

IN THE SUPREME COURT OF THE STATE OF NEVADA

ISAURO FUENTES-AGUILAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43234

FILED

JUN 15 2006

ORDER OF REVERSAL AND REMAND

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is a direct appeal from a judgment of conviction. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

On April 5, 2004, the district court convicted appellant Isauro Fuentes-Aguilar, pursuant to a jury verdict, of conspiracy to commit murder and aiding and abetting first-degree murder with the use of a deadly weapon. Fuentes-Aguilar was sentenced to serve a term of 96 months in prison with the possibility of parole in 24 months for the conspiracy concurrently with two consecutive terms of life in prison with the possibility of parole in 20 years for the murder. This appeal followed.

1. Admissibility of out-of-court statements

Fuentes-Aguilar contends that the district court abused its discretion by admitting into evidence out-of-court statements by various declarants through the testimony of Olivia Soriano and Carolyn Villa. He maintains that the admission of these statements violated both the rules against hearsay and the Confrontation Clause of the Sixth Amendment to the United States Constitution.

We partially agree and conclude that the out-of-court statements attributed to Alberto Martinez ("Concho") through Soriano's and Villa's testimony were improperly admitted. We will address the testimony of each witness separately.

Testimony of Olivia Soriano

Fuentes-Aguilar first contends that the testimony of Soriano contained an inadmissible out-of-court statement by Concho. He contends that Soriano's testimony that she overheard Concho say "[s]omething about money" during a party on June 30, 2001—the night the victim Gonzalo Gonzalez was last seen alive—was an out-of-court statement offered by the State for its truth. He maintains that it was therefore inadmissible hearsay.

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted."¹ Although trial courts have broad discretion in determining the admissibility of evidence,² hearsay is generally inadmissible "unless it falls within one of several exceptions."³ This is because hearsay statements are "not subject to the usual tests to show the credibility of the declarant."⁴

Here, when Soriano testified that she overheard Concho say "[s]omething about money," the district court instructed the jury that it was not to consider the statement for its truth. Yet later during closing arguments the State argued that Fuentes-Aguilar entered into a conspiracy with Concho whereby Concho agreed to murder Gonzalez in order to pay an illegal drug debt that Concho owed to Fuentes-Aguilar. In doing so the State stressed that Concho's statement about money was an

¹Weber v. State, 121 Nev. ___, ___, 119 P.3d 107, 122-23 (2005) (quoting NRS 51.035).

²See Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004); Collman v. State, 116 Nev. 687, 703, 7 P.3d 426, 437 (2000).

³Weber, 121 Nev. at ___, 119 P.3d at 122-23.

⁴Id. at ___, 119 P.3d at 123 (quoting Deutscher v. State, 95 Nev. 669, 684, 601 P.2d 407, 417 (1979)).

important reference to a theft of drugs by Gonzalez from Concho, which left Concho unable to pay Fuentes-Aguilar, the source of the drugs. This statement and reference, the State argued, revealed Fuentes-Aguilar and Concho's motive to murder Gonzalez.

Thus, despite the district court's admonishment to the jury not to consider Concho's alleged statement for its truth, the State nevertheless urged the jury to do just that because the meaning and truth of that statement underscored the State's entire theory of the case. Although the district court tried to limit the use of this portion of Soriano's testimony, the State's subsequent emphasis upon the statement and assertion of its truth during its closing argument nullified any value of the district court's initial limiting instruction and injected error into Fuentes-Aguilar's trial.⁵ Furthermore, as explained later below, this statement should not have been admitted since it violated the Confrontation Clause.

Testimony of Carolyn Villa

Fuentes-Aguilar also contends that the testimony of Villa contained inadmissible out-of-court statements. Portions of Villa's testimony contained not only out-of-court statements made by her to detectives in July 2003, but also the out-of-court statements made by others. This evidence, he maintains, was also inadmissible hearsay.

"[A] statement is not hearsay if it is inconsistent with the declarant's testimony and the declarant is 'subject to cross-examination concerning the statement.'"⁶ Extrinsic evidence of a prior inconsistent

⁵See generally Miller v. State, 121 Nev. ___, ___, 110 P.3d 53, 59 (2005) ("A prosecutor may not argue facts or inferences not supported by the evidence.") (quoting Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987)).

⁶Crowley, 120 Nev. at 35, 83 P.3d at 286 (quoting NRS 51.035(2)).

statement may not be admitted unless the "[w]itness is afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate him thereon"⁷ or the statement satisfies those conditions enumerated in NRS 51.035(3).⁸ And when a prior inconsistent statement is admissible, it "may be admitted both substantively and for impeachment" purposes.⁹

Here, Villa made out-of-court statements to detectives in July 2003 that were inconsistent with her trial testimony—she testified under oath that her prior statements to detectives inculcating Fuentes-Aguilar in Gonzalez's murder were lies intended to hurt the Fuentes family. She was both cross- and re-cross-examined by Fuentes-Aguilar's trial counsel regarding these prior statements.

Because Villa's prior out-of-court statements to detectives were inconsistent with her testimony, we conclude that they were admissible under the prior-inconsistent-statement doctrine as nonhearsay. However, our conclusion only applies with respect to those out-of-court statements where Villa was the actual declarant. Portions of Villa's testimony also referred to out-of-court statements made by several other declarants, *i.e.*, Fuentes-Aguilar, Albaro Avila-Gonsales, Leonardo Fuentes, and Concho. To be admissible, each of the out-of-court-statements within Villa's testimony must have an independent basis for admission under the hearsay rules.¹⁰

⁷Id. (quoting NRS 50.135(2)).

⁸Id.

⁹Id.; see Dorsey v. State, 96 Nev. 951, 953, 620 P.2d 1261, 1262 (1980). Fuentes-Aguilar urges this court to reconsider its decisions on the admissibility of prior inconsistent statements. We decline to do so.

¹⁰See NRS 51.067; Weber, 121 Nev. at ___, 119 P.3d at 122-23.

The out-of-court statements of Fuentes-Aguilar were admissible through Villa's prior inconsistent statements as nonhearsay because they were a party's statements offered against him.¹¹ Both Albaro and Leonardo testified at trial and were subject to cross-examination. Their own out-of-court statements were also admissible through Villa's testimony as prior inconsistent statements. However, before testifying concerning Albaro's out-of-court statements, Villa attributed her knowledge of the illegal drugs and Gonzalez's murder to "[r]umors around town" and statements that Concho had allegedly made to Albaro. Thus, elements of Villa's testimony involved the out-of-court statements of unspecified persons and of Concho as relayed to her by Albaro.¹²

Fuentes-Aguilar's counsel objected to the admission of Villa's testimony in regard to what Albaro told her based upon what Concho told Albaro. As counsel explained, "Now we have Albaro saying what someone told Albaro. Albaro is telling her [Villa] what she alleges that Concho said." But the district court overruled the objection, reasoning: "It is possibly a statement made in furtherance of a conspiracy. It is also a declaration against penal interest, falls within that exception. And it will be admissible."

We conclude that the district court erred in relying upon either of these two exceptions as a basis to admit Concho's out-of-court

¹¹See NRS 51.035(3)(a).

¹²At the time of Villa's testimony, the district court instructed the jury that "the rumors around town that somebody is basing a statement on is not admissible evidence." However, the instruction did not resolve the hearsay issue regarding statements attributed to Concho.

statements through Villa's testimony.¹³ Rather, the out-of-court statements attributed to Concho which formed the basis for Albaro's out-of-court statements to Villa were inadmissible. Although the district court later changed its view on the admissibility of these statements and gave curative instructions that the State emphasized during its closing, we conclude that these remedies were insufficient to cure the statements' erroneous admission. Moreover, the district court's instructions did not address references in Soriano's testimony to statements by Concho.

Additionally, the out-of-court statements attributed to Concho through Soriano's and Villa's testimony violated the Confrontation Clause.¹⁴ These statements were nontestimonial in nature.¹⁵ Thus, our pre-Crawford v. Washington analysis applies.¹⁶ To be admissible, such statements must fall under a "firmly rooted" hearsay exception or contain "particularized guarantees of trustworthiness," and the declarant must be

¹³See NRS 51.035(3)(e); NRS 51.345(2); Wood v. State, 115 Nev. 344, 349-50, 990 P.2d 786, 789-90 (1999).

¹⁴See U.S. Const. amend VI.

¹⁵See Crawford v. Washington, 541 U.S. 36, 68-69 (2004); Flores v. State, 121 Nev. ___, ___, 120 P.3d 1170, 1173-81 (2005).

¹⁶See Crawford, 541 U.S. at 68; United States v. McClain, 377 F.3d 219, 221 n.1 (2nd Cir. 2004).

unavailable.¹⁷ The State did not establish either requirement here,¹⁸ and we conclude that the admission of this evidence was constitutionally infirm. It must therefore be "clear beyond a reasonable doubt that the guilty verdict actually rendered in the case was 'surely unattributable to the error.'"¹⁹ We cannot reach such a conclusion here.

Because the State built its case around the truth of Concho's statements as establishing not only the charge that Fuentes-Aguilar conspired with Concho to murder Gonzalez, but also his motive to do so, we conclude that the erroneous admission of Concho's out-of-court statements was highly prejudicial and not harmless beyond a reasonable doubt. Fuentes-Aguilar is entitled to a new trial on this basis. Central to our conclusion is the weight of the competent evidence supporting his conviction. As we will later explain, although sufficient to support Fuentes-Aguilar's conviction, this evidence was far from overwhelming.

2. Admissibility of other-act evidence

Fuentes-Aguilar also contends that the district court abused its discretion by admitting evidence that he sold illegal drugs.²⁰ As previously discussed, statements attributed to Concho were inadmissible,

¹⁷See Ohio v. Roberts, 448 U.S. 56, 66 (1980), overruled in part by Crawford, 541 U.S. at 68-69; see also Franco v. State, 109 Nev. 1229, 1236-37, 866 P.2d 247, 252 (1993).

¹⁸Although there was some indication that Concho may be in Mexico, the State did not clearly establish his unavailability. See NRS 51.055(1)(d).

¹⁹Flores, 121 Nev. at ___, 120 P.3d at 1180 (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)).

²⁰We recognize at the outset of our discussion that the district court correctly prohibited the consideration of other-act evidence regarding Fuentes-Aguilar's alleged illegal drug activity after Gonzalez's murder.

including references to Fuentes-Aguilar's involvement with illegal drugs. But we conclude that evidence regarding Fuentes-Aguilar's involvement with illegal drugs from other sources, such as Fuentes-Aguilar's own out-of-court statements and those by Albaro independent of Concho, were admissible under NRS 48.045(2).²¹

Evidence of Fuentes-Aguilar's involvement with illegal drugs was relevant to show his motive to murder Gonzalez. Villa attributed this evidence to two sources in statements she made at different times and settings—her 2003 interview with detectives regarding Fuentes-Aguilar's statements and her 2004 trial testimony regarding Albaro's statements. It was within the district court's discretion to find this evidence clear and convincing. And the probative value of explaining to the jury why Fuentes-Aguilar murdered Gonzalez—to pay an illegal drug debt—was not substantially outweighed by the danger of unfair prejudice. In reaching this conclusion, we note that the district court properly held a pretrial hearing prior to admitting this evidence and took steps to limit its use by the jury.²² We conclude that the district court did not abuse its discretion by admitting evidence of Fuentes-Aguilar's involvement with illegal drugs for the limited purpose to show his motive to murder Gonzalez.²³

3. Sufficiency of the evidence

Fuentes-Aguilar further contends that insufficient evidence supported his conviction. We disagree.

²¹The district court also admitted this evidence under NRS 48.035(3). In light of our decision, we do not need to address this statute.

²²See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); see also NRS 48.045(2).

²³See Tavares v. State, 117 Nev. 725, 730-31, 30 P.3d 1128, 1131 (2001) (applying Tinch).

Circumstantial evidence alone may support a conviction, and as previously stated, a witness's prior inconsistent statements may be considered as substantive evidence.²⁴ And it is the function of the jury, not this court, to assess the weight of a piece of evidence or testimony and the credibility of the witness presenting it.²⁵ When reviewing the sufficiency of the evidence supporting a conviction, we view the evidence in the light most favorable to the prosecution and ask whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."²⁶

Here, after removing the inadmissible evidence described above, we have carefully reviewed the evidence remaining against Fuentes-Aguilar. We conclude, after viewing this evidence in a light most favorable to the prosecution, that it was sufficient for a reasonable jury to find Fuentes-Aguilar guilty beyond a reasonable doubt of conspiring to murder Gonzalez²⁷ and aiding and abetting his murder in the first-degree with the use of a deadly weapon.²⁸

²⁴See Dorsey, 96 Nev. at 953, 620 P.2d at 1262.

²⁵See Furbay v. State, 116 Nev. 481, 486, 998 P.2d 553, 556 (2000); Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 854 (2000).


²⁶McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).


²⁷See NRS 199.480; NRS 199.490; Bolden v. State, 121 Nev. ___, ___, 124 P.3d 191, 194 (2005); Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004).

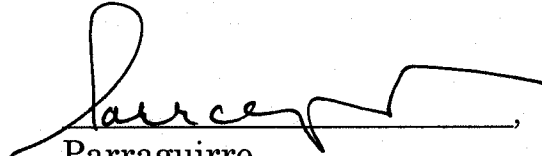
²⁸See NRS 195.020; Sharma v. State, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002); Byford v. State, 116 Nev. 215, 235-37, 994 P.2d 700, 714 (2000).

However, we also conclude that this evidence was far from overwhelming. The absence of strong evidence in this case contributes to our conclusion that the out-of-court statements attributed to Concho that were admitted in violation of either the hearsay rules or constitutional protections, or both, deprived Fuentes-Aguilar of a fair trial. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²⁹


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

cc: Hon. Andrew J. Puccinelli, District Judge
David M. Schieck
Attorney General George Chanos/Carson City
Elko County District Attorney
Elko County Clerk

²⁹Fuentes-Aguilar finally contends that the prosecutor made improper closing arguments to the jury. However, he failed to preserve the issue for appeal, and we conclude that it does not warrant him any relief. See NRS 178.602; Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).