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### Summary of Lamb v. State, 127 Nev. Adv. Op. No. 3

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*Lamb v. State*, 127 Nev. Adv. Op. No. 3 (March 3, 2011)<sup>1</sup>  
CRIMINAL LAW AND PROCEDURE

**Summary**

Appeal from a judgment of conviction by a criminal defendant convicted of first-degree murder and sentenced to life in prison.

**Disposition/Outcome**

District court's judgment affirmed. Defendant's statements were admissible under the public safety exception to Miranda. Defendant's claims of pervasive procedural, evidentiary, and instructional error fail, and an ex parte communication between the bailiff and the jury was non-prejudicial to the verdict.

**Factual and Procedural History**

The State charged Robert Lamb ("Lamb") with the first-degree murder of his sister, Susan Goddard ("Susan"). The State alleged Lamb shot Susan eight times with a .22 caliber revolver outside of her child's school. At trial, the prosecution admitted evidence that Lamb was angry with Susan, blaming her for his failed relationship with his parents. In addition, the prosecution admitted security camera visuals and a cleaning brush for a .22 caliber weapon.

Lamb argued the State failed to meet its burden of proof because the murder weapon was still missing. In addition, Lamb maintained that Earl Cottrell, a friend's ex-husband, murdered Susan. Lamb claimed Cottrell was at the murder scene that day.

A jury found Lamb guilty of first-degree murder with the use of a deadly weapon. The judge sentenced Lamb to life imprisonment without the possibility of parole. Lamb appealed on multiple issues, including Fifth Amendment and Miranda challenges, jury selection, admitted evidence, jury instructions, closing arguments, and misconduct involving the jury.

**Discussion**

*Fifth Amendment and Miranda Challenges*

a. Lamb's Statements to the Police

The police detained Lamb outside of his apartment after the shooting but told him he was not under arrest. An officer asked Lamb his name and Lamb replied, "I don't know, I bumped my head." However, the officers subsequently confirmed Lamb's identity. The officers then asked if Lamb had weapons inside his apartment and Lamb responded, "I have a revolver but I found it." The police next asked Lamb if he would come to the station for an interview, to which Lamb replied, "I don't want to but I will."

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<sup>1</sup> By Erin Elliott

At the station, Lamb spoke with Detective Lance Gibson. Lamb first denied knowing anyone named Susan, but then asked, “Susan Goddard?” Gibson then advised Lamb of his Miranda rights, and Lamb stated he would listen but not respond. After Gibson showed Lamb a picture of Susan, Lamb asked, “She’s the one who is dead?”

Subsequently, the police arrested Lamb and booked him into the Henderson jail. When Lamb arrived, he said he could not remember his name and the answers to other routine intake questions. Once he learned processing as a John Doe was a more involved process, Lamb provided his name, social security number, and other biographical information.

Lamb contended the district court should have granted his motion to suppress the statements he made outside of his apartment and at the police station because he did not receive Miranda warnings. Additionally, Lamb contended his cross-examination violated the Fifth Amendment because the examination involved questions regarding his exercise of the right to remain silent. However, Lamb failed to object to this line of questioning at trial.

#### b. Public Safety Exception

The district court properly admitted Lamb’s unwarned statement “I have a revolver but I found it” as fitting within the public safety exception of Miranda. The Nevada Supreme Court noted police officers can ask unwarned questions if they reasonably believe it is necessary to secure their own or the public’s safety.<sup>2</sup> So long as the questions relate to the reasonable need for safety and are not investigatory in nature, the public safety exception to Miranda applies.<sup>3</sup>

Because the officers knew Lamb was a suspect in a homicide involving a gun, it was within the district court’s discretion to find the officer’s unwarned questions objectively reasonable in light of the officer’s concerns for their safety. Although Lamb argued he was in handcuffs and therefore posed no threat, the handcuffs did not neutralize the risk.<sup>4</sup> Furthermore, Lamb’s apartment had not been swept, the contents of the apartment were unknown, and he was a suspect in a fatal shooting.

#### c. Identification and Booking Questions

Lamb challenged the admissibility of his responses to booking questions asked of him at the jail. However, it was unclear whether he also challenged the admissibility of the identification questions. Nonetheless, in *Pennsylvania v. Muniz*, the United States Supreme Court recognized a booking questions exception to Miranda that applies here.<sup>5</sup> In addition, Lamb’s responses to identification questions did not involve “unusual circumstances” that would make these responses otherwise incriminating.<sup>6</sup>

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<sup>2</sup> See, e.g., *New York v. Quarles*, 467 U.S. 649, 651-60 (1984).

<sup>3</sup> *State v. Estrada*, 430 F.3d 606, 612 (2d Cir. 2005).

<sup>4</sup> See, e.g., *United States v. Are*, 590 F.3d 499, 506-07 (7th Cir. 2009); *United States v. Williams*, 181 F.3d 945, 953-54 (8th Cir. 1999); *United States v. Estrada*, 430 F.3d 606, 613 (2d Cir. 2005).

<sup>5</sup> 496 U.S. 582, 601 (1990).

<sup>6</sup> *Hiiibel v Sixth Judicial Dist. Court of Nev. Humbolt Cnty.*, 542 U.S. 177, 191 (2004).

#### d. Lamb's Impeachment on Cross-Examination

The district court found Lamb's statement that "I'm not going to answer questions without a lawyer, but I'll listen to what you have to say" as invoking his right to remain silent. The Court found statements issued in violation of Miranda can be used to impeach inconsistent testimony if the unwarned statements were voluntary.<sup>7</sup> However, the State cannot use a person's silence after receiving Miranda warnings for impeachment.<sup>8</sup>

Even though Lamb denied knowing Susan before and after invoking his right to remain silent, the State used his denials to impeach Lamb once he took the stand. However, Lamb did not object to the State's questioning at trial. The Court found the State legitimately impeached Lamb because he did not actually remain silent. Also, the State did not go beyond fair impeachment to improper comment on Lamb's right to remain silent.

#### *Jury Selection*

##### a. Voir dire

Lamb appealed the district court's refusal of Lamb's request for a jury questionnaire and restriction of voir dire. In reviewing the decision, the Court applied an abuse of discretion standard and gave the lower court considerable deference.

The jury questionnaire proposed to ask the venire about news coverage of the killing. Instead, the district court conducted individual, oral voir dire. Lamb quoted NRS 175.031 to contend the district court "unreasonably restricted" his voir dire. However, the Court found this was not an abuse of discretion. Rather, courts can limit questions aimed more at indoctrination than acquisition of information.<sup>9</sup>

##### b. Batson Challenge

Citing *Batson v. Kentucky*, Lamb objected to the State's use of a peremptory challenge to dismiss an African American juror.<sup>10</sup> The State's race neutral explanation was that the juror arrived late to court. The Court gave deference to the district court's acceptance of the State's race neutral explanation and explained Lamb did not show pretext or purposeful discrimination.<sup>11</sup>

## 2. Evidence of Restraining Orders and Threats

At trial, the State agreed not to admit evidence that Susan had obtained a restraining order against Lamb unless the district court gave advanced permission. The State also agreed not to admit evidence that Susan told her husband many times she feared Lamb would shoot her

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<sup>7</sup> *Harris v. New York*, 401 U.S. 222, 225-26 & n.2 (1971). See *Johnson v. State*, 92 Nev. 405, 407, 551 P.2d 241, 242 (1976).

<sup>8</sup> *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

<sup>9</sup> *Hogan v. State*, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987).

<sup>10</sup> 476 U.S. 79 (1986).

<sup>11</sup> *Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1036 (2008).

unless there was a proper basis for a hearsay objection. Even so, two of the State's witnesses mentioned these subjects.

A witness mentioned the restraining order in response to the State's question, "Were you ever present when [Lamb] showed up unannounced at Susan's house?" The witness answered, "It was after there had been a restraining order." After Lamb objected, the district court addressed the issue in its jury instruction.

The Court found the restraining order was not admissible to show Susan's state of mind because Lamb did not claim self-defense.<sup>12</sup> Although the State should have instructed its witnesses not to allude to the restraining order,<sup>13</sup> the statement was harmless in light of the district court's curative instruction.<sup>14</sup>

Susan's husband, Stuart, mentioned her statements regarding Lamb during his testimony. The State first presented evidence that Lamb threatened Susan at the preliminary hearing. Lamb conceded it was admissible per the "excited utterance exception" to the hearsay rule.<sup>15</sup> Lamb did not argue to exclude the threat as a "prior bad act."<sup>16</sup>

At trial, Stuart testified Lamb threatened to "bash her face in," "she was so scared," and "many times . . . she thought one day he would shoot her." After Lamb objected, the district court held a hearing outside the presence of the jury. There Lamb conceded the statement about fearing Lamb would shoot her qualified for admission as an excited utterance. He argued, however, that there was no non-hearsay basis for Stuart's testimony that Susan said this "many times." The district court sustained this objection, instructing Stuart to not relate other instances in which Susan expressed this fear and allowed the State to cross-examine Stuart on inconsistencies between this and previous testimony.

Because Lamb failed to raise a prior bad acts objection at trial, the Court applied a plain error review that Lamb did not overcome.<sup>17</sup> First, the Court noted Lamb requested and accepted the district court's ruling that he be allowed to impeach Stuart. Second, while Susan's stated fear calls for a balancing test,<sup>18</sup> it does not implicate Lamb in a "prior bad act" under NRS 48.045(2), beyond the threat to "bash her face in" that Lamb conceded was admissible.<sup>19</sup> Third, Lamb's threats against Susan were relevant to motive and identity since Lamb claimed Cottrell was the shooter. Finally, the evidence against Lamb concerning his hatred of and intent to harm Susan was overwhelming.

### *Errors in the Instructions*

The Court found the district court properly denied Lamb's voluntary manslaughter instruction. The Court applied *Williams v. State*, requiring an instruction on the defendant's

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<sup>12</sup> See *Shults v. State*, 96 Nev. 742, 751, 616 P.2d 388, 394 (1980).

<sup>13</sup> See *People v. Warren*, 754 P.2d 218, 224-25 (Cal. 1988).

<sup>14</sup> See *Sterling v. State*, 108 Nev. 391, 395, 834 P.2d 400, 402 (1992).

<sup>15</sup> NEV. REV. STAT. 51.095 (2007).

<sup>16</sup> NEV. REV. STAT. 48.045 (2007).

<sup>17</sup> See *Moore v. State*, 122 Nev. 27, 36-37, 126 P.3d 508, 514 (2006).

<sup>18</sup> NEV. REV. STAT. 48.035(1) (2007).

<sup>19</sup> See *Salgado v. State*, 114 Nev. 1039, 1042, 968 P.2d 324, 326 (1998).

theory of the case if there is evidence to support it.<sup>20</sup> Lamb did not have evidence to support a voluntary manslaughter instruction and did not object to the instruction at trial.

### *Closing Arguments*

The Court found the district court did not abuse its discretion by not allowing the defense to explore why the reasonable doubt standard exists during closing argument.<sup>21</sup> In addition, the prosecutor can comment on the defense's failure to call an alibi witness during closing argument.<sup>22</sup> The prosecutor can also attack the defense's case and argument, which the prosecutor did here by criticizing the weakness of Lamb's evidence of mental illness.<sup>23</sup> Finally, the prosecutor can comment on the occupation of one juror when the comment is addressed to the jury as a whole and not intended to excite passion.<sup>24</sup>

### *Misconduct Involving the Jury*

The district court rejected Lamb's motion for a new trial based on the bailiff's interaction with the jury. During the second day of jury deliberations, the jury wrote a note to the judge, asking about the difference between first- and second-degree murder. The judge was out and the bailiff told the jury to read the jury instructions.

The Court found the bailiff should have alerted the presiding judge so that the judge could handle the matter pursuant to NRS 175.451, rather than engage in ex parte communication with the jury.<sup>25</sup> Lamb used *Conforte v. State* to argue prejudice is presumed once improper conduct by a bailiff is shown.<sup>26</sup> However, this argument overlooked *Meyer v. State*, which limits the presumption of prejudice to only the most egregious cases, such as jury tampering.<sup>27</sup> Under *Meyer*, once the court is aware of an extrinsic jury communication, the court must determine the content.<sup>28</sup> Then, the court must determine whether there is a reasonable probability that the communication affected the verdict by applying an objective test.<sup>29</sup>

Neither side disputed the content of the communication between the bailiff and the jury, so there is no question that an extrinsic jury communication occurred. In addition, although the bailiff carries great weight with a jury, the district court did not abuse its discretion in determining the communication did not affect the verdict. The instructions the bailiff told the jury to read were not an incorrect statement of the law.<sup>30</sup>

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<sup>20</sup> *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983).

<sup>21</sup> *See Evans v. State*, 117 Nev. 609, 631, 28 P.3d 498, 513-14 (2001).

<sup>22</sup> *Id.*

<sup>23</sup> *See People v. Zambrano*, 163 P.3d 4, 43 (Cal. 2007); *People v. Thornton*, 161 P.3d 3, 48 (Cal. 2007).

<sup>24</sup> *People v. Hartfield*, 484 N.E.2d 1136, 1142 (Ill. App. Ct. 1985).

<sup>25</sup> *See NEV. REV. STAT.* 175.391 (2007).

<sup>26</sup> 77 Nev. 269, 362 P.2d 274 (1961).

<sup>27</sup> *Meyer v. State*, 119 Nev. 554, 564, 80 P.3d 447, 455 (2003).

<sup>28</sup> *Id.* at 563.

<sup>29</sup> *Id.* at 564.

<sup>30</sup> *See Scott v. State*, 92 Nev. 552, 555, 554 P.2d 735, 737 (1976).

## **Conclusion**

The Nevada Supreme Court denied all of Petitioner's bases of appeal and upheld the sentence of life imprisonment without the possibility of parole. In addition, the Court reiterated that exceptions to *Miranda* apply in cases where police officers or the safety of the public are threatened. Finally, routine information obtained during the booking process does not violate the *Miranda* rule.