (c) Any device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force.

This definition includes the colloquially-named "inherently dangerous" definition as found in (a), *supra*, and also the "functional" definition as found in (b), *supra*.

The Supreme Court has long-recognized the functional test to define deadly weapon where the weapon is an element of the crime. In a 1977 decision involving a charge of Assault with a Deadly Weapon, the court stated in *dicta* that even an "unloaded pistol may, under certain circumstances . . ., be used as a deadly weapon; *e.g.*, if the assailant uses or attempts to use a pistol as a bludgeon." Loretta

v. Sheriff, Clark County, 93 Nev. 344, 345 n. 1, 565 P.2d 1008, 1009 n.1 (1977)(emphasis added). Likewise, the court later held that striking a victim with a two-by-four piece of lumber is sufficient evidence of a deadly weapon in a charge of battery with a deadly weapon. Archie v. Sheriff, 95 Nev. 182, 183, 591 P.2d 245 (1979). So, if the butt of an unloaded pistol or a piece of lumber can qualify as a deadly weapon as an element to a crime, "under certain circumstances," then certainly a sharp tool such as a screwdriver is a deadly weapon in a battery charge when it is stabbed into the neck of an unsuspecting victim.

The court again reaffirmed that the functional test defines "deadly weapon" when it is an element of the offense. Zgombic v. State, 106 Nev. 571, 573-74, 798 P.2d 548, 549-50 (1990). There, the court removed the functional test from the enhancement statute of NRS 193.165.[3] In doing so, however, it also reemphasized that, "We have no dispute with these cases which use the functional test to define a deadly weapon when a deadly weapon is an element of a crime." Id. at 574, 798 P.2d at 550.

The defendant emphasizes, but misapplies, the decision in Sheriff v. Gillock, 112 Nev. 213, 912 P.2d 274 (1996). He erroneously inserts the following claims which were actually not part of the court's record or decision: (1) that the court applied the inherently dangerous test; (2) that the glass was broken; (3) that

---

[3] This was later superseded by in 1995 by a legislative modification of NRS 193.165 which provided both the inherently dangerous test and the functional test as it stands today.

the glass caused cuts which could have been fatal if they occurred on the throat; and (4) that the court held that the drinking glass "could not" be a deadly weapon. These assertions are not supported by Gillock.

Exercising its discretion, the district court in Gillock dismissed the Battery with a Deadly Weapon count, finding insufficient evidence that a drinking glass in that specific case is a deadly weapon and the Supreme Court did not find any substantial error in the district court's decision. There was no evidence that the glass was broken, and the court provided no further information as to the glass or the facts. The court did not apply the inherently dangerous test to rule a drinking glass ineligible as a matter of law. Rather, it appears that the court followed precedent and applied the functional test.

The Gillock decision was nothing more than a district court's exercise of discretion to determine that in the specific facts presented to it in that specific case, the drinking glass did not qualify as a deadly weapon. Of note, the Gillock decision was followed two years later by Skiba v. State, 114 Nev. 612, 959 P.2d 959 (1998), wherein the court did not voice any concerns with a conviction of battery with a deadly weapon where a "broken beer bottle" was the weapon.

The definitions of NRS 193.165 are also instructive for determining what constitutes a deadly weapon in a battery charge. In Funderburk v. State, 125 Nev. 260, 212 P.3d 337 (2009), the court examined what constitutes a deadly weapon as it applies to the charge

of Burglary while in Possession of a Deadly Weapon. Finding that "because the Legislature did not define 'deadly weapon' in its amendments to NRS 205.060, we conclude that the Legislature intended the term to have broad applicability." Id. at 265, 212 P.3d at 340. Accordingly, the court held that "the definitions set forth in NRS 193.165(6) are instructive to determine what constitutes a 'deadly weapon' under NRS 205.060(4)." Id.

This same analysis should apply to a Battery with a Deadly Weapon. Like the burglary statute, the Legislature does not define "deadly weapon" in the battery statute. But, the court has historically applied the functional test to define deadly weapon. *Supra* pp. 9-10 (describing Nevada precedent involving the functional test). Thus, looking to the definitive language of NRS 193.165(6) to more completely describe the functional test is appropriate and instructive.

Moreover, in Funderburk, the court rejected the argument that the NRS 193.165(6) deadly weapon definitions are "not applicable to crimes that require a deadly weapon as an element of the crime." Id. at 262 n.4, 212 P.3d at 339 n.4. This is the same argument made by the defendant herein. It was rejected in 2009. It should be rejected today.

///

///

///

///

///

III. CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss for lack of probable cause should be stricken. As an alternative, should this court reject the State's motion to strike, the defendant's motion to dismiss should be denied.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 14th day of June, 2016.

CHRISTOPHER J. HICKS
District Attorney
Washoe County, Nevada

By /s/ Mathew Lee
MATTHEW LEE
10654
Deputy District Attorney

2315
MARTIN H. WIENER, ESQ.
NBN 2115
316 South Arlington Avenue
Reno, Nevada 89501
(775) 322-4008
ATTORNEY FOR DEFENDANT

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

vs.

DANIEL RODRIGUEZ,

Defendant.
_____/

Case No. CR16-0567
Dept. No. 15

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

MOTION TO DISMISS DEADLY WEAPON ALLEGATION

Defendant DANIEL JAMES RODRIGUEZ, through his undersigned counsel Martin H. Wiener, moves for dismissal of the Indictment's deadly weapon allegations because the alleged facts cannot establish that offense of battery with a deadly weapon.

The Indictment alleges commission of a felony battery because a "deadly weapon" was allegedly used. The item alleged to have been used in the battery is a screwdriver, which cannot meet the definition of "deadly weapon". Thus, the charged facts cannot establish the charged offense, requiring its dismissal.

FACTS

The Indictment in this case charges battery with a deadly weapon (NRS 200.481(2)(e). The alleged deadly weapon is "a screwdriver".

The deadly weapon claim is an element of the charged offense that elevates it from a misdemeanor, NRS 200.481(2)(a), to a felony, NRS 200.481(2)(e)(1).

///

wq 6.6.6
C: A v JR

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

LAW

DEFECTIVE INDICTMENT

The indictment must state, "the essential facts constituting the public offense charged", NRS 173.075(1). The indictment in this case violates that law because it does not state any facts which "constitute the public offense charged". An offense charged is battery with a deadly weapon, yet there are no facts which "constitute" the use of a deadly weapon, because a screwdriver cannot be a deadly weapon for that offense.

The fatally defective indictment allegation must be dismissed.

DEADLY WEAPON AS AN OFFENSE ELEMENT VERSUS AS A SENTENCE ENHANCEMENT

There are two competing definitions of "deadly weapon" in our statutes, and the choice of definition depends on the statute which has deadly weapon use as an element: whether it is alleged as an element of an offense (such as in the charged felony battery) or as a basis for sentencing enhancement under NRS 193.165.

First, the sentencing enhancement definition of deadly weapon is inapplicable where use of a deadly weapon is a necessary element of an offense, as it is in this case, NRS 193.165(3).

Second, **the definition of "deadly weapon" is different**. The 1995 Legislature (AB 624, p. 1431) amended NRS 193.165 (sentencing enhancement) by adopting both of the two competing definitions of deadly weapons: (presently) subsection (6)(a) – the "inherently dangerous" test, and (presently) (6)(b) – the "functional" test. Until then, the statute was silent on the definition of deadly weapon.

THE "INHERENTLY DANGEROUS" TEST

One definition of "deadly weapon" is the "inherently dangerous" test: was it **designed or manufactured with the intention that its ordinary use is likely to cause serious harm or death**? This definition certainly does not include a hand tool like a screwdriver.

The "inherently dangerous" test was applied to the following items, all of which were excluded as "deadly weapons": steel-toed boots in Zgombic v. State, 106 Nev. 571, 577, 798 P.2d 548 (1990); an automobile in Kazalyn v. State, 108 Nev. 67, 76, 825 P.2d 578 (1992); scissors in Hutchins v. State, 110 Nev. 103, 110, 867 P.2d 1136 (1994); and a hammer in Smith v. State, 110 Nev. 1094, 1102, 881 P.2d 649 (1994). All of those objects failed the "inherently dangerous" test, and none were held to be deadly weapons.

"INHERENTLY DANGEROUS" vs. "FUNCTIONAL TEST"

The **functional** test is markedly different than the inherently dangerous test. It defines a deadly weapon as anything which,

> "**under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death**".

NRS 193.165(6)(b). Under this definition, anything that **could** cause death or substantial bodily harm is a deadly weapon: a bucket of water (used for drowning); a pillow (used for smothering); a paper clip (used to puncture an artery); or, an amusing recorded episode of a TV comedy (used to caused falling-down laughter, causing victim to strike his head on a table (another deadly weapon)).

Filling the vacuum caused by the absence of a deadly weapon definition in the sentencing enhancement statute, Zgombic, at 574, adopted the "inherently dangerous" test and specifically overruled the "functional" test that had been earlier approved by Clem v. State, 104 Nev. 351, 356-57, 760 P.2d 103 (1988).

The 1995 Legislature amended NRS 193.165, the sentencing enhancement statute (AB 624, p. 1431), by adopting Zgombic's "inherently dangerous" test and added the "functional" test that Zgombic specifically rejected. The amendment specifically excluded the new definition of deadly weapon from cases where the use of a deadly weapon is a necessary element of an offense, **as it is in this case**, NRS 193.165(4).

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ▪ Reno, Nevada 89501
(775) 322-4008

The battery statute is still back where the sentencing enhancement statute was before 1995: "deadly weapon" is not defined. That means that the Legislature has not defined a "deadly weapon" when its use is an element of a charged offense, as in this case.

Following are numerous reasons why the "inherently dangerous" test must apply when "deadly weapon" is an element of the offense:

1. The Legislature clearly intended to **not** apply the "functional" test definition of "deadly weapon" to an element of battery or assault. If it intended otherwise, the Legislature would have added the "functional" test to NRS 200.481 (battery) as it added it to NRS 193.165(5) (sentencing enhancement). This is a clear expression of legislative intent to allow the deadly weapon's definition to remain as it was defined in Zgombic and its successor holdings in Kazalyn, Hutchins and Smith.

"Omissions of subject matters from statutory provisions are presumed to have been intentional", State Dep't of Taxation v. Daimler Chrysler, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005).

The inclusion of one thing within a statute must be read as the exclusion of other normally related things, i.e., the expression of one thing is the exclusion of another *("expressio unius est exclusion alterius"). See,* Galloway v. Truesdell, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) ("The maxim 'EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS,' the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State.") *See also,* Sheriff v. Andrews, 128 Nev. ___ (Adv. Op. No. 51), 286 P.3d 262, 264 (2012) (concluding that where the Legislature "clearly knows how to prohibit" an act under one statute and does not prohibit it under a second statute, the Legislature did not intend to prohibit it under the second statute).

2. Zgombic tried to determine what the Legislature intended in enacting NRS 193.165's sentencing enhancement, but then failing to define "deadly weapon". The Court, at 573-576, presented several powerful arguments in favor of adopting the "inherently dangerous" test. Those arguments in Zgombic are equally applicable to

determining the Legislature's intent in **a directly parallel situation**: it enacted the battery statute's offense level enhancements for deadly weapon use, but failed to define "deadly weapon".

3. The general rules for construing criminal statutes are much stronger, even, than those relied on by the Zgombic court's adoption of the "inherently dangerous" test, at 575:

> The rules of statutory construction are simple:
>
> – If a criminal statute is unambiguous, then it must be given its plain meaning, regardless of the result.
>
> – If a criminal statute is ambiguous, it must be given the interpretation **most favorable to the Defendant**.

Demosthenes v. Williams, 97 Nev. 611, 614, 637 P.2d 1203, 1204 (1981); Buschauer v. State, 106 Nev. 890, 896, 804 P.2d 1046, 1049 (1990); Hughey v. U.S., 495 U.S. 411, 422 (1990).

The latter rule applies because there is ambiguity from the battery statute's lack of a definition of "deadly weapon". The functional test has a broader definition of deadly weapon than does the inherently dangerous test; this makes it less favorable to defendants. Because **the interpretation most favorable to the defendant is the "inherently dangerous" test, it must be applied to resolve the ambiguity**.

4. There is a much stronger reason for applying the more defense-favorable "inherently dangerous" test to an element of an offense than any of the reasons for the pre-1995 decisions' applying that test to a sentencing enhancement: Zgombic, Kazalyn, Hutchins, and Smith. Here is the reason: the consequences of "deadly weapon" use are **much greater** when it is an element of the offense of battery than when it is merely used as a sentencing enhancement.

The sentencing enhancement statute, NRS 193.165, increases the sentence, but it does not increase the **level** of the underlying offense. In contrast, the "deadly weapon" element of a battery offense turns a misdemeanor (NRS 200.481(2)(a)) into

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

a felony (NRS 200.481(2)(e)).

5. This also leads to another reason for adopting the more defense-favorable "inherently dangerous" test for an element of an offense. The deadly weapon element does not merely double the possible sentence, as does NRS 193.165. It **multiplies the sentence twenty-fold**: A maximum six-month jail sentence, NRS 193.150, for misdemeanor battery, NRS 200.481(2)(a), is transformed into a potential **ten-year prison** sentence for felony battery, NRS 200.481(2)(e)(1).

6. Sheriff v Gillock, 112 Nev. 213, 214, 912 P.2d 274 (1996) was a post-1995 decision (i.e., after the legislative amendments to the deadly weapon definition in the sentencing enhancement statute). It continued the use of the "inherently dangerous" test to define a deadly weapon, this time **as an element of a battery offense**. A broken water glass was used to cause "serious cuts to the face", which could have been fatal if they occurred on the throat. Gillock's unanimous decision applied the "inherently dangerous" test in affirming the district court's dismissal of an indictment for battery with deadly weapon – because the water glass **could not be a deadly weapon as an element of battery**; a water glass – like the alleged screwdriver in this case – does not meet the inherently dangerous test because it was not designed or manufactured with the intention of it being used for a deadly purpose.

FUNDERBURK IS IRRELEVANT

The prosecution may seek to rely on Funderburk v. State, 125 Nev. 260, 212 P.3d 337 (2009). That case construed the burglary statute's own enhancement provision (205.060(4)) based on use of a firearm or deadly weapon; in that case, the alleged weapon used in the burglary was a BB gun.

That decision is inapplicable to the present case for several reasons. First, the enhancement in the burglary statute applies if the burglar has possession "of any **firearm or** deadly weapon.", NRS 205.060(4) (emphasis added). Thus, while the defendant's BB gun can be excluded from the definition of deadly weapon by the inherently dangerous test, the definition of "firearm" clearly includes a BB gun: "any

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

device from which a metallic projectile, including **any ball bearing or pellet** may be expelled.", NRS 202.265(5)(b). So, the inherently dangerous test did not exclude the burglary defendant's use of a BB gun from the felony enhancement.

A second reason that distinguishes Funderburk is that the burglary statute firearm/deadly weapon enhancement was enacted in 1989 (AB 592, p. 1207), immediately after the decision in Clem v. State, 104 Nev. 351, 356-57, 760 P.2d 103 (1988). As a result, the Funderburk court, at 264, assumed that the Legislature intended adoption of Clem's very recent "functional test" definition in its 1989 burglary enactment. As noted above, Zgombic clearly rejected Clem's "functional test" one year later, in 1990.

A distinguishing feature of the undefined deadly weapon enhancement in the battery statute – unlike in the burglary enactment – is that it existed as early as 1975, and likely many years earlier. Thus, its enactment could not have been influenced by Clem's 1988 adoption of the functional test as was the 1989 amendment to the burglary statute.

WHEREFOR, a screwdriver cannot be a deadly weapon as an element of the charged felony battery offense. As a result, that allegation in the Indictment must be dismissed because – despite its claim – it does not charge the use of a deadly weapon.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that this document does not contain the "personal information" of any person, as defined in NRS 603A.040.

DATED: June 15, 2016.

/s/ Martin H. Wiener, Esq.
MARTIN H. WIENER
Attorney for Defendant

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Law Office of Martin H. Wiener, and that on June 15, 2016, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

Matt Lee, Esq., for State of Nevada

/s/ Barbara Oltman

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

1650
MARTIN H. WIENER, ESQ.
NBN 2115
316 South Arlington Avenue
Reno, Nevada 89501
(775) 322-4008
ATTORNEY FOR DEFENDANT

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

vs.

DANIEL RODRIGUEZ,

Defendant.
_____/

Case No. CR16-0567

Dept. No. 15

NOTICE OF ERRORS IN DEFENDANT'S MOTION TO DISMISS DEADLY WEAPON ALLEGATION

Defendant DANIEL JAMES RODRIGUEZ, through his undersigned counsel Martin H. Wiener, notifies the Court and counsel of the following errors in his previously-filed Motion To Dismiss Deadly Weapon Allegation:

– page 2, line 18: the statutory citation should be NRS 193.165(4).

– page 4, line 10: the statutory citation should be NRS 193.165(6)(b).

– page 6, lines 3-4: the sentence should be, "The deadly weapon element of a battery charge does not merely create a possible doubling of the sentence, as does NRS 193.165(1) and (2)."

– page 7, lines 4-10: The paragraph should read,

> A second feature that distinguishes Funderburk from the issue in this Motion is that the burglary statute's firearm/deadly weapon enhancement was enacted in 1989 (AB 592, p. 1207),

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

immediately after the decision in Clem v. State, 104 Nev. 351, 356-57, 760 P.2d 103 (1988); that decision adopted the "functional test" for defining a deadly weapon for purposes of the sentencing enhancement in NRS 193.165. As a result, the Funderburk court, at 264, assumed that the Legislature intended adoption of Clem's 1988 "functional test" definition in its 1989 burglary enactment. As noted above, Zgombic clearly rejected Clem's "functional test" and adopted the "inherently dangerous" test for the NRS 193.165 sentence enhancement only one year later, in 1990. Thus, if the burglary statute had been amended in 1991, rather than 1989, Funderburk would have assumed that the Legislature intended the burglary enactment to adopt the "inherently dangerous" test established by Zgombic.

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that this document does not contain the "personal information" of any person, as defined in NRS 603A.040.

DATED: June 16, 2016.

/s/ Martin H. Wiener, Esq.
MARTIN H. WIENER
Attorney for Defendant

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Law Office of Martin H. Wiener, and that on June 16, 2016, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

Matt Lee, Esq., for State of Nevada

/s/ Barbara Oltman

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ■ Reno, Nevada 89501
(775) 322-4008

2645
Christopher J. Hicks
#007747
P.O. Box 11130
Reno, NV 89520-3083
(775) 328-3200
Attorney for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

DANIEL JAMES RODRIGUEZ,

Defendant.

Case No. CR16-0567

Dept. No. 15

_____/

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS DEADLY WEAPON ALLEGATION

COMES NOW, the State of Nevada, by and through CHRISTOPHER J. HICKS, District Attorney of Washoe County, and MATTHEW LEE, Deputy District Attorney, and hereby opposes the defendant's motion to dismiss deadly weapon allegation, filed June 15, 2016. This opposition is made and based upon the attached Memorandum of Points and Authorities.

Dated this 28th day of June, 2016.

CHRISTOPHER J. HICKS
District Attorney
Washoe County, Nevada

By /s/ Matthew Lee
MATTHEW LEE
10654
Deputy District Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

Mr. Daniel Rodriguez ("the defendant") was indicted by the Washoe County Grand Jury on April 13, 2016, on a single charge of Battery with a Deadly Weapon Causing Substantial Bodily Harm against a Person 60 Years of Age or Older. Thereafter, a bench warrant was issued and this Court ordered the defendant to self-surrender at the county detention facility.

The defendant was arraigned on April 19, 2016, at which time he pled not guilty and waived his right to a speedy trial. This Court scheduled the trial to commence on August 8, 2016.

II. STATEMENT OF FACTS

On September 29, 2015, Glen Dufrisne (the "victim") was at 195 West Second Street in Reno when the defendant approached the unsuspecting victim from behind and stabbed him in the neck. Grand Jury Transcript 6:16-7:2; 9:2-5 (April 13, 2016) ("GJT"). The victim clearly identified the stab wound as being in the neck area, and then he was also hit three or four times on the top of the head. Id. at 9:1-8. The victim is 66 years old, having been born on January 4, 1949. Id. at 6:9-12.

To the grand jury, the victim clearly identified the defendant as the one who stabbed him, as he had previous interactions with him that day and having known that the defendant lived next door to his friend. Id. at 7:10-8:12.

The victim identified two exhibits showing injuries to his own head, which were caused by the defendant. Id. at 9:20-10:4. The

victim explained that the stabbing caused an infection on the outside of his neck and inside of his throat, requiring an overnight hospital stay and then several weeks for the infection to go down and medications. Id. at 10:20-23; 12:3-16. The victim further explained that he was "bleeding really bad" which also led to him having chest pains. Id. at 11:6-11. He described the pain by stating, "Oh, it hurt. Hurt like somebody stabbed me in the throat." Id. at 11:23-24.

A witness to the crime, George Pleasant ("Mr. Pleasant") also identified the defendant and testified that the defendant attacked the victim with a screwdriver, which screwdriver he described in detail. Id. at 15:10-16:8.

III. A SCREWDRIVER IS A DEADLY WEAPON WHEN USED TO STAB ANOTHER PERSON IN THE NECK.

The defendant contends that a screwdriver, when jabbed into the neck of a victim, cannot possibly qualify as a "deadly weapon" as a matter of law. The State disagrees.

The Supreme Court has long-recognized the functional test to define deadly weapon where the weapon is an element of the crime. In a 1977 decision involving a charge of Assault with a Deadly Weapon, the court stated in *dicta* that even an "unloaded pistol may, under certain circumstances . . ., be used as a deadly weapon; *e.g.*, if the assailant uses or attempts to use a pistol as a bludgeon." Loretta v. Sheriff, Clark County, 93 Nev. 344, 345 n. 1, 565 P.2d 1008, 1009 n.1 (1977)(emphasis added). Likewise, the court later held that striking a victim with a two-by-four piece of lumber is sufficient evidence of a deadly weapon in a charge of battery with a deadly

weapon. Archie v. Sheriff, 95 Nev. 182, 183, 591 P.2d 245 (1979). So, if the butt of an unloaded pistol or a piece of lumber can qualify as a deadly weapon, where it is an element of a crime, "under certain circumstances," then certainly a sharp tool such as a screwdriver is a deadly weapon in a battery charge when it is stabbed into the neck of an unsuspecting victim.

The court again reaffirmed that the functional test defines "deadly weapon" when it is an element of the offense in Zgombic v. State, 106 Nev. 571, 573-74, 798 P.2d 548, 549-50 (1990). There, the court removed the functional test from the enhancement statute of NRS 193.165.[1] In doing so, however, it also reemphasized that, "**We have no dispute with these cases which use the functional test to define a deadly weapon when a deadly weapon is an element of a crime.**" Id. at 574, 798 P.2d at 550 (emphasis added). The defendant cannot, and therefore has not attempted to, challenge this clear and unambiguous statement of the functional test defining deadly weapon when it is an element of the offense. This has been settled.

The defendant emphasizes, but misapplies, the decision in Sheriff v. Gillock, 112 Nev. 213, 912 P.2d 274 (1996). He erroneously inserts the following claims which were actually not part of the court's record or decision: (1) that the court applied the inherently dangerous test; (2) that the glass was broken; (3) that

///

---

[1] This was later superseded by in 1995 by a legislative modification of NRS 193.165 which provided both the inherently dangerous test and the functional test as it stands today.

the glass caused cuts which could have been fatal if they occurred on the throat; and (4) that the court held that the drinking glass "could not" be a deadly weapon. These assertions are not supported by Gillock.

Exercising its discretion, the district court in Gillock dismissed the Battery with a Deadly Weapon count, finding insufficient evidence that a drinking glass in that specific case is a deadly weapon and the Supreme Court did not find any substantial error in the district court's decision. There was no evidence that the glass was broken, and the court provided no further information as to the glass or the facts. The court did not apply the inherently dangerous test to rule a drinking glass ineligible as a matter of law. Rather, it appears that the court followed precedent and applied the functional test.

The Gillock decision was nothing more than a district court's exercise of discretion to determine that in the specific facts presented to it in that specific case, the drinking glass did not qualify as a deadly weapon. Of note, the Gillock decision was followed two years later by Skiba v. State, 114 Nev. 612, 959 P.2d 959 (1998), wherein the court did not voice any concerns with a conviction of battery with a deadly weapon where a "broken beer bottle" was the weapon.

The definitions of NRS 193.165 are instructive for determining what constitutes a deadly weapon in a battery charge. In Funderburk v. State, 125 Nev. 260, 212 P.3d 337 (2009), the court examined what constitutes a deadly weapon as it applies to the charge of Burglary

while in Possession of a Deadly Weapon. Finding that "because the Legislature did not define 'deadly weapon' in its amendments to NRS 205.060, we conclude that the Legislature intended the term to have broad applicability." Id. at 265, 212 P.3d at 340. Accordingly, the court held that "the definitions set forth in NRS 193.165(6) are instructive to determine what constitutes a 'deadly weapon' under NRS 205.060(4)." Id.

This same analysis should apply to a Battery with a Deadly Weapon. Like the burglary statute, the Legislature does not define "deadly weapon" in the battery statute. But, the court has historically applied the functional test to define deadly weapon. *Supra* pp. 9-10 (describing Nevada precedent involving the functional test). Thus, looking to the definitive language of NRS 193.165(6) to more completely describe the functional test is appropriate and instructive.

Moreover, in Funderburk, the court rejected the argument that the NRS 193.165(6) deadly weapon definitions are "not applicable to crimes that require a deadly weapon as an element of the crime." Id. at 262 n.4, 212 P.3d at 339 n.4. This is the same argument made by the defendant herein. It was rejected in 2009. It should be rejected today.

///

///

///

///

///

IV. CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss deadly weapon allegation should be denied.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 28th day of June, 2016.

CHRISTOPHER J. HICKS
District Attorney
Washoe County, Nevada

By /s/ Mathew Lee
MATTHEW LEE
10654
Deputy District Attorney

FILED
Electronically
CR16-0567
2016-08-03 08:52:00 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5639376

CODE:

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

In The Matter of the Application of DANIEL RODRIGUEZ, For a Writ of Habeas Corpus.

Case No. CR16-0567
Dept. No. 15

_____/

ORDER

Defendant Daniel Rodriguez filed a pretrial petition for writ of habeas corpus, a motion to dismiss for lack of probable cause, a motion to dismiss the deadly weapon allegation, a motion to dismiss justice court complaint or to remand for preliminary hearing, and a motion to exclude evidence of or derived from Defendant's statements. The parties came before this Court for oral arguments on July 15, 2016. All the above-referenced filings are ripe for decision. This Court has read all the moving papers and carefully considered counsels' arguments made at the hearing.

Mr. Rodriguez is accused of battery with a deadly weapon causing substantial bodily harm against a person 60 years of age or older. The crime allegedly occurred on September 29, 2015. Mr. Rodriguez was arrested for stabbing Mr. Glen Dufrisne in the neck with a screwdriver.

An indictment was filed on April 13, 2016. The State called Mr. Dufrisne and Mr. George Pleasant to testify before the grand jury. Mr. Dufrisne testified that he is 65 years old and was born in 1949. He was shown a photograph of Mr. Rodriguez and stated,

"That's the guy that stabbed me."[1] Grand Jury Tr. at 6.[2] He further testified he was aware the man depicted in the photograph was named Daniel James Rodriguez. Id. at 1-2. Continuing, Mr. Dufrisne testified he was visiting George Pleasant, a neighbor of Mr. Rodriguez, when at some point Mr. Rodriguez entered the apartment and a fight broke out between the three men. Mr. Rodriguez eventually left, at which point Mr. Pleasant called the police. Messrs. Pleasant and Dufrisne waited outside the apartment for the police to arrive. Mr. Rodriguez allegedly left his apartment wielding a screwdriver, snuck up on Mr. Dufrisne, and stabbed Mr. Dufrisne in the neck. Mr. Rodriguez then struck Mr. Dufrisne in the head several times after Mr. Dufrisne had fallen to the ground. Mr. Dufrisne's stab wound was treated at the hospital. It became infected, and it took approximately two weeks for the infection to heal. Mr. Dufrisne has fully recovered. Mr. Pleasant also identified Mr. Rodriguez as his neighbor and the man who stabbed Mr. Dufrisne with a screwdriver. Id. at 15-17.

Discussion

Although Mr. Rodriguez's various filings are captioned and presented in various ways, they each attack the indictment's foundation of probable cause. Probable cause demands only that there exist "slight, even marginal evidence because it does not involve a determination of guilt or innocence of an accused." Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996) (internal quotation marks and citation omitted). Probable cause before the grand jury must be based upon admissible evidence. NRS 172.135(2).

I. Sufficiency of the evidence

Mr. Rodriguez is charged with committing battery with a deadly weapon causing substantial bodily harm against a person 60 years of age or older. The State met its burden

---

[1] This Court rejects Mr. Rodriguez's challenge to the sufficiency of Mr. Dufrisne's identification of the Defendant. The grand jury witnesses identified Mr. Rodriguez by both name and photograph. This is sufficient to support a finding of probable cause. See Burton v. Sheriff, Clark Cty., 93 Nev. 346, 347–48, 565 P.2d 1010, 1010–11 (1977).

[2] This Court rejects Mr. Rodriguez's argument that the grand jury exhibits are inadmissible because they were not attached to the grand jury transcript. Mr. Rodriguez also appears to accuse the State of misconduct in handling the exhibits. However, the record indicates the exhibits were "lodged with the Clerk." Grand Jury Tr. at 21; see NRS 172.225.

at the grand jury proceeding to establish probable cause supporting each element of the crime charged.

Battery. A battery is "any willful and unlawful use of force or violence upon the person of another." NRS 200.481(1)(a). Both grand jury witnesses identified the Defendant by name and photograph. They testified that after a brief scuffle with Mr. Rodriguez in Mr. Pleasant's apartment, Mr. Rodriguez attacked and stabbed Mr. Dufrisne in the neck with a screwdriver. This testimony is sufficient to establish probable cause in support of the allegation that Mr. Rodriguez committed a battery against Mr. Dufrisne.

Deadly weapon. Mr. Rodriguez argues a screwdriver cannot be a deadly weapon. Although the battery statute contains no definition of the term, the legislature has provided two statutory definitions of deadly weapon:

> "[D]eadly weapon" means: (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

NRS 193.165(6); see Funderburk v. State, 125 Nev. 260, 265, 212 P.3d 337, 340 (2009) ("[T]he definitions set forth in NRS 193.165(6) are instructive to determine what constitutes a 'deadly weapon' under [Nevada's burglary statute]."). The first definition, often referred to as the inherently dangerous test, does not apply to an item such as a screwdriver that was not designed as a weapon. The second definition, referred to as the functional test, does apply to an item such as a screwdriver when that item functions as a deadly weapon.

The parties have argued at length about whether this Court may apply the functional test set forth in NRS 193.165(6)(b), citing a wealth of decisional authority. This Court concludes the functional test is applicable, and evidence exists to support a finding of probable cause as to the deadly weapon element. See Loretta v. Sheriff, Clark Cty., 93 Nev. 344, 345 n. 1, 565 P.2d 1008, 1009 n.1 (1977) ("An unloaded pistol may, under certain circumstances . . . be used as a deadly weapon."); Archie v. Sheriff, Clark Cty., 95 Nev. 182,

183, 591 P.2d 245, 245 (1979) (holding two-by-four piece of lumber was a deadly weapon); Zgombic v. State, 106 Nev. 571, 574, 798 P.2d 548, 550 (1990) (overruling functional test as used in Clem v. State, 104 Nev. 351, 760 P.2d 103 (1988)), superseded by statute as stated in Steese v. State, 114 Nev. 479, 960 P.2d 321 (1998). The Supreme Court of Nevada has rejected the argument that the NRS 193.165(6) definitions are "not applicable to crimes that require a deadly weapon as an element of the crime." Funderburk, 125 Nev. at 262 n. 4, 202 P.3d at 339 n. 4.

Substantial bodily harm. Mr. Rodriguez complains first that the grand jury never considered the legal definition of substantial bodily harm and second, there lacked sufficient evidence to support probable cause. An exhibit provided to the grand jury contained the legal definitions of substantial bodily harm and prolonged physical pain. The definition of substantial bodily harm matches the statutory definition verbatim: "Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or prolonged physical pain." NRS 0.060. The definition of prolonged physical pain matches the construction of the term by the Nevada Supreme Court: "[P]hysical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act." Collins v. State, 125 Nev. 60, 64, 203 P.3d 90, 93 (2009).

Further, Mr. Dufrisne's testimony about his injury is sufficient evidence to support a finding of probable cause. The stabbing caused an infection on the outside of his neck and inside of his throat which required an overnight hospital stay and several weeks to heal. Grand Jury Tr. at 10-12. Mr. Dufrine also testified he was "bleeding really bad" which led him to experience chest pains. Id. at 11. He described the pain by stating, "Oh, it hurt. Hurt like somebody stabbed me in the throat." Id.

Person 60 years of age or older. Mr. Dufrisne testified that he is 65 years old and was born in 1949. This is sufficient to establish probable cause.

This Court rejects Mr. Rodriguez's argument that Mr. Dufrisne is incompetent to testify as to his date of birth for lack of personal knowledge; the evidence code permits

Code #4185

COPY

SUNSHINE LITIGATION SERVICES
151 Country Estates Circle
Reno, Nevada 89511
775-323-3411

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE LYNNE K. SIMONS, DISTRICT JUDGE

-oOo-

THE STATE OF NEVADA, Case No. CR16-0567

Plaintiff, Dept. 6

vs.

DANIEL JAMES RODRIGUEZ,

Defendant.

_____/

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

August 9, 2016

Reno, Nevada

DAY 2

REPORTED BY: CONSTANCE S. EISENBERG, CCR #142, RMR, CRR

Job 329374

APPEARANCES:

For the Plaintiff:

MATTHEW LEE, ESQ.
PAUL YOUNG, ESQ.
Deputies District Attorney
P. O. Box 30083
Reno, Nevada 89520-3083

For the Defendant:

LAW OFFICE OF MARTIN H. WIENER
BY: MARTIN H. WIENER, ESQ.
316 S. Arlington Ave.
Reno, Nevada 89501
775-322-4008
Fax 775-322-4099
MW@pinecrest.reno.nv.us

I N D E X

*****

THE CLERK: Sir, please raise your right hand.

GEORGE PLEASANT

called as a witness, having been duly sworn,

testified as follows:

THE BAILIFF: Have a seat over here, sir.

THE COURT: Good morning, sir.

THE WITNESS: Good morning.

MR. YOUNG: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. YOUNG:

Q Please state and spell your name.

A George Clint Pleasant, P-l-e-a-s-a-n-t.

Q Where do you live, Mr. Pleasant?

