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Summary of Grey v. State, 124 Nev. Adv. Op. No. 11

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Maw, Katie, "Summary of Grey v. State, 124 Nev. Adv. Op. No. 11" (2008). *Nevada Supreme Court Summaries*. 453.

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Grey v. State, 124 Nev. Adv. Op. No. 11 (Mar. 13, 2008)¹

CRIMINAL LAW – SIXTH AMENDMENT/CONFLICTS OF INTEREST

Summary

Appeal from a judgment of conviction pursuant to a jury verdict.

Disposition/Outcome

The Court announced a new rule that parties who intend to present expert rebuttal witnesses must provide notice of the expert rebuttal witnesses to the other party. Here, the prosecution's failure to provide such notice was not found to be plain error requiring reversal. However, the Court also found that the State must duly file an allegation of habitual criminality before a defendant may be sentenced as a habitual criminal under NRS 207.010. Because the prosecution had not done so in this case, the Court vacated the sentence and remanded.

Factual and Procedural History

On March 19, 2005, James Grey approached an acquaintance, Tracie Fryer, and asked her for a ride in her car. Fryer refused, but when Grey jumped into her passenger seat uninvited, she finally agreed to give him a ride after picking up some friends. Fryer testified that Grey seemed agitated and complained that someone had spiked his beer and tried to rob him. After Fryer picked up her friends, Grey also claimed he had a gun in his possession. Eventually Grey threatened to throw Fryer out of the car and steal it. At that point, Fryer pulled into a gas station and entered a convenience store, accompanied by her friends. When Grey also got out of the car, Fryer and her friends reentered the car and attempted to drive away without him. Grey then jumped onto one of the running boards and smashed a window, causing Fryer to stop the car. Her friends retreated into the convenience store while she remained behind talking to Grey. A short time later he grabbed the ignition key and broke it. Fryer then reentered the store.

A store employee who had witnessed the events transpiring had called 911. When police arrived, Grey retreated to the back of the store, grabbing Fryer around her neck and making a motion as if he were reaching into his waistband. He started yelling that he was going to kill one of the pursuing police officers. The police were finally able to take Grey into custody after tazing him several times.

Upon his arrest and transportation to the Clark County Detention Center, Grey repeatedly asked the detention medical staff to test him for drugs. He claimed that someone had spiked his beer earlier that day, and he attributed his behavior to the spiked beer. The medical staff did not perform any manner of drug test on Grey. During this time, Grey began to preach about a revolution, and as a result of this preaching he was placed in the psychiatric ward at the detention center. While there, he continued to preach, refused to eat, and stood in front of his door completely naked. Grey claimed he had never been diagnosed with paranoid schizophrenia, bipolar disorder, or any other mental illness.

¹ By Katie Maw.

Ultimately he was charged with false imprisonment by using a person as a human shield. His defense at trial was that he had been involuntarily intoxicated at the time the alleged crime was committed. He introduced an expert witness, Dr. Krelstein, who testified that Grey's actions on the day of the crime were the result of involuntary intoxication, opining that his behavior indicated Grey was on PCP, and that PCP was soluble in water. On cross-examination, he admitted that he did not know whether Grey was on methamphetamine that day, and that his theory was only valid under the assumption that Grey did not voluntarily consume something.

The state then called an expert rebuttal witness, Dr. Karagiozis. The state's notice of witnesses did not include any expert rebuttal witnesses, though Grey's notice stated that Dr. Krelstein would testify on his behalf.

Grey objected to Dr. Karagiozis' testimony on the ground that he was not qualified to render an opinion on mental health, drug abuse, or involuntary intoxication. Grey's counsel was allowed to examine Dr. Karagiozis outside the jury's presence to determine his qualifications as an expert witness. The state then again offered Dr. Karagiozis as a witness. The district court asked the defense if they had any objections, and they said that they did not. Thus, Dr. Karagiozis was allowed to testify as an expert rebuttal witness.

Dr. Karagiozis testified that PCP would not have caused Grey to act in that manner, and that, depending on the form of the PCP, it would have either taken a very long time to dissolve or would have bubbled over immediately. Further, he testified that the only tasteless drugs Grey could have been given, GBH and Rohypnol, would have caused him to pass out within thirty minutes. He ultimately opined that Grey's behavior the day of the crime was inconsistent with being under the influence of PCP "or any mind altering drug."²

On cross-examination, Dr. Karagiozis admitted that he had not reviewed Dr. Krelstein's reports, police reports, grand jury statements, or witness statements. He also testified that he did not specialize in psychiatry. He nevertheless opined that there was no evidence, other than Grey's own testimony, that Grey was under the influence of anything the day of the crime.

Grey was found guilty of false imprisonment by using a person as a human shield. Subsequently, he was sentenced as a habitual criminal under NRS 207.010(1)(a) despite the state's failure to formally file such an allegation. Grey appealed.

Discussion

Grey appealed his conviction under four separate grounds: failure of the state to notify defense of its intent to call an expert rebuttal witness; insufficiency of the evidence as proof beyond a reasonable doubt of Grey's guilt; the state's failure to gather exculpatory evidence (i.e. administer a drug test); incomplete jury instructions; and lack of jurisdiction to be sentenced as a habitual criminal.

Notice of Expert Rebuttal Witness

Grey argued that the state should be required to notify a defendant of its intent to call expert rebuttal witnesses under the Due Process Clause.³ Thus, to the extent that NRS 174.234 does not require such disclosure, Grey argues that it is unconstitutional.

² *Grey v. State*, 124 Nev. Adv. Op. No. 11 (Mar. 13, 2008).

³ U.S. Const. Amend. XIV.

The Court found that the language of NRS 174.234 does not require such disclosure, and effectively requires a defendant to disclose any rebuttal experts within imposing the same duty upon the state. Given this nonreciprocal burden imposed upon the defendant, the Court agreed with Grey that the statute is unconstitutional. The Court relied on a Supreme Court case, *Wardius v. Oregon*, for the rule that, without a strong state interest to the contrary, parties in criminal cases must be afforded reciprocal discovery.⁴ The Court found no such strong state interest here, nor did it find the state had shown why its intent to call Dr. Karagiozis as an expert rebuttal witness was not certain prior to the trial. Ultimately, the Court promulgated a new rule: “once a party in a criminal case receives notice of expert witnesses, the receiving party must provide reciprocal notice if the party intends to present expert rebuttal witnesses.”⁵

Despite this finding, the Court determined that, in Grey’s case, the failure to provide notice of the expert rebuttal witness did not constitute reversible error because Grey did not object to Dr. Karagiozis’ testimony on the ground of failure to give notice, and Grey did not show how further preparation, given such notice, would have affected the outcome of the trial.

Sufficiency of the Evidence

Grey argued that the state did not provide sufficient evidence to prove beyond a reasonable doubt that he intended to violate Fryer’s personal liberty, or that he intended to use her as a human shield.

The Court found that, given convenience store security tapes, witness testimony, and Fryer’s grand jury testimony, the state did provide sufficient evidence such that any trier of fact could have found all the elements of the crime were met beyond a reasonable doubt.

Failure to Perform a Drug Test

Grey argued that the state failed to gather exculpatory evidence when the detention center medical staff refused to administer a drug test upon Grey’s admittance. He claimed such a test was material to his defense because it would have revealed what substance caused him to behave the way he did, and would have allowed the expert witnesses to better analyze his behavior.

The Court found that Grey failed to show a reasonable probability that there would have been a different result had the drug test evidence been available. The evidence would not have been material because, even if it revealed a controlled substance in Grey’s substance, it would not have shown whether Grey’s intoxication on the substance was voluntary or involuntary.

Jury Instruction as to Involuntary Intoxication

Grey argued that the involuntary intoxication jury instruction was incomplete because the Court did not sua sponte add duty-to-acquit language. Grey based his contention on cases decided after his conviction.

The Court stated that “retroactivity of [a] new rule is . . . only applicable when the issue has been preserved for appeal.”⁶ Thus, because defense counsel did not preserve the issue for appeal, the new rule was not retroactive. The Court then went on to find that even if the rule was applied, the incomplete jury instruction would constitute harmless error because, based upon its review of the record, a rational trier of fact would still have found Grey guilty absent the error.

⁴ *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

⁵ *Grey v. State*, 124 Nev. Adv. Op. No. 11 (Mar. 13, 2008).

⁶ *Richmond v. State*, 59 P.3d 1249, 1252 (Nev. 2002).

Habitual Criminal Under NRS 207.010

Grey argued that because the state failed to file a notice of habitual criminality the district court lacked jurisdiction to sentence Grey as a habitual criminal under NRS 207.010. The statute requires the state to formally file such a notice prior to a sentencing hearing. Here, the state claimed it did file the notice, but the record reveals it was merely faxed to defense counsel and never formally filed with the district court. Further, the indictment did not contain any allegation that Grey was a habitual criminal.

The Court agreed that a defendant may not be sentenced as a habitual criminal under NRS 207.010 unless the state has first duly filed an allegation of habitual criminality. Therefore, it was plain error for the district court to sentence Grey as a habitual criminal when the state had not filed such an allegation. The Court vacated Grey's sentence as a habitual criminal and remanded the matter for a new sentencing hearing.

Conclusion

When a party in a criminal case receives notice of expert witnesses, the receiving party must provide reciprocal notice to the opposing party if the receiving party intends to present expert rebuttal witnesses.