IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJAMIN GUAYDACAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47146

FILED

JAN 30 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary while in possession of a firearm, and one count of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellant Benjamin Guaydacan raises several arguments on appeal. The parties are familiar with the facts, and we do not recount them except as necessary for our disposition.

Jury selection

Guaydacan argues that the State violated Batson v. Kentucky[1] by practicing racial discrimination in its peremptory challenges.

The United States Supreme Court has stated that "a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried."[2] In Batson, the Court established an exception to a prosecutor's ordinarily broad

[1]476 U.S. 79 (1986).

[2]Id. at 89 (quoting United States v. Robinson, 421 F. Supp. 467, 473 (Conn. 1976)).

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discretion, holding that a prosecutor may not exercise a peremptory challenge on the basis of a juror's race.[3] There, the Court stated, "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[4]

The Supreme Court "set forth a three-step procedure for resolving objections to peremptory challenges."[5] "First, the objector must make a prima facie showing that the peremptory challenge is based on race."[6] Second, "[i]f the objector meets this burden, the party striking the juror must articulate a race-neutral explanation for striking the juror."[7] Third, "[i]f the court finds the striking party's reason is race neutral, the court must determine whether the objecting party has shown purposeful discrimination."[8] An appellate court reviews de novo "whether the striking party's proffered explanation is race neutral" and reviews "for clear error the district court's finding of whether the striking party had discriminatory intent."[9] The district court's decision "'on the ultimate

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[3]476 U.S. at 89.

[4]Id.

[5]U.S. v. Castorena-Jaime, 285 F.3d 916, 927 (10th Cir. 2002) (citing Batson, 476 U.S. at 94-97).

[6]Id.

[7]Id. at 927-28.

[8]Id. at 928.

[9]Id. at 927.

question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.'"[10]

We conclude that the State provided race-neutral explanations for each of its four peremptory challenges. With regard to Juror Marquez, a Filipina woman, the State justified its peremptory challenge on the ground that Marquez expressed uncertainty that she could decide the case impartially if the defendant was Filipino. The State dismissed Juror Carter, a young African-American man, because he appeared distracted during voir dire. The State dismissed Juror Isaac, an African-American man, because he repeatedly expressed discomfort with serving as a juror and his brother was at that time charged with burglary with a deadly weapon. The State dismissed Juror Wissa, an Egyptian woman, because the State believed she was not sufficiently proficient in the English language to understand technical testimony regarding firearms. We conclude that each of these reasons was a non-pretextual, race-neutral justification for exclusion.

The district court concluded that the prosecutor did not act with discriminatory intent in making any of the disputed peremptory challenges. The district court's findings as to the State's discriminatory intent are entitled to great deference, and we conclude that the district court's conclusion is not clearly erroneous.

Sufficiency of the evidence

Guaydacan argues that the State failed to prove that he committed burglary, failed to prove felony murder, and failed to prove

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[10]Id. (quoting U.S. v. Sneed, 34 F.3d 1570, 1579 (10th Cir. 1994)).

deliberate and intentional murder, and therefore that his conviction is not supported by sufficient evidence.

This court will not overturn a verdict on appeal if it is supported by sufficient evidence.[11] "There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt."[12]

Burglary

Under NRS 205.060(1), a person who enters an apartment with the intent to commit any felony is guilty of burglary. We conclude that the State presented sufficient evidence that Guaydacan entered the apartment with the intent to commit the felonies of robbery and coercion, and therefore that sufficient evidence exists to support his burglary conviction.

With respect to the underlying felony of robbery, the evidence adduced at trial establishes that Guaydacan unlawfully took personal property from the person of another, against the person's will, by means of force or threat of injury.[13] Guaydacan admitted that he did not own the laptop and that he brought a loaded gun to Amanda Gonzalez's apartment as a show of aggression in order to obtain his share of the laptop money. Because Guaydacan, by his admission, entered Gonzalez's apartment with

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[11]Buff v. State, 114 Nev. 1237, 1242, 970 P.2d 564, 567 (1998).

[12]Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998).

[13]NRS 200.380(1).

the intent to use the gun to force Luis Montes to give him something to which he was not entitled, there was sufficient evidence to prove that Guaydacan entered the apartment with the intent to commit robbery.

With respect to the underlying felony of coercion, the evidence adduced at trial establishes that Guaydacan entered the apartment with the intent to use or threaten to use violence on another person to compel the person to do an act which the other had a right to abstain from doing.[14] Guaydacan admitted that he brought a loaded gun to Gonzalez's apartment as a show of aggression in order to obtain his share of the laptop money, and Betsy Medrano testified that Guaydacan waved the gun at her and Gonzalez, pointed the gun in Montes' face, and demanded that Montes give him his share of the laptop money. Because Guaydacan, by his admission, entered Gonzalez's apartment with the intent to use the gun to threaten violence to Montes to compel Montes to give him money, there was sufficient evidence to prove that Guaydacan entered the apartment with the intent to commit coercion.

Felony murder

Under NRS 200.030(1)(b), an intentional or accidental killing committed during the perpetration or attempted perpetration of a burglary is first-degree murder.[15] Guaydacan's conviction for first-degree murder under a felony-murder theory is supported by sufficient evidence because, as discussed above, the State presented evidence that Guaydacan admitted that he did not own the laptop, that he entered Gonzalez's

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[14]NRS 207.190(1).

[15]See also Crawford v. State, 121 Nev. 744, 749, 121 P.3d 582, 586 (2005).

apartment with a loaded gun, and that he brandished the gun as a threat intended to induce Montes to give Guaydacan his share of the laptop money and to prevent resistance by Montes, Medrano, and Gonzalez. Although Guaydacan claimed that his gun fired accidentally, he admitted that he was pointing the gun at Montes's face when it fired. Thus, a reasonable juror could conclude that Guaydacan caused Montes's death during the commission of a burglary. Accordingly, we conclude that Guaydacan's conviction for first-degree murder under a felony-murder theory is supported by sufficient evidence.

Premeditated murder

Under NRS 200.030(1)(a), first-degree murder is any murder perpetrated by means of "willful, deliberate and premeditated killing." A conviction for first-degree murder under this subsection must rest on "proof of willfulness, deliberation, and premeditation, whether direct or circumstantial."[16]

Sufficient evidence supports Guaydacan's conviction for first-degree murder under a premeditated murder theory. Medrano testified that on the evening before Guaydacan shot Montes, Guaydacan held a gun to Medrano's face and threatened to "blast" Montes. The next morning, Guaydacan arrived at Gonzalez's apartment and inquired as to Montes's whereabouts. Whether Guaydacan pushed his way into the apartment or was allowed entry, he then brandished a gun before Medrano and Gonzalez and demanded to know where Montes was. After surveying the apartment, Guaydacan then confronted Montes with the gun, demanded

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[16]Graham v. State, 116 Nev. 23, 28, 992 P.2d 255, 258 (2000).

the money, heard Montes claim that he did not have the money, and, by Guaydacan's admission, he shot Montes in the head.[17] A rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could find beyond a reasonable doubt that Guaydacan killed Montes willfully, deliberately, and with premeditation. Accordingly, we conclude that Guaydacan's conviction for first-degree murder under a premeditated murder theory is supported by sufficient evidence.

Pretrial holdings

Guaydacan argues that the district court erred by ruling that Stan Welch, his proposed expert witness, could not testify as an expert witness and by refusing to take judicial notice of his proposed learned treatises.

Expert witness

This court reviews the district court's decision to admit expert testimony and whether a witness qualifies as an expert for an abuse of discretion.[18]

Welch, Guaydacan's proposed expert, had an extensive background in law enforcement. However, his qualifications established only that he had considerable experience in law enforcement, not that he had specialized knowledge of firearms as required under NRS 50.275.

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[17]Although Guaydacan claims that his gun discharged accidentally, we conclude that, based on the totality of the evidence, a rational jury could have found otherwise. See Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998).

[18]Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

Accordingly, we conclude that the district court did not abuse its discretion by concluding that Welch could not testify as an expert in firearms

Learned treatises

This court reviews "a district court's decision to admit or exclude evidence at hearings and trials for an abuse of discretion. It is within the district court's sound discretion to admit or exclude evidence, and 'this court will not overturn [the district court's] decision absent manifest error.'"[19]

Guaydacan claims that the district court should have taken judicial notice of the treatises. While the district court declined to take judicial notice, it did note that Guaydacan could cross-examine the State's expert and ask her to authenticate the documents as learned treatises.

Because Guaydacan failed to include the treatises at issue in the record, we rely solely on the hearing transcript to consider his argument. The district court noted that many of Guaydacan's proposed studies did not contain empirical data concerning the reliability of the gun at issue and it was also concerned that many of the documents came from the Internet and did not have clearly-identified authors. Based on the transcript, and without additional information, we conclude that the district court did not abuse its discretion in refusing to take judicial notice of the treatises at issue.

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[19]Means v. State, 120 Nev. 1001, 1007-08, 103 P.3d 25, 29 (2004) (alteration in original) (footnote omitted) (quoting Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000)). See also Prabhu, 112 Nev. at 1548, 930 P.2d at 110 (indicating that the district court's decision regarding the admissibility of learned treatises is subject to review for abuse of discretion).

Motion for a continuance

Guaydacan argues that the district court erred by denying his motion for a continuance to obtain a new expert or new treatises.

"A continuance may be granted upon a written affidavit demonstrating good cause."[20] This court reviews a district court's decision to grant or deny a continuance for an abuse of discretion.[21]

In the eight months between Guaydacan's arraignment and the start of trial, he had sufficient time to prepare expert testimony. In addition, Guaydacan's attorney admitted that he was partially at fault for not determining earlier whether the State's expert would confirm his position about various firearms studies. In light of the length of time that passed between the arraignment and the commencement of trial, as well as Guaydacan's attorney's delay in questioning the State's expert, we conclude that the district court did not abuse its discretion in denying Guaydacan's motion for a continuance.

Motion to exclude evidence of prior convictions

Guaydacan argues that the district court erred by denying his motion to exclude evidence of his prior convictions for impeachment purposes. He argues that the district court's decision prevented him from testifying in his defense.

This court reviews a "district court's decision to admit evidence of a prior felony conviction for an abuse of discretion."[22]

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[20]State v. Nelson, 118 Nev. 399, 404, 46 P.3d 1232, 1235 (2002).

[21]Id. at 403, 46 P.3d at 1235.

[22]Williams v. State, 121 Nev. 934, 948, 125 P.3d 627, 636 (2005).

Guaydacan failed to properly preserve this issue,[23] therefore we will not reverse the district court unless its decision constituted plain error. We conclude, however, that the district court did not abuse its discretion in denying Guaydacan's motion. Under NRS 50.095(1) and (2), evidence of a prior conviction is admissible to attack the credibility of a witness if the crime was a felony under the relevant law and if the conviction occurred within the preceding 10 years. However, the district court should exclude the evidence of a defendant's prior conviction if its prejudicial effect substantially outweighs its probative value.[24]

Guaydacan's prior convictions, for drug possession in 1999 and second-degree robbery in 2000, were felonies and occurred within the 10 years preceding the start of trial. Although the record does not reflect how the district court weighed the probative value of the convictions against their prejudicial effect, we conclude that the prejudicial effect of the convictions did not outweigh their probative value and therefore that the district court did not err by denying Guaydacan's motion to exclude evidence of the prior convictions.

Motion for mistrial

Guaydacan argues that the district court erred by denying his motion for a mistrial after a State witness referred to gangs, despite a pretrial order precluding the mention of gangs.

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[23]Warren v. State, 121 Nev. 886, 894-95, 124 P.3d 522, 528 (2005) ("In order to preserve the issue for appeal . . . a defendant must make an offer of proof to the trial court outlining his intended testimony, and it must be clear from the record that, but for the trial court's in limine ruling, the defendant would have testified.").

[24]Id. at 896, 124 P.3d at 528-29; NRS 48.035(1).

This court will not overturn a district court's denial of a motion for mistrial absent a clear showing of abuse of discretion.[25] This court has determined that remarks concerning other criminal activity do not constitute reversible error where they are brief and innocuous, unsolicited by the State, and followed by an immediate curative instruction.[26]

At Guaydacan's trial, a gang unit police officer testified that he and other gang unit detectives were the first to arrive at the scene after learning about the shooting from the gang unit. The State did not solicit this reference, and the district court offered a detailed curative instruction at the end of trial. Since the reference to gangs was brief, unsolicited by the State, and addressed by a curative instruction, we conclude that the district court did not abuse its discretion in denying Guaydacan's motion for a mistrial. Although the district court failed to issue the curative instruction immediately after the detective's testimony, this error was not prejudicial because the curative instruction was so thorough.

In hearing Guaydacan's motion for a mistrial, the district court commented that Guaydacan had visible tattoos on his neck and that the jury might therefore conclude he was in a gang regardless of the detective's testimony. Reliance on Guaydacan's neck tattoos would have been error, but there is no evidence to suggest that the court considered Guaydacan's neck tattoos in its decision to deny the motion. Furthermore,

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

[26]Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980); Allen v. State, 91 Nev. 78, 83, 530 P.2d 1195, 1198 (1975).

because the court correctly denied the motion for mistrial based on the analysis above, any reliance on the existence of Guaydacan's tattoos did not create error.

Jury instructions

Guaydacan argues that the district court erred by refusing to instruct the jury on his definition of "accident," by improperly requiring him to combine his theory of the case with the State's theory in one jury instruction, and by failing to answer a juror's question.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error."[27]

Failure to define "accident" and to instruct the jury on defense theory

Guaydacan argues that the district court erred by refusing his definition of the term "accident," which was his theory of the case. Guaydacan also argues that the "accident" instruction that the court did include, Instruction No. 19, improperly required Guaydacan to combine his theory of the case with the State's theory.

Guaydacan's proposed instruction provided as follows:

> All persons are liable to punishment except those who committed the act or made the omission charged, through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence.

Instruction No. 19, the instruction given by the district court, provided as follows:

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[27]Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Accident is a defense to an alleged intentional killing. Accident is not a defense to:

1. Murder under the felony murder rule – Where the killing takes place in the commission of a burglary or attempted burglary (whether the killing was intentional or accidental);
2. Involuntary manslaughter – the killing of a human being, without any intent to do so, in the commission of an unlawful act or in the commission of a lawful act committed in an unlawful manner which is likely to produce such a killing; or,
3. Second degree murder – where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent.

This court has held that "the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be."[28] "'If [a] proposed [defense] instruction is poorly drafted, a district court has an affirmative obligation to cooperate with the defendant to correct the proposed instruction or to incorporate the substance of such an instruction in one drafted by the court.'"[29] However, this court has also held that the district court does not need to accept "misleading, inaccurate or duplicitous jury

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[28]Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991).

[29]Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005) (alteration in original) (quoting Honeycutt v. State, 118 Nev. 660, 677-78, 56 P.3d 362, 373-74 (2002) (Rose, J., dissenting), overruled by Carter, 121 Nev. 759, 121 P.3d 592)).

instructions."[30] Finally, this court has stated that, "in general, a defendant is not required to proffer both the defense's and the State's theories of the case to have an instruction given."[31]

The district court did not abuse its discretion by refusing Guaydacan's proposed instruction because it was misleading. Guaydacan's proposed instruction would have led the jury to believe that if it found that he shot Montes accidentally, he should be acquitted. However, Guaydacan was charged with felony murder, which permitted a conviction merely upon the murder occurring during the course of the commission of a felony. In addition, Guaydacan has failed to demonstrate that his proposed instruction was an accurate, if poorly drafted, statement of the law, and that the district court was obligated to help him correct it.[32]

Moreover, even though Instruction No. 19 defined "felony murder," "involuntary manslaughter," and "second-degree murder"—arguably terms that were significant to the State's case—the district court did not require Guaydacan to proffer an instruction that combined his theory of the case with the State's theory. In fact, Instruction No. 19 does not instruct the jury on the State's theory, but simply defines for the jury relevant terms pursuant to statute. For these reasons, we conclude that the district court did not abuse its discretion when instructing the jury.

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[30]Id.

[31]Id.

[32]Id.

Juror question

While the jury was deliberating, one of the jurors submitted this question to the district court, "[i]f we check 'Guilty of Burglary while in Possession of a Firearm' can we select any option on Count 2? Or are we restricted?" The district court responded, "[t]he Court is not at liberty to answer [y]our question other than to tell you to refer to the jury instructions." Under Instruction No. 15, the jury was instructed, "[i]f you find [Guaydacan] guilty of burglary or attempted burglary and that [Montes] was killed during the course of the burglary or attempted burglary then [Guaydacan] is guilty of first degree murder pursuant to the principle of criminal liability known as the 'felony murder rule.'"

We conclude that Instruction No. 15 adequately answered the juror's question. Under Instruction No. 15, if the jury found that Montes was killed during the burglary—and sufficient evidence supports such a finding as discussed above—then the jury was instructed to find Guaydacan guilty of first-degree murder under the felony-murder theory. Therefore, the district court did not abuse its discretion by declining to address the juror's question in greater detail.

Prosecutorial misconduct

Guaydacan argues that the State committed multiple acts of prosecutorial misconduct. Guaydacan's trial counsel did not object to the majority of the statements Guaydacan now challenges as improper. Failure to object during trial generally precludes appellate consideration of an issue.[33] However, "'this court has the discretion to address an error

[33]Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

if it was plain and affected [Guaydacan's] substantial rights."[34] The burden rests with Guaydacan "to show actual prejudice or a miscarriage of justice."[35]

This court has stated that a prosecutor's comments should be considered in context, and "'[a] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[36] Only by viewing the prosecutor's statements or conduct in context can a reviewing court determine whether they "affected the fairness of the trial."[37]

Additionally, "'[t]he level of misconduct necessary to reverse a conviction depends upon how strong and convincing is the evidence of guilt.'"[38] "'If the issue of guilt or innocence is close, if the [S]tate's case is not strong, prosecutor misconduct will probably be considered prejudicial.'"[39] Improper remarks by a prosecutor "constitute harmless error when there is overwhelming evidence of guilt and this court can

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[34]Id. (quoting Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001)).

[35]Id.

[36]Johnson v. State, 122 Nev. ___, ___, 148 P.3d 767, 775 (2006) (quoting Hernandez v. State, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002)).

[37]United States v. Young, 470 U.S. 1, 11 (1985).

[38]Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002) (quoting Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339 (1998)).

[39]Id. at 38, 39 P.3d at 118-19 (quoting Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962)).

determine that no prejudice resulted to the defendant."[40] "Prejudice follows from a prosecutor's remarks when they have 'so infected the proceedings with unfairness as to make the results a denial of due process.'"[41]

We conclude that none of the unobjected-to statements challenged as improper rise to the level of clear error. Guaydacan has not established that any of the statements caused actual prejudice or constituted a miscarriage of justice. In addition, we conclude that the remainder of the prosecutor's statements to which Guaydacan's trial counsel did object either did not constitute error or constituted harmless error in light of the overwhelming evidence of guilt.

Miranda violation

Guaydacan argues that the State prejudiced him by failing to warn him that it would introduce evidence of his statement to police without disclosing the information beforehand and violated his rights under Miranda v. Arizona[42] by questioning him while he was being transported from the police interview to the detention center.

Guaydacan has not shown that the State was obligated to warn him that it intended to introduce evidence of his statement about the shirt because he did not introduce any evidence to establish that his statement was grounds for attacking "the reliability, thoroughness, [or]

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[40]Johnson, 122 Nev. at ___, 148 P.3d at 775.

[41]Id. (quoting Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)).

[42]384 U.S. 436 (1966).

good faith of the police investigation, . . . impeach[ing] the credibility of the state's witnesses, or . . . bolster[ing] the defense case against prosecutorial attacks."[43]

Guaydacan failed to object at trial on grounds that the statement violated his rights under Miranda. While this failure normally precludes appellate consideration, "'this court has the discretion to address an error if it was plain and affected [Guaydacan's] substantial rights.'"[44] The burden rests with Guaydacan "to show actual prejudice or a miscarriage of justice."[45]

"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."[46] The United States Supreme Court has explained that "the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response."[47] In Koger v. State, this court noted that several factors should be considered to determine whether Miranda warnings, having already been

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[43]Lay v. State, 116 Nev. 1185, 1198, 14 P.3d 1256, 1265 (2000) (internal quotations omitted) (quoting Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000)).

[44]Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (quoting Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001)).

[45]Id.

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

[47]Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

given, have become so diluted that they must be given again.[48] Among these, "the most relevant factor . . . is the amount of time elapsed between the first reading and the subsequent interview."[49] In Koger, the court upheld a confession given 12 days after the first reading of Miranda rights.[50] However, regardless whether Miranda warnings have been given, "[c]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . Volunteered statements of any kind are not barred by the Fifth Amendment."[51]

Detective Dean O'Kelley interviewed Guaydacan at the police station and read Guaydacan his Miranda rights at the beginning of the interview. Guaydacan waived his rights at that time and gave a voluntary statement to the police. Detective Clifford Mogg testified that after the interview at the police station, he and his partner transported Guaydacan to the detention center. Detective Mogg testified that Guaydacan spontaneously told Detective Mogg and his partner that Guaydacan had washed his shirt to remove some of the gunshot residue. Guaydacan offered no evidence that the detectives asked him a question or made any statements designed to elicit a response. Guaydacan failed to prove that his statement was not spontaneous, and under Miranda, spontaneous statements by a defendant are admissible. Even if the detectives had

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[48]117 Nev. at 142, 17 P.3d at 431.

[49]Id.

[50]Id. at 144, 17 P.3d at 432.

[51]Miranda v. Arizona, 384 U.S. 436, 478 (1966) (footnote omitted).

attempted to elicit Guaydacan's response, Guaydacan failed to demonstrate under Koger that he should have been given his Miranda rights a second time just prior to being transportation to the detention center because, by his allegation, only four hours had passed between his first Miranda admonition and when he made the statement while being transported. Guaydacan has failed to prove that his statement was not spontaneous or that a second Miranda waiver was required. Accordingly, we conclude that no Miranda violation occurred in this instance.

Cumulative error

Guaydacan argues that the doctrine of cumulative error warrants reversal.

This court will reverse a conviction if the cumulative effect of errors committed during trial denied the appellant a fair trial.[52] Factors to be considered "in deciding whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'"[53]

In this case, evidence was adduced at trial that Guaydacan threatened Medrano and Montes the night before he shot Montes, that Guaydacan entered Gonzalez's apartment the next day brandishing a gun before Medrano and Gonzalez and demanding to know where Montes was, that Guaydacan then confronted Montes with the gun, demanded the money, heard Montes claim that he did not have the money, and, by Guaydacan's admission, he then shot Montes. The evidence adduced at

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[52]Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1288 (1996).

[53]Id. (quoting Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

trial illustrates that the issue of innocence or guilt is not close. And although the gravity of the crime charged could not be greater, the few demonstrated errors in this case were minor. We conclude that Guaydacan has failed to demonstrate that the cumulative effect of any other errors in this case denied him a fair trial. Accordingly, Guaydacan is not entitled to a reversal of his convictions under the doctrine of cumulative error.

Having considered Guaydacan's claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Sally L. Loehrer, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk