IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45026

FILED

JAN 11 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge. The district court sentenced appellant Christopher Brown to serve two consecutive prison terms of 20-50 years.

First, Brown contends that the jury instruction on voluntary intoxication improperly shifted the burden of proving intoxication, and therefore the lack of a specific intent to commit the crime, onto the defense. Brown objected to the following instruction:

> The burden of proof is upon the defendant to show by a preponderance of the evidence that he was intoxicated to such an extent that he did not premeditate or deliberate.

Defense counsel argued that the instruction "dilutes the State's burden of proving each and every element of the crime beyond a reasonable doubt." Brown, however, did not offer an alternative instruction. We agree with Brown and conclude that the instruction given by the district court was

erroneous.[1] Nevertheless, we further conclude that the error was harmless beyond a reasonable doubt.[2]

First, Brown did not present a defense based on a lack of specific intent due to his voluntary intoxication.[3] Brown presented evidence and corroborating testimony that he ingested drugs and alcohol on the day of the shooting; however, he did not argue that his ingesting rendered him unable to form the intent to kill. During opening arguments, defense counsel conceded that Brown shot the victim several times resulting in his death. But the theory of the defense, instead, was that "Brown was provoked. There was a sudden heat of passion." As further evidence of the defense theory, Brown did not offer the district court an alternative instruction on voluntary intoxication, or object to the instructions on manslaughter and self-defense, both of which were more consistent with his defense at trial. Therefore, we conclude that the

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[1]See Barone v. State, 109 Nev. 778, 780, 858 P.2d 27, 28 (1993) (holding that requiring the defendant "to prove that he acted in self-defense would violate his right to due process by shifting the burden to the defendant of disproving an element of the charged offense"); see also Hill v. State, 98 Nev. 295, 297, 647 P.2d 370, 371 (1982) (stating that "[w]ithout a doubt, the burden of proving absence of justification or excuse for the homicide resides with the state").

[2]See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

[3]See Garner v. State, 116 Nev. 770, 786, 6 P.3d 1013, 1023 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

erroneous instruction on voluntary intoxication did not affect Brown's substantial rights in any practical way.[4]

Second, Brown failed to demonstrate that he was entitled to a voluntary intoxication instruction. Under NRS 193.220, the jury is permitted to consider evidence of voluntary intoxication to negate specific intent.[5] To obtain an instruction under NRS 193.220, Brown's burden of production was to show not only that he ingested drugs and alcohol, but also the intoxicating effect of the substances ingested and its resultant effect on the required mental state for first-degree murder.[6] The level of intoxication must be so extreme as to preclude the formation of the intent required for the charged offense.[7] Similar to the defense in Garner v. State, Brown "did not present evidence on the effect that his consumption of drugs [and alcohol] had on his mental state."[8]

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[4]See Garner, 116 Nev. at 786, 6 P.3d at 1023-24.

[5]NRS 193.220 provides that –

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining the purpose, motive or intent.

[6]Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985).

[7]See King v. State, 80 Nev. 269, 272, 392 P.2d 310, 311 (1964).

[8]Garner, 116 Nev. at 786, 6 P.3d at 1024.

Next, Brown contends that the district court erred in denying his pretrial motion to suppress inculpatory statements he made to Reno Police Department detectives. On October 7, 2003, Detectives Dan Myers and Jim Duncan traveled to Oakland, California, where Brown had been apprehended and arrested on unrelated charges. When the detectives met with Brown, even before they could advise him of his rights pursuant to Miranda,[9] Brown invoked his right to counsel and refused to speak. Accordingly, the detectives terminated the interview and returned to Reno.

On December 23, 2003, Detectives Myers and Duncan returned to California in order to transport Brown to Reno on the murder warrant. Immediately prior to the trip, the detectives advised Brown about the extradition procedures and his rights pursuant to Miranda. The discussion was audiotaped. During the initial part of the trip, the two detectives and Brown discussed neutral topics such as sports and the weather; there was no discussion about the investigation. At a certain point, however, Brown asked the detectives, "How is Dude's family taking it?" Brown clarified that he was referring to the victim of the shooting. At the hearing on Brown's motion to suppress, the following exchange occurred between Detective Duncan and the prosecutor:

> A. Well, I told him I had spoken several times with [the victim's] sister, that's the only family member I've spoken with, and she was very hurt, and very broken up by his death. And I said she had a lot of unanswered questions, I said I have a

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[9]Miranda v. Arizona, 384 U.S. 436 (1966).

> lot of unanswered questions. I said I only know what I've learned to this point, and I have lots of questions for you, but you certainly don't have to speak with me if you don't want to.
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> Q. All right. What did he say when you told him that?
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> A. He said, "Feel free."
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> . . .
>
> I asked him, "Tell me what happened, because I'm under the impression –" I told him I'm under the impression, based on the conversation I had with your girlfriend, or the mother of one of his children, that he had told her it was a self-defense shooting. And I said, "If that's the case, I'd certainly like to hear it. If you want to tell me your version, tell me your version." And he did, he started and talked for about 90 minutes.

