IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD SAMUEL PUNDYK, No. 77587

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Appeal from a Judgment of Conviction in Case Number CR16-1290
The Second Judicial District Court of the State of Nevada
The Honorable Connie J. Steinheimer, District Judge

APPELLANT'S REPLY BRIEF

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ARGUMENT IN REPLY

Unlike its federal rule counterpart, NRS 50.295 expressly permits an expert to give an opinion that embraces the ultimate issue to be decided by the trier of fact.

In its answering brief the State asserts that Dr. Melissa Piasecki's opinion, as expressed at a pretrial hearing, that "Pundyk could not appreciate that his conduct was wrong and not authorized by law ... constituted an opinion that Pundyk was not guilty by reason of insanity," which it contends was a 'highly prejudicial, improper expression of an opinion' that went to the ultimate issue in this case, and was properly excluded." Respondent's Answering Brief (RAB) at 10-11. But NRS 50.295 expressly permits an expert to give an opinion that embraces the ultimate issue to be decided by the trier of fact. NRS 50.295 states in full:

> **Opinions: Ultimate issues.** Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

This statute was enacted in 1971, during the Fifty-sixth Session of the Nevada Legislature, as section 99 to Senate Bill 12.[1] The

[1]https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/

language of NRS 50.295, as introduced and later enacted, has remained unchanged since. The language was taken from a draft federal rule of evidence—"Draft Federal Rule 7-04."[2] But unlike NRS 50.295, the corresponding federal rule of evidence creates an express exception to its general rule.[3] Rule 704(b) of the Federal Rules of Evidence provides:

> **(b) Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

The Nevada State Legislature has not enacted a similar exception to the admissibility of expert witness testimony on ultimate issues.

At trial and again on appeal, the State seeks support in this Court's opinion in *Winiarz v. State*, 104 Nev. 43, 752 P.2d 761 (1988). But *Winiarz* did not cite to or acknowledge NRS 50.295. The Court did, in a footnote, quote Rule 704(b) of the Federal Rules of Evidence. See 104 Nev. at 51 n.6, 752 P.2d at 766 n.6. Footnote 6 was offered in

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1971/SB012,1971.pdf

[2]https://www.leg.state.nv.us/Division/Research/Publications/InterimReports/1971/Bulletin090.pdf at 39.

[3] Rule 704(a) of the Federal Rules of Evidence states: "**(a) In General--Not Automatically Objectionable.** An opinion is not objectionable just because it embraces an ultimate issue."

support of the Court's case-specific holding that to allow "Dr. Master, under the guise of describing [the defendant's] mental state, to give the jury, based on his psychiatric examination, an expert opinion that the woman he examined, now before the bar of justice, was plainly and simply a murderer who killed her 'husband in cold blood in a premediated fashion,'" was "a usurpation of the jury function." 104 Nev. at 51, 752 P.2d at 766. The forcefulness of the Court's holding may lie in part on the fact that in *Winiarz* the defendant had "claimed that the homicide in question was accidental and *never* asserted that she lacked cognitive ability at any relevant time[.]" *Estes v. State*, 122 Nev. 1123, 1132, 146 P.3d 1114, 1121 (2006) (italics added); and *cf. Guevara-Pontifies v. State*, 2017 WL 2119471 (filed on May 4, 2017) (unpublished *Order of Affirmance*) at *2 (citing *Winiarz* for the proposition that "the expert witness should not have been permitted to 'directly attack[]' the defendant's credibility by testifying that she was 'lying' and 'feigning.'") (alteration in the original).

The broad proposition that the State seeks to advance under *Winiarz* is not moored to Nevada's evidence statute. It is also inapposite here because Dr. Piasecki's proffered testimony was not an attack

credibility but instead advanced Mr. Pundyk's theory of the defense. This Court should clarify the limited case-specific nature of the holding in *Winiarz* and disavow dicta in *Pimentel v. State*, 133 Nev. Adv. Op. 31, 396 P.3d 759, 768 (2017), that expands it; specifically this sentence: "Furthermore, an expert may not opine as to the ultimate question of any element of a charged offense because to do so usurps the jury's function." This sentence is contrary to the Nevada Rules of Evidence.

Dr. Piasecki should have been allowed to express her expert opinion in this case. This Court should vacate the judgment and remand for a new trial.

The transferred intent instruction was inapplicable to the facts of this case

The State asserts that "[t]he point of the [transferred intent] instruction was that it did not matter whether Pundyk believed it was his mother or *someone* else on the other side of the fence when he fired. If he had the intent to kill, the identity of the actual victim did not matter." RAB at 13 (italics added). Stated in the abstract, this understanding of the "transferred intent" doctrine is correct. See *Ochoa v. State*, 115 Nev. 194, 197, 981 P.2d 1201, 1203 (1999) (noting that the doctrine of transferred intent "is a theory of imputed liability" developed

"to address situations where a defendant, intending to kill A, misses A and instead accidentally kills B. Without the doctrine, the individual responsible for B's death could not be charged with murder because there was never an intent to kill B."). The doctrine is inapplicable to the concrete facts of this case.

In order for an intent to be transferable two things must be present: (1) the intent—which can be negated by justification-based defenses, as well as cognitive-issue defenses; and (2) at least two individual persons existing in the world, at the moment. In this case the second element does not exist (there was only Mr. Pundyk's mother present). It was for the jury to determine whether the first element, an intent, existed. Because of Mr. Pundyk's fixed delusional belief that he was combating evil as an abstract, the State's insistence on making it about "shooting his mother or ... shooting someone else," RAB at 13, is metaphysically wrong.

The district court erred in giving a transferred instruction in the circumstances of this case. This Court should not consider the district court's error to be harmless because the instruction itself is predicated on the presumption of the existence of an actual intent that is

transferable. As noted, it was incumbent on the jury to find the "intent" element beyond a reasonable doubt. *Ochoa v. State*, 115 Nev. at 197, 981 P.2d at 1203 ("[a]s a general proposition, a person cannot be held criminally responsible for an offense unless the state proves, beyond a reasonable doubt, all of the essential elements of that offense."). The transferred intent instruction artificially supplied the intent element. Doubt exists as to whether a correctly instructed jury would have convicted Mr. Pundyk. Thus, it is not clear beyond a reasonable doubt that the inclusion of this instruction was harmless.

Because of instructional error this Court should vacate the judgment and remand for a new trial.

VI. CONCLUSION

For the reasons stated, this Court should reverse and remand for a new trial.

DATED this 17th day of September 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition 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 Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 1,589 words. NRAP 32(a)(7)(A)(i), (ii).

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 of the transcript or appendix where the matter relied upon 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 17th day of September 2019.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

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

Jennifer P. Noble, Chief Appellate Deputy,
Washoe County District Attorney

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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