

***Jezdik v. State*, 121 Nev. Adv. Op. 15, 110 P.3d 1058 (2005)¹**

EVIDENCE – REBUTTING CHARACTER EVIDENCE

Summary

This case involves allegations regarding fraudulent use of a credit card and identity theft. Appellant Michael Jezdik (“Jezdik”) and the victim in this case, Anna Behran (“Behran”), met in Las Vegas in early 1997. They enjoyed a brief romantic relationship but soon parted ways. Approximately three years later, however, Jezdik and Behran rekindled their friendship.

Behran told Jezdik that she wanted to purchase a home but did not know how to do so. Jezdik offered to help Behran complete an online mortgage application at his residence. Behran agreed. Throughout the mortgage application process, Jezdik acquired access to Behran’s social security number and other confidential information.

Approximately one month after Jezdik assisted Behran with her mortgage application, Citibank received an online application for a MasterCard naming Behran as the primary cardholder and Jezdik as the secondary cardholder. As the primary cardholder, the credit card application required Behran’s social security number and date of birth. The application, however, provided Jezdik’s address and stated that Behran was employed by Southwest Advertising, Jezdik’s employer. At trial, Behran denied any responsibility for the credit card application. She also testified that she never authorized Jezdik to use her personal information to apply for a credit card, never used Jezdik’s address to receive mail, and never worked for Southwest Advertising.

Citibank approved the application and sent two cards to Jezdik’s address. Citibank’s statements went unpaid. Upon discovering the credit card account in her name, Behran testified that she directed Citibank to close the account. As part of the ensuing fraud investigation, Las Vegas Metropolitan Police Department Detective John Woosnam (“Woosnam”) contacted Citibank and learned that Citibank lost money on the account. Woosnam obtained copies of three credit card receipts and billing statements revealing seventeen purchases made during a two-week period. At trial, Woosnam made a lay comparison of Jezdik’s signature on a copy of a voluntary statement with the signature on the Citibank receipts. While not an expert, Woosnam testified that in his opinion, the signatures were the same.²

At trial, Jezdik theorized that Behran opened the credit card account and used his address and computer to complete the application in his absence. Jezdik testified that he and Behran had renewed their romantic relationship and that Behran had complete access to his residence. Additionally, Jezdik testified that he and Behran were indeed coworkers at Southwest Advertising.

In an attempt to establish Jezdik’s credibility and good character, Jezdik’s attorney asked him during direct examination “Have you ever been accused of anything

¹ By Brian Reeve

² Although Jezdik contends on appeal that the district court’s admission of lay witness testimony concerning handwriting comparisons was improper, the court declined to reach the issue.

prior to these current charges?”³ Jezdik answered “No.” Later, in the jury’s absence, the State argued that Jezdik’s “no accusation” testimony “opened the door” to specific rebuttal evidence regarding misconduct similar to that alleged in this case.⁴ The district court agreed with the state and allowed two rebuttal witnesses to testify. A Detective Olewinski testified regarding an unrelated ongoing investigation of Jezdik. The other witness was Jezdik’s father-in-law, who testified that Jezdik once admitted to using his personal information to open a credit card account without his knowledge or consent.

The jury found Jezdik guilty on one count of obtaining and using the personal identification of another, three counts of fraudulent use of a credit card and two counts of burglary. Jezdik appealed. On appeal Jezdik contends that Detective Olewinski’s and his father-in-law’s testimony constitutes improper character evidence under NRS 48.045 and inappropriate impeachment evidence under NRS 50.085. The State argues, however, that neither NRS 48.045 nor NRS 50.085 applies because the State elicited the testimony to rebut Jezdik’s own testimony on direct examination.

Issue and Disposition

Issue: The main issue on appeal is “the extent to which the State may rebut character evidence introduced by the defendant in a criminal case.”

Disposition: The Nevada Supreme Court concluded that that district court properly admitted the State’s rebuttal evidence in response to Jezdik’s improper character evidence during defense counsel’s direct examination of Jezdik.

Commentary

State of the Law Before *Jezdik*

Character Evidence Generally

NRS 48.045(1) governs the admissibility of character evidence in a criminal trial:

1. Evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(a) Evidence of his character or a trait of his character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence . . .

⁵

Accordingly, NRS 48.045(1)(a) allows the defendant solely to decide whether to place his character in issue.

NRS 48.055 provides *the means* for proving character under NRS 48.045. It states, “In all cases in which evidence of character or a trait of character of a person is

³ Jezdik v. State, 121 Nev. Adv. Op. 15, 110 P.3d 1058 (2005).

⁴ *Id.* at 1062.

⁵ NEV. REV. STAT. 48.045 (2004) (emphasis added).

admissible, proof may be made by testimony as to reputation or in the form of an opinion. On cross-examination, inquiry may be made into specific instances of conduct.”⁶

Generally, when a defendant elects to introduce character evidence in the form of either reputation or opinion evidence, the State is correspondingly limited in its rebuttal evidence and may only ask about specific acts on cross examination. That is not what happened in this case. Here, Jezdik did not introduce evidence regarding his own character in the form of reputation or opinion evidence. Instead, Jezdik put his character in issue by testifying that he had never been “accused of anything prior to these current charges.”⁷ Jezdik’s statement essentially denied any prior specific instances of conduct.

The “Collateral Fact Rule” and Attacking Credibility

Under the “collateral fact rule” it is improper to allow “the State to impeach a defendant’s credibility with extrinsic evidence relating to a collateral matter.”⁸ Collateral facts are facts that are “outside the controversy, or are not directly connected with the principal matter or issue in dispute.”⁹ Notwithstanding these common law rules, under NRS 50,085(3), collateral matters may be used to impeach a witness during cross examination “with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness and no extrinsic evidence is used.”¹⁰

The court noted that the collateral fact rule is limited in its application. For example, the rule does not control the scope of cross-examination. An examiner may still question a witness any aspect of the witness’s direct testimony. Accordingly, the collateral fact rule’s main proscription applies when “the witness to be impeached has already left the stand and the former cross-examiner later calls a second witness or proffers an exhibit to impeach the earlier witness’s credibility.”¹¹ Consequently, the collateral fact rule does not apply to a majority of methods of impeachment including attacks on a witness’s motive for testifying and impeachment using criminal convictions. It does apply, however, “when a specific contradiction is coupled with impeachment by a prior inconsistent statement or impeachment using extrinsic prior bad acts not resulting in a conviction.”¹²

Based on the foregoing, a specific contradiction using extrinsic evidence of a prior bad act generally triggers the collateral fact rule in NRS 50.085(3). Yet, some authorities have advocated an exception to the collateral fact rule when the State “seeks to introduce evidence on rebuttal to contradict specific factual assertions raised during the accused’s direct examination.”¹³ This exception, called the “specific contradiction” exception, provides that a defendant’s false statements during direct examination “open the door” to the admissibility of remedial specific contradiction evidence.¹⁴

⁶ NEV. REV. STAT. § 48.055 (emphasis added).

⁷ *Jezdik*, 121 Nev. Adv. Op. 15, 110 P.3d 1058, 1063.

⁸ *McKee v. State*, 112 Nev. 642, 646, 917 P.2d 940, 943 (1996).

⁹ *Lobato v. State*, 120 Nev. ___, ___, 96 P.3d 765, 770 (2004).

¹⁰ *Collman v. State*, 116 Nev. 687, 704, 7 P.3d 426, 436 (2000).

¹¹ *Jezdik*, 121 Nev. Adv. Op at 11.

¹² *Lobato*, 96 P.3d at 770.

¹³ 1 JOHN W. STRONG, ET. AL., MCCORMICK ON EVIDENCE § 49, at 202 (5th ed. 1999).

¹⁴ *Id.*

State of the Law After *Jezdik*

Before this case, the Nevada Supreme Court had not explicitly adopted the “specific contradiction” exception. The court expressly adopted the exception in *Jezdik*. As a result, Nevada’s statutory rules of evidence are interpreted to mean that a party is not prohibited from introducing extrinsic evidence that specifically rebuts an adversary’s proffered evidence of good character.

One question that remains unanswered after *Jezdik* is what type of factual assertions “open the door” to the admissibility of specific contradictory evidence? How much leniency are courts willing to grant a witness during his or her testimony before the witness has “opened the door” to the opposing party’s use of extrinsic evidence?

Conclusion

The district court correctly allowed the State to specifically rebut Jezdik’s denial of previous accusations on direct examination under the specific contradiction exception to the collateral fact rule.