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## Summary of Rose v. State, 127 Nev. Adv. Op. No. 43

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*Brian Rose v. State*, 127 Nev. Adv. Op. No. 43 (July 21, 2011)<sup>1</sup>  
CRIMINAL LAW – FELONY-MURDER RULE; MERGER DOCTRINE

**Summary**

An appeal of a second-degree murder conviction by jury verdict.

**Disposition and Outcome**

The Supreme Court of Nevada reversed the conviction because the district court failed to include the merger doctrine as part of its jury instruction on Nevada’s second-degree felony-murder rule.

**Factual and Procedural History**

Brian Rose (“Rose”), Jackie Watkins (“Watkins”), and Jake Timms (“Timms”) went to Julius Castano’s (“Castano”) house for barbeque. Upon arriving at Castano’s residence, Rose brought his gun inside. Rose, Timms, and Castano handled the gun throughout that evening, during which time Rose removed the magazine and emptied the chamber of the gun. At some point, Timms holstered the gun around his waist.

Timms fell asleep on the couch. While Timms slept, Rose removed the gun from Timms’ holster and placed it in his own waistband. Despite conflicting accounts of what happened next, Rose admitted to aiming the gun at or near Watkins as a prank, while Watkins talked on the phone. The gun went off and a single bullet hit the top of Watkin’s head. Rose fled Castano’s home at speeds close to 100 miles per hour, leaving the gun behind. After noticing a police vehicle following him, Rose voluntarily pulled over and surrendered to police. After further investigation, Rose admitted to accidentally shooting Watkins, but claimed that he did not know his gun was loaded. During police interrogations, Rose explicitly denied that he intended to shoot Watkins. The police informed Rose that Watkins died from her injuries later that evening.

The State charged Rose with one count of murder with use of a deadly weapon. In response, Rose filed a pretrial motion asking the district court to strike the second-degree felony-murder theory and disallow any jury instruction on such charge. Rose argued that assault with a deadly weapon could never serve as the underlying felony in this case because it would alleviate the prosecution’s need to prove *mens rea*. The district court denied Rose’s motion.

Rose subsequently moved to strike the first degree murder charge for failure to show intent, but the State argued that they would show implied malice.<sup>2</sup> This argument is consistent with how the district court instructed the jury. Rose objected to every jury instruction, and every objection was overruled. The jury convicted Rose, and Rose appealed his conviction

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<sup>1</sup> By Michael Li.

<sup>2</sup> Implied malice is generally evidenced by a reckless disregard of consequences and social duty.

## Discussion

### *Standard of Review*

A district court's decision on the proper jury instruction is reviewed under the abuse of discretion standard.<sup>3</sup> Even if the district court erred, the conviction will not be reversed if the error was harmless.<sup>4</sup> An erroneous instruction on elements of an offense is harmless when it is clearly beyond a reasonable doubt that a rational jury would have found the defendant guilty, absent the error.<sup>5</sup>

### *The District Court Abused its Discretion in Failing to Instruct the Jury on the Merger Doctrine.*

In Nevada, application of the felony-murder rule substantially reduces the prosecution's burden to prove the defendant's mental state for purposes of a murder conviction.<sup>6</sup> Nevada's Legislature expressly specified felonies that provide the malicious intent to characterize a killing as first-degree felony-murder.<sup>8</sup> By contrast, there are no statutorily enumerated felonies with respect to second-degree felony-murder.<sup>9</sup> Historically, the Court restricted the use of the felony-murder rule in order to avoid the potential for "untoward" prosecutions resulting from a broad application of the felony-murder rule.<sup>10</sup> Consistent with this historical purpose, Rose argued to further limit the use of felony-murder rule by applying the merger doctrine.<sup>11</sup>

Relying on persuasive authorities from the other jurisdictions,<sup>12</sup> the Court adopted the merger doctrine for cases where the defendant committed the homicide as a result of felonious assault. In doing so, the Court emphasized that, absent the merger doctrine, application of the felony-murder rule would effectively preclude jurors from deciding the issue of malice aforethought in all cases involving killings in the course of felonious assault. Moreover, the Court distinguished their approach in this case from application of first-degree felony-murder rule since there are no statutorily enumerated felonies for second-degree felony murder. Therefore, in order to avoid "untoward" prosecutions resulting to overbroad application of second-degree felony-murder rule, the Court adopted the merger doctrine.<sup>13</sup>

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<sup>3</sup> Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (citing Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

<sup>4</sup> Santana v. State, 122 Nev. 1458, 1463, 148 P.3d 741, 745 (2006).

<sup>5</sup> Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

<sup>6</sup> See State v. Contreras, 118 Nev. 332, 334, 46 P.3d 661, 662 (2002)

<sup>8</sup> NEV. REV. STAT. § 200.030(1)(b) (2007); Contreras, 118 Nev. at 334, 46 P.3d at 662.

<sup>9</sup> NEV. REV. STAT. §§ 200.070 & 200.030(2) (2007); Ramirez v. State, 126 Nev. \_\_\_, \_\_\_ n. 2, 235 P.3d 619, 622 n. 2 (2010); See also Sheriff, Clark County v. Morris, 99 Nev. 109, 114-115, 659 P.2d 852, 856-857.

<sup>10</sup> Morris, 99 Nev. at 118, 659 P.2d at 859.

<sup>11</sup> Merger doctrine developed from the understanding that when the underlying felony constituted an independent crime, rather than part of the killing itself, the felonious intent cannot be used as the basis for felony-murder. See People v. Sarun Chun, 203 P.3d 425, 434-435 (Cal. 2009).

<sup>12</sup> See People v. Ireland, 450 P.2d 580, 589-590 (Cal. 1969); see also State v. Essman, 403 P.2d 540, 545 (Ariz. 1965); State v. Branch, 415 P.2d 766, 768 (Or. 1966).

<sup>13</sup> Ramirez, 126 Nev. at \_\_\_, 235 P.3d at 622.

The Court also ruled that application of the merger doctrine presents a question of law.<sup>14</sup> The jury must determine whether or not the underlying felony involves a threat of immediate bodily harm. Moreover, instead of determining the doctrine's applicability based on elements of the underlying felony, the factual determination must now be based on the manner in which defendant committed the felony.

The Court found that the district court erred in omitting the merger doctrine from its jury instruction for second-degree felony murder because a rational jury could have found that assault with a deadly weapon merged with the homicide charge. The relevant assault was Rose aiming his gun at or near Watkins, and telling her to get off the phone. The jury could have concluded that Rose threatened Watkins with immediate bodily harm, making the underlying felony "assaultive in nature". Therefore, the district court erred in omitting the merger doctrine.

Lastly, the Court held that district's court's error in this case was not harmless, and therefore grounds for reversal. Although the jury could have convicted Rose of second-degree murder under prosecution's alternative theory of implied malice,<sup>17</sup> the record presented conflicting facts and evidence of Rose's mental state. Because of these conflicting facts, the Court could not conclude beyond a reasonable doubt that the jury would have found Rose guilty of second-degree murder under the implied malice theory absent the omitted instruction. The Court reversed Rose's conviction on those grounds.

## **Conclusion**

A district court abuses its discretion if it fails to include the merger doctrine in jury instructions on the second-degree felony-murder rule. The application of the merger doctrine to a given case is a question of fact for the jury. A jury must determine whether the underlying felony involves the threat of imminent bodily harm and that determination is based on the manner in which the felony was committed.

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<sup>14</sup> Ramirez, 126 Nev. at \_\_\_ n. 2, 235 P.3d at 622 n. 2.

<sup>17</sup> NEV. REV. STAT. § 200.020(2) (2007).