

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDGAR ORTEGA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43309

FILED

DEC 21 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
PRINCIPAL DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, upon a jury verdict, of three counts of sexual assault against a minor under 16 years of age with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

The district court sentenced Ortega to three terms of life imprisonment with the possibility of parole for sexual assault with equal and consecutive terms for use of a deadly weapon. The court further ordered the second and third counts to run concurrently to count one.

Sentence enhancement

Ortega contends that the district court improperly applied a "double enhancement" to his sentence. NRS 200.366 defines sexual assault generally and differentiates between sexual assault that results in bodily harm and sexual assault that does not result in bodily harm. Each category of sexual assault is subject to a different penalty.¹ We conclude that Ortega received only one enhancement (deadly weapon) for each of the underlying primary offenses (sexual assault against a minor under 16

¹NRS 200.366(1)-(3).

years of age).² Therefore, Ortega's sentence is consistent with the plain language of NRS 200.366 and NRS 193.165.

Blood evidence

Ortega argues that the admission of the DNA evidence from the blood sample taken at booking violates the Fourth Amendment.³ Ortega further argues that the district court violated his Sixth Amendment confrontation right by admitting Nurse Clotilde Valone-Dunson's affidavit as proof that she performed a blood draw on him.

Although the nurse drew Ortega's blood without a warrant, consent or exigent circumstances, Ortega did not move to suppress this evidence.⁴ In addition, the State did not process Ortega's blood or introduce evidence from his blood to establish his DNA at trial. We conclude that because the State did not introduce evidence from Ortega's

²NRS 200.366(2)(b)(1) provides that if the victim does not suffer substantial bodily harm, the perpetrator of a sexual assault may be punished by life imprisonment with the possibility of parole in 10 years. NRS 200.366(3)(b)(1) provides that if the victim is under the age of 16 years and if the victim does not suffer substantial bodily harm, the perpetrator of a sexual assault may be punished by life imprisonment with the possibility of parole in 20 years. NRS 193.165(1) provides that if the perpetrator uses a deadly weapon during the commission of a crime, he shall receive a mandatory consecutive sentence equal to the term of imprisonment prescribed by the statute.

³See Schmerber v. California, 384 U.S. 757, 768-71 (1966) (holding that police officers could compel a suspect to participate in a blood draw where he had been arrested for driving under the influence and evidence of that crime would dissipate during the time needed to secure a search warrant).

⁴See United States v. Olano, 507 U.S. 725, 731 (1993).

blood to establish DNA, any error regarding the drawing of the blood or admitting the affidavit was harmless.⁵

Buccal swab evidence

Ortega contends that the State failed to establish a sufficient foundation for admission of the buccal swab included in the biological standards kit. Las Vegas Metropolitan Police Department (LVMPD) Detective Kevin Morgenstern and LVMPD Criminologist Thomas Wahl testified that the swab was taken at the jail and further demonstrated the chain of custody from the time it was taken until the time it was analyzed. As such, the district court did not abuse its discretion by admitting the swab into evidence to establish Ortega's DNA.

Expert witness testimony

Ortega contends that the State gave insufficient notice of its intent to call Wahl as an expert witness in DNA evidence. NRS 174.234(2) requires a party to give 21 days' notice to opposing counsel if it intends to call an expert witness at trial. Although the State gave Ortega only 20 days' notice of its intent to call Wahl, Ortega neither objected to the late notice nor moved for a continuance in order to prepare for Wahl's testimony. Ortega cross-examined Wahl as to his expertise and his findings in this case. We conclude that this one-day delay did not prejudice Ortega. Accordingly, any error in proceeding to trial despite the late notice was harmless.

⁵See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

Exculpatory evidence

Ortega further argues that the State failed to provide him with exculpatory evidence of the presence of semen on the victim's penis in violation of his right to due process.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."⁶ Further, NRS 174.234(2)(c) requires the State to provide, along with its notice of expert witness, a copy of all reports prepared by the expert.

Where a discovery violation is neither deliberate nor willful, the district court may fashion an appropriate remedy.⁷ The district court gave Ortega a copy of the report during Wahl's direct examination and allowed him to cross-examine Wahl as to evidence of consensual intercourse. We conclude that this remedy was sufficient to cure any discovery error and that the error, if any, was harmless.

Faretta canvass

Ortega argues that the district court erred by not performing a proper Faretta⁸ canvass. We disagree. The district court canvassed Ortega on each of the factors set forth in SCR 253(2). Ortega informed the court that he understood all the factors and nevertheless wished to represent himself at trial. We conclude that the Faretta canvass and

⁶Brady v. Maryland, 373 U.S. 83, 87 (1963).

⁷Maginnis v. State, 93 Nev. 173, 176, 561 P.2d 922, 923 (1977).

⁸Faretta v. California, 422 U.S. 806 (1975).

Ortega's responses to the canvass were sufficient to confirm that Ortega knowingly and voluntarily waived his right to counsel.

Jury selection

Ortega contends that the State violated his equal protection rights by using two of its peremptory challenges to exclude the only two African-Americans on the prospective jury panel.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the State from exercising its peremptory challenges to exclude jurors on the basis of their race, and the burden of proof for any alleged racially discriminatory challenge lies with the defendant.⁹ Once a criminal defendant makes a prima facie showing that the State purposefully discriminated in excluding potential jurors, the burden shifts to the State to "come forward with a neutral explanation for challenging [the] jurors."¹⁰ The State's response must allege a viable reason for challenging the potential jurors, and the district court must evaluate the plausibility of the State's reasoning based on the evidence presented.¹¹ The court must then determine whether the State's reasoning is valid or a mere pretext for racial exclusion.¹²

Ortega objected to the State's use of its peremptory challenges to excuse Rosetta Logan and Vincent Turner, the only two African-Americans on the prospective jury panel. As to Logan, the prosecutor

⁹Batson v. Kentucky, 476 U.S. 79, 93 (1986); see Miller-El v. Dretke, ___ U.S. ___, ___, 125 S. Ct. 2317, 2331-32 (2005).

¹⁰Batson, 476 U.S. at 97.

¹¹Miller-El, ___ U.S. at ___, 125 S. Ct. at 2331-32.

¹²Id. at ___, 125 S. Ct. at 2332.

explained that he utilized one of his peremptory challenges because she was unemployed and divorced. The prosecutor further stated that regardless of age or race, he generally excuses unemployed, divorced persons from the jury panel.¹³ As to Turner, the prosecutor explained that he excused Turner because Turner was a retired federal patent judge and was engaged as counsel for a private business. We conclude that the State alleged a valid race-neutral reason for the challenges.¹⁴

Jury instructions

Ortega contends that the district court erred in failing to adequately instruct the jury and in giving “rules of the road” instructions prior to opening statements. We conclude that the “rules of the road” instructions were not improper since the district court specifically informed the jurors that it was not instructing them as to the law. Moreover, Ortega failed to demonstrate that he was prejudiced by these instructions.

Ortega contends that the district court erred in instructing the jury that a butterfly knife was a deadly weapon. We disagree. We have approved jury instructions that state that knives are deadly weapons.¹⁵ A

¹³The prosecutor also excluded John Muncy, a white male, because he was divorced and unemployed.

¹⁴We have also considered Ortega’s contentions regarding (1) the district court’s voir dire; (2) Ortega’s challenges for cause; (3) his exercise of peremptory challenges; and (4) the alternate juror selection procedure, and conclude that Ortega waived appellate review of these remaining assignments of error by not objecting to them at trial. We further conclude that any errors by the district court in these matters of jury selection were harmless.

¹⁵See, e.g., Steese v. State, 114 Nev. 479, 499, 960 P.2d 321, 334 (1998); see also Hutchins v. State, 110 Nev. 103, 111, 867 P.2d 1136, 1141

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butterfly knife is specifically designed as a concealable weapon. We further conclude that since Ortega did not object to the instruction, he waived appellate review of the issue.¹⁶

Witness vouching

Ortega argues that LVMPD Detective Timothy Moniot impermissibly vouched for the victim's credibility by suggesting that the victim's statement to the police was truthful. First, we note that Ortega did not object to, or move to strike, Moniot's testimony.¹⁷ Second, Ortega asked Detective Moniot his impression as to the victim's credibility.

We conclude that Ortega opened the door for, and invited, Moniot's response. Under these circumstances, the testimony did not constitute impermissible witness vouching.

Sufficiency of the evidence

Ortega contends that the State failed to prove beyond a reasonable doubt that he used a deadly weapon during the commission of the crimes. In determining the sufficiency of the evidence, the critical question is "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."¹⁸ At trial, the

... continued

(1994) (noting, in dicta, that "in addition to their more commonplace uses, knives are often designed as weapons and have been so used throughout history").

¹⁶Id.

¹⁷Gallego, 117 Nev. at 365, 23 P.3d at 239.

¹⁸Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

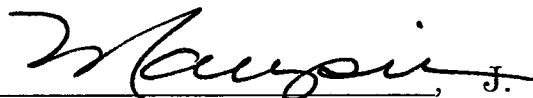
victim testified that Ortega placed a butterfly knife against his throat and told the victim that he was going to rape him. Although the victim testified that he did not see the knife during the forced sexual encounters, he did testify that he felt threatened and that he would not have engaged in sexual activity with Ortega but for the knife. We conclude that this evidence was sufficient for a reasonable jury to have concluded beyond a reasonable doubt that Ortega sexually assaulted the victim with the use of a deadly weapon.

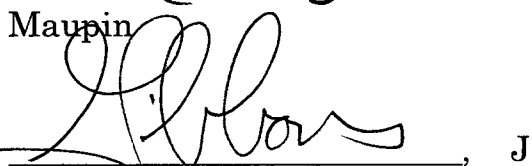
Judgment of conviction

The district court's judgment of conviction incorrectly stated that Ortega was convicted as a result of a guilty plea rather than a jury trial.

Therefore, we

ORDER the judgment of the district court AFFIRMED, but REMAND for further proceedings to correct the judgment of conviction.

 J.

Maupin
 J.
Gibbons

 J.
Hardesty

cc: Hon. Stewart L. Bell, 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