IN THE SUPREME COURT OF THE STATE OF NEVADA

WAYNE MICHAEL CAMERON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 83531

RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL BRIEF

I. INTRODUCTION

In this case, Cameron was convicted, pursuant to a jury's verdict, with Murder with the Use of a Deadly Weapon. The information alleged two theories of first-degree murder liability: 1) that the murder was willful, unlawful, and committed with malice aforethought, deliberation, and premeditation; and 2) that the killing occurred during the perpetration or attempted perpetration of a burglary. Appellant's Appendix, hereafter "AA," Volume I, 1-6.

The Northern Nevada panel issued an Order of Reversal and Remand on September 28, 2022. One justice dissented. The basis for the reversal of the first-degree murder conviction was a portion of the prosecutor's

argument asserting that entry by projectile could satisfy the entry element of burglary, thereby supporting a finding of guilt based on the felony murder statute.

The State sought rehearing pursuant to Nevada Rule of Appellate Procedure ("NRAP") 40(c)(2). On October 25, 2022, this Court issued its Order Transferring Case En Banc and Directing Refiling of Panel Petition and Answer. The Order directed the State to refile its Petition for Rehearing as a Petition for En Banc Reconsideration pursuant to NRAP 40A. On November 23, 2022, this Court granted en banc reconsideration. On January 11, 2023, this Court issued an Order Directing Supplemental Briefing. Specifically, this Court directed the parties to brief four issues:

> 1. Can shooting a bullet into a vehicle, without the shooter's hand or the gun held in his hand crossing the plane of the vehicle, constitute an "entry" under NRS 193.0145 and thus be a basis for finding burglary?
>
> 2. What is the appropriate theory and standard of review regarding any error that occurred when the district overruled Cameron's objection to the prosecutor's presentation of the bullet entry theory of burglary during closing argument? Is the matter appropriately analyzed under *Cortinas v. State*, 124 Nev. 1013, 195 P.3d 315 (2008), *Nay v. State*, 123 Nev. 326, 167 P.3d 430 (2007); or *Hedgpeth v. Pulido*, 555 U.S. 57 (2008), under *Gordon v. State*, 121 Nev. 504, 117 P.3d 214 (2005) or *Rhyne v. State*, 118 Nev 1, 38 P.3d 163 (2002), or under some other standard?
>
> 3. How do the different standards of review and harmful/prejudicial error apply to this case in light of the

State's alternative theories of first-degree and felony murder, including multiple theories of liability under the felony murder?

4. Did Cameron sufficiently raise any error with the bullet entry theory of burglary in his appellate briefs to warrant full consideration by this court?

II. FACTS

On February 11, 2020, Cameron murdered 29-year-old Jarrod Faust, hereafter "Faust," by shooting him in the face in a Reno cul-de-sac. The bullet traveled through Faust's cheek, the left side of his neck, the horn of the hyoid bone, and portions of his cervical vertebrae, resulting in his death. V AA 1120-1122. At about 8:30 that night, neighbors heard two pops, and saw two cars side by side. II AA 330-348. One of the vehicles roared off at a high rate of speed. *Id.* The police were called. *Id.* The victim's mother, Karen Faust, testified that the last time she saw her son alive was at about 8:15 p.m. the night of the murder. He told her he was going for a quick workout at the gym. She never saw him alive again. III AA 540-541.

When Faust was found by sheriff's deputies, he was still sitting in the driver's seat of his Chevy truck. II AA 259-292. The vehicle was in gear, the engine was still running, and he had his seatbelt on. *Id.* His foot was near the brake pedal, as if it had just slipped off. *Id.* The driver's side window was down, and the doors were locked. *Id.* Country music was still playing

in the car, and there was slight body damage to the front driver's side bumper. *Id.* A vape pen was in Faust's right hand, and his left hand rested on his lap. *Id.* No weapons were in the vehicle. *Id.*

Detective Michael Almaraz was involved in a video canvass of the neighborhood surrounding the murder. II AA 379-385. He obtained surveillance footage from nearby Rock Haven Drive, about four houses down from the victim's home. Footage from 8:44 p.m. showed a light-colored, lifted pickup, consistent with Faust's vehicle, and a smaller light-colored SUV sedan. *Id.* Detective Brian Atkinson testified that a brass colored .40 caliber Smith and Wesson cartridge was found near the crime scene, as well as skid marks on the asphalt. *Id.*, 415-416.

Police had no leads until they were contacted by Dave Colarchik, a friend of Cameron's. Colarchik related that at 9:40 p.m. on the night of the murder, Cameron texted him, asking if he was awake. III AA 548-560. After responding to the text, Colarchik called Cameron. *Id.* After making Colarchik promise not to tell anyone, Cameron made several incriminating statements including, "I think I just shot someone," "I hate when people make me mad, I don't know why I get so angry," and "I hate that I know the law" and "I'm the one who got out of the car." *Id.* Cameron told Colarchik, "I'm the one that went up to him" and urged Colarchik to tell no one, not

even his own wife. *Id.* Later, Cameron left Colarchik a voice mail asking Colarchik to take care of his children. III AA 559. Detective Josh Watson of the Reno Police Department's Computer Crimes Unit later testified that he examined Cameron's cell phone. His forensic examination of text messages on the phone was consistent with Colarchik's account. *Id.*

Examination of location tracking software on Cameron's phone revealed that at 8:42 p.m. on the night of the murder, Cameron was in the area of Ventana Parkway and West Zolezzi. V AA 1001-1026. Examination of Faust's cell phone revealed that he was in the same location at 8:42 p.m. *Id.* On the night of the shooting, nine specific Ring Camera videos were deleted from the Ring application on Cameron's phone, shortly before he called Colarchik. III AA 734-747.

Colarchik also advised police that Cameron had several friends in high positions at the Washoe County Sheriff's Office. Because of this, the Reno Police Department conducted the investigation. Colarchik told the authorities that Cameron had left town, but that he was flying back home to the Reno airport that night. Detectives spotted Cameron's vehicle at the airport, and followed him to Pinocchio's, a local restaurant, where they determined Cameron was having dinner with members of the sheriff's office. III AA 656-659.

When detectives arrived at his home, Cameron's first statement was, "What's your badge number?" IV AA 948-950. Cameron agreed to come to the police station for a consensual interview. *Id.* When asked if he owned guns, Cameron stated, "I don't know what I have, I have long guns." When asked if he had any .40 caliber guns, he stated, "I'm not sure." Without knowing the target of the warrant, he volunteered to open his safes. *Id.*

Detectives talked to Cameron's son, Ethan, who advised that his father had various guns that used .22 caliber and 9-millimeter ammunition. Ethan further advised that his father always carried a pistol under the seat of his car. Cameron's ex-wife, former girlfriend, and brother also remembered that he kept a small semi-automatic pistol under the driver's seat of his vehicle. III AA 620-621, 625, 631. Sean Elliott, who knew Cameron through youth sports, also testified that he saw a 9-millimeter firearm in Cameron's vehicle glove box. At that time, Cameron told Elliott he also carried a .40 caliber semi-automatic gun, which was his favorite. *Id.*, 643-647.

Ethan's trial testimony was consistent with his statements to police. III AA 586. He testified that his father kept several firearms at home, and one under the driver's seat of his vehicle, which Ethan believed to be a small .40 caliber pistol. *Id.* When detectives rang the doorbell, Ethan

thought they were Mormon missionaries. *Id.* He recalled that his father had been following news about the neighborhood shooting, and when detectives mentioned it, Cameron stated, "It's the shooting you told me about, Ethan." *Id.* But Ethan remembered that it was Cameron who had told him about the shooting. *Id.* He recalled that Cameron's arms and voice were shaking, and that he was sweating. *Id.*

After Cameron was arrested, Ethan was going through his father's things and found a "Safety & Instruction Manual" for Smith & Wesson pistol models "SD9VE" and "SD40VE." III AA 600. A hand-written receipt dated "12-22-12" from "NV Guns N Ammo" in the name of "Wayne Michael Cameron" for one "S&W SD40" was located with the manual. *Id.*

In searching Cameron's house pursuant to a warrant, police found a number of firearms, including a 9-millimeter Glock, a .22 revolver, and a 9-millimeter Smith and Wesson. III AA 662-696. No .40 caliber weapon or ammunition was found in Cameron's house. *Id.* But one 9-millimeter casing and two fired .40 caliber casings were found underneath the driver's seat of his car. *Id.*, 694; IV AA 906. Forensic examination revealed that the .40 casings matched those found at the scene, and that the casings had been fired from the same gun. Detectives later confirmed that Cameron had purchased a .40 caliber Smith & Wesson in 2012. IV AA 921-922.

When detectives again made contact with Cameron, he was sweating and shaking on a 61-degree day. IV AA 782. He agreed to come to the police station for a consensual interview. *Id.* During the ride to the station, Cameron informed Detective Nevills that he knew people working for the Reno Police Department. *Id.*, 829-839; Exhibit 20. It was established that Cameron had gotten his concealed weapons permit in January of 2018. *Id.* Cameron made a series of incriminating statements, but stopped short of admitting that he shot Faust. *Id.* He claimed that as he was driving home from Murrieta's, another local restaurant, he saw a motorcycle and a truck "going at it" and that the motorcycle was "annoying the truck." *Id.* Initially, Cameron claimed he went home after seeing the vehicles, but later admitted that he followed the truck into a cul-de-sac and spoke to the driver, and then left. *Id.* He claimed that he followed the driver to check and see if he was alright, but also indicated he followed the truck "because I am stupid." *Id.* Once police confronted him with the murder, Cameron stated, "I can tell you there was no rage on my part, yep, none whatsoever." *Id.*

Gary Miner, a former police officer, testified that he owned a wine store called Vino 100, and that Cameron was a frequent customer. IV AA 768-770. On February 24th, 2020, Cameron came in and told Miner that

he was under investigation for murder. *Id.* Miner was in disbelief. Cameron told Miner that he had called a friend and told him he might have shot somebody. *Id.* The next day, Cameron returned and told Miner that police had searched his home and taken all his guns. *Id.* Cameron whispered, "But they're not going to find that gun." *Id.* Miner asked him, "You didn't do this, did you?" *Id.* Cameron replied, "You know I can't tell you that." *Id.*

Leah Mazza testified that on October 30, 2018, she was on her way home and driving on Zolezzi Lane. IV AA 954-969. A car in front of her pulled over to the side, and she passed it. The vehicle began driving behind her very closely, with its brights on. Concerned, she decided to drive past her parents' house because she did not want the vehicle following her home. *Id.* Mazza was scared. *Id.* The vehicle continued to follow her throughout the neighborhood. *Id.* Finally, she decided to drive to her parents' house, and hurried inside. *Id.* Mazza looked out the window and saw someone taking pictures of her car. *Id.*

Cameron's daughter, Aspen, testified that she recalled an evening when she and her father were driving on Zolezzi when a vehicle was tailgating them. IV AA 982-987. She recalled that Cameron pulled over, and then began to follow the vehicle into a cul-de-sac. *Id.* Cameron exited

the vehicle and got close to the teenage occupants, "yelling at them, and just being really loud and aggressive with them." *Id.* She was scared and embarrassed. Eventually, Cameron got back in the car and drove home. *Id.*

At trial, Cameron changed his story, and his testimony contrasted sharply with his police interview. He stated that on the night of the murder, he went to Murrieta's restaurant. V AA 1151-1164. He claimed that he observed a truck and motorcycle. *Id.* The motorcycle attempted to go around the truck, and the truck almost hit the motorcycle. *Id.* Cameron maintained that he decided to follow the truck into a cul-de-sac, believing the driver might be intoxicated. *Id.* He also claimed that he stopped to ask the driver if he was all right. *Id.* Cameron further testified that the driver answered, "Yeah, I'm okay. Why the fuck are you following me?" *Id.* He claimed that he responded, "Why are you trying to kill people?" *Id.* Cameron stated that "some words went on," and that the driver stated, "I will kill you, motherfucker" and called Cameron a "panty-wearing motherfucker." *Id.* He claimed that the driver "flinched" and raised his hand up. *Id.* Cameron claimed that he thought the driver had a gun in his hand, and that he decided to reach under his seat for his gun and took the time to load it. *Id.* He further testified that he was scared, and that when he suggested "let's just call it a night", the driver responded with epithets.

Id. Cameron claimed that he told the driver to "relax" and that "I have a gun, too." *Id.* According to Cameron, the driver began to drive toward him "like he was going to kill me with his vehicle." *Id.* He claimed he fired his weapon at that point, and the truck "took off." *Id.*

Cameron also disputed the nature of his phone conversation with Colarchik, saying that he never said, "I hate it that I know the law," or admitted he was angry. *Id.*, 1168. He admitted that he never told police this version of the incident during the interview and had lied to the police several times during the investigation. *Id.*, 1171-1178. He also admitted that he lied to his friend, Detective Greg Herrera of the Washoe County Sheriff's Office. *Id.* He admitted to following Leah Mazza to her home, but said it was because she "bumped" his vehicle from behind. *Id.* Cameron also acknowledged the incident described by his daughter Aspen, wherein he followed a group of teenagers home for tailgating him, and raised his voice at them. *Id.*

On cross-examination, Cameron admitted that it had taken him 30 minutes to testify to the events leading up to the shooting, and that he did not provide any of the same information to detectives during an 8-hour police interview. *Id.*, 1179-1233. He conceded that he first decided to follow Faust because he believed he was a teenage driver. *Id.* He admitted

that he shot Faust with a .40-caliber weapon he had purchased, and that he lied to the police about owning the weapon. *Id.* Cameron testified that he was "doing a public service" by following Faust that night and that he lied to police when he stated he did not get a gun from his car. *Id.* He also conceded that during the police interview, he asked for "one my buddies, you know, Balaam" referring to the Washoe County Sheriff. *Id.* He further admitted that he asked his friend, Detective Greg Herrera, also from the Washoe County Sheriff's Office, for advice during the interview, and that Herrera told him not to lie. *Id.* He disagreed that he told his friend Colarchik, "I hate that I know the law," but conceded that he also told police that Colarchik was a trustworthy person. *Id.* He admitted that he threw the murder weapon in a trash can, but that he did not recall where. *Id.*

A .40 caliber bullet was found in the body of Faust and submitted for testing. V AA 1059-1060. The .40 caliber casing found at the murder scene was found to be fired from the same gun as the two .40 caliber casings found in Cameron's vehicle and matched the bullet recovered from the victim's body. V AA 1097-1103. The State's firearms expert determined that the bullet and casings were consistent with five models of Smith & Wesson firearms. *Id.* Additionally, a 9mm fired cartridge found in Cameron's vehicle and was compared to a 9mm Glock pistol found in his

room. It was determined to have been fired from the Glock. *Id.* The murder weapon was never found.

The medical examiner testified that the bullet's trajectory went slightly downward, supporting an inference that Cameron reached up into Faust's raised truck before he fired. V AA 1118-1120. The expert further testified that the absence of soot around the entrance wound did not support a conclusion that the gun was actually pressed against Faust's skin when Cameron fired it. The expert also explained that gunpowder stippling on Faust's skin indicated that the gun was "a little further back" than touching the skin when it fired. *Id.*

III. SUMMARY OF ARGUMENT

In this case, the panel majority reversed based on an assignment of error not identified by Cameron: one of the prosecutor's alternative arguments that entry by a bullet could satisfy the entry element of Nevada's burglary statute. But Cameron only challenged the sufficiency of the evidence regarding the State's burglary-based felony murder theory. In reversing the conviction, the panel failed to apply the appropriate standard of review.

Respectfully, because Cameron did not challenge the State's bullet-entry theory, the panel majority should have reviewed the facts of this case

in the light most favorable to the prosecution, and affirmed if the jury's verdict was supported by substantial evidence. Additionally, entry by bullet does not contradict Nevada's burglary statute, and no Nevada case forecloses the prosecution from making such an argument. Other jurisdictions with burglary statutes similar to Nevada's have approved bullet-entry as satisfying the entry element of burglary. Moreover, such an interpretation does not conflict with, or render nugatory, Nevada's statute prohibiting the discharge of a firearm into a structure.

Even if this Court finds that the prosecutor's bullet-entry argument was the functional equivalent of instructional error, an application of the harmless error standard contemplated by *Nay, Cortinas*, and *Hedgpeth* requires this Court to affirm the conviction. The record reflects overwhelming evidence established Cameron shot the unarmed victim with the malice, premeditation and deliberation required for first-degree murder.

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IV. ARGUMENT

A. The Prosecutor's Closing Argument Was Not Foreclosed By Nevada's Entry Statute, and Jurisdictions With Similar Statutes Have Recognized Bullet Entry in the Context of Burglary.

1. A bullet is an instrument within the meaning of NRS 193.0145.

In its Order of Reversal and Remand, the majority of the three-justice panel concluded that entry by a bullet could not properly used by a factfinder to satisfy the entry element of burglary:

> The phrase "held in the offender's hand" requires the offender to be holding the instrument as it enters the structure. To conclude otherwise would expand the scope of burglary so that any time an offender discharged a firearm into a structure, or even threw a rock through a window (or a spear into a castle), such could constitute an entry for purposes of burglary and, potentially, a felony murder. Such an interpretation is not only unsupported by the plain language of the statute, but conflicts with existing Nevada law that requires evidence of the offender's entry into the structure. *See Barber*, 131 Nev. at 1072, 363 P.3d at 464 (rejecting the argument that evidence of the defendant's presence outside the structure, without more, supports a burglary). Moreover, NRS 202.285 (1)(b) already criminalizes discharging a gun into a structure as a category B felony, and it would be improper to construe NRS 193.0145 in a way that could render these statutes in conflict.
>
> Order of Reversal and Remand, September 28, 2022.

In *Barber v. State*, 131 Nev. 1065, 363 P.3d 488 (2015), a juvenile defendant was charged with burglary and grand larceny. The victim returned home to find her front door ajar. A back sliding window and master bathroom window were also open. Money was missing from the

home. *Barber*, 131 Nev. 1065 at 1067. No fingerprints from the juvenile were found in the victim's home. One palm print outside the master bedroom window matched Barber. *Id.* The Court found that there was insufficient evidence to support the entry element of burglary, because the only evidence of Barber's presence at the home was outside, rather than inside. *Id.*, 1072. The panel majority's reliance on *Barber* was misplaced, because *Barber* did not pertain to the portion of NRS 193.0145 at issue in this case. The statute provides, in part, that insertion of "any instrument or weapon held in the offenders hand used or intended to be used to threaten or intimidate a person" constitutes entry.

In deciding whether a bullet crossing a threshold may satisfy the "entry" element of burglary in Nevada, this Court must consider whether a bullet, contained in a gun held in a defendant's hand at the time the gun is fired, can be construed as an instrument. The State submits that a bullet is an instrument that can enter a structure for purposes of burglary because it is a modern tool that can be used to accomplish a task inside a structure or residence. In this case, that task was murder. Other jurisdictions with similar entry statutes have held that when a defendant fires a bullet, thereby causing it to cross a threshold, the entry element of burglary may

be satisfied if the defendant possesses the necessary intent when the bullet is fired.

In *State v. Decker*, 365 P.3d 954, 239 Ariz. 29 (2016), the Court of Appeals of Arizona explained that entry for the purposes of Arizona's burglary statute includes the intrusion of any part of any instrument or any part of a person's body inside the external boundaries of a structure. It concluded that a projectile bullet could be considered an instrument, reasoning that a bullet is not any different from a knife thrown from outside a doorway. "That the perpetrator uses another instrument to accelerate the bullet does not change the fact that the bullet itself is an instrument that causes damage across the threshold." *Decker*, 239 Ariz. at 32 (2016). The court also observed that "the victim's interest in protecting his or her space does not vary depending on how the perpetrator invades the space. The intrusion of a bullet fired from just outside the open doorway no less disrupts the victim's security in his or her home than one fired after the muzzle of the gun crosses the threshold." *Id.*, 33.

The *Decker* court further observed that in other jurisdictions, based on burglary's common law underpinnings, entry by projectile has been held to satisfy burglary's entry element if used to accomplish a criminal objective. *Id.*, 33-34, (*citing Commonwealth v. Cotto*, 52 Mass. App. Ct.

225, 752 N.E.2d 768, 771 (2001) (holding that a bottle containing gasoline thrown through a window and used to start a fire inside an apartment constituted entry); *State v. Williams*, 127 Or. App. 574, 873 P.2d 471, 474 (1994) (holding that bullets fired into a house, intended to intimidate a witness, constituted entry).

In *State v. Williams*, *supra*, the Oregon trial court instructed the jury that entry for purposes of burglary occurs when "any part of [a person's] body, or by any instrument or weapon being used or intended to be used in the commission of a crime." *Williams* at 577. At the time, Oregon's statute did not provide any insight into whether an entry could be accomplished by an instrument. *Id.* The *Williams* court concluded that entry occurs when an instrument intrudes into the structure for the purpose of consummating a criminal intent. *Williams* at 579, *citing* Edward Hyde East, *The History of the Pleas of the Crown*, § 7, 484, 490 (1803); 3 *Wharton's Criminal Law* § 333 (14th ed 1980 & Supp 1993); and 2 LaFave & Scott, *Substantive Criminal Law* § 8.13 (1986 & Supp 1004). Based on the Oregon statute and these common law principles, the *Williams* court reasoned that because the defendant fired bullets into the victim's house, his actions satisfied the entry element of burglary. *Williams* at 580.

"[T]here is an entry when the defendant, after breaking a window,

pokes a stick inside for the purpose of impaling and stealing a fur coat; when, after breaking a window, the defendant pushes the barrel of a gun through the opening for the purpose of shooting and killing the occupant; or *when the defendant, while standing outside, fires a bullet which pierces a window and lands inside, the gun having been discharged for the purpose of killing the occupant*." 3 *Wharton's Criminal Law, supra*, §333 (14th ed 1980 & Supp. 1993) (emphasis added). "An 'entry' can be accomplished by even the slightest intrusion into a building by any part of a person's body, *or by an instrument, if the instrument is used to enable the person introducing it to consummate a criminal objective*." *Williams, supra*, at 474, *citing Term. News Stand, Inc. v. General Cas. Co.*, 203 Or. 54, 61, 278 P.2d 158 (1954) (emphasis added).

Jurisdictions that have rejected entry by bullet as sufficient to establish the entry element of burglary have done so based on statutes explicitly requiring entry by some part of the defendant's body. Alabama has rejected entry by bullet for purposes of burglary, but unlike NRS 193.0145, its statute specifically requires entry by some part of a defendant's body or body of someone acting in complicity of with the defendant. *Hyde v. Alabama*, 778 S. 2d 237 (2000); *Baise v. State*, 295 So. 3d 1137 (2019). NRS 193.0145 has no such body entry requirement.

2. Bullet entry for purposes of burglary does not violate the rule of lenity.

The panel majority rejected the concept of bullet entry in part based on its reasoning that NRS 202.285 (1)(b) already criminalizes discharging a gun into a structure. But the majority failed to consider that Oregon and Arizona, who have endorsed entry by bullet with respect to burglary, also have statutes prohibiting the discharge a firearm into a structure. *See* O.R.S. § 166.220; A.R.S. § 13-1211. Like Nevada, those states also have burglary statutes containing additional elements, separate from the elements contained in their statutes governing discharging a firearm at or into a structure.

Additionally, the portion of the State's closing argument at issue here did not endorse the proposition that merely firing the bullet into the victim's vehicle satisfied the crime of burglary. Instead, the prosecutor argued only that the bullet crossing the threshold over the car window satisfied the *entry* element. VI AA 1364-1365. The prosecutor further argued that the evidence could support a reasonable inference that Cameron fired his bullet into Faust's vehicle with the intent to assault or batter him, thereby satisfying the elements of burglary. *Id.*, 1363, 1366.

NRS 202.285 does not require this specific intent. Instead, that statute requires only that the person discharging the firearm into a

structure does so "willfully and maliciously." NRS 202.285 (1). The version of NRS 205.060 applicable to this case requires that in order to be guilty of burglary, a defendant must intend to commit larceny, assault, battery, any felony, or obtaining money by false pretenses at the time of entry. Thus, an interpretation of NRS 193.0145 allowing entry by bullet to satisfy the entry element of burglary does not render any portion of NRS 202.285 nugatory.

Notably, the panel majority's decision reflects that it conducted its analysis based on a version of NRS 205.060 not applicable to this case. Cameron murdered the victim on February 11, 2020. The decision noted that "our statutes define 'unlawfully enters' as 'to enter or remain in the structure or vehicle without license or privilege to do so, NRS 205.060 (6)(d)." *See* Order of Reversal and Remand, Docket No. 83531, September 28, 2022, at 5. But this cited language was created by Assembly Bill 236, which was not effective until July 1, 2020. At the time Cameron murdered Faust, Nevada's burglary statute did not contain any of the language in NRS 205.060 (6)(d):

> 205.060. Burglary: Definition; penalties; venue; exception
>
> 1. Except as otherwise provided in subsection 5, a person who, by day or night, enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane, glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or battery on

any person or any felony, or to obtain money or property by false pretenses, is guilty of burglary.

2. Except as otherwise provided in this section, a person convicted of burglary is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 10 years, and may be further punished by a fine of not more than $10,000. A person who is convicted of burglary and who has previously been convicted of burglary or another crime involving the forcible entry or invasion of a dwelling must not be released on probation or granted a suspension of sentence.

3. Whenever a burglary is committed on a vessel, vehicle, vehicle trailer, semitrailer, house trailer, airplane, glider, boat or railroad car, in motion or in rest, in this State, and it cannot with reasonable certainty be ascertained in what county the crime was committed, the offender may be arrested and tried in any county through which the vessel, vehicle, vehicle trailer, semitrailer, house trailer, airplane, glider, boat or railroad car traveled during the time the burglary was committed.

4. A person convicted of burglary who has in his or her possession or gains possession of any firearm or deadly weapon at any time during the commission of the crime, at any time before leaving the structure or upon leaving the structure, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years, and may be further punished by a fine of not more than $10,000.

5. The crime of burglary does not include the act of entering a commercial establishment during business hours with the intent to commit petit larceny unless the person has previously been convicted:

(a) Two or more times for committing petit larceny within the immediately preceding 7 years; or

(b) Of a felony.

NRS 205.060 (effective October 1, 2013 to June 30, 2020).

The version of NRS 205.060 in effect at the time Cameron murdered Faust contained no language about unlawfully entering or unlawfully remaining. Thus, the panel majority based its statutory construction analysis on the wrong version of the statute. *See State ex rel. State Bd. Of Equalization v. Barta*, 124 Nev. 612, 622, 188 P.3d 1092 (2008) (recognizing that regulations and statutes operate prospectively, absent clearly manifested retroactive intent).

B. This Court Should Apply the Sufficiency of the Evidence Standard Contemplated by *Rhyne* and *Gordon*.

In Section A above, the State has argued that no instructional error occurred within the ambit of *Stromberg v. California,* 283 U.S. 359 (1931), because the bullet-entry theory discussed in the prosecutor's closing was not inconsistent with Nevada statutes. But if the Court rejects that argument, there is a clear path to affirmance of the conviction based on the overwhelming evidence in this case, discussed here and in Section C, *infra*.

As discussed more fully in section D below, Cameron did not assert error with respect to the bullet-entry portion of the closing argument. Instead, he challenged the State's felony-murder theory for sufficiency of

the evidence. Accordingly, this Court should review for sufficiency of the evidence pursuant *Gordon v. State*, 121 Nev. 504, 117 P.3d 214 (2005).

In *Gordon v. State*, 121 Nev. 504, 117 P.3d 214 (2005), the defendant was charged with DUI causing substantial bodily harm. Officers present at the scene noticed objective indicia of intoxication. *Gordon*, 121 Nev. 504 at 506. Gordon failed the horizontal gaze nystagmus test, and he admitted to drinking. *Id.* At the time, the applicable blood alcohol limit in Nevada was .10. Only a single blood draw was conducted, and the result was .10. *Id.* The defense presented expert testimony that the margin of error could lower the Gordon's actual BAC to .099. *Id.* The jury was instructed on three alternative theories of liability, two of which required it to find that Gordon's BAC was .10 or more within two hours of driving. In returning its verdict, the jury did not specify a particular theory. *Id.*, 506-507. Gordon argued that the verdict was not supported by substantial evidence, because two of the State's theories required the jury to find his BAC was .10 or more. *Id.*, 507. He further argues that because the jury returned a general guilty verdict, the jury may have based its verdict on a theory not supported by sufficient evidence. *Id.* In affirming the conviction, the Nevada Supreme Court explained that it relied on United States Supreme Court decisions holding that a jury may return a general verdict charging alternative

theories, even if one of the possible bases of conviction is not supported by sufficient evidence. *Id.* It further explained that if the alternative theories themselves are legally sufficient, a verdict will be upheld even if one of the theories is not supported by the evidence. *Id.*, *citing Rhyne, supra; Turner v. United States*, 396 U.S. 398, 90 S. Ct. 642 (1970).

In *Rhyne v. State*, 118 Nev. 1, 38 P.3d 163 (2002), the State charged the defendant with first-degree murder under two alternative theories: premeditated and deliberate murder, and felony murder, with robbery as the underlying felony. The jury's verdict convicted Rhyne of first-degree murder and conspiracy to commit murder, but it acquitted him of the robbery charge that was the basis of the felony murder theory. In affirming the conviction, the Nevada Supreme Court found that the general guilty verdict on the indictment charging several different acts in the alternative should be upheld, despite insufficient evidence to support the robbery that was integral to the felony murder theory:

> Specifically, as long as both theories are legally sufficient, the verdict will stand even if one theory is ultimately found to be factually unsupported by the evidence. We have applied this principle to charging alternative theories of first-degree murder. Regardless of whether there was sufficient evidence of robbery, there is sufficient evidence to support a verdict of premeditated and deliberate murder. Rhyne was properly convicted of first-degree murder.

Rhyne, 118 Nev. 1 at 10.

If this Court rejects bullet-entry in the context of burglary, then this case differs from *Gordon* and *Rhyne*, but only insofar as both *Gordon* and *Rhyne* pertained to valid alternative theory instructions that may not have been supported by the evidence. But the sufficiency of the evidence standard still applies to the assignment of error identified by Cameron. Therefore, the appropriate inquiry is whether, in viewing the evidence in the light most favorable to the prosecution, any rational juror could conclude that the entry element of burglary was satisfied. An application of that standard, in light of the record, establishes that there was sufficient evidence to establish that an entry occurred.

Testimony at trial established that Cameron's and Faust's vehicles were side-by-side and facing the same direction when Cameron shot Faust. The medical examiner testified that the bullet's trajectory went slightly downward, supporting an inference that Cameron reached up into Faust's raised truck before he fired. V AA 1118-1120. The expert further testified that the absence of soot around the entrance wound did not support a conclusion that the gun was actually pressed against Faust's skin when Cameron fired it. Instead, the expert also explained that gunpowder stippling on Faust's skin indicated that the gun was "a little further back" than touching the skin when it fired. *Id.* This evidence supported a

conclusion that Cameron loaded his weapon, exited his vehicle, and made his way around to the driver's side of Faust's vehicle to shoot him at close range. When viewed in the light most favorable to the prosecution, a rational juror could have found that the State proved the entry element of burglary based on the stippling surrounding Faust's gunshot wound, which supported a reasonable inference that Cameron fired his weapon close to Faust's head, but not touching it.

Additionally, the bullet's downward trajectory from Faust's left cheekbone to his right spinal column likewise suggested Cameron's close proximity to Faust, who was elevated in his lifted pickup truck at the time of the killing. Faust's driver's-side window was down and unbroken when police found him. *Id*. This evidence supported a rational conclusion that Cameron's hand and/or the weapon entered Faust's vehicle before or as he fired the gun. In considering this evidence in the light most favorable to the prosecution, Cameron's sufficiency of the evidence argument fails. The Order of Reversal and Remand overlooked these facts supporting alternative paths to conviction, which supported affirmance of the conviction pursuant to *Gordon, supra*. However, even if this Court declines to review for sufficiency of the evidence, an application of the harmless error standard contemplated by *Nay v. State*, 123 Nev. 326, 167 P.3d 430

(2007), *Cortinas v. State*, 124 Nev. 1013 (2008), and *Hedgpeth v. Pulido*, 555 U.S. 57, 129. S. Ct. 530 (2008) , still support affirmance, as discussed further in the next section.

C. Application of the Harmless Error Standard Still Requires Affirmance of the Jury's Verdict.

In *Nay, supra*, the defendant was charged with first-degree murder and robbery with use of a deadly weapon. Nay had beaten his roommate to death with a baseball bat, and taken his money, marijuana, and handgun. *Nay*, 123 Nev. 326 at 328. Nay claimed he acted in self-defense after the victim had pulled a gun on him, and that he decided to take property after he believed victim was dead. *Id.* Nay claimed that after the pointed a gun at him, he kicked the victim in the stomach and almost fell. *Id.* Nay further claimed that hit the victim in the back of the head with a baseball head five to eight times due to adrenaline, and that it was not until after the fight was over that Nay decided to take the victim's items. When the victim's body was discovered, he had a near-fatal level of hydrocodone in his system. *Id.*

The defense proffered an instruction telling the jury that afterthought robbery could not form the basis for felony murder, and it was rejected by the trial court. In closing argument, the prosecutor argued that "if he committed that robbery then he is guilty of felony murder." *Id.* at 334. The Court found that this was instructional error. It applied the harmless error

standard and concluded that it was not "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.* at 334-335. (internal citation omitted).

The following year, the Nevada Supreme Court issued its opinion in *Cortinas*. It considered whether harmless error review applies when a general verdict based on multiple theories of liability may rest on a legally invalid alternative theory. *Cortinas*, 124 Nev. 1013 at 1015. It rejected the Ninth Circuit's approach in *Keating v. Hood*, 191 F.3d 1053 (9th Cir. 1999), previously adopted in *Bolden v. State*, 121 Nev. 908, 124 P.3d 191 (2005) which required reversal in such instances absent absolute certainty that the jury relied on a valid ground in reaching its verdict. *Id.*, 1015. It essentially came to the same conclusion that would follow in *Hedgpeth*: for purposes of harmless-error review, there is no distinction between single-theory cases in which there are no valid alternative theories, and alternative theory cases where one of the theories is invalid but others are valid. *Id.*, 1026.

In *Cortinas*, the defendant made contact with a prostitute through a massage advertisement and paid her for oral sex. *Cortinas* at 1017-1018. He then strangled her and attempted to break her neck. *Id.* After determining that she was still breathing, he stabbed her three times in the back so that she would drown in her own blood. Before dumping her body,

he stole money and marijuana from the victim's purse. *Id.* The State charged Cortinas with first degree murder under alternative theories: felony murder, with robbery as the underlying felony, and willful, deliberate, and premeditated murder. *Id.* at 1018. The jury instructions and prosecutor's argument, however, indicated that the jury could reach a verdict of first-degree felony murder even if the robbery occurred as an afterthought to the murder. *Id.* The Nevada Supreme Court found that Cortinas was entitled to the correctly-framed felony murder instruction. Nonetheless, it found the error was harmless.

In affirming the conviction, the Court distinguished the facts in *Cortinas* from those in *Nay*. It noted that in *Nay*, the defendant confessed to killing the victim, but claimed to have acted in self-defense. The Court also found that the use of the ligature, which was held to the victim's neck for over an hour, further supported a finding that the killing was willful, deliberate, and premeditated beyond a reasonable doubt. *Id.*, 1029.

Just a month after *Cortinas*, the United States Supreme Court issued its opinion in *Hedgpeth v. Pulido*, 555 U.S. 57, 129. S. Ct. 530 (2008). In that case, the Court considered a challenge to a first-degree murder conviction. Pulido was convicted of felony murder, and sought to vacate the conviction, arguing that the jury instructions pertaining to one of the

State's alternative theories erroneously allowed him to be convicted based upon intent formed after the murder was complete. *Hedgpeth* at 59. Pulido sought habeas relief, arguing that the erroneous jury instruction constituted structural error, and the federal district court granted his petition. The Ninth Circuit affirmed. In reversing the decisions of the lower courts, the U.S. Supreme Court held that "various forms of instructional error are not structural but instead trial errors subject to harmless error review." *Id.* at 60, *citing Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967); *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827 (1999); *California v. Roy*, 519 U.S. 2, 117 S. Ct. 337 (1996); *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918 (1987); *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101 (1986). The Court explained that although its previous decisions "did not arise in the context of a jury instructed on multiple theories of guilt, one of which is improper, nothing in them suggests that a different harmless-error analysis should govern in that particular context." *Id.*, 61.

In the current case, it is undisputed that the jury instructions correctly reflected the elements of burglary, including the entry element. But the prosecutor's argument, which was one of multiple alternative theories, included a statement that the law allows entry by bullet to satisfy the entry element of burglary. The State maintains that sufficiency of the

evidence is the appropriate standard of review because this assignment of error was not raised in Cameron's appeal.

However, if this Court decides not to review for sufficiency of the evidence, it should apply harmless error review if it finds the bullet-entry argument to be an inaccurate statement of law. Although no bullet-entry jury instruction was proffered, the prosecutor's argument would function as an invalid alternative theory of liability, along with all of the other valid theories reflected in the instructions. The facts of this case support and establish beyond a reasonable doubt that a rational jury would have found Cameron guilty of willful, premeditated, and deliberated murder.

Cameron committed first-degree murder because he acted in a willful, premeditated, and deliberated manner. He took the time chase Faust into a cul-de-sac. III AA 600. After angrily chasing the victim down, by his own admission, Cameron, who had an established history of conducting himself as a traffic vigilante, took the time to retrieve his weapon and load it. V AA 1151-1164. The evidence showed that after chasing Faust into a cul-de-sac, Cameron got out of the car and shot Faust in the face at close range. The medical examiner testified that the bullet's trajectory went slightly downward, supporting an inference that Cameron reached up into Faust's raised truck before he fired. V AA 1118-1120. The expert further testified

that the absence of soot around the entrance wound did not support a conclusion that the gun was actually pressed against Faust's skin when Cameron fired it. The expert also explained that gunpowder stippling on Faust's skin indicated that the gun was "a little further back" than touching the skin when it fired. *Id.* When Faust was found, his seatbelt was still on, the engine was running, and the doors were locked. He was unarmed, with his doors locked and his seat belt on. He presented no threat to Cameron's safety. II AA 259-292.

Cameron regarded himself as some sort of traffic regulator. He followed Faust for some distance because he did not like Faust's driving. Angry, he confronted the unarmed Faust. When Faust met Cameron's confrontation with defiance, the enraged Cameron shot the unarmed man in the face and drove away. He lied to police and hid the murder weapon. The undisputed facts established that Cameron had time and opportunity "to think upon or consider the act, and then determine to do it." *Curtis v. State*, 93 Nev. 504, 507, 568 P.2d 583, 585 (1977) (*quoting Payne v. State*, 81 Nev. 503, 509, 406 P.2d 922, 925-26 (1965)). He had the motive as well: Cameron explained that unlike the others he had previously chased down--Leah Mazza, and a car full of teenagers--Faust met his outrageous behavior with defiance, calling him a "panty-wearing motherfucker." V AA 1151-

1164. Faust was a threat to Cameron's inflated ego, and it enraged him.

Despite his protestations to the contrary later, Cameron texted his friend Colarchik on the night of the murder that the victim made him "so angry" and that "I hate it when people make me mad." *Id.*, 548-560. He admitted that "I'm the one who went up on him." *Id.* He also told his friend that "I hate the that I know the law." *Id.* And because he knew the law, Cameron knew that there was no justification for murdering Faust because of his driving, or because Faust met his unhinged behavior with defiance. Indeed, Cameron fled the scene at a high rate of speed, because he knew he had committed murder. II AA 330-348. He hid the murder weapon, telling another friend "they're not going to find that gun." IV AA 829-839.

Beyond a reasonable doubt, these facts establish that any rational jury would conclude that Cameron is guilty of first-degree murder, willfully killing Faust with premeditation, deliberation, and malice aforethought. He followed Faust and cornered him. Cameron, who considered himself "buddies" with the Washoe County Sheriff, almost a de-facto police officer, became enraged, by his own admission, when Faust was not grateful that he was "doing a public service." V AA 1179-1233. As stated above, Faust was a threat to Cameron's inflated ego, and he murdered him for it.

D. Cameron Did Not Sufficiently Raise the Error Identified by the Panel.

Any instructional error emanating from the prosecutor's argument regarding entry by projectile was waived by Cameron because he did not claim this error in the opening brief. Critically, in his briefs, Cameron argued that there was insufficient evidence at trial to support a finding that Cameron's conduct satisfied the "entry" element of burglary pursuant NRS 193.0145. Cameron's invocation of the sufficiency of the evidence standard was explicit. "[T]his assignment of error raises the question of whether there is sufficient evidence of an 'entry.'" OB, 22. "The issue is not that, but rather, whether the State proved that which it charged." OB, 29. Although the trial attorney objected to the bullet-entry argument, Cameron abandoned the issue on appeal, thereby waiving review. *See Campbell v. Baskin*, 69 Nev. 108, 242 P.2d 290 (1952). Instead, he challenged the sufficiency of the evidence. This Court should therefore apply the standard of review applicable to such a challenge, and affirm the conviction.

V. CONCLUSION

The panel majority departed from long-established precedent regarding the standard of review applicable to challenges to the sufficiency of the evidence. Whether the Court reviews this case for sufficiency of the

evidence, or for harmless error, the outcome should be the same. The conviction should be affirmed.

DATED: February 1, 2023.

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Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. 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 Georgia 14.

2. 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 14,000 words, it contains 8,192 words.

3. 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: February 1, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on February 1, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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