

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL JAMES RODRIGUEZ,

No. 71920

Electronically Filed  
Jun 01 2017 04:03 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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**RESPONDENT'S ANSWERING BRIEF**

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**RESPONDENT'S ANSWERING BRIEF**

INTRODUCTION

Although appellant Daniel James Rodriguez’s brief lists no less than five appellate issues, this appeal turns on a single point:

Under Nevada law, “deadly weapon,” when it’s an element of a crime, includes an instrument that, under the circumstances in which the suspect used it, might easily cause substantial bodily harm or death—a functional test. Here, Rodriguez plunged a screwdriver into his victim’s neck. Did the district court err when it instructed the jury to use the functional test to determine whether Rodriguez committed battery with a deadly weapon?

Rodriguez admits that he stabbed his elderly victim in the neck with a screwdriver. But he contends that he is guilty of battery with a deadly weapon

only if his screwdriver, when used in its intended manner, is likely to cause substantial bodily harm or death. Because the district court instructed the jury to determine whether Rodriguez's screwdriver could cause substantial bodily harm or death in the manner Rodriguez used it—to stab his victim in the neck—he asserts that the district court erred. Rodriguez's argument ignores this Court's caselaw and is one that this Court has already rejected. The district court's jury instruction is consistent with well-settled Nevada caselaw and well within the court's wide latitude in settling jury instructions. This Court should affirm the district court's judgment of conviction.

### STATEMENT OF THE CASE

A jury convicted Daniel James Rodriguez of battery with a deadly weapon against a person 60 years of age or older, a category B felony that violates NRS 200.481(2)(e) and NRS 193.167. 1 AA 61. Based on his conviction, the district court sentenced Rodriguez to probation, with several conditions, for an indeterminate period of time not to exceed 60 months, after it suspended his prison sentences for the battery-with-a-deadly-weapon conviction and the elder enhancement. 1 AA 61-63. This appeal followed. 1 AA 64.

### STATEMENT OF THE ISSUE

Did the trial court properly instruct the jury on the deadly weapon element of the battery-with-a-deadly-weapon charge?

## SUMMARY OF THE ARGUMENT

Battery is “any willful and unlawful use of force or violence upon the person of another.” NRS 200.481(1)(a). “If the battery is committed with the use of a deadly weapon,” the crime incurs severer classification and penalties. NRS 200.481(2)(e). Rodriguez’s victim and another witness identified Rodriguez. 1 AA 42-43. They both stated that, after a brief scuffle with Rodriguez in the witness’s apartment, Rodriguez attacked and stabbed the victim in the neck with a screwdriver. *Id.* There was sufficient evidence for the jury to conclude that Rodriguez committed a battery on the victim. 1 AA 58.

Although the battery statute, NRS 200.481, does not define the term “deadly weapon,” NRS 193.165(6) does. Indeed, this Court has used NRS 193.165(6)’s definitions of “deadly weapon” to determine whether an instrument used in a crime was a deadly weapon. *See Funderburk v. State*, 125 Nev. 260, 265, 212 P.3d 337, 340 (2009) (concluding that “the definitions set forth in NRS 193.165(6) are instructive to determine what constitutes a ‘deadly weapon’ under [Nevada’s burglary statute]”). In doing so, this Court rejected the argument that NRS 193.165(6) definitions are “not applicable to crimes that require a deadly weapon as an element of the crime.” *Id.* at 262 n.4, 202 P.3d at 339 n.4.

One definition of deadly weapon that NRS 193.165(6) provides is referred to as the functional test. 1 AA 44. Under the functional test, an instrument is a deadly

weapon if, “under the circumstances in which it is used, . . . [it] is readily capable of causing substantial bodily harm or death.” NRS 193.165(6)(b). The district court exercised its discretion to conclude that the functional-test definition applied. 1 AA 44. Thus, the jury was given a functional-test instruction and evidence existed to support the jury’s finding of this element. 1 AA 44-45, 54-55, 57-58.

### STANDARD OF REVIEW

This Court reviews a trial court’s decision whether to give a jury instruction for an abuse of the court’s broad discretion in settling jury instructions or judicial error. *Brooks v. State*, 124 Nev. 203, 206, 180 P.3d. 657, 658-59 (2008). Whether the jury instruction was an accurate statement of the law is a legal question that this Court reviews *de novo*. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

### STATEMENT OF THE FACTS

Rodriguez admits that he stabbed Glen Dufrisne, a 66-year-old man, in the neck with a screwdriver. *See generally* Appellant’s Opening Brief (“OB”).

### ARGUMENT

1. Because well-settled Nevada caselaw recognizes the functional test as the appropriate one to define deadly weapon when the weapon is an element of the crime, the district court did not abuse its discretion in using the functional test for its deadly weapon jury instruction.

In his Opening Brief, Rodriguez gives this Court an array of questions to consider:

- 1) Was the jury instructed on the correct definition of “deadly weapon,” leading to the conviction for battery with a deadly weapon, based on Mr. Rodriguez’s use of an ordinary screwdriver?
- 2) Is the definition of “deadly weapon” as an element of an offense (battery, in this appeal) the inherently dangerous test, the functional test, or some other test?
- 3) Can an ordinary screwdriver qualify as a “deadly weapon” under the inherently dangerous test?
- 4) Should the ambiguity in the definition of “deadly weapon” result in application in the “rule of lenity”—which compels choosing the inherently dangerous test for that definition as an element of an offense?
- 5) Should the Legislature’s refusal to define “deadly weapon” as including the functional test for an element of an offense – as it did in amending NRS 193.165 – be construed as its decision that the functional test should not be applied to an element of the offense?

OB at iv-v.

But the sole issue before this Court, as Rodriguez frankly admits, is “which definition”—the inherently dangerous test or the functional test—“should be applied to Mr. Rodriguez’s screwdriver.” OB at 5. The trial court exercised its discretion to instruct the jury on the functional test, consistent with Nevada caselaw. In challenging this decision, Rodriguez does not allege that the functional test is vague or that the evidence presented in this case was insufficient to meet that test. Rodriguez simply argues that the inherently-dangerous test should have

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applied to determine whether the screwdriver he thrust into Mr. Dufrisne's neck was a deadly weapon.

Here, the functional-test jury instruction, Jury Instruction 21, provided the following: "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." 1 AA 57.

Jury Instruction 21 was taken directly from NRS 193.165(6)(b). That statute provides that "deadly weapon" means:

(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).

This Court has long recognized the functional test to define deadly weapon when the weapon is an element of the crime. In a 1977 decision involving a charge of assault with a deadly weapon, this Court noted that even an "unloaded pistol may, under certain circumstances, . . . be used as a deadly weapon; e.g., if the

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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). Later, this Court 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). In its subsequent decision in *Zgombic v. State*, this Court again reaffirmed that the functional test defines deadly weapon when it’s an element of the offense. 106 Nev. 571, 573-74, 798 P.2d 548, 549-50 (1990), *superseded by statute on other grounds as stated in Steese v. State*, 114 Nev. 479, 499 n.6, 960 P.2d 321, 324 n.6 (1998). In *Zgombic*, this Court removed the functional test for determining whether an instrument is a deadly weapon for purposes of a penalty enhancement. But in doing so, the Court reemphasized that, “[w]e have no dispute with [those] 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. So, if the functional test defines a deadly weapon when it’s an element of a crime and 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 a sharp tool such as a screwdriver is a deadly weapon in a battery charge when Rodriguez stabs it into Mr. Dufrisne’s neck.

Rodriguez relies on the decision in *Sheriff v. Gillock*, 112 Nev. 213, 912 P.2d 274 (1996) to argue that the inherently dangerous test applies. OB at 9. He misapplies

*Sheriff*. His analysis inserts several claims that were not part of the record or decision: that (1) this Court applied the inherently dangerous test; (2) the water glass at issue was broken; (3) the glass caused cuts that could have been fatal if they occurred on the throat; and (4) this Court concluded that the drinking glass “could not” be a deadly weapon. Rodriguez’s assertions are not in *Gillock*.

Rather, in *Gillock*, the district court exercised its discretion to dismiss the battery-with-a-deadly-weapon count, finding insufficient evidence that a drinking glass in that case was a deadly weapon. This Court didn’t find any substantial error in the district court’s decision. There was no evidence that the water glass was broken, and the decision provided no further information as to the glass or the facts. Neither the district court nor this Court applied the inherently-dangerous test to rule a drinking glass ineligible as a deadly weapon as a matter of law. Indeed, it appears that the court followed Nevada law and applied the functional test. The Court reviewed the record for sufficient evidence showing that a drinking glass was a deadly weapon, consistent with the functional test’s review of the circumstances of each case. *See id.* at 215, 912 P.2d at 275-76 (“The state has not shown that the district court erred in finding that a water glass is not a deadly weapon and that the state therefore did not present sufficient evidence to the grand jury to establish probable cause that respondent committed a battery with the use of a deadly weapon.”)

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

2. Because this Court has recognized that NRS 193.165(6) provides definitions of deadly weapon useful for defining deadly weapon as an element of a crime, the district court did not err when it relied on NRS 193.165(6)(b)'s definition of deadly weapon for its deadly-weapon jury instruction.

The definitions of deadly weapon in NRS 193.165 are instructive for determining what constitutes a deadly weapon in a battery charge. This Court examined what constitutes a deadly weapon as it applies to the charge of burglary while in possession of a deadly weapon in *Funderburk v. State*, 125 Nev. 260, 212 P.3d 337 (2009). The Court's conclusion was unequivocal: "because the Legislature did not define 'deadly weapon' in its amendments to [the burglary statute], we conclude that the Legislature intended the term to have broad applicability in terms of what constitutes a 'deadly weapon.'" *Id.* at 265, 212 P.3d at 340. Therefore, this Court held, "the definitions set forth in NRS 193.165(6) are instructive to determine what constitutes a 'deadly weapon' under [the burglary statute]." *Id.*

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This analysis applies to a battery with a deadly weapon. Like the burglary statute, the Legislature does not define “deadly weapon” in the battery statute. Moreover, as discussed, this Court has historically applied the functional test to define deadly weapon. Thus, looking to the definitive language of NRS 193.165(6) to more completely describe the functional test is appropriate and instructive. Further, in *Funderburk*, this 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. Rodriguez makes the same argument that this Court previously rejected. The argument was rejected in 2009 and should be rejected now.

## CONCLUSION

Rodriguez admits he stabbed a 66-year-old man in the neck with a screwdriver. He also accepts that it is a crime in Nevada to commit a Battery with a Deadly Weapon. Rodriguez only challenges that his jury was improperly instructed on the Deadly Weapon element of his crime. He would like for this Court to conclude that a screwdriver, given the manner in which it was used in this case, does not qualify as a deadly weapon under Nevada law. For the above-

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stated reasons, this request should be rejected by this Court and the judgment of conviction should be affirmed.

DATED: June 1, 2017.

CHRISTOPHER J. HICKS  
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By: STEPHAN HOLLANDSWORTH  
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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 Microsoft Word 2013 in Californian FB 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, 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)(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

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sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: June 1, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on June 1, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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