

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL BENARD WADSWORTH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48071

FILED

JUN 04 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. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge. The district court sentenced appellant Michael Benard Wadsworth to serve a maximum term of 50 years in prison with a minimum parole eligibility of 20 years, plus an equal and consecutive term for the use of a deadly weapon.

Wadsworth was convicted of murdering Jose Esparza by shooting him, causing a rupture of his femoral artery. The State presented evidence placing Wadsworth at the crime scene and shooting a revolver. Wadsworth's theory of defense was that a second gunman was present at the crime scene and fired the fatal shot.

Following his arrest, Wadsworth was allowed to talk to his grandmother and an aunt in a police interrogation room, which had a camera that recorded the conversation. During the conversation, Wadsworth stated that there was another shooter at the crime scene. Wadsworth argues that the district court erred by not admitting a videotape of Wadsworth telling his relatives that a second shooter was

present when Esparza was shot. However, a review of the record reveals that Wadsworth did not seek admission of the videotape. Therefore, the district court did not err in failing to admit it.

Wadsworth further argues that he should have been allowed to question Detective David Fogerty about his statements to his grandmother and aunt concerning a second shooter at the crime scene. A review of the record reveals that Wadsworth testified that he told his grandmother and aunt that a second shooter was present when Esparza was killed. Wadsworth has failed to identify what additional helpful information would have been elicited had he been able to question Detective Fogerty on this matter. Therefore, even assuming error, we conclude that Wadsworth was not prejudiced by any limitation on the questioning of Detective Fogerty.

Additionally, Wadsworth argues that, but for the district court's error in limiting Detective Fogerty's questioning, he would not have had to testify because the second gunman theory would have been presented through Detective Fogerty. However, the decision to testify is a strategic decision.¹ As such, it was Wadsworth's prerogative to testify knowing the strength of the State's case. By choosing to testify, Wadsworth accepted both the risks and the rewards that accompanied his testimony.

Wadsworth next argues that the district court erred by not admitting into evidence the transcript of an interview Detective Fogerty conducted with Cisco Neal. During cross-examination, Wadsworth

¹Comer v. Schriro, 480 F.3d 960, 987 (9th Cir. 2007) (citing Rock v. Arkansas, 483 U.S. 44, 53 (1987)).

questioned Detective Fogerty about his investigation of a possible second shooter and Detective Fogerty refreshed his memory by reviewing a transcript of an interview he conducted with Neal. Detective Fogerty testified that Neal told him a chubby dude with a gun was at the crime scene when the victim was shot. Wadsworth argues that he was entitled to have the transcript admitted into evidence. However, a review of the record reveals that Wadsworth did not seek admission of the transcript. Therefore, the district court did not err in failing to admit it.

To the extent Wadsworth argues that he should have been allowed to question Detective Fogerty further about Neal's interview, Wadsworth has not identified what additional information Detective Fogerty would have provided that was helpful to the defense. As noted above, Detective Fogerty testified that Neal advised him that a second shooter was present when the victim was shot. Therefore, we conclude that Wadsworth has not demonstrated prejudice in this regard.

Wadsworth next argues that the district court erred by declining to give the following proposed jury instruction:

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt the interpretation which points to the defendant's innocence, and reject that which points to his guilt.

The district court declined to give this instruction, stating that it "could be interpreted to change the burden of proof instruction, which would be improper." This court has ruled that, so long as the jury is properly

instructed on the reasonable doubt standard, it is not error to refuse to give an instruction similar to the one that Wadsworth proposed.² As the district court properly instructed the jury on the reasonable doubt standard, we conclude that it did not err in declining to give the requested instruction.

Wadsworth next argues that there was insufficient evidence to convict him because the firearms expert could not affirmatively state that the shots fired came from Wadsworth's revolver. The firearms expert testified that the bullets recovered from the crime scene came from a Colt .38 caliber revolver. He compared the recovered bullets to the Colt .38 caliber revolver found at the crime scene. The firearms expert testified that he could not conclusively determine that the Colt .38 recovered from the crime scene was the murder weapon, but he also could not exclude it. Wadsworth later testified that the Colt .38 revolver was his and that he had fired the gun in the victim's direction, but that he had fired it into the ground. No other weapon was recovered from the crime scene.

It is for the jury to determine the weight and credibility of the evidence.³ The jury apparently found credible the firearm expert's testimony, as well as Wadsworth's acknowledgement that he owned the Colt .38 found at the crime scene. Moreover, additional evidence supported Wadsworth's conviction, including eyewitness testimony placing him at the crime scene and shooting a revolver. Therefore, we conclude

²Deveroux v. State, 96 Nev. 388, 391-92, 610 P.2d 722, 724 (1980) (citing Bails v. State, 92 Nev. 95, 545 P.2d 1155 (1976)).

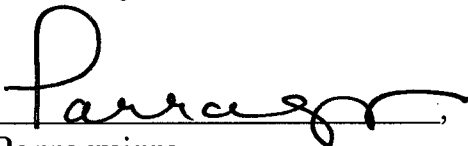
³McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (citing Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975)).

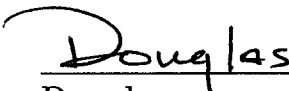
that the firearm expert's testimony did not render the evidence adduced at trial insufficient to support his conviction.⁴

Accordingly, having considered Wadsworth's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Connie J. Steinheimer, District Judge
Jenkins Law Office
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁴See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002).