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Summary of *Rugamas v. Eighth Judicial District Court*, 129 Nev. Adv. Op. 46

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EVIDENCE – HEARSAY, GRAND JURY TESTIMONY

Summary

Original petition for a writ of mandamus or prohibition challenging a district court order denying a pretrial petition for a writ of habeas corpus based on alleged deficiencies in the grand jury proceedings.

Disposition/Outcome

The statements of a child-victim were not properly before the grand jury. Where a child-victim is not subject to cross-examination concerning out-of-court statements, those statements were not excluded from the definition of hearsay under NEV. REV. STAT. 51.035(2)(a). Further, the exception in NEV. REV. STAT. 51.385 for trustworthy statements by a child-victim of sexual assault does not apply to grand jury proceedings.

Because the statements were hearsay and did not fall within an exception that makes hearsay admissible, the grand jury could not consider the statements. Absent the hearsay evidence, there was not sufficient legal evidence to support a finding of probable cause and the indictment cannot stand.

Facts and Procedural History

Rugamas is awaiting trial on an indictment charging him with one count of sexual assault of a minor under age 14 and one count of lewdness with a child under age 14. At the grand jury hearing, the State presented the testimony of four witnesses: the alleged victim (A.C.), her sister (Y.V.), her mother (Elsa), and a forensic interviewer with the Southern Nevada Children's Assessment Center (Faiza Ebrahim). The State presented evidence that on one occasion, Rugamas locked himself and the victim in a bedroom and touched her vaginal area. Unfortunately, A.C., who was six years old at the time of the hearing, was unable to recall significant details of the alleged sexual conduct other than Rugamas locking her in a bedroom. She also did not remember telling the other witnesses that Rugamas sexually abused her.

Y.V., Elsa, and Ebrahim each testified that A.C. had made statements to them that Rugamas' had sexually abused her. At the conclusion of the testimony, the grand jury returned a true bill.

Rugamas filed a pretrial petition for a writ of habeas corpus challenging the grand jury proceedings on several grounds, including that the indictment was based on hearsay in violation of Nevada law. The State responded, asserting that the subject evidence was admissible under NEV. REV. STAT. 51.385. Rugamas countered, arguing that NEV. REV. STAT. 51.385 does not apply to grand jury proceedings because the statute conditions admissibility of the evidence upon

¹ Written by Brittany K. Puzey.

⁴ *Miranda v. State*, 101 Nev. 562, 567, 707 P.2d 1121, 1124 (1985), *overruled on other grounds as recognized in*

a court making a determination that the evidence contains guarantees of trustworthiness. The district court denied the petition after a hearing. In its written order, the district court concluded that the victim's statements were not hearsay because they were prior inconsistent statements, and if they were hearsay, they were admissible under NEV. REV. STAT. 51.385.

Discussion

Hearsay and grand jury proceedings

Since the Nevada Legislature precludes a grand jury from considering hearsay evidence, the threshold question is whether the victim's out-of-court statements were hearsay for purposes of Nev. Rev. Stat. 172.135(2). Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted, but does not include statements made by a person who testifies at the proceeding and is subject to cross-examination about the statements and certain statements made or adopted by a party-opponent or made by a party-opponent's agent or coconspirator. NEV. REV. STAT. 51.035(2), (3).

Here, the district court determined that the victim's statements were not hearsay because they were inconsistent with her grand jury testimony. When a witness's out-of-court statements are inconsistent with her testimony, those statements are not hearsay if the witness "testifies at the . . . hearing and is subject to cross-examination concerning the statement." NEV. REV. STAT. 51.035(2)(a). If these requirements are met, the statements are admissible as substantive evidence,⁴ even in grand jury proceedings, because they are by definition not hearsay. Here, however, the victim testified at the grand jury hearing, but was not subject to cross-examination concerning the statements. The statements therefore were not excluded from the definition of hearsay under NEV. REV. STAT. 51.035(2)(a).

The district court also concluded the statements were not hearsay because they constituted impeachment evidence of the victim. This is true as a general proposition—when used solely for the limited purpose of impeachment, inconsistent statements are not hearsay because they are not being offered for the truth of the matter asserted in the statements. *See* NEV. REV. STAT. 51.035. Here, however, the statements were used primarily for the truth of the matter asserted in the statements—the statements were offered to prove that Rugamas touched the victim's vaginal area; there was no other evidence offered to prove that conduct.

NEV. REV. STAT. 51.385 and grand jury proceedings

The district court determined that the statements were admissible under the hearsay exception set forth in NRS 51.385(1) which allows the admission "in a criminal proceeding" of statements by a child under the age of 10 describing any act of sexual conduct or physical abuse if the child testifies at the proceeding or is unavailable or unable to testify and "[t]he court finds, in a hearing outside the presence of the jury," that there are sufficient guarantees that the statements are trustworthy. In determining trustworthiness, the court must consider several factors, including whether: "(a) The [child's] statement was spontaneous; (b) The child was

⁴ *Miranda v. State*, 101 Nev. 562, 567, 707 P.2d 1121, 1124 (1985), *overruled on other grounds as recognized in* *Bejarano v. State*, 122 Nev. 1066, 1076 n.34, 146 P.3d 265, 272 n.34 (2006).

subjected to repetitive questioning; (c) The child had a motive to fabricate; (d) The child used terminology unexpected of a child of similar age; and (e) The child was in a stable mental state." NEV. REV. STAT. 51.385(2).

Unlike most other statutory hearsay exceptions, NEV. REV. STAT. 51.385 attaches specific conditions to the admission of evidence that necessitate a hearing and findings by the court before the evidence is admissible.⁵ The language in the statute and the nature of grand jury proceedings suggest that this statutory hearsay exception does not apply to grand jury proceedings. The plain language of the statute contemplates admission of evidence in a *criminal proceeding before a court*. A grand jury hearing is not the same as a criminal proceeding conducted before a court. Thus, whereas NEV. REV. STAT. 51.385 contemplates notice to the defendant, a ruling by a court as a precondition to admissibility, and a vigorous contest regarding the reliability of the child-victim's statements, the structure of the grand jury proceeding allows for none of these safeguards.

The safeguards contemplated by NEV. REV. STAT. 51.385 would be unduly obviated for three reasons. First, the plain language of the statute does not support after-the-fact review, particularly considering how grand juries work. Second, the focus of the grand jury is to determine whether the evidence presented establishes probable cause. Introducing evidence that is unrelated to proving the elements of an alleged offense but necessary to develop a record for an after-the-fact challenge to the admissibility of that evidence that may never be pursued is a distraction to the grand jury and irrelevant to its task. Finally, an after-the-fact determination places the burden on the defendant both to challenge the evidence and to establish that it was improperly received by the grand jury when NEV. REV. STAT. 51.385 normally would put the burden on the State to give pretrial notice of its intent to offer the statements and to establish that the statements are trustworthy.⁶

Since the victim's out-of-court statements describing Rugamas' alleged sexual conduct were hearsay and could not be admitted at the grand jury proceeding under the hearsay exception set forth in NEV. REV. STAT. 51.385, the Court must determine whether "there is the slightest sufficient legal evidence and best in degree appearing in the record" on which the grand jury's probable-cause determination may be sustained.⁷ The prosecution must merely show "enough evidence to support a reasonable inference" that the defendant committed the crime charged."⁸ Here, aside from the victim's hearsay statements, no other evidence introduced at the grand jury hearing provided sufficient description of Rugamas' alleged sexual conduct to satisfy the elements of the charged offenses. Left with insufficient evidence to support the probable-cause determination, the Court was compelled to conclude that the indictment is fatally deficient, and therefore the district court manifestly abused its discretion by denying Rugamas' habeas petition.

⁵ Lytle v. State, 107 Nev. 589, 591, 816 P.2d 1082, 1083 (1991), *overruled on other grounds by* Braunstein v. State, 118 Nev. 68, 77, 40 P.3d 413, 420 (2002).

⁶ See Felix v. State, 109 Nev. 151, 181, 849 P.2d 220, 240-41 (1993) (indicating that district court erred by placing burden of challenging reliability of victim's statement under NRS 51.385 on defense), *superseded on other grounds by statute as stated in* Evans v. State, 117 Nev. 609, 625, 28 P.3d 498, 509-10 (2001).

⁷ Avery v. State, 122 Nev. 278, 285, 129 P.3d 664, 669 (2006) (quoting Robertson v. State, 84 Nev. 559, 561-62, 445 P.2d 352, 353 (1968)).

⁸ Sheriff v. Burcham, 124 Nev. 1247, 1258, 198 P.3d 326, 333 (2008) (quoting *Hodes*, 96 Nev. at 186, 606 P.2d at 180).

Conclusion

The district court erred when it denied Rugamas' petition for a writ of habeas corpus. The Court granted Rugamas' petition, and directed the clerk of the Court to issue a writ of mandamus instructing the district court to vacate its order denying Rugamas' petition for a writ of habeas corpus and enter an order consistent with the opinion.