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Summary of Rodriguez v. Nevada, 128 Nev. Adv. Op. 14

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CRIMINAL LAW—EVIDENCE

Summary

An appeal from a district court criminal conviction, pursuant to a jury verdict, on evidentiary grounds.

Disposition/Outcome

The Court affirmed the district court's judgment of conviction.

First, the Court found that the district court had abused its discretion in admitting ten of the twelve text messages into evidence without sufficient evidence authenticating the defendant as the author of the text messages. However, because the Court concluded that the error was harmless, the Court did not overturn the verdict.

Second, the Court the found that the defendant's ability to cross-examine the expert witness or offer his own expert witness' testimony as to the probative value of the DNA nonexclusion evidence substantially outweighed any danger of unfair prejudice or misleading the jury.

Factual and Procedural History

Kevin Rodriguez and his codefendant, Timothy Sanders, entered the victim's apartment on May 12, 2008. Rodriguez and Sanders bound and blindfolded the victim, and demanded her money. After Rodriguez and Sanders repeatedly threatened to "blow her head off," the victim told the men that she kept her debit card in her car and that she would give them her Personal Identification Number (PIN).

One of the men went to retrieve the debit card from the car, while the other man sexually assaulted the victim.. The latter threatened to kill the victim if she resisted too much.

After the sexual assault, the men threw the victim into the closet and threatened to kill her if she gave them the wrong PIN. The perpetrators also took the victim's phone. Later that evening, video surveillance filmed the perpetrators on a bus while they used the victim's phone to send text messages to her boyfriend.

The victim escaped to a neighbor's home where she called the police. A police detective later took her to a hospital.

At the hospital, the victim's boyfriend showed the detective twelve text messages he received from the victim's cellphone after the attack. Early in the morning on May 13, 2008, the victim's boyfriend started receiving text messages from the victim's phone. These messages

¹ By Rami Hernandez.

graphically explained how the perpetrators had sexually assaulted the victim and threatened to kill her if he did not come over to her apartment.

Later, Sanders' cousin recovered the phone. Sanders' cousin testified at trial that Sanders asked him to take the phone when the police arrested him and Rodriguez. The phone also contained photos of Rodriguez, the codefendant, and the codefendant's girlfriend.

Other evidence also linked Rodriguez and Sanders to ATM withdrawals from the victim's bank account. The perpetrators used the card on three different occasions. A detective from the Las Vegas Metropolitan Police Department (LVMPD) identified Rodriguez and Sanders after viewing the surveillance videos from the ATMs.

Additionally, DNA evidence linked Rodriguez to the ATM transactions. A LVMPD expert testified at trial regarding a pair of sneakers which were identical to the sneakers Rodriguez was seen wearing in the ATM surveillance videos. The expert compared the DNA samples to samples obtained from Rodriguez, the victim, Sanders, Sanders' cousin, and the victim's boyfriend. The expert could not exclude Rodriguez as a contributor to the samples taken from the sneakers nor could she identify him as the source.

During the trial, defense counsel asked the expert if she could exclude any percentage of the population based on the sample she had tested. The expert admitted that she had not calculated the statistical information for the sneakers. Defense counsel then objected to the DNA evidence because it was "meaningless." The district court overruled the objection and stated that the evidence "goes to the weight of admissibility." In addition, the Court noted that the prosecution had timely handed over the records to the defense and that the defense could have hired its own expert to run the tests and contradict the prosecution's expert.

A jury found Rodriguez guilty of multiple counts after a seven-day trial. Rodriguez appealed the conviction.

Discussion

Justice Hardesty wrote the unanimous opinion of the Court sitting in a three-justice panel. On appeal, Rodriguez argued two points. First, he claimed that the district court erred in overruling his objection to the admission of the twelve text messages sent from the victim's phone because the state failed to authenticate the text messages, and thus they constituted inadmissible hearsay. Second, he argued that the district court erred in overruling his objection to the admission of DNA nonexclusion evidence because the evidence was irrelevant without the supporting statistical data. Citing NRS 48.035(1),³ Rodriguez claimed that the probative value of the DNA evidence "was greatly outweighed by the danger of unfair prejudice and misleading the jury." He argued that the expert's testimony implied that Rodriguez was a contributor when anyone could have been a contributor.

³ NEV. REV. STAT. § 48.035(1) states, "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."

Authentication and Identification

The Court first addressed the issue of the text messages. The Court stated that text messages present new analytical challenges that had not been considered, so it took this opportunity to address how text messages interact with the rules of evidence. The Court reviewed the district court's decision for abuse of discretion.

Rodriguez first complained that the State did not sufficiently authenticate the text messages. In particular, Rodriguez argued that the State did not establish that he sent the messages and therefore they were not admissible against him.

To begin, the Court stated that, only relevant evidence is admissible⁵ and that evidence must be authenticated.⁶ The Court stated that the proponent of the evidence "control[s] what will be required to satisfy the authentication requirement" by "deciding what he offers to prove."

As the question of authenticating text messages is an issue of first impression in Nevada, the Court examined precedents from Pennsylvania, Maryland, and North Carolina.⁸ From the reasoning of these courts, the Court concluded that establishing the identity of the author of a text message through the use of corroborating evidence is critical to satisfying the authentication requirement for admissibility. The Court determined that if there is an objection regarding the admissibility of a text message, the proponent has the burden to explain the purpose for which the text message is being offered and to provide sufficient direct or circumstantial corroborating evidence of authorship in order to authenticate the text message.⁹

In this case, the State offered the text messages to prove that Rodriguez was one of the men who assaulted the victim. Thus, the messages were only relevant to the extent that the state could authenticate them as being authored by Rodriguez.

The state established that the victim's cellphone had been stolen during the attack, that the victim's boyfriend received the twelve messages from the cell phone after the attack, and that the cell phone had been recovered from Sanders' cousin. However, the state was only able to authenticate two of the twelve messages as being authored by Rodriguez. Surveillance video from the bus the perpetrators had taken after the attack showed that Sanders used the victim's cell phone to send two of the text messages while Rodriguez watched and participated. The Court thus found that Rodriguez had endorsed the two text messages and that they could connect him

⁵ NEV. REV. STAT. § 48.025(2); NEV. REV. STAT. § 48.015 states, "[a]s used in this chapter, 'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

⁶ NEV. REV. STAT. § 52.015(1) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what the proponent claims[.]"

⁸ Specifically, the Court cited *Commonwealth v. Koch*, ___ A.3d ___, ___, No. CP-21-CR-0002876-2009, 2011 WL 4336634, at *6 (Pa. Super. Ct. Sept. 16, 2011), *Dickens v. State*, 927 A.2d 32, 36-37 (Md. Ct. Spec. App. 2007), and *State v. Taylor*, 632 S.E.2d 218, 230-31 (N.C. Ct. App. 2006).

⁹ The court referenced NEV. REV. STAT. §§ 52.015(1), 47.060, and 47.070.

to the assault. . The other ten messages were sent while Rodriguez and Sanders were outside of video surveillance.

Because ten of the messages had not been properly authenticated, but the messages were still imputed to Rodriguez, the Court ruled the district court had abused its discretion in admitting the messages. Nonetheless, the Court found the error harmless because of the overwhelming evidence in other parts of the record to support the conviction. The Court also found that the two authenticated text messages did not constitute hearsay under Nevada law.

Admissibility of DNA Nonexclusion Evidence

The Court then addressed the admissibility of the DNA nonexclusion evidence. At trial, Rodriguez claimed that, without the statistics of who could be excluded from the sample, the evidence was either irrelevant or had limited probative value but a significant risk of unfair prejudice or misleading the jury. The Court disagreed.

The Court reviewed the district court's decision to admit or exclude evidence for an abuse of discretion. To determine whether nonexclusion evidence should be included in an expert's analysis in absence of supporting statistical data, the Court consulted other state authorities.¹¹ The Court agreed with these jurisdictions in holding that DNA nonexclusion evidence is admissible in the absence of supporting statistical data reflecting the percentage of the population that could be excluded as long as the nonexclusion evidence is relevant, because any risk of unfair prejudice is outweighed by the defendant's ability to cross examine the witness or to offer his own expert witnesses evidence as to probative value.

In this case, the expert testified that Rodriguez could neither be excluded as the source of the DNA nor that he was the source of the sample. Defense counsel competently cross-examined the expert regarding the tests she had conducted on the sample. Ultimately, the jury was the ultimate arbiter in determining what weight to give the evidence. Further, Rodriguez had ample opportunity to call his own witness to rebut the DNA nonexclusion evidence as an expert. Thus, the district court did not abuse its discretion by not admitting the DNA nonexclusion evidence.

Conclusion

A district judge in a criminal trial cannot impute text messages to a defendant and allow the messages into evidence without sufficient corroborating evidence identifying the defendant as the author of the text messages. Additionally, DNA nonexclusion evidence in the absence of supporting statistical data reflecting the percentage of the population that could be excluded is admissible under the rules of evidence as long as the evidence is relevant, because the risk of prejudice to the jury is outweighed by the defense's ability to cross-examine the witness

¹¹ Specifically, the Court cited *Sholler v. Com.*, 969 S.W.2d 706, 709 (Ky. 1998), *State v. Harding*, 323 S.W.3d 810, 816 (Mo. Ct. App. 2010), *People v. Schouenborg*, 840 N.Y.S.2d 807, 808 (App. Div. 2007).