IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ALVAREZ-VENTURA A/K/A DAVID VENTURA ALVAREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43000

FILED

DEC 30 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon jury verdicts, of first-degree murder with the use of a deadly weapon and two counts of sexual assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

On the count of first-degree murder with the use of a deadly weapon, the district court sentenced appellant David Alvarez-Ventura to a term of life imprisonment without the possibility of parole, plus an equal and consecutive term for the deadly weapon enhancement. For each of the two counts of sexual assault with the use of a deadly weapon, the district court sentenced Alvarez-Ventura to a term of life imprisonment with the possibility of parole after ten years, plus an equal and consecutive term for the deadly weapon enhancement. The sentences are to run consecutively.

Jury instructions

Alvarez-Ventura initially argues that the district court's refusal to give his two proposed jury instructions deprived him of his constitutional rights to due process and a fair trial. Proposed Instruction A advanced a defense theory of consent, while proposed Instruction B advanced a theory of mistaken belief of consent. In two recent cases, we have held that district courts, upon request, must include instructions on

the significance of findings supporting defense theories.[1] However, failure to give such instructions is subject to harmless error analysis.[2]

Alvarez-Ventura was entitled to proposed instruction A on the theory of consent, but this omission was harmless beyond a reasonable doubt. First, Jury Instruction Nos. 22 and 30 generally advised the jury that in order to find Alvarez-Ventura guilty of sexual assault, the jury must find that the State proved beyond a reasonable doubt that Alvarez-Ventura subjected the victim to sexual penetration against her will. Second, Alvarez-Ventura's counsel argued consent during closing arguments. Third, substantial evidence presented at trial clearly established the absence of consent. The victim and Alvarez-Ventura were seen arguing on the day she was killed. Forensics discovered Alvarez-Ventura's DNA in the victim's vagina and anus. An autopsy revealed lacerations, scrapes, and abrasions in these regions caused by blunt force trauma inflicted around the time of death. Death was brought on by mechanical asphyxia. Along with hemorrhages in the deep structures of her neck, bruises, scrapes, and abrasions were found on the victim's chin, face, chest, and back. Several witnesses testified to scratches on Alvarez-Ventura. For these reasons, we conclude that even with the consent instruction, this jury would have rendered the same guilty verdict.

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[1]Carter v. State, 121 Nev. ___, ___, 121 P.3d 592, 597 (2005); Crawford v. State, 121 Nev. ___, ___, 121 P.3d 582, 589 (2005).

[2]See Crawford, 121 Nev. at ___, 121 P.3d at 590 (citing Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (holding that an appellate court may find errors in instructions harmless where it is clear beyond a reasonable doubt that the guilty verdict rendered in the case was surely unattributable to the error)).

The district court properly refused to give Instruction B because no evidence in the record supported a reasonable mistaken belief of consent.[3] While Alvarez-Ventura and the victim had checked into the Western Hotel together on several prior occasions, the record indicates that only the victim checked into the room where her body was found. Further, no evidence alleged that Alvarez-Ventura had ever seen a love letter the victim had written to him in her diary. Finally, Alvarez-Ventura never testified that he believed the victim consented to intercourse.[4]

Prosecutorial misconduct

Alvarez-Ventura next alleges that in the closing argument, the prosecutor made an improper "Golden Rule" argument and a statement regarding the recording of a videotape. We disagree. First, the prosecutor did not make an improper "Golden Rule" argument because, according to the trial transcript, the prosecutor had asked the jury to place themselves in the shoes of the defendant, not the victim.[5] Second, the prosecutor's statement about the videotape is not an improper mischaracterization of

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[3]See Owens v. State, 96 Nev. 880, 884, 620 P.2d 1236, 1239 (1980) (stating that an instruction need not be given unless there is supportive evidence).

[4]Alvarez-Ventura's Fifth Amendment argument lacks merit because he was not compelled to testify against himself; rather, he chose not to testify.

[5]See Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997) ("A 'Golden Rule' argument asks the jury to place themselves in the shoes of the victims, and has repeatedly been declared to be prosecutorial misconduct."), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

the facts, but an inference based on the evidence presented. The prosecutor "has the right to state fully his views as to what the evidence shows."[6] "If the prosecutor's reasoning is faulty, such faulty reasoning is subject to the ultimate consideration and determination by the jury."[7] Finally, Alvarez-Ventura did not object to the balance of the prosecution's allegedly prejudicial statements during its closing and rebuttal arguments. We review these only for plain error,[8] and we find none.

Sentences

Alvarez-Ventura also argues that his sentences were illegally enhanced because a shoelace is not a deadly weapon. Under NRS 193.165(5)(b), a deadly weapon includes any instrument that is readily capable of causing substantial bodily harm or death under the circumstances in which it is used. Here, the appellant's sentences were properly enhanced because a shoelace, like other cord-like instruments, was readily capable of causing substantial bodily harm or death when used for purposes of strangulation.[9]

Hearsay

Finally, Alvarez-Ventura argues that the district court's admission of the victim's unsworn statements to Officer Tracy Smith

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[6]State v. Green, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965).

[7]Id.

[8]Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002).

[9]See, e.g., Hill v. State, 913 S.W.2d 581, 590-91 (Tex. Crim. App. 1996) (plurality opinion) (Baird, J., concurring in part and dissenting in part) (telephone cord); Bennett v. State, 205 A.2d 393, 395 (Md. 1964) (microphone cord).

about Alvarez-Ventura's alleged theft of the victim's belongings violated his constitutional right to confrontation. To be admissible, an unavailable witness's testimonial hearsay statements must be subject to a prior opportunity for cross-examination.[10] Statements may be testimonial if made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial.[11] In this case, the victim's statements were testimonial because they culminated in a formal accusatory statement to government officers. Under Crawford v. Washington, the district court improperly admitted the victim's statements alleging theft because they constituted testimonial hearsay and were not subject to cross-examination. However, Crawford violations are subject to harmless error analysis,[12] and we conclude that this error was harmless beyond a reasonable doubt in light of the overwhelming evidence supporting the jury's findings of guilt.[13]

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[10]Crawford v. Washington, 541 U.S. 36, 68 (2004).

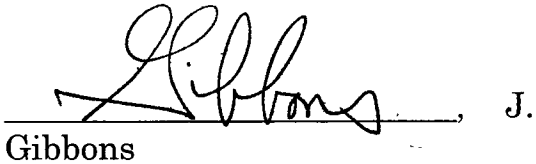
[11]Id. at 51-52; City of Las Vegas v. Walsh, 120 Nev. 392, 399, 91 P.3d 591, 594 (2004).

[12]See, e.g., U.S. v. Rodriguez-Marrero, 390 F.3d 1, 18 (1st Cir. 2004); U.S. v. McClain, 377 F.3d 219, 222 (2nd Cir. 2004); U.S. v. Nielsen, 371 F.3d 574, 581 (9th Cir. 2004).

[13]See Schoels v. State, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999) (holding that in determining whether an error is harmless beyond a reasonable doubt, this court must consider such factors as whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged); NRS 178.598.

Having considered Alvarez-Ventura's contentions of error and concluded that they either lacked merit or constituted harmless error, we ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin



_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Donald M. Mosley, District Judge
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Public Defender Philip J. Kohn
Clark County Clerk