IN THE SUPREME COURT OF THE STATE OF NEVADA

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MYRTIS TYRONE JAMES,
A.K.A.
JAMES TYRONE MYRTIS)
Appellant,)
V.) **Case No. 83439**
)
THE STATE OF NEVADA,)
Respondent.)

Appeal from the Seventh Judicial District Court

RESPONDENT'S ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

This is a direct appeal from a jury verdict arising from a Criminal Information filed in the 7th Judicial District Court, in and for White Pine County, Nevada.

A Judgment and Sentence was entered in this matter on August 18, 2021. The Appellant filed a Notice of Appeal on August 30, 2021. A Corrected Judgment and Sentence was filed on December 1, 2021.[1] This appeal is from a final order or judgment.

ROUTING STATEMENT

Respondent is satisfied with Appellant's Routing Statement.

[1] Respondent's Appendix ("RA") at 6.

STATEMENT OF THE ISSUES

Respondent is satisfied with Appellant's Statement of Issues.

STATEMENT OF THE CASE

Appellant Defendant Myrtis Tyrone James a.k.a James Tyrone Myrtis ("the Defendant") was charged with Driving Or Being in Actual Physical Control of a Vehicle While Being Under the Influence of Intoxicating Liquor, Felony Offense.[2] A Jury Trial took place in this case on May 18, 2021 through May 19, 2021. The Jury reached a verdict of guilty under the theory that the Defendant was in actual physical control of a motor vehicle while under the influence of intoxicating liquor, and guilty under the theory that the Defendant was found by measurement within two (2) hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his blood.[3]

STATEMENT OF FACTS

At the Jury Trial in this matter, White Pine County Sherriff's Sergeant Lucas Shady ("Sgt. Shady") testified.[4] Sgt. Shady testified that he had been a Patrol Sergeant for 12 years, and was a Patrol Deputy for almost 10 years prior to that.[5]

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[2] RA at 1.
[3] RA at 4.
[4] Appellant's Appendix ("AA") at 181.
[5] Id.

Sgt. Shady testified about his duties and his training, and testified about his training and experience specific to driving under the influence cases.[6] He testified that an incident occurred on December 18, 2018 at 1550 Great Basin Boulevard, which is the location of Family Dollar 1, in Ely, White Pine County.[7] He testified that the incident occurred in the parking lot of Family Dollar, and that the public is able to access the parking lot of Family Dollar.[8] He testified that this incident occurred at approximately 11:12 pm, and that Family Dollar was closed at the time.[9] Sgt. Shady identified the Defendant in court to the jury.[10]

Sgt. Shady testified that he was driving by Family Dollar, saw a car with the door open at the closed business, and turned around to check out the car.[11] He testified that it was cold outside, and that he didn't see anyone in the vehicle initially.[12] Sgt. Shady testified that in a normal shift, he would drive by Family Dollar multiple times.[13] He testified that he pulled into the parking lot, and that the Defendant still would have been able to move the vehicle given where he parked.[14] Sgt. Shady testified that when he approached the vehicle he could hear that the car

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[6] Id.
[7] Id.
[8] Id. at 181-182.
[9] Id.
[10] Id. at 182.
[11] Id.
[12] Id.
[13] Id.
[14] Id.

was running and the door was still open.[15] He could see that a male subject was in the driver's seat of the vehicle, sleeping, with the seat reclined.[16] Sgt. Shady testified that he knocked on the rear driver's side window, and the Defendant woke up, then took his wallet out of his pocket, and put it in the console area.[17]

The State then sought to admit Sgt. Shady's body worn camera footage from the incident, and played it for the jury.[18] On the body worn camera, Sgt. Shady asks the Defendant for his ID, and asks where he is staying.[19] The Defendant stated that he was staying at Love's Truck Stop.[20] Sgt. Shady testified that the Defendant got out of the vehicle and began looking for his ID in the vehicle's trunk, which he found odd, because he had just taken his wallet out of his pants pocket and put it in the console area.[21] Sgt. Shady testified that at this point he could smell the odor of alcohol emitting from the Defendant's person.[22] Sgt. Shady testified that the Defendant's eyes were bloodshot and watery. He testified that the Defendant admitted to drinking "last night".[23] He testified that he presumed the keys were in the ignition of the vehicle, because the vehicle's engine

