

IN THE SUPREME COURT OF THE STATE OF NEVADA

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DAMIEN PHILLIPS,  
Appellant,

v.

THE STATE OF NEVADA,  
Respondent.

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Case No. 78270

**RESPONDENT'S ANSWERING BRIEF**

**Appeal From Judgment of Conviction  
Eighth Judicial District Court, Clark County**

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**ROUTING STATEMENT**

This appeal is presumptively assigned to the Court of Appeals under NRAP 17(b) because it is an appeal from a judgment of conviction based on a jury verdict that challenges only the sufficiency of the evidence.

**STATEMENT OF THE ISSUE**

Whether there is sufficient evidence to sustain Phillips’ convictions

**STATEMENT OF THE CASE**

On October 23, 2018, the State filed an Information, charging Phillips with:  
Count 1 – Conspiracy to Commit Burglary; Count 2 – Conspiracy to Commit Robbery; Counts 3, 5, 8, 11, 14-15 – Burglary While in Possession of a Deadly Weapon; Counts 4, 6-7, 9-10, 12-13, 16-17 – Robbery with Use of a Deadly

Weapon; Counts 18-20 – Assault with a Deadly Weapon; and Count 21 – Assault with a Deadly Weapon - Victim 60 Years of Age or Older. 2 AA 376-87. On December 3, 2018, Phillips’ trial began. 3 AA 617. On December 13, 2018, the jury found Phillips guilty on all counts. 11 AA 2518-22. On January 29, 2019, the district court sentenced Phillips to the following: Count 1 – 364 days in Clark County Detention Center; Count 2 – 12 to 48 months in the Nevada Department of Corrections, running concurrently to Count 1; Counts 3, 5, 8, 11, 14-15 – 36 to 120 months, running concurrently; Counts 4, 6-7, 9-10, 12-13, 16-17 – 36 to 120 months with a consecutive term of 36 to 120 months for the deadly weapon enhancement, running consecutively; Counts 18-20 – 12 to 48 months, running concurrently; and Count 21 – 12 to 48 months, running concurrently to Count 20. 11 AA 2677-79. The Judgment of Conviction was filed on February 27, 2019. 11 AA 2687-91. Phillips filed a Notice of Appeal on February 28, 2019. 11 AA 2694-95.

### **STATEMENT OF THE FACTS**

On July 17, 2018, Phillips robbed a U.S. Bank at 1440 Paseo Verde. 4 AA 869, 873-74. Amie Carr was a teller working that day. 4 AA 873-74. She explained that a man approached her teller window and handed her a note. 4 AA 874. The note said \$4,500, that he had a weapon, and not to pull any alarms. 4 AA 879. She handed him what she thought to be bait money, money that had specific serial numbers. 4

AA 856-57, 875, 893-94.<sup>1</sup> He tried to hand back some of the cash but ended up taking it all. 4 AA 875-76. A total of \$3,730 was taken. 4 AA 883. Video surveillance was recovered showing Phillips committing this robbery. 4 AA 852.

On July 23, 2018, Phillips and his co-defendant, Anthony Barr, robbed a U.S. Bank at 10565 Eastern Avenue. 4 AA 956-57, 961-62. Phillips and Barr entered the bank and approached two different tellers. 4 AA 925, 961-62. One approached Melanie Terada and handed her a note that demanded cash and threatened that they had a gun. 5 AA 1002-05. A total of \$10,395 was taken from Melanie. 5 AA 1011. The other approached Allyson Santomauro and handed her a note saying that this was a robbery and demanding all of the cash in her drawer. 5 AA 1021-24. A total of \$5,775 was taken from Allyson. 5 AA 1027. Video surveillance was recovered showing Phillips and Barr committing this robbery. 4 AA 853. Alex Orellana, a universal banker present on that day, identified Phillips and Barr as the men that robbed the bank that day. 4 AA 917, 928. Chelsey Britton, the bank manager present on that day, also identified Phillips and Barr as the men that robbed the bank. 4 AA 971-73. Allyson identified Phillips as the man who approached her. 5 AA 1032-33.

On July 31, 2018, Phillips and Barr robbed a Bank of the West at 701 North Valle Verde. 5 AA 1040. Phillips was dressed in women's clothing and wore a wig.

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<sup>1</sup> A U.S. Senior Security Manager testified that there was likely not bait money at this location, and even if there had been, then it did not set off any alarm. 4 AA 856-57.

5 AA 1050-51. Barr approached Nur Begum and handed her a note that demanded all of the money, told her not to do anything funny, and that he had a gun. 5 AA 1064. A total of \$686 was taken from Nur. 5 AA 1072. Phillips approached Mary Grace Mones. 5 AA 1087-89. He set a bag down and handed her a note that said there was a bomb in the bag and to hand over the money. 5 AA 1087. A total of \$1,929 was taken from Mary. 5 AA 1092. Video surveillance was recovered showing Phillips and Barr committing this robbery. 5 AA 1040. Video surveillance from a nearby business showed the two men—one wearing a dress and wig seen in the bank video surveillance—getting into a red Mercury Grand Marquis and speeding away. 5 AA 1206-07, 1210. Regina Coleman identified Phillips as the man dressed as a woman and Barr as the other man. 5 AA 1127. Manny Saenz, a loan officer at the bank, identified Barr as being one of the men in the bank that day. 5 AA 1059. Phillips' prints were identified after processing this scene. 7 AA 1510, 1516-18.

During the investigation, Detective Ebert received video footage of Phillips dressed up in a wig and in a dress from one of Phillips' neighbors. 9 AA 2066-69. In the background, it shows the same apartment at the Aviator Suites as the search warrant photos of the apartment. 9 AA 2069.

On August 6, 2018, Phillips and Barr robbed a U.S. Bank inside a Smith's at 55 South Valle Verde Drive. 6 AA 1374-75. They walked in and the store manager



asked one of them if he needed help. 6 AA 1376. The store manager, along with another Smith's employee, helped him to find crayons in the store. Id. Video surveillance shows Barr and Phillips together in the crayon aisle with the employees and then showing Phillips put the crayons back on the shelf. 6 AA 1376, 1378-82. Phillips' fingerprints were identified on a box of crayons that the store manager and other employee had helped Phillips and Barr find just minutes before the robbery. 7 AA 1592-93.

Then Phillips and Barr approached the U.S. Bank teller windows. 6 AA 1415. Phillips approached Meghan Zitzman and showed her a note but she could not read it because he was shaking. 6 AA 1416. Then he told her to give him the money or he would shoot her. Id. After Meghan handed over the money, he demanded more money. 6 AA 1417. Then he said if she set off an alarm then he would shoot her. Id. A total of \$1,047 was taken from Meghan. 6 AA 1425. Video surveillance shows Phillips at the counter. 4 AA 853. A deposit slip that said "Oscar Delahoya, give me the loot" was found on the customer side of the bank podium. 6 AA 1463-64; 7 AA 1551. Phillips' fingerprints were identified on this slip. 7 AA 1591. Barr approached Sunny Cortner and showed her a note but she could not read it because it was upside down. 6 AA 1436-37. He also said that he wanted everything that she had and when she handed over the money, he said that was not enough. 6 AA 1436. When he left, he told her not to move or do anything or else he would shoot her. 6 AA 1437. A

total of \$1,439 was taken from Sunny. 6 AA 1438. Video surveillance shows Barr committing this robbery. 4 AA 853.

Prior to Barr and Phillips approaching the bank in Smith's, Sabrina Henderson (Barr's girlfriend at the time) was seen inside the store watching the bank area. 7 AA 1680-82. Then she left the store without purchasing anything. 7 AA 1682.

At this point, the Grand Marquis had been linked to three of the prior robberies. 7 AA 1691-94. Police secured a GPS tracking warrant so that they could track the Grand Marquis. 7 AA 1694. Through a Facebook search, police had linked Phillips to the Aviator Suites. 7 AA 1694-95. When police did surveillance of the Aviator Suites, they saw Phillips, Barr, Henderson, and the Grand Marquis. 7 AA 1696-98. Detective Ebert also saw a Protege near the Grand Marquis. 9 AA 2039. When they left in the Grand Marquis, police followed the car to the Circus Circus Manor. 7 AA 1700. Detectives were then able to place the tracker on the Grand Marquis. 7 AA 1702, 1706.

On August 9, 2018, police tracked Phillips and Barr in the Grand Marquis to a different Smith's with a U.S. Bank inside located at 2540 S. Maryland Parkway. 8 AA 1725-27; 9 AA 1982, 1985. Detective Worley saw Phillips and Barr outside of the Smith's and enter the store together after looking around. 9 AA 1985-86. Detective Worley noticed a bulge near Barr's lower back by his waistband. 9 AA 1987, 1990. After a short time, he watched them come out of the store. 9 AA 1988.

Detective Worley photographed and took video of Phillips and Barr around this Smith's, which also reflected the bulge. 9 AA 1989-90. Then, they walked over to another bank in the same parking lot before driving away. 9 AA 1992. Detective Worley noted that the Smith's was crowded that morning. 9 AA 1987. He testified at trial that at the time he was conducting the surveillance he would have been surprised if Phillips and Barr robbed the US Bank inside due to the large number of people at the store that day. Id.

Approximately 30 minutes later, police tracked Barr and Phillips to another U.S. Bank at 801 East Charleston where Barr and Phillips committed another robbery. 8 AA 1730-31, 1789-95. They entered the bank; Barr pulled out a gun and Phillips approached the teller window. 8 AA 1775. At one point, Barr pointed the gun at Teri Williams, an elderly woman, and demanded that she get on the floor. Id. Vincent Rotolo was having a meeting with a bank manager and associate when Barr commanded them to get down to the floor with a gun. 7 AA 1638, 1640-41. Phillips approached two different tellers Claudio Raucha Benitez and Jada Copeland, and demanded money. 8 AA 1790-91; 9 AA 1968. Jada recalled that Phillips had a yellow bag with him. 9 AA 1970. A total of \$5,452 was taken from Claudia and a total of \$3,108 was taken from Jada. 8 AA 1796; 9 AA 1974. Video surveillance was recovered showing Phillips and Barr committing this robbery. 4 AA 854.

Phillips, Barr, Henderson, and another woman were arrested shortly after that robbery. 8 AA 1738. Police pulled the Grand Marquis over and had to chase Phillips and Barr after they ran out of the car. 9 AA 1999-2000, 2063-64, 2114-18, 2133-37. Police also had an air unit tracking the Grand Marquis and then tracking Barr and Phillips as they ran. 9 AA 2092-99. Police found money strewn about by a yellow bag in a nearby backyard where Barr had run. 8 AA 1802, 1804; 9 AA 2004. When Phillips was arrested, he was wearing the same shoes that had been seen in prior robberies. 8 AA 1741. Barr had a Circus Circus Manor hotel card in his wallet and had makeup smeared on his face and shirt when he was arrested. 8 AA 1741-42.

Police secured a search warrant for the Grand Marquis, Phillips' car, Barr and Phillips' apartment, Vidal and Jaszman's apartment, and the Circus Circus hotel room. 9 AA 2066, 2070-71; 10 AA 2271. A pneumatic gun was found in Phillips' car, the Protege, which was parked at the Aviator Suites. 10 AA 2283-84. Another pneumatic gun was found on the rear floorboard of the Grand Marquis, Barr's car, in the back-passenger seat behind the driver. 10 AA 2288. In the Circus Circus room, police found makeup and Phillips' identification, among other miscellaneous items. 10 AA 2274-77.

### **SUMMARY OF THE ARGUMENT**

Phillips argues that there is insufficient evidence to support: 1) Counts 3 and 4 entirely; 2) Counts 3 through 14 as to the deadly weapon enhancement; and 3)

Count 14 as to his intent. However, the State presented sufficient evidence for a rational juror to find that Phillips was guilty of Counts 3 through 14 beyond a reasonable doubt.

## **ARGUMENT**

### **THERE IS SUFFICIENT EVIDENCE TO SUSTAIN PHILLIPS' CONVICTIONS**

The standard of review for the sufficiency of the evidence is the limited inquiry of whether any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686–87 (1995). The court makes this inquiry in a light most favorable to the prosecution. Id. Evidence is insufficient only if the court determines that no rational trier of fact could have found the appellant guilty beyond a reasonable doubt given the evidence. Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (*citing State v. Purcell*, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)) (overruled on other grounds). But the court will not reweigh the evidence or reevaluate the credibility of the witnesses in its inquiry. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Further, the court will not disturb a conviction if it concludes that a rational jury had sufficient evidence to find the defendant guilty beyond a reasonable doubt. Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 853 (2000).

A jury is free to rely on both direct and circumstantial evidence in returning its verdict. Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).

Circumstantial evidence alone may sustain a conviction. Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (citing Crawford v. State, 92 Nev. 456, 552 P.2d 1378 (1976)). “[I]t is the jury’s function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses.” Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). It is further the jury’s role “[to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979).

**a. There is sufficient evidence tying Phillips to the robbery and burglary to sustain Counts 3 and 4**

Phillips contends that there is no evidence to support that he committed the robbery and burglary on July 17, 2018. AOB at 6-7. Count 3 is Burglary while in Possession of a Deadly Weapon and involved the U.S. Bank on July 17, 2018. 2 AA 377. Count 4 is Robbery with Use of a Deadly Weapon and involved taking cash from Amie Carr on the same day. 2 AA 378.

The State presented several pieces of evidence to show that Phillips committed the burglary and robbery on July 17, 2018. The bank’s video surveillance shows Phillips wearing distinct glasses. 5 AA 1187-88. Amie Carr remembered the robber wearing those aviator-style reflective glasses. 4 AA 876. The video surveillance from the second robbery shows Phillips wearing those glasses as well.

5 AA 1190. These same glasses were in Barr's car, which is seen on the officer's body camera footage during one of the traffic stops. 5 AA 1233-35. Detective Dennis Ozawa identified the same facial features in the video surveillance for the first and second robberies. 5 AA 1190. The jurors themselves were able to view the video surveillance from this robbery and compare to Phillips himself in the courtroom, as well as Phillips depicted in the other video surveillance of the robberies.

Vidal Holman and Jaszman Moorehead's testimony also links Phillips to this robbery. They testified as to their relationships with Phillips and Barr. Vidal had been friends with Phillips for almost a decade and described their relationship as like family. 10 AA 2240. Vidal knew Barr because Barr began to live with Phillips. 10 AA 2252. Vidal also lived near them in the same apartment complex. 10 AA 2243. Jaszman, Vidal's girlfriend, knew Phillips and Barr and lived with Vidal near them in the same apartment complex. 9 AA 2191, 2194-95; 10 AA 2243. Jaszman confronted Phillips about these robberies when she saw the police press release regarding recent robberies, to which Phillips replied that there's nothing to worry about and that he did not care about the cops. 9 AA 2203; 10 AA 2204. At a later time, Phillips and Barr tried to recruit Jaszman to join them during this robbery, but she said no. 10 AA 2206-07. Barr threatened that if she ever spoke about this, her life would be over. Id. Both Vidal and Jaszman identified Phillips on all of the banks' video surveillance, including the surveillance of the July 17, 2018, robbery. 10 AA

2209-16, 2251, 2253-56. Thus, under the totality of the evidence, there was sufficient evidence for a rational juror to find that Phillips committed the robbery and burglary on July 17, 2018, beyond a reasonable doubt.

**b. There is sufficient evidence to sustain the deadly weapon enhancement in Counts 3 through 14**

Phillips contends that there is insufficient evidence to sustain the deadly weapon enhancement as to Counts 3 through 14. AOB at 7-9. Counts 3 through 14 are the Burglary while in Possession of a Deadly Weapon and Robbery with Use of a Deadly Weapon charges. 2 AA 377-83.

Under NRS 193.165(6), a deadly weapon is defined, in part, as, “[a]ny 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.” (emphasis added). A pneumatic gun falls within this statute. Funderburk v. State, 125 Nev. 260, 212 P.3d 337 (2009).

A defendant uses a deadly weapon through conduct that produces fear of harm by means or display of the deadly weapon. Allen v. State, 96 Nev. 334, 336, 609 P.2d 321, 322 (1980), overruled on other grounds by Berry v. State, 125 Nev. 265, 212 P.3d 1085 (2009). The Nevada Supreme Court has suggested that for the deadly weapon enhancement to apply, the victim does not need to necessarily see the weapon, so long as the victim believes that the defendant has the weapon and would use it. Brisbane v. State, Unpublished Disposition, No. 67936, 385 P.3d 55 (Aug.



10, 2016) (*citing* Bartle v. Sheriff, 92 Nev. 459, 460, 552 P.2d 1099, 1099 (1976)).

If the unarmed offender had knowledge of the use of a deadly weapon by his co-offender, then that offender can be convicted of use with a deadly weapon even though he did not personally use it. Brooks v. State, 124 Nev. 203, 210, 180 P.3d 657, 661 (2008).

Here, there is sufficient evidence to sustain the deadly weapon enhancement as to all counts because Phillips and Barr had access to guns, opportunity to use those guns, used a gun and/or bomb by means of threatening to use those, and finally displayed a gun. First, Phillips and Barr had access to guns. Jaszman testified that she previously saw both Phillips and Barr with guns. 10 AA 2204-06. They asked Jaszman to join them in the robberies and when she declined, Barr threatened her that her life was over if she ever spoke about it. 10 AA 2206-07. Vidal testified that he had previously tested out Phillips' gun with Phillips to see if it would work. 10 AA 2258. Two pneumatic weapons were found after Phillips and Barr were arrested—one in Phillips' car, the other in Barr's car. 10 AA 2283, 2288. The gun found in Barr's car was recovered and tested. 10 AA 2308, 2310-12. A firearm expert testified that the gun was indeed a pneumatic gun. 10 AA 2311. He had tested the weapon in the lab and found it to be functional, despite the defect on the air tank. 10 AA 2313-14. Under NRS 193.165, this weapon recovered from Barr's car is a deadly weapon.

Next, Phillips and Barr had the opportunity and used those weapons by means of threatening to use them. Phillips and Barr passed notes to the bank tellers in some of the robberies. As to Counts 3 and 4, Amie Carr was shown a note that threatened that he had a weapon. 4 AA 879. As to Counts 5 and 6, Melanie Terada was shown a note that threatened, “We have a gun.” 5 AA 1003-05. As to Counts 5 and 7, Allyson Santomauro was shown a note threatening that this was a robbery and demanding all of the cash in her drawer. 5 AA 1021-24. As to Counts 8 and 9, Nur Begum saw a note that threatened, “I have a weapon.” 5 AA 1064. As to Counts 8 and 10, Mary Grace was shown a note that threatened, “I have a bomb in my bag.” 5 AA 1087. Phillips also placed a bag on the counter in front of the teller window as he showed her the note. Id. These threats constitute the means of using a deadly weapon under NRS 193.165(6) and Allen, 96 Nev. at 336, 609 P.2d at 322. The victims did not need to see the weapon nor did Phillips and Barr need to display the weapon for the enhancement to apply.

Phillips and Barr also made verbal threats about weapons during some of the robberies. As to Counts 11 and 13, Meghan Zitzmann was told, “We have a gun,” and “If you alarm, I’m going to shoot you.” 6 AA 1416. As to Counts 11 and 12, Sunny Cortner was told if she says anything, moves, or does anything else, then he’ll shoot her. 6 AA 1437. These threats also constitute the means of using a deadly weapon under NRS 193.165(6) and Allen, 96 Nev. at 336, 609 P.2d at 322. Again,

the victims did not need to see the weapon nor did Phillips and Barr need to display the weapon for the enhancement to apply.

Finally, Phillips and Barr displayed a gun. As to Count 14, Detective Worley saw a bulge by Barr's lower back near his waistband area. 9 AA 1987, 1990. Video and photo footage reflected Detective Worley's testimony. 9 AA 1990. Even though Barr had the gun, Phillips can be found guilty of the deadly weapon enhancement because he knew Barr had the gun. He knew that Barr had the gun for several reasons. One, he and Barr had committed four robberies at this point. Two, he did not intend to stop committing these robberies, as he stated to Jaszman. 10 AA 2204. Three, he and Barr used a gun in a robbery a mere 30 minutes later at another U.S. Bank. 8 AA 1775, 1792. Teri Williams, a witness at the last robbery, testified that Phillips even directed Barr with the gun at one point, supporting that Phillips knew about the gun. 8 AA 1775. Further, the jury could reasonably infer from the gun being used in the last robbery that a gun was used in the prior robberies. Thus, in the light most favorable to the prosecution, there was sufficient evidence for a rational juror to find that a deadly weapon was used beyond a reasonable doubt as to Counts 3 through 14.

Phillips first cites to Berry, 125 Nev. 265, 212 P.3d 1085, to support his argument that threats are insufficient. AOB at 8. Berry clarified Allen v. State, 96 Nev. 334, 609 P.2d 321, and Anderson v. State, 95 Nev. 625, 600 P.2d 241 (1979),

by explaining that the State must prove that a weapon is a deadly weapon under NRS 193.165(6). Id. at 277-78, 212 P.3d at 1093-94. Whether the weapon could instill reasonable fear is an ancillary consideration to that determination. Id. Here, a pneumatic gun and a bomb fall under NRS 193.165(6). Phillips and Barr threatened to use a gun or a bomb throughout the six robberies that they committed and those meet the Berry test. Thus, Berry does not affect Phillips' convictions.

Phillips also relies on Utah caselaw to support his argument. AOB at 9. The Utah Supreme Court held that verbal threats did not fall under Utah's prior aggravated robbery statute that simply said, "uses a firearm... or a deadly weapon." State v. Suniville, 741 P.2d 961, 962-63 (Utah 1987). Utah's Legislature amended the statute to include gestures and threats after that case. State v. Ireland, 150 P.3d 532, 535 (Utah 2006).

Phillips alleges here that because the Nevada Legislature has not amended the deadly weapon statute with similar phrasing to Utah's latest statute, then a threat to use a weapon cannot fall under Nevada's statute. Id. However, Nevada's statute is worded differently than Utah's prior statute. Nevada's deadly weapon statute includes, "[a]ny 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) (emphasis added). Further, Nevada caselaw reflects that a weapon can be used *by*

*means or display.* Allen, 96 Nev. at 336, 609 P.2d at 322 (emphasis added). An unpublished Nevada Supreme Court opinion also states that a victim does not necessarily need to see the weapon so long as the victim believes it will be used. Brisbane, Unpublished Disposition, No. 67936, 385 P.3d 55 (Aug. 10, 2016) (citing Bartle, 92 Nev. at 460, 552 P.2d at 1099).

Utah's prior statute simply said, "uses a firearm...or a deadly weapon." Compare NRS 193.165(6) with Suniville, 741 P.2d at 962-63. Utah's statute had to be amended so that threats would fall under the statute, but Nevada's statute already includes that language. See Ireland, 150 P.3d at 535. Nevada's Legislature was wise in including threats under the deadly weapon statute, and Utah's change in law reflects this, as it does not force victims to challenge a person threatening to use a deadly weapon and make that person actually display the weapon, creating even more of a danger. Thus, the Utah caselaw that Phillips relies on is inapplicable here.

**c. There is sufficient evidence to sustain Count 14 as to Phillips' intent**

Phillips argues that there is insufficient evidence to show his intent for Count 14. AOB at 10-11. Count 14 is Burglary while in Possession of a Deadly Weapon and involved the U.S. Bank inside a Smith's located at 2540 S. Maryland Parkway on August 9, 2018. 2 AA 383. Burglary is defined as entering any building with the intent to commit a robbery. NRS 205.060. There is no requirement that the robbery be completed. State v. Patchen, 36 Nev. 510, 137 P. 406, 408 (1913).

Here, there was sufficient evidence as to Phillips' intent for Count 14. The jury could infer from Phillips' actions before and after this burglary that he intended to commit a robbery when entering the Smith's. Before this burglary, Phillips and Barr had committed four bank robberies. Video surveillance from all of those robberies depicted Barr and Phillips. 4 AA 852-53; 5 AA 1040. Jaszman testified that when she confronted Phillips after seeing him in the press releases, his reply was that there was nothing to worry about and that he did not care about the cops. 9 AA 2203; 10 AA 2204. Barr threatened that her life would be over if she said anything after she told them that she would not join them. 10 AA 2206-07. Jaszman stated that Phillips grabbed a gun from her apartment before he and Barr left to go to Circus Circus. 10 AA 2205-06.

At the time of the burglary, Detective Worley saw Phillips and Barr outside of the Smith's and enter the store together after looking around. 9 AA 1985-86. Detective Worley noticed a bulge near Barr's lower back by his waistband. 9 AA 1987, 1990. Video and photo footage show this observation, so the jurors could assess for themselves. 9 AA 1990. The detective watched them come out after a short time. 9 AA 1988. Barr and Phillips were not carrying anything out of the store and did not appear to buy anything. 9 AA 2168. Detective Worley noted that the parking lot was very crowded and he would be surprised if they actually executed a robbery at that location there because it was so busy. 9 AA 1987.

After the burglary, Phillips and Barr walked over to another bank in the same parking lot. 9 AA 1992. Approximately 30 minutes later, they robbed another U.S. Bank at a different location with a gun. 8 AA 1789-95. They were tracked, pulled over, chased, and eventually arrested. 8 AA 1738; 9 AA 1999-2000, 2063-64, 2114-18, 2133-37. The stolen money had been found in a nearby backyard and a pneumatic gun was found in Barr's car. 8 AA 1802, 1804; 10 AA 2288. Thus, in a light most favorable to the prosecution, a rational juror could find Phillips guilty of Count 14 beyond a reasonable doubt when considering the totality of the evidence.

Phillips contends that it is equally likely that the he and Barr walked into this Smith's to buy chewing gum. AOB at 11. There was no evidence presented to suggest that at trial. Further, as discussed above, there was overwhelming evidence as to Phillips' intent to rob. Thus, this Court should disregard this attempt to manufacture evidence after the fact or to present hypotheticals.

### **CONCLUSION**

Based on the foregoing, the State respectfully requests that the Judgment of Conviction be affirmed.

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Dated this 19th day of August, 2019.

Respectfully submitted,

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BY */s/ Jonathan E. VanBoskerck*  
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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 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 4,877 words and 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 sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 19th day of August, 2019.

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## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on August 19, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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