IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIUS BRADFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43446

FILED

APR 18 2006

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Julius Bradford was convicted by a jury of first-degree murder with the use of a deadly weapon and attempted robbery with the use of a deadly weapon, for the shooting death of Benito Zambrano-Lopez. Bradford was sentenced to two consecutive life sentences, with the possibility of parole, to be served concurrently with two 24 to 72 month sentences. Bradford appealed, arguing that (1) the district court erroneously instructed the jury, and (2) the prosecution committed misconduct by introducing gang-affiliation evidence incorrectly describing the reasonable doubt standard during its closing argument.

We conclude that the erroneous jury instructions amounted to plain error, which affected Bradford's substantial rights. Although we are highly concerned with the State's clear misconduct concerning gang-affiliation evidence and reference to it during the trial, we conclude that the misconduct amounted to harmless error. We reverse Bradford's conviction and sentence based on the erroneous jury instructions and

remand for a new trial.[1] The parties are familiar with the facts, and we do not recount them further except as necessary for our disposition.

Erroneous instructions

Bradford argued that the district court erroneously instructed the jury regarding (1) accomplice liability and co-conspirator liability and (2) adoptive admissions. Bradford failed to object to both issues and, therefore, we review these issues for plain error.[2] We conclude that both errors amounted to plain error requiring reversal.

Accomplice and co-conspirator liability

Bradford was charged with the specific intent crimes of first-degree murder and attempted robbery.[3] To convict a defendant of a specific intent crime, the State must prove that the defendant had the specific intent to commit the crime.[4] Accordingly, a vicarious co-conspirator liability conviction based on a foreseeability standard is error because foreseeability is a negligence standard, not a standard of criminal intent.[5] Also, to find a defendant criminally liable for aiding and abetting

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[1]Bradford also argued that (1) the district court erred by granting the State's challenge under Batson v. Kentucky, 476 U.S. 79 (1986), to one of Bradford's peremptory strikes, (2) there was insufficient evidence to support the convictions and deadly weapon enhancements, and (3) the district court erred by admitting uncharged misconduct. We have carefully considered Bradford's assertions, and conclude that they are without merit.

[2]Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

[3]Walker v. State, 116 Nev. 442, 447, 997 P.2d 803, 807 (2000); Tanksley v. State, 113 Nev. 844, 849, 944 P.2d 240, 243 (1997).

[4]Bolden v. State, 121 Nev. ___, ___, 124 P.3d 191, 200-01 (2005).

[5]See id. at ___, 124 P.3d at 196.

in the commission of the crime, it is necessary that the defendant "have knowingly aided the other person with the intent that the other person commit the charged crime."[6]

Jury instruction number three instructed on the State's criminal liability theories. The pertinent portion of the instruction stated

> Count I, murder with use of a deadly weapon.
>
> . . . .
>
> [T]he Defendants being responsible under one or more of the following principles of criminal liability, to-wit: . . . (3) by conspiring with each other to commit the offense of robbery whereby each defendant is vicariously liable for the foreseeable acts of the other conspirators when the acts were committed in furtherance of the conspiracy; and/or (4) by defendants aiding or abetting each other in the commission of the crime by directly or indirectly counseling, encouraging, hiring, commanding, inducing or procuring each other in the commission of the crime. . . .
>
> . . . .
>
> Count II, attempt robbery with use of a deadly weapon.
>
> . . . .
>
> [T]he defendants being responsible under one or more of the following principles of criminal liability, to-wit: . . . (2) by defendants conspiring with each other to commit the offense of robbery whereby each defendant is vicariously liable for the foreseeable acts of the other conspirators when the acts were committed in furtherance of the conspiracy; and/or (3) by defendant[s] aiding or abetting each other in the commission of the crime

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[6]Sharma v. State, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002).

> by directly or indirectly counseling, encouraging, hiring, commanding, inducing or procuring each other in the commission of the crime. . . .

Jury instruction number three plainly contained language prohibited under Bolden v. State and, under Sharma v. State, the instruction impermissibly instructed on aiding and abetting without stating that Bradford specifically intended to aid or abet in the commission of the crimes.[7] Although the State also instructed on other liability theories, when a case is submitted to the jury on alternative theories, if one of the theories is legally erroneous and the verdict fails to state which theory it is based on, reversal is generally required.[8] Accordingly, we reverse Bradford's conviction.

Adoptive Admissions

We also conclude that the district court committed plain error when it instructed on adopted admissions. Bradford correctly argues that jury instruction number nine, which dealt with adoptive admissions, failed to include that the statements must be made under circumstances that "in ordinary experience, dissent would have been expected if the communication were incorrect."[9] Bradford argues that because the statements at issue were made shortly after the shooting, when Tyrone Williams still had possession of his gun, Bradford would have faced "grave

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[7]Although jury instruction number four stated "To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do[] [t]he act," this was insufficient to cure the defect in jury instruction number three.

