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Summary of *Nay v. State*, 123 Nev. Adv. Op. No. 35

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Nay v. State, 123 Nev. Adv. Op. No. 35 (Sept. 20, 2007)¹

CRIMINAL LAW – FELONY MURDER

Summary

Appeal from a judgment of conviction, upon a jury verdict, of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon.

Disposition/Outcome

Affirmed the judgment as to the conviction for robbery with a deadly weapon and reversed the judgment as to the conviction for first-degree with the use of a deadly weapon, and remanded the matter to the district court.

Factual and Procedural History

Elijah Ansah and Christopher Nay became roommates in June 2003.² In the early morning of July 27, 2003, Ansah and Nay, planning to meet girls, went to Lone Mountain.³ For protection, Nay brought a bat.⁴ Upon their arrival, Ansah and Nay found that the girls were not present. They walked to a local park and waited. After approximately 20 minutes, Ansah became impatient and began to inquire as to the girl's location. At that point, Ansah brandished a handgun and pointed it at Nay.⁵ In response, Nay kicked Ansah in the stomach. As Ansah doubled-over from the blow, he discharged his weapon. No one was shot. After Ansah fell to the ground, Nay hit him in the head with the bat five to eight times, and intermittently kicked him in the ribs.

After this altercation, Nay realized that he might have killed Ansah.⁶ In an attempt to avoid murder charges, Nay tried to cover his tracks by burning Ansah's shirt with a cigarette lighter and taking Ansah's shoes to remove his finger prints from the crime scene. Additionally, Nay reasoned that he ought to get something out of the event

¹ By Tyler James Watson.

² Prior to their living together, Ansah had been living a transient lifestyle, staying with various friends and relatives.

³ At this time, Ansah had a near-fatal level of hydrocondone in his system. Hydrocondone is a narcotic analgesic that would make a person drowsy, tired, and uncoordinated. According to testimony at trial, the amount of hydrocondone Ansah had in his system would have limited the amount of control he had over his own body, but he could have held a gun and pointed it at someone.

⁴ Nay claimed to have received the bat from a friend to protect himself from gang members. However, Nay had made a joke to the same friend that he wanted the bat to pull a "lick" – to catch someone off guard and then rob them.

⁵ Nay initially thought Ansah pulled the gun in a joking manner, but Ansah replied, "We ain't in your apartment no more. I ain't f___ing playing this time." He then cocked the handgun.

⁶ The realization that he may have killed Ansah scared Nay.

because, after all, “Ansah had held a gun to his head.” Nay took Ansah’s gun⁷, money, clothes⁸, and marijuana, and then walked himself home.⁹

Subsequent to Ansah’s death, Nay told friends and acquaintances that he had committed a robbery using a bat. Also, he told a friend that he had jumped Ansah to get his money. At one point, Nay, in the presence of a group of his friends, mocked police for suspecting that Ansah’s death was gang related. Then Nay sang the lyrics to a rap song he had written which included, “I bashed someone over the head, now he lies dead behind Lone Mountain.”

Nay’s friends suspected that he had killed Ansah and, subsequently, contacted the police. Upon interrogation, Ansah admitted to the killing, but stipulated that it was in self-defense. Nay was later convicted of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. Nay was sentenced to two consecutive terms of life in prison with eligibility for parole.

Discussion

The State’s Improper Felony-Murder Jury Instruction:

Nay argued, and the court found that the felony-murder conviction could not be properly reached because the proffered jury instruction improperly stated Nevada law. The jury instruction allowed for conviction of felony-murder could be properly reached where the intent to commit the felony occurred after the murder. The question of whether robbery may serve as a predicate for felony murder when the perpetrator formed the intent to rob after killing the victim was an issue of first impression¹⁰ and a matter of statutory interpretation. The issue was reviewed de novo.¹¹

The guiding statute was NRS 200.030(1)(b) which defines felony murder as murder which is “[c]ommitted in the perpetration or attempted perpetration of . . . robbery.” Since the statute does not define perpetration or attempted perpetration, Nay argued that the intent to commit robbery needed to be present at the time of the murder. Conversely, the State argued that the force or violence used to kill the victim is “in the perpetration of” the robbery.¹² The court held that the statute was ambiguous because there was more

⁷ Nay claims that he took Ansah’s gun because he did not know if Ansah was dead and he did not want Ansah to get up and shoot him.

⁸ Nay discarded Ansah’s clothes in a dumpster.

⁹ Nay claims he did not tell police what happened because he did not want to be locked up for murder when he was just defending himself.

¹⁰ The court previously concluded that a person who takes property from a victim after he is dead still commits robbery, and that issue was not addressed in this case. *Leonard v. State*, 117 Nev. 53, 76-77, 17 P.3d 397, 412 (2001).

¹¹ De novo is the proper method of review when there is a question of whether a proffered instruction is a correct statement of the law because it presents a legal question. *Garcia v. State*, 117 Nev. 124, 127, 17 P.3d 994, 996 (2001).

¹² The State erroneously argued that the court had already determined that after though robbery may serve as a predicate to felony-murder in *Thomas v. State*, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004) (quoting *Chappell v. State*, 114 Nev. 1403, 1408, 972 P.2d 838, 841 (1998)). However, the intent in the aforementioned case preceded the murder.

than one reasonable meaning¹³, and when ambiguity arises, “[c]riminal statutes must be ‘strictly construed and resolved in favor of the defendant.’”¹⁴

For all subsequent felony-murder charges, the court held that the intent to commit robbery must exist at the time of the murder. The court reasoned that the purpose of the felony-murder law is “to deter dangerous conduct by punishing as a first degree murder a homicide resulting from dangerous conduct in the perpetration of a felony, even in the defendant did not intend to kill.”¹⁵

The Harmless Error Test:

The court held that the improper felony-murder jury instruction was not a harmless error. An error is considered “harmless when it is ‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.’”¹⁶ The jury was given no way to conclude that afterthought robbery does not satisfy the requisite intent factor for felony-murder. Additionally, the jury verdict forms did not distinguish between felony-murder and first-degree murder. Therefore, the court held that the jury instruction error did not constitute a harmless error.

Concurring Opinion

MAUPN, C.J., with whom HARDESTY, J., agrees, concurring:

Maupin concurred with the result reached by the majority. However, he disagreed with the majority’s criticism of the district court. It was wrong to view the district court’s jury instruction as an error because the issue on appeal was an issue of first impression; therefore, the district court would have had no way to follow the rule that had just been enacted. Instead of criticizing the district court, the court should have admitted its error in not clearly addressing the issue earlier.

Conclusion

The court adopted the rule that a conviction of felony-murder requires that the actor must intend to commit a requisite felony before or at the time of the killing occurred. In the event that the felony occurred as an afterthought to the killing, a conviction for felony-murder is inappropriate. Additionally, the court held that the failure to instruct the jury of the aforementioned principal was not a harmless error in Nay’s conviction. Thus, the court affirmed the conviction for robbery with the use of a deadly weapon and reversed the judgment as to the conviction for first-degree murder with the use of a deadly weapon, and remanded the matter to the district court.

¹³ State v. Kopp, 118 Nev. 199, 202, 43 P.3d 340, 342 (2002).

¹⁴ Firestone v. State, 120 Nev. 13, 16 83 P.3d 279, 281 (2004) (quoting Anderson v. State, 95 Nev. 625, 629, 600 P.2d 241, 243 (1979)).

¹⁵ State v. Allen, 875 A.2d 724, 729 (Md. 2005).

¹⁶ Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000) (quoting Neder v. United States, 527 U.S. 1, 10-11 (1999)).