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Summary of Newman v. State, 129 Nev. Adv. Op. 24

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CRIMINAL LAW & PROCEDURE – EVIDENCE
CHILD ABUSE – PARENTAL PRIVILEGE – PRIOR-BAD-ACT EVDENCE

Summary

Appeal from a jury conviction in the Second Judicial District Court, Washoe County, of battery by strangulation and willfully endangering a child as a result of child abuse. The Nevada Supreme Court addressed two issues both rooted in NRS 48.045's prohibition against using character or prior-bad-act evidence to prove criminal propensity. The defendant did not mount a conventional accidental injury defense to the child abuse charge and admitted to possessing an aggressive character, eliminating the relevance for evidence showing this to be true.

Disposition/Outcome

Justice Pickering wrote the opinion of the court, with Justice Hardesty concurring and Justice Cherry concurring in part and dissenting in part. The Court found the trial court harmlessly erred and the conviction against Mr. Newman was left to stand. The district court did not abuse its discretion in admitting evidence that Newman cuffed his younger son on the back of his head at a hospital in August 2009, but the other incidents, including nonphysical arguments and unsubstantiated incidents of child abuse, should not have been allowed. Mr. Newman did not raise the defenses warranting the State's admittance of prior-bad-acts nor character witnesses as to his aggressiveness.

Factual and Procedural History

The morning of September 14, 2009, Shawn Newman followed his twelve-year-old son, Darian, as the boy rode his bike to school. The route was new and Mr. Newman was making sure Darian would get to school on time. When the boy could not make his way up a hill, Mr. Newman left his vehicle to show his son how to use the lower gears on the bicycle. When the boy slipped off the pedals of the bicycle, Mr. Newman thought his son was lying about being too tired to go up the hill.

Mr. Newman gave his son the ultimatum of finishing his way to school on the bicycle or taking a spanking. Darian chose the spanking and readied himself at a wall while his father began to come at him with a belt. A man named Thomas Carmona saw this happen and attempted to stop the spanking. Mr. Carmona and Mr. Newman fought. The fight ended when Mr. Newman choked Mr. Carmona into submission.

At trial, Mr. Newman elected to testify, admitting he could be perceived as an aggressive, loud, obnoxious kind of person. He admitted to the facts of September 14, 2009, but argued that Mr. Carmona attacked him, not the reverse. His defense was justification: parental discipline privilege as to the child abuse charge; and, to some extent, self-defense as to the battery charge.

On cross-examination, the prosecution sought to ask Mr. Newman about various incidents of abusive or aggressive conduct found in a child protective service (CPS) report. The

¹ By Sara Stephan.

district court admitted the questioning, holding that it tended to show absence of mistake or accident as to the child abuse charge.

First, the prosecution asked about two incidents that occurred six weeks earlier, when Darian had appendicitis and was in the hospital. Newman admitted smacking Jacob, Darian's younger brother, on the back the head and getting into a heated argument with hospital staff. He also described his disciplinary parenting style.

The prosecution then asked Newman about two November 2006 and February 2009 incidents with Jacob. These reports were listed as "unsubstantiated" in the CPS report. Newman said he did not recall either, and the prosecution presented nothing to prove these incidents.

The prosecution then presented a surprise rebuttal witness, Connie Ewing, who reported that she, too, had a heated but nonphysical exchange with Newman over his disciplining a young boy outside a local Wal-Mart. The district court allowed this testimony to rebut Newman's testimony that he strangled Carmona in self-defense.

Discussion

NRS 48.045(2)

NRS 48.045(2) prohibits the use of evidence of "other crimes, wrongs, or acts . . . to prove the character of a person."² However, such evidence "may be admissible for other purposes, such as proof of motive, opportunity, intent . . . or absence of mistake or accident."³ In order for such an admission, the prosecutor must establish that "(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."⁴

Relevance and Non-Propensity Purpose

The district court allowed evidence of Newman's prior bad acts involving Jacob to show absence of mistake or accident. However, Newman did not mount a conventional accidental injury defense. Neither mistake nor accident was at issue, and so the prior acts involving Jacob should not have been admitted for that purpose. However, the prosecution argued the prior-bad-act evidence involving Jacob was admissible to refute Newman's parental privilege defense by demonstrating that Newman did not have the intent to correct that forms the heart of that defense.

Nevada has not codified the parental privilege defense, while a number of states have. In Nevada, the privilege exists by virtue of common law⁵ and the "fundamental liberty interest [a parent has] in maintaining a familial relationship with his or her child [which includes] the right . . . 'to direct the upbringing and education of children.'"⁶ That defense requires the prosecution to establish that a parent did not intend to merely discipline his child, but to injure or endanger him. "A parent who disciplines a child in a physical manner intends to correct or alter

² NEV. REV. STAT. § 48.045(2) (2011).

³ *Id.*

⁴ *Bigpond v. State*, 128 Nev. ___, 270 P.3d 1244, 1249 (2012).

⁵ NEV. REV. STAT. 1.030; 3 William Blackstone Commentaries 120 (1862).

⁶ *Willis v. State*, 888 N.E.2d 177, 180 (Ind. 2008) (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925)) (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

their child's behavior. That corrective intent is lacking in a battery."⁷ "Often the only way to determine whether the punishment is an . . . act of discipline that was unintentionally harsh or whether it constitutes the crime of child abuse is to look at the parent's history of disciplining the child."⁸ Here, the district court failed to identify the relevant non-propensity purpose for admitting evidence of the prior incidents. Nevertheless, the evidence did have probative value in assessing Newman's intent.

Clear and Convincing Evidence, Probative Value, and the Incidents Involving Jacob

Identification of an at-issue, non-propensity purpose for admitting prior-bad-act evidence is a necessary first step of any NRS 48.045(2) analysis.⁹ In addition, the prosecution must establish the prior bad act by clear and convincing evidence and demonstrate that its probative value is not substantially outweighed by the danger of unfair prejudice.¹⁰

Judged by these standards, the district court did not abuse its discretion in admitting evidence that Newman had previously struck Jacob at the hospital. That incident had enough probative value to justify admission, and as Newman admitted to hitting Jacob, it was also proven by clear and convincing evidence.

However, the same cannot be said of the November 2006 and February 2009 incidents. The prosecution did not show by clear and convincing evidence that those incidents could be substantiated.

Clear and Convincing Evidence, Probative Value, and the Incidents of Verbal Aggression

It was also error for the district court to admit the evidence that Newman was aggressive to hospital staff and Ewing under NRS 48.045(2). Neither of these incidents had any logical relevance to Newman's parental privilege defense, and both were too factually dissimilar to the battery-by-strangulation charge to refute Newman's claim of self defense.

NRS 48.045(1)(A)

NRS 48.045(1)(A) permits the prosecution to offer similar evidence to rebut evidence offered by an accused of a person's character or a trait of his or her character. Under the collateral-fact rule, extrinsic evidence, other than a conviction may not be offered to impeach a defendant's character evidence¹¹, except when the State "seeks to introduce evidence on rebuttal to contradict specific factual assertions raised during the accused's direct examination."¹²

Here, the district court admitted Ewing's testimony to rebut character evidence from Newman and found the collateral-fact rule didn't apply. That decision was erroneous for three reasons. First, Ewing's testimony did not rebut character evidence. Newman admitted to having an aggressive temperament. Newman did not claim to be peace-loving or nonviolent, so the crux of Ewing's testimony focusing on Newman's violent nature was pointless. Second, evidence of

⁷ *Cesar v. State*, 964 N.E.2d 911, 917 (Ind. Ct. App. 2012).

⁸ *State v. Taylor*, 701 A.2d 389, 396 (Md. 1997).

⁹ *Bigpond*, 128 Nev. at ___, 270 P.3d at 1249

¹⁰ *Id.*

¹¹ NEV. REV. STAT. § 50.085(3) (2011).

¹² *Jezdik v. State*, 121 Nev. 129, 138, 110 P.3d 1058, 1064 (quoting 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 49, at 202 (5th ed. 1999)).

Newman's character was collateral. Verbal combativeness was not an issue. Third, Ewing's testimony did not comply with the requirements of NRS 48.055. Ewing did not give an opinion or discuss Newman's reputation. It is improper to use evidence of specific acts that the accused has not previously being confronted with.¹⁵ Ewing discussed a specific instance of conduct that was not, and could not have been, previously raised by Newman or explored by the prosecution in its cross-examination of him.

Harmless-Error

Non-constitutional errors are deemed harmless unless they have a "substantial and injurious effect or influence in determining the jury's verdict."¹⁶ Here, the error in allowing the prosecution to ask Newman about the November 2006 and February 2009 incidents was harmless. The jury heard nothing about those incidents beyond the fact that Newman could not recall them. Additionally, the jury was instructed not to speculate that insinuations suggested by a question are true. Finally, given Newman's own frank admissions and overwhelming evidence on the child abuse charge, the error cannot be said to have had a substantial and injurious effect on the verdict.

Likewise, the error in admitting the testimony of Ewing and evidence of the hospital confrontation was also harmless. Newman's battery conviction rested on his own testimony, corroborated by numerous eyewitnesses, that he strangled Carmona. Additionally, his defense was primarily built around lack of bodily harm, and only minimally on self-defense. Furthermore, the prosecution made almost no use of the Ewing testimony. Thus, admitting both pieces of evidence was a harmless error.

Conclusion

Newman's conviction is affirmed. The court erred in admitting numerous pieces of evidence, but those evidentiary errors did not taint the accused's right to a fair trial.

Justice Cherry, concurring in part and dissenting in part:

The analysis of these errors by the majority is outstanding and can be considered a landmark holding in the often-contested area of NRS 48.045's prohibition against using character or prior-bad-act testimony to prove criminal responsibility. The problem with the majority's decision is holding these errors were harmless. Mr. Newman should be granted a new trial. Looking ahead at the long run view, fixing these errors now and retrying cases correctly will foster fairness and a closer watch against errors.¹⁷

¹⁵ *Roever v. State*, 114 Nev. 867, 871, 963 P.2d 503, 505 (1998).

¹⁶ *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

¹⁷ ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 22-23 (1970).