[8]Bolden, 121 Nev. at ___, 124 P.3d at 194-95.

[9]Maginnis v. State, 93 Nev. 173, 175, 561 P.2d 922, 923 (1977).

danger" had he confronted Williams or dissented to the statements. Based on that theory, we conclude that the defect in the adopted admissions instruction was plain error. Again, based on the erroneous instructions, Bradford's conviction must be reversed and a new trial held.

Prosecutorial misconduct

Bradford argues that the State committed prosecutorial misconduct by introducing gang-affiliation evidence in violation of a court order and by erroneously describing the reasonable doubt standard during its closing argument.

Gang-affiliation evidence

The district court ordered that no gang-affiliation evidence could be introduced at trial. Bradford argues that the State, however, introduced gang-affiliation evidence through Detective McGrath's testimony and the State's continual use of monikers. We agree. However, the district court admonished Detective McGrath's testimony, Bradford's counsel also used monikers, and Bradford failed to object to the State's use of monikers. In light of the evidence, we conclude these errors were harmless beyond a reasonable doubt.

However, we caution the State that we will not tolerate further misconduct of this nature, especially in Bradford's retrial. The State's unnecessary use of monikers extended far beyond Bradford's use of monikers. Additionally, in the State's rebuttal closing argument, it said

> Why isn't [Nelson Rogers] here? Potentially two reasons, aren't there? One—and remember, what is Nelson Rogers' nickname? Locster. Hmm? TT Loc, Locster; T-Meez, Lil' Mizz. Testified they were friends. Same root in their name. That's one reason he's not here, potentially.
>
> Ashton Parker gives you the other [reason]: It's not safe to be a witness against TT Loc.

Not only was the State's use of monikers unnecessary, it amounted to deliberate references and intimations regarding Bradford's gang affiliation. This violated a court order, and we also remind the State that when gang affiliation is not relevant to a proceeding, it violates the defendant's constitutional rights to introduce such evidence during trial.[10]

Reasonable doubt statement

It is impermissible to alter or attempt to redefine the Legislature's definition of reasonable doubt.[11] And "[a]ny attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify."[12] Nevertheless, during closing argument, the State said:

> Ladies and gentlemen, it is not your job to look for reasonable doubt. If there is reasonable doubt in this case, it will surely find you, and it has not. We ask that you return a verdict of guilty on all counts. Thank you, your Honor.

This statement improperly represented the State's burden of proof and amounted to prosecutorial misconduct. However, Bradford failed to object to this argument, the comment came after the State's discussion of the proper burden of proof beyond a reasonable doubt, and the jury was correctly instructed on reasonable doubt. Thus, we conclude that the statement, although highly erroneous, did not amount to plain error.

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[10]Dawson v. Delaware, 503 U.S. 159, 163-69 (1992).

[11]NRS 175.211; McCullough v. State, 99 Nev. 72, 75, 657 P.2d 1157, 1159 (1983).

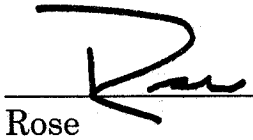
[12]McCullough, 99 Nev. at 75, 657 P.2d at 1159.

However, we are highly concerned with the State's flagrant disregard for a clear statutory proscription. We have previously cautioned prosecutors "that they venture into calamitous waters when they attempt to quantify, supplement, or clarify the statutorily prescribed reasonable doubt standard."[13] Again, the State should be aware that we will not tolerate such statements in the future, and the State should be cautious when discussing its burden of proof. As we have previously held, a new trial can be the appropriate remedy when the jury is improperly informed about the State's burden of proof.[14]

CONCLUSION

Based on the erroneous jury instructions, we

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



_____, C.J.
Rose

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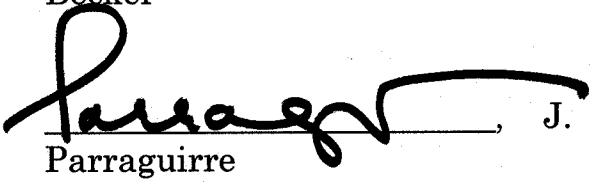
Becker



_____, J.
Parraguirre

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[13]Holmes v. State, 114 Nev. 1357, 1366, 972 P.2d 337, 343 (1998).

[14]Id. at 1366, 972 P.2d at 343; McCullough, 99 Nev. at 74-76, 657 P.2d at 1158-59.

cc: Hon. Michelle Leavitt, District Judge
JoNell Thomas
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Clark County Clerk