

IN THE SUPREME COURT OF THE STATE OF NEVADA

TULY LEPOLO,

Appellant,

vs.

STATE OF NEVADA,

Respondent,

Supreme Court Case No. 85631
District Court Case No. C-20-345911-1
Electronically Filed
Nov 13 2023 10:31 PM
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S REPLY BRIEF

JEAN J. SCHWARTZER, ESQ
Nevada Bar No. 11223
Law Office of Jean J. Schwartzer
411 E. Bonneville Avenue
Suite 360
Las Vegas, Nevada 89101
(702) 979-9941
Attorney for Appellant

STEVEN B. WOLFSON, ESQ.
Nevada Bar No. 1565
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2500
Attorney for Respondent

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**
2 **_____**
3

4 TULY LEPOLO,

Supreme Court Case No.: 85631

5 Appellant,

District Court Case No.: C-20-345911-1

6 vs.
7

8 STATE OF NEVADA,

9 Respondent,
10
11
12

13 **ARGUMENT**
14

15 **I. THIS COURT SHOULD CONSIDER NEITHER THE**
16 **STATEMENT OF FACTS IN THE STATE’S ANSWERING**
17 **BRIEF NOR APPELLANT’S PRESENTENCE**
18 **INVESTIGATION REPORT**

19 This Court has stated that “[c]ontentions unsupported by specific
20 argument or authority should be summarily rejected on appeal.” State v.
21 Haberstroh, 119 Nev. 173, 187, 69 P.3d 676, 685-86 (2003), *citing* Mazzan v.
22 Warden, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000).
23
24

25 In its Answering Brief, the State improperly copied and pasted the
26 synopsis of the event from the Presentence Investigation Report (“PSI”) as
27
28

1 its Statement of Facts. Answering Brief ("AB") 2-5. Furthermore, the State
2 moved this Court for an order directing the district court to transmit
3 Appellant's PSI, which contains unfavorable facts about his criminal
4 history that are irrelevant to the issues raised in his Opening Brief.
5

6
7 The synopsis in the PSI is not part of the trial record. It is a synopsis
8 written by a third party and does not contain witness testimony or any
9 evidence from trial. It appears to contain only information gleaned from
10 police reports, which is not evidence presented to a jury. Therefore, this
11 Court should not consider the State's Statement of Facts section in its
12 Answering Brief or Appellant's PSI as dispositive of or material to any
13 issue raised on appeal.
14
15
16
17

18 **II. THE STATE DID NOT RESPOND TO APPELLANT'S**
19 **ARGUMENT REGARDING THE VOLUNTARINESS OF**
20 **HIS STATEMENT TO DETECTIVES**
21

22 Appellant argued that the district court committed error when it
23 determined that he did not have any intellectual deficits or lack education
24 because he was "very responsive to the questioned asked, answers
25 appropriately and asked appropriate questions back" as part of the
26
27
28

1 voluntariness Opening Brief ("OB") 16 *citing* to 5 AA 881 This
2 determination was made as part of the legal analysis the district court
3 conducted in determining the voluntariness of Appellant's statement to
4 detectives.
5

6
7 Appellant went on to argue in his Opening Brief that his inability to
8 finish a sentence, his non-responsiveness at times, and the slurring of his
9 words combined with his failure to understand some simple concepts all
10 indicate that he is lacking intelligence and education. OB 16-17.
11

12
13 Not only did the State fail to address any of the voluntariness factors
14 when discussing this issue at trial¹, it failed to respond to this specific
15 argument, discussed *supra*, in its Answering Brief. In it's brief, the State did
16 nothing more than reiterate what the district court's analysis was on the
17 factors to be considered as part of totality of the circumstances when ruling
18 on a Motion to Suppress based upon the voluntariness of a statement. AB
19 9-10. The State did not address Appellant's specific argument regarding the
20 district court's error in finding him intelligent and not lacking in education
21

22
23
24
25
26
27

¹ AA 838-40.
28

1 simply based upon his responsiveness in a short conversation. This
2 constitutes confession of error.² Polk v. State, 126 Nev. Adv. Op. 19, ___,
3
4 233 P.3d 357, 361 (2010); see also NRS 49.005(3).

5
6 **III. APPELLANT'S CASE IS DISTINGUISHABLE FROM**
7 **HARTE V. STATE AND DIETZ V. STATE**

8 In response to Appellant's argument that he invoked his Fifth
9 Amendment Right to Counsel, the State cites to Harte v. State³ and Dietz v.
10 State⁴, cases in which this Court found the defendant's request for an
11 attorney to be ambiguous and equivocal, to support the argument that
12 Appellant's statement did not constitute an unequivocal and unambiguous
13 request for an attorney. Appellant disagrees with this assertion.
14
15
16
17

18
19 ² See Bates v. Chronister, 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984)
20 (treating the respondent's failure to respond to the appellant's argument as
21 a confession of error); see also A Minor v. Mineral Co. Juv. Dep't, 95 Nev.
22 248, 249, 592 P.2d 172, 173 (1979) (determining that the answering brief was
23 silent on the issue in question, resulting in a confession of error); see also
24 Moore v. State, 93 Nev. 645, 647, 572 P.2d 216, 217 (1977) (concluding that
25 even though the State acknowledged the issue on appeal, it failed to supply
26 any analysis, legal or otherwise, to support its position and "effect[ively]
27 filed no brief at all," which constituted confession of error), overruled on
28 other grounds by Miller v. State, 121 Nev. 92, 95–96, 110 P.3d 53, 56 (2005).

³ 116 Nev.1054, 13 P.3d 420 (2000).

⁴ 124 Nev. 1462, 238 P.3d 806 (2008).

1 In Harte, the defendant made numerous statements about an
2 attorney but each one contained modifiers, such as, “when,” “should,” and
3 “they told me.” which made the statements equivocal and ambiguous.
4
5 Harte, 116 Nev. 1062-63, 13 P.3d at 426.

7 Here, Appellant made a very simple statement: **“It’s time to get a**
8 **lawyer.”** No questioning, modifiers, request for clarification of rights, or
9 temporal uncertainty. *See, e.g., Alvarez v. Gomez*, 185 F.3d 995, 998 (9th Cir.
10 1999); People v. Harris, 191 Colo. 234, 552 P.2d 10, 11-13 (Colo. 1976);
11
12 See Smith v. Endell, 860 F.2d 1528, 1531 (9th Cir. 1988).

15 In Harte, following the first mention of lawyer with the statement,
16
17 “Just out of curiosity, when do I get to talk to a lawyer?” the questioning
18 officers asked follow-up questions to clarify his statement as permitted by
19
20 Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

22 **DEPUTY: . . okay. Well, that's the whole idea of the rights**
23 **there if you don't . .**

24 **HARTE: Yeah.**

26 **DEPUTY: . . want to talk to us that's fine. Yeah. You know,**
27 **that . . that's the whole idea of the rights. That's**
28 **why.**

1 HARTE: Yeah, yeah, I . .

2 DEPUTY: If you wanna talk to us or.

3 Harte, 116 Nev. 1062-63, 13 P.3d at 426.

4
5 Here, Appellant stated, "It's time to get a lawyer," and then stopped
6
7 speaking. Detectives do not ask any follow up question to clarify the
8
9 statement and instead Detective Sanborn simply responded in the
10
11 affirmative, "yeah." Appellant made one more statement reiterating what
12
13 he previously had said about not remembering anything because he was
14
15 intoxicated. *See* Recording at 12:37. At 13:06, **a mere twenty-seven seconds**
16
17 **after he invoked his right to counsel**, detectives begin questioning
18
19 Appellant again. *See* Recording at 13:06. Detective conducted no
20
21 clarification questioning.

22
23 In Harte, this Court also came to the conclusion that the defendant
24
25 chose not to invoke those rights during the interviews based on his
26
27 perception of how much incriminating evidence law enforcement already
28
possessed. This portion of the Harte decision was not mentioned by the
State in its Answering Brief:

1 "It is apparent that he chose not to invoke those rights during
2 the interview based on his assessment of how much
3 incriminating evidence deputies already possessed. For
4 instance, following the above-emphasized statements, Harte
5 told deputies that if they wished "to get to the bottom of
6 things," they should state two specific facts that only Sirex
7 would know. Deputies told Harte that they knew about a body
8 microphone that he wore during the crime and knew that Babb
9 was following the taxicab and listening during the crime. When
10 Harte later made a full confession, he stated that he would tell
11 deputies what happened since they knew more than they could
12 without being told by one of the participants and that Harte
13 had to make sure deputies "got" him before he "blabbed."
14 Afterward, Harte acknowledged that he felt better talking
15 about the crime. Thus, our review of the record does not
16 demonstrate any real confusion regarding his rights, but
17 instead shows that he was contemplating his options with
18 regard to exercising those rights."

19 Harte, 116 Nev. 1064, 13 P.3d at 427.

20 Here, Appellant did not make any statement indicating that he
21 wanted to tell detectives what happened; that he thought there was a
22 significant amount of evidence against him; or that he felt better after
23 talking to detectives.

24 The State also cites to Dietz in support of its argument that
25 "it's time to get an attorney," does not constitute an unequivocal and
26
27
28

1 unambiguous request for an attorney.⁵ In Dietz, the defendant asked two
2 questions regarding an attorney to which the detective responded with
3 clarification of his rights:
4

5 Dietz: It's all right. Should I have an attorney here?

6 **Detective: Huh?**

7 Dietz: Should I have an attorney?

8 **Detective: It's up to you.**

9 Dietz: Cuz, I don't know what I'm doing.

10 **Detective: If you don't want to speak with us anymore,**
11 **that's your right.**

12 Dietz, 124 Nev. 1462, 238 P.3d 806 (2008).
13

14 The question Dietz asked was whether or not he *should* get an
15 attorney. This is markedly different from saying, "it's time to get an
16 attorney." The former is asking for advice on what to do and the later is
17 making a firm statement on what needs to be done. Additionally, the
18 detective responded to Dietz asking for advice about getting an attorney
19
20 with clarification of his rights whereas here, detective Sanbourn responded
21
22

23
24 ⁵ It should be noted that the citation the State provided for Deitz v. State in its
25 Answering Brief does not yield a decision in Lexis. The State also does not use
26 any pinpoint citations for Dietz in its discussion of the case. Appellant's
27 counsel attempted to locate the decision used various search terms and was
28 unsuccessful. Appellant simply responds to the State's discussion and citation
to Dietz on face value.

1 with, "yeah."

2 Appellant's case is distinguishable from Harte and Dietz and
3 therefore neither decision is dispositive of the question: Does "it's time to
4 get an attorney," constitute an unequivocal and unambiguous request for
5 an attorney pursuant to Davis v. United States, 512 U.S. 452, 458, 114 S. Ct.
6 2350, 129 (1994) and Edwards, 451 U.S. at 484-85.
7
8
9

10
11 It is clear that Appellant's statement was an unambiguous and
12 unequivocal request for the assistance of counsel during questioning. There
13 is no other reason why he would make such a statement while being
14 questioned by detectives about whether or not he was the shooter in a
15 murder case after being taken into custody and told that police had search
16 warrants for his car and home. **The district court agreed that Appellant**
17 **requested an attorney.** 5 AA 882-883. However the district court then said
18 Appellant reinitiated it. Even if Appellant was re mirandized after he spoke
19 another thought after his invocation, is of no consequence because his prior
20 request for an attorney precluded any further interrogation under the
21 circumstances presented. Carter v. State, 129 Nev. 244, 240, 299 P.3d 367
22
23
24
25
26
27
28

1 (2013). It was error for the district court to deny Appellant's Motion to
2 Suppress his statement and this prejudiced Appellant.
3

4
5 **CONCLUSION**

6 Based upon the arguments herein, *supra*, TULY LEPOLO's conviction
7
8 should be REVERSED and his case REMANDED for a new trial.

9 Dated this 13th day of November, 2023.
10

11
12
13 Respectfully submitted,

14 /s/ Jean J. Schwartzer
15 JEAN J. SCHWARTZER, ESQ
16 Nevada State Bar No. 11223
17 Law Office of Jean J. Schwartzer
18 411 E. Bonneville Avenue, Suite #360
19 Las Vegas, Nevada 89101
20 (702) 979-9941
21 Jean.schwartz@gmail.com
22 Counsel for Appellant
23
24
25
26
27
28

CERTIFICATE OF COMPLIANCE

1
2 1. I hereby certify that this brief complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:
5
6

7 **[X] This brief has been prepared in a proportionally spaced typeface**
8
9 **using Microsoft Word 2010 Edition in Palatino Linotype 14 point font; or**

10 [] This brief has been prepared in a monospaced typeface using [state
11 name and version of word-processing program] with [state number of
12 characters per inch and name of type style].
13
14

15 2. This brief exceeds the with the page- or type-volume limitations of
16 NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP
17 32(a)(7)(C), it is either:
18
19

20 [] Proportionately spaced, has a typeface of 14 points or more, and
21 contains _____ words; or
22

23 [] Monospaced, has ____ or fewer characters per inch, and contains
24 _____ words or _____ lines of text; or
25

26 **[X] Does not exceed 30 pages.**
27
28

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 13th day of November, 2023.

/s/ Jean J. Schwartz
JEAN J. SCHWARTZER, ESQ
Nevada State Bar No. 11223
Law Office of Jean J. Schwartz
411 E. Bonneville Avenue, Suite #360
Las Vegas, Nevada 89101
(702) 979-9941
Jean.schwartz@gmail.com
Counsel for Appellant

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

I HEREBY CERTIFY AND AFFIRM that this document was filed electronically with the Nevada Supreme Court on the 13th of November, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

9 AARON FORD, ESQ.
Nevada Attorney General

0 ALEXANDER G. CHEN, ESQ.
1 Chief Deputy District Attorney

2 I further certify that I served a copy of this document by mailing a
3 true and correct copy thereof, postage pre-paid, addressed to:
4

Tuly Lepolo
Inmate No: 1262001
High Desert Prison
P.O. Box 650
Indian Springs, Nevada 89070-0650

1 /s/ Jean J. Schwartzer
2 JEAN J. SCHWARTZER, ESQ
3 Nevada State Bar No. 11223
4 Law Office of Jean J. Schwartzer
5 411 E. Bonneville Avenue, Suite#360
6 Las Vegas, Nevada 89101
(702) 979-9941
Counsel for Appellant