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# Summary of Anderson v. State, 121 Nev. Adv. Op. 51

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*Anderson v. State*, 121 Nev. Adv. Op. 51 (August 25, 2005)<sup>1</sup>

**CRIMINAL LAW – DRIVING UNDER THE INFLUENCE**

**Summary**

In this case, the Court considered two issues related to DUI charges against appellant. First, whether a jury may properly convict a defendant charged with driving under the influence of intoxicants based upon alternate theories of criminality. Second, whether prosecutorial misconduct requires reversal of a conviction based upon conflicting evidence.

The Court concluded with respect to the first issue that although jury verdicts must be unanimous, a jury need not be unanimous as to a particular theory of culpability for a single offense to sustain a conviction. Thus, a unanimous general verdict of guilt will support a conviction so long as there is substantial evidence in support of one of the alternate theories of culpability. As for the second issue, the Court held that prosecutorial misconduct requires reversal of a conviction based upon a plain error analysis.

**Disposition/Outcome**

The Court reversed the conviction of felony DUI and remanded to the district court for a new trial.

**Factual and Procedural History**

On May 12, 2001 NHP observed a bearded shirtless man driving a pickup with a young man in the passenger seat speeding at 89 miles per hour in a 70 mile-per-hour zone. NHP noticed one of the pickup's wheels touch the shoulder and after effecting a traffic stop noticed that the shirtless man, Anderson, emerged from the passenger-side door while Anderson's 14-year-old son remained in the driver's seat. When the state trooper asked Anderson why he switched places with his son, Anderson first denied doing so and then said he was just being a "stupid sh--." The troopers smelled alcohol on Anderson and he failed field sobriety tests and a preliminary breath test. Subsequent breath testing confirmed blood-alcohol levels in excess of the statutory minimums.

The prosecution charged Anderson with felony DUI, third offense. At trial the jury found Anderson guilty. Anderson appeals.

**Discussion**

A. Reliability of the jury's verdict

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<sup>1</sup> Summarized by Bryce C. Loveland

The State prosecuted Anderson on all three statutory theories for DUI criminal liability: (1) operating a motor vehicle under the influence of intoxicating liquor, and/or (2) operating a motor vehicle while having 0.10 percent or more by weight of alcohol in the blood, and/or (3) being found by measurement within 2 hours after driving or being in physical control of a vehicle to have 0.10 percent or more by weight of alcohol in the blood.<sup>2</sup> The jury unanimously found Anderson guilty of all three theories.

Anderson argues that the verdict is unreliable because the State presented no evidence in support of the second theory. Moreover, there is no way of knowing whether the jury was unanimous as to any one theory. The Supreme Court disagrees.

Although NRS 175.481 requires unanimous verdicts, the Court has previously held that a jury need not be unanimous as to a particular theory of culpability for a single offense to sustain a conviction.<sup>3</sup> In this case, however, adjudication of guilt was not dependent upon a general verdict based upon alternate theories of culpability. Rather, the jury was given the task of separately determining each of the statutory theories of criminality. Thus, it was necessary for the jury to issue a unanimous verdict as to one of the three theories. Although the jury clearly erred in finding Anderson guilty under the second theory, it still issued a unanimous verdict as to the other two. Because substantial evidence exists in the record supporting the jury's findings on the remaining theories, this error with respect to the second theory was harmless.

B. Prosecutorial misconduct

The Court explained that the relevant inquiry to determine whether prosecutorial misconduct occurred is whether the prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process.<sup>4</sup> Factors in determining infection with unfairness include: (1) A prosecutor may not vouch for the credibility of a witness, (2) accuse a witness of lying, (3) use a defendant's post-arrest silence for impeachment purposes, and (4) refer to a defendant's post-arrest silence in its case-in-chief. These factors were met at trial when the prosecutor accused Anderson and his son of lying, used Anderson's post-arrest silence against him and in the case-in-chief, advised the jury that it had a duty to convict Anderson, and by offering personal opinions as to the verity of witnesses.

Reversal, however, is unnecessary if the prosecutor's statements were harmless beyond a reasonable doubt. The Court further explained that the prosecutor's statements are harmless beyond a reasonable doubt if the statements were merely passing in nature, or there is overwhelming evidence of guilt. Although Anderson failed to object to these statements at trial, appellate review is not precluded because the prosecutor's statements were plainly erroneous. Furthermore, the statements compel reversal because they were not made in passing and the evidence of guilt was not overwhelming. Anderson's argument that it is virtually impossible to make a change of drivers at high speed,

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<sup>2</sup> NEV. REV. STAT. 484.379 (2004).

<sup>3</sup> *Citing Evans v. State*, 113 Nev. 885, 895-96, 944 P.2d 253, 260 (1997).

<sup>4</sup> *Citing Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004).

especially when the driver is highly intoxicated and the passenger underage and inexperienced, raises arguable reasonable doubt.

Finally, the prosecutor's statements changed the focus of the case to his personal views and away from the evidence, which prejudiced Anderson. The Court concluded its discussion by admonishing the prosecutor for such misconduct and threatened state bar discipline for repeating this type of "adversarial rhetoric."

### **Conclusion**

The Court concluded that the jury verdict is valid because the jury was unanimous as to two theories of culpability that are supported by substantial evidence. However, the prosecutorial misconduct in this case warrants plain error review because it affected Anderson's substantial rights. Accordingly, the Court reversed Anderson's conviction and remanded the matter to the district court for a new trial.