

IN THE SUPREME COURT OF THE STATE OF NEVADA

SALLY D. VILLAVERDE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43443

**FILED**

FEB 15 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary, one count of murder with the use of a deadly weapon, and one count of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

Appellant Sally Villaverde was convicted based on his involvement in the murder of Enrique Caminero. Villaverde appeals, raising numerous points of error. We conclude Villaverde's claims lack merit and affirm the judgment of conviction.

Admission of preliminary hearing testimony

Villaverde claims the district court erred in admitting the transcript of the preliminary hearing testimony of his ex-girlfriend Teresa Gamboa. Villaverde claims this testimony was inadmissible hearsay and violated his Sixth Amendment right to confrontation.

Gamboa's preliminary hearing testimony included statements made by Villaverde's co-defendants Rene Gato and Roberto Castro. As a result, our analysis is split into two separate inquiries: (1) the admissibility of Gamboa's own testimony from the preliminary hearing; and (2) the admissibility of Gato and Castro's statements.

(1) Gamboa's preliminary hearing testimony

We conclude that the district court properly admitted Gamboa's preliminary hearing testimony. The transcript of a witness's preliminary hearing testimony is admissible non-hearsay if the defendant was represented by counsel at the hearing, counsel cross-examined the witness, and the witness is shown to be unavailable at the time of trial.<sup>1</sup> Unavailability includes "when the witness is sick, out of the state, dead, or persistent in refusing to testify despite an order of the judge to do so, or when his personal attendance cannot be had in court."<sup>2</sup> Villaverde argues Gamboa cannot be classified as unavailable. However, we agree with the district court that the State committed no wrongdoing in releasing Gamboa and exercised reasonable diligence in trying to locate her prior to trial. As a result, the prior testimony was not hearsay.

Further, admission of Gamboa's testimony did not implicate Villaverde's Sixth Amendment rights. The admission of out-of-court statements only violates a defendant's Sixth Amendment rights if the statements are admitted without the ability to cross-examine the declarant and the statements are "testimonial" in nature.<sup>3</sup> The confrontation element is satisfied because Villaverde had the ability to cross-examine Gamboa at the preliminary hearing and, in fact, did so.

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<sup>1</sup>Drummond v. State, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970).

<sup>2</sup>Funches v. State, 113 Nev. 916, 922, 944 P.2d 775, 778 (1997) (quoting NRS 171.198(6)).

<sup>3</sup>Crawford v. Washington, 541 U.S. 36, 68 (2004).

(2) Gato and Castro's statements

We also conclude that the district court properly admitted that portion of Gamboa's testimony concerning Gato and Castro's out-of-court statements. Statements of co-conspirators are not considered hearsay if the statements are made "during the course and in furtherance of the conspiracy" and are being offered against the party.<sup>4</sup> "The duration of a conspiracy is not limited to the commission of the principal crime, but can continue during the period when coconspirators perform affirmative acts of concealment."<sup>5</sup> Gato and Castro's statements, both before and after the incident, were properly considered non-hearsay, because they were made before the commission of the crime and after the incident in an attempt to conceal the parties' involvement.

In addition, admission of these statements did not violate Villaverde's Sixth Amendment rights. Although Villaverde did not have the opportunity to cross-examine Gato and Castro, we conclude that the out-of-court statements to which Gamboa testified to were not testimonial in nature. In fact, Crawford v. Washington acknowledges that statements of co-conspirators are by their nature not testimonial.<sup>6</sup> Because the statements were not testimonial, cross-examination of Gato and Castro was not constitutionally mandated.

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<sup>4</sup>NRS 51.035(3)(e).

<sup>5</sup>Foss v. State, 92 Nev. 163, 167, 547 P.2d 688, 691 (1976).

<sup>6</sup>541 U.S. at 56 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example, business records or statements in furtherance of a conspiracy.").

Villaverde also claims that admitting out-of-court statements of his co-defendants violated his Sixth Amendment rights under Bruton v. United States,<sup>7</sup> because he could not confront and cross-examine Gato and Castro. The State, however, correctly points out that Bruton only prohibits the admission of statements of co-defendants when the defendants are being tried jointly.<sup>8</sup> Because Villaverde was not tried with Castro or Gato, Bruton is not applicable.

For the foregoing reasons, we conclude that Gamboa's preliminary hearing testimony was properly admitted in its entirety.

Admission of testimony regarding pre-existent conspiracy

Villaverde also claims the district court improperly admitted statements concerning a prior conspiracy to rob and murder the victim. Villaverde argues there was insufficient evidence linking him to this prior conspiracy; therefore, the statements were not admissible as statements of co-conspirators. We conclude Villaverde's claim lacks merit.

"District courts are vested with considerable discretion in determining the relevance and admissibility of evidence."<sup>9</sup> Before a statement may be introduced under the statement of co-conspirator exemption to the hearsay rule, "it must be determined by reference to independent evidence that a conspiracy existed."<sup>10</sup> The amount of

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<sup>7</sup>391 U.S. 123 (1968).

<sup>8</sup>Id. at 135-36.

<sup>9</sup>Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998).


<sup>10</sup>Fish v. State, 92 Nev. 272, 274-75, 549 P.2d 338, 340 (1976).


independent evidence may be slight; in fact "it is enough that only prima facie evidence of the fact is produced."<sup>11</sup>

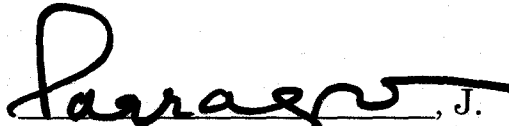
The State produced prima facie evidence establishing that Villaverde was a necessary conduit between the victim and his co-defendants. The State's theory throughout its case was that Villaverde was needed to contact the victim and lure him to the motel where he could be robbed and killed. Thus, the statements were admissible as statements of co-conspirators.

We conclude that the district court properly admitted the transcript of Gamboa's preliminary hearing testimony and the statements regarding the pre-existent conspiracy. We have reviewed Villaverde's remaining claims and conclude they are without merit.<sup>12</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Rose

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

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<sup>11</sup>Id. at 275, 549 P.2d at 340.

<sup>12</sup>These claims were: (1) prosecutorial misconduct; (2) insufficient evidence; (3) denial of motion for a mistrial; (4) denial of motion for an advisory verdict; (5) denial of motion in limini; (6) wrongful admission of testimony from the victim's mother; and (7) abuse of discretion by the sentencing court.

cc: Hon. Michael A. Cherry, District Judge  
Pike & Associates  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk