IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEX MARQUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48624

FILED

MAY 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, entered upon jury verdicts, finding appellant, Alex Marquez, guilty of first degree murder with use of a deadly weapon, attempted robbery with use of a deadly weapon, burglary with use of a deadly weapon, battery with a deadly weapon causing substantial bodily harm, and battery with a deadly weapon. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

FACTS

Paul Lowe, Bobby Wood, and Billy Wood shared an apartment in Reno. For a period during the fall of 2005, they allowed their friend, Brian Snapp, to stay at the apartment. Eventually, they decided that Snapp had overstayed his welcome, and Bobby told Snapp that he would have to find alternate living accommodations.

Shortly after Bobby told Snapp he would have to leave, Snapp made derogatory comments to a female friend of Bobby's who was visiting the apartment. He proceeded to grope the young woman and put her in a headlock. Bobby told Snapp to leave immediately. Snapp announced that he was going to return to the apartment and kill everyone.

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Snapp proceeded to the residence of his friend, Carlos Ruiz. The appellant, Alex Marquez, and his friend Eduardo Camacho were also at Ruiz's residence. Snapp eventually persuaded Marquez and Camacho to "back him up" while he returned to the apartment to "get his stuff." Marquez and Camacho each carried a baseball bat. Ruiz agreed to drive. According to Ruiz's roommate, Snapp mentioned that the Wood brothers had a safe and marijuana at the apartment.

When they got to the apartment complex, Snapp, Marquez, and Camacho jumped out of the car, ran up to the apartment, and knocked on the door. As soon as Billy opened the door, they entered the apartment, and immediately started beating the occupants of the apartment with baseball bats and a claw hammer, which Snapp carried. They continued the attack for several minutes, until Billy chased them from the apartment with a weight bar.

Lowe died as a result of injuries sustained in the altercation. Bobby also suffered serious injuries, including a broken jaw, broken teeth, and permanent hearing loss.

The day after the attack, the Reno Police Officer Ron Chalmers detained Marquez as he was leaving Ruiz's residence. Marquez agreed to accompany the officer to the police department, where he gave a voluntary statement admitting that he participated in the attack, and that he entered the apartment for the purpose of obtaining money that was not his own.

The State charged Marquez, Snapp, Camacho, and Ruiz with first degree murder with use of a deadly weapon, attempted robbery with

use of a deadly weapon, burglary with use of a deadly weapon, battery with a deadly weapon causing substantial bodily harm, and battery with a deadly weapon. Following a joint trial of all defendants, a jury convicted Marquez of all charges. Marquez appeals from the judgment entered upon the verdict.

DISCUSSION

On appeal, Marquez asserts multiple assignments of error, which among other claims, allege that the district court erred in admitting at trial Marquez's statement to the police; failing to sever Marquez's trial from his co-defendants, and by admitting incriminating statements of Marquez's co-defendants in violation of Bruton v. United States.[1] We address each of these claims below.

Admission of Marquez's statements to the police

Marquez first contends that the district court erred in allowing the State to present testimony regarding his confession to Officer Chalmers. Marquez did not file a pretrial motion to suppress, nor did he object to admission of his statement at trial. Failure to object at the trial court level precludes appellate consideration of an issue, unless the defendant demonstrates plain error affecting his substantial rights.[2] Because Marquez did not object to admission of his confession to the police either before or at trial we review his assertion of error for "plain error."

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[1]391 U.S. 123 (1968).

[2]Flores v. State, 121 Nev. 706, 722, 120 P.3d 1170, 1180-81 (2005).

As established in Miranda v. Arizona,[3] the Fifth Amendment privilege against self incrimination provides that a suspect's statements made during a custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning and the defendant makes a knowing waiver of his rights.[4] For the purposes of Miranda, "custody" means a "formal arrest or restraint on freedom of movement."[5] If no formal arrest occurs, the relevant inquiry is whether a reasonable person in that situation would feel free to terminate the interrogation and leave.[6] In Alward v. State, this court listed several factors relevant to determining whether an interrogation is custodial, including: "(1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of the questioning."[7]

Here, the interview took place at the police department, and Marquez was taken to the police department in an unmarked police car. Marquez was a focus of the investigation, and the only people present in

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[3]384 U.S. 436 (1966).

