IN THE SUPREME COURT OF THE STATE OF NEVADA

RENE GATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45166

FILED

MAY 30 2007

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

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, entered upon jury verdicts finding appellant, Rene Gato, guilty of burglary, robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

FACTS AND PROCEDURAL HISTORY

On the morning of March 6, 2002, an employee of the Capri Motel in Las Vegas found the body of Enrique Caminero inside one of the guestrooms. Post-mortem examination revealed that he died of asphyxia due to strangulation. He had also been shot and severely bludgeoned.

Caminero had earned a living by selling cocaine. As part of his operation, he supplied cocaine to Teresa Gamboa and Sally Villaverde, who sold the cocaine in small quantities on the street. In the weeks immediately preceding Caminero's death, Gamboa and Villaverde switched from selling cocaine to methamphetamine, which they acquired from Gato. Investigation implicated Gato, Villaverde and Gato's associate, Robert Castro, in Caminero's demise.

The State eventually charged Gato, Villaverde and Castro with burglary, robbery with use of a deadly weapon, and murder with use of a deadly weapon (open murder). The district court severed Villaverde's

trial and Castro eventually pleaded guilty to voluntary manslaughter. The separate prosecution of Gato proceeded to trial in January of 2005.

At trial, the State presented evidence indicating that Gato, Castro, Villaverde and Gamboa all arrived at the Capri Motel on the afternoon of March 5, 2002, that Gamboa used a fake identification to rent a room for the night, and that the group entered the motel room to "check it out." Shortly thereafter, they left the motel and dropped Gamboa off at her home. The State alleged that Gato, Villaverde and Castro returned to the motel later that evening where they lured Caminero into the room, robbed and murdered him, and fled to California with Gamboa.

DNA evidence and testimony by the motel manager confirmed that Gato entered the motel room at some point during the evening of March 5, 2002. Gamboa testified regarding the group's plan to rob Caminero, the general events of March 5 and 6, 2002, and Gato's later statement to Villaverde that "you shoulda [duct] taped him right, you're supposed to be the strong one and I had to shoot him." Garcia, a mutual acquaintance of Gato and Caminero, testified that Gato and Castro had previously approached him with a plan to rob Caminero.[1]

A jury convicted Gato on all counts and the district court imposed a series of consecutive sentences, including consecutive life sentences without the possibility of parole, in connection with the various charges.[2] Gato appeals, asserting numerous assignments of error,

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[1]Garcia was not involved in the affair.

[2]The sentences included: ten years with the possibility of parole after four years in connection with the burglary conviction; two

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including: (1) failure to corroborate the accomplice testimony of Gamboa; (2) improper admission of statements by Villaverde and Castro in violation of Bruton v. United States;[3] (3) improper commentary by the State on Gato's silence; (4) improper admission of evidence of prior bad acts, alleged witness intimidation and threats; (5) improper admission of Garcia's testimony at the Petrocelli[4] hearing; (6) improper witness vouching and hearsay testimony by Detective Robert Wilson; and (7) cumulative error. We discuss each of these claims below.

DISCUSSION

Corroboration of Gamboa's accomplice testimony

Gato first argues that the State did not provide sufficient corroboration of Gamboa's accomplice testimony. We disagree.

NRS 175.291(1) requires corroboration of any accomplice testimony used to secure a conviction. NRS 175.291(2) defines an accomplice as "one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Our prior jurisprudence establishes that this definition of an accomplice also includes a person "'who is culpably

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. . . continued

consecutive sentences of fifteen years with the possibility of parole after six years for robbery with use of a deadly weapon; and two consecutive sentences of life without the possibility of parole for murder with use of a deadly weapon.

[3]391 U.S. 123 (1968).

[4]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

implicated in, or unlawfully cooperates, aids or abets in the commission of the crime charged.'"[5] As Gamboa's own testimony established that she cooperated in the plan to rent a motel room to rob Caminero, her actions clearly place her within this definition of "accomplice."

Nonetheless, we conclude that Gamboa's testimony was supported by sufficient corroborating evidence. To properly corroborate accomplice testimony under NRS 175.291(1), the State must present evidence that independently, "without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." Corroborating evidence is not sufficient if it only establishes the commission of the offense or circumstances thereof.[6] However, corroborative evidence does not have to independently establish guilt; evidence satisfies the statute if it "'merely tends to connect the accused to the offense.'"[7]

Fingerprint and DNA evidence, and testimony from the Capri Motel staff all established that Gato entered room ten of the motel at some point during the evening of March 5, 2002. Testimony from Garcia established that a few weeks prior to the murder, Gato approached Garcia with a plan to lure Caminero somewhere for the purpose of robbing him.

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[5]Rowland v. State, 118 Nev. 31, 41, 39 P.3d 114, 120 (2002) (quoting Potter v. State, 96 Nev. 875, 876-77, 619 P.2d 1222, 1223 (1980)); see also Austin v. State, 87 Nev. 578, 587, 491 P.2d 724, 730 (1971).

[6]NRS 175.291(1).

[7]Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803 (1995) (quoting Cheatham v. State, 104 Nev. 500, 504-05, 761 P.2d 419, 422 (1988)).

This independent evidence all indicates that Gato directly participated in the robbery and murder of Caminero, satisfying the corroboration requirement of NRS 175.291.[8]

Bruton violations

Gato next asserts that Gamboa's testimony regarding certain statements made by Villaverde and Castro violated his Sixth Amendment confrontation rights as interpreted in Bruton v. United States.[9] We disagree.

In Bruton, the United States Supreme Court established that evidence of an incriminating out-of-court statement by one defendant in a joint trial which expressly refers to the other defendant, violates the Confrontation Clause of the Sixth Amendment.[10] In these situations, a limiting instruction to the jury is not sufficient to overcome any resulting prejudice.[11] Bruton also applies to situations where a single defendant proceeds to trial.[12]

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[8]See also NRS 195.020 (providing that aiding, abetting, or encouraging commission of an offense is sufficient to establish criminal liability).

[9]391 U.S. 124 (1968).

[10]Id. at 127-28; Ducksworth v. State, 114 Nev. 951, 954, 966 P.2d 165, 166 (1998).

[11]Bruton, 391 U.S. at 128.

[12]See Hill v. State, 114 Nev. 169, 177, 953 P.2d 1077, 1083 (1998) (applying Bruton analysis to a situation where one defendant pled guilty and the other defendant chose to proceed to trial).

To fall within Bruton's protective rule, a statement by a codefendant must facially or expressly implicate the defendant.[13] No Bruton violation occurs when a jury learns only that a codefendant made a statement, but is not told the specific content of that statement.[14] Similarly, statements that merely refer to the defendant's existence but do not reference the defendant by name, and are incriminating only when linked with other evidence presented at trial, may be admitted.[15] Also, statements by a codefendant that would be admissible at a separate trial as non-hearsay, such as statements by a coconspirator or adoptive admissions, do not violate Bruton.[16]

Gato argues that numerous statements admitted at trial constitute Bruton violations. First, Gato takes issue with Gamboa's testimony that Villaverde asked her to rent a motel room so that he, Gato

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[13]Rodriguez v. State, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001); McRoy v. State, 92 Nev. 758, 759, 557 P.2d 1151, 1152 (1976) (finding no Bruton violation when "the statements admitted at trial contained no direct references to [the defendant] and posed no substantial threat to his right of confrontation").

[14]Hill, 114 Nev. at 177, 953 P.2d at 1083.

[15]Lisle v. State, 113 Nev. 679, 692-93, 941 P.2d 459, 468 (1997) (finding no Bruton violation where codefendant's statement referred to the defendant as "the other guy") (citing Richardson v. March, 481 U.S. 200, 211 (1987); United States v. Enrique-Estrada, 999 F.2d 1355, 1359 (9th Cir. 1993)).

[16]Rodriguez, 117 Nev. at 809, 32 P.3d at 779 (noting in dicta that admission of statements by a co-conspirator does not violate Bruton); Maginnis v. State, 93 Nev. 173, 175, 561 P.2d 922, 923 (1977) (finding that Bruton does not apply to adoptive admissions).

and Castro could rob Caminero, and that, while in California, she had asked in Gato's presence who killed Caminero, to which Castro responded, "we did." None of these statements constitute hearsay. In short, Villaverde's statements regarding the plan to rent a motel room and rob Caminero were statements by a coconspirator in furtherance of a conspiracy.[17] Additionally, by remaining silent in the face of Castro's response, Gato adopted Castro's admission as his own.[18] Accordingly, the admission of these statements did not violate Bruton.

Gato likewise takes issue with Gamboa's testimony concerning the events following Villaverde's return to her home on the night of Caminero's death. More particularly, Gamboa's affirmative response to the State's inquiry: "[a]nd did he speak to you, without saying what he said, about Mr. Gato[?]," and her outburst that Villaverde "kept saying over [sic] he was dead" when Villaverde spoke about Caminero during that same conversation. As stated above, no Bruton violation occurs when the jury learns that a codefendant made a statement about the defendant, but does not learn the specific content of that statement. Because Gamboa did not testify regarding the specific content of Villaverde's statements, her testimony that Villaverde generally spoke to her about Gato does not violate Bruton. Similarly, because the statement "He just kept saying

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[17]See NRS 51.035(3)(e).

[18]See NRS 51.035(3)(a); Maginnis, 93 Nev. at 175, 561 P.2d at 923 (holding that a statement is an adoptive admission when the statement is made in a private setting and implicates the defendant in such a way that dissent from the statement would normally be expected).

over [sic] he was dead" does not implicate Gato until linked with other evidence, this testimony did not constitute a Bruton violation.[19]

Gato further takes issue with Gamboa's testimony that, while in California, Castro told her what happened on the night of Caminero's death. He specifically takes issue with the State's question: "[w]as the version you were hearing in this motel room in California the same version that Sally Villaverde had told you before[?]," and Gamboa's response that the story was "somewhat different." As above, this statement does not facially or expressly implicate Gato in any wrongdoing. It becomes incriminating only when viewed with other evidence. Accordingly, admission of this statement did not violate the Confrontation Clause as interpreted in Bruton.

Prosecutorial comment on Gato's silence

Gato next contends that the prosecutor improperly commented on his silence during closing argument when he stated that "[t]he only

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[19]We also note that the district court sustained Gato's objection to Gamboa's outburst, and instructed the jury to disregard that statement. While the Court in Bruton indicated that a partial limiting instruction is not sufficient to overcome the resulting prejudice when an incriminating statement is admitted against a single codefendant at a joint trial, the instruction here was not a partial limiting instruction. See 391 U.S. at 127-28. Rather, the district court directed the jury to disregard the statement completely. This does not implicate the concern expressed in Bruton that a jury cannot realistically use testimony to convict one defendant and then completely disregard the testimony in their evaluation of the remaining defendant. Therefore, the presumption remains that jurors follow the court's instructions. See Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) (citing Tennessee v. Street, 471 U.S. 409, 415 (1985)).

people that were in that motel room are not talking. Does that mean they all go free? Of course not." We agree that this comment was improper, but conclude that any resulting error was harmless.

Both this court and the United States Supreme Court have consistently stated that "'[t]he prosecution is forbidden at trial to comment upon a defendant's election to remain silent.'"[20] The prosecution is similarly forbidden from commenting on the defendant's failure to testify at trial.[21] "A direct reference to a defendant's [silence] is always a violation of the [F]ifth [A]mendment."[22] If the reference is indirect, it is constitutionally impermissible if the language is such that a jury would naturally interpret the remark to be a comment on the defendant's failure to testify.[23] Under the State's theory of the case, the only people present in the motel room at the time of Caminero's death were Gato, Castro and Villaverde, all of whom were charged as defendants. Therefore, we conclude that this statement that all people in the motel room were "not talking" was a direct comment on Gato's silence.

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[20]Murray v. State, 113 Nev. 11, 17, 930 P.2d 121, 124 (1997) (quoting Neal v. State, 106 Nev. 23, 25, 787 P.2d 764, 765 (1990)); see also Angle v. State, 113 Nev. 757, 763, 942 P.2d 177, 181 (1997); McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986).

[21]Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991).

[22]Id.

[23]Id.

Improper commentary on a defendant's silence is reversible error, unless the error is harmless beyond a reasonable doubt.[24] To determine whether error is harmless, we examine "whether the [question] of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged."[25] Here, the error was a single comment in the course of a ten day trial. In light of the other overwhelming evidence presented, including the DNA evidence, Gato's tacit admission to Gamboa that Villaverde "shoulda taped him right," and Garcia's and Gamboa's other testimony, we conclude that this error was harmless beyond a reasonable doubt.

Prior bad acts and character evidence

Gato also contends that the trial court improperly admitted eight separate pieces of bad act/character evidence. We disagree.

NRS 48.045 generally provides that evidence related to character or prior bad acts is not admissible to prove that the defendant acted in conformity therewith. However, NRS 48.045(2) allows admission of evidence of other "bad acts" for purposes other than proving conformity, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[26] When multiple crimes or bad acts are closely related to the crime charged, NRS 48.035(3) further provides that evidence related to these bad acts may be admitted if

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[24]Id. (citing Chapman v. California, 386 U.S. 18, 21-24 (1967)).

[25]Schoels v. State, 115 Nev. 33, 35, 975 P.2d 1275, 1276 (1999).

[26]NRS 48.045(2).

a witness could not describe the underlying crime without referring to the other bad acts. As with all evidence, evidence of character or bad acts is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice.[27]

To admit evidence of prior bad acts, the district court must conduct a Petrocelli[28] hearing to determine whether the evidence is relevant, the act is proven by clear and convincing evidence, and the probative value of the act is not substantially outweighed by unfair prejudice.[29] Nevertheless, failure to conduct a Petrocelli hearing is not reversible error when the record is sufficient to establish that the evidence is admissible under the test outlined above, or that any resulting error was harmless.[30] Further, trial courts have wide "discretion in determining the relevance and admissibility of evidence."[31] Accordingly, a decision to admit or exclude evidence of prior bad acts will not be disturbed absent a showing of manifest error.[32]

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[27]NRS 48.035(1).

[28]See Petrocelli, 101 Nev. 46, 692 P.2d 503.

[29]Braunstein v. State, 118 Nev. 68, 72-73, 40 P.3d 413, 416-17 (2002); see also Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005); Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); Petrocelli, 101 Nev. at 52-53, 692 P.2d at 507-508.

[30]Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998).

[31]Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996).

[32]Rhymes, 121 Nev. at 21-22, 107 P.3d at 1281.

Gato's involvement in the narcotics trade

Gato first contends that the district court erred when it allowed Gamboa and Garcia to each testify regarding Gato's involvement in the narcotics trade. As the State alleges, the narcotics trade was the common element that connected Caminero, Gamboa, Villaverde, Gato and Castro. It would have been nearly impossible for witnesses to testify concerning the facts supporting the State's theory of its murder case without mentioning the sale of narcotics. Accordingly, this evidence was admissible to suggest Gato's motive for wanting to rob Caminero. And, the district court could reasonably determine that Gamboa and Garcia's testimony at the Petrocelli hearing established by clear and convincing evidence that Gato sold narcotics. We therefore conclude that the district court did not abuse its discretion in admitting this testimony pursuant to either NRS 48.035(3) or NRS 48.045(2).

Evidence that Gato used an illegal controlled substance and wanted to do a "lick" or "jack someone"

Gato also contends that the trial court erred in allowing Gamboa's testimony that, while in California, Gato wanted to do a "lick" or "jack" (meaning to rob) someone and that, at some point, he began to "smoke a joint." The trial court, however, did not actually admit this evidence. In both instances, the district court sustained defense counsel's objections, and instructed the jury to disregard the testimony. The presumption remains that jurors follow the court's instructions.[33] Because

[33]Lisle v. State, 113 Nev. at 558, 937 P.2d at 484.

none of this "bad act" evidence was actually admitted, we conclude that the district court committed no error in relation to these rulings.[34]

Evidence that Gato threatened Garcia

Gato next contends that the district court erred in admitting certain portions of Garcia's Petrocelli hearing testimony. Garcia was a mutual acquaintance of Caminero, Gato and Castro. After Caminero's death, Garcia spoke to the police and told them that Gato and Castro had previously sought his participation in a plan to rob Caminero. Garcia testified at the Petrocelli hearing that, after his conversation with police detectives, he received a telephone call from a mutual acquaintance, nicknamed "Bobo," who told him that Gato, Villaverde and Castro planned to kill Garcia for talking to the police. Garcia further testified that, after the phone call, he obtained a firearm to protect himself, despite his status as an ex-felon.

In addition to the general restrictions on admission of bad act and character evidence, this court has repeatedly held that "'implications of witness intimidation by a defendant are reversible error unless the prosecutor also produces substantial credible evidence that the defendant was the source of the intimidation.'"[35] We conclude, however, that

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[34]Even if some error occurred, we further conclude that the error was harmless beyond a reasonable doubt. See Chapman, 386 U.S. 18, 21-24.

[35]Meek v. State, 112 Nev. 1288, 1295, 930 P.2d 1104, 1109 (1996) (quoting Lay v. State, 110 Nev. 1189, 1193, 886 P.2d 448, 450-51 (1994)); see also United States v. Peak, 498 F.2d 1337, 1339 (6th Cir. 1974); United States v. Hayward, 420 F.2d 142, 147 (D.C. Cir. 1969); Hall v. United States, 419 F.2d 582, 585 (5th Cir. 1969).

Garcia's testimony at the Petrocelli hearing provided sufficient evidence to establish that Gato, Castro and Villaverde were the source behind the threat to Garcia. Evidence of the threat was relevant to rehabilitate Garcia as a witness, and explain Garcia's felon-in-possession of a firearm conviction. The threat was also directly probative of Gato's involvement in Caminero's death.[36] We therefore conclude that the district court did not abuse its discretion under NRS 48.045 in admitting this testimony.

Gamboa's statement that "I know Gato"

Gato also contends that the district court erred when it allowed Gamboa to testify that she did not want to rent a motel room for Gato, Castro and Villaverde because "I know Gato." The admission of this ambiguous statement, although arguably constituting improper character evidence, did not, beyond a reasonable doubt, ascend beyond harmless error.[37]

Testimony portraying Cubans as violent

Gato further argues that the district court erred when it allowed Gamboa's testimony portraying Cubans as violent. Testimony at trial established that Gato, Castro and Villaverde were all of Cuban descent. Gato, therefore, asserts that this was impermissible character

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[36]See Evans v. State, 117 Nev. 609, 628, 28 P.3d 498, 512 (2001) (noting that "[e]vidence that after a crime a defendant threatened a witness with violence is directly relevant to the question of guilt [and] . . . is neither irrelevant character evidence nor evidence of collateral acts requiring a hearing").

[37]See Chapman, 386 U.S. at 21-24.

evidence, and that the danger of prejudice substantially outweighed its probative value.

On cross-examination, Gato's attorney attempted to discredit Gamboa by engaging in the following line of questioning:

> [Defense Counsel]: Did you indicate to the police that the boyfriend [Villaverde] that you had been seeing, kinda seeing, I'm not gonna be seeing anymore?
>
> [Gamboa]: Right.
>
> Q: Was it true?
>
> A: Yes
>
> Q: It was true, you weren't going to be seeing him anymore?
>
> A: Oh, no.
>
> Q: No? It was a lie?
>
> A: Well, in my head at that time I'm telling the truth.
>
> . . . .
>
> Q: And [you stayed] 'cause he's cute, wasn't he?
>
> A: Not 'cause he was cute. I loved him.
>
> . . . .
>
> Q: Did you – were you asked, "you stayed with [Villaverde] all this time?" [referring to preliminary hearing testimony] And tell the jury what you said.
>
> A: That "he's cute and it's kinda hard to tell a Cuban to leave."

On redirect, the State attempted to rehabilitate Gamboa by eliciting testimony that based on her relationship with her Cuban ex-husband, she was frightened that Villaverde would physically abuse her if she tried to end the relationship. The district court sustained Gato's objection to a

general question regarding Gamboa's perception of Cubans as violent, but allowed Gamboa to testify that she had been in an abusive relationship with her ex-husband, and that her ex-husband was Cuban.

This testimony was not offered to show that Gato was violent because he was Cuban. Rather, the State elicited the testimony to rehabilitate Gamboa after she admitted that she lied to detectives about her intentions to leave Villaverde. Therefore, the admission of this testimony did not offend NRS 48.045. Accordingly, we conclude that the district court did not abuse its discretion in admitting this evidence.[38]

Admission of Garcia's Petrocelli hearing testimony under Crawford v. Washington[39]

Gato next contends that admission of Garcia's Petrocelli hearing testimony violated his right to confrontation under the Sixth and Fourteenth Amendments. In Crawford v. Washington, the United States Supreme Court determined that the Confrontation Clause bars the use of a testimonial statement by a witness not testifying at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination.[40] Similarly, while NRS 171.198(6) and NRS 51.325(1) allow

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[38]We have considered Gato's arguments that this testimony violated the Equal Protection and Due Process clauses of the Fourteenth Amendment and conclude that these claims lack merit. We also reject Gato's argument that "viewed as a whole," the entirety of the character evidence introduced was more prejudicial than probative. We also cannot conclude that the admission of this evidence, if error at all, was harmless beyond a reasonable doubt.

[39]541 U.S. 36 (2004).

[40]Id. at 53-54.

for the admission of prior testimony at trial, the party offering the testimony must establish that (1) the defendant was represented by counsel at the prior proceeding, (2) counsel actually cross-examined the witness, and (3) the witness is actually unavailable for trial.[41]

Gato does not contest that Garcia was unavailable at trial or that he was represented by counsel at the Petrocelli hearing. He argues, however, that the Petrocelli hearing did not afford him adequate opportunity to cross-examine Garcia. We disagree. At the oral argument of this appeal, Gato's attorney conceded that Gato had received all discovery related to Garcia's testimony prior to the Petrocelli hearing. As at trial, Gato's motive at the hearing was to discredit Garcia, and he received the unrestricted opportunity to do so.[42] The record further shows that Gato's pre-trial attorney actually conducted a thorough cross-examination. We therefore discern no error in admission of Garcia's Petrocelli hearing testimony.

Testimony of Detective Wilson

At trial, Detective Robert Wilson testified about his interviews with Gamboa. We reject Gato's contention that this testimony regarding

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[41]Funches v. State, 113 Nev. 916, 920, 944 P.2d 775, 777-78 (1997). Further, NRS 171.198(6) specifically allows for the admission of preliminary hearing testimony, while NRS 51.325 provides guidelines for the admission of former testimony in general.

[42]See Lisle v. State, 113 Nev. at 698-99, 941 P.2d at 472 (finding no Confrontation Clause violation in admitting prior hearing testimony when "Lisle's attorney had full, complete and unrestricted opportunity to cross-examine [the witness], and he has not stated how he would have further impeached [the witness's] testimony").

Gamboa's statements violated the Confrontation Clause as defined in Crawford, and constituted impermissible witness vouching.

