

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN FRANCIS DUNHAM

Appellant

vs.

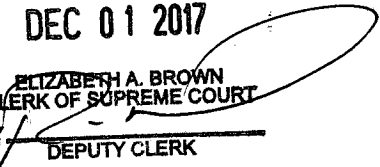
THE STATE OF NEVADA

Respondent

Supreme Court No. 73143
District Court Case No. 16-CR-0159

FILED

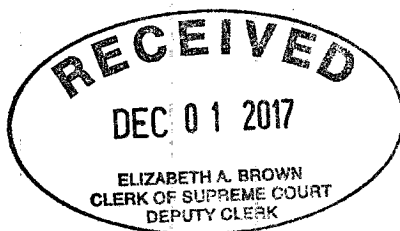
DEC 01 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

APPELLANT'S REPLY BRIEF

An Appeal from a Judgment of Conviction in the Ninth Judicial District Court,
County of Douglas, State of Nevada

Submitted By:
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17-41398

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Argument

I. The court abused its discretion in declining to give an instruction defining the term “reside” as it is used in NRS 205.067. Since the defense theory of the case was that the victim of the crime did not reside at the residence, the court had an affirmative duty to give an instruction defining the word.

Although the court is not required to define every word in a statute in the instructions, the court must instruct the jury on the necessary elements of the charge crime and failure to do so is reversible error. *Olivera, supra*; *Rossana v. State*, 113 Nev. 37, 934 p.2d 1045 (1997; *Dawes v. State*, 110 Nev. 1141, 881 P.2d 670 (1994). Furthermore, the Nevada Supreme Court has consistently held that the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be. *Crawford*, 121 Nev. at 751, 121 P.3d at 586. (citing *Vallery v. State*, 118 Nev. 357, 372 46 P.3d 66, 76-77(2002)). The jury is entitled to receive a jury instruction that gives a full explanation of the defense theory of the case. *Crawford*, 121 Nev. at 753, 121 P.3d at 588. Jurors should not be expected to be legal experts nor make legal inferences with respect to the law. They should, instead, be provided with applicable legal principals by accurate, clear and complete instructions. *Crawford*, 121 Nev. at 754, 121 P.3d at 588.

1 One of the elements of Home Invasion is that the place that was
2 entered is an “inhabited dwelling”. NRS 205.067(1). The statute then goes
3 on to describe the term “inhabited dwelling” as “ any structure, building,
4 house, room, apartment, tenement, tent, conveyance, vessel, boat, vehicle,
5 house trailer, travel trailer, motor home or railroad car in which the owner or
6 other lawful occupant **resides**.” NRS 205.067(5)(b). So to understand the
7 element of “inhabited dwelling”, the jury would have to agree about what
8 the term “resides” means.
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12 At trial, the defense offered a jury instruction concerning the term
13 ROA, Vol. I, p. 14. The instruction sought to define, clarify and emphasize
14 the term for the jury. The instruction read as follows:
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17 “Reside means to dwell permanently or continuously. It
18 expresses an idea that a person keeps or returns to a particular
19 dwelling place as his fixed, settled or legal abode. The plain
20 meaning of reside implies a continuous arrangement.”

21 Id.

22 The court determined that since the word was not defined by statute,
23 no definition would be given and the jury could use their common sense to
24 determine the plain meaning of the word. ROA, Vol. III, p. 3. It is unclear
25 whether the court determined that this was an incorrect definition or just an
26 unnecessary definition.
27
28

1 The respondent argues that the term has a plain meaning and therefore
2 did not need to be defined. But the respondent goes on to argue the
3 definition offered by the appellant was wrong in that the term “does not
4 require an intent to remain or that a person dwell in a certain location
5 continuously or permanently.” Courts in many jurisdictions in other contexts
6 disagree. The language of the defense instruction was taken from the case
7 *Petrowsky v. Krause*, 223 Wis. 2d 32, 588 N.W. 2d 318 (1998). In that case,
8 the court found that the term “reside” as used in the domestic violence
9 statute required a continuous living arrangement. *Petrowsky* at 223 Wis. 2d
10 37, 588 N.W. 2d 320. The court in *State v. Cloyd*, 238 S.W.3d 183 (Mo. App.
11 2007) made a similar finding. In *Collins v. Auto Owners Ins. Co.*, 2017 Ohio
12 App. LEXIS 866 (2017) The court found that the term, when used in an
13 insurance policy meant to dwell permanently or continuously.
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19 Dictionaries also define the term “reside” to require some type of
20 continuity. *The American Heritage Dictionary of the English Language*,
21 *Fifth Edition*. Copyright, 2016 defines “reside” as “to live in a place
22 permanently or for an extended period of time.” In *Collins English*
23 *Dictionary Complete and Unabridged, 12th Edition, 2014*, the term is
24 defined as “to live permanently or for a considerable time (in a place);
25 have one's home (in). A similar definition is found in *Random House*
26
27
28

1 *Kernerman Webster's College Dictionary, 2010. Even Black's Law*
2 *Dictionary, 10th Edition, 2014* cited by the respondent requires living in the
3 place for **some time**. (emphasis added).
4

5 The proposed instruction did not attempt to impose a requirement of
6 legal residence or domicile. The instruction used the term "or" through out
7 to give broad possibilities that could be considered. But there is a
8 requirement that the place, whatever it is, be used as some type of fixed
9 dwelling place.
10
11

12 Because of the list of locations that can be considered an inhabited
13 dwelling, some type of indication to use the place as a home would have to
14 be shown. To a transient who continuously uses a tent as his residence, the
15 tent is a dwelling place. The same tent, stored in someone's closet, although
16 taken out occasionally for camping, wouldn't be a dwelling place when
17 stored in the closet. Many people have houseboats in which they live. A boat
18 where a person sleeps occasionally when out on the lake wouldn't be an
19 "inhabited dwelling" parked in the owner's driveway. The list could go on.
20
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23 As was noted in *Crawford*, where a defendant proposes a defense
24 theory of the case instruction that should be given, the State may request
25 additional, clarifying language more fully explaining the principles of law
26 applicable to the jury's deliberations. The district court may either assist the
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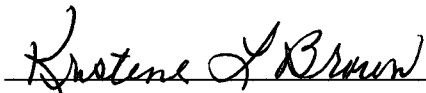
1 parties in crafting the required instruction or may complete the instruction
2 sua sponte. In the end the district court is ultimately responsible for not only
3 assuring that the substance of the defendant's requested instruction is
4 provided to the jury, but that the jury is otherwise fully and correctly
5 instructed.
6

7
8 Since the defense theory of the case was that the condominium was
9 not an inhabited dwelling, it was error for the court not to give the proffered
10 instruction, or work with the parties to craft one acceptable to both.
11

12
13 **II. The sentence of ninety six months incarceration with a minimum**
14 **parole eligibility of thirty six months violated the constitutional**
15 **prohibition against cruel and unusual punishment in that it was**
16 **grossly disproportionate to the severity of the crime.**

17 The appellant submits this argument based on the authorities cited in
18 the opening brief.

19 Dated this 1st day of December, 2017.
20

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22 
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1 **Certificate of Compliance.**

2
3 1. I hereby certify that this brief complies with the formatting
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
5 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:
6

7 This brief has been prepared in a proportionally spaced typeface using
8 Microsoft Word, 2010, in 14 point font in Times New Roman style.
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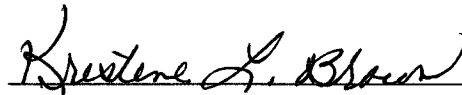
10 2. I further certify that this brief complies with the page- or type-
11 volume limitations of NRAP 3E(e)(2) because it is:
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13 Proportionately spaced, has a typeface of 14 points or more, and 1,424
14 words.
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16 3. Finally, I hereby certify that I have read this appellate reply brief,
17 and to the best of my knowledge, information, and belief, it is not frivolous
18 or interposed for any improper purpose. I further certify that this brief
19 complies with all applicable Nevada Rules of Appellate Procedure, in
20 particular NRAP 28(e)(1), which requires every assertion in the brief
21 regarding matters in the record to be supported by a reference to the page
22 and volume number, if any, of the transcript or appendix where the matter
23 relied on is to be found. I understand that I may be subject to sanctions in the
24 event that the accompanying brief is not in conformity with the requirements
25
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27
28

1 of the Nevada Rules of Appellate Procedure.

2 Dated this 1st day of December, 2017.

3 

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