

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
Appellant,  
vs.  
ANTONIO SPINA,  
Respondent.

No. 51087

**FILED**

NOV 05 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a pretrial order of the district court dismissing a count of first-degree felony murder with the use of a firearm. Third Judicial District Court, Churchill County; David A. Huff, Judge.

Respondent Antonio Spina was charged with one count of open murder with the use of a firearm, first-degree felony murder with the use of a firearm, assault with a deadly weapon, and ex-felon in possession of a firearm. The felony-murder aspect of the case was charged as murder committed during the perpetration of a burglary.<sup>1</sup> The information alleged that Spina committed the predicate crime of burglary by entering the victim's home with the intent to commit the felony of possession of a firearm by an ex-felon.

Prior to trial, Spina moved to strike the count of first-degree felony murder with the use of a firearm, arguing that because he had permission to enter the victim's home he could not commit burglary, and the merger doctrine prevented the State from relying on burglary as the predicate felony for felony murder. In support of his merger argument,

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<sup>1</sup>NRS 200.030(1)(b).

Spina cited the California Supreme Court holding in People v. Wilson that a felony-murder conviction is not appropriate when the intent in committing the burglary is the same as the intent in committing the homicide.<sup>2</sup> In opposition, the State correctly pointed out that in State v. Contreras this court declined “to apply the merger doctrine to felony murder when the underlying felony is burglary.”<sup>3</sup> The district court heard argument on the motion to strike.

On September 8, 2008, the district court entered an order dismissing the count of first-degree felony murder with the use of a firearm and declining to address Spina’s motion to strike. The district court stated that, unlike in Contreras, the merger doctrine was not at issue in this case, rather, the issue presented was whether felony murder should apply. Relying on this court’s discussion in Contreras, the district court noted that the purpose of the felony-murder rule was to deter the disproportionate number of homicides that result from the commission of the crimes enumerated in NRS 200.030(1)(b). The district court determined that the felonious intent asserted in this case in justification of the charge of first-degree felony murder, intentional possession of a firearm by an ex-felon, did not serve the purpose of the felony-murder rule because the felonious intent did not create a greater risk of death. The district court further found that the possession of a firearm by an ex-felon is not inherently dangerous when viewed in the abstract and, thus, under

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<sup>2</sup>462 P.2d 22, 28-29 (Cal. 1969).

<sup>3</sup>118 Nev. 332, 337, 46 P.3d 661, 664 (2002).

this court's holding in Sheriff v. Morris,<sup>4</sup> an ex-felon could not be convicted of second-degree felony murder for being in possession of a firearm. The district court stated that it seemed "unreasonable to require a second degree felony murder be based on an inherently dangerous act and not require the same for first-degree." Finally, the district court determined that "to apply the first degree felony murder rule to the case at hand [would] extend it beyond its intended purpose and would unfairly elevate a crime to first-degree murder without requiring the State to prove willfulness, deliberation, and premeditation." This appeal followed.

The State argues that the district court erred by dismissing the count of first-degree felony murder with the use of a firearm because the legislature has not limited or differentiated the type of felony underlying burglary and burglary is a proper predicate for a finding of first-degree felony-murder. The State further asserts that, although the district court purported to follow the holding in Contreras, the district court followed the dissent rather than the central holding in Contreras.

This court will defer to the district court's determination of factual sufficiency when reviewing pretrial orders on appeal.<sup>5</sup> In Spina's case, however, the district court's findings involved a matter of law and statutory interpretation which requires no deference and allows for de

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<sup>4</sup>99 Nev. 109, 118, 659 P.2d 852, 859 (1983) (holding that to support the application of the second-degree felony-murder rule, the underlying felony "would have to be one which is inherently dangerous when viewed in the abstract").

<sup>5</sup>See Sheriff v. Provenza, 97 Nev. 346, 630 P.2d 265 (1981).

novo review on appeal.<sup>6</sup> Our de novo review of the record on appeal reveals that the district court did not err by dismissing the count of first-degree felony murder for two reasons.

First, although a person commits burglary by entering a structure or vehicle “with the intent to commit . . . any felony,”<sup>7</sup> permitting “ex-felon in possession of a firearm” to be the predicate felony for burglary stretches the scope of burglary. The burglary statute contemplates entry into a structure or vehicle with the intent to commit a felony therein. “Possession of a firearm by an ex-felon” is not a specific intent crime. Rather, it is a strict liability “status offense” crime that is completed when the ex-felon gains possession of a firearm.<sup>8</sup> Because “possession of a firearm by an ex-felon” is completed before entry into the structure or vehicle, permitting “possession of a firearm by an ex-felon” to qualify as a predicate for burglary would remove the burden on the State to prove intent. Under this scenario, once an ex-felon obtained possession of a firearm, the ex-felon’s entry into any structure or vehicle would result in the commission of a burglary, regardless of the ex-felon’s intent when entering the structure or vehicle. We disagree. Accordingly, we conclude that burglary cannot be predicated solely on entry into a structure or vehicle by an ex-felon in possession of a firearm.

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<sup>6</sup>See Sheriff v. Marcus, 116 Nev. 188, 192, 995 P.2d 1016, 1018 (2000).

<sup>7</sup>NRS 205.060(1).

<sup>8</sup>NRS 202.360(1)(a).

Second, as the district court found, permitting “possession of a firearm by an ex-felon” to be used in this fashion does not promote the purpose of felony-murder and it would be illogical to make it harder to obtain a conviction for second-degree felony murder than for first-degree felony murder.

“The felony-murder rule simply stated is that any homicide, committed while perpetrating or attempting a felony, is first degree murder.”<sup>9</sup> The felony-murder rule elevates a homicide to first-degree murder without requiring proof of premeditation and deliberation, by relying on the felonious intent for the predicate felony to supply the malicious intent for murder.<sup>10</sup> “The purpose of the felony-murder rule 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 if the defendant did not intend to kill.’”<sup>11</sup> To fall within the statutory felony-murder theory, the killing must be “linked to or part of the series of incidents so as to be one continuous transaction.”<sup>12</sup> Additionally, to support the application of the second-degree felony-murder rule, the

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<sup>9</sup>Payne v. State, 81 Nev. 503, 505, 406 P.2d 922, 924 (1965); NRS 200.030(1)(b).

<sup>10</sup>Contreras, 118 Nev. at 334, 46 P.3d at 662.

<sup>11</sup>Nay v. State, 123 Nev. \_\_\_, \_\_\_, 167 P.3d 430, 434 (2007) (quoting State v. Allen, 875 A.2d 724, 729 (Md. 2005)).


<sup>12</sup>Payne, 81 Nev. at 506, 406 P.2d at 924.

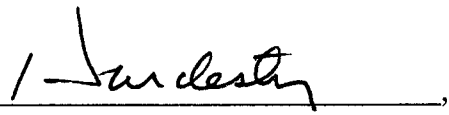
predicate felony must be one which is inherently dangerous when viewed in the abstract.<sup>13</sup>

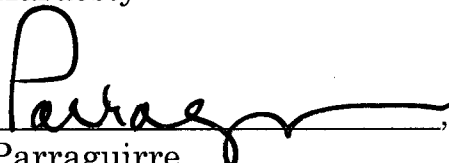
We agree with the district court that, when viewed in the abstract, “ex-felon in possession of a firearm” is not inherently dangerous.<sup>14</sup> Thus, there is no justification for the imputation of implied malice under the felony-murder rule. Accordingly, we conclude that it would be impermissible to allow the State to bootstrap “ex-felon in possession of a firearm” into burglary in order to sustain a conviction for murder in the first-degree under the felony-murder rule.

Having reviewed the State’s arguments on appeal and determined that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

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<sup>13</sup>Sheriff v. Morris, 99 Nev. 109, 118, 659 P.2d 852, 859 (1983).

<sup>14</sup>See State v. Underwood, 615 P.2d 153, 163 (1980); People v. Satchell, 489 P.2d 1361, 1369-70 (Cal. 1971), overruled on other grounds by People v. Flood, 957 P.2d 869 (1998).

cc: Hon. David A. Huff, District Judge  
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