IN THE SUPREME COURT OF THE STATE OF NEVADA

WAYNE MICHAEL CAMERON,

Appellant.

v.
STATE OF NEVADA,

Respondent.
_____/ Case No. 83531

ANSWER TO PETITION FOR EN BANC RECONSIDERATION

COMES NOW, Appellant, WAYNE MICHAEL CAMERON, and respectfully responds to the State's Petition for en banc Reconsideration, as follows:

I. **THE CASE DOES NOT FIT THE PARAMETERS EITHER OF NRAP 40(C) OR 40A.**

The first insurmountable problem with the State's Petition for en banc Reconsideration is that essentially it argues that the trial court's error, in allowing the verdict to be adjudicated on a felony murder basis when there was no competent evidence of an "entry" within the meaning of NRS 193.0145, is harmless. That creates the first problem. Nowhere in RAB 15-22 did the State argue that the error in permitting the State to argue that Cameron was guilty of a felony murder is harmless. As a petition for rehearing, that violates NRAP 40(c)(1) to the extent that the State is raising a point for the first time on rehearing. See also: Stanfill v. State, 99 Nev. 499, 500, 665 P.2d 1146 (1983).

As a Petition for en banc Reconsideration, the Petition does not show that granting it is necessary to secure or maintain uniformity of decisions of this Court or the Court of Appeals, or that it involves a substantial precedential, constitutional or public policy issue. NRAP 40A(a),(c).

The principle of law is basic: It used to be that when a general verdict was based on a possibility of a legally inadequate consideration, such that the verdict could be supported by an unsupportable theory, and it was impossible to tell which ground the jury selected, the verdict must be set aside. See: Yates v. United States, 354 U.S. 298, 311-14, 77 S.Ct. 1064, 1073-75, 1 L.Ed.2d 1356 (1957); Phillips v. State, 121 Nev. 591, 119 P.3d 711 (2005). However, Yates and its progeny, as well as Phillips, have been overruled in both Hedgepeth v. Pulido, 555 U.S. 57, 59, 129 S.Ct. 530, 531, 172 L.Ed.2d 388 (2008) and Cortinas v. State, 124 Nev. 1013, 1026-27, 155 P.3d 315, 324 (2008). Now, when a crime is charged on multiple theories of guilt, one of which is invalid, the error is subject to harmless error analysis.

But the major dispute between the majority and the dissent is whether the error in this case was harmless, which again is a point not really argued by the State. And the issue of determining harmless error versus prejudicial error clearly cannot be the proper subject of NRAP 40A (a) and (c), as that is a "mixed fact/law" issue peculiar to each case and thus does not involve a substantial

precedential, constitutional or public policy issue.

That said, the State's position is that the evidence would have been technically sufficient to show premeditation, deliberation, and a specific intent to kill under the first degree murder component of open murder. On this argument, the error was harmless for that reason. If that is the position, the only reason to consider this case for en banc purposes is to determine how we approach "harmless error" in a felony murder versus open murder context. And for the reasons stated below, the error is not harmless. Justices Silver and Cadish were certainly correct:

II. HARMLESSNESS OF ERROR HERE TURNS ON THE TEST OF Rosas v. State, *post*, NOT INSUFFICIENCY OF THE EVIDENCE OF THE GREATER CHARGE.

Based upon the proper analysis of felony murder versus open murder, an error in instructing and allowing a verdict to rest on inapplicable felony murder theory can be harmless only if no rational jury could have arrived at any verdict but first degree murder. Since that is not the case here, reversal and remand for a new trial is the proper decision.

First off, the points made in the Appellant's Reply Brief of May 3, 2022 bear repeating, with some expansion:

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 pertain 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)

And in Instruction No. 42, the jury was instructed that felony murder did not require proof of malice, premeditation or deliberation. (6-AA-1447) 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 felony murder. (6-AA-1477)

In other words, if at least one juror found this to be a felony murder, that juror would have necessarily rejected voluntary manslaughter and second degree murder as instructed.

But an open murder charges murder in the first degree and all necessarily included offenses, including second degree murder and voluntary manslaughter. See: Miner v. Lamb, 86 Nev. 54, 58, 464 P.2d 451, 453 (1970).

In fact, open murder can be charged, even where the evidence is technically insufficient to support a first degree murder conviction. Sheriff v. Willoughby, 97

Nev. 90, 92, 624 P.2d 498, 499 (1981). And an open murder charge does not require the State to plead separate counts of criminal homicide. Howard v. Sheriff, 83 Nev. 150, 153, 425 P.2d 596, 597 (1967). So, an open murder charge allows a jury to consider first degree murder, second degree murder, or voluntary manslaughter[1] automatically, whether the evidence fits more than one theory or not.

The essential difference between first and second degree murder, per Byford v. State, 116 Nev. 215, 236 n.4, 994 P.2d 700, 714 n.4 (2000), is whether the defendant killed the victim under the influence of an uncontrollable passion and without any mixture of deliberation, but under circumstances not to justify the existence or persistence of an irresistible passion in a reasonable man.

The difference between voluntary manslaughter and second degree murder is: Whether the defendant acted without implied malice, but under the existence or persistence of irresistible passion. And in the case of being confronted by the victim brandishing a weapon, or using a weapon, that would turn upon whether there was an adequate cooling off period; if so, the killing is punished as murder. Otherwise, it is punished as manslaughter. See: Allen v. State, 98 Nev. 354, 356, 647 P.2d 389, 390-91 (1982).

This Court has instructed in Rosas v. State, 122 Nev. 1258, 1264-65 n.10,

[1] Or involuntary manslaughter.

147 P.3d 1101, 1106 n.10 (2006), that a lesser-included offense cannot properly be refused on the grounds that the evidence clearly shows guilt above the lesser offense. The test is whether there is any evidence, however slight, on any reasonable theory of the case under which the defendant might be convicted.

Further, the defendant is not required to present a theory of a lesser-included offense. If the evidence is consistent with a verdict of a lesser-included offense, the court must instruct on that offense whether or not the defendant objects to it. Rosas, 122 Nev. at 1265-69, 147 P.3d at 1106-08.

Rosas is consistent with the federal standard contained in Schmuck v. United States, 489 U.S. 705, 716, 109 S.Ct. 1443, 1450-51, 103 L.Ed.2d 734 (1939): For harmless error purposes, the issue is whether a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater – even where the evidence is sufficient to convict the defendant of the greater offense. That is, the question is whether the result of guilty of the lesser but not guilty of the greater is one that a rational jury could reach.

So, the State utilizes the wrong standard. The issue is not whether the evidence would have been technically sufficient to ground a finding of premeditation, deliberation and specific intent to kill. The issue, rather, is whether there is any evidence by which a rational jury could return a verdict to second degree murder or voluntary manslaughter. And the answer to that question on this

record is clearly in the affirmative.

Mr. Cameron's testimony is discussed extensively at AOB 12-14. Per his testimony, after the victim verbally assaulted and threatened him, Mr. Cameron got his weapon. When he came back to the window, the victim's hand was up and the Appellant believed he had a gun. After an exchange of vulgar unpleasantries, the Appellant fired the weapon, not seeing where the bullet was going.

On those facts, if believed, a rational jury could reject self-defense but find the evidence of deliberation to be insufficient, thus alighting upon second degree murder. Or, a rational jury, albeit rejecting self-defense, could have decided Appellant acted without malice but under an irresistible impulse and in the heat of passion, thus alighting upon a voluntary manslaughter verdict.

This is a point not stressed by the State, or really by either the majority or the dissent. Consistently with Nay v. State, 123 Nev. 326, 333-34, 167 P.3d 430, 435-36 (2007), there is no way on this record that we can conclude that the jurors arrived at the conclusion that this could not be a second degree murder or a voluntary manslaughter. All that we really can say is that the theory of felony murder, as charged and as forcefully advocated by the trial prosecutor, took away the jury's ability to consider whether this in fact was either a second degree murder or a voluntary manslaughter.

For these reasons, then, the Order of Reversal and Remand is correctly

decided and the Petition for en banc Reconsideration should be denied.

III. IF THE EN BANC COURT AGREES WITH THE DISSENT, THEN IT SHOULD NEVERTHELESS REVERSE THE CONVICTION BASED ON IMPROPER ADMISSION OF UNCHARGED MISCONDUCT EVIDENCE.

If the Court en banc should agree with the dissent, then it must reach Appellant's third issue, which was whether the trial court abused its discretion and committed reversible error in allowing evidence of uncharged "road rage incidents" between Appellant and other individuals into evidence, when undisputedly, no violence occurred during those incidents and Appellant was never charged with an offense.

Appellant argued this issue strenuously at AOB at 30-34 and ARB at 10-15. At page 3 footnote 3 of the Order of Reversal and Remand, the Panel decided it did not need to reach this issue.

However, two procedural principles should be considered: First the Court can rely upon other grounds in upholding a decision. See: Rodriguez v. Primadonna Co. LLC, 125 Nev. 578, 591, 216 P.3d 793, 802 (2009), and cases cited therein. If this Court will affirm a district court's order if it reaches the correct result, even for the wrong reason[2], then certainly the Court en banc can uphold the decision of the Panel on a ground different than the one the Panel relied

[2] Saavedra-Sandoval v. Wal-Mart Stores, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010)

upon.

Secondly, in Jiminez v. State, 112 Nev. 610, 623, 918 P.2d 687, 695 (1996), this Court even upon reversal on a different ground addressed other issues "in order to eliminate uncertainty on the matter in the event of retrial."

Appellant submits that while the Panel was certainly correct in reversing on the issue at bar, it just as easily could have reversed on this issue. Therefore, if the en banc Court is otherwise inclined to grant the within Petition and uphold the district court on the issue of harmlessness, it nevertheless should reach this issue and reverse.

First, we note from 1-AA-12-14, that the State became aware of the "uncharged road rage incidents" as a result of their investigation into this case and interrogation of those witnesses. Independently, they did not file police reports at or about the time of the incidences.

The first incident occurred approximately 13-18 months prior to the within homicide between Appellant and a young lady with the initials, "L.M." Appellant followed her in the same general neighborhood of South-Southwest Reno to her residence. By description, nothing violent happened between the Appellant and "L.M." See: 1-AA-12-14.

After the trial court allowed that evidence in, "L.M." testified that on October 20, 2019 she was driving back home to her parents' home in South Reno.

(4-AA-954) She turned right off of Damonte Ranch and Arrowcreek Parkway to go up to Zolezzi. As she passed the car someone put their bright lights on and tailgated her. She tried to speed away, but the car stayed with her. (Id. at 956) She tried to lose the car through back roads, but the car continued to follow her. (Id. at 959) She ultimately got to her parents' home, but when she looked out the window, she noticed the car was parked behind her with its brights on. (Id. at 961) She noticed someone outside of the car taking pictures of her car while standing behind the car. The car was a white-colored small SUV and the driver was a man. (Id. at 961-62) Nobody from the car was yelling at her, and there was no weapon. The person who got out of the SUV did not come onto her parents' property. (Id. at 969-70) Her car was not vandalized, nor was her parents' home. She never saw that person again. (Id. at 971-72)

Appellant testified that regarding this incident, "L.M." bumped into him and he pulled over, but she kept going. That's why he followed her. (5-AA-1174-75) He took a picture of her license plate in case he needed to report the accident. (Id. at 1175-76) It turned out there was no damage to the vehicle, so he let it go. (Id. at 1176) He never attempted to contact her. (Id.)

The second incident which the trial court allowed into evidence involved Appellant's daughter, "A.C.," who recalled an incident occurring in the same neighborhood approximately 12 months prior to the within homicide, where

Appellant followed four teenagers in a Jeep who had tailgated him. Again, by the description, nothing violent happened between the Appellant and the teenagers. See: 1-AA-14.

"A.C.," the Appellant's daughter, testified that she was with her father one evening when a vehicle came up behind them on her tail. He slowed down to the let the vehicle pass, and then they turned onto the same street the Appellant turned onto. (4-AA-982-83) Appellant followed the vehicle. It ended up turning off at one of the lower streets before their cul-de-sac. Appellant got out and yelled at them, "loud and aggressive," while she stayed in the car and hid. (Id. at 983) The people in the car Appellant followed were just teenagers. (Id. at 985) After that Appellant got back into his car and drove away. (Id. at 987) Nothing violent occurred during the incident. (Id. at 991) The Appellant did not get his gun out of the car. (Id.) "A.C." does not remember what year the incident happened. (Id. at 991-92)

Appellant ultimately apologized to the two girls for scaring them. (Id. at 998)

Appellant's version of the incident is that it was a case of four young people goofing around in the car. He pulled over to let them pass. They turned basically towards his house, and he followed them. (5-AA-1176) He confronted them and demanded to speak to their parents. But then he realized that they did not know what they were doing. He apologized for acting like a grumpy old man. (Id. at

1177) When he got out of the vehicle on that occasion, he did not have a gun in his hand. (Id.) Likewise, when he got out of the vehicle with "L.M.," he did not have a gun in his hand. (Id. at 1178)

At trial, the trial prosecutor cross-examined the Appellant extensively about these prior incidents. See: 5-AA-1189-91.

In his closing argument, the trial prosecutor fashioned Appellant as a "traffic vigilante" who, in this case, left damning evidence at the scene. (6-AA-1345, 1348) As to this case, the trial prosecutor characterized Appellant as "a self-appointed guy who thinks he's special when it comes to traffic." (Id. at 1357, 1358)

And in rebuttal, trial prosecutor argued why the two "prior road rage" incidents bore directly on Appellant's specific intent to kill. (Id. at 1396-97) He argued that those prior incidents demonstrate aberrant behavior, behavior indicative of premeditation and deliberation, the actions of a murderer. (Id. at 1397) He labeled Appellant's position as "normalizing vigilantism." (Id.)

Simply put, here is the problem:

First, in order for the prior incidences to fit under NRS 48.045(2), they must be criminal acts. Randolph v. State, 136 Nev.Ad.Op. 78, 477 P.3d 342, 349 (2020). If the incident is not prosecutable, it simply cannot come into evidence. See: Meek

v. State, 112 Nev. 1288, 1294-95, 930 P.2d 1104, 1108 (1996)[3]. And Appellant's position throughout is that Longoria v. State, 99 Nev. 754, 755-56, 670 P.2d 939, 940-41 (1983) is on all fours with this case and compels a reversal.

Secondly, for the evidence to be admissible, it would have to bear directly on deliberation and specific intent to kill. See: Longoria, Id; Hubbard v. State, 134 Nev. 450, 456, 422 P.3d 1260, 1265 (2018). This evidence is not material to those issues. Rather, it is pure propensity evidence, and thus inadmissible.

Further, as pointed out at ARB at 14, the fact that the trial prosecutor relies upon erroneously admitted evidence in closing argument tends to eviscerate any theory of harmless error.[4]

For these reasons, then, even if the majority of the en banc Court agreed with the dissent, nevertheless the en banc Court is compelled to reverse on this assignment of error.

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[3] Neither incident qualified as "harassment" per NRS 200.571(1)(a) or as "stalking" per NRS 200.575(1), as neither person suffered property damage and neither one was physically threatened. See: Rossana v. State, 112 Nev. 375, 382, 934 P.2d 1045, 1049 (1997).

[4] 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].

DATED this 7th day of November, 2022.

Respectfully submitted,
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By: */s/RichardCornell*_____
Richard F. Cornell

ATTORNEY'S CERTIFICATE OF COMPLIANCE

I, RICHARD F. CORNELL, hereby certify as follows, pursuant to NRAP 40(b)(4):

I have read the Answer to Petition for en banc Review before signing it; to the best of my knowledge, information and belief, the Answer 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 Answer complies with all applicable Nevada Rules of Appellate Procedure, including the requirements of NRAP 28(e) and 40(a)(2), 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 – Times New Roman 14-point; it is in a plain style; and the margins on all four sides are at least one (1)inch.

The Petition also meets the applicable page and word limitations set forth in NRAP 40(b)(3), because it contains less than 4,667 words, to wit: 3,080 words.

DATED this 7th day of November, 2022.

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

CERTIFICATE OF SERVICE

The undersigned does hereby swear and declare under penalty of perjury that they are an employee of RICHARD F. CORNELL, P.C., and that on the 7th day of November, 2022, they caused a true and correct copy of the preceding document to be served upon all necessary parties, by way of electronic service through the Court's E-flex filing system, addressed as follows:

Jennifer Noble, Appellate Deputy
Washoe County District Attorney's Office
Appellate Division
jnoble@da.washoecounty.us

DATED this 7th day of November, 2022.

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