

IN THE SUPREME COURT OF THE STATE OF NEVADA

WAYNE MICHAEL CAMERON,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

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Case No. 83531

BRIEF OF AMICUS CURIAE
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IN THE SUPREME COURT OF THE STATE OF NEVADA

DEFENDANT NAME,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 79605

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT
NEVADA DISTRICT ATTORNEY’S ASSOCIATION

This court has invited the Nevada District Attorney’s Association (hereinafter “NDAA”) to provide briefing in this matter. The NDAA is an organization composed of 17 elected district attorneys of Nevada.

On July 9, 2023, this court issued an Order Inviting Amicus Curiae Participation of the NDAA. This court posed 4 specific questions which the NDAA addresses now.

ARGUMENT

- 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 a basis for finding burglary?**

NRS 193.0145 states that an entry “includes the entrance of the offender, or the insertion of any part of the body of the offender, or any instrument or weapon

held in the offender's hand and used or intended to be used to threaten or intimidate a person.

This court supports the notion that a hand holding a firearm that crosses the plane of the vehicle constitutes a burglary under the law, either as an instrument of the burglary or as a weapon. The law is clear that a firearm is considered a weapon. *See* NRS 193.165.

The question then follows whether a bullet, that is loaded into that same firearm, would similarly fall under the purview of an instrument or weapon that is contemplated by the statute. Weapons and firearms are defined in various places throughout the Nevada Revised Statutes. NRS 202.253 provides some examples of weapons, which includes a firearm. Subsection 3 defines a firearm as “any device designed to be used as a weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion.” While this definition exists, this is the normal use and operation of a firearm. A firearm is loaded with bullets that can be expelled out of the firearm.

While a firearm can certainly be used in other ways than its designed purpose (as a club for instance), the main function of a firearm is to be loaded and to expel bullets. Thus, there is a basis to conclude that a firearm is in fact an instrument or weapon that enters a structure.

Analogously, imagine an individual that is holding a remote control for a drone. The individual can control the drone so that it enters a structure, completes the individual's desired intent whether the act is stealing jewels or even committing a murder while stealing the same jewels. Once the objective is complete, the individual flies the drone out of the structure, although the individual never physically entered himself. In this example, would the individual not be criminally liable for a burglary simply because the instrument he used to enter the structure has flying capabilities? Whether it's a bullet or a drone, the instrument or weapon is there to service the individual's intent.

The same can be argued of a firearm which is designed to shoot bullets. By pointing and shooting a firearm, the intent is to enter the structure. Moreover, the distinction between placing a hand with a firearm into the vehicle and firing a shot and having one's hand outside the vehicle and firing the same shot is a distinction with little significance. The fact of the matter is that the firearm presents an ability to enter the vehicle's plane, and does by virtue of the bullet entering, should be this court's focus.

- 2. What is the appropriate theory and standard of review regarding any error that occurred when the district court 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 (2008), *Nay v. State*, 123 Nev. 326, or *Hedgpeth v. Pulido*, 555 U.S. 57 (2008), under *Gordon v. State*, 121 Nev. 504 (2005) or *Rhyne v. State*, 118 Nev. 1 (2002), or under some other standard?**

At trial, defense counsel objected to the State's argument regarding the entry of a bullet into the vehicle and requested that the district court grant a mistrial. VI AA 1364. With regards to the specific question asked by this court for the purposes of this brief, an objection to a prosecutor's statements during closing argument would be subject to harmless-error review. *Neder v. United States*, 527 U.S.1 (1999). Moreover the request for a mistrial would be subject to a clear abuse of discretion. *Smith v. State*, 110 Nev. 1094, 1102-03 (1994). Here, the prosecutor made a statement about the facts and applied them to the law. Had Appellant raised the issue of law in his appeal, this court would look to see whether the overruled objection was harmless or whether it warrants reversal of the conviction.

However the question that should be posed by this court is not so much the standard of review that should be applied to an objection made during closing arguments, but instead what standard of review should apply to the issue actually raised by Appellant.

Although the cases that this court has asked about do carry relevance (as will be discussed below), the cases do not deal with potential error of the prosecutor's statement regarding the entry of a bullet as a burglary and the district court's handling of it. This again is because the objection made was regarding why the State should not have been entitled to a felony murder instruction, not why a bullet potentially fails to satisfy the entry requirement.

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 liability under the felony murder designation?

Appellant has plainly argued this as a sufficiency of evidence issue as opposed to one based on the legality of whether a bullet entering a structure constitutes a burglary. Moreover, Appellant does not and cannot contest the accuracy of the jury instructions that were admitted. Afterall, the jury instructions were a correct statement of the law based upon Nevada statutes and case law.

Given that the issue raised is one that deals with the sufficiency of evidence to support the jury instructions given, the proper framework is to review this case pursuant to *Gordon v. State*, 121 Nev. 504 (2005) and *Rhyne v. State*, 118 Nev. 1 (2002). Ultimately, Appellant is challenging the sufficiency of evidence regarding the multiple theories of first-degree murder that the State put forth. As such, *Gordon* and *Rhyne* provide guidance that this court would follow. “As long as the theories are legally sufficient, the verdict will stand even if one theory is ultimately found to be factually unsupported by the evidence.” *Gordon*, 121 Nev., at 506 (quoting *Ryhne*, 118 Nev., at 10 citing *Griffin v. United States*, 502 U.S. 46, 56-57 (1991).)

Based on *Gordon* and *Rhyne*, the appropriate standard was to review Appellant's claim under the lens of whether any rational juror could conclude that a burglary occurred in a light most favorable to the prosecution. Here, among other evidence, there was evidence of stippling, an open window, and Appellant exiting

his vehicle and approaching the victim's vehicle. These were all factors that the jury could have used for the basis of its verdict under a felony murder theory.

Moreover, a felony murder theory was not the only theory that the State presented for first-degree murder. The State also presented evidence that the killing was committed with premeditation and deliberation. Either of these theories could have been the basis of the jury's verdict, even if the bullet entry theory of burglary had been precluded.

Alternatively, if this court chooses to examine this issue as instructional error, through the prosecutor's potentially erroneous statements, the conviction should still be affirmed. When error applies to a particular theory, such as the bullet entry not constituting a burglary, this court applies harmless-error review. *Cortinas v. State*, 124 Nev. 1013 (2009).

Although there was no jury instruction that addressed whether a bullet entry constitutes a burglary (and no proposed instruction that a bullet entry does not constitute a burglary), the State's argument of a bullet giving rise to a burglary should be reviewed against all the other evidence and arguments that were made at trial. Ultimately the comments made by the prosecutor regarding the bullet consisted of only a small fraction of his argument. VI AA 1363. He makes mention of entry with a hand or entry with an implement, which appropriately summarizes what the statutes require for a burglary charge.

Even Appellant's counsel at trial admits that the State was presenting a theory that Appellant committed the underlying burglary by walking up and sticking a gun into the victim's window prior to killing him. VI AA 1389. He then goes on to argue that the bullet theory is nonsense, and even more importantly, he says that it's a ridiculous theory for the State to advance considering that they are arguing that this was an "execution by this traffic vigilante." VI AA 1390. This is significant because the statement clearly indicates that the State was not relying solely upon a bullet entry burglary theory. If the State's theory of murder as he characterized it was an execution by a traffic vigilante, that theory would support the premeditation and deliberation required for first-degree murder. Counsel goes on to argue that the State lacked evidence of premeditation and lacked evidence of a burglary for felony murder. The argument illustrates that everyone recognized there were multiple theories that the State was putting forth and that the entry of the bullet argument was such a minor part of what was argued. Moreover, the argument illustrates that the jury was able to consider the defense and reject it in favor of finding Appellant guilty of first-degree murder.

However, this court need not stop at the felony murder theory of first-degree murder because the jury could have found that the killing was the result of premeditation and deliberation. Notably, Appellant testified at his trial and tried to convince the jury that the killing was made in self-defense. The jury either rejected

his version of events in favor of finding him guilty of first-degree murder, or it accepted his version of events and still determined that there was enough to convict him of a first-degree murder charge. Based upon the totality of what occurred at trial, any error regarding the bullet and its entry into the vehicle was harmless.

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?

This court should refrain from reframing or expanding Appellant's arguments because it would wildly alter its review of cases. This court has long held it is "the appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." *Maresca v. State*, 103 Nev. 669, 673 (1971).

Allowing this court to insert itself for the voice of the briefing party contradicts with this court's holding in *Polk v. State*, 126 Nev. 180 (2010). In *Polk*, this court held that the State's failure to address an argument in an admittedly lengthy brief constituted a confession of error. If the consequences of not responding to an argument is be deemed a confession of error, thereby resulting in an automatic adoption of the appellant's position, then it seems at odds with precedence that this court would at the same time formulate an appellant's arguments.

Understandably this court has an interest and responsibility to decide the law correctly, but it should limit itself to only entertaining arguments that are put before

it. Otherwise, the potential to advance legal arguments on behalf of a defendant becomes all too great. Moreover, if the court is permitted to advance arguments on behalf of a party that has not raised an argument, then the decision in *Polk* should be renounced because nothing should preclude this court from reaching the correct legal result even if it has not been adequately briefed. Failure to address an issue should not be a confession of error if this court is freely and willing to on the other hand raise a question on its own that has not been argued by the parties.

CONCLUSION

The NDAA respectfully requests that this court's prior order be vacated, and that Appellant's conviction be reinstated.

Dated this 28th day of March, 2023.

Respectfully submitted,

BY */s/ Alexander Chen*

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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 2003 in 14 point font of the Times New Roman style.
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 is either proportionately spaced, has a typeface of 14 points or more, contains 2,053 words and 9 pages.
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 the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of March, 2023.

Respectfully submitted,

BY */s/ Alexander Chen*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 28th day of March, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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