

IN THE SUPREME COURT OF THE STATE OF NEVADA

HERMAN MORALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45501

FILED

MAY 09 2007

ORDER OF AFFIRMANCE

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

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; Nancy M. Saitta, Judge.

FACTS AND PROCEDURAL HISTORY

On July 8, 2003, Juan Luis Victor-Garcia, Rafael Gomez and several friends spent the afternoon drinking beer at the Sunrise Apartments in Las Vegas. At some point they made a trip to a convenience store where they met appellant Herman Morales. An argument ensued between Morales and Victor-Garcia, during which they exchanged threats.

Gomez, Victor-Garcia and their friends returned to the apartment complex, and Gomez left the group to retrieve an ice bucket. A short while later, Gomez heard gunshots and saw Morales running away from the direction of the shots, hiding something under his shirt. Gomez rounded the apartment building and found Victor-Garcia, who had been shot, and later died of his injuries.

Gomez and several other witnesses testified at a preliminary hearing in November of 2003. The justice court determined that there was sufficient probable cause to bind Morales over for trial in the district court. Because Gomez was an illegal alien, the district court designated him a

material witness at the State's request. However, the State later received information from Immigration and Naturalization Services (INS) that Gomez was not wanted by INS, and petitioned the district court to release Gomez from custody. INS deported Gomez immediately after his release.

Due to Gomez's deportation, the district court declared him to be unavailable and allowed the preliminary hearing transcript of his testimony to be read into the record at trial. The State also presented the testimony of other acquaintances of Morales, one of whom testified that Morales had confessed to killing Victor-Garcia on multiple occasions. Julio Antelo-Balmacedo, a friend of Morales, testified that he had previously agreed to sell Morales a revolver for \$100. Another witness testified that immediately after the murder, he saw Antelo-Balmacedo and Morales engage in a "transaction" and then saw Antelo-Balmacedo flush bullet casings down the toilet.

The State also introduced the expert testimony of Dinnah Caluag, a firearms examiner for LVMPD, who worked with examiner James Krylo as a peer examiner to perform ballistics testing on the revolver recovered from Antelo-Balmacedo's apartment. Because Krylo performed the initial examination on the revolver, Caluag mainly testified to the opinions in Krylo's report, which she referred to throughout her testimony. Caluag testified that Krylo determined that the bullets recovered from Victor-Garcia's body were fired from a revolver similar in model and caliber to the one tested but he could not conclusively determine that the bullets were fired from the specific revolver tested. Caluag also testified that Krylo determined that the tested revolver had a bent center pin, which made the weapon difficult to fire.

A jury found Morales guilty of first-degree murder with the use of a deadly weapon, and the district court sentenced him to serve two consecutive terms of life in prison with the possibility of parole after 20 years. On appeal, Morales asserts multiple assignments of error, including improper admission of Gomez's preliminary hearing testimony and improper admission of hearsay statements in Krylo's report through firearms examiner Caluag. We discuss these claims below.

DISCUSSION

Admission of Rafael Gomez's preliminary hearing testimony

Morales first argues that the district court erred in admitting the preliminary hearing testimony of Rafael Gomez. We disagree.

This court will not reverse a trial court's admission of evidence on appeal unless the trial court's decision was "manifestly erroneous."¹ In addition, because Morales failed to object to admission of Gomez's testimony at trial, we review his claims only for plain error affecting his substantial rights.²

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-

¹Medina v. State, 122 Nev. 346, 351, 143 P.3d 471, 474 (2006) (citing Lucas v. State, 96 Nev. 428, 431-32, 610 P.2d 727, 730 (1980)).

²NRS 178.602; Flores v. State, 121 Nev. 706, 722, 120 P.3d 1170, 1180-81 (2005).

examination.³ Similarly, while NRS 171.198(6) and NRS 51.325(1) allow for the admission of preliminary hearing testimony at trial, the party offering the testimony must establish that (1) the defendant was represented by counsel at the preliminary hearing, (2) counsel actually cross-examined the witness, and (3) the witness is actually unavailable for trial.⁴ Here, Morales argues that admission of Gomez's preliminary hearing testimony violated Crawford because Gomez was not "unavailable" and because the preliminary hearing did not afford him adequate opportunity for cross-examination.

NRS 51.055(1)(d) provides that a witness is "unavailable" if the witness is

[a]bsent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance or to take his deposition.

Here, Gomez's deportation by the INS clearly rendered him "unavailable" under this definition. However, NRS 51.055(2) further provides:

A declarant is not "unavailable as a witness" if his exemption, refusal, inability or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

³541 U.S. 36, 53-54 (2004); see also Medina, 122 Nev. at 350, 143 P.3d at 474.

⁴Funches v. State, 113 Nev. 916, 920, 944 P.2d 775, 777-78 (1997). 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.

Similarly, federal courts have also held that the government may not take affirmative steps, such as deportation, to render a witness unavailable.⁵

Accordingly, Morales argues that the district court's finding of unavailability was improper under NRS 51.055(2) because the State was "directly responsible" for Gomez's deportation. As explained above, Gomez was initially detained as a material witness in connection with Victor-Garcia's death, due to the risk of possible deportation. However, Gomez eventually contacted the Clark County District Attorney's Office and informed them that he was not wanted by the INS. An employee of the District Attorney's office contacted the INS and was told that the INS had no knowledge of Gomez and was not seeking to deport him. After verifying that the Clark County Detention Center did not have an INS detainer placed on Gomez, the State requested that the district court quash the material witness warrant. Despite its previous representations, the INS deported Gomez immediately after his release from custody.

While Morales concedes that the State did not intentionally deport Gomez, he argues that by alerting the INS to Gomez's existence, the State created the very circumstances that led to Gomez's deportation. We conclude that this argument lacks merit. There is no indication that the State acted in bad faith when it contacted the INS to determine whether it was seeking to deport Gomez or would otherwise have reason to know that its actions would lead to Gomez's eventual deportation. Because Gomez's absence was not due to any "procurement or

⁵See Hernandez-Guadarrama v. Ashcroft, 394 F.3d 674, 682 (9th Cir. 2005).

wrongdoing” of the State under NRS 51.055(2), we discern no error in the district court’s finding of unavailability under NRS 51.055.

In addition to his contention that the district court erred in finding Gomez to be unavailable, Morales also contends that he did not have sufficient opportunity to cross-examine Gomez at the preliminary hearing. As stated above, to admit preliminary hearing testimony, the Confrontation Clause requires that the defendant be given full and fair opportunity to cross-examine that witness.⁶ Here, Morales received the opportunity to cross-examine Gomez at the preliminary hearing, and the record indicates that his attorney actually conducted an unrestricted cross-examination. Nonetheless, Morales argues that due to the limited nature of a preliminary hearing, any cross-examination at a preliminary hearing is not sufficient to satisfy the requirements of the Confrontation Clause as defined in Crawford.

In support of his claim, Morales cites to two cases from Colorado and Wisconsin, where courts concluded that the preliminary hearing processes in those states did not provide sufficient opportunity for cross-examination.⁷ We do not find these cases persuasive. In each of the cases, the scope of cross-examination at the preliminary hearing was

⁶Crawford, 541 U.S. at 53-54; see also Pantano v. State, 122 Nev. ___, ___, 138 P.3d 477, 482 (2006) (noting that ““the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity”” to cross-examine a witness) (quoting Walters v. McCormick, 122 F.3d 1172, 1175 (9th Cir. 1997) (quoting Delaware v. Fensterer, 474 U.S. 20, 22 (1985))).

⁷See State v. Stuart, 695 N.W.2d 259, 266-67 (Wis. 2005); People v. Fry, 92 P.3d 970, 977 (Colo. 2004).

limited to issues of plausibility; any attacks on witness credibility were “off limits.” Therefore, the state courts determined that the defendant did not have sufficient motive or opportunity to cross-examine the witness at the preliminary hearing. Conversely, in Nevada, “the credibility of a witness is one of the matters to be weighed by the magistrate.”⁸ Because the scope of preliminary hearing testimony is less restrictive in Nevada, Morales was not faced with a reduced motive to cross-examine.

In addition, as observed by the California Supreme Court in People v. Carter, Morales was not entitled to an ideal opportunity for cross-examination—only an opportunity for effective cross-examination.⁹ We conclude that Morales received this opportunity. The record indicates that Morales’ preliminary hearing attorney actually conducted a thorough cross-examination of Gomez, asking several questions specifically related to Gomez’s credibility. The district court did not impose any unique limitations on cross-examination, and Morales does not make any showing that increased discovery or time for preparation would have changed the manner in which he cross-examined Gomez. Accordingly, we conclude that Morales’ opportunity for cross-examination of Gomez satisfied the

⁸Marcum v. Sherriff, 85 Nev. 175, 179, 451 P.2d 845, 847 (1969).

⁹117 P.3d 476, 515 (Cal. 2005); see also State v. Young, 87 P.3d 308, 316-17 (Kan. 2004) (finding no Confrontation Clause violation in admission of preliminary hearing testimony); People v. Austin, 13 A.D.3d 1196, 1197 (N.Y. App. Div. 2004) (finding no Confrontation Clause violation in admission of preliminary hearing testimony where the court placed no restrictions on the defendant’s ability to cross-examine the witness at the preliminary hearing).

requirements of the Confrontation Clause, and that the district court did not err in admitting Gomez's preliminary hearing testimony.¹⁰

Testimony of firearms examiner Dinnah Caluag

Morales argues that admission of Dinnah Caluag's testimony regarding statements made by firearms examiner James Krylo in his report were erroneous under Crawford. Because Morales did not object to admission of this testimony at trial, we review these claims for plain error.¹¹

As stated above, the Supreme Court held in Crawford 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.¹² Here, Morales takes issue with firearms examiner Caluag's testimony regarding the statements made in the report of firearms examiner Krylo in his report.

At trial, Caluag testified that both she and Krylo were firearms examiners employed with LVMPD. She explained that when evidence is submitted to the lab, one examiner usually performs an initial examination. A second examiner conducts an independent peer review of any identifications made with a microscope and a general review of the

¹⁰We have also considered Morales' claim that the State's failure to provide Morales with a copy of its motion to admit preliminary hearing testimony violated his right to procedural due process, and conclude that this claim lacks merit.

¹¹Flores, 121 Nev. at 722, 120 P.3d at 1180-81.

¹²541 U.S. at 53-54; see also Medina, 122 Nev. at 351, 143 P.3d at 474.

first examiner's notes and conclusions. Here, Krylo performed the initial report, and Caluag verified his conclusions.

Caluag testified that Krylo determined that the revolver discovered in Julio Antelo-Balmacedo's apartment had a bent center pin which made the revolver difficult to fire, especially in quick succession. She further testified that the bullets recovered from Victor-Garcia's body were fired from a revolver similar to the model and caliber of the one tested, but that Krylo could not conclusively determine that they were fired from the revolver tested. While Caluag testified regarding her own personal knowledge about many of these conclusions, there were several instances where she testified directly to the content of Krylo's report, which she referred to throughout her testimony.

The district court did not determine Krylo to be unavailable, and Krylo was not subject to cross-examination regarding the statements in his report. We further conclude that the statements in Krylo's report were testimonial, as they clearly "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."¹³ Therefore, in those instances where Calaug testified directly from statements in Krylo's report, this testimony violated the Confrontation Clause as defined in Crawford.

¹³Flores, 121 Nev. at 719, 120 P.3d at 1178-79 (quoting Crawford, 541 U.S. at 52) (concluding that statements made by a child to child abuse investigators in connection with her step-sister's death were testimonial); see also Medina, 122 Nev. at 354-55, 143 P.3d at 476 (concluding that statements made by a rape victim to a forensic nurse examiner were testimonial).

Nonetheless, we conclude that any error in admission of Caluag's testimony was harmless. Under harmless error analysis, reversal is not required if the State can demonstrate, beyond a reasonable doubt, that the error did not contribute to the jury's verdict.¹⁴ Factors a court may consider in determining whether an error is harmless include "the importance of the witness' 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."¹⁵

While Caluag's testimony was not cumulative or duplicative, it was not particularly helpful to the State's case. If anything, her testimony tended to exculpate Morales, as she testified that the gun the State claimed was the murder weapon had fairly serious mechanical problems and could only be fired after Krylo replaced the bent center pin. After Krylo replaced the center pin, Caluag testified that he still had difficulty firing the gun in quick succession. Thus, of all of Caluag's testimony, the only testimony helpful to the State was Krylo's conclusion that the bullets recovered from Victor-Garcia's body were fired from a gun similar in make and model to the one tested. Even then, Krylo could not conclusively link the bullets recovered to the gun tested. In light of the strength of the other evidence presented, including witness testimony that Morales twice

¹⁴Medina, 122 Nev. at 355, 131 P.3d at 476-77.


¹⁵Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

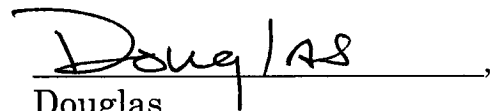
confessed to the murder, we conclude that admission of Caluag's testimony was harmless beyond a reasonable doubt.

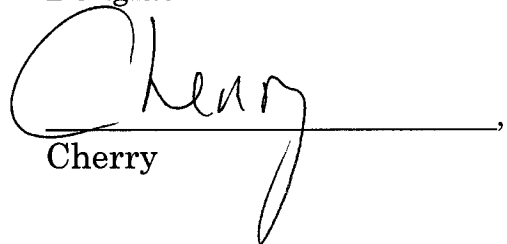
CONCLUSION

In addition to the claims discussed above, we have also considered Morales' remaining arguments, including those related to Vienna Convention violations, sufficiency of the evidence, and prosecutorial misconduct. We conclude that none of these alleged errors deprived Morales of a fair trial. We further conclude that the district court did not err in calculating the credit awarded to Morales for time served. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

cc: Eighth Judicial District Court Dept. 18, District Judge
Megan C. Hoffman Sacksteder
JoNell Thomas
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Eighth District Court Clerk