

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD LAWRENCE FINGER,
INDIVIDUALLY AND D/B/A TCB NOW;
TCB NOW GRAVEL PIT; AND SHARON
R. FINGER,
Appellants,

vs.

LOIS WILLIAMS; RONALD WILLIAMS;
ANTHONY WILLIAMS; JEFF
WILLIAMS; AND SHANE WILLIAMS,
Respondents.

No. 37561

FILED

MAY 21 2003

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

ORDER OF REVERSAL AND REMAND

This is an appeal from the district court's order granting a new trial. For the following reasons, we reverse.

This appeal arises out of the fatal shooting of George Williams by Ronald Finger during an altercation in which Williams appeared to be threatening Finger with a large stone. There was a history of vandalism at Sharon Finger's gravel pit. On the night of the shooting, Sharon and Ronald Finger were attempting to protect a screening plant from a group of trespassers who appeared to be damaging the plant. The trespassers consisted of Marley Peterson and her friends. Peterson was Sharon's business competitor, and the two women had a contentious relationship.

Ronald Finger pleaded guilty to voluntary manslaughter on the condition that he serve five years probation without jail time. Judgment was to be withheld during probation. If he successfully completed probation, a judgment of conviction for involuntary manslaughter would be entered.

Subsequently, George Williams's wife filed a wrongful death civil action against Finger. George Williams's grown sons, children from prior relationships, also filed wrongful death actions. Both complaints alleged recklessness and negligence. The actions were consolidated.

At trial, counsel for the Williams family objected to testimony from Marley Peterson sought by Finger's counsel concerning the animosity between Marley and Sharon. In sustaining the objection, the court commented as follows:

I think the background material is relevant, but I think it's there[] already. I think the jury well understands that [Marley] made a serious mistake in what she did. There's no doubt it cost the man his life. So I think that we've tortured [Marley] enough. I'm sure she has guilt pains over what happened and that she was probably a cause. And I think the jury understands that. I know you presented it, the defense has presented it, and we should move on to something else.

Counsel for the Williams family did not object to the judge's comment that Marley shared responsibility for George Williams's death. The jury was instructed regarding comparative negligence. The court specifically instructed the jurors that they must not consider the actions of a non-party as a defense. The jury found that Ronald Finger was negligent, but that George Williams was eighty percent negligent, thereby precluding compensation for his death.

The Williamses then moved for a judgment notwithstanding the verdict or a new trial based on the prejudicial effect of the judge's comment and the judge's decision to instruct the jury regarding comparative negligence. The court granted a new trial based on the

prejudicial effect of the remark concerning Marley Peterson's contribution to Williams's death.

On appeal, Finger contends that the Williamses waived the right to allege any error resulting from the alleged judicial misconduct since they failed to object to the remark at trial. Finger further argues that, although a plain error exception exists allowing for appellate review of judicial misconduct even where no objection has been made, the exception is not applicable. Additionally, Finger contends that any error flowing from the judge's remark was cured by jury instructions. The jury was instructed not to consider the conduct of a non-party in determining culpability at the close of evidence. Therefore, Finger argues it was an error of law and hence an abuse of discretion for the trial court to grant a new trial in absence of preservation of the misconduct issue for appellate review.

Pursuant to NRCP 59(a)(1), a new trial may be granted when irregularity in the proceedings materially affects a party's substantial rights to a fair trial. The decision to grant or deny a motion for a new trial "rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse."¹ It appears that the district court determined that its comment was a material irregularity that substantially affected the Williamses' right to a fair trial. We disagree.

¹Smith's Food & Drug Cntrs., Inc. v. Bellegarde, 114 Nev. 602, 605-06, 958 P.2d 1208, 1211 (1998) (quoting Pappas v. State, Dep't Transp., 104 Nev. 572, 574, 763 P.2d 348, 349 (1988)).

In Ginnis v. Mapes Hotel Corp.,² we held that the cumulative comments and demeanor by a trial judge constituted poor judicial conduct.³ However, we declined to rule on the prejudicial effect of such conduct because the aggrieved party did not preserve the error at the time of the court's actions.⁴

In Parodi v. Washoe Medical Ctr.,⁵ we reviewed judicial misconduct under the plain error doctrine, even when no objection was made at trial, where the totality of the conduct may have had a prejudicial effect.⁶ We held that, unlike the situation involving overt conduct, the aggrieved party might not wish to object to apparently benign conduct that trivialized the proceedings for fear of engendering disfavor with the jurors.⁷

We reiterated in Oade v. State⁸ the rule that allegations of prejudice resulting from judicial misconduct must be preserved for appellate review; failure to object to the conduct at the time of trial

²86 Nev. 408, 470 P.2d 135 (1970).

³Id. at 416-17, 470 P.2d at 141-42.

⁴Id. at 417, 470 P.2d at 141.

⁵111 Nev. 365, 892 P.2d 588 (1995).

⁶Id. at 368-69, 892 P.2d at 590.

⁷Id. at 369, 892 P.2d at 590.

⁸114 Nev. 619, 960 P.2d 336 (1998).

generally precludes review, unless the conduct was plain error.⁹ We then observed that conduct constituting plain error may include instances where “judicial deportment is of an inappropriate but nonnegligent and repetitive nature that becomes prejudicial when considered in its entirety.”¹⁰

The above cases demonstrate that, where the alleged error has not been preserved for appellate review, judicial misconduct may nonetheless be reviewed under the plain error doctrine in instances which though seemingly mild are repetitive and so result in prejudice. We have never employed the plain error doctrine to review a single instance of overt conduct that the aggrieved party failed to preserve for judicial review.

Here, the trial court’s comment was a single remark, assigning some potential liability to Marley Peterson. The Williamses’ counsel neither objected nor requested a sidebar or otherwise alerted the court, outside of the presence of the jury, to the potentially prejudicial effect of the comment. This is not a case like Parodi wherein the ongoing and benign conduct of the trial court may have had a prejudicial effect on the jury’s view of the seriousness of the issues when viewed in the context of the trial as a whole. Rather, this situation is more like Ginnis in which the judge’s remarks made it appear to at least one juror that the judge was

⁹Id. at 621-22, 960 P.2d at 338.

¹⁰Id. at 622, 960 P.2d at 338 (quoting Parodi, 111 Nev. at 370, 892 P.2d at 591).

prejudiced against the plaintiff.¹¹ Although the court in Ginnis disapproved of the trial court's conduct, it declined to rule on its prejudicial effect because the issue was not preserved for appellate review.¹² Moreover, the court in Parodi specifically noted that "our instant ruling is not intended to relax or emasculate the general requirement of preserving error for appellate review as enunciated in Ginnis where clear and offensive judicial misconduct occurs."¹³

Furthermore, although the trial court in the instant case did not at the time the comment was made instruct the jury, correcting its remark, the trial court did ultimately instruct the jury that they must not consider the liability of a non-party to the action. The jury received the following instruction:

There may be more than one legal cause of an injury. When negligent conduct of two or more persons contributes concurrently as legal causes of an injury, the conduct of each of said persons is a legal cause of the injury regardless of the extent in which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. It is no defense that the negligent conduct of a person not joined as a party was also a cause of the injury.

¹¹Ginnis, 86 Nev. at 416, 470 P.2d at 140.

¹²Id. at 417, 470 P.2d at 141.

¹³Parodi, 111 Nev. at 369-70, 892 P.2d at 591.

(Emphasis added.) Thus, any error associated with the judge's remark was cured by the trial court's instructions to the jury.

Because the Williamses' counsel failed to object to the remark, they waived the alleged error. The remark was not plain error, and any error otherwise associated with it was cured by the jury instructions. Therefore, the trial court's order granting a new trial constituted an abuse of discretion and must be reversed.


The Williamses contend that the trial court granted the motion for a new trial based not only upon its remark but also because the court erred by admitting comparative negligence evidence and thereafter instructing the jury concerning comparative negligence, and by determining that the requirements of NRS 41.133¹⁴ had not been met to preclude the question of liability.

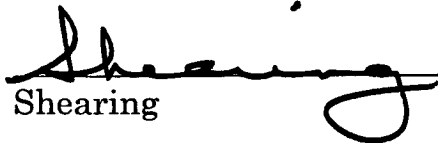
Nothing in the record supports the Williamses' contention that the trial court granted a new trial on any other basis except for the court's comment regarding Marley Peterson's contribution to George Williams's death. Furthermore, after considering the litigants' arguments regarding these other issues, we conclude that the court properly allowed the issues of comparative negligence and liability to be presented at trial, and that these would be improper bases upon which to grant a new trial.


For the foregoing reasons, we

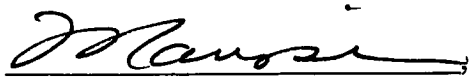
¹⁴NRS 41.133 states: "If an offender has been convicted of the crime which resulted in the injury to the victim, the judgment of conviction is conclusive evidence of all facts necessary to impose civil liability for the injury."

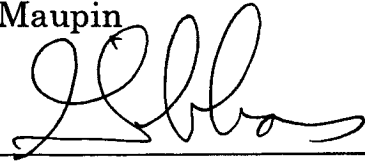
ORDER the judgment of the district court REVERSED AND
REMAND this matter to the district court for proceedings consistent with
this order.


_____, C.J.
Agosti


_____, J.
Shearing


_____, J.
Becker


_____, J.
Maupin


_____, J.
Gibbons

cc: Hon. Michael A. Cherry, District Judge
Alverson Taylor Mortensen Nelson & Sanders
Burris & Thomas, P.C.
Fred W. Kennedy
Clark County Clerk
Bolick Boyer & Fine

LEAVITT, J., with whom ROSE, J., agrees, dissenting:

I would affirm the order of the district court granting a new trial.

Counsel failed to object to the trial judge's remark that Marley Peterson was partially responsible for the decedent's death and the majority finds that the failure to preserve the issue by formally objecting waives any consideration by this court. The majority also found that the remark did not constitute plain error. I disagree.

"Plain error is error which either (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings."¹ "This court may review errors which are patently prejudicial, however, regardless of counsel's failure to object."²

The trial court exercised its discretion and determined that the remark had a prejudicial effect and improperly influenced the jury; the court decided to order a new trial. This was not an abuse of discretion.

There is an additional ground to order a new trial in this case. The trial court improperly allowed evidence of comparative negligence. The jury concluded that appellant was liable for decedent's death, but that decedent was eighty percent negligent, precluding a monetary recovery by decedent's wife and sons.

¹Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993) (citing McGuire v. State, 100 Nev. 153, 677 P.2d 1060 (1984), vacated on other grounds by Libby v. State, 516 U.S. 1037 (1996)).


²Id. (citing Sipsas v. State, 102 Nev. 119, 617 P.2d 231 (1987)).

Appellant entered a conditional guilty plea to voluntary manslaughter, but because a formal judgment of conviction was withheld pending the successful completion of appellant's probation, the court concluded the requirements of NRS 41.133³ had not been met.


Voluntary manslaughter is "the unlawful killing of a human being, without malice express or implied, and without any mixture of deliberation."⁴ Appellant admitted the elements of voluntary manslaughter when he entered a conditional plea of guilty.

The shooting of the decedent was an intentional act. As to the civil action, it was an intentional tort, not a negligent one. Therefore, any jury instruction given on comparative negligence was error.

I would AFFIRM the district court's order granting a new trial.


_____, J.
Leavitt

I concur:


_____, J.
Rose

³NRS 41.133 states: "If an offender has been convicted of the crime which resulted in the injury to the victim, the judgment of conviction is conclusive evidence of all facts necessary to impose civil liability for the injury."

⁴NRS 200.040(1).