IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN TOLE MOXLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47497

FILED

SEP 28 2009

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

John Moxley appeals his conviction for first-degree murder of his infant son, Jonathan. This was his second trial. His first trial, which also resulted in a conviction for first-degree murder, was reversed by this court in an unpublished order.[1]

Moxley's principal challenges are that the admission of Perez's testimony from his first trial violated his Confrontation Clause rights and that the district court failed to follow this court's mandate when it admitted evidence at his second trial concerning Moxley's abuse of Jonathan's mother on the day Jonathan was injured. Both challenges fail, and Moxley's remaining claims were either not adequately preserved or lack merit. Hence, we affirm his judgment of conviction.

[1]Moxley v. State, Docket No. 31596 (Order of Reversal and Remand, December 4, 2000).

09-23569

I. Admitting the prior trial testimony of a jailhouse informant based on unavailability did not violate Moxley's right of confrontation

At Moxley's first trial, Ricky Perez testified to statements Moxley made to him while they were cellmates in the Clark County Detention Center shortly after Moxley's arrest. Perez was in state custody at the Ely State Prison at the time of Moxley's second trial, which had been continued 11 times over a several-year period. For each of the prior trial dates, the prosecution transported Perez from Ely to Las Vegas to be on hand to testify. However, after Moxley's second trial finally began, the prosecution learned that the prison had misplaced its faxed request to transport Perez. Because prison officials in Ely maintained that they needed several days to arrange his transport, a continuance would be required for Perez to testify in person. The State offered its confirmed fax copies of the transport requests to verify its representations to the court.

The prosecution asked the district court to declare Perez unavailable and permit his testimony from the first trial to be read. Over Moxley's objection, the district court agreed. Moxley claims that this violated his Sixth and Fourteenth Amendment rights. Based on the unique facts of this case, we find no error.

A. Governing Standards

The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Davis v. Washington, 547 U.S. 813, 821 (2006) (internal citation and quotation marks omitted). In criminal cases, the sufficiency of the State's efforts to produce a witness at trial is governed by a constitutional standard, the "good faith efforts" test. Ohio v. Roberts, 448 U.S. 56, 74-77 (1980), abrogated on other grounds by Crawford v.

Washington, 541 U.S. 36, 60-68 (2004); Barber v. Page, 390 U.S. 719, 724-25 (1968). The constitutional "availability inquiry . . . turns on whether the proponent of the former testimony acted in good faith and made a reasonable effort to bring the declarant into court." United States v. Johnson, 108 F.3d 919, 922 (8th Cir. 1997).

This court reviews a finding of witness unavailability over a Confrontation Clause objection as a mixed question of law and fact subject to de novo review. Hernandez v. State, 124 Nev. ___, ___, 188 P.3d 1126, 1131 (2008). "In determining whether the proponent of [the prior] testimony has met its burden of proving that a witness is constitutionally unavailable, the touchstone of the analysis is the reasonableness of the efforts." Id. at ___, 188 P.3d at 1134. If the district court has admitted prior testimony in violation of a defendant's Confrontation Clause rights, this court must then determine whether the error was nonetheless harmless. Id. at ___, 188 P.3d at 1135.

B. The district court did not err in finding Perez unavailable

In finding Perez unavailable, the district court considered the significant inconvenience the witnesses, empaneled jurors, and counsel would suffer if a continuance was ordered which neither party requested. It also considered, in assessing the State's good faith, the fact that the State produced Perez for each of the 11 prior trial dates. Moxley repudiates these findings. He contends for a per se rule that, because Perez was in state prison when he was called as a witness by the State, the State is estopped to argue that Perez was unavailable. See generally Barber, 390 U.S. at 724-26 (1968).

As noted, the constitutional "availability inquiry . . . turns on whether the proponent of the former testimony acted in good faith and made a reasonable effort to bring the declarant into court." Johnson, 108

F.3d at 922. There was a clear pattern of due diligence on the part of the prosecution in securing the attendance of its witness, with the prosecution producing Perez 11 times previously. Further, the State produced proof that it timely asked the prison to transport Perez a twelfth time for trial, and only failed to produce him because the prison misplaced its requests. Given these unique circumstances, the district court did not abuse its discretion in concluding that the State met its burden of establishing unavailability and good faith.

C. Harmless error

Moxley did not include Perez's testimony as part of the record on appeal. This makes it difficult to meaningfully review Moxley's claim of error. Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975); Byford v. State, 116 Nev. 215, 238, 994 P.2d 700, 715 (2000). However, what the record and briefs reveal of the nature and substance of Perez's testimony do not show prejudice.

Moxley argued that on the evening Jonathan was injured, Jonathan had developed breathing problems of unknown origin. Moxley's counsel conceded that Moxley had hit and shaken Jonathan, but argued that he had done so only to try to revive him. The theory of defense was that Moxley lacked the malice required for first-degree murder and the baby's breathing problems resulted from his mother giving him too much formula or some other unknown cause. The State rebutted this theory with the testimony of three paramedics and four police officers, to whom Moxley gave inconsistent and implausible stories about Jonathan's breathing problems. The State also presented four expert treating medical professionals, each of whom opined, with detailed substantiation, that Jonathan's respiratory distress resulted from being violently shaken—a

form of child abuse—which led to his death, and could not have been accidental.

Perez's testimony about his conversations with Moxley supports the State's theory that Moxley hit Jonathan in anger. These facts were established and corroborated by independent evidence. Hence, Perez's testimony likely had little impact on the jury's deliberations. On the scant record presented, any error in admitting Perez's testimony was harmless.

II. The district court did not err in admitting evidence of Moxley's fight with Jonathan's mother on the day Jonathan was injured

Moxley next complains that the court admitted prior bad act evidence in violation of this court's order on his prior appeal. Specifically, Moxley argues that this court's order precluded the State from introducing any evidence of his having abused Jonathan's mother, Susan Reyes, at any time. Moxley misreads our prior order. Since Moxley's theories of defense were lack of malice, accident, and identity, the district court did not err in admitting testimony as to Moxley's earlier fight with Susan on the day that Jonathan was injured, which led to Susan not coming home that night, to refute these defenses.

As stated in this court's order on Moxley's prior appeal:

> Evidence of a defendant's prior bad acts is not admissible to prove that the accused acted in a similar manner for purposes of the charge at issue. Evidence of prior uncharged misconduct may improperly influence the jury and result in a conviction simply because the jury believes the accused is predisposed to crime or is a bad person. However, evidence of prior wrongs may be 'admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.' NRS 48.045(2). The decision to admit

> evidence of a prior bad act is within the trial court's sound discretion and that decision will not be disturbed on appeal unless it is manifestly wrong.

Moxley v. State, Docket No. 31596 (Order of Reversal and Remand, December 4, 2000) (internal citations omitted).

On Moxley's prior appeal this court sustained his objection to introduction of evidence respecting his abuse of Jonathan's mother some seven years earlier. Those instances, we held, were irrelevant except for the improper purpose of proving "appellant has a propensity to be violent," and thus testimony regarding domestic violence seven years before was inadmissible. Id. However, the court upheld the admission of evidence of Moxley's more recent abuse of Jonathan, and Susan's other son, Zachary, as "admissible to show intent and the absence of mistake or accident." Id. These rulings by a previous panel of this court establish the law of the case for this appeal. State v. Dist. Ct. (Riker), 121 Nev. 225, 232-33, 112 P.3d 1070, 1075 (2005).

Bill Early, Susan's stepfather, testified that on the night Jonathan was injured, Susan called Early crying hysterically, telling him that Moxley had beaten her earlier that day. Susan told him that Moxley had kicked her out of their vehicle, left her on the side of the road in Henderson, and she needed a ride to get back to Las Vegas. In objecting at trial, Moxley's counsel expressly argued, as he appears to impliedly argue on appeal, that this court's December 4, 2000, order barred any mention of domestic violence upon retrial.

The district court acknowledged that this court's order barred any mention of prior acts of domestic violence that were unrelated to the events that were subject to this trial. However, the court found that Bill

Early's statements were relevant to the sequence of events on the day Jonathan was fatally injured.

The district court's reasoning is sound. In our prior order, we affirmed the admission of evidence of prior acts of child abuse saying, "[a]ppellant placed his intent at issue by pleading 'not guilty' in a first-degree murder case . . . Further, absence of accident and mistake are also at issue because appellant's defense was that the death was an accident or mistake." Moxley v. State, Docket No. 31596 (Order of Reversal and Remand, December 4, 2000). The same rationale applies to the admission of Bill Early's testimony in this trial. The testimony helped explain why Moxley was alone in the apartment that evening with Jonathan and was the only adult with access to Jonathan in the hours before Jonathan's admission to the hospital with shaken baby syndrome, and corroborated other testimony that Moxley was agitated and angry that day. Thus, the district court did not err in admitting Early's testimony about Moxley's abuse of Susan on the day of Jonathan's injuries.

III. The district court did not abuse its discretion in allowing the State to use appellant's prior trial testimony

Moxley testified at his first trial. At his second trial, Moxley elected not to testify. The prosecution moved to introduce a videotape of Moxley's testimony from the first trial, together with a trial transcript, at the second trial. Moxley objected but interposed no objections to any of the specific testimony as it was played for the jury and did not seek to have the tape redacted. On appeal, Moxley claims that he was subject to improper impeachment because his drug use and several of his prior convictions, which his trial counsel in the first trial brought out on direct

examination, were too remote in time to be admitted, given the passage of time between his first and second trials.[2] Moxley's counsel conceded at oral argument before this court that Moxley made no effort at his second trial to redact portions of his prior testimony, nor did he object to these portions of his prior direct examination when it was played on videotape for the jury.

Moxley has not preserved his claim of error as he did not object to the specific testimony at trial that he challenges here. McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983) (Generally, "failure to object to asserted errors at trial will bar review of an issue on appeal."). However, when a party has failed to object at trial, "this court has the discretion to review constitutional or plain error." Somee v. State, 124 Nev. ___, ___, 187 P.3d 152, 159 (2008). "An error is 'plain' if the error is so unmistakable that it reveals itself by a casual inspection of the record." Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (internal citations and quotation marks omitted). We conclude that even if there had been error in admitting this evidence, it would not meet the standard for plain error.

IV. The district court did not abuse its discretion by allowing the State to present testimony that Moxley had threatened a witness

Moxley claims that the district court erred in allowing the State to present testimony that he threatened a witness, Maria Jensen.

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[2]Procedurally, at the first trial ten years before this one, Moxley himself introduced evidence on direct examination as to his prior convictions, which the prosecution was then free to cross-examine him upon. Here, the prosecution introduced the entirety of Moxley's prior testimony. Moxley did not object to specific portions of the transcript, rather making only a blanket objection to the whole of it.

Again, Moxley's claim is barred by his failure to object at trial, McCullough, 99 Nev. at 74, 657 P.2d at 1158, and also by the law of the case. State v. Dist. Ct. (Riker), 121 Nev. at 232-33, 112 P.3d at 1075; Moxley v. State, Docket No. 31596 (Order of Reversal and Remand, December 4, 2000).

V. The prosecutor did not improperly attempt to quantify, supplement, or clarify the statutory reasonable doubt instruction

Moxley claims that the prosecutor made improper argument in her closing statement by stating:

> Now, we, the State of Nevada, must prove to you all beyond a reasonable doubt that the defendant did this. That the defendant killed his son with malice aforethought by means of child abuse and beyond a reasonable doubt. You know, this instruction was written by lawyers, it makes not a lot of sense at times. But the Court has the instruction, read it to you, you've got to be sure that's what it means. It's not beyond a shadow of a doubt. It's not beyond all imaginary doubt. It's not any kind of mystical, magical concept. . . . [I]t just means you have to be sure.

Moxley did not object to these statements by the prosecutor at trial. Thus, his constitutional claim is subject to plain error review. Somee, 124 Nev. at ___, 187 P.3d at 159.

NRS 175.211 sets forth the reasonable doubt standard which must be provided to juries in the form of an instruction. It states:

> 1. A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth

> of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> 2. No other definition of reasonable doubt may be given by the court to juries in criminal actions in this State.

In McCullough, this court affirmed the importance of the reasonable doubt standard to a criminal defendant's due process rights. 99 Nev. at 75, 657 P.2d at 1158-59. This court explained:

> The U.S. Supreme Court has stated that the reasonable doubt instruction should impress on the jury the need to reach a "subjective state of near certitude" on the facts in issue . . . The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify.

Id. (citations omitted). However, an attempt to clarify the reasonable doubt standard is not in and of itself error, or even wrong. Id. at 75, 657 P.2d at 1158. In McCullough, the judge impermissibly attempted to quantify the reasonable doubt standard. Id. at 73-74, 657 P.2d at 1157-58.

This court extended McCullough to hold that an erroneous reasonable doubt instruction, coupled with improper argument with respect to reasonable doubt by the prosecutor, also could be reversible error. Holmes v. State, 114 Nev. 1357, 1366, 972 P.2d 337, 343 (1998) (warning "prosecutors of this state that they venture into calamitous waters when they attempt to quantify, supplement, or clarify the statutorily prescribed reasonable doubt standard").

Where there is no allegation that there was error with respect to the reasonable doubt instruction given by the court, this court's

standard rules for prosecutorial misconduct apply, though viewed in the light of Holmes's cautionary words. "In reviewing a prosecutor's comments, the relevant inquiry is whether the comments were so unfair that they deprived the defendant of due process." Witter v. State, 112 Nev. 908, 923, 921 P.2d 886, 897 (1996), receded from on other grounds in Byford v. State, 116 Nev. 215, 245, 994 P.2d 700, 720 (2000).

The prosecution's comments here did not amount to reversible error. The prosecutor did not attempt to assign a numerical probability, as in McCullough, nor did she analogize reasonable doubt to major life decisions, which this court has found objectionable in a number of decisions. See, e.g., Quillen v. State, 112 Nev. 1369, 1382-83, 929 P.2d 893, 901-02 (1996).

VI. The district court did not abuse its discretion by admitting autopsy photographs showing the the infant's injuries

Moxley next challenges the admission of certain autopsy photographs. "It is within the district court's discretion to admit photographs where the probative value outweighs any prejudicial effect the photographs might have on the jury." Sipsas v. State, 102 Nev. 119, 123, 716 P.2d 231, 234 (1986) (citation omitted). "Despite gruesomeness, photographic evidence has been held admissible when . . . utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction. Accordingly, gruesome photos will be admitted if they aid in ascertaining the truth." West v. State, 119 Nev. 410, 420, 75 P.3d 808, 815 (2003) (internal quotation marks omitted).

The autopsy incision photos were admitted to show the depth of Jonathan's bruises, and more importantly, to show the extent of Jonathan's brain injuries which could only have been caused by shaken baby syndrome, which in turn was assigned as the cause of Jonathan's

breathing problems. This was proper rebuttal to Moxley's claim he only attempted to revive Jonathan from breathing problems of unknown and innocent origin. The photographs showed the full extent and nature of Jonathan's injuries, which were not apparent externally. The court admitted them with a cautionary instruction, and noted that the State proffered a small number of selected photographs from many more. There was no abuse of discretion by the trial court in admitting these photographs.

VII. The district court did not err in instructing the jury that malice may be implied from circumstances showing an "abandoned and malignant heart"

Moxley argues that the phrase an "abandoned and malignant heart" does "not convey anything in modern language . . . [rather, that they] are devoid of rational content and are merely pejorative, and they allow the jurors to find malice simply on the ground that they believe the defendant is a 'bad man.'" See People v. Phillips, 414 P.2d 353, 363 (Cal. 1966) (noting that a jury instruction phrased in terms of "abandoned and malignant heart" "adds nothing to the jury's understanding of implied malice; its obscure metaphor invites confusion and unguided speculation."), overruled on other grounds by People v. Flood, 957 P.2d 869 (Cal. 1998).

Moxley failed to preserve this issue for appeal. Moxley's briefs challenge Instruction No. 10, which contained the term "abandoned and malignant heart," stating that defense counsel objected to this instruction. However, defense counsel did not object to Instruction No. 10—rather, trial counsel objected to Instruction No. 9.

While failure to object at trial generally bars appellate review, McCullough, 99 Nev. at 74, 657 P.2d at 1158, this court in Rossana v.

State held that instructional error is subject to plain error review. 113 Nev. 375, 934 P.2d 1045 (1997). Use of the term "abandoned and malignant heart" in a jury instruction describing implied malice does not involve error "so unmistakable that it reveals itself by a casual inspection of the record," and thus does not meet the standard for plain error. Patterson, 111 Nev. at 1530, 907 P.2d at 987 (internal citations and quotation marks omitted).

VIII. Cumulative error

Moxley's cumulative error claim fails, as we find no error on the part of the district court, much less cumulative error.

For these reasons, we affirm the judgment of conviction.

Parraguirre, J.

Douglas, J.

Pickering, J.

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