IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES L. LAXTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40190

FILED

DEC 21 2004

JANETTE M. BLOOM
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BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, upon a jury verdict, of second-degree murder with the use of a deadly weapon. Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge.

Appellant James L. Laxton was sentenced to a maximum term of twenty-five years with minimum parole eligibility in ten years for second-degree murder and an equal and consecutive term as an enhancement for the use of a deadly weapon.

Laxton was convicted of murdering his best friend, Frederick Charles Wilson, at Laxton's residence on October 18, 2001. While extremely intoxicated, the two got into a verbal argument regarding an affair that Laxton engaged in with Wilson's ex-girlfriend the year before. The argument extended over a several-hour time frame. Eventually, when they were on the porch, the argument became physical and Wilson punched Laxton, knocking Laxton unconscious. Upon regaining consciousness, Laxton entered the house and Wilson remained outside.

Several minutes later, the argument continued through the screen door. Wilson and Laxton were yelling obscenities and taunts at each other through the screen door. Witnesses testified that Laxton and Wilson traded blows through the screen door. The evidence is subject to conflicting interpretations on whether Laxton was trying to prevent

Wilson from gaining entrance to the residence or Wilson was trying to prevent Laxton from exiting.

At some point, Laxton grabbed a steak knife out of the kitchen and returned to the screen door. The two continued to fight, with Wilson reaching and/or attempting to come inside the house. Laxton told Wilson to go home, while Wilson taunted Laxton to cut his heart out. Witnesses indicated they saw Laxton raise the knife as though he intended to stab Wilson and forensic evidence indicated that Wilson was stabbed three times. Conflicting evidence was presented as to whether the fatal wound was inflicted while Wilson was at the door or after Wilson stumbled into the front yard pursued by Laxton.

Laxton was arrested and charged with open murder with the use of a deadly weapon. The State filed notice of its intent to seek the death penalty.

At a jury trial, the State introduced substantial evidence, over Laxton's objection, regarding Laxton's activities during the day. Laxton engaged in several arguments with his wife Stormie, during one of which, she slapped him and during another, Laxton threw a brick through a car window. Laxton also damaged his residence, pulling the telephone cord from the wall and cutting it, throwing items out of the closets, and pulling the curtains off of the wall. The district court ruled that the evidence was admissible to show Laxton's state of mind and to complete the story of the crime.

Laxton claimed that he acted in self-defense because Wilson came at him with a broken bottle or a shank. The police did not find a weapon at the scene, other than the knife used by Laxton, but they did observe several broken bottles. The bottles were not impounded as

evidence. Laxton attempted to show insufficiencies in the police investigation, including contamination, failure to collect evidence, and the failure to pursue evidence through cross-examination of the State's witnesses.

The only witness Laxton called was Dr. Theodore Young, a clinical neuropsychologist, who was admitted as an expert. Dr. Young testified that Laxton has an organic brain injury and that he performs on the borderline of intellectual functioning, causing him to think at a slower pace than most people, especially when under stress.

On cross-examination, the State questioned Dr. Young at length regarding the effects of being knocked unconscious and the ability to reason immediately thereafter. Dr. Young explained that these questions would be more appropriate for an emergency room doctor and that he did not feel he could give an informed answer.

On redirect, Laxton asked Dr. Young what happens to a person who is knocked unconscious. The State objected because of a lack of foundation and because the witness had indicated during cross-examination that the issue was best addressed by an emergency room doctor. Laxton established that this specific area was one that Dr. Young studied extensively in his field of practice. The district court sustained the State's objection, finding that Dr. Young's statements regarding his inability to answer the State's questions during cross-examination limited Laxton's ability to explore a new area of testimony on redirect.

Laxton raises several errors on appeal.

Prior acts evidence

Laxton argues that the district court abused its discretion by admitting evidence of: (1) Laxton and Stormie fighting earlier in the day;

(2) Stormie slapping Laxton; (3) Laxton breaking the car window with a brick; and (4) Laxton throwing stuff around the house, kicking the television, and pulling the telephone cord out of the wall. The State contends that the evidence was properly admitted pursuant to NRS 48.035(3), the res gestae doctrine.[1]

NRS 48.025(2) provides that only relevant evidence is admissible. NRS 48.035(1) states that "evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."

NRS 48.045(2) provides that evidence of other acts cannot be admitted to prove that the defendant acted in a similar manner on a particular occasion. But NRS 48.045(2) also provides that such evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Before admitting such evidence, the trial court must conduct a hearing on the record and determine: (1) that the evidence is relevant to the crime charged, (2) that the other act is proven by clear and convincing evidence, and (3) that the probative value of the other act is not substantially outweighed by the danger of unfair prejudice.[2]

NRS 48.035(3), which is the statutory expression of the res gestae doctrine, states:

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[1]Below, the district court stated that the evidence was admissible to show Laxton's state of mind and under the res gestae doctrine. On appeal, the State does not argue that the evidence was properly admitted to show Laxton's state of mind.

[2]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

Where evidence is admissible under the res gestae doctrine, "the determinative analysis is not a weighing of the prejudicial effect of evidence of other bad acts against the probative value of that evidence. . . . [Instead], the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts."[3] If the court determines that the testimony relevant to the charged crime cannot be introduced without reference to the uncharged acts, it must not exclude the evidence of the uncharged acts.[4]

"The decision to admit or exclude evidence of separate and independent offenses rests within the sound discretion of the trial court and will not be disturbed unless it is manifestly wrong."[5]

We conclude that the district court abused its discretion by admitting most of the evidence of Laxton's prior acts.

The district court did not abuse its discretion by admitting the evidence that Stormie slapped Laxton, causing his lip to split. This evidence was properly admitted to avoid any inference by the jury that the injury was caused by Wilson and that the injury supported Laxton's claim

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[3]State v. Shade, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995).

[4]Id.

[5]Domingues v. State, 112 Nev. 683, 694, 917 P.2d 1364, 1372 (1996).

of self-defense. Nevertheless, the details regarding the argument that led up to the slap were not necessary to demonstrate the source of the injury and should have been excluded.

Evidence of Laxton kicking the television was properly admitted under the res gestae doctrine, as the act occurred during the fatal fight. Evidence that Laxton pulled the telephone cord from the wall earlier in the day was admissible to explain the short delay in calling for help. Nevertheless, the details of how or why the phone cord was pulled from the wall are inadmissible.

We conclude that the district court abused its discretion by admitting the rest of the disputed evidence; namely, the evidence regarding the other fights, Laxton throwing the brick through the car window and Laxton generally damaging the house. These events occurred earlier in the day. Moreover, Stormie testified that things calmed down between her and Laxton in the time before Wilson arrived. None of this evidence has any bearing on what occurred between Laxton and Wilson. The sole purpose for admitting this evidence was to show Laxton's bad character and that he acted in conformity with that character when he stabbed Wilson.

Dr. Young's testimony

Laxton argues that the district court denied him due process by excluding testimony from his expert neuropsychologist regarding the physical and cognitive effects of being knocked unconscious. Laxton alleges that he attempted to show, through qualified testimony, that his mental deficiencies, combined with the effects of being knocked unconscious, negated the elements of intent and malice and showed self-

defense. The State counters that Dr. Young limited his own testimony because it was outside his field.

"Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and this court will not disturb that decision absent a clear abuse of discretion."[6] "'The district court is better suited to rule on the qualifications of persons presented as expert witnesses.'"[7]

NRS 50.275 states, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."

However,

> [o]nce a physician is qualified as an expert, he or she may testify to all matters within his or her experience or training, and the expert is generally given reasonably wide latitude in the opinions and conclusions he or she can state, being subject only to the general exercise of discretion by the district court concerning whether the expert is truly qualified to render such testimony.[8]

We conclude that the district court did not abuse its discretion in limiting the scope of Laxton's redirect. Although Laxton's questions would have been appropriate if they had been asked during direct

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[6]Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

[7]Id. at 13, 992 P.2d at 852 (quoting Hanneman v. Downer, 110 Nev. 167, 179, 871 P.2d 279, 287 (1994)).

[8]Fernandez v. Admirand, 108 Nev. 963, 969, 843 P.2d 354, 358 (1992).

examination, as the record indicates that Dr. Young is qualified to testify regarding the physical and cognitive effects of being knocked unconscious, his refusal to answer specific questions on cross-examination limited Laxton's ability to ascertain this information as a part of redirect examination. Thus, the district court did not err in concluding that the new area of examination was not relevant to the doctor's inability to answer the State's questions and exercising the court's discretion to exclude Laxton's additional questioning of Dr. Young.

Detective Sorenson's testimony

Laxton asserts that the district court abused its discretion by allowing Detective Sorenson to give his opinion that he did not believe Laxton's statements that Wilson attacked him with some type of ad hoc weapon and that Laxton fabricated this statement after the fact.

Laxton argues that Detective Sorenson's opinion improperly invaded the province of the jury and that it constitutes improper opinion testimony since it served to attack Laxton's veracity. The State argues that it simply used redirect to explain and clarify the testimony elicited during cross-examination regarding the police investigation and collection of evidence. The State contends that Detective Sorenson had a right to explain why the investigation did not include impounding or testing physical objects found at the scene.

"'Lay opinion about the veracity of particular statements by another is inadmissible on that issue.'"[9] "[I]t is generally inappropriate for

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[9]Sterling v. State, 108 Nev. 391, 397, 834 P.2d 400, 404 (1992) (quoting People v. Melton, 750 P.2d 741, 758 (Cal. 1988)).

either a prosecution or defense expert to directly characterize a putative victim's testimony as being truthful or false."[10]

Detective Sorenson could have testified regarding standard procedure for processing a crime scene and deciding what physical objects to impound at test; however, it was inappropriate for Detective Sorenson to comment on Laxton's veracity. Laxton did not open the door regarding his veracity through cross-examination. Accordingly, we conclude that the district court abused its discretion by allowing Detective Sorenson's statement.

Jury instruction

Laxton argues that the district court abused its discretion by refusing to give his defense of home instruction.[11]

Laxton argues that the defense of home instruction was supported by substantial evidence at trial. Laxton contends that the jury was not properly and fully instructed that a person may use deadly force in the defense of their home and that one does not have a duty to retreat, even when there is a safe avenue available. The State argues that the proposed instruction was adequately covered by other self-defense instructions.

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[10]Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987).

[11]Laxton also challenges the validity of jury instruction No. 18 regarding when a lesser offense may be considered; jury instruction No. 24 involving unreasonable belief of imminent harm; the jury instructions involving manslaughter, self-defense and malice; the reasonable doubt instruction and the equal and exact justice. We have considered these arguments and find them to be without merit.

"[A] party is entitled to have the jury instructed on all of his case theories that are supported by the evidence," if the instruction is consistent with existing case law and does not have a tendency to mislead the jury.[12] The district court's rejection of a proffered jury instruction is reviewed for an abuse of discretion.[13] However, this court will not reverse a judgment by reason of an erroneous jury instruction unless the error has resulted in a miscarriage of justice.[14]

The proposed instruction was consistent with Nevada law[15] and was supported by sufficient evidence. We conclude that the district court abused its discretion by refusing to offer the instruction. The instruction was not adequately covered by the self-defense instructions. None of the other instructions cover a situation when the defendant is defending his home or the duty to retreat. Accordingly, the district court should have given the proffered instruction.

Sufficient evidence

Laxton argues that sufficient evidence does not support his conviction because the State failed to meet its burden to prove malice aforethought and the State did not sufficiently negate his claim of self-defense. The question for the reviewing court is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational

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[12]Silver State Disposal v. Shelley, 105 Nev. 309, 311, 774 P.2d 1044, 1045 (1989).

[13]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

[14]Pfister v. Shelton, 69 Nev. 309, 310, 250 P.2d 239, 239 (1952).

[15]See NRS 200.120; NRS 200.130; Culverson v. State, 106 Nev. 484, 488, 797 P.2d 238, 240 (1990).

trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[16] The jury determines the weight and credibility to give to conflicting testimony.[17]

We conclude that, ignoring the other errors that occurred during the trial, there is sufficient evidence to sustain his conviction for second-degree murder with the use of a deadly weapon. The jury could have reasonably found that Laxton showed malice aforethought by grabbing the knife, going to the screen door to engage in further confrontation with Wilson, and stabbing Wilson, and that a reasonable person in Laxton's position would not have considered Wilson's conduct an imminent threat of death or serious bodily injury.

Compulsory DNA testing

Laxton contends that his sentence is unconstitutional because it requires him to undergo compulsory DNA testing, for which he has to pay $150.00. In Gaines v. State, this court held that NRS 176.0913, the genetic markers statute, is constitutional.[18] In his opening brief, Laxton argues that in Gaines this court relied extensively on the Ninth Circuit's decision of Rise v. Oregon.[19] Laxton argues that Rise was recently overruled. However, Laxton's counsel declined to argue this issue during oral arguments and in light of our reversal on other grounds, we decline to reconsider this issue at this time.

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[16]Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[17]Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981).

[18]116 Nev. 359, 998 P.2d 166 (2000).

[19]59 F.3d 1556 (9th Cir. 1995).

Conclusion

"In order for error to be reversible, it must be prejudicial and not merely harmless. The test is whether 'without reservation . . . the verdict would have been the same in the absence of error.'"[20] We conclude that the cumulative errors found in this case prejudiced Laxton and that we cannot say, beyond a reasonable doubt, that the outcome would have been the same absent these errors. Therefore, we conclude reversal and remand for a new trial is warranted. Accordingly, we

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

Becker _____, J.
Becker

_____, J.
Agosti

_____, J.
Gibbons

cc: Hon. Dan L. Papez, District Judge
State Public Defender/Carson City
Attorney General Brian Sandoval/Carson City
White Pine County District Attorney
White Pine County Clerk

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[20]Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990) (internal citations omitted) (quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988)).