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***Phillips v. State*, 121 Nev. Adv. Op. 58 (September 15, 2005)¹**

CRIMINAL – STALKING AND EXTORTION

Summary

Defendant/Appellant Donald E. Phillips ("Phillips") appealed from a jury conviction of one count each of aggravated stalking and preventing or dissuading a witness from testifying, and twelve counts of extortion.

Disposition

Affirmed in part, reversed in part, and remanded. The court concluded that the term "libel" means publication of a false factual statement; "'disgrace' means to humiliate or cause loss of favor or standing; and 'secret' means a fact that is unfavorable to a person and unknown to the public and that a person would wish to conceal."² Moreover, the court determined that the district court failed to provide proper jury instructions regarding the elements of extortion, which resulted in a verdict based on a legally insufficient theory of culpability, and reversed and remanded Phillips' extortion convictions for a new trial. Finally, the court concluded that although the district court erred in admitting evidence of Phillips' prior bad acts, this error was harmless as to the counts of aggravated stalking and preventing or dissuading a witness from testifying, so it confirmed Phillips' convictions on those counts.

Factual and Procedural History

1. Facts

Between September 2000 and June 2001, Phillips sent a number of letters to, and left several voicemail messages for, Las Vegas hotel developer Stephen Wynn ("Wynn").³ In the first group of letters, Phillips claimed that he and Wynn shared a biological father who allegedly left an inheritance to both Phillips and Wynn, and Phillips was trying to claim that inheritance. Phillips also asked Wynn to send him money in sums ranging from \$25,000.00 - \$50,000.00, and claimed that he would reveal their alleged family ties if Wynn did not "do the right thing."⁴

The second group of letters contained similar allegations as the first, and also alleged that Wynn had Mafia ties. Phillips demanded money, threatening to expose Wynn's alleged criminal history to the media and the FBI if Wynn did not cooperate.

Phillips then sent a third group of letters. In one letter, he addressed Wynn's director of security, Scott Werwinski ("Werwinski"), stating, " I might die in prison, but I

¹ By Patrick Murch

² Phillips v. State, 121 Nev. Adv. Op. 58 at 1 (Sept. 15, 2005).

³ To facilitate reading, the contents of these letters and messages are discussed here. As discussed *infra*, the letters and evidence of the voicemail messages were introduced at Phillips' trial.

⁴ Phillips, 121 Nev. Adv. Op. 58, at 5.

will get you."⁵ Phillips also alleged that Wynn had committed criminal acts, and continued to demand money from Wynn.

In addition to the letters, a person who called himself either Donald Phillips or Don Vici⁶ left two voicemail messages, containing threats to kill Wynn, on Werwinski's answering machine at Wynn Resorts.

2. Procedure

a. *Indictment*

On August 1, 2001, Phillips was indicted on one count each of aggravated stalking and dissuading a witness from testifying, and eighteen counts of extortion. All of the extortion counts alleged that Phillips:

[D]irectly or indirectly threaten[ed] to accuse [Wynn] with a crime and/or to injure [Wynn] and/or to publish or connive at publishing any libel; and/or to expose or impute to [Wynn's] disgrace and/or a secret of [Wynn's], with the intent to extort and/or gain money and/or United States currency, to wit: by defendant writing letters and/or correspondence demanding money from [Wynn] while threatening to expose the said [Wynn] to false claims of heritage and/or make false claims to law enforcement and/or the media.⁷

Phillips filed a motion seeking a DNA comparison to ascertain the veracity of his allegations that he and Wynn were half-brothers. The State argued that because extortion is a crime of threat, the veracity of Phillips' threats was irrelevant. Nonetheless, the State filed an amended indictment in which it changed the language charging Phillips with extortion.⁸ Based on the amended indictment, the court denied Phillips' motion.

b. *Evidence Admitted at Phillips' Trial*

The State moved to admit "bad acts" evidence of Phillips' prior criminal convictions: 1) felony theft (1977); 2) armed robbery (1978); 3) attempted robbery (1983); 4) illegal possession of a concealed weapon (1992); and 5) auto theft (1994). The court allowed the State to introduce evidence related to Phillips' prior convictions for attempted robbery and illegal possession of a concealed weapon.

At Phillips' trial, three witnesses testified to events related to Phillips' attempted robbery conviction, and two testified to events related to his concealed weapon conviction. In addition, two of Phillips' relatives testified about threats he made to them if they did not give him money.

⁵ *Phillips*, 121 Nev. Adv. Op. 58, at 6.

⁶ Phillips occasionally used this alias to sign his letters to Wynn.

⁷ *Phillips*, 121 Nev. Adv. Op. 58, at 3.

⁸ The new language charged Phillips with extortion by, *inter alia*, "threatening to expose [Wynn] to alleged claims of common heritage." *Phillips*, 121 Nev. Adv. Op. 58, at 3. The State later filed additional amended indictments, but the charging language of the extortion counts remained the same.

As previously discussed, the State introduced Phillips' letters and evidence of the voicemail messages. Moreover, Wynn testified that he and Phillips had never met, that the two were not related, and that Phillips' allegations were false. In his defense, Phillips presented no evidence. Instead, he theorized that he really did believe that he was Wynn's half-brother and that he did not intend to threaten Wynn - he merely wanted to obtain what was allegedly rightfully his from the estate of their alleged common father.

c. *Jury Verdict*

The jury returned a general verdict and found Phillips guilty of one count each of aggravated stalking and preventing or dissuading a witness from testifying or producing evidence, and twelve counts of extortion. Phillips was acquitted on the remaining counts of extortion.

d. *Appeal*

In his appeal to the Nevada Supreme Court, Phillips argued that: "1) a claim of common heritage does not constitute extortion under any theory of culpability enumerated in Nevada's extortion statute; and 2) the district court erred in admitting testimony regarding his prior convictions."⁹ Phillips claimed that a claim of common heritage would not subject him to liability under the Nevada extortion statute because every heir would commit extortion by requesting a portion of an estate based on common heritage. Moreover, because the jury entered only a general finding of guilt on the extortion charges, Phillips argued that it was not possible to determine the theory of extortion that the jury used to convict him, and that the jury "could have convicted him on the legally insufficient theory of claiming a common heritage" with Wynn.¹⁰ Thus, according to Phillips, the court had to set aside the jury's general extortion verdicts.

The State, conversely, argued that the "libel," "disgrace," or "secret" provisions of the extortion statute covered Phillips' threats to expose Wynn, and that there was "no possibility [that] Phillips was convicted of extortion based upon legally insufficient acts."¹¹

As for the "bad acts" evidence, Phillips argued that the lower court erroneously admitted evidence related to his previous convictions "because they were irrelevant, prejudicial, and too remote in time."¹² The State argued that the evidence could be admitted to prove Phillips' intent, "a common scheme or plan, and absence of mistake or accident, and that the probative value of the evidence was not outweighed by its prejudicial effect."¹³

⁹ *Phillips*, 121 Nev. Adv. Op. 58, at 7.

¹⁰ *Id.* at 8.

¹¹ *Id.*

¹² *Id.* at 13.

¹³ *Id.*

Discussion

1. Extortion

"If several theories of criminal liability are presented to a jury and one is legally insufficient or unconstitutional, a general verdict cannot stand regardless of whether the other theories are legally sufficient and factually supported."¹⁴ Conversely, if all theories are legally sufficient, a general verdict will be upheld even if only one of the theories is supported by sufficient evidence.¹⁵ Thus, the court had to determine whether the Nevada extortion statute prohibits a claim of common heritage, standing alone.¹⁶

Extortion is defined in Nevada Revised Statutes ("NRS") § 205.230. "A person is guilty of extortion if, with the intent to gain something, he directly or indirectly threatens:

1. To accuse any person of a crime;
2. To injure a person or property;
3. To publish or connive at publishing any libel;
4. To expose or impute to any person any deformity or disgrace; or
5. To expose any secret"¹⁷

The court determined that Phillips' claim that he was Wynn's half-brother: 1) was not an accusation of a crime or an injury to a person or property; and 2) did not "expose or impute to a person any deformity."¹⁸ To constitute extortion, then, Phillips' claim of common heritage had to involve libel, disgrace, or a secret.

a. *Libel*

Libel is not defined in the extortion statute, but criminal libel is defined in NRS § 200.510.¹⁹ Moreover, the statute provides no definition for "defamation," but in the civil context, "defamation" means "a publication of false statement of fact."²⁰ The court determined that NRS § 200.510 "similarly implies that libel must be false[,] as truth may serve as the basis, in part, for an acquittal."²¹

¹⁴ *Id.* at 8, citing *Yates v. United States*, 354 U.S. 298, 311-12 (1957), *overruled on other grounds by* *Burks v. United States*, 437 U.S. 1 (1978); *Stromberg v. California*, 283 U.S. 359, 368 (1931); *see also* *United States v. Garcia*, 992 F.2d 409, 415-16 (2d Cir. 1993).

¹⁵ *Griffin v. United States*, 502 U.S. 46, 56-57 (1991); *Turner v. United States*, 396 U.S. 398, 420 (1970) ("[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.").

¹⁶ If so, then a general verdict form is sufficient, but if not, the lack of a special verdict required reversal of Phillips' extortion convictions.

¹⁷ *Phillips*, 121 Nev. Adv. Op. 58, at 9, citing NEV. REV. STAT. § 205.230 (2003).

¹⁸ *Id.* at 9-10.

¹⁹ "1. A libel is a malicious defamation, expressed by printing, writing, signs, pictures or the like, tending . . . to impeach the honesty, integrity, virtue, or reputation, or to publish the natural defects of a living person . . . and thereby to expose them to public hatred, contempt or ridicule . . . 3. In all prosecutions for libel the truth may given in evidence to the jury, and, if it shall appear to the jury that the matter charged is libelous as true and was published for good motive and for justifiable ends, the party shall be acquitted, and the jury shall have the right to determine the law and the fact." NEV. REV. STAT. § 200.510.

²⁰ *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (2002).

²¹ *Phillips*, 121 Nev. Adv. Op. 58, at 10.

The State argued that "for purposes of extortion, a statement does not have to be false to be libelous."²² However, the court concluded that, to constitute libel under the extortion statute, a statement must be false, so "a demand for money to refrain from publishing a true claim of common heritage does not constitute extortion by libel."²³

b. *Disgrace and Secret*

Next, the court considered whether a claim of common heritage would meet the "disgrace" or "secret" portions of the extortion statute. "Disgrace" is not defined in Nevada's criminal statutes, so the court utilized a dictionary definition of the word.²⁴ Similarly, the Nevada Revised Statutes do not define "secret." The court looked to the California extortion statute to define the word.²⁵

The court determined that although the State presented evidence of the falsity of Phillips' common heritage claim, it never distinguished "between a false claim under the libel or disgrace provisions of the statute and a true claim under the disgrace or secret provisions."²⁶ Thus, "the jury could have convicted Phillips on the legally insufficient theory that a true claim constituted libel."²⁷ Additionally, the jury could have found that making a true claim of common heritage constituted a crime without ever finding that Wynn would be subjected to disgrace if the claim was exposed, "or that the claim was an unfavorable secret likely to induce Wynn to pay to prevent its disclosure."²⁸

The court concluded that the jury was improperly allowed to consider a legally insufficient theory of extortion because the lower court gave improper jury instructions on the elements of libel, disgrace, and secret. The court, therefore, reversed Phillips' extortion convictions because the general verdict form did not specify which theory of extortion was used to convict him.²⁹

2. Bad Acts Evidence

Under Nevada law, evidence of other crimes "is not admissible to prove the character of a person in order to show that he acted in conformity therewith," but it may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."³⁰

²² *Id.*

²³ *Id.* at 11.

²⁴ "Disgrace" means "to humiliate" or "to cause to lose favor or standing." Webster's Collegiate Dictionary 332 (10th ed. 1993).

²⁵ "[T]he thing held secret must be unknown to the general public, or to some particular part thereof which might be interested in obtaining knowledge of the secret; the secret must concern some matter of fact, relating to things past, present, or future; the secret must affect the threatened person in some way so far unfavorable to the reputation, or to some other interest of the threatened person, that threatened exposure thereof would likely to induce him through fear to pay out money or property for the purpose of avoiding the exposure." *People v. Lavine*, 1 P.2d 496, 499 (Cal. Dist. Ct. App. 1931).

²⁶ *Phillips*, 121 Nev. Adv. Op. 58, at 12.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *Griffin v. United States*, 502 U.S. 46 (1991); *United States v. Garcia*, 992 F.2d 409 (2d. Cir. 1993).

³⁰ NEV. REV. ST. § 48.045(2). Evidence of prior bad acts may be admitted only when: 1) the prior incident is relevant to the present crime; 2) the prior act is proven by clear and convincing evidence; and 3) the

Evidence admitted under the "common scheme or plan" exception must be related to the plan or scheme surrounding the crime for which the defendant is charged,³¹ while "[e]vidence admitted under the exception for "absence of mistake" must tend to show the defendant's knowledge of a fact material to the crime with which he is charged."³² Moreover, the longer an event occurred prior to the charged crime, the less relevant that event is in proving later intent.³³

The court concluded that evidence of the circumstances leading to Phillips' prior convictions did not tend to prove a common scheme or plan to extort, stalk, or dissuade anyone from testifying, nor were his prior convictions relevant to accident or mistake. However, it found that Phillips' prior convictions tended to rebut his claim that he was merely making a claim of common heritage and did not intend to extort money from Wynn.

Furthermore, the court determined that the probative value of Phillips' prior conviction was substantially outweighed by their prejudicial effect, so the lower court abused its discretion in admitting evidence of his prior bad acts. Nevertheless, the court noted that any error was harmless because other evidence, including Phillips' letters, voicemail messages, and threats to Werwinski and Wynn, coupled with Phillips' move to Las Vegas, supported his convictions for aggravated stalking and dissuading a witness.

Conclusion

The court concluded that, "in the absence of a special verdict form and jury instructions on the terms of "libel," "disgrace," and "secret," Phillips' extortion convictions could be based on a legally insufficient theory of law."³⁴ Furthermore, the court determined that the district court improperly admitted evidence of Phillips' prior bad acts, but that such error was harmless. Thus, the court reversed Phillips' extortion convictions but affirmed his convictions for aggravated stalking and dissuading a witness from testifying or producing evidence.

Concurring Opinion

Justices Maupin and Hardesty concurred in the result reached by the majority, but pointed out that "[t]he prosecution clearly overplayed its hand in its closing remarks to the jury" because the prosecutor argued that the case involved the "same game, different

probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). In determining whether to admit such evidence, the trial court must conduct a hearing on the matter outside the presence of the jury and on the record. *Petrocelli v. State*, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985), *modified in part on other grounds by Sonner v. State*, 112 Nev. 1328, 1333-34, 930 P.2d 707, 711-12 (1996), and *superseded by statute on other grounds as stated in Thomas v. State*, 120 Nev. 37, 45, 83 P.3d 818, 823 (Nev. 2004).

³¹ *Cirillo v. State*, 96 Nev. 489, 492, 611 P.2d 1093, 1095 (1980); *see also Brinkley v. State*, 101 Nev. 676, 679-80, 708 P.2d 1026, 1028 (1985) ("The offense must tend to establish a preconceived plan which resulted in commission of the charged crime.").

³² *Phillips v. State*, 121 Nev. Adv. Op. 58, at 14, *citing Cirillo*, 96 Nev. at 492, 611 P.2d at 1095.

³³ *Walker v. State*, 116 Nev. 442, 447, 997 P.2d 803, 806-07 (2000) (concluding that events that were six and ten years old were clearly remote in time and less relevant to defendant's intent at time of incident).

³⁴ *Phillips*, 121 Nev. Adv. Op. 58, at 16.

victim" when she referred to the prior convictions³⁵. Thus, the prosecutor improperly treated Phillips' prior bad acts as character evidence. The concurring Justices agreed that the admission of the bad acts evidence did not require reversal, but stated that the prosecutor had "no excuse for making arguments that endangered an otherwise strong case."³⁶

Dissent

Justice Rose concurred in the reversal of Phillips' extortion convictions for the reasons specified by the majority, but dissented because he felt the prior bad acts evidence was not harmless beyond a reasonable doubt. Justice Rose stated that the first five witnesses for the State testified about Phillips' prior bad acts, after which "the jury could not help but have a vivid picture of Phillips as a crazed, threatening, dangerous man who carries deadly weapons."³⁷ Moreover, the prosecutor intended to present Phillips "as a crazed, threatening, dangerous man who carrie[d] dangerous weapons."³⁸ Thus, because Justice Rose believed that evidence of Phillips' prior acts substantially impacted the jury, he would have reversed and remanded all of Phillips' convictions for a new trial.

³⁵ *Id.* at 17 (Maupin, J., concurring).

³⁶ *Id.*

³⁷ *Id.* at 18.

³⁸ *Id.*