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Winter 12-24-2015

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Douglas H. Smith
Nevada Law Journal

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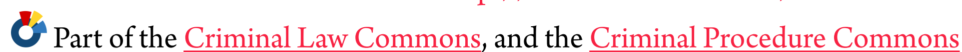
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Recommended Citation
Smith, Douglas H., "Newell v. State of Nevada, 131 Nev. Adv. Op. 97 (December 24, 2015)" (2015). *Nevada Supreme Court Summaries.* Paper 932.
http://scholars.law.unlv.edu/nvscs/932

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Newell v. State of Nevada, 131 Nev. Adv. Op. 97 (December 24, 2015)[1]

CRIMINAL LAW: USING FORCE IN RESPONSE TO THE COMMISSION OF A FELONY

Summary

The holding of *State v. Weddell* is extended. Responding with deadly force to the commission of a felony per NRS § 200.160 is justified only when the person poses a threat of serious bodily injury. Short of such a threat, the amount of force used must be reasonable and necessary under the circumstances.

Background

During an altercation at a gas station in 2012, Patrick Newell sprayed Theodore Bejarano with gasoline, lit him on fire, and threatened him with a pocketknife. Newell was charged with attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon, attempted assault with the use of a deadly weapon[2], and performance of an act in reckless disregard of persons or property. At trial, Newell claimed that his actions constituted justifiable battery because he had reasonably believed that Bejarano was committing felony coercion against him. However, the district court relied on *State v. Weddell* in issuing its final jury instruction. It stated that the amount of force used in a battery had to be reasonable and necessary under the circumstances and that deadly force could not be used unless the person battered posed a threat of serious bodily injury. Per the instruction, Newell was convicted of the battery, attempted assault, and reckless disregard charges.[3] On appeal, Newell argued that the district court abused its discretion by giving a jury instruction that was an incorrect statement of Nevada law resulting in a legally impossible conviction.

Discussion

The district court did not abuse its discretion in giving the jury instruction.

Newell argues that the jury instruction is an abuse of discretion because the plain language of NRS § 200.160 does not require that the amount of force used in battery be reasonable and necessary or that there exist a threat of serious bodily injury to justify deadly force.[4] The district court has broad discretion to finalize jury instructions.[5] Whether those instructions are accurate statements of the law is reviewed de novo, and when the words of a statute are clear and unambiguous, the court will give them "their plain, ordinary meaning."[6] The court may look to other sources in interpreting statutes, however, if a plain meaning interpretation would lead to an absurd or unreasonable result.[7]

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[1] By Douglas H. Smith
[2] The attempted assault charge was an amendment to an earlier charge of actual assault with a deadly weapon.
[3] The reckless disregard charge was later dismissed.
[4] NEV. REV. STAT. § 200.160 (2015).
[5] *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).
[6] *Davis v. State*, 130 Nev. Adv. Op. 16, 321 P.3d 867, 871 (2014); *State v. Friend*, 118 Nev. 115, 120, 40 P.3d 436, 439 (2002).
[7] *Friend*, 118. Nev. at 120-121, 40 P.3d at 439.

The plain meaning of the justifiable battery statutes do not require that the amount of force used be reasonable and necessary or in response to a serious bodily injury.

Per NRS § 200.275, battery is justified whenever homicide is justified.[8] NRS § 200.160 requires that, for a homicide to be justified, it must be either a response to a reasonable apprehension of an attempted felony or in actual resistance to an attempted felony, without reference to any particular type of felony.[9] Thus, a plain meaning interpretation of both statutes would conclude that any battery is justified when someone reasonably apprehends or actually resists an attempted felony of any type. This interpretation is absurd and dictates an examination of additional sources.

State v. Weddell

The *Weddell* court held that there was no longer a compelling policy rationale for allowing private parties to use deadly force to apprehend felons because felonies as a class were no longer strictly limited to those offenses that would be punished with death upon conviction.[10] Instead, private parties apprehending felons could use force only to the degree that was reasonable and necessary under the circumstances and deadly force required a threat of serious bodily injury.[11]

Weddell's reasoning is applicable to our interpretation of the justifiable homicide statutes.

Since the instant case also concerns the use of deadly force against felons or those committing felonies without recognizing differences between violent and nonviolent felonies, the court accepts the *Weddell* rationale when using force in response to the commission of a felony. When reasonably apprehending an attempted felony or actually resisting an attempted felony, the degree of force used must be reasonable and necessary under the circumstances, and deadly force requires a threat of serious bodily injury.

Attempted assault under NRS § 200.471(1)(a)(2) is not legally impossible.

Newell was convicted of attempted assault under NRS § 200.471(1)(a)(2), which is defined as the "intentional placement of another person in reasonable apprehension of immediate bodily harm."[12] Although the court agrees that the attempt to attempt a crime is legally impossible, this statutory provision is not a crime of attempt and is therefore possible.

Conclusion

The district court was correct to base its justifiable battery instruction on the court's holding in *Weddell* and thus did not abuse its discretion. Furthermore, attempted assault under NRS § 200.471(1)(a)(2) is legally possible. Judgment affirmed.

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[8] NEV. REV. STAT. § 200.275 (2015).
[9] NEV. REV. STAT. § 200.160 (2015).
[10] *State v. Weddell*, 118 Nev. 206, 211-212, 43 P.3d 987, 990 (2002).
[11] *Id.* at 214, 43 P.3d at 992.
[12] NEV. REV. STAT. § 200.471(1)(a)(2) (2015).