IN THE SUPREME COURT OF THE STATE OF NEVADA

WAYNE MICHAEL CAMERON,

Appellant.

v.

STATE OF NEVADA,

Respondent.

Case No. 83531

_____/

APPELLANT'S REPLY BRIEF

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCING

SECOND JUDICIAL DISTRICT
STATE OF NEVADA

The Honorable Barry Breslow, presiding

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Although the State argues that Appellant's position is "ill-conceived" and "quasi-academic"[1], in fact the State does not challenge the basic legal points behind this assignment of error:

1. In order for there to be a burglary, necessary to ground the "felony murder" charge as alleged, there must be an entry. That means, per NRS 193.0145, that when the Appellant discharged the weapon, he used or intended to use it to threaten or intimidate Mr. Faust.

2. Strictly construing that statute, this case is not an "entry," because if the jury were to believe Mr. Cameron, he acted lawfully and in self-defense; but if the jury were to believe the State (as it did), the intent here was to kill, not to threaten or intimidate[2].

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[1] RAB at 21.

[2] We do not read the State's position as being that an "intent to kill" is the same thing or coopted into "intent to threaten or intent to intimidate." To do so, the State would have to have this Court construe the statute beyond the plain meaning of "threaten" or "intimidate," and per State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226 (2011), as argued at AOB 24-25, that would only at best create an ambiguity to be construed against the State. The situation is somewhat analogous to the question of whether an assaultive felony can "merge" into a felony murder. Per State v. Contreras, 118 Nev. 332, 339-40, 46 P.3d 661, 665-66 (2002), over a three-justice dissent, there is no merger viz. first degree murder. But per Rose v. State, 127 Nev.

3. If there is no entry, there is no burglary. If there is no burglary, there is no felony murder. But the State alleged and strenuously (and successfully) argued for a verdict based on felony murder.

Instead, the State argues that Appellant has not cited anything in the record to establish that the gunshot happened outside of Faust's vehicle's window, thus distinguishing Merlino v. State, 131 Nev. 652, 661-62, 357 P.3d 379, 385-86 (Nev. App. 2015); and instead has argued that the jury drew the reasonable inference that Appellant reached either his gun or his hand into Faust's open driver-side window. (RAB at 20)

Actually, Appellant did cite to the record in support of his contention at AOB 12, 14 and 23, but apparently it would be useful to cite to it again, albeit more in detail:

The medical examiner, Dr. Julie Schrader, testified as follows at 5-AA-1116-1117:

> "When you look at the skin, you can see some extra-small black dots [on Faust's face] that should not be there. They don't look like hairs. They look like black particles.

494, 500-04, 255 P.3d 291, 295-98 (2011), there is a merger viz felony second degree murder. The distinction is legislative intent. The legislature clearly intended that a burglary could be based on a misdemeanor assault or battery, per the plain language of NRS 200.030(1)(b) and 205.060(1); but felony second degree murder is a judge-made concept. Here, NRS 193.0145 does not utilize the language of "intend to commit any felony" or "intend to kill." Therefore, the rules of construction of a criminal statute assist the defense, not the prosecution, in this particular instance.

Next to the corner, the outside corner of his left eye, you can see a little spot there, and then you can see some additional spots on his upper eyelid.

What you are seeing –

Q: I'm sorry. Are you talking about these marks? The general area of my arrows?

A: Correct.

Q: Would you like to – perhaps it would be easier if you pointed those out.

A: Correct. If you could just go up slightly, Amos. Thank you so much.

So first you're seeing on his cheek, around the beard area, those dark particles. Then some of those particles have actually embedded in the skin here. And then some of them have actually struck the skin and caused small abrasions, which you are seeing here.

Then there is also some on the side of his nose, which I do not believe we can see in this photo, but in this area here.

Q: Okay.

A: What these are demonstrating is gun powder stippling abrasions. **When we look at an entrance gunshot wound, we examine the skin around it for any evidence of how far the gun was away from the body when it was fired.**

When we see these particles here, and especially when we see them embedded in the skin around the eyes, this is what we see with gun powder stippling, <u>meaning that the gun was used within several feet of the body when it was fired</u>."

