

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL LUDWIG WOLFF,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44420

FILED

SEP 27 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, upon a jury verdict, of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge. Appellant Daniel Wolff met Richard Marotto at a bar, and the two returned to Marotto's house, with the intention of engaging in sexual intercourse. After ingesting a number of drugs, Wolff went to sleep on Marotto's bed but awoke to find Marotto sexually abusing him. After Marotto punched Wolff, Wolff struck Marotto in the head with a marble tabletop. Wolff then took knives from the kitchen, returned to the bedroom, and stabbed Marotto's unconscious body. Before leaving the residence, Wolff took a number of Marotto's possessions, some of which he later pawned. The jury found Wolff guilty of robbery with the use of a deadly weapon and first-degree murder with the use of a deadly weapon. The district court sentenced Wolff to concurrent life sentences without the possibility of parole.

We affirm Wolff's conviction and sentence and conclude that (1) the district court did not abuse its discretion by admitting autopsy photographs; (2) the district court did not abuse its discretion when it failed to declare a mistrial sua sponte; (3) the prosecutorial misconduct in asking a premature character for truthfulness question did not deprive

Wolff of his right to due process and a fair trial; and (4) the district court did not abuse its discretion by instructing the jury regarding express or implied malice, or the reasonable doubt standard. Although we conclude that the district court abused its discretion by admitting expert testimony, this error was harmless and does not warrant a new trial under the cumulative error doctrine.

The district court did not abuse its discretion by admitting crime scene and autopsy photographs

Wolff's contention that the district court abused its discretion by allowing the prosecution to introduce crime scene and autopsy photographs lacks merit.¹ Under NRS 48.035(1), relevant evidence "is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice." Here, the coroner testified that the photos aided her description of the types of injuries sustained by the victim. Thus, we conclude that the district court acted within its discretion by admitting the crime scene and autopsy photographs.

The district court did not abuse its discretion by failing to declare a mistrial sua sponte

Because the district court gave the parties an opportunity to address the drug concentration reporting error and because the defense did not move for a mistrial, Wolff's contention that the district court

¹The admissibility of autopsy photographs showing wounds on the victim's body "lies within the sound discretion of the district court, and, absent an abuse of that discretion, the decision will not be overturned." Sipsas v. State, 102 Nev. 119, 123, 716 P.2d 231, 234 (1986) (quoting Turpen v. State, 94 Nev. 576, 577, 583 P.2d 1083, 1084 (1978)).

should have declared a mistrial sua sponte is without merit.² After the prosecution disclosed the reporting error, the defense did not move the district court to declare a mistrial. Instead, the defense agreed to a continuance and to testimony from Dr. James Bourland, an expert witness who testified that given the period of time before the discovery of the body, it was not possible to determine whether the victim was conscious or unconscious due to GHB intoxication at or around the time of his death.

An appellant “must assert his right to a mistrial immediately or be deemed to have waived any alleged error.”³ Therefore, Wolff waived the issue of the effect of the GHB reporting error on appeal. Further, given Dr. Bourland’s testimony, Wolff’s self-defense testimony was still viable. The district court adequately remedied any prejudicial effect the reporting error might have had on the defense’s theory of the case. Therefore, the district court did not abuse its discretion by not declaring a mistrial sua sponte.

The district court properly sustained the defense’s objection to an improper character for truthfulness question

Wolff’s contention that the prosecutor’s misconduct in asking an improper character for truthfulness question deprived him of due process and a fair trial lacks merit. Because the district court sustained

²“The trial court has discretion to determine whether a mistrial is warranted, and its judgment will not be overturned absent an abuse of discretion.” Rudin v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004). “A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached” Beck v. District Court, 113 Nev. 624, 627, 939 P.2d 1059, 1061 (1997) (quoting Illinois v. Somerville, 410 U.S. 458, 464 (1973)).

³Maxey v. State, 94 Nev. 255, 256, 578 P.2d 751, 752 (1978).

the defense's objection to the question before the witness offered an answer, Wolff suffered no harm.

The district court properly instructed the jury on express or implied malice, and the reasonable doubt standard instruction is constitutional

Wolff's contention that the district court abused its discretion by instructing the jury on express and implied malice is without merit.⁴ The district court's express and implied malice instruction closely followed the language of NRS 200.020. We have held that "the statutory language [of NRS 200.020] is well established in Nevada" and have also previously upheld a jury instruction on express and implied malice almost identical to the one given by the district court in this case.⁵ Therefore, the district court did not abuse its discretion by instructing the jury on express and implied malice.

Further, we disagree with Wolff's contention that the reasonable doubt standard instruction is unconstitutional. The district court instructed the jury on reasonable doubt using the verbatim language of NRS 175.211(1). We have upheld the constitutional validity of the statutory reasonable doubt instruction.⁶ The district court did not abuse its discretion by instructing the jury on the reasonable doubt standard.

⁴"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. ___, ___, 121 P.3d 582, 585 (2005).

⁵Leonard v. State, 117 Nev. 53, 79, 17 P.3d 397, 413 (2001); see Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 583 (1992) (concluding that the instructions accurately informed the jury of the distinction between express malice and implied malice).

⁶Lord v. State, 107 Nev. 28, 40, 806 P.2d 548, 556 (1991).

The district court abused its discretion by admitting expert testimony on Wolff's actions

We conclude that the district court abused its discretion by allowing the State's expert witness to testify beyond his field of expertise.⁷ We have held that expert testimony is not restricted to areas governed by the scientific method.⁸ Non-scientific expertise, in fields such as legal malpractice, psychology, or insurance bad-faith, is equally admissible when "the expert's specialized knowledge will assist the trier of fact in understanding the evidence or an issue in dispute."⁹ However, expert witnesses must limit their testimony to areas properly within their field of expertise.¹⁰

⁷We will not disturb the district court's determination to admit expert testimony absent a clear abuse of discretion. Krause Inc. v. Little, 117 Nev. 929, 934, 34 P.3d 566, 569 (2001).

⁸Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 243 n.6, 955 P.2d 661, 667 n.6 (1998).

⁹Id. at 243, 955 P.2d at 667. When the expert is from a discipline that does not involve the scientific method, "the test for reliability is: (1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies on and/or utilizes the principles involved in the field." Malone v. State, 163 S.W.3d 785, 793 (Tex. App. 2005).

¹⁰See, e.g., Mulder v. State, 116 Nev. 1, 13, 992 P.2d 845, 852-53 (2000) (concluding that district court properly ruled that witness was not a qualified expert in fingerprint comparison because his expertise lay mostly in examining questioned documents); Griffin v. Rockwell International, Inc., 96 Nev. 910, 911, 620 P.2d 862, 863 (1980) (reasoning that the district court properly struck the testimony of an expert witness who testified out of his field of expertise).

We conclude that the district abused its discretion by allowing Dr. Mohandie to give his expert opinion on topics ranging from the behavior of sexual abuse victims to the effects of drugs and hypnosis on memory. Dr. Mohandie, although having experience with a broad range of topics as a result of his private research and work with the Los Angeles Police Department, was not qualified to be an expert for each one. The defense's voir dire examination established that Dr. Mohandie did not have sufficient experience regarding particular topics, especially hypnosis, in order to give an expert opinion. Based on his credentials and research experience, Dr. Mohandie's expert testimony should have been limited to behavioral science.

Despite our conclusion that the district court abused its discretion by allowing Dr. Mohandie to testify as an expert in victimology, we conclude that this error was harmless.¹¹

A new trial is not warranted under the cumulative error doctrine

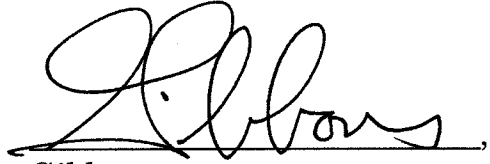
Wolff's contention that cumulative errors below deprived him of a fair trial is without merit. Cumulative errors may justify the order of a new trial even if the errors, standing alone, are harmless.¹² Because we

¹¹Collman v. State, 116 Nev. 687, 722-23, 7 P.3d 426, 449 (2000).

¹²Byford v. State, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000).

conclude that the district court committed only one error during Wolff's trial, a new trial is not warranted. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

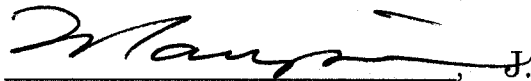

_____, J.
Gibbons


_____, J.
Hardesty

cc: Eighth Judicial District Court Dept. 16, District Judge
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Special Public Defender David M. Schieck
Clark County Clerk

MAUPIN, J., concurring:

The district court below had absolutely no basis for allowing admission, under NRS 50.275, of Dr. Mohandie's episodic study of victims of sexual assault and his invention of "victimology" as a social science. This particular forensic exercise could not, in any respect, assist the jury. In short, I have grave reservations as to whether sexual assault victims, as a group, can be "profiled." However, based upon the overwhelming body of other evidence admitted against this appellant, the error in admitting this testimony was harmless beyond a reasonable doubt.



Maupin