

IN THE SUPREME COURT OF THE STATE OF NEVADA

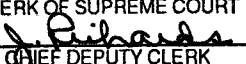
FREDRIC K. DIXON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44688

FILED

NOV 15 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, for second-degree murder. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Fredric Dixon shot Derrick Nunley in the parking lot of the Palms Casino Resort in Las Vegas. Nunley died shortly thereafter. A jury found Dixon guilty of second-degree murder. The district court sentenced Dixon to life in prison with the possibility of parole. Dixon argues he is entitled to a new trial, alleging evidentiary and instructional errors. All of Dixon's assignments of error are without merit, but two warrant detailed discussion.¹ The parties are familiar with the

¹Dixon also advanced the following arguments on appeal: (1) the district court erred in permitting the State to play a portion of a local news broadcast that included footage of the altercation and shooting, despite the fact that the State established a proper foundation for the videotape and issued a limiting instruction to the jury; (2) the district court erred in allowing the State to impeach Jermaine Clay about inconsistencies between his testimony on direct examination and his initial police report, even though Clay was given ample opportunity to explain the inconsistencies on re-direct; (3) the district court admitted Dixon's spontaneous confession at the crime scene in violation of Miranda v. Arizona, 384 U.S. 436 (1966); (4) the district court improperly permitted the State to use a peremptory challenge to exclude an African-American

continued on next page . . .

facts, and we do not recount them here except as necessary to our discussion.

Self-defense jury instruction

Dixon's primary argument is that the district court's jury instruction on self-defense contained a clearly erroneous statement of the law. Although we conclude that the jury instruction was erroneous and constitutes error, this error was harmless and does not mandate reversal.

Jury Instruction 19, which attempts to describes the standard for self-defense, reads in part: "An honest but reasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter." This is clearly an incorrect statement of the law. The jury instruction should read: "An honest but unreasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter."²

Initially, we note that Dixon's counsel failed to object to this instruction at trial. Although the failure to object generally precludes appellate review, we recognize an exception where "errors are patently

... continued

juror although the State was able to present a race-neutral reason for the challenge; (5) the district court improperly gave an instruction on verbal provocation; (6) the district court erred by failing to grant a mistrial based upon Detective Mesinar's spontaneous, allegedly prejudicial, statement; and (7) the district court erred by failing to admit one of Dixon's attorneys pro hac vice on the second day of trial. We have considered these arguments and conclude they lack merit.

²See Runion v. State, 116 Nev. 1041, 1051, 13 P.3d 52, 59 (2000) (emphasis added); see also NRS 200.120-130.

prejudicial and require the court to intervene sua sponte to protect the defendant's right to a fair trial.”³

In order to determine whether this incorrect jury instruction infringed upon Dixon’s right to a fair trial, we apply a harmless error analysis.⁴ To determine whether an instructional error is harmless, we must ask whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.⁵ In doing so, we do not merely consider the error in isolation, but observe the totality of the circumstances—including other jury instructions and evidence admitted at trial—to determine if the error affected the jury’s verdict.⁶

We conclude that this error was harmless. The first four paragraphs of Jury Instruction 19 state correctly that a defendant who reasonably believes there is imminent danger of death or bodily harm may use deadly force to defend himself. The instruction then incorrectly states that an honest but reasonable belief will not reduce a murder charge to manslaughter.⁷

³Downey v. State, 103 Nev. 4, 7, 731 P.2d 350, 352 (1987) (emphasis omitted).

⁴See Nader v. United States, 527 U.S. 1, 10-11 (1999) (holding that errors in jury instructions are subject to harmless error analysis unless they vitiate all the jury's findings and produce “consequences that are necessarily unquantifiable and indeterminate”). Because this error does not rise to that level, we apply the harmless error standard.

⁵Collman v. State, 116 Nev. 687, 722-23, 7 P.3d 426, 449 (2000).

⁶See Cupp v. Naghten, 414 U.S. 141, 147 (1973).

⁷Additionally, if the jury determined Dixon possessed an honest but unreasonable belief in the necessity of deadly force, that conclusion would
continued on next page . . .

Eyewitnesses testified that the altercation between Dixon and Nunley was over before Dixon shot him. Nunley had put away a knife and was walking back toward his car. Dixon had stepped back from the scene, and the direct physical confrontation was over. The jury heard testimony that Dixon then walked deliberately back to his car, unlocked the door, and grabbed a gun. Dixon then ran over to Nunley's vehicle and shot him repeatedly.

Although one statement in the instruction was incorrect, we conclude beyond a reasonable doubt that, given the totality of the jury instructions and the evidence admitted at trial, the error did not substantially prejudice the jury's deliberations and verdict.

Exculpatory evidence

As part of his self-defense claim, Dixon alleged that Nunley's associates retrieved a gun from Nunley's car after the shooting and dumped it in a garbage can in the casino. The garbage can had been emptied by the time it was searched by the police. Dixon claims the presence of the gun would support his statement that he believed Nunley had gone to his car to get a gun. Dixon argues the State failed to recover, secure, and preserve this potentially exculpatory evidence; therefore, he is entitled to a new trial.

... continued

have had no effect on the outcome of this case. Such a belief is not sufficient to reduce Dixon's charge to manslaughter, even if Dixon had requested a manslaughter instruction. See Hill v. State, 98 Nev. 295, 296-97, 647 P.2d 370, 371 (1982) (court declined to adopt the doctrine of imperfect self-defense).

Dixon first argues that the State withheld this evidence in violation of the Supreme Court's decision in Brady v. Maryland.⁸ In Brady, the Court held that the State is required "to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment."⁹ A failure to do so constitutes a due process violation and justifies a new trial.¹⁰ We have previously recognized three components to a Brady violation: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material."¹¹

Testimony at trial indicated that, several hours after the shooting, a slot machine operator told the police she saw two black men place something in a nearby trash can. Once the police became aware of the possibility that the can might contain evidence, they investigated and discovered the can had already been emptied. Even assuming that the men did conceal a gun in the trash can, we conclude that there is no Brady violation because the police never withheld any evidence.

Dixon also argued that the State failed to preserve potentially exculpatory evidence when the police failed to search the trash can before it was emptied. We disagree. We have previously held that "[i]n order to establish a due process violation resulting from the state's loss or destruction of evidence, a defendant must demonstrate either (1) that the

⁸373 U.S. 83 (1963).

⁹Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

¹⁰Id.

¹¹Id. at 67, 993 P.2d at 37.

state lost or destroyed the evidence in bad faith, or (2) that the loss unduly prejudiced the defendant's case and the evidence possessed an exculpatory value that was apparent before the evidence was destroyed."¹² Because the police had no knowledge of the existence of a firearm prior to interviewing the casino employee and clearly did not act in bad faith, we conclude the State did not fail to preserve exculpatory evidence.¹³

Conclusion

We conclude that the inaccurate statement of the law contained in Jury Instruction 19 was harmless error and does not justify reversal. Dixon's other claims of error lack merit. Accordingly, we

¹²Sheriff v. Warner, 112 Nev. 1234, 1239-40, 926 P.2d 775, 778 (1996).

¹³We also conclude that the State did not fail to preserve exculpatory evidence when it destroyed the original security footage of the shooting. Testimony at trial indicated that producing a composite tape for use in a criminal investigation was standard procedure and helped provide a useful aggregation of relevant footage. Dixon has failed to demonstrate that the State erased the originals in bad faith, or that their unavailability prejudiced his defense.

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Craig Washington Law Firm
Cremen Law Offices
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk