IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL T. MCLAUGHLIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44225

FILED

FEB 15 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered on a jury verdict for three counts of attempted murder, one count of battery, and one count of burglary with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Michael McLaughlin was charged with three counts of attempted murder with the use of a deadly weapon, one count of battery with the use of a deadly weapon, and one count of burglary with the use of a deadly weapon for a December attack on four individuals in a Clark County Social Services building.

After a four-day jury trial McLaughlin was convicted of all charges. For the first three counts of attempted murder with a deadly weapon, McLaughlin was sentenced to successive terms of a maximum of 240 months and a minimum of 96 months in prison, along with an equal and consecutive sentence for each count for use of a deadly weapon. For the fourth count of battery with a deadly weapon, McLaughlin was sentenced to a maximum of 240 months and a minimum of 44 months with an equal and consecutive sentence for the use of a deadly weapon, to run consecutively to the first three counts of attempted murder. Finally, for the fifth count of burglary with a deadly weapon, McLaughlin was sentenced to a maximum of 240 months and a minimum of 62 months in

prison, with an equal and consecutive sentence for the use of a deadly weapon, to run consecutively to counts one through four.

McLaughlin appeals asserting that: (1) the district court judge erroneously failed to disqualify himself from the case, (2) one of the State's witnesses made an improper comment on McLaughlin's post-arrest silence, (3) one of the State's witnesses made an improper reference to the Columbine shooting, (4) the prosecution committed prosecutorial misconduct during closing argument, and (5) the district court erred by improperly instructing the jury on malice.

We conclude that the district court did not err in its rulings, that the improper comments were harmless, and we affirm the convictions and the corresponding sentences imposed by the district court.

Motion to disqualify

The district court judge did not abuse his discretion by failing to follow the procedures in NRS 1.235, because McLaughlin did not show implied bias, or instances of actual bias by the judge in denying his proper person motions. McLaughlin contends that the district court judge's refusal to recuse himself without following the procedures set out in NRS 1.235 warrants an automatic reversal of McLaughlin's convictions. McLaughlin further asserts that procedures in NRS 1.235 are clear and mandatory. We do not disagree with McLaughlin's latter contention. However, NRS 1.235 must be read in conjunction with NRS 1.230, which requires the existence of actual or implied bias before a judge may be disqualified.

The party moving for recusal has the burden to present sufficient grounds warranting recusal.[1] The party seeking recusal must demonstrate either the judge's actual bias against a party or evidence to support a reasonable inference of bias.[2] This court has held that a judge's refusal to recuse himself is not error where a criminal defendant fails to show improper motive or instances of actual bias by the judge.[3] Where a motion for disqualification "states no legally cognizable ground justifying . . . disqualification" then "it is wholly insufficient, as a matter of law, to warrant a formal hearing" under NRS 1.235.[4] Further, failure of a district court judge to follow the procedure mandated in NRS 1.235 is harmless error without a showing of actual or implied bias.[5]

McLaughlin filed a motion to remove the district court judge, citing only the judge's denial of his motion for new counsel and also the judge's denial of McLaughlin's subsequent proper person motions. McLaughlin's proper person motions were opposed by the State. McLaughlin alleged in his supporting affidavit that the district court judge should be disqualified because the judge denied his proper person motions, and that "in the interests of fairness," removal was necessary to maintain "public confidence in the administration of justice." Implied in

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[1]Sonner v. State, 112 Nev. 1328, 1335, 930 P.2d 707, 712 (1996).

[2]City of Sparks v. District Court, 112 Nev. 952, 954-55, 920 P.2d 1014, 1016 (1996).

[3]Sonner, 112 Nev. at 1335, 930 P.2d at 712.

[4]In re Petition to Recall Dunleavy, 104 Nev. 784, 791, 769 P.2d 1271, 1275-76 (1988).

[5]Libby v. State, 109 Nev. at 911-12, 859 P.2d at 1054.

McLaughlin's affidavit was that the judge would continue to deny McLaughlin's motions so long as McLaughlin proceeded in proper person. McLaughlin, however, did not allege or show implied bias, or instances of actual bias by the district court judge. Nor did McLaughlin allege that the judge erroneously or arbitrarily ruled on his proper person motions.

Further, the district court judge held a hearing and allowed McLaughlin to provide a foundation for his allegations of bias and prejudice. McLaughlin merely stated that he wanted more leeway to defend himself.

McLaughlin's affidavit did not meet the burden to show bias or prejudice under NRS 1.230, and therefore he was not entitled to the procedural safeguards provided under NRS 1.235.[6] Therefore, NRS 1.235 did not apply and the district court judge did not err in refusing to recuse himself from the case without filing a written answer to McLaughlin's affidavit.

Comment on post-arrest silence

The State's comment on McLaughlin's post-arrest silence was harmless. McLaughlin contends that the State violated his post-arrest right to remain silent when one of the State's witnesses improperly testified that he attempted to interview the suspect. He further asserts that this testimony violated his Fifth Amendment and state constitutional rights. We disagree.

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[6]See Dunleavy, 104 Nev. at 790-91, 769 P.2d at 1275-76.

The State cannot comment upon a defendant's post-arrest silence.[7] Furthermore, this court has held that "a prosecutor also cannot use post-arrest, pre-Miranda silence to impeach a defendant."[8]

However, this court has stated that reversal "will not be required if the prosecutor's references to the defendant's post-arrest silence are harmless beyond a reasonable doubt."[9] Comments on the defendant's post-arrest silence are harmless beyond a reasonable doubt if (1) at trial there is only a passing reference, without more, to an accused's post-arrest silence,[10] or (2) there is overwhelming evidence of guilt.[11]

An officer testified at trial that he was assigned the responsibilities of the arresting officer, and he made a passing remark on the stand that as part of those responsibilities he "attempted to interview the suspect." Taken in context, the remark was inadvertent and it is doubtful that the jury could have interpreted that remark as an indication of McLaughlin's failure to testify.

We therefore conclude that the officer's passing remark was, at worst, a passing, inadvertent and consequently harmless comment on McLaughlin's post-arrest silence.

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[7]Angle v. State, 113 Nev. 757, 763, 942 P.2d 177, 181 (1997) (citing McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986)).

[8]Morris v. State, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996).

[9]Id. at 264, 913 P.2d at 1267-68.

[10]McGee, 102 Nev. at 461, 725 P.2d at 1217.

[11]Coffman v. State, 93 Nev. 32, 34, 559 P.2d 828, 829 (1977); cf. Moore v. State, 96 Nev. 220, 225, 607 P.2d 105, 108 (1980).

Reference to the Columbine shooting

The prosecution's reference to the Columbine shooting did not amount to prejudicial error. McLaughlin contends that one of the State's witnesses sought to inflame the jury and appeal to its passions and emotions by referring to the Columbine shooting. He further argues that this improper appeal to the passions and emotions of the jury denied him his due process rights. We disagree.

The State's witness made a passing remark about the Columbine shooting when describing the method the police officers used to approach the Clark County Social Services building during the attack. The prosecution subsequently made a passing remark during closing argument that the officers who responded to the scene treated the scene like a "Col[u]mbine type of shooting." Unlike the facts supporting this court's holding in Collier v. State, here the prosecution commented on a matter in evidence.[12] The prosecutor merely referred to the testimony that was in evidence, namely, an officer's testimony that the officers implemented a plan of entry that had been developed by law enforcement to deal with Columbine-type situations.

We conclude the inadvertent reference to Columbine by the State's witness, and the prosecution's subsequent reference to Columbine during closing argument, were not patently prejudicial and did not amount to a denial of due process. Therefore, it was harmless error.

Prosecutorial misconduct

The prosecution did not commit prosecutorial misconduct. McLaughlin contends the prosecution committed prosecutorial misconduct

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[12]101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985).

by ridiculing and degrading the defense, and by appealing to the passions of the jury. McLaughlin asserts that the prosecution's closing arguments were mocking, and that the district court erred by failing to intervene sua sponte to control the inappropriate comments.

This court has repeatedly held that the prosecutor has a "duty not to ridicule or belittle the defendant or his case."[13] It is also improper to ridicule or belittle a defense theory.[14]

A defendant has the right to a fair trial, but not necessarily a perfect one.[15] The defendant must show "that the remarks made by the prosecutor were '"patently prejudicial."'[16] It is not enough that a prosecutor's comments are '"undesirable or even universally condemned."'[17] The relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process.[18] In addition, "'a criminal conviction is

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[13]Barron v. State, 105 Nev. 767, 780, 783 P.2d 444, 452 (1989).

[14]Earl v. State, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995); Barron, 105 Nev. at 780, 783 P.2d at 444 (1989).

[15]Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990).

[16]Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993) (vacated on other grounds by Libby v. Nevada, 516 U.S. 1037 (1996))).

[17]Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Darden v. Wainwright, 699 F.2d 1031, 1036 (11th Cir. 1983)).

[18]Id.; see Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004).

not to be lightly overturned on the basis of a prosecutor's comments standing alone,'"[19] and the improper remarks must be read in context.[20]

While some of the prosecutor's comments were improper, we cannot find any statements that rise to the level of prosecutorial misconduct given the facts of this case. Namely, at closing argument the prosecution opined that McLaughlin's theory that he did not intend to kill the victims was "ridiculous" and "ludicrous," and commenced a short diatribe disparaging the defense's theory by comparing the theory to the defendant's acts at the scene of the crime. Given the context of the prosecutor's improper remarks, the violent nature of the crimes, the numerous victims, and the substantial evidence against McLaughlin, we conclude that the prosecutor's comments simply did not rise to the level of prosecutorial misconduct.

The district court only has the duty to intervene sua sponte where there is obvious prosecutorial misconduct and endangerment of a defendant's right to a fair trial.[21] Here, the district court did not err in failing to intervene sua sponte because the prosecutor's remarks did not endanger McLaughlin's right to a fair trial.

Jury instruction on malice

The district court's jury instructions were correct as a matter of law, and therefore McLaughlin's assignment of error is without merit. McLaughlin contends that Jury Instruction No. 8 inaccurately defines

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[19]Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

[20]Butler v. State, 120 Nev. ___, ___, 102 P.3d 71, 83 (2004).

[21]Collier, 101 Nev. at 477, 705 P.2d at 1128-29.

Nevada law regarding intent, and that it misled the jury. He asserts that an instruction on implied malice was given when the crime of attempted murder requires an instruction on express malice. McLaughlin further contends that the improper jury instruction denied him his constitutional rights to due process and a fair trial. We disagree.

An "attempt" is an "act done with the intent to commit a crime, and tending but failing to accomplish it."[22] Attempted murder is a specific intent crime, wherein the state must prove the specific intent to kill.[23] Pursuant to NRS 193.200, intent "is manifested by circumstances connected with the perpetration of the offense." Furthermore, criminal intent may be proven as a deduction from declarations or acts that tend to show that the defendant intended to do what he did.[24]

Express malice is defined under NRS 200.020(1) as "that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof."

We conclude that the district court properly instructed the jury regarding malice. The contested jury instruction provided the proper language that guilt may be proven by "direct and circumstantial" evidence. The instruction states that the jury may "infer," or deduce; the existence of a party's state of mind "from the circumstances disclosed by the evidence." This language is merely a restatement that circumstantial evidence may be considered by the jury to determine guilt beyond a

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[22]NRS 193.330(1).

[23]See Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988).

[24]Manning v. Warden, 99 Nev. 82, 83-84, 659 P.2d 847, 848 (1983).

reasonable doubt. Therefore, the instruction is a correct statement of law, and the district court did not err in giving the instruction.

Cumulative error

Factors to consider for cumulative error include whether "'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'"[25] This court will not disturb a judgment of conviction supported by substantial evidence.[26] Substantial evidence is that which "'a reasonable mind might accept as adequate to support a conclusion.'"[27] Even if the district court errs in admitting testimony, this court will not reverse if "evidence of appellant's guilt is overwhelming."[28]

We conclude that the cumulative error here does not warrant reversal of the convictions in this case. Multiple eyewitnesses testified that McLaughlin attacked multiple individuals inside the Clark County Social Services building. At least two of the victims were seriously injured. Not only were the convictions supported by substantial evidence; overwhelming evidence was presented to the point where guilt was established beyond a reasonable doubt.

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[25]Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (quoting Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1289 (1996)).

[26]Coffman, 93 Nev. at 34, 559 P.2d at 829.

[27]Ruggles v. Public Service Comm'n, 109 Nev. 36, 40, 846 P.2d 299, 302 (1993) (quoting State, Emp. Sec. Dep't v. Hilton Hotels Corp., 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

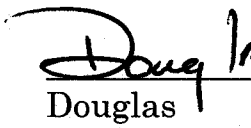
[28]Coffman, 93 Nev. at 34, 559 P.2d at 829.

CONCLUSION

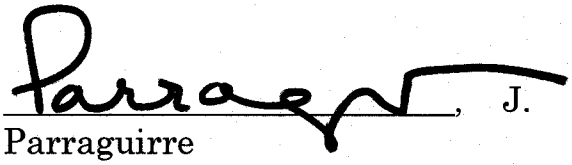
The errors assigned were slight, if error at all, and overwhelming evidence was presented at trial that McLaughlin committed the crimes for which he was convicted. None of the errors McLaughlin complains of warrant reversal of his convictions. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Rose



_____, J.
Douglas



_____, J.
Parraguirre

Cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk