

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
Appellant,  
vs.  
WESLEY RHONE RIOS,  
Respondent.

No. 69390

**FILED**

**MAR 16 2016**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

This is an appeal from a district court order granting in part respondent Wesley Rios' pretrial petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Rios was charged by criminal information with two counts of battery with use of a deadly weapon resulting in substantial bodily harm constituting domestic violence, two counts of battery constituting domestic violence — strangulation, and one count each of first-degree kidnapping, second-degree kidnapping, and coercion. Rios challenged the justice court's probable cause determination and bindover to the district court, claiming among other things "the pen allegedly used to puncture [the victim's] skin does not constitute a deadly weapon . . . as it was not used in a manner which was readily capable of causing substantial bodily harm or death." The State now appeals from the district court order granting Rios' pretrial habeas petition in part and dismissing one of the two battery-with-use-of-a-deadly-weapon counts.





We defer to the district court's determination of factual sufficiency when reviewing pretrial orders on appeal. See *Sheriff, Clark Ctny. v. Provenza*, 97 Nev. 346, 347, 630 P.2d 265, 265 (1981). Here, the district court found that the pen was not used as a deadly weapon because the victim did not suffer substantial bodily harm and a pen is "an instrument that's not traditionally used for purposes of committing a deadly injury." In effect, the district court determined the State failed to present the requisite slight or marginal evidence necessary to support one of the two battery-with-use-of-a-deadly-weapon counts. See *Sheriff, Washoe Ctny. v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (Probable cause to support a criminal charge "may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused." (internal citations omitted)); see also NRS 171.206. We disagree.


At the preliminary hearing, the victim testified that Rios stabbed her in the head and the leg with a pen, he stabbed her on the side of her head near her temple, he stabbed her on her leg about an inch or two above the knee, and both her head and her leg began to bleed. Based on the victim's testimony, we conclude the State presented the requisite slight or marginal evidence necessary to support the charge of battery with the use of a deadly weapon and the district court erred by dismissing this count. See NRS 200.481(2)(e); *Zgombic v. State*, 106 Nev. 571, 573-74, 798 P.2d 548, 549-50 (1990) (Explaining that when a deadly weapon is an element of the offense, "an instrumentality, even though not normally dangerous, is a deadly weapon whenever it is used in a deadly manner."),

*superseded by statute on other grounds as stated in Steese v. State*, 114 Nev. 479, 499 n.6, 960 P.2d 321, 334 n.6 (1998). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

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

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Richard Scotti, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Clark County Public Defender  
Eighth District Court Clerk