

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN LENEAR CAMP,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36559

FILED

MAY 14 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Bloom*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first degree murder by child abuse. Following the jury's verdict, the district court sentenced appellant Kevin Camp to life with the possibility of parole after 240 months.

Camp first argues that the denials by the district court of various motions to continue, compounded with the fact that Camp only had twenty-four hours to procure a surrebuttal witness resulted in error by the district court. Camp asserts that such error denied him the right to participate in the trial under Ake v. Oklahoma.¹ We disagree.

The district court has the sound discretion to grant or deny trial continuances and this court will not disturb that decision absent a clear abuse of discretion.² However, this discretion is not limitless, particularly when constitutional concerns are raised.³ "When a motion to continue is brought for the purpose of producing a witness, the trial court

¹470 U.S. 68 (1985).

²Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793,799 (1996).

³See Doleman v. State, 107 Nev. 409, 416, 812 P.2d 1287, 1291 (1991).

is to consider whether the facts can be proven by another available witness.”⁴

In Ake, the United States Supreme Court held that steps must be taken in a criminal trial against an indigent defendant to assure that the defendant has a fair opportunity to present his defense.⁵ Here, the district court gave Camp twenty-four hours to find a surrebuttal witness after the State provided rebuttal testimony by Dr. Clark regarding the timing of death and the amount of pain the child experienced prior to death. Camp requested a continuance in order to locate a surrebuttal witness. When the district court questioned the defense about the specific surrebuttal evidence it intended to produce, Camp could not provide proof of any new evidence, so the district court denied Camp’s request for a continuance. We conclude that, since Camp provided no proof that he actually had any surrebuttal evidence, the district court did not abuse its discretion in denying Camp’s motion to continue beyond twenty-four hours.

Camp next argues that there was no evidence adduced that he was personally responsible for any of the prior injuries to the child except for the injury that the child sustained while Camp bathed him. Therefore, Camp claims that the district court erred in admitting the incidents of the child’s prior injuries as evidence of prior bad acts and in allowing the State to amend its motion to admit bad acts to include the physical

⁴Id. (citing Banks v. State, 101 Nev. 771, 773, 710 P.2d 723, 725 (1985)).

⁵Ake, 470 U.S. at 76.

confrontation disclosed for the first time by Brook Lain, the child's mother, at the hearing. We disagree.

NRS 48.045(2) provides that:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Even if evidence is properly admitted under NRS 48.045(2), the district court must conduct a hearing outside the presence of the jury to determine whether "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."⁶ However, the evidence should still be excluded if it is "so inflammatory, speculative, and utterly fantastic as to bear practically no probative value."⁷

Here, the district court conducted a Petrocelli hearing to consider the admission of prior bad acts. These bad acts consisted of the child's injury from a falling Christmas tree, a soup burn, injuries from bouncing on the bed, and injuries from falling in the shower, all allegedly occurring while Camp was caring for the child. Pursuant to Tinch v. State, the court considered each proposed bad act and concluded that only the child's injury caused from allegedly jumping on the bed lacked clear and convincing evidence that Camp committed the act. In addition, at the

⁶Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

⁷Roever v. State, 114 Nev. 867, 872, 963 P.2d 503, 506 (1998).

end of trial, the district court instructed the jury as to the limited purpose of such evidence.

We conclude that evidence of the previous injuries to the child were relevant to prove the identity of the defendant as the perpetrator, the defendant's intent, and the lack of mistake or accident. Further, the district court found that there was clear and convincing evidence linking Camp to the acts, and the probative value outweighed the danger of unfair prejudice. In addition, evidence of the physical altercation between Lain and Camp was relevant to show motive. Therefore, the district court did not err.

Camp also contends that Batson v. Kentucky⁸ was violated when the State removed the only African-American juror and provided an allegedly pretextual explanation for such removal. However, though Camp made a prima facie showing of racial discrimination, his claim of a Batson violation lacks merit.

Under Batson, there is a three-prong test for determining when an objection to a peremptory challenge should be upheld on the basis of racial discrimination.⁹ A defendant must first make a prima facie showing of racial discrimination.¹⁰ Second, if a prima facie showing is made, the burden shifts to the party seeking to strike the peremptory challenge to tender a race-neutral explanation.¹¹ Third, the court must

⁸476 U.S. 79 (1984).

⁹Doyle v. State, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996).

¹⁰Id.

¹¹Id.

determine whether the explanation is pretextual.¹² “To establish a prima facie case, the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.”¹³

Here, the State did, in fact, exercise a peremptory challenge for the removal of the only African-American juror on the panel, and Camp is African-American. The juror informed the court that he did not harbor any animosity towards law enforcement and that he could be fair. However, the district court questioned the removed juror regarding any contact with the criminal justice system, and the juror only disclosed instances regarding his stepson. Further, Camp's own counsel asked the juror if there was anything that would be of interest to either the defense or the prosecution, and the juror responded in the negative. Nevertheless, the State asserted that after running all the jurors through the system, the African-American juror had neglected to disclose a criminal history that included arrests for DUI, domestic violence and several failures to appear in court.

Camp argued that a person with the same name as the juror may have been mistaken for the juror, and that the juror may have misunderstood the questions asked of him, and should have been recalled for clarification. However, the district court declined further inquiry and determined that the State's explanations were not pretextual. The prosecutor's explanations are presumed to be race-neutral unless

¹²Id.

¹³Id. (citing Batson, 476 U.S. at 96.)

discriminatory intent is inherent in the prosecution's explanation.¹⁴ We conclude that the district court properly concluded that there was no Batson violation since discriminatory intent was not inherent in the State's explanation that the juror failed to disclose prior contact with the criminal justice system.

Camp argues that the State's rebuttal testimony was actually testimony from its case in chief, and that the State "hid a key scientific expert for three weeks before calling her as a purported 'rebuttal' witness." The State alleges that its rebuttal witness was called only because Camp introduced new evidence from his expert witness regarding the timing of events.

Rebuttal evidence is defined as "that which explains, contradicts, or disproves evidence introduced by a Defendant during his case in chief."¹⁵ Furthermore, "[a]dmission of rebuttal evidence is within the discretion of the trial court."¹⁶

Here, the State's rebuttal witness was called to disprove evidence introduced by Camp's expert witness. Specifically, Dr. Clark disagreed with Camp's expert regarding the amount of pain the child experienced, and also testified that the child definitely died within two hours of receiving the injuries. The district court considered the content of the rebuttal witness's testimony and determined that it was proper

¹⁴See Purkett v. Elem, 514 U.S. 765, 768 (1995).

¹⁵Lopez v. State, 105 Nev. 68, 81, 761 P.2d 1276, 1285 (1985) (quoting Morrison v. Air California, 101 Nev. 233, 235-36, 699 P.2d 600, 602 (1985)).

¹⁶Id.

rebuttal testimony. Upon careful review of the record, we conclude that the district court did not abuse its discretion because the rebuttal witness's testimony clearly contradicted the testimony of Camp's expert witness.

Camp sought to cross-examine Lain about her prior arrests for prostitution, allegedly to reveal her dishonesty and her tendency to be reckless and neglectful towards her child. Camp argues that the district court's refusal to allow this line of questioning denied him the right to confront the most significant witness against him pursuant to Drake v. Nevada.¹⁷ However, we conclude that Camp's reliance on Drake is misplaced, and his argument lacks merit.

This court has stated that “[a]n arrest record for prostitution is much more than simple evidence of prior sexual conduct. The victim's arrest record shows a long-standing pattern of criminal dishonesty and sexual crimes. This would appear to be clearly probative to an allegation of sexual assault.”¹⁸

Here, Camp was charged with child abuse, not sexual assault. Therefore, we conclude that the district court properly determined that Drake was inapplicable, and did not err in refusing to allow cross-examination of Lain regarding arrests for prostitution prior to the child's birth since there was no allegation of sexual assault.

Camp suggests that this court should declare NRS 200.030(1) unconstitutionally vague and over-broad because it does not support the distinction between first degree and second degree murder. We disagree.

¹⁷108 Nev. 523, 836 P.2d 52 (1992).

¹⁸Id. at 526, 836 P.2d at 54.

Prior to 1999, NRS 200.030(1)(a) provided that:

1. Murder of the first degree is murder which is:
 - (a) Perpetrated by means of poison, lying in wait, torture or child abuse, or by any other kind of willful, deliberate and premeditated killing.¹⁹

This court has previously held that NRS 200.030 was not unconstitutionally vague and provides sufficient notice of the proscribed conduct.²⁰ In addition, the district court in the instant case provided the jury with an instruction regarding malice, further clarifying the difference between first and second degree murder. Therefore, we decline Camp's invitation to reconsider the constitutionality of NRS 200.030(1).

Camp argues that the State withheld evidence in violation of Brady v. Maryland²¹ and its progeny. Specifically, Camp alleges a pattern of withholding information that was ultimately obtained during the Petrocelli hearing, as well as information learned during the State's opening argument. Camp claims that the following information was withheld: 1) Child Protective Services ("CPS") records, 2) the child's medical records, 3) Lain's methamphetamine use the night of the child's death, and 4) a past incident where the child was rushed to the hospital.

¹⁹On October 1, 1999, the legislature moved child abuse from NRS 200.030(1)(a) to the felony murder provision in NRS 200.030(1)(b). However, at the time of the injury and trial, the relevant statutory language was located in NRS 200.030(1)(a).

²⁰Williams v. State, 110 Nev. 1182, 1189, 885 P.2d 536, 540 (1994).

²¹373 U.S. 83 (1963).

Whether the State adequately disclosed information under Brady involves both factual and legal questions and requires a de novo review by this court.²² This court has held that Brady requires a prosecutor to disclose evidence favorable to the defense if the evidence is material either to guilt or to punishment.²³ Moreover, failure to disclose the evidence violates due process regardless of the prosecutor's motive.²⁴ Evidence must also be disclosed if it provides grounds for the defense to impeach the credibility of the State's witnesses.²⁵ In addition, the State is not only responsible for disclosure of information within its possession, but is also responsible for that within the possession of another State agency.²⁶ In Nevada, after a specific request for evidence, omitted evidence is material if there is a reasonable possibility it would have affected the outcome.²⁷

Camp claims that information regarding Lamar's CPS records was withheld until the fifth day of trial, and that although the requested information was eventually disclosed, he was prejudiced by the untimely disclosure.

²²See Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

²³Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000); see also Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996).

²⁴Lay, 116 Nev. at 1194, 14 P.3d at 1262.

²⁵Kyles v. Whitley, 514 U.S. 419, 442 n.13 (1995).

²⁶See Wade v. Nevada, 115 Nev. 290, 986 P.2d 438 (1999).

²⁷Id.

NRS 432B.280 provides that information concerning reports and records of abuse and neglect may be made available only to certain entities, including the district attorney and to a court for in camera inspection. Here, rather than respond to discovery requests by obtaining and handing over the CPS records to the district court for in camera inspection, the State ignored Camp's requests for any exculpatory information contained in CPS records. In response to Camp's complaints on April 18, 2000, the State suggested that the defense file a motion for access to the CPS records with the district court. By April 24, 2000, the State had not provided any CPS records, so Camp filed a motion to compel the production of such documents on that date. The district court reviewed the file and granted Camp's motion, providing limited time to view the file and prohibiting Camp from making copies of the file.

We conclude that the State's disclosure of the CPS records was untimely. The State may not rely upon NRS 432B.280 to excuse its untimely disclosure. This "confidentiality" statute, although generally applicable to protect against public access to these documents, does not trump the due process rights of a criminal defendant. Brady's rule is a rule of due process. Camp, however, was not prejudiced by the untimely disclosure.

Upon determining that a disclosure is untimely, the next step is deciding whether the untimely disclosure prejudiced Camp. The evidence withheld was of minimal value. The CPS material was not "bombshell" evidence. Further, the district court accommodated Camp, affording him the opportunity to view the CPS records and cross-examine a witness based on that review. It appears that Camp was able to make effective use of the records, and thus was not prejudiced. Therefore, due to

the substantial evidence presented against Camp, we conclude that Camp suffered no prejudice by the untimely disclosure of the CPS records. Camp has made no showing that the outcome would have been different had he received the CPS records sooner.

Camp also claims that medical records were improperly withheld. While Lain testified that she believed she mailed medical records to the district attorney, she did not indicate precisely when she mailed the records. The State represented to the district court that it received the medical records on the same day that they were provided to Camp and Camp provided no evidence to the contrary. Therefore, we conclude that the district court did not err in ruling that there was no Brady violation.

Camp further argues that Brady was violated when the State failed to provide information regarding Lain's drug use. In addition, Camp claims that the State withheld information showing that the child didn't have an injury-free childhood.

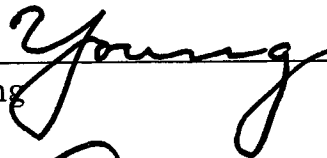
This court held that Brady does not require the State to disclose evidence where there is no reasonable probability that had the evidence been available to the defense at trial, the result at trial would have been different.²⁸ Like Steese v. State, the case against Camp was strong. The child was injured almost exclusively while in Camp's care. When rescuers arrived at Camp's home, he stated that the child was fine just thirty minutes earlier, suggesting that the fatal injuries occurred while the child was in Camp's care. Therefore, we conclude that the evidence at issue was not constitutionally material and that Camp's rights

²⁸Steese v. State, 114 Nev. 479, 492, 960 P.2d 321, 330 (1998).

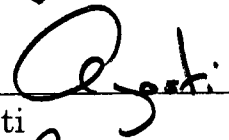
were not violated by the State's failure to disclose information obtained regarding Lain's drug use and the child's other previous injuries.

Camp also alleges that he didn't learn of the State's intention to introduce his unrecorded incriminating statements overheard by officers at the scene of the murder, further violating Brady. However, Brady specifically applies to evidence "favorable" to the defense. Here, the information Camp complains of being denied is hardly favorable to his defense. In addition, NRS 174.235 provides that the prosecutor must allow the defendant to inspect written and recorded statements or confessions made by the defendant. Camp's incriminating statements however, were neither written nor recorded. Accordingly, we

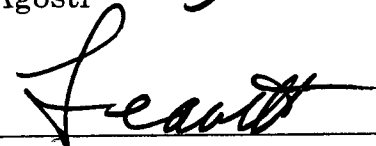
ORDER the judgment of the district court AFFIRMED.

 J.

Young

 J.

Agosti

 J.

Leavitt

cc: Hon. Mark W. Gibbons, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk