

## CRIMINAL LAW-EVIDENCE

### Summary

Appeal from a conviction, by jury, of two counts of preventing or dissuading a person from testifying or producing evidence, one count of first-degree kidnapping, two counts of battery with intent to commit a crime, six counts of sexual assault of a minor under 14, two counts of coercion, and two counts of lewdness with a child under 14. The primary issue on appeal was the admissibility of evidence gathered while the Appellant was committed to a mental institution for the purpose of evaluating competency to stand trial.

### Disposition/Outcome

All but five of the convictions were upheld. The Court remanded for dismissal of one count of battery with intent to commit sexual assault and two counts of lewdness with a minor. The Court also remanded for further proceedings on the two counts of dissuading a witness, for the judgment of conviction to reflect that the Appellant was convicted by a jury rather than a guilty plea and to correct, if necessary, the number of days credited for time served.

### Factual and Procedural History

The Appellant, Donald Estes, was accused of sexually assaulting a minor victim, B.C., in a desert area outside of Las Vegas. Estes was charged with six counts of sexual assault of a minor under the age of 14 years, two counts of lewdness with a child under the age of 14 years, two counts of battery with intent to commit a crime, two counts of coercion, two counts of preventing or dissuading a person from testifying or producing evidence, and one count of first-degree kidnapping. Because preliminary findings showed that Estes was not competent to stand trial, the district court committed him twice to the Lake's Crossing Center for Mentally Disordered Offenders. Eventually, relying on evaluations provided by Lake's Crossing staff, the district court found Estes competent to stand trial.

Estes plead not guilty by reason of insanity and testified as the only defense witness. Estes testified to his mental health problems beginning as a young adult and claimed that lithium prescribed for bipolar disorder caused him to victimize B.C. He admitted many of the alleged conduct, "stating that 'if B.C. said he did it,' he probably did."<sup>2</sup>

The State presented three Lake's Crossing staff people as rebuttal witnesses who had either observed or treated Estes. Dr. Neighbors testified that psychological testing of Estes revealed occasional feigned mental illness. Further, she testified that no member of the treatment team had observed Estes "in a psychotic state or viewed him as incompetent during his second commitment."<sup>3</sup> Dr. Henson testified that Estes attempted to introduce a history of mental illness deliberately "to avoid more severe prosecution, that Estes did not suffer from lithium poisoning,

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<sup>1</sup> By Michael Hammer

<sup>2</sup> *Estes v. State*, 122 Nev. Adv. Op. No. 96, \*2 (Nov. 30, 2006).

<sup>3</sup> *Id.*

and that Estes desired to be medicated to support his claim that he had a disabling mental condition.”<sup>4</sup> Both doctors also testified that Estes knew right from wrong and did not suffer any mental condition that would impair his judgment. Indeed, the doctors testified that Estes’ behavior “seemed deliberate and thoughtful.”<sup>5</sup>

The third member of the Lake Crossing staff who testified was social worker Ms. Coronella. She testified that the defendant had revealed an interest to her in preparing an insanity defense. While Estes had testified that his mental illness caused him to divorce his wife, Ms. Coronella testified that Estes had told her that he divorced his wife because she had an extramarital affair.

A jury convicted Estes on all counts and Estes was sentenced to a total of 40 years imprisonment with 898 days’ credit for time served.

Estes argued on appeal several trial errors that cumulatively, he asserted, warranted a reversal of all the convictions. The most significant was the State’s use of the Lake’s Crossing staff as witnesses. Additionally, he asserted the following errors: (1) the State’s portrayal of him as a liar during closing argument based upon the Lake’s Crossing staff testimony; (2) denial of his proffered involuntary intoxication instructions; (3) use of the wrong jury instruction concerning his insanity defense; (4) admission of hearsay evidence; (5) admission of a photograph of B.C.; (6) admission of video testimony given by the victim’s deceased father; (7) admission of an audiotape and transcript of Estes’ voluntary statement to police; (8) the court’s failure to merge a count of battery with intent to commit a crime with one of the sexual assault counts; and (9) the state failed to provide substantial evidence supporting the charges of dissuading a witness, battery with intent to commit a crime and lewdness with a minor.

## **Discussion**

### **Use of Testimony from the Lake’s Crossing Staff**

First, the Court clarified that, generally, statements made by a defendant to personnel during a court-ordered psychiatric evaluation are not admissible against the defendant.<sup>6</sup> The Court reasoned that if a defendant knew such statements might be used against him, he would cease to be candid and thus defeat the purpose of such evaluations. However, the Court distinguished cases wherein defendants put their sanity in controversy by presenting an insanity defense.<sup>7</sup> The Court concluded that “when the defendant places his sanity or mental capacity at issue, a defendant’s right to protection under the Fifth and Fourteenth Amendments from the disclosure of confidential communications made during a court-ordered psychiatric evaluation relates only to the incriminating communications themselves.”<sup>8</sup> Hence, when a defendant seeks to introduce such an evaluation or portions of it in support of an insanity defense, the prosecution may also rely on the evaluation for rebuttal purposes.

Accordingly, the Court held that there was no error in the admission of testimony by Ms. Coronella. The Court reasoned that the conversation about preparing an insanity defense was

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *See, e.g.,* Esquivel v. State, 96 Nev. 777, 617 P.2d 587 (1980); McKenna v. State, 98 Nev. 38, 639 P.2d 557 (1982); Brown v. State, 113 Nev. 275, 934 P.2d 235 (1997).

<sup>7</sup> *See, e.g.,* Buchanan v. Kentucky., 483 U.S. 402 (1987).

<sup>8</sup> *Estes*, 122 Nev. Adv. Op. at \*4.

properly admitted for rebutting Estes' claims of mental illness. Furthermore, nothing Estes said to Ms. Coronella was incriminating; "a statement is not 'incriminatory' merely because it tends to show that the defendant is sane."<sup>9</sup> Additionally, the statement concerning the cause of Estes' divorce was admissible to impeach Estes' testimony at trial. Because none of this information was incriminating, but only related to the validity of Estes' insanity defense, it was admissible.

Moreover, the Court held that the district court did not err by admitting Dr. Neighbor or Dr. Henson's testimony. The Court again distinguished the Estes' case because Estes had made his sanity an issue in the case. Further, the testimony by both doctors was "within their stated areas of expertise and did not reveal their confidential communications other than by inference."<sup>10</sup> Estes also challenged both doctors' testimony that he knew right from wrong. The Court had previously clarified that the ability to distinguish right from wrong "is directly linked to the nature of the defendant's delusional state."<sup>11</sup> Although the doctors did not recite the full legal standard for insanity, the district court did instruct the jurors that the court would be informing them concerning the proper legal standard. Therefore, the Court concluded, any error in this regard was harmless beyond a reasonable doubt.

Dr. Neighbors' testifying that Estes' behavior struck her as deliberate and thoughtful violated the rule prohibiting psychiatric testimony that a defendant had the mental state constituting an element of the crime charged.<sup>12</sup> However, the Court concluded that the error did not warrant reversal and cautioned the prosecution from introducing such testimony in the future. Additionally, the Court found no error in the State's closing arguments despite Estes' contention that the prosecution inappropriately portrayed him as a liar.

### Jury Instruction on Insanity and Involuntary Intoxication

While defendants are entitled to a jury instruction on their theories, "no matter how weak or incredible they may be," there must be at least some competent evidence in the record to support the theory.<sup>13</sup> The Court held that Estes offered no evidence, other than his "irrelevant lay opinion," that he had been intoxicated by lithium toxicity. In fact, the only competent evidence in the record suggested this was not the case. The Court held there was no error in refusing the defendant's request for an involuntary intoxication instruction and, even had the district court erred, such an error would have been harmless. Estes also argued that the insanity instruction was insufficient because it did not specify that the jury was to consider his mental state during the commission of the offense, not before or after. The Court disagreed, holding that the text of the instruction left the "clear inference that the delusional state must exist at the time of the offense charged."<sup>14</sup>

### Cumulative Error

Estes argued that, aside from the asserted errors above, the introduction of a videotape of the victim's deceased father and the duplicative admission of audio taped and transcribed

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*4-5.

<sup>11</sup> *Finger v. State*, 117 Nev. 548, 576, 27 P.3d 66, 85 (2001).

<sup>12</sup> *See, e.g., Winiarz v. State*, 104 Nev. 43, 51, 752 P.2d 761, 766 (1988).

<sup>13</sup> *Estes*, 122 Nev. Adv. Op. at \*6.

<sup>14</sup> *Id.*

versions of Estes' statement to police were prejudicial. Additionally, Estes challenged the showing of a photograph of the victim taken at the preliminary hearing on relevance grounds. Lastly, Estes challenged on hearsay grounds the admission of the victim's medical records, police testimony as to the victim's statements and Dr. Neighbors' testimony about the opinions of other staff members. Cumulatively, Estes claimed, these evidentiary errors merited reversal of all convictions.

The Court rejected the claim that the medical records were inadmissible hearsay because the victim testified at trial. Further, the Court rejected that testimony by the police officers was inadmissible because Estes' counsel had the opportunity to cross-examine the victim about these statements. With respect to Dr. Neighbors' testimony as to the opinions of other staff members, the Court agreed with Estes that admission of the testimony was likely erroneous. However, the Court noted that NRS 50.285 allows expert witnesses to base opinions on information otherwise inadmissible so long as the information is of the type reasonably relied upon by experts in the field. Dr. Neighbors' reliance on the opinions of colleagues was, therefore, "marginally appropriate."<sup>15</sup>

Although the admitted photograph of the victim had "marginal probative value," the Court concluded that its introduction was harmless beyond a reasonable doubt "given the overwhelming evidence presented by the State. . . ."<sup>16</sup> Concerning the videotaped testimony of the father, the Court concluded that the potential prejudice was outweighed by the probative value of the testimony. The tape demonstrated the scope of the father's consent regarding Estes' transportation of the victim.

Lastly, the Court rejected that the duplicative introduction of both an audiotape and written transcript of Estes' statement to police warranted reversal. The Court concluded that cumulatively the alleged evidentiary errors were minor and that "the overwhelming evidence inculcated Estes in the crimes alleged."<sup>17</sup>

## Errors Claimed with Respect to Individual Charges

### Merger

Estes argued that count three of his conviction, battery with intent to commit a crime, merged with the sexual assault count. Estes claimed the battery went to the "lack of consent" element of the sexual assault charge and that the State was constitutionally prohibited from charging him twice for the same crime. The Court rejected this argument, reasoning that battery requires physical force or violence while sexual assault requires neither. Moreover, the charges referred to distinct acts.

### Substantial Evidence

Estes also argued that the State failed to prove five of the counts beyond a reasonable doubt. The Court proceeded to review the evidence in the light most favorable to the prosecution.<sup>18</sup> Concerning the two counts of dissuading a witness, the State premised one count

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<sup>15</sup> *Id.* at \*7.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at \*8.

<sup>18</sup> *Braunstein v. State*, 118 Nev. 68, 79-80, 40 P.3d 413, 421 (2002).

on Estes' threat to kill the victim's parents should she report the incidents. The second count was premised on Estes' offer of money to the victim not to report him. Estes claimed that because B.C. was not under subpoena or yet a potential witness at the time of the alleged threats, the State did not meet its burden. Moreover, Estes argued that the jury instruction was erroneously based on NRS 199.305 because the statute was not relied on in the original charging document. Estes urged that the proper instruction fell under NRS 199.230. The Court agreed that the State wrongly offered a jury instruction based on a statute other than the one used in the charging document.

Additionally, the Court reversed Estes' conviction for battery with intent to commit sexual assault, for allegedly grabbing the victim's throat, because the victim did not testify as to this particular act. Finally, the Court reversed the two counts alleging lewdness with a minor. The Court observed that the victim never testified that Estes touched the areas in question. Therefore, the Court agreed that the evidence failed to establish those two charges.

## **Conclusion**

The Court summarized that “[w]hen the prosecution seeks to use a court-ordered psychiatric evaluation to rebut an insanity defense, the prosecution may not utilize the portions of the evaluation containing the defendant’s statements that directly relate to culpability for the crimes charged. . . .”<sup>19</sup> The prosecution may, however, “use other portions of the evaluation to rebut an insanity defense.”<sup>20</sup> Therefore, Estes’ rights were not violated in this case.

The Court found error regarding the admission of a portion of Dr. Neighbors’ testimony but concluded “that the overwhelming evidence against Estes militates against reversal.”<sup>21</sup> The Court remanded for dismissal the count for battery with intent to commit sexual assault and the two counts for lewdness with a minor because of the State’s failure to meet its burden on those charges. Additionally, the Court remanded the case for further proceedings concerning the two counts for dissuading a witness. Lastly, the Court remanded to have the judgment of conviction changed to reflect that Estes was convicted by a jury rather than a guilty plea and to assess whether the number of days’ credit for time served was accurate.

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<sup>19</sup> *Estes*, 122 Nev. Adv. Op. at \*9-10.

<sup>20</sup> *Id.* at \*10

<sup>21</sup> *Id.*