6-4-2020

# Belcher v. State, 136 Nev. Adv. Op. 31 (June 4, 2020)

Maggie DiFederico

DEATH PENALTY DIRECT APPEAL

## Summary

Norman Belcher appealed his conviction and capital sentence, alleging several errors by the district court. The Court agreed with Belcher on two challenged errors: that the district court should have suppressed statements Belcher made to police because he was in custody at the time and had not been advised of his *Miranda* rights, and that one of Belcher's robbery convictions was not supported by sufficient evidence. The Court reversed the robbery conviction and ultimately concluded that the district court's failure to suppress his statements to the police was harmless error. The Court established factors to consider in determining whether to review an error's harmlessness when the State has not argued harmlessness. The Court affirmed Belcher's conviction because no other error warranted relief.

## Background

In December 2010, Norman Belcher purchased prescription drugs from William Postorino. When Postorino was unable to fill the prescriptions he purchased, Belcher sent Postorino a string of threatening text messages demanding his money back. Postorino returned Belcher's money and ended their business relationship. Soon after, an intruder broke into Postorino's home at 2:30 in the morning. The intruder shot Postorino's roommate, Nick Brabham, and 15-year-old daughter, Alexus. Brabham was seriously injured and fell into a coma. Alexus's injuries killed her. Brabham's friend, Ashley Riley, was also in the home but was not shot. The intruder took several items from Postorino's home, including a laptop, safe, television and wallet.

Postorino's neighbors observed a man outside of his home before and after the shooting, loading objects into a white car. Officer Cavaricci stopped a rented white Nissan Versa for speeding about 18 miles from Postorino's home at 3:16 that same morning. Belcher, who Officer Cavaricci later identified as the vehicle's driver, was ticketed and allowed to leave. The vehicle was set on fire a few hours later. Belcher was caught on video walking away from the burning car. A month later, after Brabham woke from his coma, he identified Belcher as the shooter.

Belcher's romantic partner, Bridgette Chaplin, said Belcher indicated before the shooting that his motive to shoot Alexus was revenge against Postorino. He also told Chaplin that the best way to dispose of evidence is to burn it. After Belcher was arrested, he asked an officer at the jail if he would be placed under higher security because he "killed a kid." Following a jury trial, Belcher was found guilty of two counts of robbery with the use of a deadly weapon and one count each of burglary while in possession of a firearm, murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon causing substantial bodily harm, and third-degree arson. The jury sentenced Belcher to death for the murder. Belcher appealed his conviction.

---

[1] By Maggie DiFederico.

**<u>Discussion</u>**

*Admissibility of Belcher's statement to police*

On appeal, Belcher asserted that his statements to detectives should have been suppressed because he was in custody when he made them and thus entitled to *Miranda* warnings.[2] Failure to advise a defendant of his or her *Miranda* rights renders any statements made during a custodial interrogation inadmissible at trial for any purpose other than to impeach inconsistent testimony.[3] Because it was uncontested that Belcher was not given *Miranda* warnings, the Court focused its inquiry on whether Belcher was in custody at the time of the interview. A defendant is in custody if they have either been formally arrested or had their freedom restrained to the extent that a reasonable person would not feel free to leave.[4] The Court analyzed the totality of the circumstances, including the interrogation site, objective indicia of arrest, and the length and form of questioning to conclude that Belcher was in custody during the interrogation and that the district court erred in denying his motion to suppress.

*Site of interrogation*

Belcher was questioned in an interview room at the homicide office. While an interview room alone does not establish that a suspect is in custody, the additional fact that detectives drove Belcher to the interrogation site indicated that he was in custody.[5] The Court reasoned that, by transporting him to the homicide office, detectives made it harder for Belcher to leave without their help. The detectives also sat in front of the only door to the interview room while questioning Belcher and locked the door behind them when they left the room, further restricting his ability to leave. Therefore, the Court concluded that the interrogation site suggested that Belcher was in custody.

*Objective indicia of arrest*

The Court listed seven objective indicia of arrest and noted that all but one were present in Belcher's case.[6] First, Belcher was never told that he was free to leave and the detectives' actions indicated that he was not. Second, detectives restricted Belcher's movement during the interview. Although the State argued that Belcher was not forbid from using his cell phone, the Court rejected this argument based on evidence in the record establishing that Belcher's cell phone was in his apartment at the time of questioning. Third, detectives forced responses from Belcher to questions he initially refused to answer, suggesting that some of Belcher's responses were not voluntary. Fourth, the detectives deceptively told him he had already been identified by a police officer. Fifth, Belcher was not allowed to leave after the interview and was arrested an hour later when Officer Cavaricci identified Belcher as the driver. The last indicia present in Belcher's case was that the

---

[2]  Miranda v. Arizona, 384 U.S. 436 (1966).
[3]  Carroll v. State, 132 Nev. 269, 282, 371 P.3d 1023, 1032 (2016); Lamb v. State, 127 Nev. 26, 36, 251 P.3d 700, 707 (2011).
[4]  *Carroll*, 132 Nev. at 282, 371 P.3d at 1032 (quoting State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998)).
[5]  California v. Beheler, 463 U.S. 1121, 1125 (1983).
[6]  The indicia are found in *Taylor*, 114 Nev. at 1082 n.1, 968 P.2d at 323 n.1.

interrogation atmosphere was police-dominated— he was either flanked by officers or locked in the interview room at all times.

*Length and form of questioning*

Police questioned Belcher for a little less than an hour, but he was in the interview room for three and a half hours. Belcher asked to leave after the interview but, despite telling him he could leave in about ten minutes, the detectives kept Belcher for an additional hour. Further, detectives questioned Belcher as a suspect rather than a witness, employed pressure and deception, and offered evidence that conflicted with his answers on several occasions. The Court thus concluded that under a totality of the circumstances analysis, Belcher was in custody when detectives questioned him. Because detectives never issued *Miranda* warnings, the district court erred in denying Belcher's motion to suppress.

*Harmless-error review*

The Court must reverse a judgment when an appellant shows constitutional error, unless the error was harmless beyond a reasonable doubt.[7] The State has the burden of proving the error was harmless and forfeits the chance to meet its burden if it neglects to address harmlessness.[8] The State did not address harmlessness, which the Court could have treated as a waiver of the issue. However, the Court addressed whether there are circumstances in which it will evaluate harmlessness when the State does not argue it. Because Nevada's statutory definition of harmless error includes what the Court views as mandatory language that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," the Court determined that Nevada appellate courts may consider harmlessness even when the State has omitted such an argument.[9]

Because there are policy reasons not to do so, the Court will only overlook such an error on behalf of the State in extraordinary circumstances.[10] Most importantly, it would be unfair to allow courts to make the State's argument without giving the defendant an opportunity to respond.[11] Limiting the circumstances in which appellate courts can consider harmlessness also discourages laxness on the part of the State and avoids using up too many of the reviewing court's resources.[12] The Court stated that it will consider three factors in deciding whether to review an error's harmlessness in the absence of an argument by the State: the length and complexity of the record, whether the harmlessness of an error is certain or debatable, and the futility and costliness of reversal and further litigation. In applying those three factors to Belcher's case, the Court concluded that the error in admitting Belcher's statements to the detectives was harmless.

First, the Court was not convinced that the size of the record was compelling in this case. The Court determined that only the guilt phase verdict portion of the record was relevant to determining whether the admission of Belcher's statements was harmless. Additionally, because the Court is already required to devote extra resources to capital cases, unbriefed harmlessness

---

[7] NEV. REV. STAT. § 178.598 (2019).
[8] *See* Chapman v. California, 386 U.S. 18, 24 (1967); *See also* Polk v. State, 126 Nev. 180, 184–86, 233 P.3d 357, 359–61 (2010).
[9] NEV. REV. STAT. § 178.598 (2019).
[10] United States v. Rodriguez, 880 F.3d 1151, 1164 (9th Cir. 2018).
[11] United States v. Gonzalez-Flores, 418 F.3d 1093, 1100–02 (9th Cir. 2005).
[12] *Rodriguez*, 880 F.3d at 1163; *Gonzalez-Flores*, 418 F.3d at 1100.

review would not present undue burden. Second, the Court was convinced that the error in Belcher's case was harmless beyond a reasonable doubt because Belcher did not confess during the interview or provide detectives with information or evidence linking him to the crimes. Further, there was other more compelling evidence of Belcher's guilt, including his statements to Chaplin and the prison officer, Brabham's identification of Belcher, and eyewitness testimony placing a white car, which police later pulled over, at the scene of the shooting. Lastly, the Court determined that reversal in this case would be futile because another jury would surely reach the same result based on the overwhelming evidence of Belcher's guilt. Therefore, the Court's consideration of the factors revealed that the district court's error in denying Belcher's motion to suppress was harmless.

*Conflict of interest*

Belcher also argued that the district court should have granted his motion to dismiss based on a conflict of interest. Belcher contented that one of his attorneys, Lance Maningo, defended Brabham in a separate case and did not cross-examine Brabham at the preliminary hearing because of this prior relationship. An attorney has a conflict of interest where he "actively represents conflicting interests."[13] The Court determined that Maningo did not have a conflict of interest because his co-counsel's decision not to cross-examine Brabham was unrelated to Maningo's prior representation of Brabham. Therefore, a conflict did not adversely affect Maningo's performance and the district court did not err in denying Belcher's motion to dismiss.

*Apartment search*

Belcher next argued that the district court should have granted his motion to suppress evidence seized from his apartment because police entered the apartment before they had a warrant to do so. The Court rejected this argument. Although officers entered his apartment before obtaining a warrant, their search began after the warrant was issued. Their application for a warrant did not include any evidence found during the unauthorized entry. Because there was an independent source for information used to obtain a warrant, the Constitution does not require suppression of the evidence.[14]

*Out-of-court identifications*

Belcher argued that the district court erred in denying his motion to exclude Nick Brabham's and Officer Cavaricci's identifications of him. He contended that the identification procedures were unnecessarily suggestive. While the Court agreed, it determined that the district court did not err because the procedures did not render the identifications unreliable. The procedures were unnecessarily suggestive because the police showed Brabham a photo lineup in which Belcher was the only subject with light hair and allowed Officer Cavaricci to view Belcher at the homicide office. However, Brabham's identification was still reliable because he identified Belcher by his name and features before officers showed him the photo lineup. Officer Cavaricci's identification was also reliable because he was able to view Belcher extensively during the traffic

---

[13]  Strickland v. Washington, 466 U.S. 668, 692 (1984).
[14]  Segura v. United States, 468 U.S. 796, 813–14 (1984).

stop and had to confirm that Belcher matched his driver's license photo. He also identified Belcher less than one day after the stop and was able to identify him immediately and with certainty.

*Failure to preserve exculpatory evidence*

Belcher next argued that that the district court should have granted his motion to dismiss because the State did not collect Postorino's cell phone. Belcher asserts that text messages on the phone would have shown that Postorino's drug debt had been settled, thus rebutting the State's proposed motive. The Court held that Belcher did not demonstrate that the phone contained additional text messages or that they would have altered the outcome of the trial had they existed. Further, Belcher was required to show that the officers acted in bad faith in order to have a dismissal granted. Because he failed to do so, the Court ruled that the district court did not err in denying the motion to dismiss.

*Aiding and abetting theory of guilt*

Belcher argued that the district court should have granted his motion to strike the State's aiding and abetting theory of guilt. The Court disagreed. Evidence at the preliminary hearing indicated that more than one individual was involved in the burglary and shootings. Belcher was not prejudiced by the district court's denial, as the State rested solely on the theory that Belcher acted alone at trial.

*Prior bad acts*

Belcher also argued that the district court erred in allowing testimony about a prior burglary accusation against him and about his comments about harming one of the victims, as well as excluding evidence of a home break-in by another suspect. The Court held that Belcher waived any challenge to the witnesses' testimony about the prior burglary when he agreed at a pretrial hearing to admission of evidence about his drug dealing with Postorino and the burglary accusation. Further, Belcher's conversations with Chaplin were relevant because they illustrated intent to harm William by harming his child, and were therefore subject to a hearsay exception.[15] Lastly, evidence of the alternative suspect's criminal history was not admissible to prove the other suspect was the perpetrator under NRS 48.045(1) and Belcher did not demonstrate that the evidence was subject to an exception under NRS 48.045(2).

*Witness vouching*

Belcher argued that the district court should have prohibited one of the detectives from testifying that Ashley Riley's statement to the police was credible. Riley, the alternative suspect's girlfriend, told police that her boyfriend would not have been upset that she was spending time with Brabham. The Court noted that Belcher did not object to the detective's testimony at trial and that defense counsel actually invited the challenged testimony. Defense counsel asked the detective about her skepticism of Riley's statement during direct examination. This provoked the State to cross-examine the detective on this issue, which was when the detective testified that she later

---

[15] *See* NEV. REV. STAT. § 51.035(3)(a) (2019).

believed Riley's statement. Therefore, the Court held that Belcher could not raise this issue on appeal.

*Hearsay*

Belcher argued that the district court violated the Confrontation Clause in admitting hearsay evidence. Belcher did not object to this evidence at trial. Further, the challenged testimony was not offered to prove the truth of the matter asserted and thus was not hearsay. The Confrontation Clause does not prohibit admitting testimonial statements for purposes other than establishing the truth of the matter asserted.[16]

*Sufficiency of the evidence of robbery*

Belcher argued that the State offered insufficient evidence to support the robbery conviction for taking Brabham's laptop and wallet. On this challenge, the Court agreed with Belcher. Police found Brabham's laptop and wallet in Postorino's home after the burglary and shooting. Additionally, there were contradictory accounts of where Branham's belongings were before the shooting. Given these two factors, the Court did not believe that a rational trier of fact could conclude beyond a reasonable doubt that Belcher took the laptop and wallet. The Court reversed Belcher's robbery conviction related to Brabham's property.

*Guilt phase jury instructions*

Belcher challenged several jury instructions given at trial. He asserted that the implied malice instruction contained outdated language, the premeditation instruction did not distinguish between the elements of first- and second-degree murder, the reasonable doubt instruction minimized the State's burden of proof, and the equal and exact justice instruction was confusing. Belcher did not object to these instructions at trial. The Court noted that it has previously upheld the language in the implied malice instruction, premeditation instruction, and the equal and exact justice instruction.[17] And the district court gave the reasonable doubt instruction contained in NRS 175.211, which the Court has held to be constitutional.[18]

*Ineffective assistance of trial counsel*

Belcher argues that defense counsel introduced prejudicial expert testimony from a psychologist during the penalty hearing and that counsel's ineffectiveness is apparent from the record. The Court normally only addresses claims of ineffective assistance of counsel if there has already been an evidentiary hearing or determination that a hearing is unnecessary.[19] No evidentiary hearing was held in Belcher's case and the Court did not believe counsel's error was so obvious that a hearing was unnecessary. The Court therefore declined to consider Belcher's ineffective-assistance-of-counsel challenge.

---

[16] Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004).
[17] Leonard v. State, 117 Nev. 53, 78–79, 17 P.3d 397, 413 (2001); Byford v. State, 116 Nev. 215, 236–37, 994 P.2d 700, 714–15 (2000); Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 824–25 (2004).
[18] Nev. Rev. Stat. § 175.211 (2019); Garcia v. State, 121 Nev. 327, 340 & n.26, 113 P.3d 836, 844 & n.26 (2005).
[19] Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001).

*Penalty phase jury instructions*

Belcher argued that the penalty phase jury instructions defining mitigation improperly limited mitigating evidence to evidence related to the offense. He also contended that the jury should not have been instructed that it was allowed to considered hearsay evidence. Belcher failed to object to these instructions at trial. The Court reviewed the record and concluded that neither mitigation instruction implied that mitigating evidence is limited to evidence concerning the offense. In challenging the hearsay instruction, Belcher asked the Court to overrule its prior decisions that hearsay is generally admissible at a capital penalty hearing under NRS 175.552(3) and that neither the Confrontation Clause nor *Crawford* applies.[20] Belcher also did not point to any specific hearsay statements introduced at the penalty phase, and thus did not demonstrate plain error.

*Constitutionality of the death penalty*

Belcher argued that the death penalty violates the Eighth Amendment. The Court cited its prior rejection of this argument in declining to consider Belcher's claim.[21]

*Cumulative error*

Belcher finally argued that reversal is warranted due to the cumulative effect of trial errors. The Court noted that Belcher demonstrated two errors (that the district court should have suppressed his statement to police and that one robbery conviction was not proven beyond a reasonable doubt). Once the Court reversed the robbery conviction, Belcher was left with one error, which the Court determined was harmless. The Court held that there was nothing to cumulate and rejected Belcher's cumulative error challenge.

*Mandatory review of death sentence*

NRS 177.055(2)(c)-(e) requires the Court to review the evidence to confirm that it supports the aggravating circumstances found; whether capital punishment was imposed under the influence of passion, prejudice or arbitrary factors; and whether capital punishment was excessive in this case.[22] The Court held that four of the five aggravating circumstances found by the jury were supported by sufficient evidence and that the jury did not impose the death penalty under improper influence. The Court also held that the death penalty was not excessive in Belcher's case because there was no evidence that Belcher was under the influence or suffering from uncontrollable or delusional impulses when he shot two people. Belcher had also previously committed a violent crime that resulted in another person's death.

---

[20]  NEV. REV. STAT. § 175.552(3) (2019); Crawford v. Washington, 541 U.S. 36 (2004); *See, e.g.*, Summers v. State, 122 Nev. 1326, 1332–33, 148 P.3d 778, 783 (2006).
[21]  *See, e.g.*, Thomas v. State, 122 Nev. 1361, 1373, 148 P.3d 727, 735–36 (2006).
[22]  NEV. REV. STAT. § 177.055(2)(c)-(e) (2019).

## Conclusion

The Court held that the district court erred in denying Belcher's motion to suppress his statements to police because he was in custody during the interview and was not read his *Miranda* warnings. However, after setting forth factors to determine whether harmlessness should be considered when the State has not argued it, the Court found that the district court's error was harmless. The Court further held that Belcher's robbery conviction related to Brabham's property was not supported by sufficient evidence and reversed that conviction. The Court found no other meritorious claims of error and thus affirmed Belcher's other convictions and capital sentence.