

7-27-2017

## Desai v. State, 133 Nev. Adv. Op. 48 (July 27, 2017)

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*Nevada Law Journal*

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### Recommended Citation

Giddens, Christopher, "Desai v. State, 133 Nev. Adv. Op. 48 (July 27, 2017)" (2017). *Nevada Supreme Court Summaries*. 1068.  
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CRIMINAL APPEAL: AIDING, ABETTING, NEGLIGENCE, RECKLESSNESS

**Summary**

The Court determined that a defendant can be convicted of aiding and abetting negligent or reckless crimes upon sufficient proof that the defendant was aware of, and had the intent to promote or further, the negligent or reckless conduct that caused harm. Additionally, the Court (1) confirmed appellant’s convictions for aiding and abetting negligent and reckless “endangerment crimes”<sup>2</sup>; and (2) reversed appellant’s second-degree murder conviction due to intervening causes between his actions and the victim’s death.

**Background**

Appellant Dipak Desai was a managing partner of multiple ambulatory surgical centers (collectively, “the clinic”) in Las Vegas. Desai oversaw the clinic’s nurse anesthetists and made all decisions regarding the clinic’s use of supplies.

On July 25, 2007 and September 21, 2007, the clinic’s first patient of the day informed Desai and staff that he had hepatitis C before his procedure. Six patients who received treatment at the clinic on these dates were later diagnosed with hepatitis C. One of these six patients failed to adequately treat the disease following his diagnosis and eventually died as a result.

After the Southern Nevada Health District initiated an investigation, the Centers for Disease Control and Prevention (CDC) determined the sources for the hepatitis C strain contracted by the six patients were the two patients first seen July 25, 2007, and September 21, 2007. The CDC also concluded that the clinic’s nurse anesthetists reentering and reusing propofol vials on patients after injecting prior patients resulted in the hepatitis C outbreak.

Desai and two of the clinic’s nurse anesthetists were indicted. A jury found Desai guilty of multiple charges including reckless disregard of persons resulting in substantial bodily harm,<sup>3</sup> criminal neglect of patients resulting in substantial bodily harm,<sup>4</sup> and second-degree murder.<sup>5</sup> Desai appealed.

**Discussion**

*There was sufficient evidence to convict Desai of the endangerment crimes*

To resolve whether Desai had the necessary intent for aiding and abetting the endangerment crimes, the Court first addressed whether individuals can aid and abet negligent or reckless crimes.

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<sup>1</sup> By Christopher Giddens.

<sup>2</sup> “Endangerment crimes” is the Court’s characterization of NRS 202.595(2) and NRS 200.495(1). A jury convicted the appellant of “performance of an act in reckless disregard of persons or property resulting in substantial bodily harm” and “criminal neglect of patients resulting in substantial bodily harm,” pursuant to NRS 202.595(2) and NRS 200.495(1), respectively.

<sup>3</sup> NEV. REV. STAT. § 202.595(2) (2017).

<sup>4</sup> NEV. REV. STAT. § 200.495(1) (2017).

<sup>5</sup> NEV. REV. STAT. § 200.030(2) (2017).

*Aiding and abetting a negligent or reckless crime*

Because Nevada had yet to determine whether an individual can aid and abet negligent or reckless crimes, the Court examined other jurisdictions. Some jurisdictions consider the intent to aid another in acting negligently or recklessly to be logically impossible, and thus hold that defendants cannot be convicted of aiding and abetting negligent or reckless crimes.<sup>6</sup> However, courts are moving away from non-liability because assisting or encouraging someone known to engage in dangerous conduct should suffice for accomplice liability. This rationale persuaded the Court to adopt potential liability for aiding and abetting negligent and reckless crimes.

Next, the Court noted that NRS 195.020 does not specify the required mental state to convict under an aiding or abetting theory.<sup>7</sup> Consistent with past reasoning for specific intent crimes,<sup>8</sup> as well as other jurisdiction's holdings,<sup>9</sup> the Court concluded that one must act with awareness of the negligent or reckless conduct and with intent to promote or further such conduct to be convicted of aiding and abetting negligent or reckless crimes.

Therefore, Desai could be convicted of aiding and abetting the endangerment crimes upon sufficient evidence showing he possessed the required intent.

*There was sufficient evidence to show that Desai intended to aid and abet in the endangerment crimes*

Desai argued there was insufficient evidence to convict him of the endangerment crimes because he did not possess the required intent for aiding and abetting. Desai argued that the State failed to sufficiently prove he knew the injection practices violated a standard of care, or that he intended for the injection practices to violate a standard of care. Additionally, Desai argued the State did not prove he knew of the supply reuse at the clinic.

First, the Court highlighted that one nurse anesthetist testified he had expressed concern to Desai regarding the risk of reentering and reusing propofol vials, yet Desai ordered the anesthetist to continue the practice to save money. The nurse also testified that Desai would yell at the anesthetists for being wasteful if he found unused propofol in syringes or vials. A second anesthetist testified that Desai told him to feign ignorance of multiuse vials if asked.

Next, the Court noted the range of testimonies regarding Desai's focus on minimizing the clinic's use of supplies. Some clinic staff testified that Desai complained about employees wasting too many supplies, including propofol, and that Desai offered a bonus to nurse anesthetists if they lowered the propofol expense. Others testified that Desai wanted doctors to wear the same gowns for multiple procedures, cut materials in half, and reuse disposable forceps. Additionally, a Las Vegas Metropolitan Police Department analyst testified that the clinic's 2007 records indicated an inadequate number of supplies available to use a new vial of propofol and a new syringe for each patient injection.

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<sup>6</sup> See, e.g., *Flight v. State*, 863 S.W.2d 800, 805 (Ark. 1993); *People v. Marshall*, 106 N.W.2d 842, 844 (Mich. 1961).

<sup>7</sup> NRS 195.020 states that aiders and abettors shall be punished as principals. NEV. REV. STAT. § 195.020 (2017).

<sup>8</sup> *Sharma v. State*, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002) (holding "that in order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime.").

<sup>9</sup> See, e.g., *People v. Wheeler*, 772 P.2d 101, 105 (Colo. 1989); *State v. Foster*, 522 A.2d 277, 284 (Conn. 1987); *Commonwealth v. Bridges*, 381 A.2d 125, 128 (Pa. 1977); *State v. McVay*, 132 A. 436, 439 (R.I. 1926).

The Court concluded that, viewing the trial evidence in a light most favorable to the prosecution, any rational trier of fact could have found Desai guilty of the endangerment crimes beyond a reasonable doubt.<sup>10</sup> The State presented evidence that Desai was concerned more with curbing supply waste than patient safety, and that the clinic lacked adequate supplies to safely inject patients. The evidence further demonstrated that Desai knew of the risks of multiuse vials but requested the anesthesiologists continue, and conceal, the unsafe practices. Accordingly, the State presented sufficient evidence for the required intent to aid and abet, and the Court affirmed Desai's convictions for the endangerment crimes.

*There was insufficient evidence to convict Desai of second-degree murder*

The jury instructions provided both second-degree felony murder and murder in the second degree as theories of liability under which Desai could be convicted of second-degree murder. The verdict form for second-degree murder provided two boxes—"Guilty of Second Degree Murder" and "Not Guilty"—with no way to determine whether the jury found Desai guilty of murder in the second-degree or second-degree felony murder.

*Second-degree felony murder*

Second-degree felony murder requires "an immediate and direct causal relationship between" a defendant's actions and the victim's death.<sup>11</sup> Nevada courts define "immediate" as "without the intervention of some other source or agency."<sup>12</sup>

The Court concluded Desai's reckless and negligent conduct was sufficiently attenuated from the victim's death because the victim did not die as an immediate and direct result of Desai's actions. Instead, the victim's refusal to follow two doctors' recommended treatment to potentially cure the disease during the four years after Desai's conduct broke any direct causal relationship. Thus, the Court held that no rational trier of fact could have found the required elements of second-degree felony murder beyond a reasonable doubt.

*Murder in the second degree*

Murder in the second degree requires implied malice, but without the premeditation and deliberation elements of first-degree murder.<sup>13</sup> A defendant whose affirmative act harms the victim demonstrates implied malice.<sup>14</sup>

The Court concluded that Desai acted without implied malice because his conduct was one step removed from the harmful act. Instead, the nurse anesthetist who performed the improper injection committed the affirmative act that harmed the victim. Thus, the Court held that no rational trier of fact could have found the required elements of murder in the second degree beyond a reasonable doubt.

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<sup>10</sup> When reviewing challenges to the sufficiency of the evidence, courts must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

<sup>11</sup> An inherently dangerous felony is also required. *Sheriff v. Morris*, 99 Nev. 109, 118, 659 P.2d 852, 859 (1983).

<sup>12</sup> *Ramirez v. State*, 126 Nev. 203, 206, 235 P.3d 619, 622 (2010) (internal quotation marks omitted).

<sup>13</sup> NEV. REV. STAT. § 200.030 (2015); *see Labastida v. State*, 115 Nev. 298, 307, 986 P.2d 443, 449 (1999).

<sup>14</sup> *Labastida*, 115 Nev. at 307, 986 P.2d at 449.

Accordingly, Desai's conviction for second-degree murder was reversed due to insufficient evidence under either liability theory.

### **Conclusion**

The Court affirmed Desai's convictions for negligent and reckless crimes resulting in bodily harm because the State presented sufficient evidence that Desai acted with awareness of, and intent to promote, the clinic's risky injection practices that caused the hepatitis C outbreak. The Court reversed Desai's conviction for second-degree murder because Desai acted without implied malice, one step removed from the harmful act, and his conduct was sufficiently attenuated from the death.