

IN THE SUPREME COURT OF THE STATE OF NEVADA

JESSICA BARRAZA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50623

**FILED**

AUG 03 2009

THACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Jessica Barraza focuses this appeal on argument that the district court usurped the jury's role as fact-finder by instructing the jury that a knife is a deadly weapon as a matter of law and that this constitutes plain error, requiring reversal.<sup>1</sup> We disagree and affirm.

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<sup>1</sup>Barraza also contends that: (1) the district court erred in denying her motion for mistrial; (2) the district court erred in allowing the State to elicit prior bad act testimony; (3) the district court erred in allowing a photograph of the victim into evidence; (4) reversal is warranted because a witness for the prosecution improperly testified on Barraza's veracity; (5) the district court improperly allowed hearsay testimony; (6) this court should overrule its decision in Hill v. State, 98 Nev. 295, 647 P.2d 370 (1982), and adopt the "imperfect self-defense" rule; (7) ameliorative amendments to the deadly weapon enhancement statute apply to offenders who committed their crimes prior to the effective date of the amendments but were sentenced after that date; and (8) cumulative error warrants reversal. Having considered each of these additional arguments, we conclude that they are without merit.

The district court's deadly weapon instruction read as follows:

“Deadly weapon” means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause bodily harm or death.

You are instructed that a knife is a deadly weapon.

Barraza contends that this instruction improperly removed from the jury's consideration the factual issue of whether the particular knife used in this case qualifies as a deadly weapon. Barraza did not raise this objection at trial. On appeal, we thus review her challenge to this instruction for plain error. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (noting that, while the failure to object to a jury instruction at trial generally precludes appellate review, this court may address an erroneous instruction if the error was plain and affected the defendant's substantial rights).

To qualify as “plain,” the error must be “clear under current law,” Gaxiola, 121 Nev. at 648, 119 P.3d at 1232 (quoting U.S. v. Weintraub, 273 F.3d 139, 152 (2d Cir. 2001)) and “so unmistakable that it reveals itself by a casual inspection of the record.” Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal quotation marks and citations omitted). Further, “[n]ormally a defendant must show that an error was prejudicial in order to establish that it affected his substantial rights.” Tavares v. State, 117 Nev. 725, 729, 30 P.3d 1128, 1131 (2001).

The district court based its deadly weapon instruction on the definitions provided in NRS 193.165(6), Nevada's deadly weapon enhancement statute. NRS 193.165(6)(b) defines deadly weapon to mean “[a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be

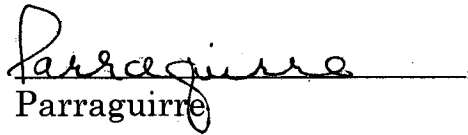
used, is readily capable of causing substantial bodily harm or death.” Citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), Barraza argues that whether a knife qualifies as a deadly weapon presents a question of fact that the jury must resolve under all circumstances, such that instructing the jury as a matter of law that the knife used to kill the victim in this case was a deadly weapon amounted to plain error.

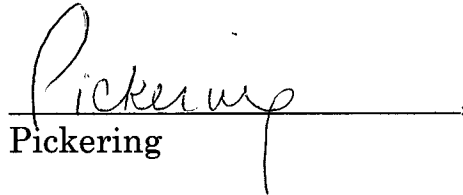
We disagree, for three reasons. First, the error is not as clear under current law as Barraza asserts. Compare Hernandez v. State, 118 Nev. 513, 528 n.31, 50 P.3d 1100, 1111 n.31 (2002) (citing Steese v. State, 114 Nev. 479, 499, 960 P.2d 321, 334 (1998) and Thomas v. State, 114 Nev. 1127, 1146, 967 P.2d 1111, 1123 (1998) and noting with apparent approval the instructions they reviewed with respect to certain knives being deadly weapons as a matter of law) with Knight v. State, 116 Nev. 140, 147, 993 P.2d 67, 72 (2000) (noting in a related context that “the determination of whether a common steak knife is a dangerous or deadly weapon is a question of fact for the jury” but finding the instructional error harmless). Second, the knife Barraza used to kill the victim in this case was a butterfly knife which, when closed, conceals its blade and when opened, has hand-guards that lock the blade in place and prevent the wielder’s hand from slipping onto the blade if used to stab. While not dispositive, these are characteristic of knives that qualify as deadly weapons. See Knight, 116 Nev. at 146, 993 P.2d at 72. Third, the deadly properties of this particular knife in this particular case, given the knife’s construction and the mortal stab wounds it was used to inflict, were neither contested, nor seriously open to contest (which may explain Barraza’s failure to object to the instruction in the district court). See State v. Graham, 650 S.E.2d 639, 648 (N.C. App. 2007) (upholding conviction in a case in which

the jury was instructed a particular knife was a deadly weapon given the uncontroverted evidence that the knife was used to inflict severe life-threatening injuries). Under these circumstances, the error, if any, in the jury instruction was harmless beyond a reasonable doubt. State v. Donk, 181 P.3d 508, 511-12 (Idaho Ct. App. 2007) (canvassing cases and noting that failure to submit a sentencing enhancement to the jury may constitute harmless error where, as here, the record establishes the elements of the enhancement with overwhelming evidence).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Parraguirre

 J.  
Pickering

cc: Hon. Jackie Glass, District Judge  
Special Public Defender David M. Schieck  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk

DOUGLAS, J., dissenting:

The majority holds that, under the circumstances of this case, it was uncontested and beyond dispute that the butterfly knife used by Barraza was a deadly weapon. I must dissent because the majority misapplies the clear language of NRS 193.165(6) and misapprehends the vital function of the jury.

NRS 193.165(6) provides that, as a matter of law, the following instruments qualify as deadly weapons:

(a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;

(b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or

(c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

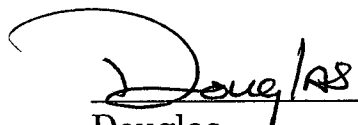
In the present case, the district court instructed the jury that a knife is a deadly weapon. Thus, the court implicitly determined that Barraza's butterfly knife was, as a matter of law, a dangerous or deadly weapon. This implicit determination is incorrect.

Nevada's deadly weapon enhancement statute specifically describes dirks, daggers, machetes, switchblade knives, and knives that are an integral part of a belt buckle as dangerous or deadly weapons. See NRS 202.265, 202.320, 202.350. The deadly weapon enhancement statute

does not, however, describe knives in general or butterfly knives as dangerous or deadly weapons. See NRS 193.165. Accordingly, I conclude that this instruction is an incorrect statement of law.

I further conclude that this instruction improperly removed from the jury's consideration the factual issue of whether the knife is a deadly weapon, which is a requisite factual finding for the deadly weapon enhancement. In Apprendi v. New Jersey, the United States Supreme Court held that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. 530 U.S. 466, 490 (2000). This court has since recognized that Apprendi applies to statutory enhancements such as the deadly weapon enhancement at issue here. See Abrego v. State, 118 Nev. 54, 60, 38 P.3d 868, 871 (2002). Accordingly, I conclude that the district court erred in instructing the jury that a knife is a deadly weapon. Finally, I conclude that this error was plain and that it affected Barraza's substantial rights.

I dissent for the reasons stated.

  
\_\_\_\_\_, J.  
Douglas