

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVERY ALLEN CHURCH, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41036

**FILED**

**AUG 25 2004**

ORDER OF REVERSAL

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit burglary, burglary with the use of a deadly weapon, conspiracy to commit robbery, robbery with the use of a deadly weapon, first-degree kidnapping, attempted murder with the use of a deadly weapon, and battery with the use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On appeal, Church contends that the district court committed reversible error by admitting the tape-recorded conversations and allowing police detectives to testify as to Church's prior bad acts and uncharged crimes without limiting instructions or a Petrocelli<sup>1</sup> hearing. Additionally, Church argues that several of his convictions are redundant. We reverse.

FACTUAL AND PROCEDURAL HISTORY

At trial, the State presented evidence that on July 29, 2002, appellant, Avery Church and his co-defendant, Rene Ross, forcibly entered Jack Battle's residence with the intent to commit robbery. While inside, they removed several of Battle's belongings and physically assaulted

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<sup>1</sup>Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

Battle with the intent of killing him. The district court, over Church's objection, allowed the State to introduce evidence regarding Church's prior bad acts and uncharged crimes.

Las Vegas Metropolitan Police (LVMPD) Detective Laura Andersen testified at trial that her supervisor contacted a supervisor in "ROP"<sup>2</sup> in an effort to release Battle from jail following an unrelated arrest by his parole officer because she obtained information that Battle was unsafe in the same facility as Church. Church's counsel objected to this evidence outside the presence of the jury. The district court deemed Church's objections timely and admonished Detective Andersen to refrain from further reference to "ROP" or Church's criminal history. The district court did not give the jury a limiting instruction.

On re-direct examination of Detective Andersen, the State sought to question her regarding Church's violent reputation and alleged threats against Battle while incarcerated. The State argued that Church opened the door to this evidence because they impugned Battle's character by eliciting testimony about his history of pawning personal property and his drug activity. Additionally, the State argued that Church questioned Detective Andersen's decision-making integrity regarding Battle's release from jail. In response, Church argued that this questioning did not open the door to bring Church's character in issue.

The district court concluded that Church's examination of both Battle and Detective Andersen opened the door to the State's questioning of Detective Andersen about Battle's release and Church's violent

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<sup>2</sup>This referred to the "Repeat Offender's Unit" of the LVMPD. Detective Andersen only used the acronym at trial.

reputation. The court gave a limiting instruction to the jury that other crimes, wrongs or acts are inadmissible as character evidence but may be admissible for other purposes, such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Detective Andersen ultimately did not testify as to Church's reputation but did state that she received information regarding Church that caused her to be concerned for Battle's safety in jail.

LVMPD Detective Clint Robison testified regarding the surveillance of Church's apartment, Ross's attempt to hide from police, and Church's resistance to arrest on July 31, 2002. At the time of the testimony, Church did not object. Church objected at the close of the State's case-in-chief on the basis that NRS 48.045 forbids Detective Robison's testimony on uncharged conduct of Church.

The district court acknowledged that the parties should have determined this testimony's admissibility pretrial, however, it conducted a makeshift Petrocelli hearing regarding the testimony. The court found that "the fight was relevant and clear and convincing and . . . prejudicial didn't outweigh the probative value." The court ruled that the evidence fell within NRS 48.045, but was admissible for other purposes, which the court did not state. The court did not give the jury a limiting instruction.

The State also introduced several tape-recorded telephone conversations of Church and Ross, while incarcerated, with Annette (Church's girlfriend) and Nicole (Ross' girlfriend). The State argued for admission of the tapes on the theory that they were in furtherance of a conspiracy because the statements inferred the parties pawned Battle's stolen belongings. Over Church's objection that the conversations were inadmissible hearsay, the district court stated that the defendants opened

the door through their cross-examination of Battle and Detective Andersen. Therefore, the district court admitted the conversations under the conspiracy hearsay exception. Neither of the women on the tapes testified at trial.

The jury ultimately returned a guilty verdict against Church for conspiracy to commit burglary, burglary with the use of a deadly weapon, conspiracy to commit robbery, robbery with the use of a deadly weapon, first-degree kidnapping, and attempted murder with the use of a deadly weapon. Church filed this timely appeal.

### DISCUSSION

#### Detectives' testimony

Church contends that the district court committed reversible error in admitting improper character evidence against him through the testimony of LVMPD Detectives Laura Andersen and Clint Robison. We disagree.

“Trial courts have considerable discretion in determining relevance and admissibility of evidence.”<sup>3</sup>

“Reference to a defendant’s prior criminal history may be reversible error.”<sup>4</sup> The test is whether, based upon the reference made, the jury could infer that the defendant engaged in prior criminal activity.<sup>5</sup>

Under NRS 48.045(2), evidence of other crimes, wrongs or acts is inadmissible to prove the character of a person in order to show that he acted in conformity therewith.

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<sup>3</sup>Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996).

<sup>4</sup>Collman v. State, 116 Nev. 687, 705, 7 P.3d 426, 437 (2000).

<sup>5</sup>Id.

To be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.<sup>6</sup>

We will not disturb a trial court's determination to admit or exclude evidence absent manifest error.<sup>7</sup>

Detective Laura Andersen

Church contends that the district court committed reversible error in admitting Detective Andersen's testimony referencing the "ROP" and Church's threats against Battle without a limiting instruction or a Petrocelli hearing.

We conclude that no error occurred through Detective Andersen's reference to "ROP" because this term did not relate to Church or his past criminal record. Rather, it related to her process of getting Battle released from jail. It is highly unlikely that the jury knew or could infer what "ROP" meant or that it related to Church's criminal history as the jury received no explanation as to this acronym, and the reference did not relate to Church's criminal activity. We also conclude that Detective Andersen's testimony regarding Church's violent reputation and alleged threats against Battle while incarcerated was irrelevant. Though we conclude that this testimony was irrelevant and the district court erred in allowing the State to pursue this line of questioning, the error was

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<sup>6</sup>Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

<sup>7</sup>Roever v. State, 114 Nev. 867, 872, 963 P.2d 503, 506 (1998).

harmless because Detective Andersen ultimately did not specifically testify about Church's reputation or alleged threats against Battle.<sup>8</sup>

#### Detective Clint Robison

Church contends that the district court also committed reversible error in admitting Detective Robison's testimony regarding Church's arrest without a limiting instruction or Petrocelli hearing.

We conclude that the district court sufficiently determined that the essential elements of the Tinch v. State<sup>9</sup> test were satisfied to admit Detective Robison's testimony. Though the court failed to state the purpose for admitting Detective Robison's testimony, we find that clear and convincing evidence established that the testimony related to Church's consciousness of guilt to deter police and avoid arrest. Accordingly, we conclude that the district court did not err in admitting Detective Robison's testimony.

#### Tape-recorded conversations

Church contends that the district court's admission of the tape-recorded conversations violated the Confrontation Clause of the Sixth Amendment. We agree.

NRS 51.035 defines hearsay as a statement offered into "evidence to prove the truth of the matter asserted." The Confrontation Clause restricts the State's use of hearsay evidence when a hearsay declarant does not testify at a criminal trial.<sup>10</sup> "[H]earsay offered against

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<sup>8</sup>Barnier v. State, 119 Nev. \_\_\_, \_\_\_, 67 P.3d 320, 322 (2003) (An error is harmless where it does not affect a party's substantial rights.).

<sup>9</sup>113 Nev. at 1176, 946 P.2d at 1064-65.

<sup>10</sup>Wood v. State, 115 Nev. 344, 348, 990 P.2d 786, 789 (1999).

an accused [must] be sufficiently reliable to substitute for in-court scrutiny through cross-examination.”<sup>11</sup> To determine sufficient reliability, the statements must qualify under a “firmly rooted” hearsay exception or evidence showing “particularized guarantees of trustworthiness.”<sup>12</sup>

During trial, the State moved for the admittance of several tape-recorded conversations on the basis the statements were in furtherance of a conspiracy. The parties stipulated to the authenticity of the tapes, but not to the tapes’ admissibility. The district court found that Church opened the door to this evidence and admitted the conversations as in furtherance of a conspiracy, not hearsay, and they demonstrated indicia of reliability. We conclude that the district court committed reversible error in reaching this determination for several reasons.

First, under NRS 48.045(1)(a), when an accused offers evidence of his good character, the prosecution is permitted to rebut this with evidence of the accused’s bad character. Church did not testify on his own behalf and he did not present any witnesses who testified as to his good character. A defendant does not place his character in issue through challenging the character of a State witness, such as Battle or Detective Andersen. Therefore, we conclude that the district court committed reversible error in concluding that Church “opened the door” through his

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<sup>11</sup>Id. (quoting Franco v. State, 109 Nev. 1229, 1239, 866 P.3d 247, 253 (1993)).

<sup>12</sup>Id. at 349, 990 P.2d at 789 (quoting Franco, 109 Nev. at 1239, 866 P.2d at 254); but see Crawford v. Washington, \_\_\_ U.S. \_\_\_, 124 S. Ct. 1354 (2004) (eliminating reliability test if the statements are “testimonial” in nature).

cross-examination of Battle and Detective Andersen to place Church's character in issue.

Secondly, as stated above, hearsay statements are generally inadmissible absent some exception. Since neither Annette nor Nicole, whose statements appeared on the tapes, testified at trial, the State was required to establish either that the statements fell under a hearsay exception or demonstrated indicia of reliability. The State argued for admittance of the conversations under the co-conspirator's statements hearsay exception.

We have held that before an out-of-court statement by an alleged co-conspirator may be admitted into evidence against a defendant, the existence of a conspiracy must be established by independent evidence and the statement must have been made during the course of, and in furtherance of, the conspiracy.<sup>13</sup> Here, the State did not meet this burden. The State presented no independent evidence to establish that Church was involved in a conspiracy with either Nicole or Annette. Neither woman was charged with conspiracy or any other crime related to the July 29, 2002, incident against Battle. Additionally, the State did not allege any further involvement by Annette or Nicole during the proceedings. We conclude that the district court erred in concluding that the taped statements qualified under the conspiracy hearsay exception.

While a majority of the taped conversations admitted at trial were nonsensical and do not appear prejudicial to Church, the statement by Annette referencing a statement by Nicole, "I know about the necklace," in particular, is prejudicial. In addition to this statement

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<sup>13</sup>Wood, 115 Nev. at 349, 990 P.2d at 789.



constituting double hearsay,<sup>14</sup> the State conceded at oral argument before this court that the tapes were admitted to show Church and Ross had stolen the necklace and knew of its disposal. Thus, the State sought to use this out-of-court statement specifically to prove the truth of the matter asserted, and the conversations were inadmissible as they do not qualify under any hearsay exception and lack any indicia of reliability. Accordingly, the district court committed reversible error in the admission of these statements.

#### Redundant convictions

Finally, Church contends that several of his convictions are redundant and should be dismissed. Specifically, Church argues that his convictions for conspiracy to commit robbery and conspiracy to commit burglary, as well as his convictions for attempted murder and kidnapping, are redundant. We disagree.

The Double Jeopardy Clause of the United States Constitution protects a defendant from multiple sentences based upon the same offense.<sup>15</sup> We have adopted the test from Blockburger v. United States<sup>16</sup> to determine whether multiple convictions based upon the same act or incident are permitted.<sup>17</sup> Under Blockburger, “if the elements of one

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<sup>14</sup>NRS 51.067 states:

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms to an exception to the hearsay rule.

<sup>15</sup>Salazar v. State, 119 Nev. 224, \_\_\_, 70 P.3d 749, 751 (2003).

<sup>16</sup>284 U.S. 299 (1932).

<sup>17</sup>Salazar, 119 Nev. at \_\_\_, 70 P.3d at 751.

offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses.”<sup>18</sup>

Further, “while the State may bring multiple charges based upon a single incident, we will reverse ““redundant convictions that do not comport with legislative intent.””<sup>19</sup> In State v. Dist. Court, we stated that in determining whether convictions are redundant, “[t]he question is whether the material or significant part of each charge is the same even if the offenses are not the same.”<sup>20</sup>

Conspiracy to commit burglary and conspiracy to commit robbery are separate offenses under the Blockburger test. In Stowe v. State, we held that a person who commits burglary with the intent to commit felony theft therein, may be convicted of both burglary and the theft crime.<sup>21</sup> This rule also applies in a conspiracy situation, where the co-conspirators conspire to commit burglary and a robbery offense therein.

We further conclude that the conspiracy convictions are not redundant as independent evidence supports the convictions. The jury could infer that Church and Ross formed an agreement to rob Battle while driving to Battle’s residence based upon their knowledge of the drug

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<sup>18</sup>Id. (quoting Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002), cert. denied, 537 U.S. 1031 (2002)).

<sup>19</sup>Salazar, 119 Nev. at \_\_\_, 70 P.3d at 751 (quoting State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997) (quoting Albitre v. State, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987))).

<sup>20</sup>State v. Dist. Court, 116 Nev. 127, 136, 994 P.2d 692, 698 (2000).

<sup>21</sup>109 Nev. 743, 745, 857 P.2d 15, 16-17 (1993).

manufacturing and sales that occurred there.<sup>22</sup> Additionally, once at the residence, when Battle asked Church and Ross to wait in the car, the jury could infer that Church and Ross agreed to enter Battle's residence by force. Thus, the agreements related to separate acts, one of robbing Battle for drugs or money and one for forcing entry into the residence to steal from Battle. Therefore, the jury did not err in convicting Church of both offenses, as the convictions are not redundant.

Secondly, we conclude that attempted murder and kidnapping are separate offenses under Blockburger. "[P]roof of asportation [is required] when the kidnapping is incidental to another offense where restraint of the victim is inherent with the primary offense."<sup>23</sup> When a victim is physically restrained, proof of asportation is not required.<sup>24</sup> If the restraint elevates the threat of harm to the victim or the restraint had some independent relevance, the kidnapping charge is not incidental to the underlying charge.<sup>25</sup>

Here, Church and Ross restrained Battle by placing a rope around his neck in an effort to search Battle's residence for drugs and money. This restraint alone suffices for a first-degree kidnapping conviction and is a separate act from that of the facts supporting the attempted murder offense, which included Ross and Church choking and dragging Battle with the noose, severe beatings, and stabbing Battle in

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<sup>22</sup>See, e.g., Thomas v. State, 114 Nev. 1127, 1143-44, 967 P.2d 1111, 1122 (1998).

<sup>23</sup>Doyle v. State, 112 Nev. 879, 893, 921 P.2d 901, 910-11 (1996).

<sup>24</sup>Id. at 893, 921 P.2d at 911.

<sup>25</sup>Id.

the head with a knife. Therefore, the State was not required to demonstrate asportation to support a kidnapping conviction because Ross and Church physically restrained Battle.

The present case differs from Skiba v. State, where we held that convictions for battery with the use of a deadly weapon and battery causing substantial bodily harm were redundant where the gravamen of the charges was that the defendant hit the victim with a broken beer bottle.<sup>26</sup> Here, the State never alleged that the convictions against Church and Ross arose out of a single act, that involving the use of a noose. Even though the noose seemingly was a factor of both offenses, merely placing the rope around Battle's neck in an effort to confine him, was sufficient to constitute kidnapping. The evidence establishing the further use of the rope to choke and drag Battle, continued beatings, verbal threats and stabbing were sufficient to support the attempted murder conviction. We conclude that the kidnapping and attempted murder convictions against Church are not redundant. Therefore, the jury did not err in convicting Church of both attempted murder and kidnapping.

#### CONCLUSION

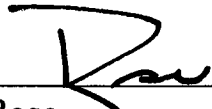
We conclude that the district court improperly admitted hearsay testimony by way of the tape-recorded telephone conversations and improperly determined that defense counsel brought Church's character into issue through cross-examination of Battle and police detectives. We further conclude that the district court did not err by admitting the detectives' testimony against Church. In addition, Church's convictions for conspiracy to commit robbery, conspiracy to commit

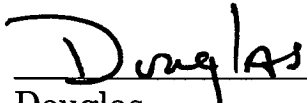
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<sup>26</sup>114 Nev. 612, 616, 959 P.2d 959, 961 (1998).

burglary, attempted murder and kidnapping are not redundant.  
Accordingly, we

ORDER the judgment of the district court REVERSED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Joseph T. Bonaventure, District Judge  
Amesbury & Schutt  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

MAUPIN, J., dissenting:

The State argued for the introduction of numerous tape-recorded telephone conversations at trial as statements made in furtherance of a conspiracy.<sup>1</sup> The district court in turn introduced the

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<sup>1</sup>Track one:

Annette: By the way, she's like, she's like, and "I know, I know about the necklace." She's like, "I know what you did for them. I know."

Church: Be quiet.

Annette: Yeah, well.

Track two:

Church: Yeah there is nothing to worry about Nicole.

Nicole: You're the one stressing over there.

Church: But when you're, when you're talking over the phone and you f\*\*\*ing . . . a

Nicole: You're the one stressing.

Annette: Nicole and you're talking about some s\*\*\* I did for AJ [referring to Church], AJ and Rene. Dude, you can't be repeating that s\*\*\* Nicole.

Nicole: Oh well.

Annette: What do you mean, "Oh well?"

Church: Oh well? And Nicole you know if you don't.

Nicole: I can repeat what I want to repeat, ok.

Annette: Whatever, f\*\*\* you Nicole. F\*\*\* you, bitch, go to hell . . . hello . . . f\*\*\* that little bitch. F\*\*\* that little c\*\*\*. Cuz I'm going to f\*\*\* her up when I see her.

*continued on next page . . .*

conversations into evidence upon this hearsay exception. While I agree with the majority that the statements are not in furtherance of a

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*... continued*

Track three:

Church: I don't know why you even had to say anything about that thing she was talking about. I don't know why you even talk about anything Annette. Do you understand how f\*\*\*ing paranoid I am about these telephones? Do you understand that if they record something off these telephones.

Annette: Oh, so, so, repeat that. That's great.

Church: What? Listen to me dude.

Annette: So you say that?

Church: Do you understand . . . .

Annette: So they definitely, so they definitely know something is going on.

Church: Annette would you shut your f\*\*\*ing mouth.

Track four:

Nicole: Ever since I left that on her machine. I was like . . . .

Ross: He told me.

Nicole: And I was like, f\*\*\*ing . . . something I said (inaudible) I know you're the one that pawned the necklace.

Ross: Heh.

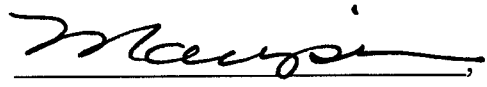
Nicole: Right, that's what I said.

Ross: Right and he f\*\*\*ing started crying. And he started crying about that s\*\*\*, 'Oh what the f\*\*\*.' You know he's, he's the one that f\*\*\*ing . . . who told you this? You know who went, who went and told you about our case? Huh, babe? Hello.

conspiracy, I do not believe that the admission of these conversations violate the hearsay rules, thus constituting reversible error.

The statements, specifically those referenced by the majority, simply demonstrate Annette and Nicole's knowledge of the stolen property and Church's reaction to their knowledge. Therefore, I conclude that this evidence was not hearsay. The State did not offer the statements to prove that Annette or Nicole knew about the necklace; the conversations were admitted to prove that the women made the statements and that Church implicitly ratified their assertions based upon his failure to deny the allegations and his silence.<sup>2</sup> Accordingly, I find that the district court did not err in admitting these conversations into evidence.

I agree with the majority that the State improperly placed Church's character in issue based upon Church's attacks of the State's witnesses, particularly Battle and Detective Andersen. The district court should have rejected this proof since Church's examination of the witnesses did not place Church's character in issue.<sup>3</sup> However, given the overwhelming evidence of guilt against Church, I find this was harmless error and would affirm the district court's judgment of conviction.

 J.  
Maupin

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<sup>2</sup>See NRS 51.035(3)(b).

<sup>3</sup>See NRS 48.045(1)(a).