

## ***Daniel v. State*, 78 P.3d 890 (Nev. 2003).<sup>1</sup>**

### **CRIMINAL LAW – CRIMINAL PROCEDURE**

#### **Summary**

Appellant, Donald M. Mosely, shot and killed Frederick Washington and Mark Payne. At the same time, Terhain Woods and Antione Hall were also shot by Mosely, but both survived. On July 28, 1997, Moseley was convicted in district court of first-degree murder, attempted murder with use of a deadly weapon, and burglary while in possession of a firearm. During Mosely's trial, a number of errors occurred, which brought rise to this appeal. Because of these cumulative errors, the Nevada Supreme Court reversed appellant's conviction and remanded the case for a new trial. In analyzing the issues raised by appellant on appeal, the court broadened an earlier Nevada Supreme Court decision regarding the admissibility of victim character evidence, establishing precedent in Nevada pertaining to the cross-examination of a criminal defendant when the cross-examination is related to other witnesses' credibility.

#### **Issues & Dispositions**

In total, 11 issues of error were raised by Mosely on appeal. However, only two of the 11 issues changed or established law in Nevada. As such, only the two issues, with significant effect on Nevada law, are discussed in this commentary. The first issue considers whether instances whereby a defendant is allowed to corroborate his own testimony with additional evidence regarding the character of his victims. The second issue considers whether instances whereby prosecutors are allowed to ask defendants if other witnesses who offer testimony that conflicts the defendant's testimony have lied.

#### **Commentary I**

The district court in *Daniel* allowed appellant to testify concerning the victims' specific acts within appellant's knowledge, but did not allow extrinsic evidence such as testimony from others corroborating his testimony. Appellant believes that he should have been allowed to cross-examine the surviving victims and to solicit extrinsic evidence from witnesses who can testify to being robbed or assaulted by the victims.

#### **Issue I**

Is a defendant allowed to present extrinsic evidence to corroborate his own testimony regarding specific acts by victims if the defendant seeks to establish self-defense?

#### **Disposition I**

---

<sup>1</sup> By Clarke Walton

Yes, if the defendant seeks to establish self-defense, and the defendant was aware of specific acts by the victims, then the defendant is allowed to corroborate his testimony regarding such acts with additional evidence.

### **State of the Law Before *Daniel***

Prior to *Daniel*, the standard adopted in Nevada was that set forth in *Petty v. State*, which allowed victim character evidence to be admitted only in cases involving an abuse of discretion. NRS 48.045(1) states that character evidence is generally inadmissible to show that persons have acted in conformity with their character. However, NRS 48.045(1) provides three exceptions to the general rule. Germaine to this case is the exception established by NRS 48.045(1)(b) which permits “evidence of the character or a trait of character of the victim of the crime offered by an accused . . . and similar evidence offered by the prosecution to rebut such evidence . . . .” *Petty* interpreted NRS 45.056(1)(b) to mean that a defendant can present evidence of a victim’s character when it tends to prove that the victim was the likely aggressor, regardless of the defendant’s knowledge of the victim’s character.<sup>2</sup> In *Petty*, the court held that the district court abused its discretion when it excluded evidence of the victim’s prior conviction where the defendant claimed self-defense.<sup>3</sup>

In *Burgeon v. State*, the court held that evidence of specific acts showing that the victim was a violent person is admissible if a defendant seeks to establish self-defense *and was aware of those acts*.<sup>4</sup> The principal difference between *Petty* and *Burgeon* is whether the defendant must be aware of the acts for the evidence to be admissible. In *Petty*, a victim’s prior convictions were admitted as extrinsic evidence.<sup>5</sup> In *Burgeon*, such evidence was considered relevant to the defendant’s state of mind in order to determine whether the defendant’s belief in the need to use force in self-defense was reasonable.<sup>6</sup> Although both *Petty* and *Burgeon* allowed extrinsic evidence, neither case considered evidence in the form of corroborating testimony to support the defendant’s testimony.

### **Effect of *Daniel* on Current Law**

*Daniel* broadened *Petty*’s declaration by holding that extrinsic evidence of a victim’s conduct in the form of corroborating testimony is admissible. *Daniel* set forth the new rule that “when a defendant claims self-defense and knew of relevant specific acts by a victim, evidence of the acts can be presented through the defendant’s own testimony, through cross-examining of a surviving victim, and through extrinsic proof.” After *Daniel*, cases in Nevada where the accused alleges self-defense may be supported

---

<sup>2</sup> See Generally *Petty v. State*, 997 P.2d 800 (Nev. 2000).

<sup>3</sup> *Id.* at 803.

<sup>4</sup> See *Burgeon v. State*, 714 P.2d 576, 578 (Nev. 1986).

<sup>5</sup> See *Petty v. State*, 997 P.2d 803 (Nev. 2000).

<sup>6</sup> See *Burgeon v. State*, 714 P.2d 576, 578 (Nev. 1986).

by extrinsic evidence in the form of testimony corroborating the accused's statements regarding his victims' known acts.

### **Survey of Law in Other Jurisdictions**

The Nevada Supreme Court relied heavily on *State v. Daniels*, a Wisconsin Supreme Court case that dealt with this issue. Of particular importance to the Nevada Supreme Court was the Wisconsin court's acknowledgement that the defendant should have the opportunity to prove the reasonableness of his knowledge, apprehension of the victim, and credibility of his assertions regarding his own state of mind.<sup>7</sup> The Wisconsin Court reasoned that "[T]he self-serving nature of an accused's testimony about prior violent acts of [his] victim makes corroborating evidence of those acts particularly important for an accused's claim of self defense."<sup>8</sup>

### **Unanswered Questions**

The Nevada Supreme Court decided that an error was committed in *Daniel*. The court held that the district court abused its discretion by "unduly limiting appellant's cross-examination of the surviving victims and in completely excluding testimony by defense witnesses regarding prior violent conduct by the victims known to appellant." However, the court decided that this error alone was not so prejudicial that it required reversal. Oddly, the Court offered no explanation as to why the error was not prejudicial enough to warrant reversal. Furthermore, the court offered no indication as to what the appropriate standard should be when making such a determination. The court's lack of explanation regarding this issue means that determining whether reversal is required in future cases may be difficult.

### **Commentary II**

On cross-examination, the appellant was asked by the prosecutor several times whether any of the other witnesses during the trial had lied or were mistaken. Appellant's defense counsel objected unsuccessfully, and appellant responded that some witnesses had indeed lied. During closing arguments, the prosecutor attacked appellant's statement that other witnesses had lied.

### **Issue II**

May prosecutors ask a defendant whether other witnesses have lied, or goad a defendant to accuse other witnesses of lying?

### **Disposition II**

---

<sup>7</sup> See *State v. Daniels*, 465 N.W.2d 633, 636 (Wis. 1991).

<sup>8</sup> *Id.*

No, prosecutors may not ask a defendant whether other witness have lied, or goad a defendant to accuse other witnesses of lying, *unless* the defendant, during direct examination, has directly challenged the truthfulness of those witnesses.

### **State of Law Before *Daniel***

Prior to *Daniel*, the Nevada Supreme Court had never addressed this issue. The court merely held that, “. . . it is the exclusive province of the trier of fact to pass on the credibility of witnesses: ‘Thus, a lay witness’s opinion concerning the veracity of the statement of another is inadmissible.’”<sup>9</sup>

### **Effect of *Daniel* on Current Law**

The court in *Daniel* established a clear-cut rule for dealing with future cases where this issue arises. The rule prohibits prosecutors from “asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying *except* where the defendant during direct examination has directly challenged the truthfulness of those witnesses.” Because of the court’s adoption of this rule, conduct by prosecutors similar to the conduct exhibited in *Daniel*, is no longer tolerated. This rule reduces prosecutors’ ability to admit evidence of a defendant’s opinion regarding the truthfulness of other witnesses by limiting its availability to cases where the defendant asserts on direct examination that other witnesses have lied. If a defendant does not assert, during direct examination, that other witnesses have lied, then prosecutors will no longer be able to raise the issue of that defendant’s opinion as to the truthfulness of other witnesses.

### **Law in Other Jurisdictions**

The court recognized that the law in other jurisdictions regarding this issue varies, but that courts generally disapprove of prosecutors asking defendants whether other witnesses have lied. Courts in some jurisdictions have clear-cut rules forbidding prosecutors from engaging in this activity, yet other courts allow the activity under certain circumstances. For example, a New Mexico appellate court adopted “a strict prohibition upon asking the defendant if another witness is ‘mistaken’ or ‘lying.’”<sup>10</sup> The New Mexico court based its rule partially on the rationale that it is the role of the jury to determine the credibility of witnesses and the defendant’s opinion as to whether other witnesses are lying is irrelevant.<sup>11</sup> Furthermore, the New Mexico court reasoned that such questions often leave the jury with the false belief that the only way to reconcile any discrepancy in testimony by a defendant and another witness is to conclude that either the defendant or the witness is lying.<sup>12</sup>

### **Unanswered Questions**

---

<sup>9</sup> See *Daniel v. State*, 78 P.3d 890, 903 (Nev. 2003).

<sup>10</sup> See *State v. Flanagan*, 801 P.2d 675, 679 (N.M. Ct. App. 1990).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

The Nevada Supreme Court's rule does leave a glaring question unanswered. That is, what level of prosecutorial conduct is considered "goading a defendant to accuse other witnesses of lying?" For example, without specifically asking a defendant whether another witness has lied, may a prosecutor ask a defendant on cross-examination if the defendant has an explanation for a discrepancy between his own testimony and the conflicting testimony of another witness? While obviously not a violation of the court's rule by directly asking the defendant whether another witness has lied, it seems that a question of this nature is likely to yield an answer from the defendant that the conflicting testimony by the other witness is a lie. In the event that the defendant does reply that the other witness lied, would the prosecutor have thus broken the court's rule that forbids goading defendants into such statements?

### **Conclusion**

*Daniel* is a favorable case for defendants. First, defendants are allowed to corroborate their testimony with additional evidence regarding their victims' character in certain circumstances. Second, the ability of prosecutors to ask a defendant whether the defendant believes other witnesses have lied when giving testimony is limited. The Court's disposition on each of these issues results in the possibility of additional protections for defendants.