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Brown (Larry) v. State of Nevada, 138 Nev. Adv. Op. 44 (June 23, 2022)

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Confrontation Clause

Summary

In this appeal, the Court considered whether a jury may consider footwear impression evidence without the aid of expert testimony. The Court determined it was proper here. The Court also considered whether the district court violated the defendant's rights under the Confrontation Clause by allowing a witness to testify via a two-way video and limiting cross-examination to protect proprietary trade secrets. The Court determined that the district court failed to make express findings under *Lipitz*.² The Court also concluded that the district court did not abuse its discretion by limiting witness testimony. No reversal was granted, and the court affirmed.

Facts and Procedural History

The State indicted Larry Brown on charges that included conspiracy to commit robbery with the use of a deadly weapon, robbery with the use of a deadly weapon, murder with the use of a deadly weapon, and ownership or possession of a firearm by a prohibited person. Mr. Brown entered an *Alford* plea for the possession charge but went to trial for the remaining charges.³ These charges stemmed from the 2017 death of Kwame Banks who was shot and killed outside a Las Vegas apartment complex. Detectives at the scene learned that before his death Banks agreed to sell marijuana to Anthony Carter, Brown's codefendant, and to an unidentified third party. The detectives found Banks' body lying between two cars in a pool of blood. They also found two bullet cartridge cases, bloody shoe prints leading away from the body, and a torn latex glove near the body with remnants also near the apartment complex exit. Officers also found a black glove and three cell phones. Detectives were also able to obtain surveillance video that showed a white SUV picking up an African American male and driving off.

The police investigated the three cell phones and learned that two belonged to Banks and the third one was registered to Brown. Upon executing a search warrant for Brown's home in Atlanta, the white SUV and shoes that had prints which appeared to match the shoe prints at the crime scene. Detectives further linked Brown's DNA to both the torn latex glove and the black cloth glove found at the scene. The murder weapon was never recovered. Detectives used technology from a private company called Cellebrite to extract information from Bank's phones. Initially, Cellebrite was unable to access the information on the phone. The police then sent Brown's phone to Cellebrite, which again was unable to access the information on the phone. After a software update and the issuance of a second search warrant, Brian Stofik at Cellebrite

¹ By Anne-Greyson Long.

² *Lipsitz v. State*, 135 Nev. 131, 442 P.3d 138 (2019).

³ *North Carolina v. Alford*, 400 U.S. 25 (1970).

was able to extract the information. The extracted information contained a series of text messages between Carter and Brown indicating that they were planning something involving an identified third person. The messages included the address where the murder occurred and other statements.

Before trial, Brown moved to strike evidence of footwear impressions, arguing that such evidence required expert testimony. The State countered, noting that it would be showing the shoeprint and the photograph of the shoes found at Brown's residence later impounded into evidence — as these were independently admissible. The district court denied the motion. Brown also moved to preclude any cell phone information obtained from Cellebrite. Brown asserted that he should be able to cross-examine Cellebrite about its software that allows for the duplication of the phone's data without reviewing the information on it. The district court agreed to have a sealed hearing outside the jury's presence to allow Brown to question Cellebrite's witness prior to his testimony at trial.

The State learned early during the trial that Brian Stofik would be unable to appear in person. Stofik was testifying as to whether the copy of the phone returned to law enforcement was accurate. The State argued that good cause existed to allow Stofik to testify audio visually. Brown made a *Crawford* objection.⁴ The court concluded that Stofik could effectively testify over two-way video.

Before Stofik testified, the district court held a sealed hearing during which Stofik explained Cellebrite's process for receiving and returning phones and for extracting information from those phones. Stofik was not the employee who attempted to extract the information the first time. Brown then made a *Crawford* objection arguing that he had the right to confront all involved Cellebrite employees about the chain of custody. Brown also argued that that evidence was not properly authenticated. The district court concluded that the proprietary coding and programming did not need to be presented to the jury because of its complicated nature. The district court overruled the objections and allowed the parties to question Stofik regarding how Cellebrite-downloaded and returned the phone information with ensuring its accuracy.

The State also introduced photographs of the bloodied footwear impression taken at the crime scene. While the prosecution did not ask any witness at trial to compare the crime scene photographs against the shoes recovered from Brown's residence, during closing arguments the State suggested that the jury should compare them during deliberations. Banks presented evidence to counter the inference that he fled to Atlanta following the crime and that he fled officers once in Atlanta. Brown testified that he learned of the murder after he returned to Atlanta. Brown was asked about the text messages to Carter on cross-examination. Brown testified that he did not know what the text message about the knife meant. Brown also testified that the text about the address of the crime was on his phone because he dropped Carter off or

⁴ *Crawford v. Washington*, 541 U.S. 36 (2004).

picked him up at that location. Brown denied ever having been at the location. The jury convicted Brown on all counts, leading to an aggregate sentence of thirty years and four months to life in prison. The appeal followed.

Discussion

Brown raised several arguments on appeal, two of which are addressed in the opinion. First, whether the district court improperly submitted evidence of the bloodied footwear without regarding expert testimony; and second, whether the district court violated Brown's rights under the Confrontation Clause by allowing Stofik to testify via two-way video and by limiting the scope of his testimony to avoid disclosing trade secrets.

The footwear impression evidence in this case was admissible without expert testimony

Brown argues that the district court abused its discretion in admitting footwear impression evidence without forensic expert testimony. He contends that the jury needed expert testimony to properly consider the footwear impression evidence admitted at trial, and that the State's suggestion during closing argument that the jury could compare the evidence was improper.⁵ Relevant evidence is generally admissible, and laypersons may draw inferences that are both rationally based on the observer's perception and helpful to determine a fact in issue. Expert testimony is needed "to provide the trier of fact with a resource for ascertaining truth in relevant areas outside the ken of ordinary laity."⁶ The Court had never addressed the issue of whether comparing footwear impressions is within the ordinary range of knowledge or whether such evidence requires an expert's explanation.

A survey of other jurisdictions revealed differing conclusions. The Court concluded that a juror may make personal observations and draw general inferences regarding the similarities between footwear impressions and footwear. The Court further concluded that such evidence generally need not be supported by expert testimony to be admissible. The Court noted that the photographs of the bloodied shoe prints near Banks's body and the shoes found in Brown's girlfriend's home are independently relevant circumstantial evidence.⁷ Further, the photograph of the footwear impression evidence was admitted for the jury's overall observation, and the State elicited no testimony during trial regarding the evidence that would require specialized testimony for the jury to understand. While expert testimony may have helped the jury, it did not render the photograph inadmissible or require an expert testimony to be independently admissible.⁸

⁵ See *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

⁶ *Valentine v. State*, 135 Nev. 463, 472, 454 P.3d 709, 718 (2019).

⁷ See *Commonwealth v. Hawk*, 709 A.2d 373, 376 (Pa. 1998).

⁸ *State v. Yalowski*, 404 P.3d 60, 2017 UT App. 117 (2017).

The prosecutor did not improperly argue during closing that during deliberations the jury should compare the footwear impressions to the shoes found in Brown's residence. Once evidence is admitted during trial, the prosecutor can argue inferences from that evidence. The Court determined that the district court did not abuse its discretion by admitting the footwear impression without accompanying witness testimony.

The district court did not violate Brown's rights under the Confrontation Clause

Brown argued that the district court violated his rights under the Confrontation Clause and that the district court improperly limited his ability to cross-examine. "The Confrontation Clause of the Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him."⁹ The Court reviewed this case de novo because there is a question of law.¹⁰

The district court did not improperly limit witness testimony

A criminal defendant has the right to "explore and challenge through cross-examination the basis of an expert witness's opinion."¹¹ The defendant's right to confrontation is not unlimited and does not entitle the defense to "cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish."¹² The district court can place reasonable limits on cross-examination. The Court had never addressed whether a court may limit testimony in a criminal trial to protect proprietary rights in trade secrets. Both Nevada and federal law accord special protection to trade secrets in civil litigation. A court should consider whether the cross-examination is designed to harass, annoy, or humiliate the witness, whether it could cause prejudice, place the witness in danger, and whether it would confuse the issues, be repetitive of other testimony, be speculative or vague, or only marginally relevant.¹³

The Court concluded that the district court did not clearly abuse its discretion by limiting cross-examination. The record does not show that limiting the testimony left the jury with insufficient information to judge Stofik's credibility regarding the core issues or that a reasonable jury would have received a significantly different impression of Stofik's credibility had the district court not limited the scope of cross-examination. Brown's own testimony independently established the accuracy of the text messages. The Court determined that the district court did not violate the Confrontation Clause by limiting Stofik's testimony to avoid disclosing Cellebrite's trade secrets.

CONCLUSION

⁹ State v. Eight Judicial Dist, Court (Baker), 134 Nev. 104, 106, 412 P.3d 18, 21 (2018).

¹⁰ Chavez v. State, 125 Nev. 328, 339, 213 P.3d 467, 483 (2009).

¹¹ Black v. State, 121 Nev. 779, 790, 121 P.3d 567, 574 (2005).

¹² Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006).

¹³ Cf. Leonard v. State, 117 Nev. at 72, P.3d at 409.

The Court concluded that the jury could consider photographs of footwear impressions along with Brown's shoes without the aid of an expert witness. Both pieces of evidence were independently admissible as circumstantial evidence. The Court further determined a reversal is not warranted for the district court's failure to make express findings under *Lipsitz v. State* regarding the use of a two-way video for a witness testimony. The district court did not abuse its discretion by limiting the cross-examination of a witness to avoid disclosing trade secrets. The Court affirmed the conviction.