

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES STANTON, III A/KA
CHARLES HERBERT STANTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43199

FILED

SEP 07 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
By: *J. Richards*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction and the denial of a motion for a new trial. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Charles Stanton III was convicted, pursuant to a jury verdict, of attempted robbery with the use of a deadly weapon, first-degree kidnapping, and attempted murder with the use of a deadly weapon.¹ Prior to his sentencing, Stanton moved for a new trial. The district court denied his motion. Thereafter, the district court sentenced Stanton to serve various terms of imprisonment: two consecutive terms of 22 to 96 months for the attempted robbery with the use of a deadly weapon; a term of life with the possibility of parole in 60 months for the kidnapping to run concurrently with the robbery sentence; and two consecutive terms of 60 to 240 months for the attempted murder with the use of a deadly weapon to run consecutively to the kidnapping sentence. This appeal followed, raising several issues for review.

¹The jury also found Stanton guilty of battery with the use of a deadly weapon causing substantial bodily harm, but the district court dismissed that charge.

Sufficiency of the evidence

Stanton first contends that insufficient evidence of intent was admitted at trial to support his conviction for attempted murder with the use of a deadly weapon.

"Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill."² In determining the sufficiency of the evidence, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."³ Evidence of deliberation is usually indirect, and circumstantial evidence alone may be sufficient to support a criminal conviction.⁴ Moreover, the function of assessing the weight of evidence and witness credibility is within the province of the jury.⁵

Here, Las Vegas taxicab driver Mark Chavez testified at trial that he picked up three men and was directed to drive to a secluded part of town. One of the men had a handgun and demanded money from him. As he pulled his cab to the side of the street and reached in his shirt pocket to hand approximately \$90.00 to one of the men in the back seat, he was shot

²Sharma v. State, 118 Nev. 648, 652, 56 P.3d 868, 870 (2002) (quoting Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988)); see NRS 200.010; NRS 193.330(1).

³McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

⁴Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 854 (2000); Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980).

⁵See Furbay v. State, 116 Nev. 481, 486, 998 P.2d 553, 556 (2000).

in the head, just in front of his right ear. The bullet passed between his skull and jaw, exited his head, and struck part of his thumb. The three men fled the cab and left Chavez, who, although in critical condition, was able to drive to a convenience store for help.

Stanton testified during the trial. He admitted that he planned the robbery and claimed that he was sitting in the front passenger seat of the cab when he pulled a handgun out of his pants and demanded money from Chavez. Stanton also admitted that he was the one who actually shot Chavez, but he maintained that he never intended to kill Chavez—only rob him—and that he did not point the handgun at Chavez's head. Rather, he contended that the handgun accidentally discharged while he was trying to put the safety on.

Stanton's claim that the shooting was accidental, however, was belied by his other testimony regarding his behavior before, during, and after the crime, as well as the nature of Chavez's wound. Specifically, Stanton testified that prior to the robbery he obtained the handgun from an associate earlier in the day. It only contained one round, so another associate loaded a second round into the chamber and put the gun in a cocked position. Thus, according to Stanton's own testimony, he initiated the robbery not only with the knowledge that the handgun he was carrying was loaded with two rounds, but was cocked. Stanton also testified that he directed Chavez to drive to a secluded street before initiating the robbery, and that after he shot Chavez, he and his companions immediately fled the scene and he disposed of the handgun.

Stanton also admitted during trial that he had previously indicated to an investigator that he believed that Chavez may have been

reaching for Stanton's handgun during the robbery. Stanton, however, testified that he no longer held this belief about Chavez's actions.

Although the evidence regarding Stanton's intent is largely circumstantial, the jury could have reasonably concluded that portions of Stanton's testimony were not credible and, instead, found that his actions demonstrated that he acted with a deliberate intent to kill Chavez. If Stanton only intended to rob Chavez, then it would have been unnecessary for Stanton to commit the robbery with a loaded weapon, let alone obtain additional ammunition. Moreover, Stanton admitted that he initiated the crime knowing that the handgun was in a cocked, ready-to-fire position. The jury apparently did not find Stanton's claim that he was trying to put the handgun's safety on in the middle of the armed robbery believable. That the bullet entered Chavez's head in front of his right ear and exited his head at an angle that caused it to also strike his thumb, without the gun ever being pointed at Chavez's head, as Stanton claimed, may have been equally unbelievable to the jury. Stanton's claim that the shooting was accidental was further belied by the timing of the shooting—only after Chavez drove his cab to a secluded area and pulled it over.

Viewing the above evidence in a light most favorable to the prosecution, we conclude that a reasonable jury could find beyond a reasonable doubt that Stanton deliberately intended to kill Chavez during the robbery. The evidence was therefore sufficient to support his conviction for attempted murder with the use of a deadly weapon.

Brady violation

Stanton next contends that the State withheld exculpatory evidence from the defense in violation of Brady v. Maryland.⁶ Specifically, Stanton contends that about a week after the jury returned its verdict, but before his sentencing hearing, his trial counsel, Jonathan MacArthur, had a chance encounter with the victim, Chavez, at a neighborhood grocery store. According to MacArthur, Chavez remarked that it was "too bad" that Stanton was convicted of attempted murder because the shooting was "an accident." MacArthur claims that Chavez added, "I could just tell by the way he was acting that he didn't mean to shoot me." Chavez, according to MacArthur, told him that he told this information to Deputy District Attorney Marc DiGiacomo, who had prosecuted Stanton. Stanton maintains that this occurrence shows that a violation of Brady occurred.

We have stated, "Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment."⁷ To establish a Brady violation, three components must be met: (1) the evidence is favorable to the defendant; (2) the evidence was withheld by the State either intentionally or unintentionally; and (3) the evidence was material to the defense, *i.e.*, prejudice ensued.⁸

We conclude that Stanton fails to establish a Brady violation for several reasons.

⁶373 U.S. 83 (1963).

⁷State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (quoting Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000)).

⁸See id.

This matter is predicated on hearsay information. Stanton has not provided any direct affirmation by Chavez about the alleged conversation with MacArthur, and there is some indication in the record that Chavez has either denied or could not recall making such statements. Moreover, Chavez did testify during the trial that after he was shot one of the assailants made a statement of surprise to the effect of "I can't believe . . . [inaudible remark] shot him," but he could not recall exactly what was said. The jury could have inferred from this portion of Chavez's testimony that it supported Stanton's claim that the shooting was an accident, but the jury apparently did not give it much weight. MacArthur also had an opportunity to fully cross-examine Chavez about the shooting during the trial; Chavez's alleged belief about the accidental nature of the shooting never materialized.

Most notably, DiGiacomo filed an affidavit in the district court stating that "[a]t no time did Mr. Chavez indicate to your affiant that he had any belief that he was 'accidentally' shot." Stanton has failed to establish that Chavez's alleged beliefs were ever within the knowledge of the State, let alone withheld by it. Stanton has therefore failed to establish that he is entitled to relief pursuant to Brady.

Motion for a new trial

Stanton also contends that the district court abused its discretion by denying his motion for a new trial. His motion was largely based upon the same facts as his Brady claim discussed above. The district court, however, denied the motion, finding that it did not "meet the requirements to have a new trial or even an evidentiary hearing."

A district court's decision on whether to grant a motion for a new trial is reviewed for an abuse of discretion.⁹ NRS 176.515 generally provides that a district court "may grant a new trial to a defendant . . . on the ground of newly discovered evidence." This court has held that to warrant a new trial pursuant to NRS 176.515 that

(1) the evidence must be newly discovered; (2) it must be material to the defense; (3) it could not have been discovered and produced at trial even with the exercise of reasonable diligence; (4) it must not be cumulative; (5) it must indicate that a different result is probable on retrial; (6) it must not simply be an attempt to contradict or discredit a former witness; and (7) it must be the best evidence the case admits.¹⁰

Here, as a threshold matter and as discussed above, Stanton has failed to establish that any newly discovered evidence actually exists and that Chavez truly believed that the shooting was accidental. Moreover, even if this evidence exists, Stanton's trial counsel had a full opportunity to cross-examine Chavez during trial about this matter. Thus, this information certainly could have been discovered with reasonable diligence. And even if Chavez's alleged opinion was admissible evidence, we are not persuaded that its admission would have altered the outcome of Stanton's trial. We conclude that Stanton has failed to satisfy the criteria necessary for a new trial and that the district court did not abuse its discretion in denying his motion.

⁹See Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991).

¹⁰Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995).

Prosecutorial misconduct

Stanton also contends that several instances of prosecutorial misconduct occurred during his trial.

We have held that "[t]o determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."¹¹ Moreover, we will not lightly overturn a criminal conviction based on a prosecutor's remarks standing alone, and we will review any alleged improper remarks in their context.¹²

Stanton contends that Deputy District Attorney GiDiacomo improperly misstated the law to the jury during his closing argument and that prejudice ensued because of arguments by GiDiacomo that followed. Stanton, however, failed to object to these alleged improper remarks below, and this issue has therefore not been preserved for our review.¹³

He also contends that DiGiacomo repeatedly made prejudicial references to facts not admitted into evidence during his cross-examination of Stanton and that the cumulative effect of these references created an incensed jury that convicted Stanton of attempted murder without proper regard for the actual evidence. Our review of the record reveals that DiGiacomo did improperly refer to Chavez as testifying that a handgun was raised to his head—Chavez did not make such a statement.

¹¹Butler v. State, 120 Nev. ___, ___, 102 P.3d 71, 83 (2004) (quoting Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)).

¹²See id.

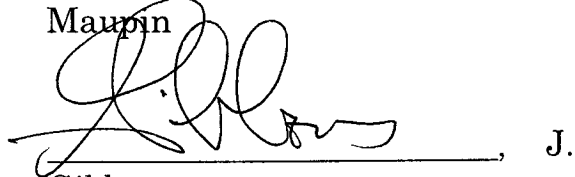
¹³See Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993) ("In order to preserve the issue of prosecutorial misconduct for appeal, the defendant must raise timely objections and seek corrective instructions.").

However, there was evidence to support a reasonable inference that the handgun was raised to Chavez's head before he was shot. We therefore conclude that DiGiacomo's remarks did not so infect Stanton's trial with unfairness as to warrant reversal of his conviction. Accordingly, we

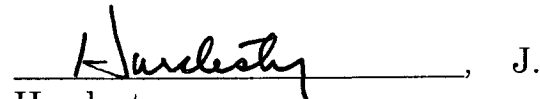
ORDER the judgment of the district court AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

cc: Honorable Jackie Glass, District Judge
Jonathan E. MacArthur
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk