

State v. Dist. Ct. (Romano), 97 P.3d 594 (Nev. 2004)¹

CRIMINAL LAW – MANDAMUS – PROHIBITION

Summary

Real party in interest Robert Romano is charged in an indictment with four counts of sexual assault of a minor under fourteen years of age and ten counts of lewdness with a child under fourteen years of age. Romano and his girlfriend are the natural parents of the child victim, born May 5, 1997.

In November 2002, the child allegedly told her mother that Romano had engaged in inappropriate activities with her. The mother contacted Nevada Child Protective Services and, at that agency's request, took the child to Sunrise Hospital for evaluation. A pediatric emergency physician at Sunrise testified before the grand jury that the findings of the child's examination were normal, meaning that there were no signs of trauma, but that this did not necessarily preclude the possibility of sexual assault.

On December 19, 2002, the five-year-old child testified before the grand jury that she knew people were not supposed to touch certain areas of her body. She testified that she had touched Romano's penis with her hands. She also demonstrated how she touched him. The child further testified that Romano had touched her butt with his hands and mouth while they were both naked and that he told her not to tell anyone. The child's mother was not present in the courtroom when the child testified.

Romano did not testify before the grand jury. Instead, he requested that the prosecutor tell the grand jury that the mother had fabricated these charges and used the child either for financial gain or to get revenge on Romano.

On January 10, 2003, the grand jury returned an indictment charging Romano with sexual assault and lewdness with a child under fourteen years of age. Subsequently, Romano moved for an independent psychological examination of the victim, alleging that there was no corroborating evidence other than the victim's testimony and that a reasonable basis existed for believing the victim's mental or emotional state may have affected her veracity. The district court granted Romano's motion. Thereafter, the State petitioned the Nevada Supreme Court for a writ of prohibition or, alternatively, for a writ of mandamus.

Issue and Disposition

Issue

Is a petition for writ relief seeking either to prevent the district court from enforcing its order or compelling it to vacate its order proper in the instant case?

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Disposition

Yes. The Nevada Supreme Court concluded that the district court abused its discretion in ordering the child witness to submit to an independent psychological examination by the defendant's experts. Accordingly, it granted the State's petition for a writ of prohibition to prevent the district court from ordering the child victim to submit to a psychological examination.

Commentary

State of the Law before *State v. Dist. Ct. (Romano)*

In *Washington v. State*,² the Nevada Supreme Court stated that trial courts have discretionary authority to order the psychological examination of a sexual assault victim. However, the court failed to discuss its reasoning for granting trial courts such discretionary authority. Nor did its decisions subsequent to *Washington* clarify its reasoning.³

Effect of *State v. Dist. Ct. (Romano)* on Current Law

The Nevada Supreme Court reaffirmed its holding that a trial court has the discretion to order alleged victims to submit to psychological examination under certain narrow circumstances. The court took this opportunity to clarify its reasoning for granting trial courts such discretionary authority.

The court noted that although a fixed rule or a rule giving trial courts unbridled discretion may subject a victim to unnecessary harassment and embarrassment, a defendant has the right to preserve his constitutional right to a fair trial by countering the State's proffered evidence. In *Koerschner v. State*,⁴ the court reconciled prior Nevada case law concerning a trial court's discretionary power to order the psychological examination of a sexual assault victim. It concluded that the overriding judicial question is whether a compelling need exists for the trial court to order a psychological examination.⁵ In determining whether a compelling need exists, *Koerschner* requires a trial court to consider three factors, not necessarily to be given equal weight: (1) whether the State calls or benefits from a psychological expert, (2) whether little or no corroboration of the offense exists beyond the victim's testimony, and (3) "whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity."⁶

The court concluded, however, that the *Koerschner* test does not always adequately balance the needs of the victim and the defendant. It therefore modified its decision in

² 96 Nev. 305, 307, 608 P.2d 1101, 1102-03 (1980).

