

***Bellon v. State*, 121 Nev. Adv. Op. 45, 117 P.3d 176 (August 11, 2005) (per curiam)<sup>1</sup>**

**CRIMINAL LAW – EVIDENCE**

**Summary**

The trial judge, during a murder trial, allowed testimony of a closely-related crime committed by the defendant. The judge admitted the testimony based on NRS 48.035(3), the *res gestae* statute, since the crime was closely related. On appeal, the State argued that the testimony was admissible under NRS 48.045(2) to show a consciousness of guilt.

**Disposition/Outcome**

The Nevada Supreme Court held that once the State has argued at trial that testimony is admissible under the *res gestae* statute, the law does not permit the State to argue the testimony is admissible to show a consciousness of guilt, thereby circumventing a *Petrocelli* hearing.

**Factual and Procedural History**

Robert Linzy Bellon appeals from a murder conviction for which he received a life sentence without the possibility of parole. Bellon contends that the district court erred by allowing testimony of threats he made against police officers after his arrest.

On October 8, 1995, Frank Dunlap was shot in the back and neck while driving three acquaintances to a club, Bellon, Elliot, and Benzo. Bellon was sitting behind the driver's seat at the time of the shooting. Elliot, who was in the backseat behind the passenger, testified that he heard a two loud pops. After hearing the gunshots, Benzo and Elliot exited the car and ran away. Bellon suggested to Elliot that they take the car. Benzo testified that he heard the shots as well, but did not see the shooting.

Bellon was arrested in Lake Charles, Louisiana on November 20, 1998, on unrelated charges. When asked whether officers would find anything related to the Nevada investigation from a search of his residences in Louisiana, Bellon responded, “[l]ike the murder weapon or something like that?”<sup>2</sup> Other events related to the Las Vegas homicide of Dunlap also occurred in Louisiana including the arrest of Bellon's girlfriend, Carleen Holland, for accessory after the fact to the murder and recovery of Dunlap's gun from a hotel in Louisiana.

After Holland was arrested, Bellon made threatening statements to the Louisiana police officers to the effect that he would return from prison in Las Vegas and kill the officer's children. These statements were allowed into testimony by the district court under the Nevada *res gestae* statute.<sup>3</sup> It is from the admission of these statements that the Appellant seeks relief. On appeal,

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<sup>2</sup> *Bellon v. State*, 121 Nev. Adv. Op. 45, 5 (August 11, 2005).

<sup>3</sup> NEV. REV. ST. § 48.035(3) (2004) reads:

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.

the State dropped its *res gestae* argument, instead relying on NRS 48.045(2)<sup>4</sup> for admission of the testimony, arguing that the threats showed a consciousness of the Appellant's guilt.

### **Discussion**

The court held that the State could not change its argument on introduction of *res gestae* testimony, thereby avoiding a *Petrocelli* hearing.<sup>5</sup> At trial, the State argued that the threats were admissible because they were so closely related to the offense that the crime with which the State charged Bellon could not be referred to without referring to the threats. On appeal, the State argued that the threats were admissible because they showed a consciousness of Bellon's guilt.

In holding that the State could not change its argument, the court rejected both of the State's substantive arguments for admission of the threats. The court concluded that the narrative of the murder could be told without referring to the threats, and reiterated that a witness could only refer to an "uncharged crime if it is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged crime or act."<sup>6</sup> The court further concluded that the threats failed to show a consciousness of Bellon's guilt for the murder, but instead showed his frustration over being arrested.

### **Conclusion**

The district court committed reversible error by admitting the testimony. The court further concluded the gravity of the error in allowing the testimony of threats was prejudicial in nature. For that reason, the court remanded the case to the district court for a new trial.

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<sup>4</sup> NEV. REV. ST. § 48.045(2) reads:

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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

<sup>5</sup> See *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985). In order to admit evidence of a collateral or prior bad act, the prosecution must show that the offense is relevant and must prove by clear and convincing evidence that the Defendant *de facto* committed the offense.

<sup>6</sup> *Bellon*, 121 Nev. Adv. Op. at 11. See *Bletcher v. State*, 111 Nev. 1477, 907 P.2d 978 (1995).