IN THE SUPREME COURT OF THE STATE OF NEVADA

LEROY THOMAS TOWNER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36115

FILED

DEC 04 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. The district court sentenced appellant Leroy Thomas Towner to two consecutive terms of ten to twenty-five years in prison.

The pivotal issue at trial was whether Towner shot the victim, William Hall, in self-defense. On appeal, Towner asserts that the district court abused its discretion by: (1) excluding evidence of Hall's prior specific acts of violence unless Towner testified at trial; (2) excluding evidence of Hall's character for violence; (3) admitting improper character evidence that characterized Towner as a "mean" drunk; (4) admitting specific instances of Towner's untruthfulness; and (5) allowing the State to make an improper opening statement regarding the victim's family. Furthermore, Towner asserts that these cumulative errors deprived him of his right to a fair trial. With the exception of Towner's first and fifth claims, we conclude that Towner's assertions have merit. Therefore, we reverse the judgment of conviction and remand this case for a new trial.

First, Towner contends that the district court abused its discretion when it refused to allow him to present evidence of Hall's specific acts of violence unless Towner testified concerning his knowledge of those acts at the time of the shooting. Under Nevada law, both NRS 48.045(1)(b) and NRS 48.055(2) provide avenues for admitting evidence of the victim's violent character. NRS 48.045(1)(b) permits the accused to present evidence of the victim's character for violence as a means of demonstrating that the victim was the likely aggressor. It is irrelevant under this analysis whether the accused had any knowledge of the victim's

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violent propensity.[1] Proof of the victim's character for violence may be demonstrated only by testimony in the form of reputation or an opinion.[2]

NRS 48.055(2) provides that:

> In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof of specific instances of his conduct may be made on direct or cross-examination.

Accordingly, an accused who claims self-defense is permitted under NRS 48.055(2) to present evidence of the victim's specific acts of violence in order to establish the accused's own state of mind. But the accused must have knowledge of these specific acts of violence when the claim of self-defense arises in order to admit the specific acts of violence into evidence.[3] Towner asserts that he had knowledge of Hall's specific acts of violence, which included a prior domestic violence conviction and a prior arrest for armed robbery. Moreover, Towner argues that his knowledge was demonstrated by his own videotaped statements that were offered by the State and his own offer of proof. We disagree.

Neither Towner's videotaped statements nor his offer of proof adequately establishes Towner's alleged knowledge of Hall's prior battery domestic violence conviction or armed robbery arrest. While Towner's statements on the video may have demonstrated that Towner knew that Hall had knocked people out and that Hall had broken into houses, they did not establish that Towner knew of an unrelated battery domestic violence conviction or an arrest for armed robbery. Towner must demonstrate his own knowledge of each of Hall's specific acts of violence if he wishes to present evidence of those specific acts. The fact that Towner had knowledge of some of Hall's specific acts of violence at the time he shot Hall does not grant him free reign to admit evidence of any specific act of violence ever committed by Hall.

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[1]See Burgeon v. State, 102 Nev. 43, 46, 714 P.2d 576, 578 (1986).

[2]See NRS 48.055(1).

[3]See Burgeon, 102 Nev. at 46, 714 P.2d at 578. In Burgeon, this court held that specific acts of an alleged victim's violent character may be admitted for the purpose of establishing the state of mind of the accused so long as the defendant can show that he knew of the specific acts at the time the crime was committed.

Similarly, Towner mistakenly asserts that his offer of proof may be used to support his claim that he had knowledge of Hall's specific acts of violence. While Towner's offer of proof did contain specific references to Hall's prior acts of violence, the offer of proof was never before the jury. Allowing Towner to establish his knowledge based upon the offer of proof would confer an unfair advantage upon Towner. Towner would be allowed to freely attest to his knowledge of Hall's specific acts of violence while denying the jury the opportunity to properly weigh this evidence. Since Towner's knowledge is the critical link that permits the admission of Hall's other specific acts of violence, we conclude that it was proper for the district court to require that Towner first demonstrate his knowledge to the jury through his testimony before Hall's other specific acts could be admitted.

Second, Towner contends that the district court abused its discretion when it prevented him from presenting evidence of Hall's character for violence after Donna Butler testified that Hall was a law-abiding citizen. In particular, Towner argues that he should have been allowed to cross-examine Butler and also show that Hall had several prior arrests. We agree.

Pursuant to NRS 48.045(1)(b), evidence of the character of a crime victim is admissible when it tends to prove that the victim was the likely aggressor. NRS 48.045(1)(b) states:

> 1. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
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> . . . .
>
> (b) Evidence of the character or a trait of character of the victim of the crime offered by an accused . . . and similar evidence offered by the prosecution to rebut such evidence. . . .

Additionally, NRS 48.055(1) provides that when character evidence is admissible, inquiry into specific instances of conduct may be made on cross-examination.[4]

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[4]NRS 48.055(1) states:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof

continued on next page . . .

We conclude that Towner should have been permitted pursuant to NRS 48.045(1)(b) and NRS 48.055(1) to inquire into specific instances of Hall's character for violence on cross-examination. The absence of such evidence distorted the jury's perception of Hall and deprived Towner of his right to a fair trial. Therefore, we conclude that the district erred when it refused to admit evidence of Hall's character for violence.[5]

Third, Towner contends that the district court abused its discretion when it admitted evidence characterizing Towner as a habitual alcoholic and a "mean" drunk. Towner admits that he did not object to the evidence and concedes that it was necessary for the State to present some evidence regarding his alleged drinking habits. Nonetheless, Towner contends that the evidence admitted against him was excessive and constituted plain error and prejudiced his right to a fair trial.[6] While we agree that the district court erred when it admitted this evidence, we decline to determine whether or not it was plain error in light of our conclusion that there was reversible error elsewhere. Nonetheless, we

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> may be made by testimony as to reputation or in the form of an opinion. On cross-examination, inquiry may be made into specific instances of conduct.

[5]This evidence of the victim's good character is inadmissible until Towner attacks Hall's character. NRS 48.045(1)(b). However, Towner did not timely object to Donna Butler's testimony that Hall was law-abiding. He objected only at the close of her direct examination. The district court properly overruled this objection because it was untimely. The State mistakenly suggests that Towner had already attacked Hall's character through his opening statements, his videotaped statements and his cross-examination of Butler. However, Towner's opening statement is not evidence before the jury. Likewise, Towner's videotaped statements were not an attack on Hall's character by Towner because they were offered by the State. Finally, Towner's cross-examination of Butler did not occur until after she had already testified on direct examination that Hall was law-abiding.

[6]Plain error is error that either "(1) had a prejudicial impact on the verdict when viewed in the context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings." Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993). This court has held that plain error may be addressed sua sponte. See Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 986, 987 (1995).

have chosen to fully address the merits of this matter as a means of providing guidance in this area.

We have previously stated that "[t]he decision to admit or exclude evidence of separate and independent offenses rests within the sound discretion of the trial court and will not be disturbed unless it is manifestly wrong."[7] Nevertheless, we have also cautioned that "[i]t is the trial court's duty to strike a proper balance between the probative value of the evidence and its prejudicial dangers."[8]

NRS 48.045(1)(a) and NRS 48.045(1)(b) only allow the State to present evidence concerning Hall's character for violence in rebuttal after Towner has placed his own character in issue by offering evidence of his own good character for nonviolence, or placed Hall's character in issue by offering evidence of Hall's bad character for violence. Here, Towner was not permitted to place Hall's violent character in issue. Similarly, Towner had not offered evidence of his own good character for nonviolence. Therefore, it was error for the district court to permit the State to present evidence of Towner's bad character for violence. The State in its case-in-chief was therefore erroneously permitted to present evidence of Towner's violent tendencies arising from his drinking habits.[9] Despite that NRS 193.220 permits evidence of intoxication to be admitted for purposes of establishing a defendant's purpose, motive or intent,[10] we conclude that

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[7]Domingues v. State, 112 Nev. 683, 694, 917 P.2d 1364, 1372 (1996).

[8]Id.

[9]See Roever v. State, 114 Nev. 867, 871, 963 P.2d 503, 505 (1998) (holding that the district court improperly admitted bad character evidence about the accused on the State's case-in-chief).

[10]NRS 193.220 states:

> No act committed by a person while in a state of insanity or voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his insanity or intoxication may be taken into consideration in determining the purpose, motive or intent.

the evidence admitted regarding the defendant's drinking habits strayed far beyond the intended scope of NRS 193.220.[11]

Clearly, in this case the State's purpose was to demonstrate that when Towner drinks he is mean, thereby making it more likely that he shot Hall because Towner was in a mean and drunken condition. This purpose is flatly prohibited by NRS 48.045(1), which prohibits the admission of evidence of a person's character or a trait of his character in order to show that he acted in conformity therewith on a particular occasion. We can perceive no other use put to the evidence submitted by the State other than this impermissible purpose.

Fourth, Towner contends that the district court abused its discretion when it admitted testimony by Randy Newton describing specific instances of Towner's untruthfulness. Towner asserts that the admission of this evidence violated NRS 50.085.[12] Furthermore, Towner

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[11]The State's questions to witnesses repeatedly went beyond the scope of Towner's alleged drinking on the day of the shooting. For instance, witnesses were asked whether Towner was habitually intoxicated, whether he was a "happy" or "mean" drunk, and how he treated children when he was intoxicated.

[12]NRS 50.085 states:

> 1. Opinion evidence as to the character of a witness is admissible to attack or support his credibility but subject to these limitations:
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> (a) Opinions are limited to truthfulness or untruthfulness; and
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> (b) Opinions of truthful character are admissible only after the introduction of opinion evidence of untruthfulness or other evidence impugning his character for truthfulness.
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> 2. Evidence of the reputation of a witness for truthfulness or untruthfulness is inadmissible.
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> 3. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon

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asserts that his right to a fair trial was prejudiced when the court allowed the prosecutor to make a speaking objection and when the prosecutor interjected his own opinion as to Towner's bad character for truthfulness. We agree.

The admission of Newton's testimony to show that Towner "sometimes doesn't tell the truth" clearly violates NRS 50.085. NRS 50.085 permits the admission of character evidence in limited circumstances. NRS 50.085 permits the admission of opinion evidence of truthfulness or untruthfulness to attack or support the credibility of a witness, but prohibits evidence of a witness's reputation for truthfulness. Moreover, pursuant to NRS 50.085(3) specific instances of a witness's conduct may only be inquired into "on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness." Proof of specific instances of a witness's conduct may not be had by extrinsic evidence.

We conclude that Newton's testimony violates NRS 50.085(3). Newton's testimony should not have been admitted because he was testifying on direct examination to specific instances of Towner's conduct in order to establish that Towner was not truthful. This error was compounded by the prosecutor's improper speaking objection and the improper interjection of the prosecutor's own opinion as to Towner's character for truthfulness. Therefore, we conclude that the district court abused its discretion by admitting Newton's testimony to show that Towner "sometimes doesn't tell the truth."[13]

Finally, Towner contends that the district court erred when it overruled his objection to a remark made by the State in its opening statement. During opening statements, the prosecutor said: "The evidence will show that on the afternoon of June the 18th, 1999, William Hall was planning a family reunion with his niece, Dion. Little did he

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interrogation and subject to the provisions of NRS 50.090.

[13]We also conclude that this issue was properly preserved for appeal. Towner properly based his objection upon relevancy grounds because Newton's testimony regarding a past lie by Towner was irrelevant to the crime charged.

know that a few hours later his family would be planning his funeral." Towner contends that the district court should have either declared a mistrial or admonished the jury. We conclude that although the statement was improper, it was harmless and completely innocuous.

This court has held that the prosecutor may comment on the loss experienced by the family of a murder victim during the penalty phase of a capital trial.[14] But it is inappropriate for the prosecutor to comment on the impact of the crime on the victim's family during opening statements.[15] We conclude that the portion of the opening statement about planning Hall's funeral was improper because it went beyond the purpose of an opening statement. The statement was intended to appeal to the emotions of the jurors and garner sympathy for the loss suffered by the victim's family. Nonetheless, we do not believe that the statement prejudiced Towner's right to a fair trial.[16] The statement was made once during opening statements, and the State did not belabor the issue.[17] Therefore, we conclude that although the statement amounted to prosecutorial misconduct, it was harmless beyond a reasonable doubt.

Considering the cumulative effect of these errors, we conclude that Towner was deprived of his right to a fair trial. In particular, we note that the quantity and character of the error is significant, that the charged offense is of a serious nature, and that the question of guilt or innocence was close.[18] Accordingly, having considered all the arguments in this case, we

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[14]See Homick v. State, 108 Nev. 127, 135, 825 P.2d 600, 605 (1992).

[15]See Greene, 113 Nev. at 170, 931 P.2d at 62.

[16]We also conclude that this instance of prosecutorial misconduct does not constitute a bar against retrial because there is no evidence to suggest that the State made the statement as a deliberate tactic to goad Towner into moving for a mistrial in order to avoid an acquittal. See United States v. Catton, 130 F.3d 805, 807-08 (7th Cir. 1997).

[17]This court has previously noted that "'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial.'" Greene, 113 Nev. at 169, 931 P.2d at 62 (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

[18]See Dechant v. State, 116 Nev. 918, 10 P3d 108 (2000).

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

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Jack Lehman, District Judge
David M. Schieck
Attorney General
Clark County District Attorney
Clark County Clerk

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AUG 31 2000

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CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER

After reviewing the documents submitted in this appeal, we have determined that full briefing will assist the court in the disposition of this appeal. Accordingly, we order the parties to brief this court in compliance with NRAP 28, 28A, 30, 31 and 32. The appellant shall file and serve the opening brief[1] within forty (40) days after the date of this order.[2] The answering brief and reply brief shall be filed in compliance with NRAP 31.

It is so ORDERED.

_____, C.J.

cc: Attorney General
Clark County District Attorney
David M. Schieck
Christopher R. Oram

[1]"Every assertion in briefs regarding matters in the record shall be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found." NRAP 28(e). "If a party's brief will cite to documents not previously filed in this court, that party shall file and serve an appropriately documented supplemental appendix with the brief." NRAP 3C(j)(2).

[2]Neither party has objected to the sufficiency of the rough draft transcripts to adequately inform this court of the issues raised in this appeal. See NRAP 3C(d)(5). Accordingly, we hereby suspend the requirement in NRAP 9 for counsel to file a certified transcript in this appeal. Should either party cite to portions of transcripts not previously filed in this court, the party shall file a transcript request form for the necessary transcripts, pursuant to NRAP 9(a).