

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUSTIN D. SMARTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50124

FILED

JAN 27 2009

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

ORDER REVERSING AND REMANDING

This is an appeal from a judgment of conviction. Sixth Judicial District Court, Humboldt County; Richard Wagner, Judge.

On August 22, 2007, the district court convicted appellant Justin Smartt, pursuant to a jury verdict, of sexual assault on a child under the age of 16 years, burglary, and battery with intent to commit sexual assault. He was sentenced to a term of life in prison with the possibility of parole after 20 years for sexual assault, 16 to 72 months for burglary, and 80 to 240 months for battery. All sentences were ordered to run concurrently.

Smartt contends that the district court erred by allowing the State's expert, Denise Engel, to testify. Specifically, he argues that the State failed to provide notice that it intended to call Engel as an expert, pursuant to NRS 174.234(2), and failed to provide a copy of her curriculum vitae prior to trial. Eight days prior to trial, the State disclosed Engel as a witness but not an expert witness. In addition, the State did not provide Engel's curriculum vitae to Smartt until the day she was scheduled to testify. Smartt argues that the State acted in bad faith when it failed to follow the requirements of NRS 174.234(2) and, as a result, he was unable

to conduct an effective cross-examination of Engel regarding her qualifications as an expert. Smartt further contends that he was unaware that Engel would be testifying as to her opinion whether the injuries suffered by the victim were consistent with non-consensual intercourse. Smartt received Engel's reports prior to trial but these reports did not contain findings on whether the victim's injuries were consistent with non-consensual intercourse.

The State argued that it did not act in bad faith when it failed to disclose Engel as an expert. The State believed that Engel would not become an expert until the State qualified her as an expert on the stand, much like how a police officer is qualified as an expert in subjects such as gangs, drugs, or weapons. A police officer is not noticed as an expert, rather he can be qualified as an expert on the stand based on his training and experience. The State conceded at trial that this belief was incorrect.

This court reviews a district court's decision whether to allow an unendorsed witness to testify for abuse of discretion.¹ NRS 174.234 governs the disclosure of witnesses and information regarding expert testimony in criminal cases. Pursuant to NRS 174.234(2), if the State intends to call an expert witness, then at least 21 days before trial, the State must provide the defense: (a) a brief statement about the subject matter and substance of the expert's expected testimony, (b) a copy of the expert's curriculum vitae, and (c) a copy of the expert's reports. Under NRS 174.234(3)(b), if the prosecution in bad faith fails to satisfy these requirements, then the district court must not allow the expert witness to

¹Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000); Dalby v. State, 81 Nev. 517, 519, 406 P.2d 916, 917 (1965).

testify and must also bar the prosecution from introducing any evidence that the expert would have produced.

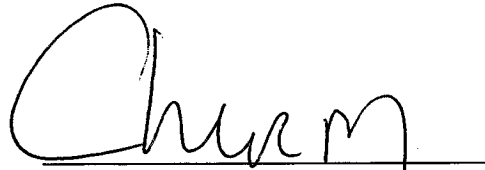
In this case, the district court did not find bad faith on the part of the State. However, we are very concerned with the State's explanation respecting why it did not disclose Engel as an expert witness. Following the State's reasoning, a witness would never have to be disclosed as an expert, leading to trial by ambush, which is what NRS 174.234(2) was designed to avoid. While the State's reasons for not disclosing Engel as an expert are very troubling, we do not need to reach the question of whether the State acted in bad faith. Instead, we conclude that the district court abused its discretion in allowing Engel to testify as an expert. In Jones v. State, we held that "Nevada case law establishes that failure to endorse a witness constitutes reversible error only where the defendant has been prejudiced by the omission."² The prejudice in this case was severe. Smartt's defense in this case was that the sexual intercourse was consensual. Engel was the only expert who testified that the injuries sustained by the victim were consistent with non-consensual intercourse. And the other evidence presented at trial was not overwhelming. In addition, had Smartt known that Engel was going to testify as an expert, he would have had an opportunity to prepare for cross-examination or to secure his own expert. Accordingly, the remedy fashioned by the district court did not cure the prejudice caused by the

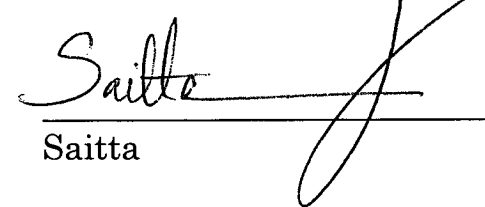
²113 Nev. 454, 473, 937 P.2d 55, 67 (1997) (citing Redmen v. State, 108 Nev. 227, 234, 828 P.2d 395, 400 (1992), overruled on other grounds by Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995)).

State's actions. Therefore, we reverse the judgment of conviction and remand for a new trial.³

Having considered Smartt's arguments, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁴


_____, J.
Cherry


_____, J.
Saitta

cc: Hon. Richard Wagner, District Judge
Kyle B. Swanson
Attorney General Catherine Cortez Masto/Carson City
Humboldt County District Attorney
Humboldt County Clerk

³We note the limited nature of expert testimony in sexual assault cases. In particular, NRS 50.345 provides that “[i]n any prosecution for sexual assault, expert testimony is not inadmissible to show that the victim's behavior or mental or physical condition is consistent with the behavior or condition of a victim of sexual assault.”

⁴Smartt also contends that the district court erred by refusing to allow Nancy Smartt to testify. However, in light of our order reversing the judgment of conviction, we need not consider this claim.


GIBBONS, J., dissenting:

Since the district court did not find that the State acted in bad faith in failing to disclose Engel as an expert, the district court had several remedial tools at its disposal. Pursuant to NRS 174.295(2), it can “order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the part from introducing in evidence the material not disclosed, or it may enter such other order as is deems just under the circumstances.” As a remedial measure, the district court allowed Smartt the opportunity to examine the curriculum vitae, required the State to qualify Engel as an expert outside the presence of the jury, and allowed Smartt to voir dire Engel concerning the limits of her expertise. In addition, Smartt did not request the district court to grant a continuance.

While the State concedes that it did not properly disclose the information required by NRS 174.234(2) with respect to Engel, I conclude that the district court did not abuse its discretion in admitting the testimony because the record does not indicate bad faith. The State did not purposely try to mislead or prejudice Smartt. The State had a mistaken belief that Engel was not an expert until qualified as such, but that mistaken belief does not rise to the level of bad faith.

Even if the district court improperly allowed Engel to testify as an expert, Smartt failed to show how he was prejudiced. In Jones v. State, we concluded that “Nevada case law establishes that failure to endorse a witness constitutes reversible error only where the defendant has been prejudiced by the omission.” 113 Nev. 454, 473, 937 P.2d 55, 67

(1997). Smartt's counsel acknowledged that he received a copy of Engel's report, interviewed Engel prior to trial, and told the district court that he knew it was possible that Engel would testify as to whether she believed that Smartt's sexual encounter with the victim was nonconsensual. Moreover, Smartt has not specifically shown how a more thorough investigation or preparation would have made any difference in the case. Accordingly, I conclude that the district court did not abuse its discretion in this regard.


_____, J.
Gibbons