

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON K. DANIELS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44071

FILED

NOV 29 2006

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Appellant Aaron Daniels was convicted of murder with the use of a deadly weapon, conspiracy to commit robbery, robbery with the use of a deadly weapon, and first-degree kidnapping with the use of a deadly weapon. He was sentenced to life in prison with the possibility of parole after 20 years for murder, plus an equal and consecutive term for the deadly weapon enhancement. He also received a consecutive life term in prison with the possibility of parole after five years for kidnapping, plus an equal and consecutive term for the deadly weapon enhancement. Finally, the district court sentenced Daniels to definite terms in prison for conspiracy to commit robbery and robbery with the use of a deadly weapon.

Daniels raises several claims on appeal. He first argues that his murder conviction cannot stand because the evidence only showed that he abducted the victim and no direct evidence proved that he murdered him. In considering whether sufficient evidence supports a conviction,

"[t]he relevant inquiry . . . 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.'"¹ "Circumstantial evidence alone may support a conviction."²

The prosecution pursued the murder charge on the following theories: the murder was premeditated and deliberate; the murder was committed during the perpetration or attempted perpetration of a robbery and/or kidnapping; Daniels aided or abetted others in murdering the victim; and he was vicariously liable as a coconspirator.

In Sharma v. State, this court held that "in order for a person to be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime."³ Similarly, in Bolden v. State, we held that to convict a defendant of a specific intent crime under the theory of vicarious coconspirator liability, the State is required to prove that he had the specific intent to commit that offense.⁴

¹Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

²Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

³118 Nev. 648, 655, 56 P.3d 868, 872 (2002).

⁴121 Nev. ___, ___, 124 P.3d 191, 200 (2005).

Here, regarding murder, the district court instructed the jury on aiding or abetting liability and vicarious coconspirator liability; however, the instructions were inadequate because they failed to inform the jury that Daniels must have acted with the specific intent to kill in regard to either theory. But Daniels did not object to the instructions. Generally, the failure to object at trial precludes appellate review of an issue.⁵ Nonetheless, this court may address an error if it was plain and affected a defendant's substantial rights.⁶ To establish that his substantial rights were affected, the appellant bears the burden of showing that the error was prejudicial.⁷ We conclude that the error was plain in regard to the theory of aiding and abetting. Sharma, unlike Bolden, had already been decided by the time of Daniels's trial and clearly set forth the specific intent component necessary to find a defendant liable for specific intent offenses under a theory of aiding or abetting. Therefore, the instruction given was plainly erroneous.

Daniels must also demonstrate prejudice. Because the jury returned a general verdict, the theory upon which it relied to convict Daniels of murder is unknown. In closing arguments, the prosecution conceded that no evidence established that Daniels shot the victim or acted with premeditation and deliberation in the murder. Although the

⁵Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

⁶Id.; NRS 178.602.

⁷Gallego, 117 Nev. at 365, 23 P.3d at 239.

prosecution argued that the evidence supported felony murder, it focused the jury's attention primarily on vicarious coconspirator liability and, to a lesser extent, aiding or abetting. There was no evidence of Daniels's precise role in the killing; given this circumstance and the prosecutor's argument, it appears likely that jurors relied on the last two theories to convict him of murder. But there was essentially no evidence supporting a finding that he had the specific intent to kill required under a theory of aiding or abetting. We conclude therefore that Daniels has demonstrated prejudice to establish plain error.⁸ Therefore, we conclude that Daniels's conviction for murder must be reversed on this basis. Should Daniels be retried for this offense, we are confident that the district court will properly instruct the jury on the mens rea required to convict him under a theory of aiding or abetting (or as a coconspirator).

Daniels does not challenge the factual sufficiency of his kidnapping conviction, but it is a specific intent offense that also implicates Sharma and Bolden. The prosecution proceeded on the following theories in regard to kidnapping: Daniels directly committed the kidnapping; he aided or abetted others in kidnapping the victim; and he was vicariously liable as a coconspirator. Again, as Daniels did not object to the aiding or abetting or the vicarious coconspirator liability

⁸Cf. Phillips v. State, 121 Nev. 591, 597, 119 P.3d 711, 716 (2005) ("If several theories of criminal liability are presented to the jury and one is legally insufficient or unconstitutional, a general verdict cannot stand Conversely, if the theories are all legally sufficient, a general verdict can stand even if sufficient evidence supports only one of the theories.").

instructions, we review his challenge to the validity of his kidnapping conviction for plain error affecting substantial rights. Because Sharma was established law, it was plain error not to instruct the jury regarding the specific intent required to establish liability under a theory of aiding and abetting.

We conclude, however, that Daniels has not demonstrated prejudice affecting his substantial rights. The jury returned a general verdict respecting the kidnapping charge; therefore, once again we cannot discern which theory jurors relied upon to convict Daniels of kidnapping. However, unlike the dearth of evidence regarding the circumstances of the murder, the evidence overwhelmingly established Daniels's direct participation in kidnapping the victim, and we conclude that there is little probability that jurors relied on the theory of aiding or abetting (or of vicarious coconspirator liability) in finding Daniels guilty of kidnapping.

Daniels next argues that the district court erred in admitting a number of recorded telephone conversations he made to individuals outside the Clark County Detention Center. Although Daniels objected to their admission at trial, none of the bases upon which he challenges their admission on appeal were presented for the district court's consideration. "Where a defendant fails to present an argument below and the district court has not considered its merits, we will not consider it on appeal."⁹

⁹McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998); see Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 584 (1992).

However, even if Daniels's arguments were properly before us, we conclude that they lack merit.

Daniels further contends that the district court erred in not suppressing his statement to Las Vegas Metropolitan Police Department Detective Phillip Ramos. He alleges that his statement was involuntary because prior to advising him of his Miranda¹⁰ rights, Detective Ramos informed him as follows: "since you are on probation and one of the conditions of your probation is that you cooperate with law enforcement and investigations, I have to read you your rights." Daniels contends that this warning was improper because Detective Ramos implied that his probationary status obligated him to submit to interrogation.

"The Fifth Amendment privilege against self-incrimination requires that a suspect's statements made during custodial interrogation not be admitted at trial if the police failed to first provide a Miranda warning."¹¹ We consider the totality of the circumstances in determining if Miranda warnings were properly given and whether the defendant validly waived them.¹² "A waiver is voluntary if, under the totality of the circumstances, the confession was the product of a free and deliberate

¹⁰Miranda v. Arizona, 384 U.S. 436 (1966).

¹¹Koger v. State, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001).

¹²Id.; Harte v. State, 116 Nev. 1054, 1062, 13 P.3d 420, 426 (2000).

choice rather than coercion or improper inducement."¹³ We conclude that Detective Ramos's preMiranda statement constituted an improper inducement, rendering Daniels's waiver of his rights involuntary, and that the district court erred in denying his motion to suppress. Any error in this regard is reviewed under a harmless error analysis.¹⁴

As we are reversing Daniels conviction for murder pursuant to Sharma, we apply this analysis only to his remaining convictions. Considering all of the evidence presented, we conclude that any prejudice resulting from the admission of this evidence was harmless beyond a reasonable doubt respecting those convictions.

Daniels next argues that the district court erred in not striking Nelson Rodgers's testimony. However, he failed to object to the admission of this evidence. "Failure to object to the admission of evidence generally precludes review by this court, although the court may address plain error."¹⁵ Daniels contends that Rodgers's testimony should have been stricken because the police extorted testimony from him by agreeing to refrain from pressing charges in an unrelated matter if Rodgers testified that Daniels admitted being present when the victim was shot.

¹³Mendoza v. State, 122 Nev. ___, ___, 130 P.3d 176, 181-82 (2006) (quoting U.S. v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998)).

¹⁴See Arizona v. Fulminante, 499 U.S. 279, 295 (1991); Tomarchio v. State, 99 Nev. 572, 578-79, 665 P.2d 804, 808 (1983).

¹⁵Herman v. State, 122 Nev. ___, ___, 128 P.3d 469, 472 (2006); see NRS 178.602.

Daniels contends that this bargain resulted in the procurement of perjured testimony.

In Sheriff, Humboldt County v. Acuna, this court held that "any consideration promised by the State in exchange for a witness's testimony affects only the weight accorded the testimony, and not its admissibility."¹⁶ The terms of the agreement "must be fully disclosed to the jury, the defendant or his counsel must be allowed to fully cross-examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction."¹⁷

Here, defense counsel cross-examined Rodgers thoroughly on this matter and others, drawing out inconsistencies between his statements to police and his testimony. Daniels does not allege and the record does not reveal the terms of any promise that were not presented to the jury. Finally, the district court instructed the jury at the conclusion of evidence that it could consider a witness's motive, bias, or prejudice in determining his credibility.

Daniels also contends that Rodgers's testimony was perjurious and should have been stricken. Although one could view Rodgers as an inconsistent witness, we conclude that nothing in the record suggests that the prosecution or the police suborned perjury. Therefore, Daniels fails to

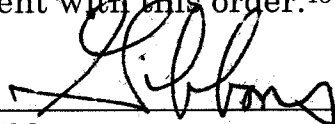
¹⁶107 Nev. 664, 669, 819 P.2d 197, 200 (1991).

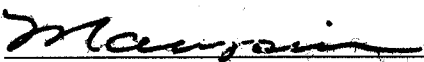
¹⁷Id.


demonstrate any plain error in regard to the admission of Rodgers's testimony.

In conclusion, we reverse Daniels's conviction for murder and affirm his remaining convictions. Accordingly we,

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹⁸


_____, J.
Gibbons


_____, J.
Maupin


_____, J.
Douglas

¹⁸Although this court directed supplemental briefing solely on the application of Sharma and Bolden to the murder and kidnapping convictions, Daniels advanced additional issues in his supplemental brief, including: whether conspiracy may be charged as a separate crime because there is no clear statutory definition of criminal conspiracy; whether his conviction for the general intent offense of robbery should be reversed pursuant to Sharma and Bolden; and whether there is insufficient evidence to support his conviction for conspiracy to commit robbery. We conclude that none of these matters are properly raised or warrant relief. However, we grant Daniels' motion to file a reply and direct the clerk of this court to file the reply received on November 22, 2006.

cc: Hon. Joseph T. Bonaventure, District Judge
Gary E. Gowen
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk