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Richard v. State, 134 Nev. Adv. Op. 64 (Aug. 23, 2018)

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Recommended Citation

Patrick, Kaila, "Richard v. State, 134 Nev. Adv. Op. 64 (Aug. 23, 2018)" (2018). *Nevada Supreme Court Summaries*. 1187.

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CRIMINAL APPEAL: EVIDENCE, HEARSAY

Summary

The Court determined that a declarant must have testified and have been subject to cross-examination about a specific out-of-court statement for it to be excluded from the definition of hearsay as a prior inconsistent statement or identification. Further, the Court held that the errors of admission made by the district court were harmless.

Background

Appellant Dvontae Richard was convicted of crimes committed during two incidents that occurred four days apart. Only the second incident is relevant to this appeal.

On the date of the second incident, Kirsten Kinard and his cousin, Eric Blake, were at a car wash when Richard, walking with an unidentified man, approached Kinard and grabbed his Cuban link gold necklace valued at approximately \$45,000. Kinard's cousin reacted by discharging his firearm. Richard's accomplice returned fire. During the shooting, people were hit, including Kinard and a person wearing a red hood.

Police arrived on the scene. They tracked down Richard with the help of witnesses and by following a trail of his blood. Both Kinard and Richard were taken to University Medical Center (UMC) for treatment. At UMC, the Las Vegas Metropolitan Police Department (LVMPD) interviewed Kinard as a victim and Richard as a suspect.

At UMC, Richard made statements to Detective Weirauch and Detective Spiotto which included inculpatory remarks. Richard made these statements after the detectives read Richard his *Miranda* rights. The statements were recorded and transcribed. Kinard described Richard to Detective Weirauch. He identified Richard when he was wheeled past Richard's hospital room.

Richard made a pre-trial motion to suppress his prior statement to police. After an evidentiary hearing, the district court denied the motion and allowed the State to use the statements because it met its burden by demonstrating Richard's statements were made voluntarily.

When Kinard testified at trial he responded "no" when asked if he could identify Richard as the person who "snatched" his chain. Kinard was never asked about the identification during the trial. A jury convicted of various crimes.

On appeal Richard argues that Kinard's identification at the hospital provided by Weirauch's testimony is inadmissible hearsay and that his inculpatory statements introduced at trial were involuntary and thus violated the Fourteenth Amendment.

Discussion

Detective Weirauch's testimony

The district court allowed the state to present testimony by Weirauch involving Kinard's initial statements identifying Richard. Richard argues that this testimony was hearsay and violated his Sixth Amendment right to confront his accuser.

¹ By Kaila Patrick

NRS 51.035 defines hearsay as “a statement offered in evidence to prove the truth of the matter asserted,” but exempts certain statements from that broad definition. A statement is not hearsay if: “the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: (a) Inconsistent with the declarant's testimony.”² The Court reviewed the admission of the testimony for abuse of discretion.

Kinard’s description of his attacker

At trial, Kinard was unwilling to testify as to the identity of Richard. Further, he was not asked about his previous statements to Detective Weirsauch at any time during trial. Weirsauch testified that Kinard described Richard as a “black male adult wearing a [red] hoodie.” The State contends the detective’s testimony was properly admitted according to NRS 51.035(2)(a) because Kinard testified, was subject to cross-examination, and his testimony was inconsistent with Weirsauch’s testimony.

However, the Court determined that the district court should not have allowed Weirsauch’s testimony about Richard’s race to be admitted. The Court reasoned that Kinard did not testify inconsistently with his initial description of Richard. However, it held that because Richard admitted to grabbing Kinard’s chain, Weirsauch’s testimony about race did not prejudice Richard.

Kinard’s Identification

The State contends that the testimony regarding Kinard’s identification while in the hospital is admissible because it was a proper impeachment as a prior inconsistent statement and that it was admissible as an identifying statement in accordance with NRS 51.035(2)(c). The Court addressed the two contentions separately.

Prior Inconsistent Statement

NRS 51.035 permits admission of a statement made out-of-court if “the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: inconsistent with the declarant's testimony.” The Court found that Kinard’s prior identification of Richard are out-of-court statements that fail to meet the necessary requirements for admission pursuant to NRS 51.035(2)(a) and NRS 50.135(2)(b) because the State neglected to ask Kinard about his initial identification of Richard at the hospital. Therefore, Kinard was not “subject to cross-examination concerning the statement” as required by NRS 51.035(2) or given an opportunity to explain or deny the statement. Accordingly, the Court determined that Weirsauch’s testimony was not properly admitted as an inconsistent statement in accordance with NRS 50.135(2).

Prior Identification

NRS 51.035(2)(c) provides that an out-of-court statement is not hearsay if “the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made soon after perceiving the person.”

The State argued that “identifying statements made by a declarant who testifies and is

² NEV. REV. STAT. § 51.035(2)(a) (2017).

subject to cross examination are not hearsay." The State relied on *Jones v. State* to support its argument that when a "declarant identifies the defendant out-of-court, soon after perceiving the defendant, the identifying statement may be admitted as an exception to hearsay."³ The Court found the State's reliance on *Jones* was misplaced.

The Court explained that the State ignored a crucial portion of the statute which requires the declarant be subject to cross-examination concerning the relevant statement. It held that the district court abused its discretion by admitting Weirauch's testimony because the statement was not properly admitted as either a prior inconsistent statement or prior identification. However, the Court held that the error was harmless.

Richard's inculpatory statements

Richard argued that the admission of his statements to the police violated his Fourteenth Amendment rights based on the circumstances surrounding the statements. The Court looked to the totality of the circumstances to determine if the confessions made by Richard are admissible.

Richard's Statement to Detective Weirauch

Richard gave his statement to Weirauch shortly after being shot in the leg and while in the hospital, which Richard contends makes the statements involuntary. The Court considered the decisions in *Chambers v. State*⁴ and *Wallace v. State*⁵ to determine that Richard's circumstances did not render his statements involuntary. The Court reasoned that although Richard's responses to question were not direct, they do not show proof of an altered state of consciousness.

Richard's Statement to Detective Spiotto

Spiotto took Richard's statement the day after the shooting. Richard contends that his statements were involuntary based on the interview taking place at 10:30pm, injuries, location, and medical treatment. Based on the circumstances surrounding Richard's second statement, the Court held that the district court made the correct determination that Richard's statement was in fact voluntary.

Conclusion

The Court clarified that unless an individual testifies to and is subject to cross-examination regarding the actual out-of-court statement, that statement is not excluded from the definition of hearsay as a prior inconsistent statement or a prior identification. Accordingly, the Court held that the district court admitted some prior statements in error, but that the errors were harmless. Further, the Court affirmed the district court's judgment of conviction.

³ *Jones v. State*, 95 Nev. 154, 591 P.2d 263 (1979).

⁴ 113 Nev. 974, 980, 944 P.2d 805, 808 (1997).

⁵ 84 Nev. 603, 605, 447 P.2d 30, 31 (1968).