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Summary of Zana v. State, 125 Nev. Adv. Op. No. 41

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Zana v. State, 125 Nev. Adv. Op. No. 41 (Sept 24, 2009)[1]

CRIMINAL LAW – ADMISIBILITY OF SEALED EVIDENCE, JURY MISCONDUCT, AND JOINDER OF CHARGES

Summary

An appeal from a judgment of conviction in the Eighth Judicial District Court, pursuant to a jury verdict, of one count of open or gross lewdness, three counts of lewdness with a child under the age of fourteen, and six counts of visual representation depicting sexual conduct of a person under the age of sixteen.

Disposition/Outcome

The district court's decision is affirmed with regard to the three issues presented. First, the district court may permit testimony that is confined to a witness's personal experiences so long as the witness does not rely on previously sealed or expunged court proceedings and there is no indication that such proceedings took place. Second, any jury misconduct in this case did not prejudice the verdict and thus, did not warrant a new trial. Third, the district court did not abuse its discretion by denying the motion to sever the lewdness counts from the child pornography counts because the evidence presented in each case was admissible in the other.

Factual and Procedural History

Mark R. Zana ("Zana"), a fifth grade teacher, was alleged to have touched female students while under his supervision. The girls alleged that Zana would touch their breasts and/or invite them to place their hand in his pocket to get candy. During the investigation of these allegations, two previous allegations against Zana came to light.

In 1992, while in Pennsylvania, Zana was accused of pinning a 13-year-old girl against his bed and fondling her breast. Zana agreed to a plea bargain and the records of the case were sealed. Additionally, in 1998, while working as a teacher in Henderson, Nevada, Zana was accused of enticing a second-grader to touch his penis by telling her she could retrieve candy from his pocket. This case was dismissed because the victim's parents did not want her to have to testify. The records of the dismissed Henderson case were subsequently sealed.

The State introduced the prior allegations against Zana through the testimony of his alleged victims. The State sought to use the evidence to prove Zana's motive in touching his female students and to rebut Zana's claims that the touching was accidental or a mistake. Because the records of the previous incidents were sealed, the district court limited the victims' testimony to Zana's actual conduct and the witnesses' experiences, excluding testimony regarding subsequent charges and judicial proceedings.

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[1] By Anthony R. Sassi

Discussion[2]

Sealed or expunged cases

When a court orders a record sealed "[a]ll proceedings recounted in the record are deemed never to have occurred."[3] This permits the individual to properly deny his arrest, conviction, dismissal, or acquittal in connection with the proceedings[4] and to pursue law-abiding citizenship unencumbered by records of past transgressions.[5] However, such disavowals cannot erase history nor force persons to disregard independently known facts of an individual's criminal record.[6] A sealing order erases many of the consequences that potentially flow from past transgressions, but it is beyond the power of the court to unring a bell.[7]

Here, the district court preserved the effect of the sealing orders, while correctly admitting testimony to which the sealing orders do not apply. Neither the Pennsylvania order nor the Henderson order erased the witnesses' memories of Zana's inappropriate conduct.

Jury Misconduct

While at home during a break from deliberations, one juror engaged in an unsuccessful search for a pornographic website that was mentioned during the trial. Upon returning, he advised his fellow jurors of his fruitless search but came to no conclusions about the meaning of that failure. After discussing the search for a few moments the jury returned to deliberation and rendered a verdict a few hours later.

When juror misconduct involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of the prejudicial effect of any misconduct is appropriate[8] To justify a new trial, "[t]he defendant must demonstrate, through admissible evidence, the nature of the juror misconduct and that there is a reasonable probability that it affected the verdict."[9] The factors that guide a juror prejudice inquiry include how long the jury discussed the extrinsic evidence, when that discussion occurred relative to the verdict, the specificity or ambiguity of the information, and whether the issue involved was material.[10]

The Court concluded that the juror's independent search did amount to the use of extrinsic evidence in violation of the Confrontation Clause, however it did not rise to a level so

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[2] Appellant also argued that (1) he is entitled to a new trial based upon the introduction of inadmissible prior bad acts pursuant to NEV. REV. STAT. § 48.045(2) (2007); (2) the district court erred by admitting several instances of hearsay testimony; (3) the district court erred by failing to suppress images obtained from his computer because the search warrant did not contain sufficient information to support probable cause; (4) insufficient evidence supported his conviction of possession of visual representations depicting sexual conduct of a person under the age of 16; (5) the district court erred by failing to dismiss the child pornography counts; and (6) his conviction should be reversed based on the cumulative errors committed during trial. These Court concluded that these challenges were without merit.

[3] NEV REV. STAT. § 179.285 (2007).

[4] *See* Yllas v. State, 112 Nev. 863, 867, 920 P.2d 1003, 1005 (1996).

[5] *See* Baliotis v. Clark County, 102 Nev. 568, 570-71, 729 P.2d 1338, 1340 (1986).

[6] *Id.* at 571, 729 P.2d at 1340.

[7] *See id.*

[8] Meyer v. State, 119 Nev. 554, 561-62, 80 P.3d 447, 453 (2003).

[9] *Id.* at 565, 80 P.3d at 456.

[10] *Id.* at 566, 80 P.3d at 456.

prejudicial as to necessitate a new trial. The jurors only briefly discussed the search and deliberated at least a few hours more. The failed search was highly ambiguous and could not have affected the jury's inquiry, although the issue that motivated the search was material.

Joinder of Charges

Joinder decisions will not be reversed absent an abuse of discretion.[11] Criminal charges are properly joined whenever: (1) the acts leading to the charges are part of the same transaction, scheme, or plan; or (2) the evidence of each charge would be admissible in the separate trial of the other charge.[12]

Joinder was proper here because the evidence of each charge would have been admissible in a separate trial. The lewdness charge required the State to prove that Zana touched his victims for the purpose of sexual gratification.[13] The pornography on his computer suggests that he found images of young girls sexually gratifying. Likewise, evidence of his lewd behavior suggests that the pornography was not the result of an accident or mistake.

Conclusion

The Court concluded that the district court properly exercised its discretion in admitting the testimony of Zana's prior victims, denying his motion for a mistrial based on juror misconduct, and denying his motion to sever lewdness and pornography charges. Accordingly, the Court affirmed the judgment of conviction.

[11] Tillema v. State, 112 Nev. 266,268, 914 P.2d 605, 606 (1996) (quoting Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990)).
[12] NEV. REV. STAT. § 173.115 (2007); Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1998); *see generally*, Robinson v. United States, 459 F.2d 847, 855-56 (D.C. Cir. 1972).
[13] NEV. REV. STAT. § 201.230 (2007).