IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 45374

FILED

JUN 15 2006

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

ORDER OF AFFIRMANCE

This is a direct appeal from a judgment of conviction. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

Appellant Terry Brown was convicted by the district court, pursuant to a jury verdict, of first-degree murder for strangling Vickie Lee in Reno in 1998. Brown was sentenced to a term of life in prison without the possibility of parole. He now appeals, raising several issues.

Brown first contends that the district court improperly denied his motion for a mistrial. He argues that his counsel became aware for the first time during the State's opening statement to the jury that it was going to call Kyle Edwards, a former inmate housed in an Oregon prison with Brown, as a witness against him. Being unaware of Edwards, Brown's counsel had to alter their trial strategy and reserve their opening statement. Brown moved for a mistrial on this basis. The district court denied the motion, and Brown maintains that this decision was in error. We disagree.

A motion for a mistrial "may be granted for any number of reasons where some prejudice occurs that prevents the defendant from

receiving a fair trial."[1] And a district court's decision to grant or deny that request rests within its sound discretion and will not be reversed on appeal "absent a clear showing of abuse."[2]

Here, the record shows that the lack of awareness and preparation for Edwards's testimony by Brown's counsel was due to oversight, and not any intentional misrepresentation or fault by the State. Further, we conclude that the district court took appropriate steps to cure any prejudice to Brown on this matter.

Brown's counsel were provided with an additional opportunity to interview Edwards prior to his appearance in court. The State provided Brown's counsel with copies of discoverable materials related to Edwards. And Brown's counsel thoroughly cross-examined Edwards during the trial. Brown has failed to demonstrate that he was prejudiced by this matter or how his trial was rendered unfair because of it. We conclude that the district court did not abuse its discretion by denying Brown's mistrial motion and he is not entitled to relief on this basis.

Second, Brown contends that the district court improperly denied his pretrial motion to suppress statements he made to Reno Police Department (RPD) Detective Jim Duncan during an interview in an Oregon prison. Those statements, he maintains, were obtained in violation of his rights pursuant to Miranda v. Arizona[3] and should not have been admitted into evidence, and warrant him relief. We disagree.

---

[1]Rudin v. State, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004).

[2]Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001).

[3]384 U.S. 436 (1966); see U.S. Const. amend. V.

"The Fifth Amendment privilege against self-incrimination requires that a suspect's statements made during custodial interrogation not be admitted at trial if the police failed to first provide a Miranda warning."[4] Here, it is undisputed that Brown was in custody at the time of the interview, that Miranda warnings were read to him, and that a redacted version of the interview was admitted into evidence. However, the warnings were read to Brown after the interview had begun, and Brown's pre-Miranda statements were admitted into evidence along with his post-Miranda statements.

The information conveyed by Brown during the initial, pre-Miranda portion of the interview consisted of such things as his name, date of birth, where he grew up, whether he ate lunch that day, and the prison where he was confined. Brown has failed to show this information had any incriminating value. Even assuming that Brown's pre-Miranda statements were the product of police interrogation[5] and the Fifth Amendment applied, we conclude that any error by the district court in admitting these statements was harmless beyond a reasonable doubt.[6]

The portions of Brown's statements that had incriminating value were made after the detective read him his rights pursuant to

---

[4]Koger v. State, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001).

[5]Cf. Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (defining interrogation as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect") (internal citations omitted).

[6]See Mendoza v. State, 122 Nev. ___, ___ n.28, 130 P.3d 176, 182 n.28 (2006); Arizona v. Fulminante, 499 U.S. 279, 295-96 (1991).

Miranda. The question before us with respect to the admissibility of these post-Miranda statements is whether Brown validly waived his Miranda rights.

This court has held that "[a] valid waiver of rights under Miranda must be voluntary, knowing, and intelligent."[7] A waiver is voluntary if, under the totality of the circumstances, the statement was the product of free and deliberate choice rather than coercion or improper inducement.[8] Here, Brown acknowledges on appeal that he understood and waived his rights, but asserts that the waiver was involuntary because he was in prison at the time on an unrelated charge. We conclude that simply being made in prison, however, does not render Brown's waiver involuntary.

Brown has failed to provide this court with an entire copy of a transcript of the interview, which was his burden to do.[9] Thus, our ability to completely review this matter is impaired. Our review of those portions of the interview available in the record before us shows that he was lucid, conversational, and responsive during the interview. Moreover, Detective Duncan informed Brown that he could terminate the interview by merely saying "I'm done" or by requesting to see an attorney. Brown eventually requested to see an attorney, and the interview was concluded. Brown cites to no instances of threats or coercion by the detective during the interview or any other evidence showing that his waiver was involuntary or otherwise invalid. We conclude that Brown validly waived his Miranda

---

[7]Mendoza, 122 Nev. at ___, 130 P.3d at 181.

[8]Id. at ___, 130 P.3d 181-82.

[9]See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

rights and he failed to show that the district court abused its decision by denying his suppression motion and admitting his post-Miranda statements.

Third, Brown contends that the district court improperly limited his right to cross-examine RPD Detective William Gallagher regarding his investigation into the alibis of two other suspects, Obed Pigg and Leland Potter. He maintains that the district court improperly sustained numerous objections raised by the State during the cross-examination which hindered his right to present his defense. We disagree.

A criminal defendant has a right to cross-examine witnesses against him,[10] which includes presenting "any relevant evidence and testimony at trial that someone other than the defendant committed the offense."[11] However, district courts also have the discretion to limit the scope of cross-examination,[12] and the evidence sought to be elicited by the defendant through the cross-examination must otherwise be admissible.[13]

The record reveals that the State lodged 11 objections during Brown's cross-examination of Detective Gallagher. Two of those objections were overruled; Brown only opposed the district court's decision with respect to one of the remaining nine objections. He made no offer of proof and said nothing in response to the State's eight other objections.

---

[10]See U.S. Const. amend VI.

[11]See Garcia v. State, 121 Nev. ___, ___, 113 P.3d 836, 845 (2005), modified in part on other grounds by Mendoza, 122 Nev. at ___, 130 P.3d at 180-81.

[12]See Crawford v. State, 121 Nev. ___, ___, 121 P.3d 582, 591 (2005).

[13]See Garcia, 121 Nev. at ___, 113 P.3d at 845.

Nevertheless, and despite the State's objections, Brown's cross-examination of Detective Gallagher was extensive, consisting of over 150 questions. Brown elicited information from the detective about his investigation into Pigg and Potter, an inability to confirm Pigg's and Potter's alibis, the inconclusive results of their polygraph examinations, and the reasons why the focus of the investigation shifted away from them and toward Brown. Brown fails on appeal to specify what credible and admissible information he was improperly prevented from presenting to the jury during his cross-examination of the detective. He also fails to explain how any such information had any probability of altering the jury's verdict. We conclude that Brown's cross-examination of the detective satisfied constitutional requirements, and any errors by the district court in its rulings on this matter were harmless beyond a reasonable doubt.[14] Brown is not entitled to relief on this basis.

Fourth, Brown contends that the district court improperly denied his proposed jury instruction concerning circumstantial evidence.[15] We disagree.

A defendant has a right to have the jury instructed on his theory of his case when it is supported by evidence, regardless of how

---

[14]See Bushnell v. State, 95 Nev. 570, 573, 599 P.2d 1038, 1040 (1979) (reviewing a district court's decision improperly limiting a defendant's cross-examination of a witness for harmless error).

[15]Brown's proposed instruction was as follows:

> Circumstantial evidence alone can certainly sustain a criminal conviction. However, to be sufficient, all the circumstances taken together must exclude to a reasonable certainty every hypothesis but the single one of guilt.

weak or incredible.[16] However, the district court may refuse a proposed jury instruction on a defendant's theory of the case when it is substantially covered by other instructions.[17]

Here, the district court instructed the jurors on the proper use of circumstantial evidence in Jury Instruction No. 27.[18] Brown's proposed instruction was substantially covered by Instruction No. 27, and we conclude that the district court did not improperly reject it. Moreover, this court has held that a district court may refuse a circumstantial evidence instruction where the jury is correctly instructed on reasonable doubt.[19] The jury in Brown's case received a correct instruction defining reasonable doubt.[20] We conclude that Brown is not entitled to relief on this basis.

---

[16]See Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002).

[17]Id. at 372, 46 P.3d at 77; see Milton v. State, 111 Nev. 1487, 1492, 908 P.2d 684, 688 (1995).

[18]Instruction No. 27 provided:

> There are two types of evidence which the jury may consider in this case. One is direct evidence, such as the testimony of an eyewitness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of another circumstance.
>
> The law makes no distinction between direct and circumstantial evidence, but requires that before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

[19]See Bailey v. State, 94 Nev. 323, 325-26, 579 P.2d 1247, 1248-49 (1978).

[20]See NRS 175.211 (defining reasonable doubt).

Fifth, Brown contends that the district court failed to have an independent laboratory test the DNA evidence linking him to the murder. He filed a pretrial motion requesting he be permitted to conduct his own DNA testing. The motion was unopposed by the State. But the record does not reveal whether the district court ever denied the motion or made any ruling on it. Brown maintains that the district court had a sua sponte duty to order the testing on his behalf. We disagree.

Brown cites to no authority placing an obligation on district courts in Nevada to sua sponte order DNA testing. We note that the DNA evidence relied on by the State linking Brown to the murder was tested by two laboratories in Oregon and Utah in addition to its own in Washoe County. Brown failed to show that the DNA evidence was unreliable. Independent testing of the DNA evidence may have been a defense strategy for Brown's counsel to pursue, but it was not a responsibility of the district court. Brown is not entitled to relief on this basis.

Finally, Brown contends that insufficient evidence supported his conviction and sentence. We disagree.

The standard for reviewing the evidence supporting a conviction is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[21] Moreover, circumstantial evidence alone may support a conviction, and the function

---

[21]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

of assessing the weight of the evidence and witness credibility is the jury's.[22]

Here, the State introduced evidence showing that the victim, Vickie Lee, died as a result of manual strangulation.[23] Brown was in Reno on the day of her murder and registered at a motel near where her body was found. Brown's DNA was matched by three laboratories to tissue found beneath two of Lee's fingernails. When questioned by detectives, Brown initially denied ever seeing Lee or having any sexual or physical contact with her. But he later implausibly suggested during his defense that his DNA was placed beneath Lee's fingernails through some type of casual contact that he failed to remember. And Edwards—the former Oregon prison inmate housed with Brown—once told a detective that Brown stated to him in reference to the murder, "I did the shit, but I don't think they got enough to convict me on it." We conclude that this evidence was sufficient to support Brown's conviction for first-degree murder.[24]

Brown's sentence of life in prison without the possibility of parole was within the statutory limits, and he has failed to demonstrate

---

[22]See Furbay v. State, 116 Nev. 481, 486, 998 P.2d 553, 556 (2000); Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 853-54 (2000).

[23]Brown contends that the State did not prove sufficient corpus delicti. However, the State produced evidence during Brown's preliminary hearing and trial that Lee died from manual strangulation. We conclude this evidence established sufficient corpus delicti to bind him over for trial and to support his murder conviction. See Tabish v. State, 119 Nev. 293, 312, 72 P.3d 584, 596 (2003); Sheriff v. Middleton, 112 Nev. 956, 961-62, 921 P.2d 282, 285-86 (1996).

[24]See NRS 200.010; NRS 200.030.

that the jury relied upon any impalpable or highly suspect evidence in imposing it.[25] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.

Becker, J.

Parraguirre, J.

cc: Hon. Steven R. Kosach, District Judge
Mary Lou Wilson
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

[25]See NRS 200.030(4)(b); Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976); see also NRS 175.552.