

IN THE SUPREME COURT OF THE STATE OF NEVADA

CURTIS RANDALL BARKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37958

FILED

JUL 11 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *JMB*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal of a judgment of conviction, pursuant to a jury verdict, of one count of first-degree murder with use of a deadly weapon. The district court sentenced appellant to a term of life without the possibility of parole with an equal and consecutive sentence for the weapons enhancement.

Appellant claims various errors relating to several district court rulings which limited his ability to fully testify regarding the events on the day of the victim's death; limited the scope of cross-examination of several witnesses; limited his ability to impeach testimony as to the victim's good character; and which excluded his taped statement to police at the time of his arrest. We conclude that some of appellant's claims of error have merit.

Appellant first contends that the district court violated his right to due process and to a fair trial by prohibiting him from testifying about his personal knowledge of the victim's actions on the day of his death. Specifically, he claims that the district court's decision to prohibit any evidence of the victim's shoplifting and the victim's attempt to buy cocaine precluded him from testifying fully as to the day's events - including witnessing the victim's pattern of violent behavior. He argues that his testimony as to the day's events would have explained his state of

mind as well as the relationship between the two men, which culminated in them fighting in the hotel room. Further, he claims that his state of mind was an important element of the offense and that any restriction on his right to testify violated his constitutional rights. We agree.

In Rock v. Arkansas,¹ the United States Supreme Court held that Arkansas' per se limitation on hypnotically refreshed testimony was unconstitutional.² There, the Court held that a defendant's fundamental right to testify took precedence over the state's interest in barring unreliable evidence.³ This court has also recognized a defendant's right to testify.⁴

Here, the district court refused to allow testimony in any manner regarding the victim's alleged shoplifting and attempt to purchase drugs. The district court's rationale for this ruling was to avoid casting aspersions upon the deceased. We conclude that the ~~victim's~~ ^{defendant's} right to testify as to the full sequence of events on the day of the victim's death should have taken precedence over the district court's interest in protecting the victim's reputation.

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¹483 U.S. 44 (1987).

²Id. at 62.

³Id.

⁴Allan v. State, 118 Nev. ___, ___ P.3d ___ (Ad. Op. No. 2, January 22, 2002).

Appellant next contends that the district court erred in limiting the scope of cross-examination of the investigating officer, which was designed to elicit evidence that the investigation was biased and prejudiced. We agree.

Cross-examination is the heart of the Confrontation Clause.⁵ Prior to the detective testifying, respondents filed a motion in limine to restrict cross-examination of the detective's knowledge of what people may have told him about the victim's propensity for violence or rage. Respondents argued that these type of questions would introduce inadmissible evidence into the proceedings. Appellant countered that the detective knew that appellant claimed that the victim's death was self-defense and that the purpose of eliciting these types of statements was not for their truth but to show the detective's state of mind in determining how to proceed with the investigation. Appellant further argued that the objections should be lodged and considered when any alleged hearsay was introduced. However, the district court refused to allow the testimony unless appellant's counsel either agreed to refrain from asking any questions which might create the need for a hearing outside the presence of the jury or made a record of the testimony he intended to elicit on cross-examination of the detective so that the district court could rule on its admissibility before the detective took the stand.

⁵DeRosa v. Dist. Ct., 115 Nev. 225, 231, 985 P.2d 157, 161 (1999).

This court has repeatedly held that statements are not hearsay if they are not offered to prove the truth of the matter asserted.⁶ In this case, the detective had been informed of several instances in which the victim had reacted in a violent or belligerent manner when he did not obtain something he desired. The detective also had knowledge that on the day of his death, the victim was highly intoxicated, and of appellant's allegation of self-defense. Appellant thus contends that the detective's state of mind in electing not to investigate the victim's propensity for violence rose to the level of bias or prejudice. Bias or prejudice is always relevant to the fact finder's assessment of credibility.⁷ Respondents counter that appellant's lengthy cross-examination of the detective was allowed to proceed almost uninterrupted.

We conclude that the district court improperly applied the hearsay analysis since appellant's offer of proof demonstrated that he sought to elicit the statements about the victim's propensity for violence to show the detective's bias or prejudice in conducting the investigation rather than for the truth of the statements. We also conclude that the length of appellant's cross-examination, and the limited objections

⁶See, e.g., Collins v. State, 113 Nev. 1177, 1182, 946 P.2d 1055, 1059 (1997) (holding that statements made to police by third parties were admissible to explain the police conduct); Wallach v. State, 106 Nev. 470, 473, 976 P.2d 224, 227 (1990) (holding that "[a] statement merely offered to show that the statement was made and the listener was affected by the statement . . . is admissible as non-hearsay"); Cunningham v. State, 113 Nev. 897, 904, 944 P.2d 261, 265-66 (1997) (holding that statements by a third party were admissible to show why a witness chose a particular course of conduct).

⁷Ransey v. State, 100 Nev. 277, 680 P.2d 596 (1984) (citing Davis v. Alaska, 415 U.S. 308, 316-17 (1974)).

interjected by the prosecution, are irrelevant since the limitation on the scope of cross-examination was placed on appellant before the detective was even called as a witness.

Appellant also claims that the district court erred by refusing to allow him to rebut testimony as to the victim's good character by impeaching the witnesses or by testifying of his personal knowledge as to the victim's character. Respondents claim that the complained-of evidence - characterizing the victim as a generous, friendly person who was a 'giver' and appellant as a 'taker,' and contrasting the victim's success with appellant's failures: in battling his addiction and succeeding in the rehabilitation program; in making friends; and in pursuing gainful employment - did not constitute character evidence and that any error in admitting evidence is harmless because the evidence of guilt was strong.⁸ However, we have previously characterized as character evidence testimony that a person sold drugs and associated with gangs.⁹ Likewise, we conclude that the testimony presented here was character evidence of the victim.

NRS 48.045 provides that "[e]vidence 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" except in certain circumstances. NRS 45.045(1)(b) permits "[e]vidence of the character . . . of the victim . . . by an

⁸See Kelly v. State, 108 Nev. 545, 552, 837 P.2d 416, 420 (1992).

⁹Robins v. State, 106 Nev. 611, 798 P.2d 558 (1990) (upholding admission of this character evidence in the penalty phase of the proceedings).

accused.” In Petty v. State,¹⁰ we again noted that “NRS 48.045(1)(b) permits the accused to present evidence of the character of a crime victim regardless of the accused’s knowledge of the victim’s character when it tends to prove that the victim was the likely aggressor.”¹¹ We have reiterated our prior ruling that

[w]hen [the victim’s character] is necessary to show the state of mind of the accused at the time of the commission of the offense for the purpose of establishing self-defense, specific acts which tend to show that the deceased was a violent . . . person may be admitted, provided that the specific acts of violence of the deceased were known to the accused.¹²

“The character of the deceased can only be brought in issue where the circumstances are such as to raise a doubt whether the homicide was committed in malice or was prompted by the instinct of self-preservation.”¹³ Here, appellant alleged that the death resulted from a fight instigated by the victim and he had allegedly witnessed the victim’s violent outbursts throughout that day.

NRS 48.055(1) provides that in cases where character is admissible, “[o]n cross-examination, inquiry may be made into specific instances of conduct.” NRS 48.055(2) also provides that in cases where the “character of a person is an essential element of a charge, claim or defense,

¹⁰116 Nev. 321, 997 P.2d 800 (2000).

¹¹Id. at 325, 997 P.2d at 802 (citing Burgeon v. State, 102 Nev. 43, 46, 714 P.2d 576, 578 (1986)).

¹²Id. (quoting Burgeon, 102 Nev. at 45-46, 714 P.2d at 578).

¹³State v. Pearce, 15 Nev. 188, 191 (1880).

proof of specific instances of his conduct may be made on direct or cross-examination.” Here, appellant was precluded from eliciting testimony as to the victim’s character on direct or cross-examination. Under NRS 48.055, the district court should have allowed inquiry as to the specific acts impeaching the victim’s good character on cross-examination. As to the victim’s propensity for violence, which is an element of the claim of self-defense, the district court should have allowed evidence of specific acts on either direct or cross-examination. “A district court’s decision to admit or exclude evidence is within its sound discretion and will not be disturbed unless it is manifestly wrong.”¹⁴ Here, we conclude that denial of the proffered evidence was manifestly wrong.

“We have [previously] established certain considerations which are relevant to the decision of whether error is harmless or prejudicial. These include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.”¹⁵ Here, the crimes charged were serious felonies. Appellant conceded that he caused the victim’s death but claimed he did so without malice or the intent to kill him and thus, the only issue to be decided was the level of criminal liability to be imposed. Under these circumstances, “[w]e cannot say without reservation that the verdict would have been the same in the absence of error.”¹⁶ Therefore, we conclude that the district court’s error in refusing to allow appellant to rebut testimony of the

¹⁴Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999).

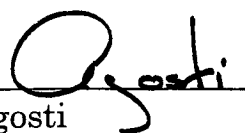
¹⁵Big Pond v. State, 101 Nev. 1, 2-3, 692 P.2d 1288, 1289 (1985).


¹⁶Id. at 3, 692 P.2d at 1289.

victim's good character and propensity for violence was not harmless. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.¹⁷


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Nancy M. Saitta, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

¹⁷In light of our conclusion on these issues, we need not reach appellant's other claims of error.