IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY STEWART,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
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Supreme Court Case No. 80084

APPELLANT'S REPLY BRIEF

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Appeal from Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ATTORNEY FOR APPELLANT

AMD LAW, PLLC
Alexis Duecker, Esq.
Nevada Bar Number 15212
8687 W. Sahara Ave. Ste 201
Las Vegas, NV 89117
(702) 743-0107

ATTORNEYS FOR RESPONDENT

CLARK COUNTY DISTRICT ATTY.
Steven B. Wolfson
200 Lewis Ave., 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

NEVADA ATTORNEY GENERAL
Aaron Ford
100 N. Carson St.
Carson City, Nevada 89701
(775) 684-1265

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I. ARGUMENT

Appellant, Tommy Stewart (hereinafter "Stewart"), would submit that all of his claims for relief are meritorious and this Court could grant relief on any or all of them. Even so, this reply has four brief points to aid in the Court's review of this matter.

A. The District Court did not err by merely adopting the State's arguments and findings, the district court erred by verbatim copying the State's Response for its own Findings of Fact and Conclusions of Law.

The State contends Stewart waived his right to object to the Findings because he did not raise an objection with the district court while citing "relevant" caselaw. RAB 11 (citing Dermody v. City of Reno, 113 Nev. 207, 210-211 (1997); Guy v. State, 108 Nev. 770, 780 (1992), cert. denied, 507 U.S. 1009 (1993); Davis v. State, 107 Nev. 600, 606 (1991)). Yet none of those cases support this contention.

This string cite of twenty-year-old cases is not persuasive because they do not support the waiver of the objection to findings of fact. Dermody held that the defense cannot raise a new theory for the first time on appeal if it "is inconsistent with or different from the one raised below" as for summary

judgment. 113 Nev. at 210. The Guy Court held that because the appellant did not raise a hearsay exception at trial, he is precluded from raising it on appeal. 108 Nev. at 780. The Davis Court held that because the appellant failed to raise the ineffective assistance of counsel in his original petition for post-conviction relief and it was not considered by the district court, it would not be considered on appeal by the Court. 107 Nev. at 606.

None of those cases support an appellant waiving his right to object to findings if appellant only first raises the issue on appeal. In fact, the State proffered Smith which contradicts that very notion. The Smith Court stated that the appellant "has the opportunity in this appeal to challenge any perceived factual or legal errors in the written order." Smith v. State, 2019 WL 295686 at *2; RAB 15.

Furthermore, the Byford Court (another State proffered case) stated, "NRCP 52(b) provides an opportunity to seek amendment of a district court order, **it does not require** the party to do so. Similarly, EDCR 7.21 does not require a party to seek amendment of an order prior to exercising the right to appeal the order." (emphasis added) Byford v. State, 123 Nev. 67, 70, 156

P.3d 691, 692 (2007). Because the State did not provide one on-point case to support its contention, this Court should disregard the argument that Stewart waived his right to object to the Findings.

Third, the State argues that the district court did not err by merely adopting the State's proposed Findings. RAB 11-12. Stewart agrees. The State's blanket response misses the nuance of this argument. Stewart does not contend the court's adopting the State's proposed findings is erroneous. Stewart contends that the court's adopting the State's verbatim Opening Brief as its own findings is erroneous.

Under Byford, "the district court must make a ruling and state its findings of fact and conclusions of law before the State can draft a proposed order for the district court's review." Byford v. State, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007). The district court "must ensure that the 'other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.'" Id.

The State cites the civil case of King v. St. Clair as persuasive authority about the adequacy of findings of fact. RAB 12-13 (citing King v. St. Clair, 134 Nev. 142 (2018)). The King district court only adopted the plaintiff's proposed findings after hearing the defendant's objections to the proposed findings. Id at 142. When adopting the plaintiff's findings in full, the district court in King only satisfied its duty to make factual findings when it held a hearing to listen to the defendant's objections to those findings.

Here, the district court did not hold an independent hearing to hear Stewart's objections before adopting the Findings. The Findings did not merely have additional findings beyond the court's oral pronouncement. The Findings **were identical** to the State's Response, so far as to even forget to update an instance in the Findings when the Court "should" do something. See 3 AA567 ("This Court **should** strike each of the supplemental petitions…")(emphasis added).

The written Findings went beyond the Court's minute order. The district court's order directed the State "to prepare a detailed order consistent with its Response." 3 AA 554. The State argues that the State's proposed findings

followed the minute order and its Response. RAB 13. Still, without a record of due diligence from the district court that it fulfilled its duty in preparing the findings, then a verbatim adoption of the State's findings is erroneous.

And the State argues that the court "deliberately adopted [the findings] after the exercise of independent judgment." RAB 13. That said, the State fails to cite to the record and identify when the court exercised its independent judgment.

Fourth, the State mischaracterizes Stewart's argument. The State argues that "Appellant's claim that it was improper for the district court to adopt an order written by the State is not consistent with Nevada law." RAB 13. Even so, Stewart's argument is that it is prejudicial and improper for a court to verbatim adopt the State's Response brief and pass it off as an order. The State cites to two unpublished dispositions to support its argument that the district court's order was sufficiently detailed. RAB 14 (citing Leonard v. State, 133 Nev. 1043, 403 P.3d 1270 (2017); Smith v. State, 2019 WL 295686 at *2 (Nev. Jan. 17, 2019)). Neither Leonard nor Smith have any application here as there is a large difference between merely adopting the State's

proposed order and copying the State's Response Brief. It is irrelevant that Stewart's counsel was provided with a copy of the State's Response around three weeks before the court's decision. RAB 14. Being provided with a Response Brief does not equate to being provided with a copy of the proposed order. There is thus no evidence in the record that Stewart or his counsel reviewed the State's proposed order before the court adopted it.

Fifth, the State also argues that the court exercised its independent judgment. RAB 15. That said, there is no evidence in the record of the court exercising independent judgment. The mere adoption of the Findings is not prima facie evidence of the exercise of independent judgment. "Appellate courts must be careful to evaluate a claim that a prepared order drafted by the prevailing party and adopted by the trial court verbatim does not reflect the independent and impartial findings and conclusions of the trial court." Ex parte Ingram, 51 So. 3d 1119, 1124 (Ala. 2010). "[W]hen a trial court accepts verbatim a party's proposed findings of fact and conclusions thereon, that practice 'weakens our confidence as an appellate court that the findings are the result of considered judgment by the trial court.'" Staff Source, LLC v.

Wallace, 143 N.E.3d 996, 1009 (Ind. Ct. App. 2020). Additionally, the district court side stepped the arguments presented by Stewart and the State's Response was conclusory and provided circular statements. Verbatim copying of the State's Response Brief is not above and beyond, as the State argues. RAB 15.

Sixth, the State argues that the district court gave Stewart notice of what the ruling was. RAB 15-16. Even so, directing the State to file an order consistent with its Response does not equate to the court giving Stewart "an opportunity to respond to the proposed findings and conclusions." Byford v. State, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007).

Finally, the minute order was not sufficient notice to Stewart or his counsel that an order was entered in the case. A "minute order" is prepared by the Office of the County Clerk and is not in the form of an order that is governed by rules such as EDCR 7.24 which requires that "orders" must be "signed by a judge." Nor did the minute order contain any language that an order contains, such as "it is ordered." The Nevada Supreme Court has held that "the district court's oral pronouncement from the bench, the **clerk's**

minute order, and even an unfiled written order are ineffective for any purpose and cannot be appealed." (emphasis added). Rust v. Clark Cty. Sch. Dist., 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987). Stewart had no chance to review, edit, or even comment on the minute order before the clerk filed it. Stewart therefore did not receive adequate notice of the Court's ruling and the District Court failed to make sufficient findings. As a result, the Court should reverse so that the district court may draft its own Findings.

B. The district court did not commit harmless error by dismissing Stewart's four pro per Supplements on the merits.

The State argues that the district court committed only harmless error by dismissing Stewart's four pro per supplements because it disposed of them on the merits. RAB 18. That said, it was not the "district court" who found each of Stewart's claims meritless or waived. It was in-effect the State who did because, as discussed above, the court verbatim adopted its Response brief.

As a note, the State's arguments in pages 23 through 56 are a verbatim copy of the State's Response Brief filed in the district court on April 03, 2019,

with the exchange of "Petitioner" for "Appellant." 3 AA 527-551. Those same pages are an exact copy of the Findings drafted by the State and signed by the district court. 3 AA 568-592. The State has gotten plenty of mileage out of its original response to Stewart's Petition for Writ of Habeas Corpus. This Court should decline to consider those pages of the State's Response brief, because it clearly is not tailored to respond to Stewart's Opening Brief in this appeal.[1]

As discussed above, the district court's verbatim copying of the State's Response is not harmless error because the district court did not make the proper determinations of the issues presented in Stewart's pro per supplements on the merits. Stewart's reasonable expectations as a defendant for a fair and independent judicial review of his claim is belied by the State's

[1] For example, the State claims that: "Appellant cites to NRS 200.310 and then makes the naked assertion that all of the elements of second degree-kidnapping are included in first-degree kidnapping, boldly claiming that '[a]ny argument to the contrary is simply ridiculous.' 1AA000237." That said, the State is not citing the Opening Brief, but to Stewart's Supplemental Petition for Post-Conviction Writ of Habeas Corpus.

and district court's actions. "Courts and judges exist to provide neutral fora in which persons and entities can have their professional disputes and personal crises resolved. Any degree of impropriety, or even the appearance thereof, undermines our legitimacy and effectiveness." Bright v. Westmoreland Cty., 380 F.3d 729, 732 (3d Cir. 2004) (holding that the district court's adopting a proposed opinion and order, coupled with the procedure it used to solicit them, were improper and required reversal and remand). So this Court should refuse to consider the State's argument as it is a recitation and copy of its response in the post-conviction petition for habeas corpus proceedings, as well as the court's Findings.

C. The State's conclusory statements regarding Second-Degree Kidnapping as a lesser included offense of First-Degree Kidnapping misstate Stewart's argument.

The State argues that trial and appellate counsel were not ineffective for allegedly failing to argue the lesser included charges of False Imprisonment and Second-Degree Kidnapping in the jury instructions. RAB 56. The State merely concludes that Second-Degree Kidnapping is not a lesser included offense of First-Degree Kidnapping by referencing a previous

section it copied from its response in the petition for habeas corpus proceedings. RAB 57. However, Stewart did not claim that trial and appellate counsel were ineffective; Stewart claimed that the district court should have included the lesser-include offense instruction because it is mandatory without request under Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966). It is evident that the State is not responding to the Opening Brief, but merely copying the Findings, which it copied from its Response to Stewart's Supplemental Petition for Writ of Habeas Corpus.

Furthermore, Stewart should not be precluded from raising the False Imprisonment instruction in this appeal. Generally, a party may not raise a new theory for the first time on appeal if it is "inconsistent with or different from the one raised below." Schuck v. Signature Flight Support of Nevada, Inc., 126 Nev. 434, 437, 245 P.3d 542, 544 (2010). However, this Court has used its discretion to hear issues that have been raised for the first time on appeal. See Garcia v. Prudential Ins. Co. of Am., 129 Nev. 15, 19, 293 P.3d 869, 872 (2013); see also Durango Fire Prot., Inc. v. Troncoso, 120 Nev. 658, 661,

98 P.3d 691, 693 (2004); see also Shapiro v. Welt, 133 Nev. 35, 37, 389 P.3d 262, 266 (2017).

Here, as the false imprisonment instruction was not brought before, it is not inconsistent with or different than the theory raised before, therefore, Stewart should not be precluded from bringing the theory. This honorable Court should take the opportunity to clarify whether Second-Degree Kidnapping and False Imprisonment are lesser-included offenses of First-Degree Kidnapping to warrant a jury instruction, as the issue has not been previously addressed in detail by this Honorable Court. Therefore, should this Honorable Court hold as such, this Court should then reverse and remand for a new trial.

D. The law of the case doctrine should not apply to the sufficiency of the evidence for First-Degree Kidnapping argument.

The State argues that Stewart's claim that the evidence presented at trial could not support his conviction for First-Degree Kidnapping is barred by the law of the case doctrine. RAB 57-58. But the State cites only one case—without explanation—to support its claim.

The law of the case doctrine "provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case." Dictor v. Creative Mgmt. Servs., LLC, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010) (citing Hsu v. County of Clark, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007); Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003)). That said, the doctrine "is not a jurisdictional rule," but "merely expresses the practice of courts generally to refuse to reopen what has been decided: it is not a limit to their power." Hsu v. Cty. of Clark, 123 Nev. 625, 630, 173 P.3d 724, 728 (2007).

A court can depart from a prior holding if "convinced that it is clearly erroneous and would work a manifest injustice." Id. (citing Arizona v. California, 460 U.S. 605, 618 n. 8, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)). The federal courts have adopted three specific exceptions to the doctrine:

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(1) subsequent proceedings that produce substantially new or different evidence;

(2) an intervening change in controlling law develops; or

(3) the prior decision was clearly erroneous and would result in manifest injustice.

Id.

Here, the law of the case doctrine does not bar Stewart's claim that there was insufficient evidence for First-Degree Kidnapping. Although this Honorable Court discussed the sufficiency of the evidence in Stewart's direct appeal, the issues are not exactly the same. In Stewart v. State, 133 Nev. 142, 145, 393 P.3d 685, 688 (2017), this Court discussed the difference between Robbery and First-Degree Kidnapping and inquired into whether the victim's movement "was incidental to the robbery, and whether the risk of harm to her was substantially increased." Still, the Court did not address whether the State proffered evidence of independent intent for the kidnapping charge, which Stewart argues here.

Even if this Court is inclined to impose the law of the case doctrine, this Court may depart from it if "convinced that it is clearly erroneous and would work a manifest injustice." Hsu v. Cty. of Clark, 123 Nev. 625, 630, 173 P.3d 724, 728 (2007).

Here, the previous decision is clearly erroneous for the reasons stated in Stewart's Opening Brief. It would work a manifest injustice to bar Stewart's claim, especially if this Court determines that Second-Degree Kidnapping and False Imprisonment are lesser-included offenses to First-Degree Kidnapping. If that were the case, the jury could have found Stewart guilty of Second-Degree Kidnapping or False Imprisonment. That leads to the possibility of insufficiency of evidence for First-Degree Kidnapping, and the direct appeal denial would be erroneous. For that reason, this Court should refuse to apply the law of the case doctrine and should consider Stewart's claim on the merits.

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II. CONCLUSION

Stewart believes that any issues raised in his Opening Brief but not addressed here are adequately presented for the Court's review and would support a reversal of his sentences and convictions.

For all these reasons and those in the Opening Brief, Stewart requests this Honorable Court grant relief on his claims and order that the convictions and sentences be reversed.

DATED this 26th day of February, 2021.

AMD LAW, PLLC

By: 

ALEXIS DUECKER, Esq.
Attorney for Appellant
8687 Sahara Ave. Ste 201
Las Vegas, Nevada 89117
(702) 743-0107

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 26, 2021. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

STEVEN WOLFSON
Clark County District Attorney
Counsel for Respondent

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

AARON FORD
Nevada Attorney General

/s/ Milica Bosnjak

An Employee of AMD LAW, PLLC