

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODRIGO CHAVEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39987

FILED

DEC 08 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, upon a jury verdict, of second-degree murder with the use of a deadly weapon. Appellant Rodrigo Chavez was sentenced to two consecutive ten year terms. On appeal, Chavez makes the following arguments: (1) the district court's advisory opinion mandates a judgment of acquittal after a mistrial; (2) a district court's advisory opinion constitutes the law of the case, requiring a subsequent district judge to enter a judgment of acquittal; (3) a district judge cannot recuse himself sua sponte; (4) evidence from a trial adjudicated in his favor cannot be used subsequently for impeachment or rebuttal purposes; and (5) the district judge's personal opinion about a jury's verdict in a prior trial constitutes bias against Chavez, requiring the judge to disqualify herself.¹

FACTS

While swimming in the pool of his apartment complex, Chavez asked another swimmer, Lisa Bruce, to remove her dog from the pool. Bruce testified that Chavez threatened to kill the dog if she did not remove it from the pool. Bruce removed the dog and returned to her

¹We have considered Chavez's other assignments of error and find them to be without merit.

apartment to tell her friends what had occurred. The dog's owner, Robert Elliot, went to the pool to confront Chavez. A brief fight ensued, resulting in Elliot knocking Chavez unconscious with a kick to his head.

Chavez's friends carried him to his apartment. Subsequently, the argument between Chavez and Elliot renewed, although there is dispute as to which individual was the aggressor. Chavez's neighbor dispersed the fight by brandishing a shotgun. However, another altercation occurred later. Chavez left his apartment armed with a knife and looking for Elliott. Elliott was unarmed. Chavez stabbed Elliott in the abdomen, the left shoulder, and the left chest. Elliott died from a stab wound to the heart. The State charged Chavez with murder.

At Chavez's first trial, the district judge gave the jury an advisory opinion that insufficient evidence existed to convict Chavez. The jury disregarded the district court's advice; however, they could not reach a unanimous verdict. As a result, the district court declared a mistrial.

Over three months later, Chavez moved the district court to enter a judgment of acquittal. Chavez argued that the district court's advisory opinion indicating insufficient evidence provided sufficient grounds to grant the motion. The district judge who presided over Chavez's trial recused himself before ruling on the motion for judgment of acquittal; therefore, a subsequent district judge denied the motion.

The district judge who presided over Chavez's first trial recused himself in response to the State's oral motion. The district judge stated that his "objectivity has been tainted, so in the interests of justice, I am removing myself from the case." He filed a recusal order requiring the case to be randomly reassigned to another district judge.

Another district judge presided over Chavez's retrial. While Chavez was in custody awaiting retrial, the State charged him with battery upon a prisoner. A jury acquitted Chavez of this charge. Notably, the same district judge presided over that trial as well.

During a pre-trial motions hearing, Chavez moved the district court seeking discovery and suppression of evidence the State intended to use from the battery trial. The district court deferred ruling on the motion, indicating that if Chavez introduced evidence of his non-violent character, rebuttal evidence from the battery trial might be admissible. Chavez repeatedly renewed this motion throughout the trial; however, the district judge continually reserved ruling until Chavez presented his defense.

During arguments on the motion outside the jury's presence, the district judge indicated she did not necessarily agree with the jury's verdict in the battery case. The district judge's comments regarding her difference of opinion on the issue of self-defense led Chavez to allege bias. Instantly, the district judge ordered a hearing before another district judge on her alleged bias. The order contained her affidavit that she held no bias or prejudice against Chavez.

The chief district judge conducted a hearing the following morning. After a brief discussion with counsel, he indicated he lacked jurisdiction to resolve the issue and referred the matter back to the presiding district judge. The chief district judge stated that the presiding district judge was the only person qualified to make a determination as to bias.

The presiding district judge then made a determination that she was not biased against Chavez. She reiterated her opinion that she

would not rule on the motion to exclude evidence from the battery trial until Chavez presented his defense. Subsequently, Chavez decided not to introduce character evidence of his non-violent nature.

The jury returned a verdict finding Chavez guilty of second-degree murder. The district court sentenced Chavez to consecutive ten-year terms. This appeal followed.

Advisory opinions

NRS 175.381(1) permits a district court to issue an advisory opinion if it finds there is insufficient evidence to warrant a conviction. The district court "may advise the jury to acquit the defendant, but the jury is not bound by such advice."² If the jury disregards the advisory opinion but is unable to reach a unanimous verdict, a retrial "does not constitute double jeopardy."³

NRS 175.381(2) states that a district court may enter a judgment of acquittal "after the jury returns a verdict of guilty . . . if the evidence is insufficient to sustain a conviction." This is discretionary, not mandatory, language allowing the district court to set aside a guilty verdict if it finds insufficient evidence.

Chavez argues that the advisory opinion the district judge gave at the conclusion of the first trial requires the district court to grant his motion for judgment of acquittal. The district judge's finding of insufficient evidence that led to the advisory opinion compels a finding in Chavez's favor for acquittal.

²NRS 175.381(1); see also Sheriff v. Robertson, 90 Nev. 365, 366, 526 P.2d 1178, 1179 (1974) (explaining that advisory verdicts are nonbinding).

³Robertson, 90 Nev. at 366, 526 P.2d at 1179.

At the conclusion of the first trial, the district court advised the jury to acquit Chavez because insufficient evidence existed to warrant a conviction. Despite the advisory opinion, the district court declared a mistrial after the jury remained deadlocked. Thus, because the jury did not return a verdict, the district court lacked the authority to enter a judgment of acquittal. The discretionary language of NRS 175.381(2) applies specifically to guilty verdicts. If the Legislature intended the statute to include mistrials, it would have done so.

Chavez argues that NRS 175.381(2) allows a district court to enter a judgment of acquittal simply by implication. He further contends the Legislature did not intend for a defendant to be tried repeatedly until a guilty verdict is reached so that a district court might then enter a judgment of acquittal.

We conclude the Legislature intended the statute to apply only after a verdict is reached. Mistrials do not fall within the ambit of the statute. Therefore, a district judge's advisory opinion imposes no duty on the district court to grant a motion for judgment of acquittal when no verdict is returned.

Law of the case

The doctrine of the law of the case governs issues relative to a rule of law decided by an appellate court.⁴ "The doctrine only applies to issues previously determined, not to matters left open by the appellate court."⁵

⁴Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. ___, ___, 71 P.3d 1258, 1262 (2003).

⁵Id.

Chavez contends the advisory opinion issued by one district judge becomes the law of the case for a subsequent district judge. As such, the district judge appointed to replace the recused district judge should have entered a judgment of acquittal.

An advisory opinion by a district judge is not the law of the case in subsequent proceedings. An advisory opinion is non-binding, not only on the presiding district judge, but to any subsequent district judges involved in the proceedings. Therefore, Chavez's argument is without merit.

Recusal

NRS 1.230(3) allows a judge "upon his own motion, [to] disqualify himself from acting in any matter upon the ground of actual or implied bias." A party may seek to disqualify a judge "for actual or implied bias or prejudice [by filing] an affidavit specifying the facts upon which the disqualification is sought."⁶

Chavez argues that the State's recusal motion was defective and that the district judge's recusal prejudiced his right to a fair trial. He contends we should reverse his conviction because the district judge did not rule on his motion for judgment of acquittal prior to his recusal.

The district judge properly recused himself when he realized he "started rooting for the defendant." His inability to remain impartial and objective caused an actual bias that required recusal. His recusal complies not only with NRS 1.230 but also with the Nevada Code of

⁶NRS 1.235(1).

Judicial Conduct.⁷ Therefore, the district judge did not err in recusing himself upon his own motion.

Impeachment/rebuttal evidence

NRS 48.045(1) permits the State to introduce rebuttal evidence of a defendant's character or trait of his character once the defendant introduces similar character evidence. However, the State may not introduce the rebuttal evidence until the accused presents a defense making the evidence relevant.⁸ The decision to admit evidence of prior bad acts is within the discretion of the district court.⁹

Chavez contends that the district court erred by allowing the State to use prior bad act evidence from a trial adjudicated in his favor to rebut testimony of his character for non-violence. The district court's ruling prejudiced Chavez's defense by preventing him from presenting evidence of his character for non-violence.

Here, the district court conducted a hearing outside the jury's presence to determine whether the State could introduce evidence of a prior bad act by Chavez. Chavez intended to introduce evidence of his non-violent character. The district court found that, depending upon how broadly Chavez testified about his character, the State might be permitted to introduce testimony from Chavez's battery trial.

⁷See NCJC Canon 3(E)(1) (explaining that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned").

⁸Taylor v. State, 109 Nev. 849, 854, 858 P.2d 843, 846 (1993).

⁹Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

Since a jury acquitted Chavez of the charge, the battery allegations cannot be introduced by the State to argue that Chavez had a violent character.

However, Chavez never offered evidence of his non-violent nature; therefore, the district court never admitted the State's rebuttal evidence. The district court never made a definitive ruling; thus, Chavez's failure to offer the evidence at trial precludes appellate review.¹⁰ We have no way to review a district court decision regarding admissibility that was never made. The district court repeatedly told Chavez it would reserve ruling on the admissibility until he presented non-violent character evidence. Chavez cannot now allege the district court erred by waiting to determine the admissibility of rebuttal evidence until Chavez presented his defense. This court has no means of ascertaining whether the district court "might reconsider the issue and change its ruling."¹¹

Disqualification

As previously stated, NRS 1.230 allows a judge "upon his own motion, [to] disqualify himself from acting in any matter upon the ground of actual or implied bias." The Nevada Code of Judicial Conduct also requires disqualification "in a proceeding in which the judge's impartiality might reasonably be questioned."¹²

Chavez contends the district judge erred by not disqualifying herself for bias because she disagreed with the jury's verdict in his battery

¹⁰See Richmond v. State, 118 Nev. ___, ___, 59 P.3d 1249, 1254 (2002).

¹¹Id.

¹²NCJC Canon 3(E)(1).

case. The district court opined that evidence from the battery trial would be admissible depending upon what Chavez presented as a defense. The district court also diverged from Chavez as to the burden of proof necessary for admissibility. However, differences of opinion do not necessarily indicate bias or prejudice. The same district judge presided over both trials and articulated her opinion as to how she would potentially determine admissibility. Because Chavez failed to offer character evidence, the district judge did not have to rule on the admissibility of the rebuttal evidence. Chavez's decision to withhold evidence of his non-violent character, combined with the district judge's affidavit denying bias, precludes a conclusion that the district judge erred by not disqualifying herself.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Steven L. Sexton
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk