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Recommended Citation

Murphy, Jocelyn, "City of Las Vegas v. Eighth Judicial Dist. Court, 133 Nev. Adv. Op. 82 (Nov. 16, 2017)" (2017). *Nevada Supreme Court Summaries*. 1102.

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CRIMINAL PROCEDURE: “PLAIN ERROR” STANDARD &
WITNESS EXCLUSION RULE

Summary

(1) The Court held the district court’s order was “contrary to the evidence” because the record was not sufficient to determine that any unpreserved issues were “plain” error. (2) The court also determined that NRS 50.155(1) does not presently bar witnesses from communicating outside of the courtroom about topics other than witness testimony when the witness exclusion rule is in effect.

Background

In 2015, at Steven Kamide’s bench trial, his attorney invoked NRS 50.155(1), the witness exclusion rule. Later, his attorney observed three witnesses talking during a court recess. Upon questioning a witness on the record about the out-of-court discussions, the witness testified that he and the other witnesses did not discuss the case. No further questioning took place. Kamide was found guilty, and on appeal, he alleged for the first time a violation of the witness exclusion rule under NRS 50.155(1). The district court reviewed Kamide’s appeal under the “plain error” standard and determined that the witness exclusion rule had been violated, and that prejudice had to be presumed because the record did not adequately show that the proceeding was free from prejudice. The district court reversed Kamide’s convictions.

Discussion

Although unpreserved issues are generally barred on appeal², appellate courts have discretion to address an error if it was plain, clear from the record, and affected a defendant’s rights.³ An error is “plain” when it “is so unmistakable that it reveals itself by a casual inspection of the record.”⁴ The district court erred when it found “plain” error based on testimony that the witnesses had talked to one another during the recess, but not talked about their testimony. The record is clear in establishing that the witnesses did not discuss their testimony with one another. The witness exclusion rule states, “at the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses.”⁵ Thus, a plain reading of the record did not reveal a violation of NRS 50.155(1). The district court also erred in finding in the record “plain error” that the witnesses had violated the court’s admonishment. NV courts have not yet addressed whether NRS 50.155(1) “impose[s] a duty to limit out-of-court communications between witnesses about their testimony when the witness exclusion rule has been invoked.” Further, even if the court had issued an admonishment to the witnesses the record is not clear as to whether or not the witnesses discussed testimony with each other and thus “plain error” could not be found.

¹ By Jocelyn Murphy.

² Brown v. State, 114 Nev. 1118, 1125, 967 P.2d 1126, 1131 (1998) (internal quotation marks omitted).

³ Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotation marks omitted).

⁴ Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d, 984 (1995) (internal quotation marks omitted).

⁵ NEV. REV. STAT. § 50.155(1) (2013).

Finally, the district court erred in using the *Givens* standard of assumed prejudice based on a silent record.⁶

Conclusion

Applying the plain error standard and NRS 50.155(1) plain error could only be found in the record by speculating. Accordingly, the Court granted the petitioner's petition for a writ of mandamus and vacated the order reversing Kamide's convictions.

⁶ *Givens v. State*, 99 Nev. 50, 657 P.2d 97 (1983) (disapproved of on other grounds by *Talancon v. State*, 102 Nev. 294, 301, n.3, 721 P.2d 764, 768–69, n.3 (1986)).