As stated above, the United States Supreme Court holding in Crawford established that a testimonial statement of a witness who does not appear at trial is inadmissible hearsay under the Sixth Amendment Confrontation Clause, unless the witness was unavailable to testify and the defendant had prior opportunity for cross-examination.[43] The Court, however, specifically noted that the Confrontation Clause places no constraints on the use of prior testimonial statements when the declarant appears for cross-examination at trial.[44] Even assuming that Gamboa's statements to Garcia were testimonial, Gamboa testified at trial and was subject to cross-examination regarding her statements. We therefore discern no Crawford violation in admission of this testimony.

Gato also contends that Detective Wilson engaged in impermissible witness vouching when he testified that he believed some, but not all, of what Gamboa told him during her initial interview. As a general rule, one witness may not vouch for the testimony of another.[45] In Browning v. State, we observed that "such vouching occurs when the prosecution places '"the prestige of the government behind the witness,"'

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[43]541 U.S. at 53-54.

[44]541 U.S. at 59 n.9.

[45]Leonard v. State, 117 Nev. 53, 74 n.14, 17 P.3d 397, 410 n.14 (2001); Marvelle v. State, 114 Nev. 921, 931, 966 P.2d 151, 157 (1998).

by providing "'personal assurances of [the] witness's veracity.'"'[46] However, we further determined that such vouching did not occur when the prosecution stated that a witness's identification was "'as [accurate] as you could ask for [under the circumstances].'"[47]

In this case, Detective Wilson specifically stated that he did not believe everything Gamboa told him. This testimony certainly did not place the "prestige of the government" behind Gamboa's testimony or provide "personal assurances" of Gamboa's veracity. Accordingly, we conclude that Detective Wilson's testimony did not constitute impermissible witness vouching.

Cumulative error

Finally, Gato argues that the cumulative effect of the alleged errors warrants dismissal. This court will reverse a conviction if the cumulative effect of trial error denies a defendant the right to a fair trial.[48] Even so, a defendant is only entitled to a fair trial, not a perfect one.[49] Relevant factors in the cumulative error analysis "include whether "'the

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[46]120 Nev. 347, 359 (2004) (alteration in original) (quoting U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992) (quoting United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980))).

[47]Id.

[48]Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1288 (1996) (citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

[49]Rudin v. State, 120 Nev. 121, 144, 86 P.3d 572, 583 (2004).

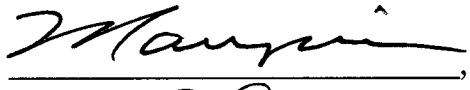
issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.""[50]

While burglary, robbery and murder are all serious crimes, we have determined that any errors alleged by Gato are either nonexistent or lack the necessary force to compel reversal. Thus, in light of the strength of the evidence presented against Gato, we reject Gato's contention that the cumulative effect of any error deprived him of a fair trial.

CONCLUSION

We conclude that none of Gato's alleged errors deprived him of a fair trial. Therefore, we

ORDER the judgment of the district court AFFIRMED.



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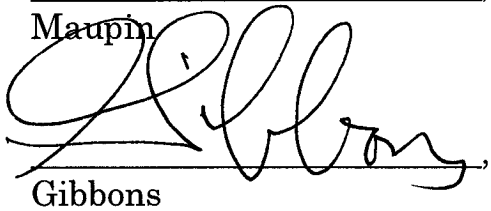

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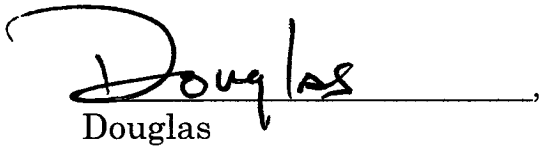

_____, J.
Douglas

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[50]Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (quoting Homick, 112 Nev. at 316, 913 P.2d at 1289) (quoting Big Pond, 101 Nev. at 3, 692 P.2d at 1289)).

cc: Eighth Judicial District Court Dept. 17, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk