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Summary of State v. Weber, 121 Nev. Adv. Op. 57

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State v. Weber, 121 Nev. Adv. Op. 57 (Sept. 15, 2005)¹

CRIMINAL LAW – DEATH PENALTY

Summary

An appeal from a judgment of conviction and sentence of death, pursuant to a jury trial.

Disposition/Outcome

Judgment of conviction and sentence of death affirmed.

Facts and Procedural History

On April 4, 2002, Appellant T.J. Weber raped his girlfriend's 14-year-old daughter, whom he had been molesting for five years, and killed his girlfriend, Kim, and her 17-year-old son. Weber then fled Las Vegas and traveled to several other states before returning to Las Vegas on or before April 12. On the morning of April 14, the day on which funeral services for the victims were to take place, Weber attacked Kim's 15-year-old son and the son's care giver with a baseball bat. Again, he fled. Weber remained at large for two weeks. Finally, on April 28, 2002, police located and arrested Weber.

In May 2002, a grand jury indicted Weber, charging him with seventeen felony counts. The charges included two counts of open murder with the use of a deadly weapon, two counts of attempted murder with the use of a deadly weapon, two counts of first-degree kidnapping, two counts of burglary, and various counts arising from Weber's prolonged sexual abuse of his girlfriend's adolescent daughter. After indictment, the State filed notice of its intent to seek the death penalty. In February 2003, Weber received a jury trial and the jury found him guilty on all seventeen felony counts. In the sentencing phase of Weber's trial, the jury found the existence of thirteen aggravating factors. It subsequently recommended a sentence of death for the murder of Kim's son and a sentence of life without the possibility of parole for the murder of Kim.

Discussion

On appeal, Weber advanced a number of arguments: First, Weber argued that the district court erred in denying his motion to sever the charges against him; second, Weber argued that the district court erred in admitting hearsay evidence; third, Weber argued that the district court erred in denying his challenge of two jurors for cause, thereby denying him his right to a fair trial; fourth, Weber argued that the district court erred in instructing the jury on flight; fifth, Weber argued that the district court improperly denied his motion to suppress evidence seized during a search performed under authority of a search warrant that Weber maintains was improper; sixth, Weber argued that the penalty hearing of his trial should have been bifurcated; seventh, Weber argued that he should have made the final argument during his penalty hearing; and eighth, Weber argued that the State's notice of intent to seek the death penalty was flawed. The Court denied all of

¹ By Danielle Oakley.

Weber's claims. Additionally, the Court reviewed Weber's death sentence and considered the three questions required under NRS § 177.055(2).²

I. Denial of Weber's Motion to Sever Charges

NRS § 173.115 provides that a defendant may be charged with multiple offenses in the same indictment if the offenses charged are "1. Based on the same act or transaction; or 2. Based on two or more acts or transactions connected together or constituting parts of a common plan or scheme." Weber asserted that the joinder of all seventeen charges was improper under the statute and that his crimes should have been separated into three separate indictments. Weber argued that the charges for his sexual crimes, spanning five years, against the fourteen-year-old could be joined together, the murders of April 4, 2002, could be joined together, and the beatings of April 14, 2002, could be joined together. Weber maintained, however, that these three groups of crimes should have been kept separate and distinct. The Court agreed that the three groups of crimes did not constitute a common plan or scheme and that joinder was inappropriate on that ground.³

Nevertheless, the Court found that the district court did not abuse its discretion in joining the claims because the claims were "connected together" pursuant to NRS § 173.115(2). Having never interpreted the phrase "connected together" under this statute, the Court articulated that "for two crimes to be 'connected together' under NRS 173.115(2), a court must determine that evidence of either crime would be admissible in a separate trial regarding the other crime."⁴ The court determined that evidence of Weber's crimes would have been admissible in trials for Weber's other crimes because the evidence would have been relevant and because Weber failed to show that the admission of such evidence would have been unfairly prejudicial. Accordingly, the court found that all of Weber's seventeen counts were "connected together."

II. Admission of Hearsay Evidence

Weber argued that the district court erred in admitting testimony of Kim's friend regarding statements Kim had made to that friend on the day Weber murdered her. Kim's friend testified that Kim had told her about a fight she had had with Weber the day before. Kim's friend testified to the following:

She had told me that a boy had called for [her daughter]; that [Weber] had answered it and went crazy, cussed out the kid on the phone; proceeded to call [the daughter] names and call her a slut and racial gestures to her going out with black guys.

² NEV. REV. STAT. § 177.055(2) requires the Supreme Court to review every death sentence and consider, in addition to any errors enumerated on appeal, the following three issues:

- (c) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
- (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
- (e) Whether the sentence of death is excessive, considering both the crime and the defendant.

NEV. REV. STAT. § 177.055(2) (2003).

³ *Weber*, 121 Nev. Adv. Op. 57 at 20.

⁴ *Id.* at 21.

And [the daughter] told Kim. Kim was mad. She told [Weber]: [my daughter] is going to be able to talk to boys and go out with boys. You are not her boyfriend; you're my boyfriend. You need to start acting like a father figure, if you're in her life, and not her boyfriend

And she was going to drive her and her boyfriend wherever they wanted to go on a date⁵

The district court admitted the evidence, finding that it was not offered for the truth of the matter asserted. On appeal, the Court ruled that the testimony included several layers of hearsay, most of which were offered for the truth of the matter asserted. Nevertheless, the Court held that, although most of the testimony was inadmissible hearsay, the court's admission of the testimony was not prejudicial. The Court found that admission of the evidence was not prejudicial both because most of the evidence was admissible through other means and because the overwhelming evidence of Weber's guilt rendered the hearsay testimony unnecessary for a guilty verdict.

III. Denial of Weber's Challenge of Jurors

During voir dire, Weber challenged two potential jurors whom he believed were incapable of serving as impartial jurors. The district court denied Weber's challenges. On appeal, the Court found that the district court erred in denying Weber's challenges, but found the error to be harmless. The Court ruled that the district court's error was not prejudicial because Weber eventually relieved both of the challenged jurors via peremptory challenge. Although Weber exhausted all of his peremptory challenges during voir dire, he failed to allege that any of the jurors actually seated were not fair or impartial.

IV. Flight Instruction

At trial, Weber unsuccessfully objected to a jury instruction on flight. On appeal, Weber argued that a flight instruction was improper because his arrest was delayed because of incompetent police work, not his flight. The Court found Weber's contention without merit. A flight instruction is appropriate so long as it is supported by the evidence.⁶ The Court ruled that the evidence in Weber's case supported a flight instruction. Specifically, Weber abandoned his car on the day of the murders and traveled, by bus, to several states before returning to Las Vegas. Furthermore, he purchased a fake mustache, and hid in his former home, despite police seal.

V. Denial of Weber's Motion to Suppress

Weber argued that the district court erred in denying his motion to suppress evidence of child pornography found on Weber's computer depicting sex acts between Weber and Kim's daughter. Weber contended that the search warrants authorizing the computer searches were unconstitutional because they were based on "unsupported and

⁵ *Id.* at 25-26.

⁶ *Potter v. State*, 96 Nev. 875, 875-76, 619 P.2d 1222, 1222 (1980).

misleading probable cause statements.”⁷ The Court found Weber’s argument without merit.

The Court found that the warrants had issued on probable cause supported by the affidavit of a Las Vegas Metropolitan Police Department detective. The affidavit stated that Kim’s friend had told him that Weber was very computer literate, could make fake I.D.’s, used numerous fraudulent credit cards, and had run scams over the internet. The Court found this information, along with the detective’s knowledge and experience, sufficient probable cause to search Weber’s computer.

VI. Bifurcation of Penalty Phase

Weber argued that his penalty hearing should have been bifurcated. The Court summarily rejected the argument, citing *McConnell v. State*.⁸

VII. Last Word at Penalty Hearing

Weber argued that the district court erred in denying his motion to argue last to the jury in his penalty hearing. The Court summarily rejected this argument, citing NRS 175.141(5).

VIII. State’s Notice of Intent to Seek Death Penalty

Weber argued that the district court erred in denying his motion to strike the State’s notice of intent to seek the death penalty. Weber argued that the death penalty scheme is unconstitutional. The Court refused to revisit its prior holding that the scheme is constitutional.⁹

IX. Required Considerations under NRS § 177.055(2)

NRS § 177.055(2) requires the Supreme Court to review every death sentence and consider, in addition to any errors enumerated on appeal, the following three issues:

- (c) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
- (d) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
- (e) Whether the sentence of death is excessive, considering both the crime and the defendant.¹⁰

A. *Whether the Evidence Supported the Aggravating Circumstances*

⁷ *Weber*, 121 Nev. Adv. Op. 57 at 36.

⁸ ___ Nev. ___, ___, 102 P.3d 606, 619 (2004).

⁹ *See, e.g.*, *Gallego v. State*, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001); *Vanisi v. State*, 117 Nev. 330, 344, 22 P.3d 1164, 1173-74 (2001).

¹⁰ NEV. REV. STAT. § 177.055(2) (2004).

The jury found that thirteen aggravating circumstances existed during the penalty phase of Weber's trial. Aggravators one through eight were based on NRS § 200.033(2), which provides that "first degree murder is aggravated when it was committed by a person who has been convicted of a felony 'involving the use of threat or violence.'"¹¹ The Court concluded, without discussion, that Weber used or threatened violence during the commission of the following felonies: the sexual assault of Kim's daughter between January 1, 1997 and December 1, 1998; the first-degree kidnapping of Kim's daughter on April 4, 2002; the sexual assault on Kim's daughter on April 4, 2002; the first-degree kidnapping of Kim's seventeen-year-old son on April 4, 2002; the attempted murder of Kim's fifteen-year-old son on April 14, 2002; and the attempted murder of the fifteen-year-old son's caregiver on April 14, 2002.

The Court examined, and subsequently found sufficient evidence to support the finding of the use or threat of violence, in the two counts arising from Weber's sexual assault of Kim's daughter between January 1, 2000, and April 3, 2002.

Aggravators nine through eleven were based on NRS § 200.033(4), which provides that first-degree murder is aggravated when committed while the perpetrator was engaged in "burglary, invasion of the home or kidnapping in the first degree, and the person charged . . . [k]illed or attempted to kill the person murdered."¹² Weber argued that this aggravator is invalid because it makes every felony-murderer eligible for the death penalty. However, Weber was not convicted of felony murder; he was convicted of deliberate, premeditated murder and/or murder by torture. Therefore, the Court found sufficient evidence to support the jury's finding that these aggravating circumstances existed.

Aggravator twelve was based on NRS § 200.033(8), which provides that first-degree murder is aggravated when it involves torture of the person killed.¹³ The Court previously held that torture "requires that the murderer must have intended to inflict pain beyond the killing itself."¹⁴ Here, Weber murdered Kim's son by binding his hands and feet with duct tape, placing weights on him so that he could not move, duct-taped his eyes and mouth, but left his nostrils free, and placed a plastic bag over his head. Autopsy results revealed that the boy died a slow, suffocating death, both bleeding and vomiting out of his nose. The Court found this sufficient to support a jury's finding that Weber tortured his victim.

Aggravator thirteen was based on NRS § 200.033(12), which provides that first-degree murder is aggravated when "the defendant has, in the immediate proceeding, been convicted of more than one offense of murder"¹⁵ Weber was convicted of the murders of both Kim and her son.

Accordingly, the Court found that there was sufficient evidence to support the aggravating circumstances, as found by the jury.

¹¹ *Weber*, 121 Nev. Adv. Op. 57 at 41 (quoting NEV. REV. STAT. 200.033(2)).

¹² NEV. REV. STAT. § 200.033(4) (2004).

¹³ NEV. REV. STAT. § 200.033(8) (2004).

¹⁴ *Domingues v. State*, 112 Nev. 683, 702, 917 P.2d 1364, 1377 (1996).

¹⁵ NEV. REV. STAT. § 200.033(12) (2004).

B. Whether the Sentence of Death Was Imposed Under the Influence of Passion, Prejudice or Any Arbitrary Factor

The Court concluded that there was no evidence that Weber's sentence was influenced by passion, prejudice, or any other arbitrary factor. To the contrary, the Court found evidence that Weber's jury was discerning and that Weber's crimes, themselves, caused the jury to recommend a sentence of death.

C. Whether the Sentence of Death is Excessive, Considering Both the Crime and the Defendant

The Court concluded that Weber's crimes were particularly brutal and senseless. The Court found that, "[g]iven the appalling nature and circumstances of [Kim's son's] murder and Weber's character as revealed by all his crimes, death is not an excessive sentence for Weber."¹⁶

Conclusion

Weber's conviction and sentence were affirmed. The Court found that the district court did not err in denying Weber's motion to sever charges. The district court did, however, err in admitting hearsay evidence and denying Weber's challenges to two potential jurors. The Court found, however, that these errors were not prejudicial. The district court did not err in instructing the jury on flight, nor did it err in denying Weber's motion to suppress the evidence obtained from his computer. Furthermore, the court found without merit Weber's arguments that the penalty phase of his trial should have been bifurcated, that he was entitled to make the last argument at his penalty hearing, and that the State's death penalty scheme is unconstitutional. Finally, the Court reviewed Weber's sentence, pursuant to NRS § 177.055(2), and found that the evidence supported the finding of aggravating circumstances, the sentence was not imposed under the influence of passion, prejudice, or an arbitrary factor, and the sentence was not excessive.

Concurring Opinion

Justice Hardesty filed a concurring opinion, with which Justice Rose agreed. Although concurring in outcome, Justice Hardesty disagreed with the majority on two points. First, Justice Hardesty disagreed with the Court's conclusion that it was proper to join the counts arising from the April 14 beatings of the fifteen-year-old boy and his caregiver with the rest of the counts. Nevertheless, Justice Hardesty agreed that the error was harmless.

Second, Justice Hardesty would interpret the term "connected together," under NRS § 173.115, more narrowly than did the majority. Justice Hardesty cautioned that cross-admissibility may be too lenient a standard. He urged district courts to be "reluctant to join unrelated criminal acts for trial unless it is shown that the evidence of both crimes is clearly cross-admissible, that the two criminal incidents appear to be closely connected together, and that no substantial prejudice will occur to the defendant."¹⁷

¹⁶ *Weber*, 121 Nev. Adv. Op. 57 at 45.

¹⁷ *Id.* at 4.