

Butler v. State, 120 Nev. Adv. Op. 93, 102 P.3d 71 (Dec. 2004)¹

CRIMINAL LAW—FIRST-DEGREE MURDER, WITNESSES, SENTENCING AND PUNISHMENT

Summary

Defendant appealed his conviction on two counts of first-degree murder with the use of a deadly weapon, for which he received a sentence of death.

Disposition/Outcome²

The Nevada Supreme Court held that (1) evidence of defendant's gang affiliation was admissible under Nevada's statute governing admission of evidence of other crimes, wrongs, or acts; (2) the state's cross-examination of defendant's witness regarding her prior conviction for attempted forgery was proper; (3) in a matter of first impression, the trial court's denial of defendant's request to allow both of his counsel to individually address the jury during penalty phase was erroneous; (4) an erroneous instruction regarding the limited use of "other matter" evidence, given during the penalty phase was not harmless; (5) the prosecutor's comments during his closing argument in the penalty phase, referring to the defense expert witness as "that high falootin' expert" and the witness's testimony as an "infomercial" were improper; (6) the prosecutor's comments during his closing argument in the penalty phase, twice remarking about how much money the defense experts were being paid for their testimony, were improper; and (7) the cumulative impact of errors committed during the penalty phase deprived the defendant of a fair hearing and required remand for a new penalty phase hearing.

The court affirmed defendant's conviction on two counts of first-degree murder, reversed defendant's sentence, and remanded for a new sentencing trial.

Factual and Procedural History

Facts

Defendant was a member of a white supremacist gang known as the Independent Nazi Skinheads (INS). The victims Linn Newborn, an African-American male, and Daniel Shersty, a Caucasian male, were members of a rival nonracist gang known as Skinheads Against Racial Prejudice (SHARP).

Newborn was at work as a body-piercer on the evening of July 3, 1998, and he and Shersty later told friends they were going to party that night with a couple of girls they met at Newborn's work when Newborn had pierced one of them. Newborn and Shersty were never heard from again.

The next morning, defendant picked up a friend and drove to a dirt road in the desert, telling the friend that "he needed help picking up some mistakes they left out there from the

¹ By Sally L. Galati

² Before the court en banc; Justice Douglas did not participate in this decision.

night before.” Defendant warned the friend that he might see one or two bodies. After arriving, the friend saw a blood-covered body on the ground.

Shortly afterward, the group was approached by a group of people riding ATVs in the desert, who had come across a body later identified as Shersty’s. One of the ATV riders used his cellular telephone to call the police. Defendant and his friend drove away.

On the drive home, defendant admitted killing the two victims the previous night, using his girlfriend to lure the men into the desert with the promise of drinking and partying. Defendant asked the friend to tell the police, if asked, that they were in the desert looking for a place to ignite fireworks.

The police responded to a call that morning, and found Shersty’s body. Two days after Newborn’s friends reported him missing, the police returned to the desert and found his body. The medical examiner concluded that the cause of both men’s deaths was homicide. Ten days later, police recovered a .32 caliber handgun from defendant that was determined to be the one used to kill Shersty, but the gun was not tied to Newborn’s murder.

After his arrest, defendant gave a statement to the police, claiming he and his friends had been in the desert looking for a location to light fireworks, that they had found the body and hailed the ATV riders to call the police. Defendant blamed coincidence for the fact that he happened to be in the same area of the desert as two bodies of rival gang members.

Defendant was placed in a detention center. Three inmates at that center who shared living quarters with defendant said that defendant made several inculpatory statements to them about the murders.

Guilt Phase

The state produced witnesses and evidence to prove defendant’s guilt. Defendant produced several witnesses to testify about his whereabouts on the night of the murders, and these witnesses variously placed defendant at the home of his mother, at the home of his brother, at his girlfriend’s father’s house, and at a Stratosphere Hotel fireworks event that allegedly occurred that night.

The jury found defendant guilty of two counts of first-degree murder with use of a deadly weapon.

Penalty Phase

During the penalty hearing, the state presented victim impact witnesses. The state also presented an officer who testified that defendant had worked as a police informant in various cases, and that when arrested, defendant possessed a stolen jeep, had two outstanding warrants for felony possession of a stolen vehicle, that he had the key to the jeep and a small bag of methamphetamine, and that inside the jeep, officers found a letter sent from a prison to defendant asking defendant to “reach[] out and touch[]” one of the victims. Other state witnesses testified to defendant’s lengthy criminal history and prison record, and that defendant had been arrested or cited thirty-two times for various misdemeanor and felony offenses.

The defense presented a number of witnesses who testified to defendant’s traumatic childhood, beginning with defendant’s mother leaving his father before defendant was born, never seeing his biological father, moving between various states, living with alcoholic, abusive grandparents, suffering abuse from a convicted pedophile, becoming addicted to crack cocaine,

and spending time in a juvenile detention facility. Defendant became affiliated with the skinheads while he was in prison.

The only aggravator found for each murder was that each was committed by a person who had been convicted of more than one offense of murder. The jury found as mitigating circumstances that defendant had a lifelong dysfunctional family, lifelong habitual drug abuse, suffered sexual abuse and poverty, and lacked a father figure. For each count of murder, the jury found the aggravating circumstance outweighed the mitigating circumstances, and imposed a sentence of death.

Motion for a new trial

Defendant moved for a new trial based on the state failing to disclose certain evidence, and the trial court ordered a new penalty hearing. The parties cross-appealed, with the Nevada Supreme Court affirming the denial of the new trial motion as to the guilt phase, but reversing the order as to the penalty phase, concluding the evidence was not material.³

The district court entered its judgment of conviction and sentenced defendant to death on March 17, 2003. Defendant appealed.

Discussion

1. Admissibility of gang-affiliation evidence

Defendant contended the trial court erred in allowing the state to introduce evidence about his INS gang affiliation. The court disagreed, because NRS 48.045(2) provides “[e]vidence of other crimes, wrongs or acts ... may... be admissible for other purposes, such as proof of motive,” and the court has repeatedly held that gang-affiliation evidence may be relevant and probative when it is admitted to prove motive.⁴

Evidence of defendant’s gang affiliation was essential to show his motive for murdering the victims, members of a rival gang. The trial court properly held a pretrial *Petrocelli* hearing and determined the evidence was relevant, was proven by clear and convincing evidence, and was more probative of motive than it was prejudicial.⁵ The trial court also gave a cautionary instruction to the jury on the use of the evidence before it began deliberations.

The court concluded that the trial court did not abuse its discretion in admitting evidence of defendant’s INS gang affiliation.

2. Impeaching a witness with a prior gross misdemeanor conviction

Butler contended that the state engaged in deliberate misconduct by impeaching a defense witness on cross-examination with questions relating to her prior conviction for attempted forgery, a gross misdemeanor. The court disagreed, because the crime of forgery involves dishonesty, and NRS 50.085(3) provides “[s]pecific instances of the conduct of a witness, for the

³ State v. Butler, Docket No. 37591 (Order Affirming in Part, Reversing in Part and Remanding, May 14, 2002).

⁴ Lara v. State, 120 Nev. 177, 189, 87 P.3d 528, 530 (2004); Lay v. State, 110 Nev. 1189, 1195-96, 886 P.2d 448, 452-53 (1994).

⁵ Petrocelli v. State, 101 Nev. 46, 692 P.2d 508 (1985), *modified on other grounds* by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

purpose of attacking or supporting his credibility ... may, ... if relevant to truthfulness, be inquired into on cross-examination of the witness.” The court had held that the statute “permits impeaching a witness on cross-examination with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness.”⁶

Because attempted forgery is a crime involving dishonesty and conduct that goes to the witness’s truthfulness, and because the state did not introduce extrinsic evidence, the court concluded the state’s cross-examination was proper.

3. Notice requirements of NRS 174.233 regarding rebuttal alibi witnesses

Defendant contended that the state failed to comply with the notice requirements of NRS 174.233 and that the trial court abused its discretion by finding good cause for waiving the statute’s requirements. The court disagreed, because NRS 174.233, which requires the state to give the defense notice of any known rebuttal alibi witnesses “[n]ot less than 10 days after receipt of the defendant’s list of witnesses,” also provides that “the court may exclude evidence offered by the State in rebuttal to the defendant’s evidence of alibi ... For good cause shown the court may waive the requirements of this section.”

Although the trial court acknowledged that the state failed to comply with the notice requirements of NRS 174.233, the trial court found that the state had provided defendant with some verbal notice of its intent to call a rebuttal alibi witness, and that that witness’s testimony went to an important fact. The Nevada Supreme Court concluded that the trial court’s good cause finding was reasoned and well within its discretion as contemplated by the statute.

4. Interpretation of NRS 175.151

Defendant contended that the trial court erred in refusing to allow both of his counsel to individually address the jury during the penalty hearing, as permitted by NRS 175.151. The court agreed on this matter of first impression.

NRS 175.151 provides “[i]f the indictment or information be for an offense punishable with death, two counsel on each side may argue the case to the jury ... If it be for any other offense, the court may, in its discretion, restrict the argument to one counsel on each side.”

The Nevada Supreme Court determined that the statute contains two sentences, each addressing separate and distinct grants of authority, one that applies to capital defendants, and one that applies to noncapital defendants. The court interpreted the statute to contain no express grant of discretionary authority to the trial court to deny such a request in the first sentence when referring to capital defendants. The statute’s plain language reasonably extends to capital defendants the option of having both of their counsel address the jury, and allows that option to all other criminal defendants only at the discretion of the trial court.

The court concluded that the trial court erred in denying defendant’s request to allow both of his counsel to address the jury during the penalty hearing.

5. “Other matter” evidence jury instruction

Defendant contended the trial court erroneously instructed the jury regarding the limited use of “other matter” evidence admitted against him during the penalty hearing, and that the

⁶ Collman v. State, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000).

instruction was confusing and inadequate. Even though defendant did not object to the instruction at the time, the court agreed, because *Hollaway*⁷ directs district courts, in regard to “other matter” evidence in capital penalty hearings to “admonish the jury that the evidence is not to be used in determining the existence or the weight of aggravating circumstances.”

The court found the challenged jury instruction to be problematic, because it first gave the required admonition, but then contradicted it, making the instruction self-contradictory. A reasonable juror could be misled into considering “other matter” evidence in determining that defendant was death eligible, thus prejudicing defendant. The court agreed with defendant that the trial court’s jury instruction was erroneous.

6. Allegations of prosecutorial misconduct

Defendant contended that the state committed several instances of prosecutorial misconduct during the penalty hearing. The court agreed in each of the three instances claimed by defendant.

First, defendant contended the state improperly alluded to evidence not in the record in an attempt to mislead the jury. Defendant’s objection was to the state alluding to the victims’ alleged screams and begging before being shot. The court agreed that defendant was correct that there was no evidence about the sounds the victims may have made before being killed, and that it was improper for the state to include reference thereto. However, the court concluded that the inferences the state asked the jurors to draw were reasonable under the facts of the case and that any error in the remarks was harmless.

Second, defendant contended that the state improperly implied that defense counsel were deceptive and disparaged them with remarks in the state’s closing argument. Those remarks included references to the defense tactics as “distract[ing]” the jury, that the defense was trying to “fool” the jurors, that the defense argument was “very creative” and an “infomercial” selling the product “the defendant doesn’t merit death for his actions.” The court stated that disparaging remarks about the defense counsel “clearly constitute misconduct”⁸ and do not belong in a courtroom. Additionally, the court concluded it was improper for the state to disparage legitimate defense tactics.

Third, defendant contended the state committed misconduct by disparaging his witnesses in two separate instances. In the first, the state referred to the defense witness as a “high falootin’ expert getting paid over \$200 an hour” and analogized the witness’s testimony to a Ronco infomercial; in the second instance, the state called the witness a “pseudo expert[]” that “Clark County paid him \$125—or 120 plus dollars an hour” to give testimony when the warden’s testimony would have been sufficient except that “he wouldn’t have given that spin, ... what they wanted.”

The court concluded the state’s final remarks were abusive, and that it was improper for the state to twice remark about how much money the defense experts were being paid for their testimony.

7. Cumulative error

The court rejected defendant’s assignments of error regarding the guilt phase of his trial because overwhelming evidence supported his two convictions. However, relying on the fact

⁷ *Hollaway v. State*, 116 Nev. 732, 746, 6 P.3d 987, 997 (2000).

⁸ *McGuire v. State*, 100 Nev. 153, 158, 677 P.2d 1060, 1063-64 (1984).

that “[t]he cumulative effect of errors may violate a defendant’s constitutional right to a fair trial even though errors are harmless individually,”⁹ the court concluded that the cumulative impact of the errors deprived defendant of a fair hearing during the penalty phase.

Conclusion

Defendant was convicted by a jury of two counts of first-degree murder with the use of a deadly weapon and was thereafter sentenced by the jury to death. On appeal, the Nevada Supreme Court affirmed defendant’s convictions, but vacated his death sentences and remanded for a new penalty hearing.

Concurring Opinions

Justice Agosti, with whom Justice Maupin agreed:

These justices disagreed with that portion of the majority’s analysis that characterized as misconduct the state’s remarks in closing argument concerning defense expert testimony. Instead, these justices considered the term “high-falootin” to be hyperbole, but not misconduct. These justices also believed that the money charged by an expert is very proper impeachment material and not misconduct.

However, even without its determination of prosecutorial misconduct, these justices concurred with the majority’s conclusion that defendant was entitled to a new sentencing hearing.

Dissenting Opinion

Justice Gibbons concurred in part and dissented in part:

Justice Gibbons concurred that defendant’s guilt phase conviction should be affirmed, but disagreed with the majority’s conclusion that reversed the jury’s decision to sentence defendant to death.

Justice Gibbon’s dissent focused on three issues: (1) the district court did not abuse its discretion by denying defendant’s motion to have two defense attorneys argue at sentencing; (2) any error in the jury instructions was harmless; and (3) defendant failed to object to the prosecutor’s alleged misconduct.

Regarding the first issue, Justice Gibbons disagreed with the majority that NRS 175.151 bestows discretion on the capital defendant, stating that to do so “would be monumental indeed, for it would mark the only time that the Legislature extended authority to a litigant to control trial procedure.”¹⁰ Instead, he believed the district court’s interpretation granting discretion to the judge was consistent with the legislative history behind NRS 175.151. Given that interpretation, Justice Gibbons then said that he believed the district court did not abuse its discretion by denying defendant’s motion, and that defendant did not demonstrate any prejudice based upon the fact that only one of his attorneys presented his closing argument.

⁹ Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

¹⁰ Butler v. State, 120 Nev. Adv. Op. 93, 102 P.3d 71, 87 (2004) (Gibbons, J., dissenting).

On the second issue, Justice Gibbons disagreed with the majority's conclusion that reversal was proper because the jury instruction improperly or incompletely stated the standard for the jury's consideration of "other matter" evidence at sentencing. Justice Gibbons believed the jury instruction error, if any, was harmless. The jury instruction correctly stated Nevada law, and read as a whole, it correctly instructed the jury on the proper uses of other matter evidence.

Last, Justice Gibbons contended that, by failing to object at the appropriate time, defendant waived appellate review of any error that may have resulted from the alleged misconduct, and that policy reasons should prevent those issues from being heard on appeal.¹¹ The majority's conclusion will serve to discourage diligent trial practice, further inundate the overworked court system, and require the parties to relive the penalty hearing. Further, the legal system already provides for reversal of criminal sentences that result from attorney error.

¹¹ Ringle v. Bruton, 120 Nev. 82, 94, 86 P.3d 1032, 1040 (2004).