IN THE SUPREME COURT OF THE STATE OF NEVADA

VERNON NEWSON, JR.,
Appellant,
v.
THE STATE OF NEVADA
Respondent.

CASE NO: 75932

PETITION FOR REHEARING

COMES NOW the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, ALEXANDER CHEN, and petitions this Court for rehearing in the above-captioned appeal.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 28th day of October, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney

MEMORANDUM
POINTS AND AUTHORITIES

On October 10, 2019, a panel of this Court issued an Order in this case, reversing Appellant Vernon Newson's conviction of First-Degree Murder. The Court may consider rehearings in the following circumstances: "(A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2).

In finding that the district court abused its discretion by declining to instruct the jury on voluntary manslaughter, the panel overlooked and misapprehended a material question of law. A panel of this Court has misapplied Crawford to the instant case. Crawford v. State, 121 Nev. 746, 121 P.3d 582 (2003). The panel has overlooked that, even if the district court erred by not giving the voluntary manslaughter instruction, the error was harmless because a jury still found Appellant guilty of first-degree murder beyond a reasonable doubt. Thus, there was no prejudicial effect to the error, and there is no need for a new trial when the jury clearly found Appellant guilty of first-degree murder.

In Crawford, the error of not giving the voluntary manslaughter instruction was harmless beyond a reasonable doubt because the jury still found the defendant guilty of first-degree murder. Id. 121 Nev. at 756, 121 P.3d at 590. The Court held

that the jury was justified in its verdict of first-degree murder because of the lack of evidence supporting provocation. Id. Despite the fact the district court erred by not providing the voluntary manslaughter instruction, the error was harmless because the jury properly found the defendant guilty of first-degree murder. Id. This is because a jury follows the instructions that it is given. Newman v. State, 129 Nev. 222, 236, 298 P.3d 1171, 1182 (2013); Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006); Leonard v. State, 117 Nev. 53, 56, 17 P.3d 397, 405 (2001).

This Court has also held that instructional errors are harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," and the error is not the type that would undermine certainty in the verdict. Wegner v. State, 116 Nev. 1149, 1155–56, 14 P.3d 25, 30 (2000); See also NRS 178.598. So, while this Court in its Opinion in the instant case concluded that the circumstantial evidence demonstrates this killing occurred in the heat of passion, the jury did not, and found Appellant guilty of first-degree murder. Despite the error, the jury would have still found Appellant guilty of first-degree murder. Thus, this error does not undermine the certainty in the verdict and has no prejudicial effect.

The jury received the following relevant jury instructions before returning a verdict of first-degree murder:

> INSTRUCTION NO. 5
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> Murder is the unlawful killing of a human being with malice aforethought, either express or implied.

INSTRUCTION NO. 6

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, from anger, hatred, revenge, or from particular ill will, spite or grudge towards the person killed.

It may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief or with reckless disregard of consequences of social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes an unlawful purpose and design as opposed to accident and mischance.

INSTRUCTION NO. 7

Express malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof. **Malice may be implied when no considerable provocation appears**, or when all the circumstances of the killing show an abandoned and malignant heart.

INSTRUCTION NO. 8

Murder of the First Degree is murder which is perpetrated by means of an kind of willful, deliberate, and premeditated killing. All three elements – willfulness, deliberation, and premeditation – **must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder**.

II AA 269-268 (emphasis added).

The jury received the above instructions explaining that murder is the unlawful killing with malice aforethought, and that malice aforethought is an intentional act without provocation. II AA 266-267. The instructions also explain that malice may be implied when there is no considerate provocation for the persons act. II AA 268. These instructions clarified for the jury that to return a verdict of murder, the act occurs without provocation. II AA 266-268. If the jury had found

that Appellant acted with adequate provocation, they would not have returned a verdict of first-degree murder beyond a reasonable doubt. Thus, even with a voluntary manslaughter instruction, the jury still would have found Appellant guilty of first-degree murder because they did not find he acted with provocation.

The jury instructions also explain that first-degree murder is a willful, deliberate, and premeditated killing:

> INSTRUCTION NO. 8
>
> Murder of the First Degree is murder which is perpetrated by means of an kind of willful, deliberate, and premeditated killing. All three elements – willfulness, deliberation, and premeditation – **must be proven beyond a reasonable doubt before an accused can be convicted of first-degree murder**.
>
> INSTRUCTION NO. 10
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> Deliberation is the process of determining upon a course of action and considering the consequences of the actions.
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> A deliberate determination may be arrived at in a short period of time. But in all cases, the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even though it includes the intent to kill.
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> INSTRUCTION NO. 11
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> Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.
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> Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

INSTRUCTION NO. 12

> The law does not undertake to measure in unites of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as Murder of the First Degree.

II AA 269, 272-274 (emphasis added).

Despite the factors discussed in the Court's Opinion that support provocation, the jury still found Appellant did not act with provocation and returned a verdict of first-degree murder. Instead of acting under provocation, the jury found Appellant's actions were willful, deliberate, and premeditated, with malice aforethought. As the instructions explained, if the jury found the killing occurred with malice aforethought, and that it was willful, premeditated, and deliberate, then first-degree murder is the correct verdict. The jury heard all the evidence, considered the law, and still found Appellant guilty of first-degree murder beyond a reasonable doubt.

Thus, even if the district court erred in not providing the voluntary manslaughter instruction, there was no prejudicial effect to the error like in Crawford, because the jury found Appellant guilty of first-degree murder. It is also like the outcome in Wegner, where the error for lack of an instruction did not undermine the jury's verdict. The jury clearly found that Appellant acted with malice

aforethought and not with provocation to return a verdict of first-degree murder. Therefore, even if the district court erred in not providing the voluntary manslaughter instruction, the error was still harmless, and there was no prejudicial effect to the error.

Moreover, a panel of this Court has misapplied the facts of why the district court did not give the voluntary manslaughter instruction. The district court discussed why the voluntary manslaughter jury instruction was not applicable to this case:

> THE COURT: -- I just don't think that there's enough evidence here of anything to give that instruction right now. Because if you evaluate everything we have so far that's in evidence in as open way as I can, there is a shooting in the car, there's shell casings in the car, there are bullets or bullet holes in the back – well, let me back up a little further.
>
> The state of the evidence would be that the decedent is in the back seat of the car where the two children are, that there is a shooting in the car, that there's at least three shots fired since there are three bullet holes in that back seat of the car, that she's wounded in some fashion in the car, you would infer from a bullet shot.
>
> But she's wounded in some fashion and she would appear to have been seat belted in at the time since there's blood on the seat belt as well, and blood in the car and then blood that gets into the car seat and on the baby's blanket. And then there's a shooting outside the car at some point once the car stops, and she's taken out of the car and is on the side of the road where there is at least, I think from the testimony, six shell casings found and blood on the side of the road.
>
> So the state of it is that there appears to be two shootings, that they had a relationship where according to Ms. Marshall they argued a lot, each of them would argue with the other, yell at the other. She said no fighting, but that they would – like no physical fighting she was aware of, but – or ever witness, but that they would yell at each other a lot, and that she had methamphetamine in her

system, and that he made the statement to Zarharia after this was over.

And I'm less concerned about his behavior after it was over because that's after this has occurred and he's dropping off the kids, and I don't know that that's really indicative of anything related to intent or state of mind before the crime occurred. And by that I mean his rushing around to get the kids in the house and out of the car and whatnot.

But he makes that statement to her about, you know, mother fucker, they pushed me too far and I couldn't take it anymore, that. There is absolutely no context to when something like that occurs. I mean, that, a jury could listen to that and say somebody's sating they got pushed too far and they decided they decided they were going to go kill somebody, which could be first degree murder.

It could be pushed me too far moments ago and I reacted very suddenly to what occurred there, and that could be, you know, voluntary manslaughter certainly. But without any further context of that, I don't know that that meets the standard of getting that statement in, because there's no basis to argue in evidence for the voluntary manslaughter.

I mean it would be saying we want you to take this and then kind of speculate about what else must have been going on to reach that he was so obscured by what it was that occurred that his passions were inflamed and he couldn't act rationally. Because there are separate parts to that.

There is the suddenness of the heat of passion, there is the provocation part of it, and I don't think that his simple statement about I got pushed too far really provides either, and especially not both of those things to justify a manslaughter instruction.

And I recognize that your trouble with that invoking his, you know, right to remain silent and not produce evidence, but like I said, I don't think that violates constitutional provision when in order to get a certain theory of deense in the defendant is the one that holds that evidence, and they'd be the person that has to testify since there is no other witnesses to it.

So I'm going to deny the request to give those instructions right now. Obviously first and second degree murder apply. But – and I can revisit this if and when we need to based on any other witness testimony, whether it's anything with your last witness, which I'm assuming it won't because it's a DNA person, or any witnesses that you all decide to put on. Okay.

V AA 951-954.

As the district court judge explained, the defense never presented any evidence about the murder being committed by provocation or in the heat of passion. The voluntary manslaughter instruction was not warranted simply for Appellant's statement about being "pushed too far" with no other evidence or context to it. Moreover, the fact that the shooting occurred inside the car, and then Appellant took the victim outside the car and shot her more times, does not support an instruction for provocation. In sum, the district court judge thoroughly weighed the facts and circumstances surrounding the shooting and determined that the instruction was not applicable because the defense did not provide any evidence of provocation.

To the extent the district court should have actually provided the instruction, Crawford establishes that a district court should "provide upon request accurate and complete instructions setting forth the State's burden to prove the absence of heat of passion upon sufficient provocation unless that principle is fully, accurately, and expressly stated in the other instructions." Id. 121 Nev. at 753, 121 P.3d at 589. However, for that duty to arise, there must be at least "some evidence" in the murder prosecution that "implicates the crime of voluntary manslaughter." Id.

This Court in Crawford weighed the evidence and found that there were multiple factors that supported the jury's first-degree murder verdict. Id. 121 Nev. at 756, 121 P.3d at 590. The Court reasoned that, ultimately, a voluntary

manslaughter instruction was not necessary because the evidence did not establish the provocation necessary for an instruction. Id. The evidence in Crawford was that the defendant confronted the victim at her home, brandished a gun, and then killed the victim when she merely smirked at him after he showed her his weapon. Id. The Court found that the evidence in the case "overwhelmingly established the absence of the legal provocation necessary for voluntary manslaughter." Id. Thus, the jury's first-degree murder verdict was valid based on the above factors supporting willfulness, premeditation, and deliberation. Id.

In the instant case, there are many factors that support the jury's first-degree murder verdict. The jury considered the fact that Appellant would have had to grab for his gun while driving the car, and decide to turn around just to shoot Anshanette. Appellant then shot her multiple times inside of the car. Once he finished shooting Anshanette inside the car, he decided to take her out of the car to shoot her more times on the side of the road. The jury also heard how she was shot by Appellant in the face at a close range. These factors, like the factors in Crawford, all support the jury's verdict that this was a willful, premeditated, and deliberate killing.

This Court determined that the facts and circumstances of this case coupled with the Appellant's statement "just know mother fuckers took me to a point where I can't take it no more," is circumstantial evidence of provocation. The Court reasons that because Appellant had to turn around to shoot Anshanette and point the gun

directly behind him is circumstantial evidence of provocation. However, this Court misconstrues that fact as provocation instead of a willful, premeditated, and deliberate. The Court overlooks that Appellant chose to get his gun while driving, and that after shooting her in the car, he decided to take Anshanette out of the car and shoot her multiple times again in her face at close range. V AA 951-952. These factors show a willful intent to kill, and a deliberate and premeditated decision to shoot Anshanette.

The Court also concludes that because the children were in the car, it likely means the killing occurred with provocation in the heat of passion. The Court also points to the circumstantial evidence that the killing did not seem planned based on Appellant's demeanor immediately after, because the bullets fell from his lap, and because he did not attempt to hide Anshanette's purse. But Appellant's actions *after* the shooting do not show there was adequate provocation *before* the shooting. The Court also points to the fact Anshanette had methamphetamine in her system. But, just because she had methamphetamine in her system does not mean she provoked the Appellant.

Further, Appellant's statement about being "pushed too far" was introduced into evidence without any further context as to when or how he was pushed. V AA 952-953. There was no other evidence introduced at trial that Anshanette provoked the Appellant, other than this vague statement. There was no additional trial

testimony supporting a sudden impulse of passion or adequate provocation. Because the statement had no context, including a voluntary manslaughter instruction based on it would have caused the jury to speculate to how or when Appellant was "pushed too far" without any evidentiary support. And as this Court held in Crawford, the defense is not entitled to instructions incorporating the defense's theory that are "misleading, inaccurate, or duplicitous." Crawford, 121 Nev. at 754, 121 P.3d at 589. In the instant case, including this jury instruction would have been misleading by causing the jury to speculate to the context of one vague statement without any additional supporting evidence.

In sum, even if the district court erred by not providing the voluntary manslaughter instruction, the error was harmless because there was no prejudicial effect to the error. The defense also provided no evidence supporting the voluntary manslaughter instruction. Thus, there is no need for a new jury trial when a jury clearly found Appellant guilty of first-degree murder beyond a reasonable doubt.

WHEREFORE, the State respectfully requests that rehearing be granted and the Order be amended.

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Dated this 28th day of October, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar # 001565

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155
(702) 671-2750

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this petition for rehearing 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this petition complies with the type-volume limitations of NRAP 40 or 40A because it is proportionately spaced, has a typeface of 14 points and contains 3,134 words and 335 lines of text.

Dated this 28th day of October, 2019.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Alexander Chen*

ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 89155-2212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 28, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

WILLIAM M. WATERS
Deputy Public Defender

ALEXANDER CHEN
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

AC/Briana Stutz/ed