A 195 West Second.

Q Where is that at? Is that Reno?

A Yes.

Q All right. Is that in Washoe County?

A Yes.

Q Do you still -- did you live there on September 29th, 2015?

A Yes, I did.

Q Okay. Were you at that location on September 29th,

MR. YOUNG: I apologize, Your Honor.

Do you want me to re-ask the question?

THE WITNESS: Please do.

BY MR. YOUNG:

Q So as you are standing on the sidewalk, can you describe -- you described earlier -- you testified earlier that Daniel Rodriguez came out. Please describe that in detail.

A Glen had his back to him, facing the sidewalk. Mr. Rodriguez came up behind him and began stabbing him.

Q What did you do in response?

A I yelled.

Q Do you remember what you yelled?

A No.

Q Okay. Then what did you do?

A I ran over and tried to jump on Mr. Rodriguez to distract him.

Q And so what did you see when you got over there?

A Him stabbing Glen with a screwdriver.

Q Can you describe the screwdriver.

A Four to six inches long, total length.

THE COURT: I'm sorry.

THE WITNESS: Four to six inches long, total length. The blade of the screwdriver was three and a half, four inches long.

///

BY MR. YOUNG:

Q Did you see what type of screwdriver it was?

A Standard screwdriver, small handle, small shaft.

Q And how far away were you, approximately, from visually seeing the screwdriver?

A On his back.

You mean when I first noticed it?

Q Correct.

A It was in his hand when he came up behind Glen.

Q In the defendant's hand?

A Yes.

THE COURT: Okay. Let's turn to "A deadly weapon is an instrument, which as used in the ordinary manner contemplated by

its design or construction, will or is likely to cause a life-threatening injury or death."

I indicated that this could be compared to 21 of the State's. I was inclined to give 21 of the State's before I received yours.

Did you have an opportunity to meet and confer regarding the definition of "deadly weapon"?

MR. LEE: Yes, Your Honor.

THE COURT: And have you reached any resolution?

MR. LEE: No, we haven't.

THE COURT: Why don't you provide the Court with record why your 21 is more appropriate than the defendant's comparative instruction.

MR. LEE: There's -- the Supreme Court has recognized two different definitions -- more now, actually. Specifically, a firearm is a different definition, but two main definitions of "deadly weapon."

One is somewhat called the inherently dangerous test. That's what Mr. Wiener has proposed. The other is the functional test, and that's what relevant to this case and proposed by the State.

THE COURT: Well -- and isn't this Court restricted by the law of the case? Because Judge Hardy indicated in his order -- specifically, he addressed this, and he discerned that the functional test applied in this case.

MR. LEE: Yes, Your Honor.

THE COURT: Okay. Mr. Wiener?

MR. WIENER: Counsel is correct. Under the decision made by Judge Hardy, the one offered by the prosecution is the alternative that should be applied. I'm not going to make an extended argument here why Your Honor should reverse the decision made by Judge Hardy.

THE COURT: Well, I don't think that I have the authority or power to reverse a decision. The only thing that I would have the ability to do is reconsider.

MR. WIENER: Well, that's sort of what I meant. You're -- actually, you are correct. You are not a higher court, so you can't actually reverse it.

I respectfully disagree with Judge Hardy, but I think in order to maintain our appeal rights here, I need to propose this as the instruction for the jury, and I'll leave it to Your Honor to make your decision.

But this supports my claim earlier in the case where I asked for dismissal because a screwdriver could not be a deadly weapon under this test.

THE COURT: All right. Thank you.

Counsel, I've reviewed at length the order that was entered by Judge Hardy on August 3rd, 2016, specifically at page 3 and 4, which discusses the Court's analysis.

In addition, I have also reviewed a subsequent -- it's

the Clem case as well. However, it's 119 Nevada 615, 2003.

And it goes through the history of both the inherently dangerous and the functional test, and provides the background to -- I don't find any reason to reconsider or change the order of Judge Hardy, and it will stand in this case as a matter of law. And therefore -- and as the law of this case.

And, therefore, I will refuse the definition that was provided by counsel for the defense. And I'm indicating as such and it will become part of the record.

And I will be giving 21 that was proposed by the State.

Moving to --

MR. WIENER: Excuse me, Your Honor. Did you say 119 Nevada 216?

THE COURT: 119 Nevada 615.

MR. WIENER: 6, 5, 0?

THE COURT: 615 -- 6, 1, 5.

MR. WIENER: Thank you.

THE COURT: 2003, 81 P.3d 521.

MR. WIENER: Thank you.

THE COURT: It provides some background and discussion in its initial statement.

All right. Let's turn to "'Prolonged physical pain' means physical suffering or injury that lasts substantially longer than the pain resulting from the wrongful act."

I have made a note to compare this to the definitions

A deadly weapon is any instrument which, if used in the ordinary manner contemplated by its design or construction, will, or is likely to cause a life-threatening injury or death.

Refused 8/9/2016

INSTRUCTION NO. _____

If you find that the defendant committed the offense of Battery, then you must further determine whether it was committed with a Deadly Weapon.

A "deadly weapon" is defined as any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

You should indicate your finding by checking the appropriate box on the Verdict form. The burden is on the State to prove beyond a reasonable doubt that the Battery was committed with the use of a Deadly Weapon.

Instruction No. 21

If you find the defendant committed the offense of Battery, then you must further determine whether Glen Dufrisne suffered substantial bodily harm as a result of the offense.

"Substantial Bodily Harm" is defined as:

1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or

2. Prolonged physical pain.

"Prolonged Physical Pain" means physical suffering or injury that lasts longer than the pain immediately resulting from the wrongful act. In a battery, for example, the wrongdoer would not be liable for "prolonged physical pain" for the touching itself. However, the wrongdoer would be liable for any lasting physical pain resulting from the touching.

You should indicate your finding by checking the appropriate box on the Verdict form. The burden is on the State to prove beyond a reasonable doubt that the victim suffered substantial bodily harm as a result of the offense.

Instruction No. 22

FILED
Electronically
CR16-0567
2016-08-11 08:46:12 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5653120

CODE 4245

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

DANIEL JAMES RODRIGUEZ,

Defendant.

Case No. CR16-0567

Dept. No. D6

_____/

VERDICT

We, the jury in the above-entitled matter, find the defendant, DANIEL JAMES RODRIGUEZ, GUILTY of BATTERY.

DATED this 9 day of August, 2016.

Edward Roose

FOREPERSON

Do you find that the Battery was committed with the use of a Deadly Weapon?

Yes X No _____

(check one)

Do you find that the Battery resulted in Substantial Bodily Harm upon Glen Dufrisne?

Yes _____ No X

(check one)

Do you find that the Battery was committed against a Person 60 Years of Age or Older?

Yes X No _____

(check one)

DATED this 9 day of August, 2016.

John D-Rose

FOREPERSON

CODE: 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

DANIEL JAMES RODRIGUEZ,

Defendant.

/

Case No. CR16-0567

Dept. No. 15

ORDER TRANSFERRING CASE

This case is hereby transferred from Department No. 15 to Department No. 6 for all future proceedings.

DATED: August 11th, 2016.

William G. Maddox
Senior Judge

LYNNE K. SIMONS
District Judge
Department Six

FILED
Electronically
CR16-0567
2016-11-15 12:51:04 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5806824

CODE 1850

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

STATE OF NEVADA,

Plaintiff,

vs.

DANIEL JAMES RODRIGUEZ,

Defendant.

/

Case No. CR16-0567

Dept. No. 6

CORRECTED JUDGMENT OF CONVICTION

The Defendant, having been found Guilty, and no legal reason or cause existing to preclude entry of judgment against him, the Court rendered judgment as follows:

1. Daniel James Rodriguez is guilty of the crime of Battery with a Deadly Weapon Against a Person 60 Years of Age or Older, a violation of NRS 200.481(2)(e) and NRS 193.167, a Category B felony, as found guilty by jury.

2. He is punished by:

a) Imprisonment in the Nevada Department of Corrections for a maximum term of ten (10) years with a minimum parole eligibility of four (4) years with a consecutive minimum term of one (1) years and a maximum term of ten (10) years for the elder enhancement, with credit for fifty-three (53) days time served, to be served concurrently with RMC 15CR14135.

b) Payment to the Clerk of the Second Judicial District Court of the following amounts:

1. Twenty-Five Dollars ($25.00) administrative assessment fee; and

2. Three Dollar ($3.00) administrative assessment for obtaining a biological specimen and conducting a genetic marker analysis.

3. It is further ordered that the prison sentence is suspended and the Defendant is placed on probation for an indeterminate period of time not to exceed sixty (60) months, in accordance with the following:

a) Pursuant to NRS 176A.100(4) and NRS 176A.440, Defendant is placed on probation pursuant to the Program of Intensive Supervision;

b) The Defendant's probation shall include the general terms stated by the Court and reduced to writing in the terms and general conditions set forth in the Order Admitting Defendant to Probation and Fixing the Terms Thereof.

c) The Defendant's probation shall include the following special conditions:

1. Defendant shall submit to a substance abuse evaluation, at his own expense, and if necessary, participate in a counseling program as approved by the Division of Parole and Probation until discharged by agreement of both counselor and supervising officer.

2. Defendant shall abstain from the use, possession, or control of any alcohol, controlled substance, or weapon during his entire term of probation.

3. Defendant is to have no contact with victim, Glen Dufrisne or his family or friends, during his entire term of probation.

4. Defendant shall not enter any gaming establishment for the purpose of gambling or consuming alcohol during his entire term of probation.

5. Defendant shall participate in an anger management counseling program and parenting classes, as deemed appropriate by the Division of

Parole and Probation, at his own expense, until discharged by agreement of both counselor and supervising officer.

6. Defendant must remain gainfully employed. He may continue his employment at the Grand Sierra Resort, notwithstanding subsection 4 above restricting Defendant from entering gaming establishments.

7. Defendant must volunteer for at least ten (10) hours per month.

8. Defendant shall continue participating in Bristlecone outpatient treatment program until discharged by agreement of both Bristlecone staff and Defendant's supervising officer.

9. Defendant shall continue attending with at least three (3) NA/AA meetings per week and will maintain documentation of the same to provide to Defendant's supervising officer.

Any fine, fee or administrative assessment imposed upon the Defendant as reflected in this Judgment of Conviction constitutes a lien, as defined in Nevada Revised Statutes (NRS 176.275). Should the Defendant not pay these fines, fees, or assessments, collection efforts may be undertaken.

Dated the 15th day of November, 2016.

Nunc pro tunc to November 9, 2016.

DISTRICT JUDGE

2515
MARTIN H. WIENER
NBN 2115
316 South Arlington Avenue
Reno, Nevada 89501
(775) 322-4008
ATTORNEY FOR DEFENDANT

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,

Plaintiff,

vs. Case No. CR16-0567

DANIEL JAMES RODRIGUEZ, Dept. No. 6

Defendant.

_____/

CORRECTED NOTICE OF APPEAL

Defendant DANIEL JAMES RODRIGUEZ, through his undersigned counsel Martin H. Wiener, appeals to the Supreme Court of Nevada from the judgment of conviction of this Court entered in this action on November 9, 2016, and from the corrected judgement entered November 15, 2016. The conviction was for a Category B felony, so this is not a Fast Track Appeal, NRAP 3C(a)(3)(A).

The undersigned affirms, under NRS 239B.030, that this document does not contain the "personal information" of any person, as defined in NRS 603A.040.

DATED this 9th day of December, 2016.

/s/ Martin H. Wiener
MARTIN H. WIENER
Attorney for Defendant

N:\BJO\CLIENTS\Rodriguez\Appeal\NotApplCorr.wpd

LAW OFFICES OF
MARTIN H. WIENER
316 South Arlington Avenue ▪ Reno, Nevada 89501
(775) 322-4008