Detective Duncan testified that the conversation was mostly a monologue conducted by Brown, and that Brown never asked for an attorney or indicated that he did not want to talk about the case. Upon returning to Reno, Brown gave a videotaped statement repeating the inculpatory statements. Brown informed the detectives that he wanted to tell his version of the incident "because the stuff is eating me up inside." On October 28, 2004, the district court entered an order denying Brown's motion to suppress the inculpatory statements he made while traveling from California to Reno and in the videotaped statement.

Citing to Edwards v. Arizona for support, Brown argues that because he invoked his right to counsel when the detectives first met him in October of 2003, the State therefore cannot demonstrate that he waived that right "by showing only that he responded to further police-initiated

custodial interrogation" nearly three months later.[10] Brown claims that the Reno detectives improperly initiated contact and violated Edwards when they Mirandized him immediately prior to transporting him from California. As a result, Brown contends that the district court erred in failing to suppress his inculpatory statements. We disagree with Brown's contention.

In Edwards, the United States Supreme Court stated that "an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities . . . unless the accused himself initiates further communication, exchanges, or conversations with the police."[11] The United States Court of Appeals for the Ninth Circuit added that the Edwards line of cases "recognize that the accused may change [his] mind and initiate communication. It is a factual question whether that is what occurred."[12]

Here, we conclude that there was substantial evidence to support the district court's finding that Brown, not the detectives, initiated the discussion about his case when he asked about the victim's family.[13] Brown provides no authority for the proposition that being Mirandized, by itself, amounts to police-initiated custodial interrogation in

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[10]451 U.S. 477, 484 (1981).

[11]Id. at 484-85 (emphasis added).

[12]U.S. v. Michaud, 268 F.3d 728, 737 (2001).

[13]See Camacho v. State, 119 Nev. 395, 400, 75 P.3d 370, 374 (2003) (findings of fact in a suppression hearing will not be disturbed where supported by substantial evidence).

violation of Edwards. The detectives merely informed Brown about the extradition procedures, which included advising him of his rights pursuant to Miranda. The detectives also testified at the suppression hearing that they were careful not to discuss any aspect of Brown's case during the trip and they made no attempt to elicit incriminating information; instead, the discussion among the three focused on neutral topics.[14] Brown was aware of his right to remain to remain silent; nevertheless, he initiated conversation about the case. We conclude that the district court did not err in so ruling.

Finally, we conclude that the district court did not err in finding that Brown voluntarily and knowingly waived his right to counsel prior to making the incriminating statements.[15] The Supreme Court stated that Edwards was "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights."[16] Determining whether the waiver was valid requires a review of the "'particular facts and circumstances'" of a case.[17] This court has stated that "[a] valid waiver of a fundamental constitutional right ordinarily

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[14]See Rhode Island v. Innis, 446 U.S. 291, 300-03 & n.9 (1980); see also Koza v. State, 102 Nev. 181, 186, 718 P.2d 671, 674-75 (1986).

[15]See Rosky v. State, 121 Nev. ___, ___, 111 P.3d 690, 694 (2005) (holding that "voluntariness determinations present mixed questions of law and fact subject to this court's de novo review").

[16]Michigan v. Harvey, 494 U.S. 344, 350 (1990).

[17]Edwards, 451 U.S. at 482 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); see also Floyd v. State, 118 Nev. 156, 171, 42 P.3d 249, 259 (2002).

requires 'an intentional relinquishment or abandonment of a known right or privilege.'"[18] For the waiver to be valid, it must be (1) "the product of a free and deliberate choice rather than intimidation, coercion, or deception," and (2) "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[19]

As discussed above, Brown initiated the discussion about his case by asking about the victim's family. Detective Duncan told Brown he had "lots of questions for him," but reminded Brown that he did not have to speak to him.[20] At that point, Brown waived his right to counsel when he responded to Detective Duncan by stating, "Feel free." There is no indication in the record that the detectives coerced or intimidated Brown while they were in transport, or when Brown made his formal, videotaped statement in Reno. In fact, the district court found that while Brown was recording his statement, the detectives provided Brown with "breaks, refreshments, and the use of the facilities." Further, the record demonstrates that Brown understood the right he was waiving and its

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[18]Mack v. State, 119 Nev. 421, 427, 75 P.3d 803, 806 (2003) (quoting Johnson, 304 U.S. at 464).

[19]Moran v. Burbine, 475 U.S. 412, 421 (1986); Williams v. State, 113 Nev. 1008, 1015, 945 P.2d 438, 442, (1997), overruled on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

[20]See Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983) (no Edwards violation where defendant initiated further communication by asking an ambiguous question and police officer reminded defendant, and defendant understood, that he did not have to speak to the officer).

consequences. Prior to transporting Brown from California, an audiotape recording was made of the detectives advising Brown of his rights pursuant to Miranda, which Brown indicated he understood. Additionally, Brown understood that he was being charged with murder. Therefore, based on all of the above, we conclude that the district court did not err in denying Brown's motion to suppress.

Accordingly, having considered Brown's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Connie J. Steinheimer, District Judge
Edward B. Horn
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk