IN THE SUPREME COURT OF THE STATE OF NEVADA

JIM HOLDEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46325

FILED

MAR 28 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, entered upon jury verdicts, finding appellant, Jim Holden, guilty of first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, conspiracy to commit murder and first-degree kidnapping with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

FACTS

In February of 2004, an altercation arose between a group of teenagers in a house located at 5564 White Cap in Las Vegas. As a result, Gary Sutton and Michael Panek, two members of the group, beat up Josh Heatwole, another teenager. Leah Niemeyer and her daughter Kourtney, the official occupants of the White Cap house, told Sutton and Panek to leave.

Rodney Steven Evans, a friend of Heatwole's, heard about the beating, and was angered. He contacted the appellant, Jim Holden, and asked for his assistance in procuring a gun. Holden refused to give Evans a gun, but offered to stay at the White Cap house for a couple of days in the event that Panek and Sutton returned.

At 5:00 am on February 6, Panek and Sutton returned to the White Cap house. They entered the house, where Holden, among others,

was present in the living room. Holden pulled a gun on the pair, and forced them to sit down on the couch. Sutton surreptitiously dialed 911 on his cellular phone. The 911 transcript indicates that the group argued for a few minutes before Evans asked Holden to "f___ing shoot his ass."[1] The 911 transcript further indicates that a person, presumably Holden, responded that "I'm gonna . . . right now." After that, Panek lunged at Holden, in response to which Holden shot Panek in the back of the head. After a struggle for the gun, Holden also shot at and wounded Sutton, who, by then, was attempting to flee. The police arrived at the scene shortly thereafter, but it does not appear that they made any arrests at that time.

Six weeks later, Holden was arrested in connection with a separate fatal shooting near Civic Center Drive in Las Vegas. Holden gave a voluntary statement admitting to the shooting, indicating that he had been paid to "enforce" a debt. While incarcerated in connection with that shooting, Holden wrote a journal detailing the killings at the White Cap house and at Civic Center Drive. He claimed that he was a paid "enforcer" in both cases, boasting that he had fooled the police into thinking that he acted in self-defense in the White Cap shooting. Holden entrusted the journal with a fellow inmate, who eventually turned the journal over to the police.

In connection with the White Cap shooting, the State charged Holden with first-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, conspiracy to commit

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[1]Evans admitted at trial that it was his voice on the 911 recording and that he directed that remark at Holden.

murder, and first-degree kidnapping with the use of a deadly weapon. Holden proceeded to trial in August 2005, and a jury convicted him of all charges. Holden appeals from the judgment entered upon the verdict.

DISCUSSION

On appeal, Holden asserts multiple assignments of error which, among other claims, allege that the district court erred in admitting evidence related to the Civic Center Drive shooting, including Holden's journal; improperly admitted the voluntary statement of a witness in violation of Crawford v. Washington;[2] and erred in instructing the jury on vicarious coconspirator liability. We address each of these arguments below.

Evidence related to the Civic Center Drive shooting

We first examine Holden's claim that the district court erred in admitting evidence related to the Civic Center Drive shooting, namely the portions of his jail journal where he describes both shootings.

NRS 48.045(1) generally provides that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." If offered to prove conformity, this includes evidence of "other crimes, wrongs or acts."[3] 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."

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[2]541 U.S. 36 (2004).

[3]NRS 48.045(2).

This court set forth the procedures for allowing evidence of bad acts committed by the defendant in Petrocelli v. State.[4] Before admission of evidence of such acts, the district court must conduct a hearing outside the presence of the jury and determine that "'(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by danger of unfair prejudice.'"[5]

In any case, district courts have wide discretion in determining the relevance and admissibility of evidence.[6] Thus, we review decisions to admit or exclude evidence under an abuse of discretion standard.[7] Accordingly, a decision to admit or exclude evidence of prior bad acts will not be disturbed absent a showing of manifest error.[8]

Holden specifically takes issue with the admission of portions of the journal he purportedly wrote during his pretrial confinement, in which he described both the White Cap and Civic Center Drive shootings. In this journal, Holden described both shootings, indicating that in each case, he had received some form of compensation for his actions, stating "[t]he one on whitecap did not pay much though they were pore [sic]," and

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

[5]Braunstein v. State, 118 Nev. 68, 72-73, 40 P.3d 413, 417 (2002) (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)); see also Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005).

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

[7]See id.

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

that he "was born to do this and was making so much money doing it payed [sic] to kill is easy." The journal contained numerous threats of violence and ended with the phrase "To Murder or to Torcher [sic] that is The question!" After holding a Petrocelli hearing, the district court concluded that significant portions of Holden's journal could be admitted at trial.

As Holden contends, portions of his journal were undoubtedly prejudicial. Nonetheless, we conclude that the probative value of the journal was not substantially outweighed by the danger of unfair prejudice. The text of Holden's journal indicated that the killings at both White Cap and Civic Center Drive were paid murders. Therefore, we conclude that this evidence was highly relevant to prove Holden's motive in the White Cap shooting, to show that the shooting was not accidental, and to rebut Holden's claims of self-defense. Accordingly, we discern no abuse of discretion in the district court's admission of Holden's journal.[9]

Admission of Bradley McNutt's voluntary statement

Holden next argues that the district court violated his confrontation rights under Crawford v. Washington[10] when it allowed a recording of a voluntary statement that witness Bradley McNutt made to the police shortly after the shooting to be played to the jury at trial.

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[9]We have reviewed Holden's claim that he was unduly prejudiced by admission of the journal because he wrote the journal to impress his cellmates in a "highly emotional environment," and conclude that it lacks merit. While the environment in which Holden wrote the journal may work to diminish the credibility of any statements made by Holden, it does not diminish the relevance of theevidence.

[10]541 U.S. 36 (2004).

McNutt was an acquaintance of the Niemeyers, and one of several teenagers present during the shooting at the White Cap house. As indicated above, this court will not reverse a district court's admission of evidence on appeal unless the district court's decision was "manifestly erroneous."[11]

In Crawford, the United States Supreme Court determined that the Confrontation Clause bars the use of a testimonial statement by a witness who does not testify at trial unless the witness is unavailable and the defendant had a prior opportunity for cross-examination.[12] 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.[13]

Here, McNutt testified at the preliminary hearing on June 30, 2004. During McNutt's preliminary hearing testimony, McNutt was visibly upset, crying, and answered a majority of questions with "I don't

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[11]Medina v. State, 122 Nev. 346, 353, 143 P.3d 471, 474 (2006) (citing Lucas v. State, 96 Nev. 428, 431-32, 610 P.2d 727, 730 (1980)).

[12]541 U.S. at 53-54; see also Flores v. State, 121 Nev. 706, 714-15, 120 P.3d 1170, 1180-81 (2005). Under Crawford, a statement is testimonial if an objective witness would reasonably believe that the statement would be available for later use at trial. Medina, 122 Nev. at 354, 143 P.3d at 476.

[13]Funches 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.

know." Therefore, with the justice court's permission, the State used a number of McNutt's prior inconsistent statements from his voluntary statement to the police for impeachment purposes. Because McNutt had limited reading abilities, this resulted in large portions of McNutt's initial voluntary statement to the police being read into the record. McNutt was subject to cross-examination regarding all of these statements. The justice court also admitted the complete CD recording of McNutt's voluntary statement to the police into evidence, but the recording was not played aloud. At trial, McNutt could not be located, and the parties stipulated to his unavailability. Therefore, the district court allowed the transcript of the preliminary hearing testimony to be reenacted before the jury. The district court also allowed the CD recording of McNutt's prior voluntary statement to the police to be played for the jury.

Holden does not contest McNutt's unavailability, nor does he assert that the district court erred in publishing the transcript of McNutt's preliminary hearing testimony before the jury. However, he argues that the district court's admission of the full recording of McNutt's statement to the police violated his confrontation rights under Crawford. We agree. McNutt's voluntary statement to the police was clearly "testimonial" in nature,[14] and he was not subject to cross-examination with respect to any portions of the statement not read into the record at the preliminary hearing. Accordingly, we conclude that admission of the unread portions

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[14]See Medina, 122 Nev. at 354, 143 P.3d at 476 (reiterating that a statement is testimonial if an objective witness would reasonably believe that the statement would be available for later use at trial).

of McNutt's voluntary statement violated Holden's Sixth Amendment right to confrontation.

Nonetheless, this court reviews Confrontation Clause errors using harmless error analysis.[15] 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.[16] 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."[17]

Using the harmless error standard, we conclude that admission of McNutt's entire voluntary statement was harmless. First, while neither party has included a copy of McNutt's voluntary statement in the record on appeal, it appears that the crucial portions of McNutt's testimony were largely corroborated by other witnesses, as testimony by Sutton, Evans, Heatwole, and Kourtney Niemeyer all established that Holden and Evans forced Panek and Sutton to sit on the couch at gunpoint and that Holden shot Panek when he attempted to defend himself. Second, statements made in Holden's own journal indicated that he intentionally shot Panek and "fooled" the police into thinking that he shot Panek in self-defense. Therefore, in light of the overwhelming evidence

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[15]Medina, 122 Nev. at 353, 143 P.3d at476.

[16]Id. at 353, 143 P.3d at 476.

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

presented against Holden, we conclude that admission of McNutt's voluntary statement was harmless beyond a reasonable doubt.

Jury instruction on vicarious coconspirator liability

Finally, we examine Holden's assertion that the district court erroneously instructed the jury regarding vicarious coconspirator liability. In addition to other theories of liability, the State charged Holden with first-degree murder and attempted murder as a coconspirator. To this end, jury instruction sixteen provided,

> Every member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if the act or the declaration is in furtherance of the object of the conspiracy.
>
> The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. Every conspirator is legally responsible for an act of a co-conspirator that follows as one of the probable and natural consequences of the object of the conspiracy even if it was not intended as part of the original plan and even if he was not present at the time of the commission of such act.
>
> In the contemplation of the law, the act of one is the act of all.

After trial, but while Holden's appeal was pending, this court issued its opinion in Bolden v. State, rejecting the "natural and probable consequence" doctrine and concluding that a defendant cannot be found guilty of specific intent crimes on the basis that commission of those offenses was a natural and probable consequence of a conspiracy.[18] In

[18]121 Nev. 908, 922, 124 P.3d 191, 201 (2005).

determining whether the error resulting from use of a "natural and probable consequence" jury instruction was harmless, this court further indicated that when a jury issues a general verdict that could be based on either a legally valid or legally invalid ground, "the verdict may not stand, because a reviewing court cannot discern the ground upon which the jury based its verdict."[19] Thus, even if sufficient evidence exists to prove the defendant directly liable for the underlying offenses, reversal is required unless "it is absolutely certain that the jury relied upon the legally correct theory to convict the defendant."[20]

We conclude that under Bolden, the district court clearly erred in issuing jury instruction 16. Because the jury returned its verdicts for first-degree murder and attempted murder on a general verdict form, Holden's convictions for these charges must be reversed unless it is absolutely certain that the jury did not rely upon the conspiracy theory to convict Holden. Based on the evidence presented at trial, we conclude that, in this case, it is absolutely certain that the jury did not rely on the invalid theory.

To obtain a conviction for first-degree murder, the State must establish, beyond a reasonable doubt, a "willful, deliberate and premeditated killing" by the defendant.[21] In other words, ""the state must prove that a design to kill was distinctly and rationally formed in the mind

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[19]Id. at 923, 124 P.3d at 201.

[20]Id. at 924, 124 P.3d at 201 (internal quotations omitted).

[21]NRS 200.030(a).

of the perpetrator, at or before the time the fatal blows were struck.'"'"[22] The amount of time between the formation of the design to kill and the killing itself is irrelevant.[23] Here, Holden, not Evans, actually fired the shots at Panek and Sutton. Prior to firing the shots, he held both victims on the couch for several minutes at gunpoint. Although no one conclusively identified Holden's voice on the 911 recording, Evans admitted that he asked Holden to shoot Panek and the transcript indicates that an unidentified male answered, "I'm gonna . . . right now." In his own journal, Holden admitted that the shooting was premeditated, and not in self-defense. Accordingly, we conclude that the jury did not rely on vicarious coconspirator liability to convict Holden of first-degree murder and attempted murder.

CONCLUSION

In addition to the claims discussed above, we have also considered Holden's remaining arguments, including those related to reference to Panek as a "victim," restriction of Holden's ability to refer to Evan's guilty plea during closing argument, denial of Holden's request for witness immunity, prosecutorial misconduct, and sufficiency of evidence,

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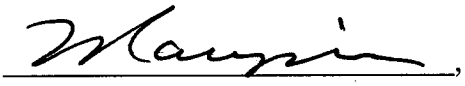
[22]Byford v. State, 116 Nev. 215, 245, 994 P.2d 700, 720 (2000) (Maupin, J., concurring) (quoting Powell v. State, 108 Nev. 700, 701, 838 P.2d 921, 921 (1992) (quoting Briano v. State, 94 Nev. 422, 423, 581 P.2d 5, 6 (1978))).

[23]Id.

and conclude that none of these alleged errors deprived Holden of a fair trial.[24]

Therefore, for the reasons stated above, we

ORDER the judgment of the district court AFFIRMED.



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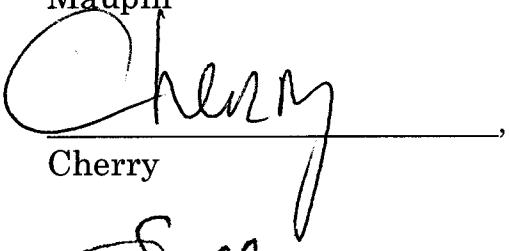

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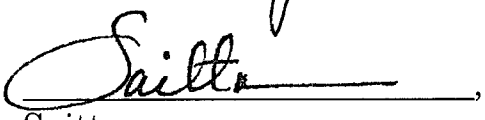

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cc: Hon. Jennifer Togliatti, District Judge
Bret O. Whipple
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[24]With respect to Holden's claims of prosecutorial misconduct regarding the decision to inform Leah and Kourtney Niemeyer of their Fifth Amendment rights, we specifically note that as established by the Tenth Circuit, "[t]he potential for unconstitutional coercion by a government actor significantly diminishes . . . if a defendant's witness elects not to testify after consulting an independent attorney." U.S. v. Serrano, 406 F.3d 1208, 1216 (10th Cir. 2005) (emphasis deleted). As there appeared to be a legitimate concern that the Niemeyers' testimony could expose them to prosecution, and Leah and Kourtney Niemeyer each spoke with an attorney before deciding whether to testify, we conclude that the State did not commit prosecutorial misconduct by informing the Niemeyers of their Fifth Amendment rights.