IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LINZY BELLON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47798

FILED

OCT 17 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction and sentence. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Following this court's reversal of his first conviction and remand, appellant Robert Linzy Bellon was again convicted, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon in the shooting death of Frankie Dunlap. Bellon waived sentencing by the jury, and the district court sentenced him to serve two consecutive terms of life in prison without the possibility of parole. This appeal followed.

Bellon first argues that Judge Glass, who presided over the first and second trial, erred by refusing to voluntarily recuse herself due to bias against him.[1] The only evidence of bias he cites is Judge Glass' statement to him at sentencing after his first trial: ". . .you're a punk. You're a punk who had a gun and you just kill people. . . ."

This court gives "'substantial weight'" to a judge's decision not to voluntarily recuse herself and will not reverse that decision absent an

[1]See Nevada Code of Judicial Conduct Canon 3(B)(5); NRS 1.230.

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abuse of discretion.[2] "The burden is on the party asserting the challenge to establish sufficient facts warranting disqualification."[3] An opinion formed by a judge based on facts learned during the current or prior proceedings may support a claim of bias "'where the opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible.'"[4]

Here, Judge Glass' isolated comment did not indicate that she could not conduct the proceedings fairly.[5] Bellon's claim in his opening brief that his family and friends in the local community may have believed that Judge Glass was biased against him is wholly unsupported by facts. We conclude that Judge Glass did not abuse her discretion.

Second, Bellon argues that the district court erred in denying his motion to suppress statements he made while in custody in Louisiana three years after Dunlap's killing. He claims that the officers who interrogated him failed to establish that he understood his rights under Miranda v. Arizona.[6] In reviewing the district court's determinations regarding custody and the voluntariness of statements, this court gives deference to "[t]he district court's purely historical factual findings

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[2]Kirksey v. State, 112 Nev. 980, 1006, 923 P.2d 1102, 1118 (1996) (quoting Goldman v. Bryan, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988)).

[3]Id. at 1006, 923 P.2d at 1118.

[4]Walker v. State, 113 Nev. 853, 864, 944 P.2d 762, 769 (1997) (quoting Liteky v. U.S., 510 U.S. 540, 555 (1994)).

[5]See Cameron v. State, 114 Nev. 1281, 968 P.2d 1169 (1998).

[6]384 U.S. 436 (1966).

pertaining to the 'scene- and action-setting' circumstances surrounding an interrogation."[7] Such findings are reviewed for clear error.[8]

Here, during argument on the motion, the district court reviewed and found persuasive testimony from the previous trial, in which a Louisiana detective testified that, in his presence, another detective read Bellon his Miranda rights from a printed card and Bellon indicated he understood those rights and wanted to talk to the detectives. Bellon failed to establish that these factual findings by the district court were clearly erroneous.

Bellon also claims his statements should have been suppressed because officers ignored his invocation of his right to have an attorney present during questioning. Once an accused has invoked the right to counsel, questioning must cease until counsel is provided, unless the accused himself initiates further communication.[9] But questioning need not cease if the invocation is ambiguous or equivocal.[10] "A district court's determination of whether a defendant requested counsel prior to questioning will not be disturbed on appeal if supported by substantial evidence."[11]

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[7]Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

[8]Id.

[9]Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); Harte v. State, 116 Nev. 1054, 1065, 13 P.3d 420, 428 (2000).

[10]Davis v. U.S., 512 U.S. 452, 458-59 (1994); Harte, 116 Nev. at 1065-68, 13 P.3d at 427-29.

[11]Harte, 116 Nev. at 1065, 13 P.3d at 427-28.

We conclude that the district court's determination that Bellon's invocation was insufficient was supported by substantial evidence. The district court reviewed a videotape and transcript of the interrogation. Bellon's statement that he wanted to talk to "[his] attorney, Johnny Cochran," a famous attorney whom Bellon acknowledged he could not afford, was too ambiguous and equivocal to constitute an invocation of the right to have counsel present. Although they were not required to, the officers asked clarifying questions to determine whether Bellon actually wanted the presence of an attorney;[12] Bellon's answers did not indicate that he did.

Bellon further argues that his statements should be suppressed because officers ignored his statement that he would "take the 5th amendment on that question" when asked about the Dunlap killing. We conclude that the district court did not abuse its discretion in rejecting this argument. Bellon's statement did not suggest that he wanted to remain completely silent and cut off the questioning altogether;[13] in fact, after making the statement, Bellon began asking the officers what they knew about Dunlap's killing. Thus, it seems clear that Bellon wanted the session to continue so he could learn what the officers knew.

Further, even had the district court erred in denying Bellon's motion to suppress his statements, the error would have been harmless in light of the substantial evidence supporting Bellon's conviction: among other evidence, two eyewitnesses placed Bellon at Dunlap's killing, one of

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[12]See Davis, 512 U.S. at 461.

[13]See Miranda, 384 U.S. at 474.

them testified that he saw Bellon shoot Dunlap, and Dunlap's missing gun turned up in the same area of Louisiana in which Bellon was arrested.

Third, Bellon argues that the district court erred in denying his motion to admit statements he made to Carmel Gadsen after Dunlap's killing pursuant to the excited utterance exception to the hearsay rule.[14] The district court ruled that Bellon had not laid a sufficient foundation for admission of the statements. "A trial court's decision to admit evidence will not be reversed on appeal unless it is manifestly erroneous."[15]

We conclude that that the district court's decision was not manifestly erroneous. In his motion, Bellon only asserted that he made the statements in a "frantic state shortly after" the killing. Other than Gadsen's previous testimony that Bellon was fearful and in shock and that she tried to calm him down, Bellon provided no facts to support his assertion that his statements were made while he was under the stress of excitement caused by Dunlap's death.

Fourth, Bellon argues that the malice,[16] malice aforethought, and unanimity jury instructions were unconstitutional. He concedes that

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[14]See NRS 51.035; NRS 51.095.

[15]Medina v. State, 122 Nev. 346, 351, 143 P.3d 471, 474 (2006).

[16]Bellon's brief indicates that the "malice instruction" was instruction number 21; however, instruction number 21 pertains to the deadly weapon enhancement. His challenge to "the malice instruction" cites Cordova v. State's discussion of express and implied malice. 116 Nev. 664, 666-67, 6 P.3d 481, 482-83 (2000). Accordingly, we conclude that Bellon is actually challenging instruction number 7, which defined express and implied malice.

this court has repeatedly found each instruction to be constitutional.[17] He requests that we reconsider those findings but provides no new argument for why we should do so. We therefore decline to revisit these holdings, and conclude that the district court did not err in giving the instructions.

Fifth, Bellon argues that the district court erred by refusing to give his proposed instruction limiting the felony-murder doctrine. This court reviews the district court's decisions on jury instructions for abuse of discretion.[18] Bellon wanted the jury instructed that "[i]f you believe that the Defendant simply took advantage of a terrifying situation that he created and took the deceased's property he may have committed a robbery. However, this robbery may not be used as the underlying felony for purposes of the felony-murder rule."

In Nay v. State, we held that "the felony-murder doctrine requires that the actor must intend to commit the predicate enumerated felony before or at the time the killing occurred."[19] Accordingly, as long as there was some evidence supporting it,[20] Bellon was entitled to have the jury instructed that to convict him of felony murder based on robbery, it

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[17]See, e.g., Leonard v. State, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1998) (upholding the malice aforethought instruction); Cordova, 116 Nev. at 666-67, 6 P.3d at 482-83 (upholding the malice instruction); Evans v. State, 113 Nev. 885, 893-96, 944 P.2d 253, 258-61 (1997) (upholding the unanimity instruction).

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

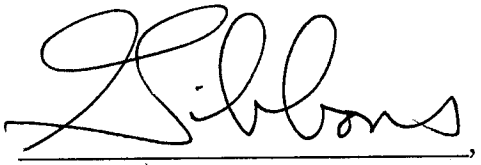
[19]123 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. 35 at 13, September 20, 2007).

[20]See Rosas v. State, 122 Nev. ___, ___, 147 P.3d 1101, 1109 (2006).

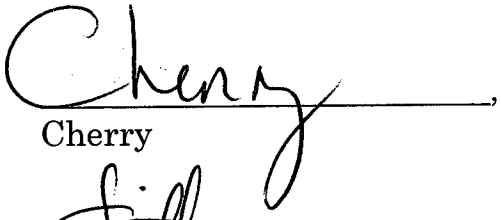
had to find that he intended to rob Dunlap before or during the killing. We conclude that, under the circumstances of this case, such an instruction was warranted. Nevertheless, the failure to give the instruction was harmless.[21] The evidence supporting a finding of premeditated murder was strong. That evidence included testimony that Bellon freed his left hand by giving his drink to another passenger, used his left hand to hold or grab Dunlap before shooting him, and shot Dunlap twice at very close range, once in the neck and once in the back. Further, although the instruction was refused, defense counsel in closing argued that felony murder was not appropriate unless Bellon had formed the intent to rob Dunlap before shooting him. The State did not object, nor did it counter this argument in rebuttal closing.

Having reviewed Bellon's arguments and concluded he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Gibbons



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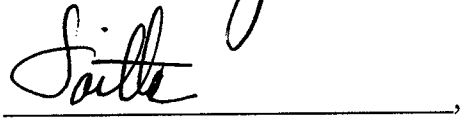

_____, J.
Saitta

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[21]See Nay, 123 Nev. at ___, ___ P.3d at ___ (Adv. Op. 35 at 12-13).

cc: Hon. Jackie Glass, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk