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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELANIE A. OCHS, Petitioner-Appellant, v. STATE OF NEVADA; et al., Respondents-Appellees.	No. 21-16698 D.C. No. 2:16-cv-00982-JCM-DJA MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted November 17, 2022
San Francisco, California

Before: LINN,** RAWLINSON, and HURWITZ, Circuit Judges.

Melanie Ochs appeals the district court's dismissal of her 28 U.S.C. § 2254 habeas corpus petition. We review the district court's decision de novo, *Vosgien v. Persson*, 742 F.3d 1131, 1134 (9th Cir. 2014), and may not grant relief unless the underlying state court decision was "contrary to, or involved an unreasonable

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and reverse.

1. Ochs was convicted in Nevada state court of the first-degree murder of her foster son, BBC. The jury was instructed on premediated first-degree murder, first-degree felony murder, and second-degree felony murder. The district court correctly held that Instruction 10, which defined the predicate felony on the second theory, used the wrong definition of "child abuse." The first-degree felony murder statute, Nev. Rev. Stat. § 200.030(6)(b), defines "child abuse" as "physical injury of a nonaccidental nature to a child," but Instruction 10, which was apparently based on a definition in a separate statute, Nev. Rev. Stat. § 200.508(1), stated:

> "Child abuse" is defined as a person who willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to place a child in a situation where the child may suffer physical pain or mental suffering as a result.

Mere "neglect" cannot serve as a predicate felony for first-degree felony murder, *Labastida v. State*, 986 P.2d 443, 446 (Nev. 1999) (per curiam), but second-degree felony murder can be predicated on a violation of § 200.508(1), *Ramirez v. State*, 235 P.3d 619, 623–24 (Nev. 2010). A separate and somewhat different instruction about the predicate crime for second-degree felony murder was given, so there can be no doubt that Instruction 10, which was given among the instructions concerning

first-degree murder, was meant to guide the jury when considering first-degree felony murder. Moreover, the instruction omits the phrase "of abuse or neglect" at the end of the first sentence and could therefore allow a conviction for "plac[ing] a child in a situation where the child may suffer physical pain or mental suffering," conduct that would not constitute child abuse under § 200.030(6)(b).

It is well established that the Due Process Clause is violated when the jury is given an instruction that relieves the State of its burden to prove every element of an offense beyond a reasonable doubt. *See Carella v. California*, 491 U.S. 263, 265 (1989); *Sandstrom v. Montana*, 442 U.S. 510, 520, 523 (1979). Instruction 10 allowed the jury to return a conviction without finding all the elements of first-degree felony murder, and the district court therefore correctly found that it was improper. The issue is not, as the state court assumed, whether the instructions as a whole contained all the elements of the various crimes but whether they allowed the jury to convict Ochs of first-degree felony murder without finding all the elements of that offense. *Carella*, 491 U.S. at 265; *Sandstrom*, 442 U.S. at 520; *see also Labastida*, 986 P.2d at 446.

2. After finding no reversible error in Instruction 10, the Nevada Supreme Court stated: "Furthermore, Ochs has failed to show prejudice. See Rose v. State, 86 Nev. 555, 558, 471 P.2d 262, 264 (1970)." Because *Rose* does not deal with constitutional error—or error at all—we do not view its citation as an application of

federal law, but rather simply as support for the state court's erroneous conclusion that the instructions were not constitutionally deficient.[1] A federal court can only grant habeas relief if the trial court's error had a "substantial and injurious effect or influence" on the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). "There must be more than a reasonable possibility that the error was harmful." *Davis v. Ayala*, 576 U.S. 257, 267–68 (2015) (cleaned up).

"More than a reasonable possibility" of harmful error is present here. The central issue at trial was whether BBC's death was accidental or caused by "child abuse." Expert evidence and testimony was presented by each party on that issue, and it was the focus of each party's closing argument. Instruction 10's definition of child abuse, therefore, went to the heart of the case. But Instruction 10 conflated the definition of the predicate felony for first-degree felony murder ("child abuse") with that for second-degree murder ("neglect") and therefore permitted a guilty verdict for first-degree felony murder even if the jury believed that Ochs had only been neglectful. In addition, Instruction 10 could have permitted a finding of first-degree murder for placing BBC in a situation where he might suffer physical pain or mental suffering, which was what Ochs said occurred: she claimed that she placed BBC on

[1] If the Nevada Supreme Court meant to find harmless error under *Chapman v. California*, 386 U.S. 18 (1967), it unreasonably applied established federal law, which requires the State to prove beyond a reasonable doubt that the constitutional error was harmless. *Id.* at 23–24.

a washing machine, became distracted, and he fell and suffered the fatal injury. We therefore are left with "grave doubt" whether the instructional error "had substantial and injurious effect or influence in determining the jury's verdict." *Davis*, 576 U.S. at 267–68 (cleaned up). We reverse and instruct the district court to grant the writ unless Ochs is retried.

REVERSED.