This was not a "slip of the tongue" by Dr. Schrader. She continued at 5-AA-

1117-1118:

> "Because what happens when a gun is fired is not just the bullet comes out. Hot gases come out, soot or burned gunpowder comes out, and also unburned or burning gunpowder also comes out. When those gunpowder flakes come out of the end of the barrel and strike the skin, we see these types of injuries here.
>
> We can also see the gunpowder particles here. When we looked at the right side of his face, which does not have a gunshot wound, we did not see the small abrasions or punctate marks on his skin, and we did not see these dark particles. So this is all associated with this entrance gunshot wound to the face on the left side of his head.
>
> **So this is what we used to determine range of fire. And we determined this intermediate range of fire, meaning that the gun is usually within several feet of the body when it is fired**."

Put otherwise factually, Mr. Cameron did not place his gun inside of the vehicle through the open window. He was several feet away, outside of Mr. Faust's vehicle, when he discharged the Glock. Mr. Cameron did not testify to firing the weapon at point blank. To the contrary: He testified that he fired his weapon as Mr. Faust drove the truck right at him (5-AA-1162) and that he did not see Mr. Faust when he discharged the Glock. (5-AA-1164)

Thus, the record does not support the State's assertion of a "point blank" firing through a window. It supports the opposite. At very best, the State's position that this was a "burglary" ultimately is based upon speculation, contrary to the record evidence. As this Court stated in State v. Teeter, 65 Nev. 584, 632, 200 P.2d 657, 685 (1948):

> "A defendant is, at all stages of the proceedings in a case in which he is charged with a criminal offense, presumed to be innocent until he is proved guilty, by competent, relevant and material evidence, beyond a reasonable doubt. Only such evidence, direct or circumstantial, or both, meeting the legal requirements, and such reasonable, legitimate inferences as may legally be drawn therefrom, can properly be considered by a trial court or jury in the determining a defendant's guilt or innocence of the crime charged. Mere conclusions based on supposition, assumption, conjecture or imagination, and not upon competent, legal and sufficient evidence cannot, with proper regard for truth or justice, be permitted to assume the role of legitimate factual inferences in the determination of guilt or innocence. While much latitude is frequently allowed attorneys in argument, same cannot be allowed to be abused to the extent of permitting conjectural or speculative opinions of counsel to take the place of sound, legitimate inferences, reasonably drawn from evidence of actual facts."

Accord: Glover v. Eighth Judicial District, 125 Nev. 691, 703, 220 P.2d 684, 694 (2009).

Had Dr. Schrader testified that this probably was a "point blank contact wound," that might be one thing. But she rendered no such testimony.

The State also argues that any error is harmless because the jury was given the opportunity to return a verdict of either second degree murder or voluntary manslaughter. As to the open murder count, the State is correct. See: Miner v. Lamb, 86 Nev. 54, 58, 464 P.2d 451, 453 (1970) [an open murder complaint charges murder in the first degree and all necessarily included offenses]. But as to first degree felony murder, the State is incorrect. A charge of felony murder obviates and eliminates theories of second degree murder and voluntary

manslaughter; with felony murder, a jury is not entitled to lesser-included instructions on those two crimes. See: United States v. Pearson, 159 F.3d 480, 486-87 (10th Cir. 1998); United States v. Miguel, 338 F.3d 995, 1004-05 (9th Cir. 2003); Graham v. State, 116 Nev. 23, 29, 992 P.2d 255, 258 (2000).

And in fact the jury was instructed in No. 29 that second degree murder and voluntary manslaughter pertained to Open Murder, and that those crimes could not be considered if the jury first concluded Appellant was guilty of first degree murder. (6-AA-1477)

In No. 42, the jury was instructed the felony murder did not require proof of malice, premeditation or deliberation. (6-AA-487) And Instruction No. 34 allowed a first degree murder verdict even if only one juror found this to be an open murder, if the other 11 found it to be a felony murder. (6-AA-1477)

That is why the error cannot be harmless. Based on the jury instructions given and the trial prosecutor's argument, the jury easily could have alighted on its verdict of first degree murder based on a felony murder theory, without regard to consideration of open murder and the lesser offenses of second degree murder and voluntary manslaughter. And if it did so, it did so erroneously. And based on the citations at AOB 22, the error in that instance cannot be harmless; the verdict must be set aside. The United States Constitution does not permit a "harmless error

analysis" under these circumstances[3].

II. THE TRIAL COURT VIOLATED APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW, TO A PROPER PROBABLE CAUSE DETERMINATION, AND TO FAIR NOTICE OF THE CHARGES AGAINST HIM WHEN IT PERMITTED A CONSTRUCTIVE AMENDMENT TO THE INFORMATION BY OF THE JURY INSTRUCTIONS [AND PROSECUTORIAL ARGUMENT TO THE JURY]

This is why we have Reply Briefs. Sometimes an appellant makes an immaterial misstatement in his Opening Brief upon which the respondent seizes, and it is necessary to address the immaterial misstatement in the Reply:

As noted at AOB 1 and RAB 24, the initial charging document did indeed read at 1-AA-2 that the Defendant killed Faust in the perpetration or attempted perpetration of a burglary.

But the manner and means of the charging document went on to say "by entering the vehicle with the intent to commit assault or battery or any felony therein occurred when the Defendant followed a vehicle driven by Jarod Faust on Welcome Way. The Defendant stopped his vehicle, exited his vehicle with a firearm, approached the driver's side of the Chevrolet Silverado occupied by Jarod Faust, and shot Jarod Faust in the face, thereby inflicting mortal injuries upon Jarod Faust from which he died…"

The charging document indeed alleges a burglary or "attempted burglary," and it indeed alleges that Appellant entered the vehicle with the intent to commit

[3] Had the State charged Mr. Cameron with burglary, and had the jury found him not guilty of that charge, then the State's harmless error argument might be valid. See: Fiegehen v. State, 121 Nev. 293, 298-301, 113 P.3d 305, 308-09 (2005). However, the State did not charge burglary in this case, so the error cannot be saved in that regard.

an assault or a battery or any felony therein.

But that by itself does not carry the day. An information that charges murder must charge either the manner and means of the cause of death or that the manner or means are unknown. West v. State, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003). A murder indictment (or information) that allows a prosecutor to change theories at will violates due process of law because it does not afford an accused full and complete notice of the charge the defendant is defending. Simpson v. Eighth Judicial District, 88 Nev. 654, 660, 503 P.2d 1225, 1229-30 (1972). An indictment that gives no allegation of the manner of committing the offense is constitutionally deficient. Sheriff v. Standal, 95 Nev. 914, 916, 604 P.2d 111, 112 (1979).

If assault were a lesser-included offense of murder, the defendant arguably could not be heard to complain. See: Benitez v. State, 111 Nev. 1363, 1364-65, 904 P.2d 1036, 1037-38 (1995). However, it is not. Assault (with a deadly weapon) is not a lesser-included offense of ("attempted") murder. Jackson v. State, 128 Nev. 598, 607, 291 P.3d 1274, 1280 (2012).

Further, an assault by definition can be perpetrated in one of two ways: either unlawfully attempting to use physical force against another person; or intentionally placing another person in reasonable apprehension of immediate bodily harm. NRS 200.471(1)(a)(1),(2). So, per NRS 200.471(1)(a)(1), assault is a lesser-included offense of battery; but per NRS 200.471(1)(a)(2), it is not under

Jackson because one can violate that statute without battering or intending to batter another.

So, the manner and means as alleged in this Information, which gave Mr. Cameron notice of which he was required to defend, is that he "attempted" to perpetrate a burglary by committing an "assault" in that he fired a gunshot through the driver's side of the Chevrolet Silverado and killed Faust by inflicting mortal injuries on his face. That does not read like an attempt or an assault; it reads like a successful battery, meaning an alleged burglary based on battery, not an alleged attempted burglary based on assault. But that was the charge which Mr. Cameron was required to defend.

What the State did, by utilizing Instructions No. 42, 45 and 47 – to which the Defendant objected at trial – was to argue over objection and motion for mistrial that the "attempted burglary" was committed when the Defendant fired the gunshot "with the intent to scare" Mr. Faust. (6-AA-1363, 1364) And undoubtedly the trial prosecutor successfully sought those instructions and made that argument in order to tailor the theory of felony murder not to the facts as known to the police prior to filing the Information, but tailored to Mr. Cameron's trial testimony (assuming rejection of self-defense). That is a constructive amendment to an Indictment or Information which violates due process for the reasons stated in Barren v. State, 99 Nev. 661, 665-68, 669 P.2d 725, 727-29 (1983) and Wright v. State, 101 Nev. 269,

272-73, 701 P.2d 743 (1985).

Put otherwise, the charging document appeared to allege as an "assault" a violation of NRS 200.471(1)(a)(1), albeit as a lesser-included of misdemeanor battery; but the theory at trial, tailored to the Appellant's testimony, switched the theory of assault to NRS 200.471(1)(a)(2). Federal due process of law simply does not countenance that type of constructive amendment.

Accordingly, the verdict must be set aside for this reason as well and a new trial ordered.

III. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN ALLOWING EVIDENCE OF UNCHARGED "ROAD RAGE INCIDENTS" BETWEEN APPELLANT AND OTHER INDIVIDUALS. IN SO DOING, THE TRIAL COURT VIOLATED APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL.

Oddly, the State trumpets Hubbard v. State, 134 Nev. 450, 456, 422 P.3d 1260, 1265 (2018)[reversed and remanded]. That is a case Appellant should have trumpeted in his Opening Brief.

The specific holding, in reversing and remanding the robbery and discharge of a weapon in an occupied residence convictions, is that the defendant's prior conviction of residential burglary was inadmissible on the facts of that case to establish the defendant's specific intent to commit felonies after entering the residence in question. The defendant's defense was that he did not participate in the charged burglary and was not present when the robbery and other crimes occurred.

In Hubbard, the Nevada Supreme Court first noted that the State must indicate in its pre-trial motion an at-issue, non-propensity issue for admitting a prior bad act evidence. The Court cannot justify admission of such evidence on a theory not initially propounded by the State. See: Hubbard, 834 Nev. at 454, 458, 422 P.3d at 1262, 1267. Here, the State wished to introduce the other incidents, claiming that they were relevant to Appellant's motive, his intent and absence of mistake or accident. See: 1-AA-14. The State continues that theory at RAB 28. Accordingly, the Court may not consider any other theory of admissibility[4].

But secondly, even where the State has the burden of proof of specific intent, the rule of law does not require automatic admission of the prior bad act. The prior bad act must have relevance to the charged specific intent. Hubbard, 134 Nev. at 456, 422 P.3d at 1265.

Here, it is undisputed that burglary is a specific intent crime, as is first degree murder in terms of premeditation, deliberation and specific intent to kill. The issue is whether the so-called "road rage incidents" are in any way relevant, either to the Appellant's alleged specific intent to enter Faust's vehicle or his alleged specific intent to kill Faust. The answer clearly is no. The uncharged cases involving Leah Mazza and the carload of girls do not involve Appellant entering

[4] Therefore, the Court need not be concerned with Bigpond v. State, 128 Nev. 108, 116, 370 P.3d 1244 (2012). For reasons stated at AOB 31-32, Bigpond should be of grave concern in a different case.

any of their vehicles, any of their homes, or threatening physical violence against any of them. They simply do not meet the threshold for relevant evidence per NRS 48.015 and 48.025. See: Taylor v. State, 109 Nev. 849, 852, 858 P.2d 843, 845-46 (1993)[reversed]. Indeed, as argued in the Opening Brief and not traversed by the State, Mr. Cameron broke no law in his confrontations either with Leah Mazza or with the carload of the three teenage girls. Thus, the evidence does not pass the screening test of Randolph v. State, 136 Nev.Ad.Op. 78, 477 P.3d 342, 349 (2020) for admission of a "prior bad act."

That being the case, Judge Breslow's conclusion that the evidence was "prejudicial but not overly prejudicial" (1-AA-146) should have informed him of the inadmissibility of the evidence. Any degree of prejudice clearly outweighs the probative value here, which was none.

Additionally, "motive" evidence under NRS 48.045(2) in a murder prosecution must establish a legitimate inference on why the defendant would kill the victim. Otherwise, it is irrelevant and inadmissible. See: Flores v. State, 116 Nev. 659, 662, 5 P.3d 1066, 1068 (2000)[reversed and remanded].

Here, the uncharged evidence might establish why the defendant was motivated to follow Faust, believing that Faust had violated some rule of the road; but it simply is irrelevant to the issue of why Appellant would fire a gunshot at Faust. Thus, as in Flores, the evidence is irrelevant and inadmissible on that theory.

Finally, Appellant cited to this Court Longoria v. State, 99 Nev. 754, 670 P.2d 939 (1983) at AOB 33. There the defendant was charged with first degree murder. His defense was self-defense. The uncharged misconduct had to do with stabbing a different man in the chest approximately one month prior, where the victim did not die. This Court held that the uncharged misconduct simply was not relevant to the issues of whether the defendant acted with premeditation and deliberation in the charged murder; to the contrary, the principal relevance of the questioning about the alleged prior bad act was to show the defendant's bad character and his predisposition to commit violent crimes. Therefore, the evidence was inadmissible, and the error reversible. Longoria, 99 Nev. at 755-56, 670 P.2d 940-41.

Longoria is on all fours with this case. Since it has not been overruled it informs this Court's ruling. Undoubtedly, that is why the State chose not to discuss Longoria!

The remaining issue is whether the error is harmless. The State does not argue harmless error, but in the event the Court reaches that issue *sua sponte*, we respond:

As noted at AOB 33, the trial prosecutor cross-examined Appellant extensively on the "road rage incidents." And in closing argument, the trial prosecutor referenced the Appellant as an "executioner as a traffic vigilante." In

rebutting self-defense, the trial prosecutor stressed that the case was "an execution" because Appellant is a "vigilante." He argued that the prior uncharged acts are "abhorrent behavior, behavior indicative of premeditation and deliberation, the acts of a murderer." (6-AA-1345, 1367, 1397)

The fact that a trial prosecutor relies upon erroneously admitted evidence in closing argument tends to eviscerate a theory of harmless error. See: Gibbons v. State, 97 Nev. 299, 302, 629 P.2d 1196, 1197 (1981) [reversed]; Daly v. State, 99 Nev. 564, 569, 665 P.2d 798, 802 (1983) [reversed]; Murray v. State, 113 Nev. 11, 18, 930 P.2d 121, 125 (1997) [reversed].

Reversal may (and should) also be had on a theory of cumulative error. See: Gonzales v. State, 131 Nev. 991, 1003, 366 P.3d 680 (2015); DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000). Relevant factors to consider in deciding whether the error is harmless or prejudicial include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.

Here, the errors directly affected Appellant's convictions, and undermined his affirmative defense that he did not act with deliberation and otherwise acted in self-defense. Further, the crime he was convicted of is grave. Because the cumulation of errors directly affected his conviction in that regard, Appellant was denied his constitutional right to a fair trial.

IV. THE TRIAL COURT COMMITTED PLAIN CONSTITUTIONAL ERROR IN ALLOWING THE VICTIMS AND DERIVATIVELY THROUGH THE PROSECUTOR'S ARGUMENT, THE APPELLANT'S OWN SON, TO GIVE SENTENCING RECOMMENDATIONS AS PART OF "VICTIM IMPACT" EVIDENCE. AS SUCH, APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW, TO A FAIR SENTENCING TRIAL, AND TO FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT WERE IMPINGED.

The only authority the State cites in answering this contention is the Nevada Constitution, §8A (1)(h), concerning the rights of victims of crime. That provision grants victims the right to be reasonably heard, upon request, at any public proceeding, including any court involving sentencing. But nothing in that subsection or any other subsection of 8A grants victims the right to advocate the imposition of a particular sentence.

§8A is not unconstitutional, nor do we advocate as such. In fact, it is perfectly consistent with Payne v. Tennessee, 501 U.S. 808, 820-21, 111 S.Ct. 2597, 2606, 115 L.Ed.2d 720 (1991): The Eighth Amendment does not erect a per se bar prohibiting a (capital) sentencing jury from considering victim impact evidence. That is, the jury may hear evidence of the actual harm caused by the crime.

But that is distinguished from victim impact evidence that is offered to encourage comparative judgments, that is, tying harshness of the sentence to be imposed to the victim's significance as a contributor to society. That is improper.

See: Payne, 501 U.S. at 823-24, 111 S.Ct. at 2607.

Put another way, the sentencer should consider any aspect of the defendant's character or record, or circumstances of the offense, in imposing a just and proper sentence. See: Smith v. Spisak, 558 U.S. 139, 144, 130 S.Ct. 676, 681-82, 175 L.Ed.2d 595 (2010), and numerous cites therein. Evidence of the actual harm to the victim's family as a result of a murder certainly falls within the "circumstances of the offense." But comparative judgments – that is, the victim's opinion as to the sentence the sentencing jury should impose because of the harm caused by the crime – is a different matter. This Court said so correctly in Kaczmarek v. State, 120 Nev. 314, 336-37, 91 P.3d 16, 31-32 (2004), discussed extensively at AOB 36 and 37. The victim's opinion on sentencing is irrelevant to the defendant's character, his record, or the circumstances of the victim's murder.

How, then, can we countenance a system where a jury is not allowed to hear the victim's opinion, when that opinion is inconsistent with the sentence the prosecutor is advocating, but is strictly allowed to hear that opinion when it is perfectly consistent with the prosecutor's? How can that result pass muster under the equal protection clause of the Fourteenth Amendment? Where is the rational basis for that distinction? And why does it matter whether what is at stake is the death penalty or life without parole? Why does anyone think juries are relatively impervious to such opinions in life cases, but not on death cases?

The State does not even try to answer these questions, much less attempt to distinguish Kaczmarek. Instead, the State's approach is a "how dare he" emotional argument, devoid of any legal analysis.[5] As the Supreme Court of the State of Nevada is a court of law, not a court of emotions, it should conclude that nothing in the State's brief is helpful to its ultimate decision on this issue.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING EVIDENCE OF "PRIOR SHOOTINGS" TO BE CONSIDERED BY THE JURY, AS THEY WERE NOT PROVEN CLEARLY AND CONVINCINGLY, BUT RATHER, BASED UPON IMPALPABLE AND HIGHLY SUSPECT EVIDENCE.

The State's traverse essentially is to distinguish the cases cited by Appellant. However, the distinction in each case is without a difference.

The evidence regarding these "other shootings" was by any other name impalpable and highly suspect. The evidence in support thereof was very far from clear and convincing. Just because Ethan Cameron – who, unlike Appellant, had a motive – denied doing it does not make the "impalpable" evidence into something "palpable." That is why we cited Glispey v. Sheriff, 89 Nev. 221, 510 P.2d 623 (1973) to this Court. Just because the other visitors to the prison bathroom there denied stashing the marijuana in the bathroom did not turn the case suffering from a lack of probable cause into a probable cause determination.

[5] And Appellant did not attack the testimony of Jeff Ardito on this basis, but only the testimonies of Jordyn Faust, Ashley Faust, Karen Faust, and the trial prosecutor's inference of Appellant's own son's so-called position.

The fact remains that, absent evidence that Appellant had exclusive access to his vehicle 24 hours a day, the evidence tying him to the shootings is impalpable. And it is especially impalpable because no evidence was adduced as to why Appellant would do this – unlike the charged offense, the incident involving Leah Mazza, and the incident involving the three errant teenage girls.

While the State can present hearsay at sentencing, as it did here, the hearsay rendition of a circumstantial evidence case must exclude to a moral certainty every hypothesis but the single one of guilt. See: Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003). Here, the evidence did not exclude the hypothesis that someone else with access to Appellant's car did it. And proof of that pudding is in this eating: What the perpetrator did was an arrestable offense per NRS 202.285. But although a police report was obviously filed from the State's pre-trial motion, nobody was arrested. See: Meek v. State, 112 Nev. 1288, 1294-95, 930 P.2d 1104, 1108 (1996) [clear and convincing evidence of uncharged rape not established where victim filed police report but defendant was not arrested.] See also: Goodson v. State, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982) [sentence reversed and remanded because of unsupported allegation of drug trafficking in PSIR.]

For reasons stated at AOB 41-42, this error – singly or in cumulation with the other sentencing error(s) – denied Appellant his right to a fair sentencing hearing.

VI. THE COURT SHOULD DECLARE THE LAST SENTENCE OF NRS 200.030(4) TO BE UNCONSTITUTIONAL.

The State claims that it does not understand this contention. Often times, the State says that when it is trumped and does not know how to respond. In the event that this Court is likewise confused, however, we will explain it even more clearly:

When a jury is given the option to sentence a defendant to death, it must weigh and find aggravating factors versus mitigating factors before imposing a capital penalty. That result is mandated constitutionally per Gregg v. Georgia, 428 U.S. 153 (1976), and it is contained in NRS 200.033 and NRS 200.035.

But NRS 200.030(4) does not require that result. The question is whether constitutionally – whether federal or state constitution – it should require it.

In Indiana by statute the sentencer must balance and give proper weight to mitigating versus aggravating factors before imposing a life without parole sentence. See: Losch v. State, 834 N.E.2d 1012, 1013 (Ind. 2005). The reason such specificity is required before imposing a life without parole sentencing judgment is to ensure that the jury considers only proper matters when imposing that sentence, thus safeguarding against sentences that are arbitrary or capricious, and so as also to enable the appellate courts to determine the reasonableness of the sentence imposed. See: Brown v. State, 783 N.E.2d 1121, 1127-28 (Ind. 2003).

The same result and reasoning exist in the state of Alabama. See: Cook v. State, 369 So.2d 1251, 1257 (Ala. 1978).

Our question is: Why not the same result in Nevada?[6]

If the penalty jury were instructed pursuant to NRS 200.035, the jury would have to consider Mr. Cameron's lack of significant history or prior criminal activity. It would also consider his genuine belief in the need of self-defense, even if it was not reasonable, and consider whether the victim was a participant in some way in his criminal conduct. It would also have to consider not only Mr. Cameron's lack of criminal history, but the positive things he has done in the community and in his business and profession.

If the jury were to consider aggravators pursuant to NRS 200.033, it could not consider NRS 200.033(4) if it found Mr. Cameron guilty of felony murder. See: McConnell v. State, 120 Nev. 1043, 1062-69, 102 P.3d 606 (2004). Otherwise, none of the factors of NRS 200.033 even remotely applies to Mr. Cameron.

If a reasonable jury is so instructed, and particularly if a jury does not hear the prejudicial sentencing opinions of the victim's family and does not hear the impalpable character evidence, what is left?

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[6] The State pooh-poohs our footnote at AOB 43, claiming it undercuts our argument. Actually, it does not. Per NRS 213.085, the Pardons Board could commute a life without parole sentence to a term of years; but it could not grant a sentence that would allow release on parole. Thus, even commuting a sentence from life without to 20-to-50 years, a defendant could not parole on such a sentence but would have to expire. For someone like Mr. Cameron, a sentence of 20-to-50 years, is, by any other name, a life without parole sentence.

Although rare, there are occasional cases where this Court will exercise its supervisory powers in reducing a life without to life with parole sentence. See: Young v. State, 103 Nev. 233, 238, 737 P.2d 512 (1987); Biondi v. State, 101 Nev. 252, 259-60, 699 P.2d 1062 (1985) [death penalty reduced to life without possibility of parole]. We respectfully submit that this is another such rare case meriting that relief on direct appeal.

VI. CONCLUSION

This Court should reverse the judgment and remand for a new, constitutionally fair trial. But if the jury returns a first degree guilty verdict at such retrial, the Court should mandate that life without the possibility of parole is not a viable option, and the sentence should either be 20 years-to-life imprisonment or 20-to-50-years with the possibility of parole.

DATED this 3rd day of May, 2022.

Respectfully submitted,

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By: */s/RichardCornell*
Richard Cornell

CERTIFICATE OF MAILING

The undersigned certifies that they are an employee of Richard F. Cornell, P.C., and that on the 3rd day of May, 2022, they served a true and correct copy of the foregoing document upon the necessary party(ies), as set forth below, by way of the court's E-flex filing system:

Washoe County District Attorney's Office
Appellate Division
jnoble@da.washoecounty.us

DATED this 3rd day of May, 2022.

*/s/KathrynOBryan*_____
Kathryn O'Bryan, Employee

ATTORNEY'S CERTIFICATE OF COMPLIANCE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 28(e), and NRAP 32(a)(8):

I have read the Appellant's Opening Brief before signing it; to the best of my knowledge, information and belief, the Brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

The Brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e), in that every factual assertion in the brief regarding matters in the record is supported by appropriate references to the record on appeal.

Further, I certify that the document complies with the formatting requirements of Rule 32(a)(4)-(6). Specifically, the brief is 2.0-spaced; it uses a mono-spaced type face which is Times New Roman14-point; it is in a plain style; and the margins on all four sides are at least one (1)inch.

The Brief also meets the applicable page limitation of Rule 32(a)(7), because it contains less than 7,000 words, to wit: 5,346 words.

DATED this 3rd day of May, 2022.

/s/RichardCornell
Richard Cornell, Esq., #1553