

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL MESSICK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41824

FILED

FEB 03 2005

ORDER OF AFFIRMANCE

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

This is an appeal from judgments of conviction, upon jury verdict, of first-degree murder with the use of a deadly weapon and second-degree murder. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellant Michael Messick was charged and convicted of first-degree murder with the use of a deadly weapon for killing his mother, Hisayo Miller, and of second-degree murder for killing his girlfriend, Anne Suazo. For Miller's murder, Messick received a sentence of life without the possibility of parole with an equal and consecutive sentence for the deadly weapon enhancement. For Suazo's murder, Messick received a consecutive life sentence with parole eligibility after ten years.

FACTS

Suazo had been engaged in a sporadic relationship with Messick for a couple of years. On April 3, 2001, Suazo and Messick left her apartment in Suazo's van and she was never seen again. Suazo's family became concerned when they did not hear from Suazo. During their search for her, Suazo's family discovered a message from Messick on Suazo's voicemail saying that the van ran out of gas and he was leaving it on the side of the road for her to pick up. On April 6, Suazo's family filed a missing person's report. A couple of days later, the police located Suazo's

van. The van had been stripped of all of its floor mats, blankets and towels and was impeccably cleaned.

At trial, James Conlan testified that he saw Messick's white car parked outside Jeffery Iverson's apartment a couple of days after Suazo's disappearance. Conlan saw a woman matching Suazo's description in the backseat with a white plastic bag over her head. There was something red on the bag. Conlan waved to her as he hurried by, but he did not see her move or wave back.

Iverson testified that Messick came to his apartment to discuss getting rid of some "bad trash" that he had in his car. Iverson agreed to help Messick. Later, Iverson observed Messick trying to put what appeared to be a body wrapped in black plastic in Iverson's car. Iverson interfered, telling Messick to get in the apartment. Iverson asked Messick whose body it was and Messick replied it did not matter. Iverson told Messick to leave.

Iverson later discovered several black plastic bags in his car. Iverson put the bags in a dumpster. Iverson then decided that he needed to know what was in the bags and returned to the dumpster. Iverson discovered some clothes and a wallet which contained Suazo's driver's license.

On April 11, when Miller uncharacteristically failed to report to work, concerned co-workers convinced the police to conduct a welfare check at her condominium. Her body was discovered under several objects in the master bathtub. Miller had been stabbed through the heart and severely beaten about the head with a blunt object. The evidence suggests that Miller was murdered in the kitchen. The condo was immaculate and bleach had been recently applied to the carpeting. The police discovered a

pair of jeans, which were Messick's size, in the bathtub with the body. The jeans had a blood splatter pattern that was consistent with being worn at the time of the murder or hung over a chair near the victim.

Earlier on April 11, before Miller's body was discovered, Messick had been in the condominium with Mark Vanderlin, allegedly to sell him a computer. Vanderlin observed several items stacked in the master bathtub and Messick told him it was some furniture that needed to be moved. Messick retrieved a storage tub and proceeded to place some items from the bathroom in it while Vanderlin stood in the hallway. Messick and Vanderlin loaded the tub into Messick's car and drove to Jay Lilly's house.

Messick placed the tub in Lilly's garage. Daniel Massey, who was visiting at Jay Lilly's house, looked inside it and discovered a framing hammer, a carving knife, individual bags containing pants, shirts, socks and tennis shoes, a wine bottle, an empty bleach bottle and bloody towels and washcloths. Messick saw Massey looking in the tub and became angry.

Sometime later, Messick and Massey left Lilly's to go to the condominium to discuss with Miller the possibility of them cleaning the carpets. Massey discovered a police business card that had been placed in the door jam in relation to Suazo's disappearance and he took the card. Massey testified that he stopped in the doorway of the condo, waiting to meet Miller. Massey stated that the condo was immaculate and the floors did not need cleaning. Messick ventured into the condo, calling for his mother. Massey never heard a response. Massey claims that he freaked out and he and Messick left the condo. They returned to Lilly's house.

When Massey and Messick arrived at Lilly's house, Massey was extremely agitated. Massey said something about Messick killing his mother. Massey convinced everyone at the house to look in the tub. Vanderlin and Tonya Dodge testified to observing items similar to what Massey had seen in the tub. Messick said that the red substance was cranberry juice. Messick stated that if anyone deserved to be killed, it is child molesters and snitches. Dodge queried if he meant that he had hurt a child molester or a snitch. Messick responded that he had not. Massey testified that Messick came at him and Massey picked up a golf club and hit Messick across the chest. The force of the blow shattered the golf club. Messick appeared unfazed by the hit.

Massey went to a neighbor's house and called the number on the business card he had found at Miller's condominium. The officer asked to speak to Messick, who was on the street loading the tub back into his car. Messick came to the phone. After the call, Messick drove away with the tub in his car.

After discovering Miller's body, the police initiated an investigation. Messick was arrested shortly thereafter and the police impounded his vehicle. There were no floor mats in the vehicle. In the trunk there was a large storage tub, which contained a duffle bag and a pair of jeans. In the bottom of the tub there were traces of Miller's blood. The police also discovered a thin line of blood on the rear hatch latch deck that belonged to Suazo.

Messick was separately charged with the murders of Miller and Suazo. On October 30, 2002, the State moved to consolidate the cases, arguing that they were inextricably intertwined, and the story of one could not be told without reference to the other. Messick opposed the motion.

The district court granted the motion to consolidate, stating that because the cases were so closely related in time, the complete story required consolidation.

On March 19, 2003, Messick made a Brady request for evidence regarding one of the State's witnesses, Phillip Done. Done, an inmate at the Clark County Detention Center (CCDC), informed the police of comments Messick supposedly made while incarcerated. In the motion, Messick claimed that he had learned from a probation officer that Done had provided informant information in an unrelated matter. Messick sought discovery regarding Done's prior informant activities.

The State countered that the information Messick sought was outside the scope of a Brady request. The State claimed that Done might have provided confidential information in 1997, but there was no proof that he actually testified at a trial. Furthermore, the State claimed that it did not have any records pertaining to Done and that it did not have any information regarding Done being an informant in another case. At the hearing on the discovery motion, Messick orally requested an NCIC (National Crime Information Center) report on Done. The district court refused to order the State to produce NCIC information and determined that the State did not have any relevant information.

Messick made another discovery request regarding Done, seeking copies of Done's inmate records from the CCDC. In response, the State agreed to allow Messick to examine all of Done's relevant jail records, as long as the scope of the discovery was limited. The district court ordered the parties to get together and attempt to resolve the issues.

A seven-day jury trial commenced on April 22, 2003, and the jury returned guilty verdicts.

DISCUSSION

On appeal, Messick argues that the district court abused its discretion by consolidating the two cases. NRS 173.115(2) permits the district court to join two or more charges if the offenses are “[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan.” Joinder decisions are within the sound discretion of the district court and will not be reversed on appeal absent an abuse of discretion.¹

“If . . . evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together.”² “Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.”³ However, NRS 48.045(2) permits admission of evidence of other crimes or wrongs in order to show “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

¹Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990); Lovell v. State, 92 Nev. 128, 132, 546 P.2d 1301, 1303 (1976).

²Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989); see also Middleton v. State, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998); Tillema v. State, 112 Nev. 266, 268, 914 P.2d 605, 606 (1996).

³NRS 48.045(2).

other act is not substantially outweighed by the danger of unfair prejudice.⁴

Evidence of other bad acts may also be admissible to provide necessary context under the complete story doctrine.⁵ The complete story doctrine is codified in NRS 48.035(3):

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 . . . 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.

However, even if joinder is permissible under NRS 173.115, it may still be inappropriate if joinder unfairly prejudiced the defendant.⁶ “To establish that joinder was prejudicial ‘requires more than a mere

⁴Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1131 (2001); Middleton, 114 Nev. at 1108, 968 P.2d at 309; Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

⁵See NRS 48.035(3); Flores v. State, 116 Nev. 659, 662, 5 P.3d 1066, 1068 (2000); Bletcher v. State, 111 Nev. 1477, 1479-80, 907 P.2d 978, 980 (1995).

⁶See NRS 174.165(1), which provides in pertinent part:

If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

See also Middleton, 114 Nev. at 1107, 968 P.2d at 309.

showing that severance might have made acquittal more likely.”⁷ Reversal for misjoinder is required “only if the error has a substantial and injurious effect on the jury’s verdict.”⁸

We conclude that joinder was appropriate because of: (1) the common relationship between Messick and the two victims; (2) the short time frame between Suazo’s disappearance and Miller’s murder; (3) the similar clean-up of Miller’s condominium, Suazo’s van and Messick’s car; and (4) the trace of Suazo’s blood that was discovered in Messick’s vehicle during the investigation into Miller’s murder. Pursuant to NRS 48.045 and NRS 48.035, we conclude that the district court did not abuse its discretion by joining the charges for Suazo and Miller’s murders after finding that the above evidence was cross-admissible.

Next, Messick contends that the State failed to comply with his reasonable Brady request for information on Done from NCIC. Whether the State adequately disclosed information under Brady involves both factual and legal questions and requires a de novo review.⁹ “Brady and its progeny require a prosecutor to disclose evidence favorable to the defense if the evidence is material either to guilt or to punishment.”¹⁰ Failure to disclose the evidence violates due process regardless of the

⁷Floyd v. State, 118 Nev. 156, 164, 42 P.3d 249, 255 (2002) (quoting United States v. Wilson, 715 F.2d 1164, 1171 (7th Cir. 1983)).

⁸Middleton, 114 Nev. at 1108, 968 P.2d at 309 (citing Mitchell, 105 Nev. at 739, 782 P.2d at 1343).

⁹Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

¹⁰Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000).

prosecutor's motive.¹¹ In Nevada, when the defense makes a specific request, evidence is material if there is a reasonable possibility it would have affected the outcome of the trial.¹²

We conclude that the district court did not err by refusing to order the State to produce an NCIC report on Done. Messick's oral request for the report failed to demonstrate that an NCIC report would contain the information sought, that the information would be favorable, or that it would be material to Messick's guilt or punishment. Further, Messick successfully impeached Done. Therefore, Messick failed to show that an NCIC report would have contained information that had a reasonable probability of affecting the outcome of the trial.

Messick also alleges that the district court abused its discretion by refusing to instruct the jury on his accessory after the fact theory. "A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it."¹³ The district court's rejection of a proffered jury instruction is reviewed for an abuse of discretion or judicial error.¹⁴ Messick failed to present any evidence to support his contention that he did not know about Miller's murder until after it occurred and that he was simply an accessory after the fact. Therefore, we conclude that the district court did not abuse its discretion

¹¹Id.

¹²Id.

¹³Roberts v. State, 102 Nev. 170, 172-73, 717 P.2d 1115, 1116 (1986).


¹⁴Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

by refusing to offer Messick's accessory after the fact jury instruction.¹⁵
Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Kathy A. Hardcastle, District Judge
Special Public Defender David M. Schieck
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁵Having reviewed Messick's argument regarding the reasonable doubt jury instructions, we conclude that it is without merit.