IN THE SUPREME COURT OF THE STATE OF NEVADA

RUSSELL KISER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38089

FILED

JUN 03 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, for attempted murder with use of a deadly weapon, misdemeanor battery, and aiming a firearm at a human being.

On the morning of August 22, 2000, Jean Feeley went to Fred Conquest's apartment. Feeley and Conquest started dating in 1997. Conquest lived with appellant Russell Kiser and had been his roommate for several years. While Feeley was at the apartment, she got into an argument with Kiser. During the argument, Feeley testified that Kiser hit her in the head, yanked her by her hair, and threw her on the ground. Shortly after, Kiser shot Feeley in the hip area. Conquest testified that Kiser then pointed the gun at him, but did not shoot him.

Trial commenced on March 15, 2001. On March 19, the jury found Kiser guilty of attempted murder with use of a deadly weapon, misdemeanor battery, and aiming a firearm at a human being. They found him not guilty of battery with use of a deadly weapon. Kiser was sentenced to a maximum of one-hundred-fifty months with a minimum parole eligibility of sixty months for attempted murder; a consecutive one-hundred-fifty months with a minimum parole eligibility of sixty months

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for use of a deadly weapon, and restitution of $20,082.06; a concurrent twelve months for aiming a firearm at a human being; and a concurrent six months for battery. On June 20, 2001, Kiser filed this appeal.

Kiser argues that he is entitled to a new trial pursuant to this court's decision in Finger v. State.[1] At trial, Kiser testified that he was taken prisoner during the Vietnam War by Commander Ky of the Khmer Rouge, who tortured him. Kiser testified that after Vietnam, whenever someone angered him, he would lose his temper, remember Commander Ky, and black out. He testified that he did not remember shooting Feeley because he blacked out. Expert witnesses testified that Kiser suffers from post-traumatic stress syndrome. They also testified that Kiser did not have the specific intent to commit the crime as he believed he was shooting Commander Ky, not Feeley.

Even though Kiser was allowed to present such testimony, he was limited to arguing that the State did not prove specific intent beyond a reasonable doubt and was prohibited from arguing insanity under the M'Naghten standard.[2] Kiser was charged with attempted murder, which

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[1]117 Nev. 548, 575-76, 27 P.3d 66, 84 (2001) (holding that defense of legal insanity is protected by the United States and Nevada Constitutions, the legislature unlawfully abolished such defense through its amendments of Nevada statutes concerning insanity, and that prior versions of the statutes amended or repealed remain effective).

[2]Id. at 562-67, 27 P.3d at 76-79 (noting legislature abolished M'Naghten standard in 1995). See Williams v. State, 85 Nev. 169, 173, 451 P.2d 848, 851 (1969) (holding that M'Naghten standard is the appropriate test of insanity); see also C. Clark & W. Finnelly, Daniel

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requires the State prove that Kiser intended the act of killing and also knew of its wrongfulness.[3] In Finger, this court stated that "[a]nytime a statute requires something more than the intent to commit a particular act, then legal insanity must be a viable defense to the crime and involves both tests under the M'Naghten rule."[4] The jury was instructed that they could consider the post-traumatic stress syndrome evidence in determining whether Kiser "had express malice aforethought with deliberate intention unlawfully to kill the victim." However, Kiser was unable to offer a jury instruction regarding the M'Naghten standard. In Finger, this court held that a defendant has a "constitutional right to present evidence demonstrating that he was legally insane under the M'Naghten standard" and stressed "the need for experts and juries to be correctly advised on the M'Naghten standard."[5]

Kiser is a viable candidate for legal insanity under M'Naghten. In Finger, this court stated:

> An individual who labors under the total delusion that they are a soldier in a war and are shooting at enemy soldiers is not capable of forming the intent to kill with malice

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. . . continued
M'Naghten's Case, in Cases in the House of Lords, 172-184 (J.C. Perkins ed., 1874).

[3]Murder is the "unlawful killing of a human being, with malice aforethought, either express or implied." NRS 200.010.

[4]117 Nev. at 575, 27 P.3d at 84.

[5]Id. at 577, 27 P.3d at 85 (emphasis added).

> aforethought. His delusional state prohibits him from forming the requisite mens rea, because he believes that his killing is authorized by law. He is legally insane under M'Naghten.[6]

Kiser's claim directly parallels this example as Kiser's defense rests on the assertion he flashed back to the Vietnam War and was shooting Commander Ky, not Feeley. Finger was filed a month after Kiser's notice of appeal. We apply a new rule of criminal law retroactively "to all cases not finalized on direct appeal" as long as the issue was preserved for appeal.[7] Kiser was prohibited from offering a M'Naghten jury instruction because the Nevada legislature abolished the M'Naghten standard. Therefore, we hold the issue was preserved for appeal. Thus, we reverse and remand this case to the district court for a new trial in order to give Kiser an opportunity to argue insanity under the M'Naghten standard.

Kaiser also argues that the district court did not have jurisdiction over the misdemeanor battery charge, pursuant to State v. Kopp.[8] The State stipulates the district court lacked jurisdiction to hear this charge. We agree that the district court lacked jurisdiction as it does not acquire "jurisdiction over misdemeanors that have been joined in a single indictment or information with a felony or gross misdemeanor."[9]

Accordingly, we

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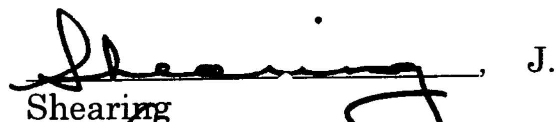
[6]Id. at 574-75, 27 P.3d at 84.

[7]Richmond v. State, 118 Nev. ___, ___, 59 P.3d 1249, 1252 (2002).

[8]118 Nev. ___, 43 P.3d 340 (2002).

[9]Id. at ___, 43 P.3d at 341.

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



_______________, J.
Shearing

_______________, J.
Leavitt

_______________, J.
Becker

cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk