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Summary of Sampson v. State, 121 Nev. Adv. Op. 80

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***Sampson v. State*, 121 Nev. Adv. Op. 80 (Dec. 1, 2005)¹**

CRIMINAL LAW

Summary

Admission of expert testimony is within the sole discretion of the trial judge. Abuse of discretion does not exist where defense counsel waited until the eighth day of trial to seek to call a newly-named expert witness without sufficient justification for the delay. The Nevada Supreme Court adopts the rule against admission of witness and prosecution comments regarding a defendant's invocation of Fourth Amendment rights when such evidence is used to support an inference of guilt. When the district court admits such evidence, this Court will determine the existence of reversible error by application of the same test used for admission of such evidence regarding the invocation of Fifth Amendment rights. Reversible error does not exist where a witness makes comments without being solicited as to the specific details of the invocation and without the intention of inferring meaning from the defendant's invocation of rights.

Disposition/Outcome

Judgment of conviction affirmed. First, the district court did not err in refusing to admit the testimony of a new expert witness eight days into trial. Next, the district court's admission of a witness's testimony regarding the defendant's invocation of Fourth and Fifth Amendment rights was harmless error because the testimony was made in passing.

Factual and Procedural History

Defendant Willie Sampson was accused of sexually victimizing a 9-year-old boy pursuant to picking the boy up at a bus stop and taking him to McDonald's. The boy testified to the following sequence of events: Sampson picked him up on the street and bought the boy food from McDonald's; after eating at Sampson's house, Sampson pointed a gun at the boy and told him to do whatever Sampson said; Sampson ordered the boy to strip; Sampson covered the boy's eyes with a white cloth and ordered the boy into the bathtub to "wash up good"; Sampson got into the bathtub facing the boy and touched and washed the boy's buttocks and genitals; Sampson then ordered the boy to lay down on his back on a bed; Sampson rubbed lotion on and laid underneath the boy; Sampson placed the boy's hand on Sampson's penis and ordered the boy to masturbate him; when the boy refused, Sampson forced the boy to masturbate him until Sampson ejaculated; Sampson placed his penis near the boy's mouth and repeatedly demanded oral sex; the boy refused; Sampson then gave the boy a pair of Sampson's silver boxer shorts and a tee shirt; Sampson allowed the boy to watch television; when the boy asked Sampson for chips, Sampson compiled a grocery list of items the boy requested, tied the boy to a chair, and left the apartment to go to the store; and finally the boy freed himself and returned to his home.

¹ By Denise S. Balboni

On cross-examination, inconsistencies between the victim's testimony during trial, his testimony at the preliminary hearing, and the recorded statement he gave police following the incident were revealed.

Sampson testified at trial, and his version of events differed greatly from the boy's. Essentially, Sampson testified that the boy motioned to him to stop his car, asked him for a ride to McDonald's, and asked to come to Sampson's home when Sampson informed him that he had to go home and work. Sampson claimed that after eating, he asked the boy to call home, but the boy refused, that he offered to wash the boy's clothes at a neighbor's house because the boy smelled dirty and his clothes were filthy, that the boy took a bath alone, that he gave the boy some of his clothes to wear while the boy's clothes were being washed, and that the boy noticed a chair with ropes on it that Sampson used for sexual activities with a female acquaintance and played with it until Sampson told him to leave it alone. He denied ever attempting to have sex with the boy or touching him in any way.

On the eighth day of trial, Sampson sought to introduce the boy's school records and an expert witness, Dr. Racoma. Both identified the boy as having a diagnosis of Oppositional Defiant Disorder (ODD), an illness that is characterized by lying. Sampson sought to allege that the boy had lied about the alleged abduction and molestation. The court denied both requests.

During trial, two officers testified that they spoke with Sampson at the crime scene to request permission to conduct an unwarranted search but that Sampson denied this request. A different officer testified that he did not speak with Sampson at the crime scene because Sampson was already in a patrol car and had requested an attorney. Although defense counsel moved for a mistrial at this point, the court denied the motion.

Sampson now appeals his judgment of conviction and sentence of multiple life terms, entered after jury verdict, for one count of first-degree kidnapping, two counts of lewdness with a minor, one count of attempted sexual assault on a minor under the age of fourteen, and one count of sexual assault on a minor under the age of fourteen. Sampson argues that this Court should reverse his conviction on the grounds that the district court did not allow him to introduce his expert witness and that the State's witnesses commented on his invocation of Fourth and Fifth Amendment rights.

Discussion

Exclusion of Expert Testimony

Sampson's first argument on appeal is that the district court erred by refusing to allow him to call Dr. Racoma to testify about the boy's behavioral disorder. As the admission of expert testimony lies within the sound discretion of the trial court, the Supreme Court reviews the court's decision for abuse of discretion only.² When making such a determination, the Court remains cognizant of the defendant's constitutional right to discredit his accuser.³ While there is

² Brown v. State, 110 Nev. 846, 852, 877 P.2d 1071, 1075 (1994); Smith v. State, 100 Nev. 570, 572, 688 P.2d 326, 327 (1984).

³ Reese v. State, 458 A.2d 492, 496 (Md. Ct. Spec. App. 1983).

a strong presumption favoring the admission of even late-disclosed witnesses,⁴ the Court must be sure neither to waste judicial time nor to permit attacks on character unrelated to credibility.⁵

Nevada statutory law mandates that defense counsel and counsel for the state submit to the court and serve on opposing counsel written notice of all witnesses that each intends to call at least 5 days prior to trial. Counsel must submit and serve 21 days before trial a list of expert witnesses that each intends to call.⁶ The court may choose among various penalties for a violation of these rules, including “prohibit[ing] the party from introducing in evidence the material not disclosed.”⁷

Here, the district court did not abuse its discretion in denying Sampson’s request for admission. Although defense counsel was unable to ascertain Dr. Racoma’s identity until the eighth day of trial because of a misspelling in the boy’s school records, defense counsel could have located Dr. Racoma based on the misspelled records. Defense counsel could have obtained evidence of the ODD diagnosis by questioning the boy’s mother. Additionally, admission would have resulted in unfair surprise for the prosecution. It is defense counsel’s error, not the Court’s, for failing to submit evidence contained in the boy’s school records and failing to timely pursue testimony from Dr. Racoma.

Testimony relating to Sampson’s invocation of Fourth Amendment rights

Sampson’s second argument on appeal is that the district court erred by admitting testimony by police officers regarding Sampson’s invocation of his Fourth Amendment right to refuse to consent to a warrantless search. Because defense counsel failed to object to the testimony during trial, Sampson bears the burden of establishing that plain error affecting his substantial rights occurred.⁸

Today, this Court adopts the rule against admission of a defendant’s invocation of his or her Fourth Amendment right to refuse to consent to a warrantless search when used to support an inference of guilt. This brings Nevada courts in line with those Circuit and state courts that have addressed the issue.⁹ It is improper to punish a defendant for asserting his or her constitutional rights.¹⁰ Just as defendants may invoke their Fifth Amendment rights to conceal evidence of wrongdoing,¹¹ so may defendants invoke their Fourth Amendment rights. However, this prohibition of comments on defendants’ exercise of Fourth Amendment rights does not apply when defendants put their compliance with a search into issue.

This Court shall measure whether reference to a defendant’s invocation of Fourth Amendment rights is harmless error by the same test used to determine whether reference to an invocation of Fifth Amendment rights requires reversal: reversal of conviction is not required if, “(1) at trial there was only a mere passing reference, without more, to an accused’s post-arrest silence, or (2) there is overwhelming evidence of guilt.”¹² Here, there was not overwhelming

⁴ *Farris v. State*, 818 N.E.2d 63, 69 (Ind. Ct. App. 2004).

⁵ *Reese*, 458 A.2d at 497.

⁶ NEV. REV. STAT. § 174.234(1)-(2) (2006).

⁷ NEV. REV. STAT. § 174.295(2) (2005).

⁸ NEV. REV. STAT. § 178.602 (2006).

⁹ See *U.S. v. Runyan*, 290 F.3d 223, 249 (5th Cir. 2002); *U.S. v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999); *U.S. v. Thame*, 846 F.2d 200, 205-08 (3d Cir. 1988); *U.S. v. Prescott*, 581 F.2d 1343, 1351-52 (9th Cir. 1978); *Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979); *Mackey v. State*, 507 S.E.2d 482, 484 (Ga. Ct. App. 1998).

¹⁰ *Thame*, 846 P.2d at 206-07; *Prescott*, 581 F.2d at 1351.

¹¹ *Prescott*, 581 F.2d at 1351.

¹² *Morris v. State*, 112 Nev. 260, 913 P.2d 1264 (1996).

evidence of guilt, but instead the conviction was based on the jury's decision to assign greater credibility to the boy than to Sampson. Thus, this decision addresses only what constitutes "a mere passing reference."¹³

Although the admission of the officers' testimony was error, it was a mere passing reference and thus does not mandate reversal. The officers' comments were made in response to inquiries concerning whether they spoke to Sampson and what he said to them. The questioning was not aimed at bringing out his invocation of his Fourth Amendment rights.

Testimony relating to Sampson's invocation of Fifth Amendment rights

The test to determine whether a witness's or a prosecutor's reference to a defendant's invocation of Fifth Amendment rights is harmless error is whether: "(1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence, or (2) there is overwhelming evidence of guilt."¹⁴ The Court will more likely find reversible error where "the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's [assertion of her Fifth Amendment rights]."¹⁵ To constitute reversible error, the comments must have been intended to draw a meaning from the silence.¹⁶ The court will view the comments in context, and will not undertake reversal lightly.¹⁷

Here, the officer's comment was a mere passing reference and does not mandate reversal. He made the statement without solicitation by the prosecution and in the context of explaining what he did when he arrived at the scene and whether he made contact with Sampson at that time. His comments were not intended to draw meaning from Sampson's silence, and they were not of a character that the jury would naturally take them to do so.

Conclusion

The district court did not abuse its discretion in refusing to permit Defendant Sampson to introduce a new expert witness eight days into trial because the delay was without good excuse, and it would have resulted in unfair surprise for the prosecution. This Court adopts the rule against admission of comments regarding a defendant's invocation of Fourth Amendment rights when such evidence is used to support an inference of guilt. The district court did err in admitting witness testimony regarding Defendant Sampson's invocation of his Fourth and Fifth Amendment rights, but all comments were made in mere passing reference and thus constitute harmless, irreversible error.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Knight v. State*, 116 Nev. 140, 144, 993 P.2d 67, 71 (2000) (internal citations omitted).

¹⁶ *Washington v. State*, 112 Nev. 1054, 1060, 921 P.2d 1253, 1257 (1996).

¹⁷ *Knight*, 116 Nev. at 145, 993 P.2d at 71.