

Buchanan v. State, 69 P.3d 694 (Nev. 2003).¹

Criminal Law – Appeal – Evidence – Jury Instructions

Summary

Appeal from a judgment by the Second Judicial District Court of Washoe County, convicting Denise Dianna Buchanan of two counts of first-degree murder.

Disposition

Affirmed. The Court upheld Buchanan’s conviction of two counts of first-degree murder in the deaths of her sons John and Jacob, and the acquittal of her murder conviction regarding the death of her son Jeremiah. The Court rejected Buchanan’s arguments that (1) there was insufficient evidence to support her conviction; (2) she suffered prejudice by the state’s failure to preserve evidence; (3) the jury instructions regarding premeditation, deliberation, and reasonable doubt constituted reversible error; (4) the district court erred by allowing the State to present rebuttal evidence; and (5) the district court erred by failing to instruct the jury on an advisory verdict of acquittal.

Factual and Procedural History

Between 1987 and 1993, Denise Buchanan gave birth to five sons; Joseph, Joshua, Jeremiah, John and Jacob. Except for her first son Joseph, all sons were fathered by Francisco Leal, who lived with Buchanan. Leal testified that while Buchanan was very fond of her first son, Joseph, she was disappointed with her second son, Joshua, because she wanted a girl. According to Leal, she clearly favored Joseph over Joshua.

Buchanan’s third son Jeremiah died after four months of age. Dr Terrance Young, the pathologist who performed the autopsy, attributed the cause of Jeremiah’s death to Sudden Infant Death Syndrome (SIDS) because he could not determine another reasonable cause of death.

Buchanan’s fourth son, John, died when he was only three months old. John was brought home with an apnea monitor because Jeremiah’s death had been ruled as a SIDS death. Buchanan called Leal to tell him that the monitor had gone off, after which Leal performed CPR on John. According to the police officer who reported to the call, Buchanan was very calm, while Leal appeared distraught. A paramedic further testified that Buchanan had told him that John was a “victim of SIDS” whereas mothers usually tell him that their child “stopped breathing.” Forensic pathologist Dr. Ellen Clark noticed capillary bursts beneath the tissue surface of the lungs, which could be a sign of asphyxial injury or suffocation, but also could indicate a SIDS case. She listed the cause of John’s death as undetermined.

Buchanan’s fifth son, Jacob, a healthy baby, was born in 1993. Jacob, too, was placed on an apnea monitor. Leal testified that Buchanan had been disappointed again because she wanted a girl. Jacob died just before his first birthday. According to Leal,

¹ By Akke Levin

this was significant because the doctor told Buchanan that Jacob would be no longer at risk for SIDS after his first year.

Buchanan described the circumstances surrounding Jacob's death in several ways. She told Leal that she had turned off the monitor, became distracted by the dog's barking outside, and returned to find that the baby stopped breathing. She told the police officer, however, that she had turned off the monitor in the morning, did some housework, laid down to rest, and forgot to turn the monitor back on. The representative of the apnea monitor testified that the monitor had been shut off at 4:00 in the morning, and not at 7:00 as Buchanan contended.

Pathologist Dr. Samuel Parks ruled out metabolic illnesses, and concluded that the cause of Jacob's death was undetermined. The Washoe County Coroner, Dr. McCarty, listed the cause of Jeremiah's death as SIDS; the cause of death of John and Jacob as undetermined, but listed Jacob's manner of death as homicide. Dr. McCarty did so based on statistical evidence showing that the incidence of SIDS is only 1 in 1,000 births, and that it is almost impossible to have a second SIDS case in the same family.

Numerous medical experts were called upon to give their opinion regarding the deaths of Buchanan's three sons. Dr. Clark, like Dr. McCarty, stated that statistically, it was practically impossible to have a second or third SIDS case in one family, and concluded that the deaths were a result of homicide based on physical findings and surrounding circumstances. Dr. Roe concluded that another person had caused the deaths, most likely by asphyxiation. Dr. Ophoven testified that many early cases of SIDS were misdiagnosed due to insufficient exams and death investigations, in part because it was then considered incomprehensible that mothers would kill their babies. He believed that all three children were killed, based *inter alia* on (1) evidence of physical and emotional neglect, (2) Buchanan's inconsistent stories regarding the circumstances of the children's deaths, and (3) the fact that apnea was never observed by anyone besides Buchanan. Dr. Colletti believed that Jacob died of SIDS, and that John died due to a kidney infection.

The defense called Dr. Cyril Wecht, who generally concluded that the investigation as to all three deaths had not been extensive enough. The other four defense experts were of the opinion that genetic or metabolic diseases attributed the deaths of the three children. The State's rebuttal witness, Dr. DiMaio, however, saw no evidence of any metabolic diseases nor did he see the need to conduct genetic testing.

Besides the medical experts, numerous other witnesses testified as to their experience with the family, relating Buchanan's inconsistent stories, her lack of emotion regarding the deaths of all three sons, and her neglect and physical abuse of Joshua.

Appellant Denise Dianna Buchanan, charged with three counts of first-degree murder in the deaths of her three infant sons, was tried in the Second Judicial District Court of Washoe County. After a four-week trial, the jury found Buchanan guilty of two counts of first-degree murder in the deaths of her sons John and Jacob, while acquitting her of murder regarding the death of her son Jeremiah. Buchanan was sentenced to two consecutive terms of life in prison with the possibility of parole.

Buchanan appealed her judgment, claiming (1) there was insufficient evidence to support her conviction; (2) she suffered prejudice by the state's failure to preserve evidence; (3) the jury instructions regarding premeditation, deliberation, and reasonable doubt constituted reversible error; (4) the district court erred by allowing the State to

present rebuttal evidence; and (5) the district court erred by failing to instruct the jury on an advisory verdict of acquittal.

Discussion

I. Claim that conviction was based on insufficient evidence

In all murder cases, the State is required to prove the corpus delicti. Specifically, the state must prove (1) the fact of death, and (2) the criminal agency of another as the cause of death. As to the second element, the reviewing court must determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have concluded beyond a reasonable doubt that [the decedent’s] death was caused by a criminal agency.”²

The jury determines how much “weight and credibility” to give the various testimonies.³ Moreover, the jury may convict a defendant based on circumstantial evidence alone.⁴ Circumstantial evidence is sufficient if all the circumstances taken together point to guilt precluding “to a moral certainty” any other theory.⁵

In Buchanan’s case, numerous experts testified, resulting in a wide variety of conflicting opinions. Regardless of the array of opinions, it is up to the jury to determine the credibility of each expert and to decide which expert to believe. The jury could properly have found Buchanan guilty of killing her children based on the expert testimony alone. Further evidence consisted of testimony relating that Buchanan had been unemotional about the deaths of her children, had abused her children, and had told inconsistent stories of the events that led to their deaths. Contrary to Buchanan’s contention, the evidence was not solely based on statistical probabilities alone, and was sufficient for a jury to find her guilty of murdering her children.

II. Claim regarding the lost or destroyed evidence

Buchanan’s claim that the state’s failure to preserve or gather various tissues of the three children deprived her of a fair trial also fails.

The State’s loss of evidence constitutes a due process violation if the defendant can show either that (1) the State acted in bad faith, or (2) “that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed.”⁶ When arguing prejudice, it is not enough to show that the evidence may be helpful in preparing a defense, or that there is a mere hope of a positive conclusion for the defense. Moreover, the evidence sought must be material to the defense.⁷

There is no evidence of bad faith on the part of the State, because the murder investigation did not start until the third child died. Law enforcement would not have

² Frutiger v. State, 111 Nev. 1385, 1389, 907 P.2d 158, 160 (1995).

³ Frutiger, 111 Nev. at 1391, 907 P.2d at 161.

⁴ Hutchins v. State, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994).

⁵ Walker v. State, 113 Nev. 853, 861, 944 P.2d 762, 768 (1997).

⁶ Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001).

⁷ See *id.*

known that tissues of the first two children could have any exculpatory value. Moreover, because the children were small, most tissues were consumed during testing.

There is no evidence of undue prejudice either. The defendant has the burden of proving prejudice.⁸ Buchanan's mere hope that an examination of the evidence would prove a metabolic or hereditary kidney disease, however, is not enough because she has not shown that the lost evidence would have been exculpatory. Moreover, if Buchanan truly expected that exculpatory evidence would have been produced, the defense could have conducted hereditary tests on the surviving family members. Finally, Buchanan's argument that she suffered prejudice for the state's failure to collect bedding and pajamas fails, as she did not show how this evidence would be material to her defense.

III. Claim as to the erroneous jury instructions

The fact that in *Byford v. State*,⁹ the Nevada Supreme Court disapproved of the *Kazalyn* jury instruction regarding premeditation and deliberation does not mean that all prior convictions using this instruction must be overturned. If the *Kazalyn* instruction was given, the court reviews the evidence to determine if sufficient evidence was presented to establish premeditation and deliberation. Here, the evidence showing how long it takes to suffocate a child establishes deliberation, whereas premeditation is inferred by the fact that two children were killed years apart.

Finally, Nevada's reasonable doubt instruction codified in NEVADA REVISED STATUTE 175.211 is constitutional.¹⁰ Therefore, Buchanan's claim challenging this instruction fails.

IV. Other claims

Buchanan's claims that the district court should have refused to allow the State's rebuttal testimony, and should have instructed the jury on an advisory verdict of acquittal fail. The court has discretion regarding admitting or refusing rebuttal evidence and may equally choose not to issue an advisory verdict.

Concurring opinion by Justice Rose¹¹

While agreeing with the majority's analysis and conclusion, Justice Rose had concerns about the admission of statistical evidence to show the probability of an event occurring, and opined that a defendant ought to be convicted by the evidence, in addition to numbers and probabilities. However, because there was substantial evidence besides statistics to establish that the two children died from asphyxiation, Justice Rose concurred in the majority's opinion.

Conclusion

⁸ Sheriff v. Warner, 112 Nev. 1234, 1240, 926 P.2d 775, 778 (1996).

⁹ 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

¹⁰ See Noonan v. State, 115 Nev. 184, 189, 980 P.2d 637, 640 (1999).

¹¹ with whom Justice Leavitt agrees.

This opinion reaffirms that circumstantial evidence may suffice to convict a defendant. The opinion further emphasizes that an abundance of conflicting expert testimony does not mean that there is insufficient evidence to convict a defendant. Rather, it is for the jury to weigh the evidence and to determine which witnesses to believe.

It is possible that the Nevada Supreme Court, following Justice Rose's admonition, would in the future overturn a conviction if the conviction was based on statistical evidence alone. While the Court did not specifically allude to such possibility, it specifically stated that the evidence on which Buchanan was convicted was not solely based on statistical probabilities. This would suggest that something more than statistical evidence is needed to convict a defendant for murder.