³ See *Chapman v. State*, 117 Nev. 1, 16 P.3d 432 (2001); *Koerschner v. State*, 116 Nev. 1111, 13 P.3d 451 (2000) (abrogating *Marvelle v. State*, 114 Nev. 921, 966 P.2d 151 (1998), and *Griego v. State*, 111 Nev. 444, 893 P.2d 995 (1995), and overruling *Keeney v. State*, 109 Nev. 220, 850 P.2d 311 (1993)); *Lickey v. State*, 108 Nev. 191, 827 P.2d 824 (1992); *Colley v. State*, 98 Nev. 14, 639 P.2d 530 (1982).

⁴ 116 Nev. at 1116-17, 13 P.3d at 455 (abrogating *Marvelle*, 114 Nev. 921, 966 P.2d 151 and *Griego*, 111 Nev. 444, 893 P.2d 995, and overruling *Keeney*, 109 Nev. 220, 850 P.2d 311).

⁵ *Id.*

⁶ *Id.* at 1117; 13 P.3d at 455.

Koerschner, holding that a defendant is entitled to a psychological examination of an alleged sexual assault victim only where: (1) the State notifies the defendant that it intends to examine the victim by its own expert and (2) the defendant makes a prima facie showing of a compelling need for a psychological examination. In determining whether a compelling need exists, the trial court must consider: (1) whether little or no corroboration of the offense exists beyond the victim's testimony, and (2) whether there is a reasonable basis "for believing that the victim's mental or emotional state may have affected his or her veracity."⁷ Moreover, in the exercise of discretion, the trial courts must set forth a particularized factual finding that there is reason to believe that a psychological examination is warranted.

The court further held that a victim is not required to submit to a psychological examination. Where the victim refuses to submit to an examination, however, the State may not introduce expert evidence, either in a report or testimony that addresses or assesses the victim's character.⁸ "An expert who has personally examined a victim is in a better position to render an opinion than is an expert who has not done so."⁹ Therefore, when the victim refuses to submit to a psychological examination by a defendant's expert, both the State and the defendant would be restricted to the use of generalized testimony submitted by non-examining experts.¹⁰

Given its recognition of the validity of *Washington* and its line of authority and applying *Koerschner*, as modified, to the instant case, the court concluded that the district court manifestly abused its discretion when it ordered the psychological examination of the child victim. Because the State has not conducted a psychological examination of the child victim and does not intend to call an examining expert at trial, Romano may not request an independent psychological examination of the victim.

Summary of the Law in Other Jurisdictions

While the Nevada Supreme Court's decision is consistent with holdings in several other jurisdictions,¹¹ California, through the legislative enactment of California Penal Code § 1112, has taken the position that a trial court may not order victims to submit to psychological examinations. Section 1112 superseded the California Supreme Court's decision in *Ballard v. Superior Court of San Diego County*,¹² which empowered the trial courts with discretionary authority to order a sexual assault victim to submit to psychological examination. The *Ballard* court had articulated antiquated beliefs that women falsely accuse men of sex crimes "as a result of a mental condition that transforms into fantasy a wishful biological urge," from aggressive tendencies directed to the accused or from "a childish desire for notoriety."¹³ In overruling *Ballard*, in 1986, the California Supreme Court acknowledged that "previous expectational disparities, which singled out the credibility of rape complainants as suspect, have no place in a modern system of jurisprudence."¹⁴

⁷ *Id.*

⁸ *People v. Wheeler*, 602 N.E.2d 826, 833 (Ill. 1992).

⁹ *Id.* at 832.

¹⁰ *See id.* at 833.

¹¹ *See, e.g., State v. Jerousek*, 590 P.2d 1366 (Ariz.1979).

¹² 410 P.2d 838 (Cal. 1966), superseded by statute as stated in *People v. Haskett*, 640 P.2d 776, 787 n.7 (Cal. 1982).

¹³ *Id.* at 846 (stating that the jury should not hear a sex offense charge until a qualified physician testifies as to his examination of the female victim's mental state and social history).

¹⁴ *People v. Barnes*, 721 P.2d 110, 121 (Cal. 1986).

Conclusion

A trial court has the discretion to order alleged sexual assault victims to submit to psychological examination where: (1) the State notifies the defendant that it intends to examine the victim by its own expert and (2) the defendant makes a prima facie showing of a compelling need for a psychological examination. In determining whether a compelling need exists, the trial court must consider: (1) whether little or no corroboration of the offense exists beyond the victim's testimony, and (2) whether there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity.