IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD WILLIAM PETERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47887

FILED

AUG 14 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. On July 24, 2006, appellant Richard William Peters was sentenced to serve a term of life in prison without the possibility of parole, with an equal and consecutive term for the deadly weapon enhancement.

Peters raises seven issues on appeal. First, he contends that his due process rights were violated when police officers coerced him into speaking to them after he had exercised his Fifth Amendment right to counsel. The police originally contacted Peters on June 19, 2003, and engaged him in what the district court determined was a tape recorded noncustodial interrogation. On June 23, Detectives Jensen and Popp returned to Peters' residence and took him to the police station for further interrogation. Detective Popp read Peters his Miranda[1] rights, and Peters subsequently requested an attorney. The detectives then left the room to

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

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prepare paperwork for Peters' arrest. While preparing Peters for transportation, the officers' supervisor, Sergeant Hefner, entered the interview room and made the following statement to Peters:

> SERGEANT HEFNER: Hey Richard, something you need to think about while you're sitting there in jail. There is a big difference between getting pissed at somebody, thumping them and saying OK we've screwed up, now what are we going to do. We gotta get rid of the body, in a panic you cut the body up and you get rid of it. That's somewhat understandable to me of course. We have a basis of knowledge that a juror doesn't have. Because a juror's going to be appalled at somebody cutting up a body to get rid of it because to them it means you planned on doing it. You went over there with the knives and you were going to do it yada yada yada. You need to think about portraying it to the thing of yeah we lost our temper, went over there screwed up. So that you don't get painted as this psycho that went over there with the intent to chop up this 'cause he owed you some money. So you need to clarify that with these guys you know you are always able to pick up the phone and call them, they will come down and talk to ya.
>
> RICHARD PETERS: [Inaudible]
>
> DETECTIVE HEFNER: You're the one that changes the light this thing gets painted in not us. But your time is short. You're the one with the knives in your apartment. You're the one who returned the pager call.

Sergeant Hefner then left the room. Detective Popp took Peters to Detective Jensen's police car for transportation to the jail, at which point Peters changed his mind and agreed to speak with the detectives.

Peters asserts that Sergeant Hefner's comments violated his constitutional rights. "[A]n accused, . . . having expressed his desire to

deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[2] The term "interrogation" is not limited to express questioning by police, but includes its "functional equivalent."[3] Therefore, the term "interrogation" will be applied to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[4] "In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."[5]

The State contends that because Sergeant Hefner did not pose any direct questions and was "not aware of any unusual susceptibility to the subject matter of [his] statement," his words do not constitute further interrogation. We disagree. We conclude that Sergeant Hefner's statement was intended to convince Peters to waive his invocation of the Fifth Amendment right to counsel and continue speaking with police. Therefore, Sergeant Hefner should have known it was reasonably likely that his statements would have that effect, and were thus the "functional

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[2]Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

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

[4]Id.

[5]Id. at 302, n.7.

equivalent" of an interrogation. Because of Sergeant Hefner's comments, it cannot be said that Peters' offer to speak with police was an uninvited initiation of further communication. We conclude that Peters' admissions to police on June 23, 2003, were obtained in violation of his Fifth Amendment right to counsel and should not have been admitted at trial.[6]

Nevertheless, "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."[7] Therefore, "a conviction of guilty may be allowed to stand if the error is determined to be harmless beyond a reasonable doubt."[8] "Relevant factors to consider 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.'"[9] Peters was charged with first-degree murder with the use of a deadly weapon. The error committed was the admission of Peters' own statement in violation of his constitutional rights. Nevertheless, in the face of strong evidence of guilt, we will not

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[6]Peters also asserts that his confession to police was coerced and was the result of promises by the police that his wife would be kept safe from Wayne Dearion. The record does not support his assertions. While the police did confirm for Peters that Dearion was in custody, the record reflects that Peters specifically acknowledged that his confession was not the result of any promises made by law enforcement. Nevertheless, for the reasons stated above, his June 23, 2003, statement to police should not have been admitted at trial.

[7]NRS 178.598.

[8]Obermeyer v. State, 97 Nev. 158, 162, 625 P.2d 95, 97 (1981).

[9]DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000) (quoting Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

deem such error to be prejudicial.[10] In particular, when a defendant's own statements are admitted in error at trial, that error will not be prejudicial if the defendant takes the stand and testifies "substantially in accordance" with those statements.[11]

Peters' testimony at trial was "substantially in accordance" with his admissions to the police. Review of the videotaped interview indicates that Peters admitted to dismembering the victim, but denied striking the victim with the brass knuckles. Peters told police that Wayne Dearion took his brass knuckles and beat the victim to death and that he helped dispose of the body only because Dearion threatened to harm him and his wife. Peters did not make any significant admissions during his interview with the police that were not repeated during his testimony at trial. Therefore, we conclude that the district court's error in admitting the videotape of Peters' June 23, 2003, interrogation was harmless beyond a reasonable doubt.

Second, Peters claims that reference to the deceased as a "victim" violated his due process rights. Prior to trial, Peters filed a motion in limine to preclude reference to the deceased as a "victim" at trial. The district court denied the motion in light of the fact that Peters' codefendant had already pleaded guilty to murder. In Peters' view, the references created an impermissible inference of guilt. However, Peters

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[10]Mendoza v. State, 122 Nev. 267, 277 n.28, 130 P.3d 176, 182 n.28 (2006) (concluding that any error in admitting unMirandized statement was harmless beyond a reasonable doubt in light of wealth of evidence supporting defendant's guilt).

[11]See State v. Fouquette, 67 Nev. 505, 534, 221 P.2d 404, 419 (1950).

does not cite to any case law holding that use of the word "victim" at trial is prejudicial to a defendant.

We do not agree with Peters that use of the word "victim" in this case created a presumption of guilt. In Nevada, the term "victim" is specifically defined by statute as "[a] person who is physically injured or killed as the direct result of a criminal act."[12] It is undisputed that the deceased in this case was a "victim." Prior to Peters' trial, Dearion pleaded guilty to the murder of the deceased and the jury was made aware of that fact. Thus, there was no dispute that the deceased was a "victim" and that there had been a murder; the question at trial was Peters' involvement in that murder. The jury was repeatedly instructed on the presumption of innocence, and in light of the facts of this case it is highly unlikely that the use of the word "victim" to describe the deceased had an impact on the jury's verdict. Therefore, we conclude that no relief is warranted in this regard.

Third, Peters argues that he is entitled to a new trial because the jury was improperly influenced by the verbal outburst of the victim's father. During closing argument, Peters' counsel asserted that the evidence was misleading. The victim's father yelled out, "Those weren't pork chops on that . . . ." The district court instructed the victim's father to remain silent and warned him that if he spoke again, he would be removed from the courtroom. Defense counsel continued with closing argument. Peters did not object to the statement or seek an

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[12]NRS 217.070(1).

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admonishment; therefore we will review the record for plain error.[13] "In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights."[14]

Peters asserts that this outburst highlighted the fact that the victim had been dismembered and was highly prejudicial. He claims that because the district court did not sua sponte admonish the jury to ignore the statement, the only way to cure the prejudicial impact is to order a new trial. We disagree. At trial, Peters testified in detail about how he dismembered the victim, and the jury was shown several photographs of the recovered pieces of the victim's body. In light of the evidence presented to the jury throughout trial, Peters has not shown that the brief outburst, which was immediately curtailed by the district court, had a prejudicial impact on the jury. And the district court's treatment of the speaker signaled to the jury that such outbursts were not permissible. Accordingly, we conclude that Peters failed to demonstrate plain error in this regard.

Fourth, Peters claims that the evidence at trial was insufficient to support the deadly weapon enhancement. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[15]

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[13]NRS 178.602.

[14]Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005).

[15]See Wilkins v. State, 96 Nev. 367, 374-75, 609 P.2d 309, 313-14 (1980); see also Jackson v. Virginia, 443 U.S. 307, 312-13, 316 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

In particular, we note that Adam Hilty testified at trial that when he was first interviewed by police he told them he had overheard Peters admit to hitting the victim with brass knuckles. However, Hilty recanted that statement during his deposition and at trial and instead stated that he never saw any brass knuckles and could have been mistaken about what he heard. Hilty did state that he knew Peters owned brass knuckles. Dearion, who had already pleaded guilty to the murder, testified that he did not see Peters strike the victim, but that as he was leaving the scene he saw Peters riding on the victim's back strangling the victim. Dearion testified that he could not tell if Peters was wearing brass knuckles because they would have been covered up by the gloves that Peters was wearing.

Joseph Robinton testified that the day before the murder he had seen Peters wearing his gloves with some kind of "wrap" around them. Robinton testified that just prior to the murder Peters directed him to "give [the victim] a beating" and threatened that if he didn't, he would "get it, too." Robinton testified that as a result he went back to the victim's apartment to warn the people there, but that the victim "didn't take it serious." Robinton then grabbed his things and left immediately, leaving Dearion and the victim at the apartment.

Peters testified in his own behalf and admitted to striking the victim with his fists several times on the day before the murder. He also admitted that he owned brass knuckles and that he had them with him at the time the victim was murdered. However, he claimed that Dearion was the aggressor and that he took the knuckles out to try to intimidate Dearion and stop him from fighting. Peters testified that Dearion took the brass knuckles away from him and used them to beat the victim to death.

Forensic pathologist Lary Simms conducted the autopsy and testified that because the head and neck were not recovered, he could not determine a specific cause of death, but that the death was likely a homicide. He testified that his examination of the body revealed the presence of several contusions on the arms consistent with a person trying to protect themselves from being beaten, as well as bruises on the victim's buttocks, thighs, chest, and shoulders. Simms testified that all of the bruises were inflicted prior to the victim's death.

Detective Jensen testified that he recovered bicycle gloves with the fingers cut off from Peters' car. Detective Popp executed a search warrant for Peters' apartment and recovered brass knuckles from a kitchen drawer.

The jury could reasonably infer from the evidence presented that the appellant was guilty of first-degree murder with the use of a deadly weapon. Therefore, we conclude that no relief is warranted.

Fifth, Peters claims that his life sentence violates the Eighth Amendment. "A sentence does not constitute cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience."[16] Peters does not claim that the statute is unconstitutional and the imposed sentence is within the statutory limits.[17] Therefore, we conclude that Peters' claim lacks merit.

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[16] Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

[17] See id.

Sixth, Peters contends that reversal of his conviction is warranted because Judge Bell, who presided over his trial, was the Clark County District Attorney at the time the criminal proceedings against him were initiated. Peters argues that recusal was mandatory because of the appearance of potential conflict or bias. Peters further argues that comments made by the district court at sentencing are evidence of actual bias. We conclude that Peters' contention lacks merit.

Preliminarily, we note that Peters failed to preserve this issue for appeal by filing a motion to recuse Judge Bell in district court pursuant to NRS 1.235 or NCJC Canon 3E.[18] Nonetheless, even assuming the issue was preserved for review, we conclude that recusal was not mandatory merely because the complaint was filed while Judge Bell was the District Attorney. There is no allegation here, or indication in the record, that Judge Bell, while acting as Clark County District Attorney, signed a document filed with the court or made a court appearance as an attorney in the case. Therefore, NRS 1.230 and NCJC Canon 3E are not implicated.[19] A deputy district attorney signed the complaint and made the pretrial court appearances in the case. Accordingly, we conclude that recusal was not warranted.

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[18]See NRS 1.230(2)(c); see also PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 437, 894 P.2d 337, 341 (1995), overruled in part by Towbin Dodge, LLC v. Dist. Ct., 121 Nev. 251, 260-61, 112 P.3d 1063, 1069-70 (2005).

[19]Cf. Turner v. State, 114 Nev. 682, 686, 962 P.2d 1223, 1225 (1998) (mandatory recusal required where trial judge had previously appeared on behalf of district attorney's office, at one of appellant's prior sentencing hearings, as well as initial arraignment of case over which he was now presiding as judge).

Peters also argues that the district court's statements at sentencing that it was "impressed" by Peters' callousness and lack of remorse and that Peters was "sort of an empty vessel," reflect bias and prejudice entitling him to a new trial. Peters' claim lacks merit. "[R]emarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence."[20] "The personal bias necessary to disqualify [a judge] must 'stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'"[21]

Here, the district court's opinion was based on Peters' reactions to the evidence presented and his demeanor throughout the proceedings. We conclude that the statements are not evidence of preexisting personal bias and that no relief is warranted.

Finally, Peters argues that his conviction should be reversed for cumulative error. "'The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually.'"[22] The factors to consider are the same as those used to determine whether a single error is harmless or prejudicial:

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[20]Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

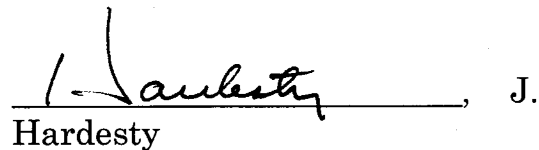
[21]In re Dunleavy, 104 Nev. 784, 790, 769 P.2d 1271, 1275 (1988) (quoting United States v. Beneke, 449 F.2d 1259, 1260-61 (8th Cir. 1971)).

[22]Rose v. State, 123 Nev. 24, __, 163 P.3d 408, 419 (2007) (quoting Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002)).

namely, "'(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'"[23] Thus far, we have found error only in the admission of Peters' pretrial admissions obtained in violation of the Fifth Amendment right to counsel, which we concluded was harmless beyond a reasonable doubt. We conclude that any error committed at trial, considered either individually or cumulatively, does not warrant reversal of Peters' convictions.

Having considered Peters' claims and determined that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.



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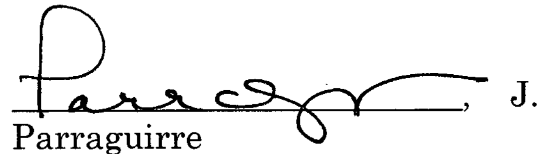

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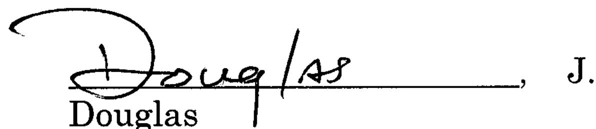

_____________________, J.
Douglas

cc: Hon. Stewart L. Bell, 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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[23]Id. (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).