

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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JOHN FRANCIS DUNHAM,

Appellant,
vs.

Supreme Court Case No. 82405

THE STATE OF NEVADA,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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RELEVANT FACTS

John Francis Dunham, hereafter “Dunham,” defendant was charged with Invasion of the Home for breaking a window and entering into the home of Patricia Scripko on or about October 25, 2016, and Burglary, for entering the home of Patricia Scripko with the intent to commit an assault or battery on her on or about October 25-26, 2016. JA Vol. I, 1, 5. Dunham pled not guilty to both charges. JA Vol. I, 10, 26.

At the time of the offense, Dr. Patricia Scripko was a 33-year-old physician who was married to Dunham. JA Vol. I, 195-199. In October 2015, Dr. Scripko purchased a condominium located at 311 Olympic Court in Stateline, Nevada. JA Vol. I, 210, 212. The condominium was purchased in Dr. Scripko’s name only. JA Vol. I, 212. In June 2016, Dr. Scripko and Dunham separated from one another. JA Vol. I, 209-210. In August 2016, Dr. Scripko received a protective order against Dunham. JA Vol. I, 213-215. The August 2016, protective order was effective from August 23, 2016, through February 23, 2017. JA Vol. I, 215. One of its conditions required Dunham to stay 100 yards away from 311 Olympic Court in Stateline, Nevada. JA Vol. I, 216; JA Vol. II, 285. Dr. Scripko carried a copy of the protective order with her. JA Vol. I, 214.

Dr. Scripko began pursuing an annulment of her marriage with Dunham in August 2016, and began a relationship with someone else around the end of August

or early September 2016. JA Vol. I, 216-217. Dunham sent Dr. Scripko several e-mail communications between September 11, 2016, and October 21, 2016. JA Vol. I, 217-237. Some of those e-mails implored Dr. Scripko to answer Dunham and talk to him. JA Vol. I, 232-233. One of the e-mails appeared to threaten Dr. Scripko that Dunham might release a sex video of Dr. Scripko. JA Vol. I, 223. With just one exception, Dr. Scripko did not respond to Dunham's emails or communicate with him. JA Vol. I, 224. On October 2, 2016, Dunham sent Dr. Scripko an e-mail assuring her that she would never see him again. JA Vol. I, 234.

On October 21, 2016, Dr. Scripko was driving from California to her Stateline condominium. JA Vol. II, 258. Dr. Scripko was changing the locks on the condominium and preparing to rent it out. JA Vol. I, 260. At the time, she did not believe Dunham was at the condominium. JA Vol. II, 258. During the drive to Stateline, Dr. Scripko came into possession of information that caused her concern and she called law enforcement to see if Dunham was present at the condominium. JA Vol. II, 259. When Dr. Scripko arrived at the condominium on October 21, 2016, she found that Dunham had left a handful of various notes and papers throughout the condominium. JA Vol. II, 265-270. Dr. Scripko threw the notes away as she found them. JA Vol. II, 270. Between August 2016 and October 21, 2016, Dr. Scripko did not go to the condominium often because she had the protective order against

Dunham and thought he was likely at the condominium and she wanted to avoid a confrontation. JA Vol. II, 294-295. On October 26, 2016, at about 9:45 am, Deputy Eric Eissinger was dispatched to 311 Olympic Court where he discovered evidence of a forced entry into the residence. JA Vol. II, 334-339. Deputy Eissinger then located Dunham inside the residence. JA Vol. II, 339-342.

Dunham was thereafter convicted by jury of Invasion of the Home. RA 1-3.

SUMMARY OF ARGUMENT

The Court of Appeals properly found that Dunham did not demonstrate that trial counsel's failure to argue that Dunham could not be convicted of home invasion because he had a legal right to enter the home fell below an objective standard of reasonableness or a reasonable probability of a different outcome but for counsel's alleged errors. The Court of Appeals' decision was based on the undisputed fact that Dunham had a protective order issued against him prohibiting him from being within 100 yards of the residence in question and the well settled law in the State of Nevada that a defendant may be convicted of home invasion, even of their own home, if they do not have a lawful right to be in the home.

Dunham has offered this Court with no argument whatsoever that the issue herein meets any of the factors for consideration of review as suggested in NRAP 40(b)(a). In fact, the issue presented is not one of first impression or general statewide significance. The issue presented was decided under well-settled Nevada

Supreme Court precedent. The outcome of this case is not one of general statewide significance and it will affect Dunham only. The Court of Appeal decision is consistent with the precedent of this court and conflicts with no known controlling case law. Further, this case presents no issue of statewide public importance. Though the safety of guests and residents of the Nevada are always issues of public importance, in this case the Court of Appeals decision was consistent with this Court's precedent where this Court already addressed those issues.

ARGUMENT

The Court of Appeals correctly applied Dunham's claim of ineffective assistance of counsel to the standards announced in *Strickland v. Washington*, 466 U.S. 668 (1984); *Warden v. Lyons*, 100 Nev. 430 (1984); and *Kirksey v. State*, 112 Nev. 980 (1996). Dunham has not challenged the applicable standards for or the application of those standards to claims of ineffective assistance of counsel. In fact, in the argument in his petition for review Dunham does not even mention ineffective assistance of counsel. Rather, Dunham spends all but one paragraph arguing whether or not he was the lawful owner of the property in question.

As the State argued, and the Court of Appeals confirmed, for the purposes of Nevada's Home Invasion statute, NRS 205.067, ownership of the property does not provide any right to entry if the owner has no lawful right to be there. The facts and rulings in this case are that Dunham had a protective order issued against him that

prohibited him from being within 100 yards of the residence. Whether or not he owned the property does not change that prohibition.

It is correct that, “a person cannot commit the crime of home invasion by forcibly entering his or her own home *if that person is a lawful occupant or resident of the home.*” *Truesdell v. State*, 129 Nev. 194, 202 (2013) (*emphasis added*). As made clear at trial, Dunham, whether or not he had an ownership interest in 311 Olympic Court, did not have a lawful right to occupy, reside, or even be present within 100 yards of 311 Olympic Court because there was a valid protective order preventing him from being within 100 yards of the condominium at 311 Olympic Court.

This Court further analyzed the rationale behind the absence of liability for a lawful occupant or resident of a home in the context of Nevada’s Burglary statute, NRS 205.060. *State v. White*, 130, Nev. 533 (2014). In *White*, the Court reviewed the historical context and legislative intent behind Nevada’s Burglary statute and concluded:

Based on this analysis, we conclude that while the Legislature has expanded common law burglary in several respects, it has at least retained the notion that: (1) burglary law is designed to protect a possessory or occupancy right in property, and (2) one cannot burglarize his own home so long as he has an absolute right to enter the home. Thus, while ownership may be one factor to consider, the appropriate question is whether the alleged burglar has an absolute, unconditional right to enter the home.

Id. at 538-39, (*emphasis added*). In *White* the defendant was entitled to relief because he was excluded from his home by agreement with the mother of his children. *Id.* at 535. *White* therefore, retained an absolute right to re-enter the residence. *Id.* at 539. By contrast, in this case Dunham was excluded from the home by judicial order. Therefore, while *White* could not be convicted of Burglary, in this case Dunham did not have an absolute unconditional right to enter the structure and he could be convicted of Invasion of the Home.

Dunham further complains that the Court of Appeals failed to address his argument that NRS 193.166 prohibits the crime of Invasion of the Home from being based on a violation of a temporary protective order. Thus, Dunham argues, “[t]he violation of the TPO cannot be used to establish the felony and then be used once again for the enhancement.” This argument fails for several reasons. First, Dunham did not raise this claim until he filed his reply brief. As the name suggests, reply briefs generally are to answer any matter set forth in the opposing brief, not to raise new legal theories. *Bongiovi v. State*, 122 Nev. 556, fn. 5 (2006). The State did not have the opportunity to brief this theory in the Court of Appeals, nor did the Court of Appeals address this theory in its Order of Affirmance. Second, Dunham was neither charged with an enhancement under NRS 193.166 and, as a result, nor was he sentenced for it. JA Vol. I, p. 8; RA, 1-3. Finally, *Truesdell*, which both parties

rely upon in their arguments, was, like the present case, a home invasion that was based upon the violation of a protective order.

CONCLUSION

Based on the foregoing, the State respectfully asserts that this Court should deny the petition for review.

DATED this 1st day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document, **RESPONDENT’S ANSWER TO PETITION FOR REVIEW**, was filed electronically with the Nevada Supreme Court on November 1, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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