IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO; AND THE HONORABLE J. MICHAEL MEMEO, DISTRICT JUDGE,
Respondents,
and
JOHN MARK FENTON,
Real Party in Interest.

No. 58183

ORDER DENYING PETITION AND MOTION FOR STAY

This original petition for a writ of mandamus or prohibition challenges a district court order denying petitioner's motion in limine to exclude the testimony of a criminal defendant's expert in neuropsychiatry. Real party interest, John Mark Fenton is awaiting trial on five charges: (1) battery with the intent to kill a person 60 years of age or older, (2) battery resulting in substantial bodily harm to a person 60 years of age or older, (3) burglary, (4) robbery of a person 60 years of age or older, and (5) grand larceny of a motor vehicle. Relying on NRS 193.220, Fenton gave notice of his intent to call an expert in neuropsychiatry to testify whether Fenton could form the specific intent required on the grand larceny of a motor vehicle charge due to the combination, or individual influence, of post-traumatic stress disorder (PTSD), alcohol consumption, and ingestion of several prescribed psychiatric medications. Petitioner contends that the expert's testimony is inadmissible absent a plea of not guilty by reason of insanity, which is not the case here, and that the district court's ruling

allows Fenton to introduce a diminished capacity defense—a defense Nevada does not recognize. We disagree.

NRS 193.220 provides:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining the purpose, motive or intent.

As applied in this case, the statute means that evidence of voluntary intoxication may be introduced to negate the intent element of a specific intent offense, that is, grand larceny of a vehicle. Here, the expert testified at a hearing on the motion in limine that he "strongly suspect[s] that [Fenton] was delirious on the night of the offense and, therefore, could not understand his circumstances or form a meaningful intent." The expert's opinion was based on Fenton's diagnosis of extreme PTSD caused by an incident that occurred while Fenton was serving in Iraq, numerous psychiatric medications prescribed to him around the time of the charged offenses, and his apparent intoxication when the offenses occurred.[1] Ultimately, the district court denied petitioner's motion in limine, reasoning that the expert's testimony would assist the jury in determining Fenton's intent at the relevant time, which is an essential element of the

[1]The expert testified that Fenton did not meet the M'Naghten criteria for insanity and the submissions before us indicate that Fenton is not proceeding on an insanity defense.

offense of grand larceny.[2] In reaching this conclusion, the district court observed decisions of this court referring to instructions that a jury may consider a defendant's intoxication when determining purpose, motive and intent pursuant to NRS 193.220.

We have held that while voluntary intoxication does not excuse criminal conduct, it "may be considered in determining intent." Andrade v. State, 87 Nev. 144, 145, 483 P.2d 208, 208, (1971); see Vincent v. State, 97 Nev. 169, 170, 625 P.2d 1172, 1173 (1981); Allen v. State, 96 Nev. 334, 337, 609 P.2d. 321, 323 (1980), overruled on other grounds by Berry v. State, 125 Nev. ___, 212 P.3d 1085 (2009). Here, the expert's testimony comports with the purpose of NRS 193.220 and supports Fenton's defense that voluntary intoxication (ingestion of psychiatric medications and alcohol) rendered him unable to form the specific intent necessary for the offense of grand larceny of a vehicle.[3] Therefore, considering the district court's detailed order, the evidentiary hearing transcript, and relevant legal authority, we conclude that petitioner failed to demonstrate that the district court manifestly abused it discretion or exceeded its jurisdiction in denying petitioner's motion in limine. See NRS

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[2]In its order, the district court explained that from prior statements of defense counsel, the defense is offering the expert's testimony as it relates only to the grand larceny charge and that the defense is denying that Fenton is the perpetrator of the remaining offenses.

[3]As this matter involves a motion in limine, the district court may revisit its ruling should events at trial warrant reconsideration and petitioner is free to object should Fenton introduce the expert's testimony for an improper purpose.

34.160; NRS 34.320; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). Accordingly, we

ORDER the petition DENIED.[4]

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

cc: Hon. J. Michael Memeo, District Judge
Attorney General/Carson City
Elko County District Attorney
Elko County Public Defender
Elko County Clerk

[4]We deny petitioner's motion for stay of the proceedings filed on April 19, 2011.