

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

DAMIEN PHILLIPS,

Appellant,

vs.

STATE OF NEVADA,

Respondent.

) SUPREME COURT NO. 78270
)
)
)

) **APPEAL**
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) DISTRICT COURT NO. C-18-334400-1
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)

APPELLANT'S REPLY BRIEF

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PHILLIPS offers the following by way of reply to the State's Answering Brief filed on August 19, 2019.

I

ARGUMENT ISSUES

A. NO EVIDENCE TO SUPPORT COUNTS 3 AND 4

The state argues as follows (in bold) which is analyzed and refuted by comments below each assertion. This relates only to the robbery of the US Bank at 1440 Paseo Verde.

Video surveillance was recovered showing Phillips committing this robbery [US Bank, Counts 3 and 4]. 4 AA 852.¹

Video surveillance showed someone committing the robbery. PHILLIPS was not identified as the perpetrator, and the face of the perpetrator could not be identified from the video. Amie Carr, the teller who was robbed, testified that she didn't remember the perpetrator's clothes, and that she couldn't see his face.²

Both Vidal and Jaszman identified Phillips on all of the banks' video surveillance, including the surveillance of the July 17, 2018, robbery. 10 AA 2209-16.³

At Page 2209, the witness Jaszman is asked to look at State's Exhibit 1, but we are not sure she is testifying about a video depicting the US Bank on Paseo Verde. Exhibit 1 was identified by Kirkham Ayers (Senior Regional Security

¹ Ans.Br./3.

² PA/4/876.

³ Ans.Br./11-12.

Manager for U.S. Bank Nevada and Utah)⁴ on December 4, 2018.⁵ While he was sure that the first clip for Exhibit 1 was of the bank at 1440 Paseo Verde (Counts 3 and 4), he was not sure if all the clips on Exhibit 1 were of that bank.⁶ Indeed, Clip 2 appears to be of a completely different bank – the US Bank on Eastern that was robbed on July 23, 2018.⁷ The witness Jaszman was testifying about Clips 2 and 6⁸ which were never identified in the record as pertaining to the US Bank on Paseo Verde, and appear from Mr. Ayers’ testimony to be of the US Bank on Eastern.

B. NO EVIDENCE TO SUPPORT WEAPON FOR COUNTS 3-14

The issue here is a narrow one and asks whether under Nevada’s enhancement statute a person’s sentence will be “enhanced” where they threaten use of a deadly weapon even if there is no proof that they actually had a deadly weapon. The state cites to *Brisbane v. State* to support its position that a mere threat is sufficient. However, as the state notes, *Brisbane* involved a situation where one of two offenders actually had a deadly weapon, and the question was whether the enhancement would apply to the unarmed offender who knew that his co-defendant had a deadly weapon. The Court held that it could be applied to him. This is not the situation here. In the case at bar, there was no evidence that either Barr or PHILLIPS actually had a deadly weapon. The state goes on to argue that

⁴ PA/4/850.

⁵ PA/4/855.

⁶ PA/5/959:2-11.

⁷ PA/4/860-861.

⁸ PA/10/2209.

Nevada's enhancement statute applies to mere threats because it contains the wording "threatened to be used."⁹ However, that language requires that there first actually be a deadly weapon. The Nevada deadly weapon statute does not provide for an enhanced sentence for mere threats from an unarmed perpetrator.

The state next argues that since Barr and PHILLIPS had access to a deadly weapon, that is proof that they had a deadly weapon with them at the time the crimes were committed. That argument makes no sense. The state further argues that since a police officer saw a bulge in Barr's clothing, that was evidence that he had a gun.¹⁰ A bulge is evidence of nothing, and the supposed bulge was seen at the Smith's grocery store (Count 14) where no crime was committed.

C. NO EVIDENCE TO SUPPORT COUNT 14

Count 14 pertains to the burglary conviction when Barr and PHILLIPS walked into a Smith's grocery store. There was absolutely no evidence that the two men had an intent to commit a robbery inside the store when they entered. The state argues that since the men had committed bank robberies before entering the Smith's store, that supports the contention that the men must have had the intention when they entered the Smith's store to commit a robbery there, too.¹¹ PHILLIPS argued that the men might have walked into the store to buy some chewing gum. The state asserts that should be disregarded because there was no

⁹ Ans.Brff./16.

¹⁰ Ans.Brff./15.

¹¹ Ans.Brff./18.

evidence of that.¹² Likewise, there was no evidence that the men intended to commit a robbery when they entered the Smith's grocery store. That count should be dismissed.

II

CONCLUSION

Counts 3 and 4 must be dismissed because there was no evidence to support the jury's conclusion that Phillips was the perpetrator of that robbery. The deadly weapon enhancement for Counts 3-13 must be reversed because there was no evidence that the perpetrators had a deadly weapon, when all they did was show a threatening note. Count 14 for burglary with use of the Smith's grocery store must be reversed because (1) there was no evidence that the two men had a deadly weapon, and (2) there was no evidence that the men had a criminal intent when they walked into the Smith's grocery store, or that they committed any crime while inside the store.

Respectfully submitted,

Dated this 13th day of September, 2019.



SANDRA L. STEWART, Esq.
Attorney for Appellant


¹² Ans.Br./19.

III

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this reply 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 N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript of 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. I further 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 Word 14.4.3 For Mac with Times New Roman 14-point. I further certify that this reply brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because it contains only 1,296 words.

DATED: September 13, 2019



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DAMIEN PHILLIPS

IV

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the:

APPELLANT'S REPLY BRIEF

by mailing a copy on September 14, 2019 via first class mail, postage thereon fully prepaid, to the following:

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and by e-filing the original with the Nevada Supreme Court, thereby providing a copy to the following:

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