IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFRED P. CENTOFANTI, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44984

FILED

DEC 27 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Alfred Centofanti, III, was convicted of first-degree murder for the shooting death of his ex-wife Virginia (Gina). Centofanti was sentenced to serve two consecutive life terms without the possibility of parole. Centofanti appeals his conviction, arguing that he is entitled to a new trial because (1) hearsay statements were introduced in violation of Crawford v. Washington[1] and the evidentiary rules, (2) the jury engaged in various forms of misconduct, (3) the prosecutor committed misconduct, and (4) the State destroyed evidence. We conclude that Centofanti's arguments are without merit, and we affirm the judgment of conviction.

[1]514 U.S. 36 (2004).

Hearsay statements

Centofanti argues that he is entitled to a new trial because various hearsay statements were admitted at trial that violated Crawford and his Confrontation Clause rights. Specifically, he challenges Officers Lourenco's and McGregor's testimony regarding Gina's statements to them when they arrived to investigate the December 5, 2000, domestic violence incident; Counselor Mark Smith's testimony regarding Gina's statements to him over the telephone in the domestic dispute; and Officers Lourenco's and McGregor's testimony regarding LVMPD dispatch's statements on December 5 relaying information Smith provided concerning Gina's statements. Centofanti also argues that the testimony of Tricia Miller, Gina's best friend, regarding Gina's statements to Miller on the day following the domestic violence incident were introduced in violation of the evidentiary rules. We conclude that his arguments are without merit.

Crawford only governs testimonial hearsay. The United States Supreme Court recently clarified the distinction between testimonial and nontestimonial statements made during police interrogations in Davis v. Washington, and its companion case, Hammon v. Indiana.[2] We have also recently addressed this distinction in Harkins v. State.[3]

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[2]547 U.S. ___, 126 S. Ct. 2266 (2006).

[3]122 Nev. ___, 143 P.3d 706 (2006).

In Davis and Hammon, the Supreme Court concluded that if the circumstances objectively indicate "that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," the statements made during a police interrogation are nontestimonial.[4] In Harkins, we adopted a general rule and listed a series of factors to be considered when deciding whether a statement is testimonial under the general rule.[5] The general rule for determining whether a statement is testimonial is "whether the statement would, under the circumstances of its making, lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[6] A "nonexhaustive list of factors" for courts to consider in deciding this issue includes:

> (1) to whom the statement was made, a government agent or an acquaintance; (2) whether the statement was spontaneous, or made in response to a question (e.g. whether the statement was the product of a police interrogation); (3) whether the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial, or whether it was to provide assistance in an emergency; and (4) whether the statement was made while an emergency was ongoing, or whether it was a recount of past events made in a more formal setting sometime after the exigency had ended.[7]

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[4]Davis, 547 U.S. at ___, 126 S.Ct. at 2273-74.

[5]122 Nev. at ___, 143 P.3d at 714.

[6]Id.

[7]Id.

Confrontation Clause violations are subject to a harmless error analysis.[8] An error is harmless "where it is clear beyond a reasonable doubt that the guilty verdict actually rendered in the case was 'surely unattributable to the error.'"[9] The factors to be considered are "the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, . . . and, of course, the overall strength of the prosecution's case."[10]

Although Gina's statements were made to State agents in response to their questions, Smith's, Lourenco's, and McGregor's inquires and Gina's responses were for the purpose of providing assistance during an emergency. We conclude that an objective witness in Gina's position would not reasonably believe that those statements would later be used at trial. Further, to the extent that any of Gina's statements to Lourenco and McGregor could be considered testimonial because they occurred after the emergency had concluded, any Crawford violation is harmless as their testimony was cumulative and was corroborated by other testimony. And, in light of the strength of the State's case against Centofanti, we consider any error harmless.

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[8]Power v. State, 102 Nev. 381, 384, 724 P.2d 211, 213 (1986).

[9]Flores v. State, 121 Nev. 706, 721, 120 P.3d 1170, 1180 (2005) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)).

[10]Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

Finally, regarding Miller's testimony, although the State impliedly concedes that Miller's statements were improperly introduced, we conclude that their introduction was also harmless. Again, Miller's testimony was corroborated by other evidence, and the evidence against Centofanti was voluminous. Accordingly, we conclude that Centofanti is not entitled to a new trial based on the admission of hearsay statements.

Juror Misconduct

Centofanti argues that he is entitled to a new trial because a juror concealed her prior felony conviction and a juror conducted his own firearms experiment.[11]

Failure to disclose felony status

Centofanti argues that he is entitled to a new trial because his conviction was not the product of a unanimous verdict issued by twelve "qualified" jurors, as required by NRS 6.010. Centofanti also contends that Juror Barrs intentionally concealed her prior felony before and during voir dire and her participation in the verdict requires a new trial. We disagree.

Although under NRS 6.010 a convicted felon is not a qualified juror unless her civil right to serve on a jury has been restored, "the participation of a felon-juror is not an automatic basis for a new trial."[12] However, a felon-juror's presence on the jury can be the basis for a new

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[11]Centofanti also argues that he is entitled to a new trial because a juror wore a tee shirt that read, "Do you know what a murderer looks like" and because two jurors were sleeping during trial. Centofanti failed to object to both instances of the alleged misconduct, and we conclude that neither instance amounted to plain error.

[12]Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1059 (9th Cir. 1997).

trial if the defendant can show actual bias or prejudice.[13] We conclude that Centofanti has failed to demonstrate that Juror Barrs was actually biased against him or that he suffered prejudice from her jury service. Accordingly, Juror Barrs' mere presence on the jury is insufficient to warrant a new trial.

We further conclude that Centofanti is not entitled to a new trial based on Juror Barrs' misconduct during voir dire. Juror misconduct during voir dire implicates the Sixth Amendment right to an impartial jury.[14] When deciding whether a defendant is entitled to a new trial based on juror misconduct during voir dire, we examine whether the juror intentionally concealed information and whether the misconduct was prejudicial.[15]

From the record, it appears that Juror Barrs intentionally concealed her felony status. However, Centofanti has not shown that he was prejudiced by Juror Barrs' misconduct. When deciding whether a juror's misconduct was prejudicial, we look to whether there was actual or implied bias.[16] "Actual bias exists when a juror fails to answer a material question accurately because he is biased,"[17] and the defendant must prove actual bias "through admission or factual proof."[18] In "extreme

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[13]Id. at 1059.

[14]United States v. Wood, 299 U.S. 123, 133 (1936).

[15]Canada v. State, 113 Nev. 938, 941, 944 P.2d 781, 783 (1997).

[16]See Wood, 299 U.S. at 133.

[17]U.S. v. Bishop, 264 F.3d 535, 554 (5th Cir. 2001).

[18]Id.

circumstances" a court may imply juror bias as a matter of law.[19] Juror bias may be implied "where a juror's actions create 'destructive uncertainties' about the indifference of a juror."[20]

We conclude that Centofanti has not demonstrated that Juror Barrs was actually biased and that this is not an "extreme circumstance" where bias should be implied as a matter of law. Juror Barrs' misconduct was the failure to disclose a more-than-twenty-year-old felony conviction for obtaining property in exchange for a worthless check. This conviction is unrelated to the instant crime, and we conclude that Juror Barrs' misconduct did not "create 'destructive uncertainties'" about her indifference as a juror. Accordingly, because Centofanti has demonstrated no implied bias or prejudice, he is not entitled to a new trial.

Firearms experiment

Centofanti argues that he is entitled to a new trial because Juror Wheeler conducted his own firearms experiment. When a juror is exposed to extrinsic evidence, we do not conclusively presume that that exposure is prejudicial; instead, we examine the nature of the extrinsic influence in the context of the trial as a whole.[21]

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[19]Id.; see also Solis v. Cockrell, 342 F.3d 392, 395 (5th Cir. 2003).

[20]Green v. White, 232 F.3d 671, 677 (9th Cir. 2000) (quoting Dyer v. Calderon, 151 F.3d 970, 983 (9th Cir. 1998)).

[21]Meyer v. State, 119 Nev. 554, 565, 80 P.3d 447, 456 (2003).

Here we conclude that any exposure Juror Wheeler had to extrinsic information through the purported firearm experiment was minimal in the context of the trial as a whole, considering the overwhelming evidence supporting Centofanti's conviction. Accordingly, we conclude that Centofanti has failed to demonstrate that misconduct actually occurred or, if it did, that the misconduct was prejudicial. Therefore, Centofanti's argument is without merit.

Prosecutorial misconduct

Centofanti argues that he is entitled to a new trial because the State committed prosecutorial misconduct by repeatedly referring to Gina as a "victim," the shooting as a "murder," and the location of the shooting as the "crime scene."[22]

We will not overturn a conviction solely because of prosecutorial misconduct "unless the misconduct is 'clearly demonstrated to be substantial and prejudicial.'"[23] We conclude that Centofanti has not demonstrated substantial and prejudicial misconduct. The majority of the references to "victim" and "crime scene" occurred during the examinations of law enforcement officers when they testified about their investigation, and the State did not use the terms in an inflammatory manner.

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[22]Centofanti also argued that the State committed prejudicial misconduct by twice improperly and sarcastically questioning Centofanti and impermissibly expressing the prosecutor's opinion about the veracity of Centofanti's testimony. Although the State's questions were improper, Centofanti objected to this line of questioning, the district court sustained the objection, and the State moved on. We conclude that any error was harmless.

[23]Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (quoting Sheriff v. Fullerton, 112 Nev. 1084, 1098, 924 P.2d 702, 711 (1996)).

Regarding the word "murder," Centofanti only twice objected to the use of the word murder, and the district court sustained the objection and admonished the State. And, the jury was instructed on Centofanti's theories of the case, including first- and second-degree murder, manslaughter, and self-defense. Accordingly, we conclude that Centofanti has not clearly demonstrated substantial and prejudicial misconduct, and we will not overturn his conviction on this basis.

Destruction of evidence

Centofanti argues that the Las Vegas Metropolitan Police Department destroyed his telephonic messages to Sharon Zwick, which prejudiced him in presenting his defense. When the State loses or destroys evidence, the loss or destruction will amount to a due process violation if the defendant demonstrates that (1) "'the State acted in bad faith or [(2)] that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed.'"[24]

Centofanti has not shown that the State acted in bad faith with regard to erasure of his messages. Zwick testified that the LVMPD's standard procedure was to erase each message after it was played and the information recorded. Centofanti has failed to demonstrate that the exculpatory value of the messages was apparent before it was destroyed. Finally, Centofanti has not demonstrated that he suffered undue prejudice from the destruction of this evidence. Zwick's testimony was focused on Centofanti's demeanor during their telephone conversation and not his

[24]Daniel v. State, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003) (quoting Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001)).

messages. Therefore, we conclude that Centofanti's due process rights have not been violated.[25] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Parraguirre, J.
Parraguirre

Shearing, Sr. J.
Shearing

cc: Hon. Donald M. Mosley, District Judge
Carmine J. Colucci & Associates
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

[25]We conclude that because of the evidence against Centofanti, his contention that cumulative error requires a new trial is without merit.