

IN THE SUPREME COURT OF THE STATE OF NEVADA

SANJIV DAVESHWAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50051

FILED

APR 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault. Sixth Judicial District Court, Pershing County; Richard Wagner, Judge.

This appeal arises out of two alleged sexual assaults that occurred at the Burning Man Event¹ (Burning Man) in 2005. Sanjiv Daveshwar attended Burning Man and became a masseur at one of the camps. Under the pretense of giving massages to two different women, Daveshwar penetrated each woman vaginally with his fingers. Thereafter, Daveshwar was charged with and convicted of two counts of sexual assault. At trial, Daveshwar maintained a consent defense and now appeals, arguing that the district court erred in admitting irrelevant evidence, over his objection, of the Code of Ethics of the National Certification Board for Therapeutic Massage and Body Work (the Code).²

¹The State characterizes "Burning Man" as "an annual event held in the Black Rock Desert of Pershing County Nevada every year during the weekdays preceding and including Labor Day weekend." Moreover, "[t]he [e]vent is divided up into theme camps. Each camp dedicates itself to showing its theme through art and other exhibits."

²Daveshwar also raises several other issues on appeal regarding the district court's error in: 1) giving a consent instruction to the jury, 2) the
continued on next page . . .

We agree that the Code was not relevant and the district court improperly admitted it into evidence. We also instruct the district court not to deviate from this court's pronounced consent definition and instruction as iterated below.

FACTS

David Jacob, a trained massage therapist who oversaw the massage area of the Heebee Geebee Camp at Burning Man in 2005, screened the people who wanted to work as masseurs at the Heebee Geebee camp. Jacob had no method to prove that any of the volunteer masseurs had actually received any type of formal training. In 2005, the Heebee Geebee Camp advertised and provided tantric, sensual, and sexual massages. The two persons responsible for tantric, sensual, and sexual massages worked as a team in a private area of the tent. The people responsible for giving tantric, sexual and sensual massages were turning people away on the day the incidents of sexual assault by Daveshwar occurred.

Jacob interviewed Daveshwar to work at Heebee Geebee. Daveshwar did not completely fill out the application form because Jacob knew Daveshwar from another camp and they had a mutual acquaintance. Jacob testified that Daveshwar told him that he had "formal training" and had been practicing massage for three years. Daveshwar did not specify

... continued

admission of expert witness testimony, and 3) insufficient evidence to uphold his conviction. We conclude that these arguments are without merit and decline to address them in this order in light of the other reversible issue.

the type of massage in which he was trained. However, on his application, Daveshwar wrote “no” when the application asked if he had any massage certifications. Jacob admitted that the application was ambiguous in terms of weeding out people offering sexual services. As a nationally certified massage therapist, Jacob is personally governed by a code of conduct, which very clearly prohibits sexual activity and also requires explaining what exactly the masseur will do to the client. However, Nevada did not license masseurs at the time of the alleged assault, thus the Code was not in force.

DISCUSSION

Admission of the Code

The State offered the Code into evidence, which the district court admitted over Daveshwar’s objection on grounds of relevance. Article XIV of the Code states: “Refrain, under all circumstances, from initiating or engaging in any sexual conduct, sexual activities, or sexualizing behavior involving a client, even if the client attempts to sexualize the relationship.” Additionally, Article X of the Code admonishes licensed massage therapists to: “[r]espect the client’s right to treatment with informed and voluntary consent. The certified practitioner will obtain and record the informed consent of the client, or client’s advocate, before providing treatment. This consent may be written or verbal.”

On his application to be a guest healer, or masseur, at the Heebee Geebee Camp, Daveshwar represented that he did not have any certifications. Jacob testified that he did not show the Code to Daveshwar or obtain Daveshwar’s promise to follow the dictates of the Code before allowing him to be a guest healer at the Heebee Geebee Camp. Daveshwar objected on the grounds of relevance when the State admitted

the Code through Jacob's testimony. The court found the Code relevant, stating:

I find it relevant. The evidence that [Daveshwar] apparently held out in his application that he was going to do therapeutic massage. And, therefore, **it sets up a standard that can be used as evidence in this case.** So it's hereby admitted.

(Emphasis added). Thereafter, the State had Jacob read the aforementioned sections of the Code into the record.

In line with the district court's ruling that the Code was "a standard that [could] be used as evidence in this case," the State mentioned the Code in its closing argument:

Mr. Daveshwar had held himself out as something he was not. He had held himself out as a therapeutic massage person who was formally trained, had three years of experience and was a professional. He didn't comply with the ethical guidelines that are required by a massage therapist.

You heard testimony that Dr. – Mr. Jacobs [sic], and Dr. O'Donohue even agreed, that professionals are guided by ethical guidelines. And those ethical guidelines talked about consent, informed consent. They talked about not having sex with your clients.

The State's closing argument continued to link Daveshwar's guilt with the Code:

But then [Daveshwar] holds himself out here as a therapeutic – a person trained in therapeutic. And he told them he had formal training. And then he says he's a professional with three years' [sic] experience . . . **So what's inappropriate in therapeutic massage is governed by these. Massage therapists have a set of ethical**

guidelines that they should abide by in performing body work and massage therapy.

(Emphasis added). In finishing its closing argument, the State again stressed the importance of the Code:

So what's the case about again? And I keep saying it's a breach of trust because these women truly placed their trust in Daveshwar's representations. He was there in a legitimate massage place. And they had a right to rely on that. Daveshwar didn't get any consent. Remember those ethical guidelines? He's supposed to get informed consent just like when you go to a doctor or any health care professional, they tell you what they're going to do. If they'd gone to the doctor and if he'd done this, that would be outrageous. It's no different with massage therapists. They were not in a dating or any kind of relationship like that. There were ethics that govern that. He held himself out to be a person who did that. No sex with your patients, your clients.

(Emphasis added). In this manner, the State used the Code as a standard for Daveshwar's behavior.

Under NRS 48.035(1), a district court has the power to exclude relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or concerns over misleading the jury. See, e.g., Yates v. State, 95 Nev. 446, 449-50, 596 P.2d 239, 241-42 (1979). The decision whether to exclude evidence under NRS 48.035(1) is within the sound discretion of the district court, Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). and will not be set aside absent a manifest abuse of discretion. Petrocelli v. State,

101 Nev. 46, 52, 692 P.2d 503, 508 (1985), superseded by statute on other grounds as stated in Thomas v. State, 120Nev. 37, 83 P.3d 818 (2004).

To be admissible, evidence must be relevant. NRS 48.025. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury. NRS 48.035(1).

We conclude that the Code was not relevant evidence and the district court should not have admitted it as such because there is no standard and/or “code” for behavior that is relevant to a charge of sexual assault. Therefore, the district court abused its discretion by admitting the code. We further conclude that even if the code was relevant, it would not be admissible because the unfair prejudice outweighs the probative value.

Sexual assault is a general intent crime.³ Because he was charged with a general intent crime, the State must prove beyond a reasonable doubt that Daveshwar had the intent to engage in nonconsensual sexual penetration with a person of another. See Williams v. State, 95 Nev. 830, 833, 603 P.2d 694, 697 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

The State’s theory relied on showing that Daveshwar acted outside of the Code such that he was implicitly guilty of sexual assault. In its attempt to prove Daveshwar’s guilt, the State ignored Daveshwar’s

³Daveshwar was charged with two counts of sexual assault under NRS 200.366. NRS 200.366(1) provides that “A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another . . . against the will of the victim . . . is guilty of sexual assault.”

representations that he was not a licensed masseur, as well as Jacob's testimony that Daveshwar had no knowledge of the Code. Rather, the State reiterated its theory that Daveshwar could only obtain informed consent because he was governed by the Code. We also note, as the State admitted at oral argument, that the Code was not in force for licensed massage therapists at the time of the incident in 2005 because Nevada had yet to license massage therapists.

Harmless error

When an error in a trial infringes on a defendant's constitutional rights, the error may be deemed harmless only if the reviewing court is "able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. State of California, 386 U.S. 18, 24 (1967). Considerations relevant to determining whether the erroneous admission of evidence constitutes harmless error include: whether the issue of innocence or guilt is close, the quantity and character of the error and the gravity of the crime charged. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). Under NRS 178.598, "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

Daveshwar's defense theory was consent. The State's theory included that Daveshwar was held to a higher standard because he was governed by the Code. As such, the State repeatedly told the jury that Daveshwar did not obtain informed consent as required by the Code, and that his behavior was inappropriate because "[m]assage therapists have a set of ethical guidelines that they should abide by in performing body work and massage therapy." In closing, the State continually linked consent with the Code to prove its theories that: 1) Daveshwar should be held to a higher degree of conduct; and 2) Daveshwar did not obtain informed consent, as required by the Code, making his consent defense null.

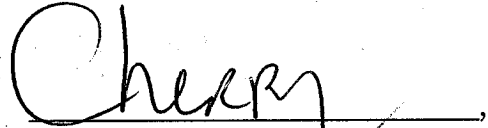
We conclude that the district court's error in admitting the Code was not harmless because the Code had an effect on the verdict. The State's theory of proving Daveswar's guilt as tantamount to showing he violated the Code had a direct impact on the verdict, thus affecting Daveswar's substantial rights. Because of the gravity of the crimes charged and the character of the error in admitting evidence, which could influence the jury on the central question of the case, the error was not harmless. We thus reverse and remand for a new trial in which the Code is not admitted into evidence.


Consent instruction


On remand, we also note that the district court should not give a truncated version of the consent instruction from McNair v. State, 108 Nev. 53, 825 P.2d 571 (1992). Rather, the latter part of the instruction, which included the language that "[m]erely being passive does not amount to consent. Consent requires a free will and positive cooperation in an act or attitude[.]" is not an accurate statement of the law under McNair. Instead, the district court should omit this added language to the consent instruction and should relay the entire consent definition under McNair, including the language that "[s]ubmission is not the equivalent of consent. While consent inevitably involves submission, submission does not inevitably involve consent. Lack of protest by a victim is simply one among the totality of circumstances to be considered by the trier of fact." Id. at 57, 825 P.2d at 574.

Accordingly, we

ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Richard Wagner, District Judge
Richard F. Cornell
Attorney General Catherine Cortez Masto/Carson City
Pershing County District Attorney
Pershing County Clerk