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Summary of Lobato v. State, 120 Nev. Adv. Op. No. 57

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EVIDENCE – IMPEACHMENT – EXTRINSIC EVIDENCE

Disposition/Outcome

District court convictions for first-degree murder and sexual penetration of a dead body reversed and case remanded for new trial. Trial court's exclusion of extrinsic evidence to prove potential bias of State's witness against Defendant was reversible error, not harmless error. Although a trial court had broad discretion to control cross-examination attacking a witness's credibility, that discretion was narrowed when bias or motive was to be shown. Unless materially related to the case and admissible on other grounds, extrinsic evidence of prior bad acts or inconsistent statements is always collateral and, therefore, inadmissible to attack credibility. But, extrinsic evidence to prove a witness's bias interest, corruption, or prejudice is never collateral and was admissible for impeachment. Even though Defense failed to recall the State witness for possible impeachment without the use of extrinsic evidence, Defendant preserved right of appeal where Defendant crossed the witness on the relevant matter outside the presence of the jury and where the trial court made a definitive exclusionary ruling.²

Factual and Procedural History

The Appellant/Defendant, Kirstin Blaise Lobato, was convicted, after jury trial in the Eighth Judicial District Court, Clark County, for first-degree murder with a deadly weapon and for sexual penetration of a dead body. Judge Valerie Vega presided at the trial. Lobato, from Panaca, Nevada, was convicted for the murder of Duran Bailey, of Las Vegas. The coroner, after conducting an autopsy, attributed Bailey's death to laceration to a carotid artery. The victim's body also had extensive wounds inflicted with a sharp object and blunt force injuries to the skull, jaw, and teeth consistent with an assault with a baseball bat. The victim's penis had been amputated at the base and a slash wound ran from just above the anus, through and into the rectum, and ended just behind the scrotum. The coroner concluded these latter wounds were sustained post-mortem. The victim's body was found behind a dumpster on West Flamingo Road in Las Vegas on July 8, 2001. The coroner concluded the death occurred some ten to eighteen hours prior to discovery of the body.

In mid-July 2001, Lobato informed her former teacher and counselor that an older man had attacked and attempted to sexually assault her during a recent visit to Las Vegas. Lobato also claimed she cut-off the attacker's penis. Las Vegas Metropolitan Police Department (LVMPD) Detective Thomas Thowsen learned of the claim and interviewed Lobato. When Thowsen asked Lobato about her molestation as a child and the need to defend herself against the attack in Las Vegas, Lobato began crying and said, 'I did not think anyone would miss him.'³ Thowsen then gave Lobato a *Miranda*⁴ warning and took her statement. Lobato said she had used

¹by Keith Brown

² *Lobato v. State*, 120 Nev. Adv. Op. No. 57, 96 P.3d 765, 769, n.5 (citing NEV. REV. STAT. 50.085(3)):

[NRS 50.085\(3\)](#) states: Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of [NRS 50.090](#).

³ *Lobato*, 96 P.3d at 768.

⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

her butterfly knife to defend herself and cut the man's penis, but she did not know whether she had severed it. She stated she escaped and left the victim, lying still and on the ground. Lobato also admitted to keeping a baseball bat in her car, but could not say whether she hit Bailey with the bat and could not recall the exact date or details of the attack, claiming she was high on drugs. Based on her statement, Lobato was arrested and ultimately charged with separate counts of murder with use of deadly weapon and sexual penetration of a dead body.

Korinda Martin, an inmate sharing a cell with Lobato at the Clark County Detention Center, became a witness for the State against Lobato. Martin testified Lobato boasted about the murder and the amputation of a man's penis. Martin also testified Lobato was worried blood might be found in her vehicle, because she struck the man in the face. The man was a person Lobato said she knew as "Darren;" and from whom she was trying to buy drugs. According to Martin, Lobato said that "Darren" wanted to have sex with her and she refused. Martin said Lobato told her she then stabbed him at least eight times in the rectum. Martin testified Lobato spoke of playing the "poor me" act and claim Darren attempted to sexually assault her, even though the man never tried to force her to have sex.

After Lobato allegedly told all this to Martin, Martin contacted the district attorney's office concerning the conversations. Martin requested a letter of recommendation to the parole board for her own criminal charges, in exchange for her testimony against Lobato. No such recommendation was forthcoming.

During direct and cross-examination, Martin admitted to prior robbery and coercion convictions. She also admitted to unsuccessful attempts to secure her release from custody on several occasions, including a claim she was pregnant with a high risk pregnancy. Martin stated she would do "whatever it took to get out of jail,"⁵ but she would not lie, have someone lie for her, or assist someone to lie to the court.

During an *in camera* recess hearing, Lobato confronted Martin with two handwritten letters, purportedly written by Martin. The first letter requested Brenda Self, a former co-prisoner with Martin, to send a letter of recommendation in Self's own handwriting to advise Martin's sentencing court that Martin was pregnant, that Self had hired and continued to employ Martin, and that Self was willing to help Martin in any way possible. The second letter was the letter of recommendation to the sentencing court. Martin denied writing or sending the letters, but agreed the letters constituted fraud on the sentencing court. After the trial, an LVMPD documents examiner concluded the letters were authored by Martin.

Martin was crossed on her prior convictions and attempts to avoid further prison time. No questions were asked about the letters. Later in the trial, when Lobato attempted to present her handwriting expert's opinion on the Martin letters and Self's testimony on Martin's attempt to defraud the sentencing court, the district court excluded any extrinsic evidence on the authorship of the letters or prior bad acts as collateral to the proceeding, under NRS 50.085(3).⁶ The district court ruled that Self could give testimony as to Martin's reputation for truthfulness. Based on this ruling, Lobato did not present Self's testimony, nor did the jury hear any evidence concerning the letters, including Martin's denial of any connection with the letters. Lobato testified in her own defense, claiming self defense against an unknown assailant who attempted to sexually assault her.

The jury returned guilty verdicts on both counts. Lobato was sentenced to consecutive 20- to 50-year sentences for first-degree murder and 5- to 15-years for sexual penetration of a dead body. The district court also imposed a special lifetime supervision sentence, should

⁵ *Lobato*, 96 P.3d at 771.

⁶ *Id.* at 769, n.5.

Lobato be released. A new trial based on the new evidence from the handwriting expert was denied. Lobato timely filed an appeal.

In an opinion by Nevada Supreme Court Justice A. William Maupin, the court reversed Lobato's convictions and remanded for new trial. The court held: (1) the district court erred by excluding extrinsic evidence of a witness's motive to give false testimony, as such evidence did not implicate the collateral-fact rule and was therefore admissible; and (2) excluding evidence of Martin's motive and interest to assist the State against Lobato constituted reversible error.⁷

Discussion

The primary issues in this case were whether extrinsic evidence to impeach a witness's credibility was admissible and whether exclusion of such evidence constituted harmless error.

The court described nine basic modes of impeachment. The first four involved attacks on a witness's competence to testify on the basis of defects in perception, memory, communication, or ability to understand the oath to testify truthfully.⁸ The second four impeachment modes involved evidence of prior felony convictions, prior inconsistent statements, specific instances of conduct, and ulterior motives for testifying.⁹ The ninth mode, the witness's reputation for truthfulness, necessarily involved extrinsic evidence, but was not pertinent to the appeal.¹⁰

The "collateral-fact" rule prohibited the use of extrinsic evidence for impeachment when collateral to the proceedings.¹¹ A collateral fact was 'outside the controversy, or not directly connected with the principle matter or issue in dispute.'¹² The collateral-fact rule was limited in application. Extrinsic evidence of the first four modes of impeachment was never collateral and, thus, admissible. Extrinsic evidence to prove a witness's motive to testify in a certain way, *i.e.*, bias, interest, corruption, or prejudice was never collateral and was not subject to NRS 50.085(3)¹³ limitations.¹⁴ The "collateral-fact" rule was implicated only in two of the nine modes of impeachment.¹⁵ Extrinsic proof of a prior inconsistent statement was not admissible unless material to the case in hand (relating to a "linchpin" fact of the case).¹⁶ Under NRS 50.085(3), extrinsic evidence of specific instances of conduct attributable to the witness (prior bad acts) was always collateral and inadmissible, unless related to the case and admissible on other grounds.¹⁷ On this basis, the letters, expert opinions, and Self's testimony contradicting Martin's denial of authorship were inadmissible as extrinsic evidence of specific instances of untruthfulness relating to Martin's attempt to suborn perjury in her separate criminal trial.¹⁸

⁷ *Id.* at 771-772.

⁸ *Id.*, at 770.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (citing BLACK'S LAW DICTIONARY, 262 (6th ed. 1990)).

¹³ NEV. REV. STAT. 50.085(3): Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of [NRS 50.090](#).

¹⁴ *Lobato*, 96 P.3d at 770, n.11.

¹⁵ *Id.* at 770.

¹⁶ *Id.* (citing JOHN W. STRONG, MCCORMICK ON EVIDENCE § 49 (5th ed. 1999)(extrinsic evidence of prior inconsistent statement non-collateral if: (1) '...relevant to a fact of consequence...', or (2) relates to a 'linchpin' fact).

¹⁷ *Lobato*, 96 P.3d at 770.

¹⁸ *Id.*, at 771.

Evidence Martin tried to get another person to lie for her was not material as to whether Lobato had committed homicide.¹⁹

However, the court concluded evidence disproving Martin's denial she wrote the letters was admissible for another purpose: to prove Martin's motive (interest) to testify for the State.²⁰ The proffered letters and extrinsic evidence from the experts and Brenda Self would have supported a strong inference that Martin's cooperation was simply part of a continuum of deceptions, desperation, and willingness to adopt a fraudulent course of action to secure her own freedom.²¹ The court stated that, although district courts have wide discretion to control cross-examination to attack a witness's credibility, a 'trial court's discretion...is narrow[ed] where bias [motive] is the object to be shown, and an examiner must be permitted to elicit any facts which might color a witness's testimony.'²² According to the court, the extrinsic evidence was admissible because it related to a witness's motivation to give false testimony. This mode of impeachment did not raise the collateral-fact rule.²³ The court distinguished prior cases that held extrinsic evidence was collateral and inadmissible, because those cases dealt with evidence of a witness's prior bad acts, not an inquiry into the witness's bias or interest.²⁴ The court held that district court erred by not permitting Lobato to present extrinsic evidence of Martin's motive for testifying against her.

The court then considered whether the exclusion was harmless error. Under NRS 178.598, any error that does not affect a defendant's substantial rights shall be disregarded.²⁵ However, the exclusion of testimony is prejudicial if there a reasonable probability the testimony would have affected the outcome of the trial.²⁶ Reasonable probability is defined as a probability sufficient to undermine confidence in the outcome.²⁷ No physical evidence tied Lobato to the homicide and the circumstantial evidence supported multiple theories of criminal culpability, including second-degree murder or manslaughter. Martin's testimony suggested Lobato conjured up a false defense to the homicide and supported the State's theories of malice and premeditation. Because of the equivocal and circumstantial nature of the evidence supporting the State's first-degree murder charge, the district court's exclusion of evidence of Martin's interest in assisting the State constituted reversible error. The court stressed that, in any criminal case where issues of guilt are close, the testimony of jailhouse informants should be regarded with particular scrutiny.²⁸

Conclusion

Based on the above, the court concluded the district court erred in precluding the Defense from fully impeaching a State's witness. The court further concluded the error was not harmless, but reversible error. For all these reasons, Lobato's district court conviction was reversed and

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* (citing *Bushnell v. State*, 599 P.2d 1038, 1040 (Nev. 1970)); see also [Ransley v. State](#), 680 P.2d 596, 597 (Nev. 1984) ("Where [the] purpose of [cross-examination] is to expose bias ... [the] examiner must be permitted to elicit any facts which might color a witness' testimony,' and the trial court's usual discretion to control the scope of cross-examination is circumscribed." (quoting [Eckert v. State](#), 605 P.2d 617, 620 (Nev. 1980)); [Jones v. State](#), 837 P.2d 1349, 1354 (Nev. 1992)).

²³ *Lobato*, 96 P.3d at 771.

²⁴ *Id.*, at 771, n.16.

²⁵ NEV. REV. STAT. 178.598 "Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

²⁶ *Lobato*, 96 P.3d at 772, n.17 (citing *Bell v. State*, 885 P.2d 1311, 1315 (Nev. 1994)).

²⁷ *Id.* at 772, n.18 (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

²⁸ *Id.* at 772.

remanded for a new trial.