

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARL JOE HENRY A/K/A CARL JAE
HENRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47686
FILED

FEB 15 2008

FRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY:  DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from a judgment of conviction, upon a jury verdict, of robbery with the use of a deadly weapon and first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge. For one count of robbery, the district court sentenced appellant Carl Joe "Jae" Henry to a maximum of 156 months with minimum parole eligibility after serving 35 months plus an equal and consecutive term of 35 months minimum and 156 months maximum for the use of a deadly weapon. For one count of first-degree murder, the district court sentenced Henry to life without the possibility of parole plus an equal and consecutive term of life without the possibility of parole for the use of a deadly weapon.

Felony murder and after-thought robbery

Henry argues that the district court erroneously instructed the jury that felony murder could be found where the intent to rob was formed after the act of killing itself occurred. We agree.

This court reviews de novo whether a jury instruction is a correct statement of the law.¹ If we conclude that the district court erred, then we review that error under a harmless-error analysis.² “An error is harmless when it is ‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.’”³

After the parties briefed this case, this court decided Nay v. State.⁴ Under Nay, for a defendant to be convicted of felony murder, “the intent to commit the predicate enumerated felony must have arisen before or during the conduct resulting in death.”⁵ Accordingly, a robbery does not support a felony-murder conviction where the defendant formed the intent to rob the victim only after the defendant killed the victim.⁶

In this case, the district court instructed the jury that acts immediately antecedent to the robbery were included within the scope of the perpetration of the robbery. The district court rejected Henry’s suggested jury instruction that robbery as an afterthought to a killing cannot support a felony-murder conviction, which represents the holding

¹Nay v. State, 123 Nev. ___, ___, 167 P.3d 430, 433 (2007).

²Id.

³Wegner v. State, 116 Nev. 1149, 1155, 14 P.3d 25, 30 (2000), (quoting Neder v. United States, 527 U.S. 1, 18 (1999)), overruled on other grounds by Rosas v. State, 122 Nev. ___, ___ n.26, 147 P.3d 1101, 1108 n.26 (2006).

⁴123 Nev. ___, 167 P.3d 430.

⁵Id. at ___, 167 P.3d at 431.

⁶Id. at ___, 167 P.3d at 435.

in Nay. Accordingly, we conclude that the district court's failure to instruct the jury properly on felony murder amounts to judicial error.

Harmless error-analysis for the robbery conviction

In Nay, the erroneous jury instructions did not impact the robbery conviction because a robbery can occur after a killing.⁷ Overwhelming evidence, including Nay's admission that he robbed the victim, supported the robbery charge.⁸

In this case, Henry confessed to the police on tape that he stole, among other things, prescription drugs including Oxycontin, from the victim's apartment after he killed the victim with a crowbar. He never disputed that he stole the drugs or that he killed the victim.

We conclude that Henry's confession and the fact that he stole personal property and killed the victim with a crowbar provide overwhelming evidence that he committed robbery with the use of a deadly weapon.⁹ Accordingly, we conclude that the district court's error did not impact the robbery conviction.

Harmless-error analysis for the first-degree murder conviction

If a jury has no option of concluding that "afterthought robbery cannot provide the predicate felony for felony murder," then the failure to so instruct constitutes reversible error.¹⁰ In Nay, the robbery jury instruction indicated that "[i]t is irrelevant . . . when the intent to

⁷Id. at ___, 167 P.3d at 436.

⁸Id.

⁹See NRS 193.165, 200.010, 200.030.

¹⁰Nay v. State, 123 Nev. ___, ___, 167 P.3d 430, 435 (2007).

steal property from the victim is formed.”¹¹ Further, “the jury verdict forms did not differentiate between felony murder and first-degree murder.”¹² Accordingly, “it [was] not possible to determine beyond a reasonable doubt that the jury would have convicted Nay of first-degree murder if it had been properly instructed.”¹³

In this case, the jury instruction defining robbery included acts of violence preceding the taking of property, even if the acts of violence were primarily intended for another purpose. Similar to the facts in Nay, there was no explanation as to when the intent to rob must be formed. Finally, as in Nay, neither party requested a verdict form specifying the theory supporting conviction. Accordingly, we conclude that the district court’s error was not harmless with respect to the first-degree murder conviction. Therefore, we reverse Henry’s conviction on that count.

Deville’s financial condition and purported concerns about being charged as an accessory

Henry contends that the district court violated his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 8 of the Nevada Constitution when it prevented him from cross-examining Martin Deville about his financial situation and possible bias. We agree. However, we conclude that the error was harmless.

¹¹Id. at ___, 167 P.3d at 435 (quoting the jury instruction) (alteration in original).

¹²Id. at ___, 167 P.3d at 435-36.

¹³Id. at ___, 167 P.3d at 436.

The standard of review for whether to admit evidence is abuse of discretion.¹⁴ “The scope and extent of cross-examination is largely within the sound discretion of the trial court and in the absence of abuse of discretion a reversal will not be granted.”¹⁵ Therefore, we will not disturb a district court decision to admit or exclude evidence unless such decision was an abuse of discretion or “manifestly wrong.”¹⁶ While the district court has wide discretion to decide the admissibility of evidence, its discretion is narrower where the party is attempting to show the witness’ bias.¹⁷ Accordingly, “[t]he only proper restriction should be those inquiries which are repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy[,] or humiliate the witness.”¹⁸

If we conclude that the district court erred in its decision on admissibility of evidence, we then determine whether the error was harmless.¹⁹ In making this determination, we consider whether overwhelming evidence supported the jury’s verdict.²⁰

¹⁴Collman v. State, 116 Nev. 687, 704, 7 P.3d 426, 437 (2000).

¹⁵Azbill v. State, 88 Nev. 240, 246, 495 P.2d 1064, 1068 (1972).

¹⁶Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999).

¹⁷Baltazar-Monterrosa v. State, 122 Nev. 606, 619, 137 P.3d 1137, 1145-46 (2006).

¹⁸Id. at 619, 137 P.3d at 1146 (quoting Lobato v. State, 120 Nev. 512, 520, 96 P.3d 765, 771 (2004)).

¹⁹Id.

²⁰Id. at 619-20, 137 P.3d at 1146.

In Baltazar-Monterrosa v. State, this court concluded that the district court erred by refusing to allow defense counsel to question a witness about whether the witness had been threatened with deportation unless he testified against the defendant.²¹ However, this court found that the error was harmless because there was “overwhelming physical evidence in the record, as well as [the defendant’s] own admission to police about his involvement in the crimes.”²²

In this case, Henry attempted to question Deville about his financial situation and his knowledge of the California “three strikes” rule in an attempt to impeach him, to show his bias, and to convince the jury that Deville was the one who stole personal property from the victim’s home. While evidence of his financial situation, if disclosed, would not have had any tendency to show whether Henry stole the victim’s prescription drugs, which Henry admitted to stealing, it may have influenced the jury to find that Deville stole the victim’s other household belongings. Further, whether Deville knew of the “three strikes” rule may have influenced him to avoid being arrested and could have established his bias.

We conclude that the district court abused its discretion when it prohibited Henry from questioning Deville about his financial situation and his knowledge of the “three strikes” rule. Nevertheless, we conclude that this error was harmless beyond a reasonable doubt in light of the fact

²¹Id. at 619, 137 P.3d at 1146.

²²Id. at 619-20, 137 P.3d at 1146.

that Henry admitted that he stole prescription drugs after he killed the victim with a crowbar.

Calling Vickie Spoonmore to impeach Deville

Henry contends that the district court erroneously prohibited Henry from calling Deville's girlfriend, Vickie Spoonmore, to rebut Deville's testimony that he had never told her that the police were nearby and that he did not want to turn himself in. Henry asserts that Spoonmore's testimony would have presented prior inconsistent statements made by Deville and that such inconsistent statements qualify for admission under NRS 51.035(2). We disagree.

The collateral-fact rule limits the admissibility of extrinsic evidence to show both prior inconsistent statements and specific instances of conduct.²³ In Lobato v. State, this court concluded that "extrinsic proof of a prior inconsistent statement is inadmissible unless the statement is material to the case at hand."²⁴ This court noted that there are "two methods by which extrinsic evidence of a prior inconsistent statement is non-collateral: (1) 'if the matter is itself relevant to a fact of consequence on the historical merits of the case' and (2) if the extrinsic evidence relates to a 'linchpin' fact of the case."²⁵

In this case, Henry sought to question Spoonmore about whether Deville saw police and refused to reveal himself to them. The State objected. However, Deville had already admitted that he called 911

²³Lobato v. State, 120 Nev. 512, 519, 96 P.3d 765, 770 (2004).

²⁴Id.

²⁵Id. at 519 n.12, 96 P.3d at 770 n.12 (quoting 1 John W. Strong, McCormick on Evidence § 49 (5th ed. 1999)).

on the night of the killing and then hung up because he was afraid to give his name. Henry admitted that he took prescription drugs from the victim's apartment and that he killed the victim. Therefore, whether Deville told Spoonmore that he had seen the police and did not want to turn himself in is a collateral issue because it is not material to whether Henry killed and robbed the victim. Accordingly, we conclude that the district court did not err.

Detective Mogg's testimony about how criminal suspects tend to lie, mislead, and mischaracterize their acts

Henry argues that the State committed prosecutorial misconduct by improperly eliciting testimony about how criminal suspects tend to lie and the district court erred by overruling Henry's objection to this line of questioning. We agree. However, we conclude that the error was harmless.

This court has a long-standing rule that a prosecutor may not condemn the defendant as a "liar."²⁶ Further, a witness may not give his or her opinion as to the veracity of the statement of another.²⁷ In DeChant v. State, the state questioned a police detective who had reviewed the defendant's videotaped statement to police, which was shown at trial.²⁸ On the videotape, the defendant described the murder as a "mob hit."²⁹ The detective properly highlighted inconsistencies between the

²⁶Rowland v. State, 118 Nev. 31, 39-40, 39 P.3d 114, 119 (2002); Ross v. State, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990).

²⁷DeChant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000).

²⁸Id. at 922-23, 10 P.3d at 111.

²⁹Id. at 923, 10 P.3d at 111.

defendant's statement and his own experiences with homicides involving organized crime.³⁰ However, against the district court's instructions, the witness "commented that [the defendant's] story was a 'fairy tale' and that he did not believe it for one second."³¹ The district court ordered these statements on the defendant's veracity stricken and gave the jury a limiting instruction.³² However, during closing arguments, the prosecutor relied on the police detective's testimony and described the defendant's statement as a "fairy tale."³³ This court concluded that "this testimony and the prosecutor's comments during closing, constituted an impermissible comment on the veracity of [the defendant's] statement."³⁴

In this case, similar to the facts in DeChant, Detective Mogg reviewed Henry's taped confession during trial. Also similar to the witness in DeChant, Detective Mogg testified that there were inconsistencies in Henry's statement. Unlike the facts in DeChant, the prosecutor in this case did not rely on Detective Mogg's testimony during closing argument to characterize Henry as a liar. However, while Detective Mogg did not expressly call Henry a liar or opine that Henry's statements to police were unbelievable, he testified that defendants are "not always forthright." We conclude that Detective Mogg improperly commented on Henry's veracity. Therefore, we conclude that the district

³⁰Id.

³¹Id.

³²Id. at 923-24, 10 P.3d at 111.

³³Id. at 924, 10 P.3d at 111.

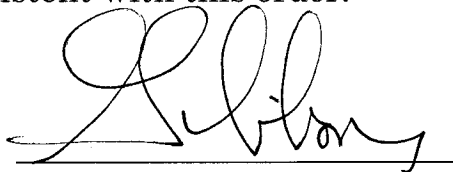
³⁴Id. at 924, 10 P.3d at 112.


court erred when it overruled Henry's objection and admitted this testimony. However, Henry admitted that he killed the victim and stole prescription drugs from the victim's home. As such, any error was harmless beyond a reasonable doubt.

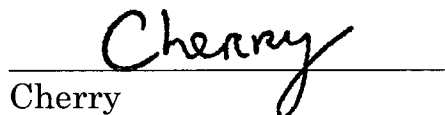
Conclusion

In summary, we conclude that the district court erroneously instructed the jury that felony murder could be found where the intent to rob was formed after the act of killing itself occurred. While this was harmless error for the robbery conviction, it was not harmless for the first-degree murder conviction, and we therefore reverse Henry's murder conviction. We further conclude that the district court abused its discretion when it prevented Henry from questioning Deville about his financial situation and possible bias. However the error was harmless as to the robbery conviction. The district court did not abuse its discretion when it prevented Henry from calling Spoonmore to impeach Deville. Finally, we conclude that the district court erroneously permitted Detective Mogg to comment on Henry's truthfulness. However, any error was harmless. Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for further proceedings consistent with this order.

 , C.J.

Gibbons
 , J.
Maupin

 , J.
Cherry

cc: Eighth Judicial District Court Dept. 18, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
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Eighth District Court Clerk