

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN GLOVER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NO. 77425

Electronically Filed
Apr 17 2019 05:44 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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Respondent.)	
)	

APPELLANT’S OPENING BRIEF

JURISDICTIONAL STATEMENT

- A. Statute which grants jurisdiction to review the judgment: NRS 177.015.
- B. Judgment of Conviction filed 10/15/18; Notice of Appeal filed 11/08/18.
- C. This appeal is from a final judgment entered 10/15/18.

ROUTING STATEMENT

D. Pursuant to NRAP 17, is this matter presumptively assigned to the Court of Appeals? Identify issues or circumstances that override any presumptive assignment to the Court of Appeals or require retention by the Supreme Court. Issues should be identified and explained with specific reference to arguments in the Opening Brief.

Subsection (b) of Rule 17 provides that certain cases shall “presumptively” be heard and decided by the court of appeals. NOT INCLUDED in the cases to be “presumptively” assigned to the court of appeals are appeals of convictions for persons convicted of Category A and Category B felonies. No provision of the Nevada Rules of Appellate Procedure suggests that Category A or Category B felonies should be assigned to the court of appeals for resolution. Pursuant to the Judgment of Conviction, Mr. Glover was adjudicated guilty of Ct. 1 – Murder With Use of a Deadly Weapon (Category A felony), Ct. 2 – Assault with a Deadly Weapon and Ct. 3 – Discharge of Firearm From or Within a Structure or Vehicle, which are classified as “category B” felonies. That because this case is a Category A and B felony, and because the provisions that “presumptively” assign certain cases to the Court of Appeals expressly exclude cases involving Category A and B felonies, the Appellant respectfully requests this Court retain this case for resolution.

ISSUES PRESENTED FOR REVIEW

I. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO OVERCOME THE PRESUMPTION OF INNOCENCE AND THEREBY TO SUSTAIN THE CONVICTIONS AGAINST SHAWN GLOVER.

II. MR. GLOVER WAS DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL WHEN THE STATE ATTEMPTED TO SHIFT THE BURDEN OF PROOF TO HIM.

III. MR. GLOVER WAS DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL WHEN THE COURT ALLOWED THE STATE TO SOLICIT FROM MIRANDA SUTTON AND AKIRA VEASLEY IMPROPER CHARACTER EVIDENCE.

STATEMENT OF THE CASE

An Indictment, filed on February 4, 2016, charged Shawn Glover with the crimes of: **Count 1** – Murder with use of a Deadly Weapon; **Count 2** – Assault with a Deadly Weapon; **Count 3** – Ownership or Possession of a Firearm by a Prohibited Person; and **Count 4** – Discharge of Firearm. (App. Vol. I, pgs. 1-3)

On February 8, 2016, Mr. Glover was arraigned in District Court. He pled Not Guilty and waived his right to a trial within 60 days. (App. Vol. II, pg. 312) On April, 25, 2016, after Mr. Glover's previous attorney withdrew, the Public Defender reconfirmed on the case, and the trial date was reset. (App. Vol. II, pg. 314) On June 28, 2018, Mr. Glover's motion to bifurcate Count 3 (Ownership or Possession of a Firearm by a Prohibited Person) was granted as unopposed. (App. Vol. II, pg. 327)

An Amended Indictment was filed with the court on July 21, 2018. The Amended Indictment charged Shawn Glover with the crimes of: **Count**

1 – Murder with use of a Deadly Weapon; Count 2 – Assault with a Deadly Weapon; Count 3 – Discharge of Firearm from or within a Structure or Vehicle; and Count 4 – Ownership or Possession of a Firearm by a Prohibited Person. (App. Vol. I, pgs. 214-216)

A five day trial, beginning on July 30, and concluding on August 3, 2018, was conducted in District Court, Department IX, before the Honorable Jennifer Togliatti. (App. Vol. III, pg. 435 – Vol. V. pg. 1047) After the presentation of evidence, and deliberation, the jury returned a verdict of: Count 1 – Guilty of First Degree Murder with use of a Deadly Weapon; Count; Count 2 – Guilty of Assault with use of a Deadly Weapon; and Count 3 – Guilty of Discharge of Firearm from or within a Structure or Vehicle. (App. Vol. II, pgs. 257-58)

Pursuant to the verdict, the Court sentenced Mr. Glover to: Count 1 – Life without the possibility of Parole plus a consecutive term of 180 months with a minimum parole eligibility of 48 months for the use of a deadly weapon; Count 2 – a maximum of 72 months with a minimum parole eligibility of 28 months, concurrent with Count 1; and Count 3 – a maximum of 180 months with a minimum parole eligibility of 60 months, concurrent with Counts 1 and 2. (Count 4 was dismissed.) Mr. Glover was given 1,011 days credit for time served. (App. Vol. pgs. 305-06)

STATEMENT OF THE FACTS

In December of 2015, about two weeks before this shooting, Patrick Fleming, his wife Miranda Sutton, their 21 year old daughter Akira Veasley, and 12 year old twins, moved into a townhouse with their goddaughter Angela. (App. Vol. IV, pgs. 790-92; 811) Shortly after that, around Christmas Eve, Shawn Glover also moved into the townhouse. (App. Vol. IV, pg. 812) Mr. Glover has a daughter in common with Angela. (App. Vol. III, pgs. 792-93) On January 1, 2016, five adults, along with several children were living in Angela's townhouse on 4032 Smokey Fog Avenue, in North Las Vegas. (App. Vol. III, pg. 793)

On the morning of January 1, 2016, after he returned from taking Angela to work, Patrick Fleming got into an argument with his stepdaughter Akira over her behavior the night before. The argument took place downstairs in the garage and Miranda was present. (App. Vol. IV, pgs. 793-95; 847-48) According to Miranda's testimony, "it was an argument. It was a loud argument. It was a lot of shouting and that's primarily why we went to the garage. There was a lot of handclapping, you know, when you talk with your hands. But other than that, no, it was a typical argument that we were having. (App. Vol. IV, pg. 795)

At some point during the argument, according to Miranda Sutton, Shawn Glover came downstairs with the phone and told Miranda that Angela was on the phone and wanted to speak to her. After Miranda told Angela that everything was okay, Mr. Glover went back upstairs. (App. Vol. IV, pg. 796) Later, as the argument in the garage was winding down, Mr. Glover returned downstairs to the garage. (App. Vol. IV, pg. 796) Miranda testified that Mr. Glover asked her to come upstairs with him, which she did. (App. Vol. IV, pg. 797) She claimed that Mr. Glover asked her if she wanted him to handle the situation. She indicated that everything was fine and not to worry. (App. Vol. IV, pgs. 797-98)

From this point on in the narrative, Miranda Sutton and Akira Veasley tell two different stories about happened to Patrick Sutton on January 1, 2016.

At trial, Miranda Sutton and Akira Veasley testified that shortly after Patrick and Akira had come back upstairs, Patrick and Shawn Glover returned to the garage. A couple of seconds later, the women heard shots. When they ran over and looked down the stairs, they claimed to see Patrick slumped over on the ground and Mr. Glover with a gun, which he pointed at them and told them not to “tell on me”. (App. Vol. IV, pgs. 800-02; 843-44)

However, that was not the original story that they told the police immediately after calling 911. Miranda Sutton originally told the police that she did not know who had shot her husband. (App. Vol. IV, pg. 815) Akira Veasley testified that she had initially told the police that someone named Hatch, someone who had come over to buy marijuana from Patrick Fleming, had shot him. (App. Vol. IV, pgs. 850-51) (Akira also told the police that it was Hatch, not Shawn Glover, who, during the argument, came downstairs initially to talk to her mother. (App. Vol. IV, pg. 851))

SUMMARY OF THE ARGUMENT

There was insufficient evidence presented at trial to overcome the constitutionally mandated presumption of innocence protecting Mr. Glover. The State did not prove guilt beyond a reasonable doubt.

When it improperly shifted the burden of proof to the defense to prove Mr. Glover's innocence, the State denied Mr. Glover his 5th amendment rights and thereby denied him a fair trial.

In this case, allowing the jury to hear evidence that Miranda Sutton and Akira Veasley knew that Mr. Glover had been violent toward other people was highly prejudicial and was not be cured by the Court's limiting instruction. Allowing this evidence certainly led the jury to assume that if

Mr. Glover had been violent before, he must have been violent here. This evidence was highly prejudicial and should have been disallowed. By allowing this testimony to come in, the Court denied Mr. Glover a fair trial.

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO OVERCOME THE PRESUMPTION OF INNOCENCE AND THEREBY TO SUSTAIN THE CONVICTIONS AGAINST SHAWN GLOVER.

The test for insufficiency of evidence upon appellate review is whether the jury, acting reasonably, could be convinced of a defendant's guilt beyond a reasonable doubt by evidence it had a right to accept. *See Edwards v. State*, 90 Nev. 255 (1974); *Woodall v. State*, 97 Nev. 235 (1981); *Jackson v. Virginia*, 443 U.S. 307 (1979); *see also Wilkins v. State*, 96 Nev. 367, 374 (1980) ("In reviewing the evidence supporting a jury's verdict, the question is . . . whether the jury, acting reasonably, could have been convinced to that certitude by the evidence it had a right to consider."). Stated differently, this Court must decide if the jury acted unreasonably in determining there was no reasonable doubt of guilt. *See Edwards*, 90 Nev. at 255.

At trial, there was no fingerprint evidence that might have either established whether or not there was any possible link of Mr. Glover to these

crimes. (App. Vol. IV, pgs. 901-908) Also, there was no DNA evidence collected from inside 4032 Fog Avenue that potentially could have identified the shooter. (App. Vol. IV, pg. 913) Likewise, there was no DNA collected from the .40 caliber shells that were found at the crime scene. (App. Vol. IV, pg. 914) In short, there was no physical evidence to tie Shawn Glover to the killing of Patrick Fleming.

The case against Mr. Glover solely relied on the testimonies of Miranda Sutton and Akira Veasley. The problem with their testimonies as the sole basis on which to convict Mr. Glover was that they told a different story at trial than the story that they had originally told the police.

Immediately after the shooting, when Miranda Sutton told the 911 operator that her husband had been shot, she declared that she did not know who shot him. (App. Vol. IV, pgs. 814-15) At trial she identified Shawn Glover as the shooter. However, during cross examination it was not clear why she originally had a narrative that was different than her testimony at trial. When pressed why her story was originally that she did not know who shot her husband, her explanation was not a coherent one. Her comments were all over the map – “I was afraid, so I initially lied to the police”; “I really don’t - don’t even remember that part”; “I’m not sure if I lied to them”; “ I believe I said that”; “I might have said that”; “I don’t know”

(App. Vol. IV, pgs. 816-20; 824-26) She was unable to answer simple and direct questions. Her inconsistency in her accounts of what happened created reasonable doubt about the trustworthiness of her testimony.

Likewise, Akira Veasley told multiple versions of what happened that day. She told the police on the day of the shooting that someone named Hatch was at the house. According to her, Hatch was a customer of Patrick's and was there to buy marijuana. (App. Vol. IV, pg. 850) She also told the police that Hatch had been waiting upstairs during the argument, but at some point came downstairs and spoke to Miranda. (App. Vol. IV, pg. 851) She further told the police that Hatch sticking his nose into family business upset Patrick. (App. Vol. IV, pg. 851) Later, however, she told the police that Hatch was Shawn Glover. (App. Vol. IV, pgs. 853-54) This inconsistency clouds the credibility of her testimony that Shawn Glover was in fact the actual shooter and created reasonable doubt.

Accordingly, there was insufficient evidence presented at trial to overcome the constitutionally mandated presumption of innocence protecting Mr. Glover. The State did not prove guilt beyond a reasonable doubt.

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II. MR. GLOVER WAS DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL WHEN THE STATE ATTEMPTED TO SHIFT THE BURDEN OF PROOF TO HIM.

During its Rebuttal argument, the State attempted to short circuit any possible consideration of the reasonable doubt created by the circumstances surrounding the shooting when it argued that “He [defense attorney] said – Mr. Bashor said, as he was making his comment about this Defendant, is the Defendant was not even there. Where is the evidence about that?” (App. Vol. V, pg. 1033) The State’s question told the members of the jury that in order for them to consider the Defense’s argument regarding the evidence, the Defense needed to present to them some evidence.

Nothing is more fundamental in the universe of criminal justice than the presumption of innocence and the burden upon the State, in seeking criminal convictions, of proving the defendant guilty beyond a reasonable doubt. **Barron v. State**, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989). When a prosecutor tells the jury, through argument, that the Defense should or could have produced certain evidence, then the prosecutor shifts the burden of persuasion upon the defendant, violating the Fifth Amendment Due Process Clause of the United States Constitution. Id. **Mullaney v. Wilbur**, 421 U.S. 684 (1975)(shifting of burden to defendant implicates Due Process clause and makes the verdict less reliable); **In re Winship**, 397 U.S.

358 (1970); Colley v. State, 101 Nev. 473, 705 P.2d 1126 (1985) (“impermissible to comment on a defendant's failure to call a witness”); Emerson v. State, 98 Nev. 158, 643 P.2d 1212 (1982).

When it improperly shifted the burden of proof to the defense to prove Mr. Glover’s innocence, the State denied Mr. Glover his 5th amendment rights and thereby denied him a fair trial.

III. MR. GLOVER WAS DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL WHEN THE COURT ALLOWED THE STATE TO SOLICIT FROM MIRANDA SUTTON AND AKIRA VEASLEY IMPROPER CHARACTER EVIDENCE.

Because Miranda Sutton and Akira Veasley had told the police multiple versions of what had happened in the shooting of Patrick Fleming, the State asked the Court, pursuant to **NRS 50.135(2)(b)**, to be able to explain why those statements were inconsistent and different from their (then anticipated) trial testimony. (App. Vol. IV, pgs. 717-26) The State indicated that the witnesses had lied to the police because they purported to be afraid of Mr. Glover, believing him to be a member of the GPK gang and to have committed multiple acts of murder. (App. Vol. IV, pg. 723)

The Defense objected to this. (App. Vol. IV, pgs. 730-34; 784) The Court ruled that it would “allow the District Attorney to talk about the

witness' belief of the history of violence, but I'm going to exclude gang affiliation ..." (App. Vol. IV, pg. 784)

Accordingly, on redirect examination of Miranda Sutton, the State asked, "... right after Patrick had been shot, and you told police what was going on and left out that it was the Defendant who shot Patrick, did you believe – did you believe that the Defendant had committed other acts of violence against other people in the past"? Miranda Sutton answered, "I know he had, yes." (App. Vol. IV, pg. 836) Similarly, during redirect examination of Akira Veasley, the State asked, "Akira, when you told the police that it was – that it was Hatch and didn't use the Defendant's real name at that time, did you personally believe that the Defendant had been violent toward other people in the past"? She answered, "yes". (App. Vol. IV, pg. 856) Both times the Court did instruct the jury that the testimony could not be considered as substantive evidence that the Defendant had a history of violence against other people or that he was a person of bad character. (App. Vol. IV, pg. 837; 856)

Although the admission of evidence of separate and independent criminal acts rests within the sound discretion of the trial court, it is, nevertheless, the duty of that court to strike a proper balance between the probative value of the evidence and its prejudicial dangers. **Maves v. State,**

95 Nev. 140, 591 P.2d 250 (1979). Care must be taken to require that such evidence be probative of something beyond mere bad character, such as intent, motive or plan. **Berner**, 104 Nev. at 697. The Court has also established that in evaluating whether the probative value of the evidence is substantially outweighed by the danger of prejudice, the evidence of prior bad acts may unduly influence the jury and result in a conviction based on the accused's propensity to commit a crime rather than on the State's ability to prove all the elements of the crime. **Walker**, 166 Nev. at 447.

Testimony that Mr. Glover had previously been violent toward other people was more prejudicial than probative. One of the purposes of **NRS 48.045(2)** is to shield the defendant from undue prejudice and to prevent convictions based on bad character. This is the reason why the Nevada Supreme Court has always viewed bad act evidence as heavily disfavored.

In this case, allowing the jury to hear evidence that Miranda Sutton and Akira Veasley knew that Mr. Glover had been violent toward other people was highly prejudicial and was not cured by the Court's limiting instruction. The instruction amounted to the proverbial act of trying to un-ring the bell. Allowing this evidence certainly led the jury to assume that if Mr. Glover had been violent before, he must have been violent here, which is the exact type of propensity evidence disfavored by the courts. This

evidence was highly prejudicial and should have been disallowed. By allowing this testimony to come in, the Court denied Mr. Glover a fair trial.

CONCLUSION

Mr. Glover's right to Due Process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as Art. 1, Sec. 8(5) of the Nevada Constitution, was violated by his convictions despite the insufficiency of evidence, the State's attempts to shift the burden of proof, and the admission of bad character evidence. All this denied him his right to a fair trial.

Based on these errors, the judgment of convictions in this case must be reversed.

Respectfully submitted,

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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 Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 15 pages which does not exceed the 30 page limit.

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 sanctions in

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

DATED this 17 day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 17 day of April, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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BY /s/ Carrie M. Connolly
Employee, Clark County Public Defender's Office