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### Summary of Fields v. State, 125 Nev. Adv. Op. No. 36

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*Fields v. State*, 125 Nev. Adv. Op. No. 36 (Dec 10, 2009)<sup>1</sup>

**Evidence – Admissibility of Prior Bad Act Evidence**

**Summary**

This case is an appeal from the Fourth Judicial District Court judgment of conviction of first-degree murder and conspiracy to commit murder. The appellant asserts error in admitting prior bad act evidence, error in excluding witness testimony as inadmissible extrinsic evidence, error in admitting telephone conversations subject to marital privilege, error in instructing the jury on specific intent, and improper argument by the prosecutor in closing argument.

**Disposition/Outcome**

Fields' conviction of murder and conspiracy to commit murder was affirmed because the district court did not abuse its discretion in its evidentiary rulings and jury instructions.

**Factual and Procedural History**

This case involves the murder of Jaromir Palensky. In 2002, Palensky was sentenced to an 18-month prison term. Before Palensky went to prison, he gave Linda Fields (Linda) general power of attorney. While Palensky was serving his prison term, Linda liquidated a number of his assets and transferred the proceeds into joint accounts held with John Vernon Fields (Fields). Additionally, Linda took out a \$300,000 life insurance policy on Palensky's life and listed herself as the beneficiary. Furthermore, after Palensky's death a will surfaced. The will named Linda and Fields as beneficiaries and recited that it had been written for Palensky by a man that had since deceased. Evidence presented at trial established that the writing was a forgery by Fields.

Before Palensky disappeared, he had been living in a trailer on the ranch leased by Fields and Linda. At that time he was working for Fields and Linda as a ranch hand. Palensky was last seen alive in December of 2003, at the ranch. In January of 2004, Palensky's body was found floating in a river. Forensic evidence showed that blunt force blows to the back of his head had killed Palensky.

Fields and Linda were tried in separate trials and Fields was charged with first-degree murder and conspiracy to commit murder. Fields argued that he did not murder Palensky, and that even if Linda arranged Palensky's death, he was not involved with any scheme to murder him.

At trial, the district court admitted prior bad act evidence regarding Roy Mobert. Mobert's lawyer, Gregory Corn, provided the evidence. Corn testified that Mobert gave Linda power of attorney in 2000 and revised his will to include her and Fields as beneficiaries before Mobert underwent a hospital procedure. Linda subsequently used the power of attorney to sell some of Mobert's assets and transfer to proceeds into joint accounts held with Fields. When Mobert realized this, he sued Linda and Fields. To settle the suit, Linda and Fields returned the money they had and provided a note for the rest, secured by a deed of trust on the Silver Dollar Bar. Linda and Fields defaulted on the note and filed for bankruptcy in 2002. In November

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<sup>1</sup> By John F. Burns

2003, Mobert obtained an order lifting the bankruptcy court stay against foreclosure on the Silver Dollar Bar. Shortly thereafter Palensky disappeared. The district court also admitted a tape recording of Fields, Linda and Billy Wells discussing a scheme to kill Mobert and make it look like an accident. The State argued that the recorded conversation was similar to one Linda and Fields had with Ralph Mackley about killing Palensky because in both instances Linda indicated that the victim was a child molester.

Fields challenged the admissibility of the evidence offered by Corn and the taped conversations, claiming that they were inadmissible as propensity evidence. The district court admitted the evidence to establish that Linda and Fields had monetary motive to kill Palensky, that Fields had knowledge of the scheme to murder Palensky, and to prove identity. The district court found that the evidence was sufficiently clear and convincing to admit it into evidence. The district court also found that in light of the limiting instructions provided to jurors and the fact that the contested evidence took less than a half day of the two-week trial, the risk of unfair prejudice did not substantially outweigh the probative value of the evidence.

In addition, at trial the district court excluded testimony of two witnesses who would have testified about negative statements made to them by third parties concerning Mike Walker, a witness for the State. It also admitted evidence of recorded telephone conversations between Linda and Fields from when Linda was in jail. Furthermore, in its jury instruction on specific intent, the district court stated that “murder is a specific intent crime” and that “[s]pecific intent means the intent or active desire to accomplish a precise act or hidden objective.” However, the district court did not add that “specific intent is not merely the intent to do an act,” as requested by Fields.

Finally, when Linda spoke to Fields on a jail phone, she complained that she was in jail because of what Fields did, and Fields did not contest that accusation. At the district court, the State commented on Fields’s silence, and Fields objected. The district court sustained the objection as it could be inferred as a comment on Fields’s refusal to testify, but overruled the objection to the extent that the silence was an adoptive admission.

The jury convicted Fields of murder and conspiracy to commit murder in connection with the death of Palensky. Fields appealed, asserting error in admitting prior bad act evidence, error in excluding witness testimony as inadmissible extrinsic evidence, error in admitting telephone conversations subject to marital privilege, error in instructing the jury on specific intent, and improper argument by the prosecutor in closing argument.

## **Discussion**

### *Standard of Review*

A district court’s decision regarding admission of prior bad act evidence is not reversed on appeal unless there is a finding of manifest error.<sup>2</sup>

### *Admissibility of Prior Bad Act Evidence*

Evidence of other crimes, wrongs, or acts cannot be introduced into evidence to “prove the character of a person in order to show that he acted in conformity therewith.”<sup>3</sup> Prior bad act

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<sup>2</sup> Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

<sup>3</sup> NEV. REV. STAT. § 48.045(2) (2007).

evidence may be admissible for proof of motive, intent, knowledge, or identity.<sup>4</sup> Such evidence is only admissible when the trial court determines “that: (1) the incident is relevant to the crime charged; (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.”<sup>5</sup>

The Court held that there was no error in admitting the prior bad act evidence because the prior bad act evidence of Fields’s interactions with Mobert and prior discussions regarding killing Mobert were relevant to motive, intent, knowledge, and identity. The Court reasoned that at the time Palensky disappeared, Linda and Fields were in desperate financial condition due to their prior interaction with Mobert. As beneficiaries to a life insurance policy on Palensky, and to Palensky’s forged will, Linda and Fields stood to benefit financially from Palensky’s death, providing a motive to kill Palensky. Additionally, the Court held that the Mobert evidence had relevance to knowledge and intent because it showed that Fields was not an innocent bystander to Linda’s plan to commit murder. The Court concluded that prior participation in a conspiracy may be admissible to refute claims by the defendant that his acts in a subsequent conspiracy were “nothing more than innocent acts of a friend, and not a knowing participation in a conspiracy.”<sup>6</sup> Finally, the Court held that the Mobert evidence tended to prove identity. Evidence of prior bad acts may be admissible only when the “prior behavior demonstrates characteristics of conduct which are unique and common to both the defendant and the perpetrator whose identity is in question.”<sup>7</sup> The Court held that the district court did not abuse its discretion when it determined that the Mobert and Palensky facts were sufficiently similar and unique for use in showing identity. The Court reasoned that the facts were sufficiently similar because both Mobert and Palensky were older men that gave Linda power of attorney which she used to transfer assets to accounts held by Linda and Fields. In both cases, when the men recovered, Linda and Fields spoke with third parties about killing the men. Additionally, in each encounter, Linda falsely accused the men of being a child molester in conversation with the third parties.

The Court concluded that the Mobert evidence was sufficiently clear and convincing to admit it into evidence. The Court also concluded that in light of the limiting instructions provided to jurors and the fact that the contested evidence took less than a half day of the two-week trial, the district court did not abuse its discretion in determining that the risk of unfair prejudice did not substantially outweigh the probative value of the evidence.

#### *Exclusion of Witness Testimony as Inadmissible Hearsay*

The Court held that the district court did not abuse its discretion in excluding the testimony of two witnesses who would have testified about negative statements made to them by third parties concerning a witness for the State. The Court concluded that such testimony was inadmissible hearsay because no evidence indicated that the third parties were unavailable, because the statements were not statements against penal interest, and because the statements were not excited utterances.

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<sup>4</sup> *Id.*

<sup>5</sup> *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

<sup>6</sup> *United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009).

<sup>7</sup> *Canada v. State*, 104 Nev. 288, 292-293, 756 P.2d 552, 554 (1988).

### *Admissibility of Jail Telephone Conversations*

The Court rejected Fields's argument that admission of recorded telephone conversations between Linda and Fields from when Linda was in jail violated the marital privilege.<sup>8</sup> The Court reasoned that because both Linda, as the inmate, and Fields, as the outside caller, listened to warnings that indicated that their conversation was being recorded, Fields waived any expectation of privacy.

### *Jury Instruction on Intent*

The Court rejected Fields's argument that the jury instruction was inadequate because it did not state that "murder is a specific intent crime" and "[s]pecific intent means the intent or active desire to accomplish a precise act or forbidden objective, not merel the intent to do an act." The Court reached this conclusion because the jury was instructed that "the Defendant cannot be found guilty of murder merely because it was a natural and probable consequence of the conspiracy unless he had a specific intent to commit murder" and that first degree murder requires a "willful, deliberate and premeditated killing." The Court found that the jury instruction provided adequately conveyed the information Fields sought to add to the specific intent instruction.<sup>9</sup>

### *Admissibility of State's Comment Regarding Fields's Silence*

At trial court, the State commented on Fields's silence after Linda accused him of being the cause of her incarceration, and Fields objected. The district court sustained the objection as it could be inferred as a comment on Fields's refusal to testify, but overruled the objection to the extent that the silence was an adoptive admission. On appeal, the Court concluded that the State's comment should have been more narrowly tailored but found that the district court's ruling did not constitute reversible error.

### **Conclusion**

The Court concluded that the district court did not abuse its discretion in making the evidentiary rulings it did or commit instructional error. Accordingly, the Court affirmed the judgment of conviction.

### **Dissenting Opinion (Cherry, J.)**

Justice Cherry's dissenting opinion questioned the relevance of the bad act evidence and whether its probative value was outweighed by unfair prejudice. Justice Cherry pointed out that Corn was not Mober's attorney at the time that Linda obtained power of attorney for Mober, but his testimony focused on that time period. Furthermore, Justice Cherry questioned the relevance of the testimony regarding Fields's conversations with Wells, because the recorded conversations were not sufficient to bring charges against Fields and because the officers involved questioned Wells's reliability. The dissenting opinion also found that the prior act

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<sup>8</sup> NEV. REV. STAT. § 49.295 (2007).

<sup>9</sup> See *Powell v. State*, 113 Nev. 258, 262-63, 934 P.2d 224, 227 (1997).

evidence was insufficient to show identity because it was not an “integral part of an overarching plan explicitly conceived and executed by the defendant.”<sup>10</sup>

Justice Cherry found that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice and the danger of misleading the jury.<sup>11</sup> This opinion relied on the finding that explanation of a civil suit during a criminal prosecution is confusing to the jury to the differing standards.

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<sup>10</sup> *Ledbetter v. State*, 122 Nev. 252, 260-61, 129 P.3d 671, 677-78 (2006).

<sup>11</sup> NEV. REV. STAT. § 48.035(1) (2007).