IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman

NORMAN K. FLOWERS

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

Docket No. 55759

CONSOLIDATED WITH

Docket No. 53159

Direct Appeal From an Order Denying Motion for New Trial
Eighth Judicial District Court
The Honorable Linda Bell, District Judge
District Court No. C288755

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant Norman Keith Flowers was convicted of burglary, sexual assault, and first degree murder (under a felony-murder theory), following the death of Sheila Quarles. 2 App 250-251. Sheila drowned in a bathtub, showed signs of strangulation, and was found to have vaginal injuries. Her body contained semen which was identified as belonging to Flowers and George Brass. The State's theory was that Brass had sex with Sheila a few hours prior to her death and that Flowers subsequently went to her apartment, sexually assaulted her and killed her. Other than the semen, there was no physical evidence that Flowers was in the apartment and no one saw him near or in the apartment the day Sheila was killed. 2 App 329-502; 3 App 503-628. George Brass was at the scene of Ms. Quarles death when police were investigating. He did not admit to having sex with her shortly before her death until almost the eve of trial after police advised him that they were not going to prosecute him. 2 APP 493-497.

After the trial in this matter, George Brass was then convicted of Murder and Robbery (C253756). The Motion below and this appeal followed.

II. REPLY TO STATE'S ARGUMENTS:

A. THE DISTRICT COURT ERRED IN DENYING FLOWER'S MOTION FOR A NEW TRIAL

The newly available impeachment evidence was sufficient to justify granting the Motion for a new trial, and the failure of the Court to so rule constitutes an abuse of discretion, under both McCabe v. State, 98 Nev. 604, 655 P.2d 536 (1982) and Funches v. State, 113 Nev. 916, 944 P.2d 775 (1997).

1. The newly available impeachment evidence is properly considered "new evidence" in this context.

In the present case, the Court below apparently ruled solely on the fact that "a conviction when he had already been arrested and charged with the crimes and when the Defense had been provided the information constitutes – under those circumstances constitutes new evidence". 4 App 682. This was the sole criteria of the Court's decision, and it was not further explained in the Order prepared by the State, as the Order merely indicates that the Motion was denied. 4 App 687.

Flowers acknowledges that Brass' alleged involvement and the fact that he was eventually charged with the unrelated murder and robbery was known to the defense as well as the State. Clearly, however, the newly available evidence that is relevant to impeachment was the fact that George Brass was subsequently convicted of that murder and robbery. Mr. Brass had, prior to the State's calling him as a witness, been allowed to withdraw his pleas of guilty to two counts of robbery in that case.

As the State has requested that this Honorable Court take Judicial notice of the proceedings in the case of George Brass, (Case No. C-227661) so too does the appellant. In the Brass case, it is important to note that Mr. Brass had entered a plea of guilty prior to the trial of Mr. Flowers. However, just prior to his sentencing, on June 6, 2008, Mr. Brass brought a Motion to withdraw his plea of Guilty. While the State did file an opposition to Mr. Brass' motion, it appeared that it was basically a *pro forma* opposition, stating that "no reasonable person would withdraw their pleas under the facts and circumstances of this case." (State's Opposition pg. 3). Had the State opposed this withdrawal of plea more rigorously, and the conviction remained intact, then the defense would have used these convictions to impeach the witness in the original trial. The State's actions, however, paved the way for Brass to testify without impeachment by a prior felony conviction in the jury trial which began on October 15, 2008. 2 App. 331.

The State and Federal Constitution offers a firm protection that defendants are presumed innocent until proven guilty. N.R.S. 175.191. The fact that Brass has been proven guilty and convicted of both murder and robbery, changes the circumstances and certainly is newly available evidence that a jury should hear, and is relevant to his impeachment as a witness. Indeed, the nature and the quality of this impeachment evidence could be said to have been within the control of the prosecuting agency.

2. Brass's conviction is of a nature and quality that it provides a sufficient basis upon which a new trial should have been granted.

Even under the authority cited by the State, under the Funches approach, it is clear that the judgement of conviction upon which the motion is based would be both "the best evidence

that the case admits" and even if this was an attempt to "impeach or discredit a former witness" that Brass was "so important that a different result would be reasonably possible." Funches, *supra* at 113 Nev. At 923-24, 944 P.2d at 779-80. This is consistent with the decision in Hennie v. State, 114 Nev. 1285, 968 Pl.2d 761 (1998) when the witness to be impeached is so important that impeachment would necessitate a different verdict.

In the present case, the State's witness was not only an alternate suspect as a result of his DNA being found in the body of the deceased, but his actions in withholding his identity for years, his lack of concern over the death of Ms. Quarles and his subsequent actions certainly belied the credibility and strength of his alleged "alibi".

George Brass, who was also known as "Chicken" was identified as the second source of semen. The detectives only learned of "Chicken" or George Brass a few months before trial. 3 App. 530. The DNA levels from Sheila's vaginal sample and the sample from her underwear were "pretty much even" as to the levels attributed to Flowers and Brass. 3 App. 556. Brass lived in the same apartment complex as the Quarles family as did several members of Brass's family. 2 App. 373. None of Brasses family members came forward, nor did Brass until after he was contacted by police while in custody.

Following Sheila's death, Flowers approached Debra while she was at work, hugged her and said "I hear what happened to your baby. That's really . . . fucked up. She was a nice girl. She didn't deserve that." 2 App. 379. He also said that Debra looked down and out and that she should see a psychiatrist for depression. 2 App. 379 . Flowers recommended a psychiatrist and drove her to the two appointments she attended. 2 App. 379. On the other hand there was no evidence that Brass showed any such compassion or post death concern over the death of his alleged lover.

3. The State's supposition that the Defense would attempt improper impeachment of their witness is not a basis to deny a new trial in this case.

In the present case, the State vouched for Brass' credibility by calling him as a witness to testify in the case, using the only other person whose DNA was found on the body of the deceased. There was no other witness called by the State to corroborate the testimony of

Brass. This established a paradigm in which the credibility of Brass became an extremely important issue to the jury given the fact that there was no physical evidence as to the perpetrator of the death-producing act and there were no eyewitnesses. It appears that Brass went out of his way to avoid providing any assistance to the family or police. Brass was at the scene of Ms. Quarles death when police were investigating, yet he did not admit to having sex with her shortly before her death until nearly the eve of the trial after police advised him that they were not going to prosecute him. 2 App 493-497.

The State presupposes that the defense would impeach Brass with improper arguments. In doing so, the State's own actions of vouching for Mr. Brass, by challenged commentary upon the defendant's right to remain silent at the time of the trial and it's prejudice is clearly focused. (See Appellant's opening brief in the companion appeal). Counsel for the Defendant is well aware that pursuant to N.R.S. 50.095, evidence of the conviction of a crime is admissible for the purpose of attacking the credibility of a witness is limited, however, it is also absolutely admissible:

> 1. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which the witness was convicted.
>
> 2. Evidence of a conviction is inadmissible under this section if a period of more than 10 years has elapsed since:
>
> (a) The date of the release of the witness from confinement; or
>
> (b) The expiration of the period of the witness's parole, probation or sentence, whichever is the later date.
>
> 3. Evidence of a conviction is inadmissible under this section if the conviction has been the subject of a pardon.
>
> 4. Evidence of juvenile adjudications is inadmissible under this section.
>
> 5. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

The admissibility of impeachment by confrontation with a criminal conviction is absolute and is not subject to the restrictions of NRS 48.045 suggested in the State's opposition. The only restriction of impeachment by a conviction is contained within the

statute itself.

III. CONCLUSION

A simple comparison of the evidence concerning Flowers and Brass reveals that the State's case against Flowers was not strong. Both men were identified as having semen inside of Sheila's vagina; neither man was known by Sheila's mother to be in a relationship with Sheila; and neither man immediately told police officers investigating the case that they had a sexual relationship with Sheila. Brass had work records which indicated that he was at work when Sheila was killed, but no witness testified that he was at work and it was acknowledged that someone else could have signed him in and out at work. Finally, Brass was seen near Sheila's apartment on the day she was killed while Flowers was not. The motion for a new trial should have been granted. For each of the reasons set forth above, Flowers is entitled to a new trial.

DATED this 2nd day of August, 2010.

Respectfully submitted,

/s/ RANDALL H. PIKE

By:_________________________
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State Bar 1940

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: August 2, 2010.

/s/ RANDALL H. PIKE

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 2nd day of August, 2010 a copy of the Appellant's Reply Brief was served as follows:

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