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[15] Id.
[16] Id.
[17] Id. at 183.
[18] Id. at 183-186.
[19] Id. at 184.
[20] Id. at 184.
[21] Id.
[22] Id.
[23] Id. at 185

was running.[24] Sgt. Shady testified that he told the Defendant to turn the vehicle off, and that the vehicle then made a "dinging noise like when your door's open and your keys are in the ignition."[25] Sgt. Shady testified that he began asking the standard questions asked before standardized field sobriety testing.[26] The Defendant admitted to operating the vehicle.[27] He admitted to drinking "probably quite a bit" that night.[28] He stated he had drank liquor, specifically rum and vodka.[29] The Defendant stated he still had some liquor in the car.[30] Sgt. Shady testified that two containers of alcoholic beverage were located in the vehicle.[31]

Sgt. Shady testified that he performed the Horizontal Gaze Nystagmus test on the Defendant, and that the Defendant was unable to complete the test.[32] Sgt. Shady testified that he was going to have the Defendant complete the Nine Step Walk and Turn test, but that the Defendant stated something to the effect of "oh shit, just take me", and didn't want to complete the test.[33] When asked if he wished to complete anymore tests, the Defendant stated that he was drunk.[34] He

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[24] Id.
[25] Id.
[26] Id. at 185-186.
[27] Id. at 186.
[28] Id. at 185.
[29] Id.
[30] Id. at 186.
[31] Id. at 192.
[32] Id. at 187.
[33] Id.
[34] Id.

stated "I'm drunk. You know I'm drunk. We're all drunk."[35] Sgt. Shady testified that during that time he observed the Defendant had slurred speech, bloodshot watery eyes, appeared intoxicated, and noticed a strong odor of an alcoholic beverage.[36] Sgt. Shady testified that he then placed the Defendant into custody and transported him to the White Pine County Sheriff's Office.[37] He testified that the Defendant consented to a blood draw, and that Brandi Sumrall conducted the blood draw.[38] Sgt. Shady testified that he was present during the blood draw, and that the blood draw occurred at 12:10 am on December 19, 2018.[39] The State then moved to admit the paperwork that Sgt. Shady observed Brandi Sumrall complete, and published it to the jury.[40] Sgt. Shady testified that during his contact with the Defendant, he did not see the Defendant consume any alcohol.[41]

The State then called Registered Nurse Brandi Sumrall.[42] Nurse Sumrall testified about her qualifications and the procedure for conducting a blood draw for evidentiary purposes.[43] She identified the Defendant, and testified about the blood draw she conducted on him, in which she obtained two samples of the Defendant's

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[35] Id. at 142. The body camera footage of this statement was published to the jury.
[36] Id.
[37] Id.
[38] Id. at 188.
[39] Id.
[40] Id.
[41] Id. at 188.
[42] Id. at 193.
[43] Id. at 193-194.

blood.[44] The State moved to admit an Affidavit completed by Ms. Sumrall, and it was published to the jury.[45] The Affidavit contained her name, occupation, the name of the Defendant, and the date and time she withdrew two samples of the Defendant's blood.[46] Nurse Sumrall testified that the time of the blood draw was 12:10 am on December 19, 2021.[47]

Washoe County Sheriff's Office Forensic Science Division Criminalist Felicia Mason also testified.[48] She testified about her education, training, and experience, and was qualified to testify as to her professional opinion regarding the presence or absence as well as the quantity of alcohol in the Defendant's blood.[49] After describing in detail the process she underwent to test the Defendant's blood, Ms. Mason testified that she determined that there was 0.277 grams per one hundred milliliters of ethanol in the Defendant's blood.[50] Ms. Mason's Forensic Report was admitted as an exhibit and published to the jury.[51]

After the conclusion of the State's case, the Defendant testified.[52] The Defendant testified that on the date in question, he got off work, worked out at the

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[44] Id. at 193-194.
[45] Id. at 195.
[46] Id.
[47] Id.
[48] Id. at 197-203.
[49] Id. at 197-198.
[50] Id. at 203.
[51] Id. at 202-203.
[52] Id. at 204-210.

gym, then went to Ridley's and got dinner.[53] The Defendant stated that he had "a shot or two" with his dinner.[54] He testified that he then went over to Family Dollar, and parked.[55] The Defendant then stated that after Sgt. Shady initially made contact with him, and after he had smelled the odor of alcohol and observed the Defendant's behavior, he decided to chug the remainder of a pint of vodka he had, while Sgt. Shady checked his driver's license.[56]

The District Court settled jury instructions outside the presence of the jury with both parties' counsel.[57] The Defendant proposed a lengthy jury instruction regarding circumstantial evidence based on the California Criminal Jury Instructions.[58] The District Court already had a jury instruction regarding circumstantial evidence.[59] The State argued that the proposed instruction was confusing, and that it had already been covered in the District Court's instructions.[60] The State then asked that if the District Court decided to give the instruction, that the entire instruction be included.[61] The District Court stated that the proposed instruction was used when the State's case was based substantially or

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[53] Id. at 207.
[54] Id.
[55] Id.
[56] Id. at 208-209.
[57] RA at 17.
[58] Id. at 35, AA at 165-170.
[59] AA at 226.
[60] RA at 36.
[61] Id. at 37.

entirely on circumstantial evidence.[62] The court stated that in this case there were a number of areas with direct evidence, and maybe one with circumstantial.[63] The court ultimately determined that the proposed instruction was wordy, confusing, and was covered by other instructions.[64]

A Jackson-Denno hearing on the State's Motion to Introduce Defendant's Statements occurred on October 7, 2019.[65] A Suppression Hearing in this matter occurred on July 15, 2020.[66] Sgt. Shady testified at both hearings.[67] The State's Motion to Introduce Defendant's Statements was granted.[68] At the Suppression hearing the District Court indicated that it was familiar with the filings of both parties and had reviewed body camera footage.[69] Sgt. Shady testified that he was initially suspicious of potential criminal activity because the store was closed, the car door was open, and he didn't see any occupants inside the vehicle.[70] Sgt. Shady testified that a car being parked there with the store closed, and the door being open was unusual.[71] He testified that he considered a possible burglary of

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[62] Id. at 39.
[63] Id. at 39-40.
[64] Id. at 40.
[65] AA at 65.
[66] Id. at 129.
[67] Id. at 130.
[68] Id. at 70-71.
[69] Id. at 130.
[70] Id.
[71] Id.

the store or of the car.[72] He testified that when he approached, he observed that the vehicle was running.[73] Sgt. Shady testified that part of his duties as a law enforcement officer is ensuring the safety and well-being of the public.[74] Following the Suppression Hearing, the Court issued an Order Denying Defendant's Motion to Suppress.[75]

In the Order, the Court indicated that it based its findings of facts on the Preliminary Hearing Transcript, Sgt. Shady's body camera video, the testimony heard on October 7, 2019, and the testimony heard on July 15, 2020.[76] The Court ruled that the incident did not begin as a traffic stop.[77] The court found that Sgt. Shady initially approached the Defendant's car to investigate a possible burglary, or other unknown circumstances, and to check the occupant's welfare.[78] Based on the totality of the circumstances, the court found that it was reasonable for Sgt. Shady to investigate why a car, with no visible occupants and with the door open, was parked in front of a closed retail business.[79] The Court also found that it was appropriate for Sgt. Shady to ask the Defendant for his driver's license even after

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[72] Id.
[73] Id. at 131.
[74] Id.
[75] Id. at 140.
[76] Id.
[77] Id. at 142.
[78] Id. at 143.
[79] Id. at 144.

the Defendant stated he was okay, because Sgt. Shady's concern about criminal activity had not been dispelled.[80]

The court found that while the Defendant was looking for his driver's license, Sgt. Shady could smell an odor of an alcoholic beverage emitting from the Defendant, and that he observed the Defendant's eyes were bloodshot and his speed was slurred.[81] The court described the Defendant's statements during SFSTs and found that the statements were voluntary and not coerced.[82] The court specifically found that Sgt. Shady acted appropriately by approaching the Defendant's vehicle to investigate suspicious circumstances, and that his actions served an important governmental interest.[83] The court found that Sgt. Shady's continued suspicion of possible criminal activity was reasonable and justified him asking for the Defendant's driver's license, based on the totality of the circumstances.[84]

The court found that the Defendant's arrest was based on probable cause, because Sgt. Shady observed an odor of alcoholic beverage, bloodshot and watery eyes, and slurred speech, as well as the Defendant's inability to complete the Horizontal Gaze Nystagmus Test, refusal to complete additional SFSTs, and his

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[80] Id. at 145.
[81] Id.
[82] Id. at 146.
[83] Id.
[84] Id.

voluntary statements that he was drunk.[85] The court found that because the Defendant was found in the driver's seat; the car engine was running; the keys were in the ignition; the vehicle was located in a parking lot that the public could access; and the Defendant must have driven to the location he was found, a trier of fact could find that the Defendant was in actual physical control of a vehicle.[86] The court also pointed out that this was independent of the Defendant admitting to operating the vehicle.[87]

STANDARD OF REVIEW

I. Suppression Motions involve mixed questions of fact and law.[88] The district court's findings of fact are reviewed for clear error.[89] Questions of law are reviewed de novo.[90]

II. Questions of law are reviewed de novo.[91] A jury verdict will not be reversed if it is supported by any substantial evidence.[92]

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[85] Id.
[86] Id. at 149.
[87] Id.
[88] State v. Lloyd, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013).
[89] Id.
[90] Id.
[91] Id.
[92] Bias v. State, 105 Nev. 869, 872, 784 P.2d 963, 965 (1989).

III. Appellate claims involving jury instructions are reviewed using a harmless error standard.[93]

SUMMARY OF THE ARGUMENT

IV. The District Court did not error in denying the Defendant's Motion to Suppress because the officer's approach of the Defendant was reasonable and appropriate, and the investigation that followed was reasonable and appropriate based on the officer's observations and the circumstances.

V. The law regarding the *Rogers* factors is clear and well established, and the jury's verdict was supported by substantial evidence showing that the Defendant was in actual physical control of the vehicle.

VI. The District Court did not err in refusing to provide an additional instruction on circumstantial evidence because instructions on circumstantial evidence, reasonable doubt, and the Rogers factors were provided.

LEGAL ARGUMENT

I. The District Court did not error in denying the Defendant's Motion to Suppress.

[93] Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003).

"The ultimate standard set forth in the Fourth Amendment is reasonableness."[94] "Fourth Amendment reasonableness "is predominantly an objective inquiry.' We ask whether 'the circumstances, viewed objectively, justify [the challenged] action.' If so, that action was reasonable '*whatever* the subjective intent' motivating the relevant officials."[95] In Florida v. Bostick, the U.S. Supreme Court stated "[o]ur cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions."[96] The Nevada Supreme Court has also addressed this issue, holding "the police may randomly--without probable cause or a reasonable suspicion--approach people in public places and ask for leave to search."[97]

Regarding the community caretaking doctrine, the Nevada Supreme Court held that

> The community caretaking doctrine recognizes that police officers have a *duty* to aid drivers who are in distress which is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.''[98]

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[94] Cady v. Dombrowski, 413 U.S. 433, 439, 93 S. Ct. 2523, 2527 (1973).
[95] Ashcroft v. al-Kidd, 563 U.S. 731, 736, 131 S. Ct. 2074, 2080 (2011) (citing City of Indianapolis v. Edmond, 531 U.S. 32, 47, 121 S. Ct. 447, 148 L. Ed. 2d 333, Scott v. United States, 436 U.S. 128, 138, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978), and Whren v. United States, 517 U.S. 806, 814, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).
[96] Florida v. Bostick, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991).
[97] State v. Burkholder, 112 Nev. 535, 538, 915 P.2d 886, 888 (1996) (citing Bostick, 501 U.S. at 434).
[98] State v. Rincon, 122 Nev. 1170, 1176, 147 P.3d 233, 237 (2006) (citing Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528 (1973) (emphasis added).

It stated "An objectively reasonable belief that emergency assistance is needed may arise if a police officer observes circumstances indicative of a medical emergency or automotive malfunction."[99]

In Hiibel v. Sixth Judicial District[100], the Court noted that

> The ability to briefly stop [a suspect], ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice".[101]

The Court also quoted language stating

> A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time").[102]

In this case, Sgt. Shady observed the Defendant's vehicle parked at a closed business, with the car door open, and could not see any occupants in the vehicle. When he approached the vehicle, he observed the Defendant apparently asleep in the driver's seat of the vehicle. He then asked the Defendant whether he was okay.

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[99] Id. citing State v. Rinehart, 2000 SD 135, 617 N.W.2d 842, 844 (S.D. 2000).
[100] 542 U.S. 177, 124 S. Ct. 2451, 2457 (2004).
[101] Id. at 186 (quoting Hayes v. Florida, 470 U.S. 811, 816, 105 S. Ct. 1643, (1985)).
[102] Id. (quoting Adams v. Williams, 407 U.S. 143, 146, 92 S. Ct. 1921 (1972)). The Defendant's reliance on Hiibel to support his proposition that Sgt. Shady was not permitted to request the Defendant's identification is misplaced. The sections of Hiibel the Defendant cites relate to the Supreme Court's interpretation of NRS 171.123, which the Court found to be constitutional.

He asked for the Defendant's license, and while the Defendant was looking for his license, Sgt. Shady noticed an odor of alcoholic beverage. He then observed the Defendant's slurred speech and bloodshot eyes. The Defendant was parked in a public place; Sgt. Shady had the right to be in that public place as well, which is where he was when he made these observations. His initial approach of the vehicle due to suspicious circumstances was entirely reasonable and appropriate, both based on a crime detection and prevention standpoint, and under the Community Caretaking doctrine. The District Court's denial of the Motion to Suppress was correct.

II. The law regarding the *Rogers* factors is clear and well established, and the jury's verdict was supported by substantial evidence.

In Rogers v. State, the Nevada Supreme Court held that "a person is in actual physical control when the person has existing or present bodily restraint, directing influence, domination, or regulation of the vehicle."[103] The Court stated that

> In deciding whether someone has existing or present bodily restraint, directing influence, domination, or regulation of a vehicle**, the trier of fact must weigh a number of considerations, including** where, and in what position, the person is found in the vehicle; whether the vehicle's engine is running or not; whether the occupant is awake or asleep; whether, if the person is apprehended at night, the vehicle's lights are on; the location of the vehicle's keys; whether the person was trying to move the vehicle or moved the vehicle; whether the property on which the vehicle is located is public or private; and whether the person must, of necessity, have driven to the location where apprehended.[104]

[103] Rogers v. State, 105 Nev. 230, 233, 773 P.2d 1226, 1228 (1989).
[104] Id. at 233-234, 1228.

Regarding the issue of actual physical control, the Nevada Supreme Court held:

> [o]bviously, the objective in requiring the arrest of those who are not driving but who are in actual physical control of a vehicle, is to prevent and discourage persons from placing themselves in control of a vehicle where they may commence or recommence driving while in an intoxicated state, notwithstanding the fact that they are not actually driving at the time apprehended.[105]

NRS 484A.185 states:

> "Premises to which the public has access" means property in private or public ownership onto which members of the public regularly enter, are reasonably likely to enter, or are invited or permitted to enter as invitees or licensees, whether or not access to the property by some members of the public is restricted or controlled by a person or a device.[106]

Premises to which the public has access includes

> [a] parking deck, parking garage or other parking structure", and "[a] paved or unpaved parking lot or other paved or unpaved area where vehicles are parked or are reasonably likely to be parked.[107]

The Nevada Supreme Court has

> reaffirmed the *Rogers* factors in every subsequent opinion in which we have considered the subject of "actual physical control." In *Rogers*, we stated that a spectrum of cases may arise from those where no actual physical control was present because it was clear that the defendant did not drive his vehicle, to those where the defendant must have driven to the location where apprehended and so must have been in actual physical control. **The result will differ based on an application of the *Rogers* factors to specific factual**

[105] Rogers v. State, 105 Nev. 230, 233, 773 P.2d 1226, 1227-28 (1989).
[106] NRS 484A.185(1)
[107] NRS 484A.185(2)(a) and (2)(b).

situations. We, therefore, leave the proper balancing of those factors to the discretion of triers of fact in individual cases.[108]

In Isom v. State, the Nevada Supreme Court affirmed a jury verdict that found the Defendant guilty of being in actual physical control of a vehicle while being under the influence of alcohol.[109] In Isom, the officer noticed a vehicle parked at a closed gas station.[110] The officer found Isom behind the wheel, with the engine running, but no headlights on.[111] The officer was eventually able to wake Isom after he turned off the engine, and when she awoke she attempted to start the car.[112] The officer noticed an odor of alcoholic beverage on Isom's breath, and noticed containers of alcohol in the vehicle.[113] Isom was arrested after failing 4 filed sobriety tests.[114] She was ultimately convicted of a third offense DUI.[115]

Isom argued that she could not have been in actual physical control of the vehicle because she was asleep.[116] The court held that Isom was in actual

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[108] Barnier v. State, 119 Nev. 129, 134, 67 P.3d 320, 323 (2003) (emphasis added). In Barnier, the Court held that the District Court erred by not providing a jury instruction that contained all of the Rogers factors. In the present case, a jury instruction containing the Rogers factors was provided.
[109] Isom v. State, 105 Nev. 391, 776 P.2d 543 (1989).
[110] Id. at 392, 544.
[111] Id.
[112] Id.
[113] Id.
[114] Id.
[115] Id.
[116] Id. at 393, 545.

physical control of the car, noting that she was in the driver's seat of the vehicle with the vehicle running; that she must have driven to her location; that she could return to the highway at any time; and that she attempted to drive off.[117]

In the present case, five of the Rogers factors definitively point to the Defendant being in actual physical control of the vehicle: 1) He was found in the driver's seat of the vehicle, 2) the vehicle's engine was running, 3) the keys were in the ignition, 4) the vehicle was located in a parking lot that the public could access, and 5) the Defendant must have driven to the location where he was apprehended. Additionally, the Defendant admitted to operating the vehicle to Sgt. Shady at the scene, and when he testified at trial that he went to the Family Dollar parking lot and parked after having a couple of shots.[118] Sgt. Shady testified that the Defendant would have been able to move the vehicle, given where Sgt. Shady was parked. The Defendant told Sgt. Shady that he was staying at the truck stop, not Family Dollar.

The facts of this case are strikingly similar to those in Isom. The only differences are that the Defendant did not attempt to drive the vehicle after Sgt. Shady contacted him, and the additional factors that he admitted to operating

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[117] Id.

[118] The State did not present evidence or argue that the vehicle lights were on. The State indicated the lights were not on based on the body camera video that was published to the jury. *See* AA at 212.

the vehicle, and said he was drunk. The jury's conclusion that the Defendant was in actual physical control of the vehicle was reasonable, and was based on substantial evidence.

III. The District Court did not error in refusing to provide an additional instruction on circumstantial evidence.

Appellate claims involving jury instructions are reviewed under the harmless error standard of review.[119] The Nevada Supreme Court stated

> Harmless error, as defined by NRS 178.598, requires that "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." With regard to claims of inadequacy of jury instructions, we have stated that, if "a defendant has contested the omitted element [of a criminal offense] and there is sufficient evidence to support a contrary finding, the error [in the instruction] is not harmless." However, while "'the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be,'" a "'defendant is not entitled to an instruction which incorrectly states the law'" or that "is substantially covered by other instructions."[120]

In Vincze v. State[121], a defendant proposed a jury instruction stating "If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, the jury should adopt the one of innocence."[122]

[119] Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003).
[120] Id. at 132-133, 322 (internal citations omitted).
[121] 86 Nev. 546, 472 P.2d 936 (1970).
[122] Id. at footnote 3.

The district court declined to issue the instruction.[123] This Court stated that a proper instruction regarding reasonable doubt was given, and that it was not error to refuse the proposed instruction.[124] The Court noted that with both circumstantial and testimonial evidence,

> a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.[125]

In this case, the District Court provided an instruction on direct and circumstantial evidence.[126] The District Court also provided instructions on reasonable doubt.[127] The Defendant requested an additional instruction on circumstantial evidence that the court found to be wordy, confusing, and had been covered by other instructions.[128] The Defendant now argues that this instruction

> would permit the jury to conclude the non-existence of a factor in the absence of direct evidence point toward innocence of an element of the crime: actual physical control.[129]

The Defendant points to no case law in support of his theory that the absence

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[123] Id. at 547, 937.
[124] Id. at 549, 938.
[125] Id. at 548-549, 937-938.
[126] AA at 266.
[127] Id. at 219-250.
[128] RA at 40.
[129] Appellant's Opening Brief at 25.

of direct evidence, in relation to circumstantial evidence, necessarily creates a hypothesis of innocence. The District Court ruled that the Defendant could argue as to the weight to be given to the circumstantial evidence presented.[130] Assuming, *arguendo*, that it was an error to omit the Defendant's proposed instruction, the error was harmless because it did not affect the substantial rights of the Defendant, because the jury was properly instructed on direct and circumstantial evidence, reasonable doubt, and the Rogers factors.

CONCLUSION

Based on the arguments stated above, the State respectfully requests the conviction and sentence be affirmed.

[130] RA at 41.

CERTIFICATE OF COMPLIANCE

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 Times New Roman, 14 point font. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages and does not exceed 14,000 words.

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). 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 7th day of February, 2022.

/s/ McKinzie M. Hilton
Chief Deputy District Attorney
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of February, 2022. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON FORD – NEVADA ATTORNEY GENERAL

RICHARD SEARS- COUNSEL FOR APPELLANT

JAMES S. BEECHER – WHITE PINE COUNTY DISTRICT ATTORNEY

I further certify that this document was personally served to Appellant's counsel, by placing a copy in his box at the White Pine County District Attorney's Office, with his consent.

DATED this 7th day of February, 2022.

SIGNED: /s/ McKinzie Hilton
White Pine County Chief Deputy District Attorney