IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPH EUGENE GOODMAN, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43434

FILED

NOV 16 2005

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a direct appeal from a judgment of conviction, upon a jury verdict, of two counts of first-degree murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellant Ralph Eugene Goodman, III, was convicted of stabbing and shooting David Bender and Steven Szany in the victims' Henderson apartment. On appeal, Goodman argues that (1) the State failed to adequately advise him of its witnesses under NRS 174.234, (2) the district court erred in giving three faulty jury instructions, (3) the State committed prosecutorial misconduct during its rebuttal closing argument, and (4) cumulative error below mandates a new trial.

Disclosure of witnesses under NRS 174.234

On September 5, 2003, the State filed a notice of witnesses indicating that it intended to call "Amanda Cardiff . . . Address Unknown" to testify. At trial, Cardiff, whose last name is now Haefs, testified that she and Steven Szany were dating and that Goodman had threatened Szany on at least three separate occasions. Defense counsel moved for a mistrial on the grounds that the State had failed to provide adequate discovery regarding Haefs' testimony. The district court denied the

motion since Goodman's pleadings indicated that he was on notice as to Haefs' potential testimony.

Nevada law requires the State to notify the defense of the name and last known address of witnesses that it intends to call during its case in chief.[1] The statute does not require that the State perform investigations on behalf of defense counsel in order to locate addresses for its intended witnesses.

In Buckley v. State, we held that defense counsel has a duty to diligently pursue information during discovery.[2] "If appellant was dissatisfied with the discovery process he should have notified the court of this fact and sought a continuance. Since he went to trial without seeking redress for the alleged inadequate discovery, he cannot now be heard to complain about the discovery process."[3] There is no evidence that Goodman sought a continuance on the grounds that he could not locate Haefs or that the discovery process was inadequate. Since he went to trial without seeking redress, he cannot claim the discovery provided by the State was inadequate.

Jury instructions

This court has long held that "[a]ll instructions to a jury should be read in the light of each other and considered in their entirety."[4] No reversible error exists, even if instructions are erroneous or incomplete, so long as, when read together, the instructions "are

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[1]NRS 174.234(1)(a)(2) (emphasis added).

[2]95 Nev. 602, 604, 600 P.2d 227, 228 (1979).

[3]Id.

[4]Cutler v. P. S. P. M. Co., 34 Nev. 45, 54, 116 P. 418, 422 (1911).

consistent and state correct principles of law, and are not calculated to mislead the jury."[5]

Instruction 6

Instruction 6 reads:

> The prosecution is not required to present direct evidence of defendant's state of mind as it existed during commission of crime, jury may infer existence of particular state of mind from circumstances disclosed by evidence. The intention to kill may be ascertained or deduced from the facts and circumstances of the killing, such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act.

Goodman objects to the first sentence of Instruction 6. That sentence was taken from our opinion in Miranda v. State, which noted that "[t]he prosecution is not required to present direct evidence of a defendant's state of mind as it existed during the commission of a crime, and the jury may infer the existence of a particular state of mind from the circumstances disclosed by the evidence."[6]

Goodman argues that Instruction 6 was improperly given because "the indefinite article a has been removed . . . and replaced with the definite article the changing the meaning of the clause from a general statement of law to a statement particularized to both [Goodman] and the crime charged." As a result of this grammatical change, Goodman argues that "a reasonable jury could have interpreted this language as a conclusive presumption that [Goodman] had the requisite intent if they

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[5]Id.

[6]101 Nev. 562, 568, 707 P.2d 1121, 1125 (1985) (emphasis added).

found the crime had been committed; thus shifting the burden of persuasion on the element of intent, a due process violation."

Goodman's argument is without merit. Though Instruction 6 is technically incomplete since several words from the Miranda opinion are left out of the instruction, the result still constitutes an accurate statement of Nevada law. Thus, the instruction was not erroneous and the district court did not err in giving it.

Instruction 10

Instruction 10 is a stock instruction and states the elements of the crime of robbery. Goodman objects to the final sentence of Instruction 10, which reads, "The value of property or money taken is not an element of the crime of Robbery, and it is only necessary that the State prove the taking of some property or money." Goodman argues that although this final sentence is a correct statement of law, its placement at the end of Instruction 10 "created an ambiguity that may have mislead [sic] the jury into believing that a finding of force or fear of force, the gravamen of robbery, was not required."

The sentence was drawn from our opinion in Williams v. State.[7] In Williams, we noted that "[t]he State is not required to prove the entire amount or value of property taken in a robbery, only that some property was indeed taken."[8] Thus, as Goodman concedes, the sentence represents a correct statement of law.

Furthermore, taken in context, the statement does not render the instruction ambiguous or misleading to the jury. Instruction 10

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[7]93 Nev. 405, 566 P.3d 417 (1977).

[8]Id. at 407, 566 P.2d at 419.

correctly states: "Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future." The disputed sentence merely clarifies that the value of the property taken by force is irrelevant. It does not, as Goodman suggests, instruct that a taking by force is not required to prove robbery. The instruction was not erroneous, and the district court did not err in giving it.

Instruction 34

Goodman argues that Instruction 34, the statutory reasonable doubt instruction, is unconstitutional. Instruction 34 is drawn, verbatim, from NRS 175.211(1). At trial, Goodman offered alternative instructions regarding the reasonable doubt standard. However, pursuant to NRS 175.211(2), no other jury instruction on reasonable doubt is permitted. Goodman concedes that this court has upheld the constitutionality of the statutory reasonable doubt instruction.[9] Nevertheless, Goodman argues that the instruction is unconstitutional. We disagree and do not need to reexamine the constitutionality of this instruction.

Prosecutorial misconduct

During closing argument, defense counsel suggested that the State, using its allegedly infinite prosecutorial power, was attempting to convict Goodman by presenting lies and false evidence:

> [Y]ou have to understand that the Constitution protects Ralph Goodman. The Constitution protects you and me, it protects we, the people. That's why there's a burden of proof. It does not protect them, it does not protect the State, because

[9]See, e.g., Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004); Lord v. State, 107 Nev. 28, 38-40, 806 P.2d 548, 554-56 (1991).

> the State doesn't need protection. The State already has the power. They have the control. They're the ones who take the photographs of the evidence, they're the ones who decide what they're going to preserve and what they're not going to preserve, what are they going to test, how are they going to test it, which tests, how many times, when are they going to do it. They have the power.
>
> . . . .
>
> Ladies and gentlemen, don't allow them to fool you. Don't be afraid to ask questions . . . Because if you don't, then who will? If we allow them to convict individuals based on cheating and lying and desperate acts, then who is going to be next?
>
> . . . .
>
> During the selection process when you were all here you probably thought that I was just ranting on crazy forever and ever about the burden of proof and the presumption of innocence. But I hope now that you can appreciate the significance of that, because the burden of proof that is on the State is the only thing that can balance the scales that are automatically tipped in their favor from day one.

The State began its rebuttal closing argument by addressing those comments:

> Defense counsel began her argument by telling you that we have the best criminal justice system in the world. And we do. And Ralph Goodman is a lucky man because of that. This is a very civilized process for him. He's had lawyers defending him, and he brought evidence to court, his lawyers had access to that evidence, and there's been a process where you weigh the evidence against him. He's lucky that process was in place.

> David Bender and Steve Szany, they weren't so lucky, were they. They weren't lucky on August the 22nd when someone along with Ralph Goodman burst into their apartment and killed them both.
>
> The defense in this case has been a little bit of a work in progress sort of shotgun approach. During last week they suggested to you that it wasn't Ralph Goodman at all who committed these murders. Steve Szany - -
>
> [DEFENSE COUNSEL]: Objection.
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> THE COURT: Overruled. Go ahead.

"A prosecutor has 'a duty to refrain from improper methods calculated to produce a wrongful conviction.'"[10] However, a prosecutor's statements are not misconduct, even if they would not otherwise be allowed, when the statements are made in direct response to defense counsel's argument.[11] Indeed, "[t]he strongest factor against reversal on the grounds that the prosecutor made an objectionable remark is that it was provoked by defense counsel."[12] Here, the prosecutor's statement that Goodman was "lucky" regarding the legal system's protection of criminal defendants was provoked by defense counsel's argument that the State had abused the system in an attempt to falsely convict Goodman. Accordingly, the statements do not constitute misconduct.

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[10]Rippo v. State, 113 Nev. 1239, 1251, 946 P.2d 1017, 1025 (1997) (quoting Berger v. United States, 295 U.S. 78, 88 (193[5])).

[11]See Greene v. State, 113 Nev. 157, 178, 931 P.2d 54, 67 (1997); Owens v. State, 96 Nev. 880, 885, 620 P.2d 1236, 1239 (1980); Pacheco v. State, 82 Nev. 172, 179-80, 414 P.2d 100, 104 (1966).

[12]Greene, 113 Nev. at 178, 931 P.2d at 67.

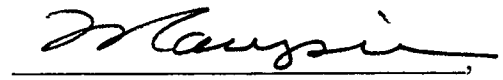
Cumulative error

We have held that cumulative error below may justify the order of a new trial, even if the errors, standing alone, are harmless.[13] As set forth above, the district court did not err. Thus, Goodman is not entitled to a new trial under the cumulative error doctrine.

CONCLUSION

We conclude that the State's notice of witnesses complied with the plain language of NRS 174.234(1)(a)(2). The district court did not err in giving the disputed jury instructions because each instruction accurately states Nevada law without ambiguity. The State did not commit prosecutorial misconduct because prosecutors are entitled to respond to defense counsel's argument. Finally, cumulative error is not applicable. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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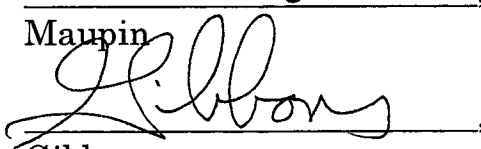

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Kathy A. Hardcastle, District Judge
Special Public Defender David M. Schieck
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[13]See, e.g., Byford v. State, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000); Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986).