

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RODGER ORLIN EVANS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69275

**FILED**

JUN 20 2016

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

*ORDER OF AFFIRMANCE*

This is an appeal from a judgment of conviction, pursuant to a jury verdict, for exploitation of elderly over \$5,000. Tenth Judicial District Court, Churchill County; Thomas L. Stockard, Judge.

Appellant Rodger O. Evans was convicted of exploitation of elderly over \$5,000.<sup>1</sup> On appeal, Evans argues: (1) the district court erred by excluding evidence that the victim previously gifted a large sum of money to his friends and evidence of the victim's sexual orientation on the ground that such evidence was not relevant; and (2) the district court improperly admitted a recorded telephone call in violation of Nevada's wiretapping statute.

We review a district court's decision to admit or exclude evidence for "an abuse of discretion or manifest error." *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006) (citing *Means v. State*, 120 Nev. 1001, 1007-08, 103 P.3d 25, 29 (2004)). For the reasons set forth herein, we conclude the district court did not err.

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

*The district court did not abuse its discretion by excluding evidence of the victim's prior gifts to his friends and the victim's sexual orientation*

At trial, Evans sought to introduce evidence that the victim previously gifted a large sum of money to other friends, arguing that the evidence made it more likely that the victim also gifted the funds at issue to Evans. Likewise, Evans sought to introduce evidence of the victim's sexual orientation on the theory that it explained why the victim would give large amounts of money to his friends, including Evans. The district court excluded the proposed evidence as irrelevant. Relevant evidence is generally admissible and is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." See NRS 48.015; NRS 48.025. Having considered the parties' arguments and reviewed the record on appeal, we conclude that the district court did not err by excluding the evidence.

*Victim's prior gifts*

Evidence of the victim's prior gifts to others is relevant in that it tends to prove the victim was a generous person who may also have voluntarily given money to Evans without him having to steal it. But while relevant, the evidence runs afoul of the character evidence rule in that it ultimately seeks to show that the victim acted in conformity with a generous character, and is therefore inadmissible. See NRS 48.045(1) (With limited exception, "[e]vidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion . . .").

Evans asserts that the evidence should be viewed as admissible "habit" evidence rather than inadmissible "character" evidence,

but the problem with this argument is that there is no evidence the victim gifted large sums of money to his friends repeatedly over time. The only evidence provided indicates the victim may have gifted money to his friends on individual occasions, but not as often as Evans suggests. *Thomas v. Hardwick*, 126 Nev. 142, 151, 231 P.3d 1111, 1117 (2010) (To be admissible as habit evidence, the proponent must show “that specific, recurring stimuli have produced the same specific response often and invariably enough to qualify as a habit or routine.” (internal citations omitted)). See also *Folsom v. Woodburn*, 100 Nev. 331, 334, 683 P.2d 9, 11 (1984) (“The general rule is that a single instance is not sufficient to prove routine practice.”). The district court therefore did not err in excluding the evidence. See *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 598-99, 245 P.3d 1198, 1202 (2010) (“This court will affirm a district court’s order if the district court reached the correct result, even if for the wrong reason.”).<sup>2</sup>

#### *Victim’s sexual orientation*

Evans contends that the victim’s sexual orientation is relevant to show why the victim does not have children of his own and why he would give such generous gifts to Evans, rather than to his own family. But one does not need to be of a particular sexual orientation in order not to have children; many people do not have children for many reasons having nothing to do with their sexual orientation or preferences.

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<sup>2</sup>Because Evans does not argue that the evidence was admissible under NRS 48.045(1)(b), we do not consider whether that exception applies. See *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (“It is appellant’s responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.”).

Furthermore, one's sexual orientation has nothing to do with one's generosity or stinginess toward others; the victim's sexual orientation has no discernible relation to whether he did or did not voluntarily give large amounts of money to Evans or to any other person. Therefore, the victim's sexual orientation is not relevant to any fact in issue, and the district court did not err in excluding this evidence.

*The district court did not abuse its discretion by admitting the recorded telephone call*

Evans also challenges the admission of a recording of a telephone conversation that he had with a police detective investigating the case in which Evans made incriminatory statements on the ground that the call was recorded without Evans' consent.

Generally, unauthorized interception of oral communications using a device is prohibited. See NRS 200.620. However, an exception exists for "[a]ny telephone instrument . . . used by an investigative or law enforcement officer in the ordinary course of his duties." See NRS 179.425(1)(b). This exception allows law enforcement officers to perform "criminal investigations and law enforcement[, which] represent the most fundamental and critically necessary aspect of their duties." *State v. Reyes*, 107 Nev. 191, 197, 808 P.2d 544, 548 (1991). NRS 200.620(4) provides an additional exception for recording "of conversations on wire communications installed in the office of an official law enforcement . . . or on a telephone with a number listed in a directory on, which emergency calls . . . are likely to be received." Lawfully intercepted communications are admissible at trial. NRS 48.077.


Here, the call was made using a telephone by a detective at the Fallon Police Department, an investigative and law enforcement officer, and to investigate a reported crime, a necessary and fundamental


duty of an investigative and law enforcement officer. Thus, the requirements of NRS 179.425(1) have been met. Additionally, the call was made using a telephone installed at the Fallon Police Department, and with a registered number matching the Fallon Police Department dispatch and emergency number listed in the local directory. Accordingly, the requirements of NRS 200.620(4) have also been met. Moreover, the district court determined that Evans provided consent by continuing to engage in the conversation without any objection or hesitation after the detective verbally informed Evans that the call was being recorded. Consequently, we conclude that the district court did not err by admitting the recording.

Therefore, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Thomas L. Stockard, District Judge  
Charles B. Woodman  
Attorney General/Carson City  
Churchill County District Attorney/Fallon  
Churchill County Clerk