[4]State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998) (citing Miranda, 384 U.S. at 479).

[5]Casteel v. State, 122 Nev. 356, 361, 131 P.3d 1, 4 (2006) (internal quotations omitted).

[6]Id.

[7]112 Nev. 141, 155, 912 P.2d 243, 252 (1996) overruled on other grounds by Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005).

the interview room were Marquez and other police officers. Based on these facts, we conclude that the interview of Marquez was custodial.

As indicated above, to admit statements made during a custodial interrogation, the defendant must knowingly and voluntarily waive his Miranda rights.[8] Specifically, Miranda requires a person be warned that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[9] In this case, Officer Chalmers stated that he did not read Marquez a full version of his Miranda rights. However, Officer Chalmers testified that he informed Marquez that he had the right to remain silent, that any information would be recorded in a police report and given to the district attorney, and that he had the right to consult with an attorney. Officer Chalmers did not inform Marquez that any statement he made could be used as evidence against him. After acknowledging that he understood these warnings, Marquez continued to speak with Officer Chalmers, and described his involvement in the attack.

We conclude that by informing Marquez that any statements he made would be documented in a police report, rather than warning Marquez that any statement he made could be used as evidence against him, Officer Chalmers did not technically comply with the requirements set forth in Miranda. We further conclude, however, that any error resulting from admission of Marquez's statement to Officer Chalmers does

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[8]Koger v. State, 117 Nev. 138, 141, 17 P.3d 428, 430 (2001).

[9]384 U.S. at 444.

not rise to the level of plain error requiring reversal.[10] First, Marquez's failure to file a timely suppression motion, or to otherwise object at trial, is indicative of an apparent tactical decision by trial counsel to waive the argument so that the statement could be used for defensive purposes so that Marquez would not have to testify and subject himself to cross-examination about his admitted participation in this affair. Second, under Ducksworth v. Egan,[11] it appears that the warnings actually given reasonably conveyed the rights afforded under Miranda.

Failure to sever

Marquez next argues that the district court erred in failing to sever his trial from that of Snapp, Camacho and Ruiz. Because Marquez did not file a pretrial motion to sever or otherwise object at trial, we review this claim using the plain error standard. [12]

The joinder of defendants is within the sound discretion of the district court, and this court will not reverse a district court decision to join or sever claims absent an abuse of discretion.[13] When considering whether to reverse a district court decision to join defendants, this court

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[10]We have also reviewed Marquez's claim that he should have been warned in Spanish and conclude that this claim lacks merit, as it appears that Marquez speaks and understands English.

[11]492 U.S. 195, 203 (1989).

[12]Flores v. State, 121 Nev. at 722, 120 P.3d at 1180-81 (stating that failure to object at trial generally precludes appellate consideration of an issue, unless the defendant demonstrates plain error affecting his substantial rights).

[13]Lisle v. State, 113 Nev. 679, 688, 941 P.2d 459, 466 (1997).

"must consider not only the possible prejudice to the defendant but also the possible prejudice to the Government resulting from two time-consuming, expensive and duplicitous trials."[14] Therefore, an appellant challenging a district court joinder decision bears a "heavy burden" of showing that the district court abused its discretion.[15]

NRS 174.165 provides that

> If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

In interpreting NRS 174.165, this court has concluded that joinder is appropriate where (1) multiple defendants present antagonistic defenses, or (2) when evidence properly submitted against one defendant will "spill over" to another defendant, improperly influencing the way the jury views the other defendant.[16]

To sever trials due to antagonistic defenses, a defendant must show that the defenses presented by the co-defendants are "antagonistic to the point they are mutually exclusive."[17] This court has adopted the rule of the Ninth Circuit that "defenses become 'mutually exclusive' when 'the core of the codefendant's defense is so irreconcilable with the core of the

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[14]Id. at 688-89, 941 P.2d at 466 (internal quotations omitted).

[15]Rowland v. State, 118 Nev. 31, 44, 39 P.3d 114, 122 (2002).

[16]Id. at 45, 39 P.3d at 122-23.

[17]Id. at 45, 39 P.3d at 122.

defendant's own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant.'"[18]

Marquez argues that his defense was antagonistic to Snapp and Ruiz's because he and Camacho "reluctantly" agreed to "back up" Snapp in retrieving his property from the apartment, while Snapp wanted to return to the apartment to get revenge, and possibly steal property. We disagree. At trial, Snapp never argued that he intended to seek revenge, or kill anyone. Rather, Snapp maintained that wanted to return to the apartment to retrieve property that belonged to him. Therefore, we conclude that severance was not warranted due to presentation of antagonistic defenses.

We also conclude that severance was not mandated under the "spillover" or "rub-off" theory. "The 'spillover' or 'rub-off' theory involves the question of whether a jury's unfavorable impression of one defendant against whom the evidence is properly admitted will influence the way the jurors view the other defendant."[19] However, severance is not appropriate if based solely on a theory of "guilt by association."[20] In addition, a defendant is not entitled to a severance "merely because the evidence admissible against a co-defendant is more damaging than that admissible

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[18]Id. at 45, 39 P.3d at 123 (quoting United States v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996)).

[19]Lisle, 113 Nev. at 689, 941 P.2d at 466 (internal quotations omitted).

[20]Id.

against the moving party," or because a defendant stands a better chance at acquittal if tried separately.[21]

Here, Marquez points to several statements that he claims improperly spilled over against him. He notes that Ruiz's roommate offered a statement by Ruiz that when he got to the apartment complex, "the other three guys had jumped out before he even had time to park the car." He also points to an admission by Snapp to a police detective that he had a disagreement with his roommates earlier, and that he wanted to go back to the apartment to "kick some ass and get the money and the drugs out of the safe." Finally, he points to an admission by Camacho to the police that he was involved in the incident at the apartment, hit a person with a wooden bat, and wanted money that was not his own.

We conclude that none of these statements is so unfavorable or prejudicial that they improperly "spilled over" to Marquez. Rather, the statements align closely with Marquez's own admission that he entered the apartment with a baseball bat for the purposes of obtaining money that was not his own. As indicated above, the fact that a defendant would have a better chance of acquittal if tried separately does not, in itself, warrant severance. Thus, because Marquez has not demonstrated the presence of antagonistic defenses or prejudice due to spillover, we conclude that the district court did not abuse its discretion in failing to sua sponte order severance.

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[21]Id. at 689-90, 941 P.2d at 466.

Bruton violations

In addition to his claim that the district court erred in failing to sever his trial, Marques also argues that admission of certain statements by Snapp, Camacho and Ruiz violated his Sixth Amendment right to confrontation, as established in Bruton v. United States.[22] In Bruton, the United States Supreme Court held that evidence of an incriminating statement by one defendant which expressly refers to the other defendant violates the Confrontation Clause of the Sixth Amendment, and a limiting instruction to the jury is not sufficient to overcome the resulting prejudice.[23]

To fall within Bruton's protective rule, a statement by a codefendant must facially or expressly implicate the defendant.[24] No Bruton violation occurs when a jury learns only that a codefendant made a statement, but is not told the specific contents of that statement.[25] Similarly, statements that merely refer to the defendant's existence (such as "me and another guy"), but do not reference the defendant by name,

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[22]391 U.S. 123.

[23]Id. at 127-28; Ducksworth v. State, 114 Nev. 951, 953, 966 P.2d 165, 166 (1998).

[24]Rodriguez v. State, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001); McRoy v. State, 92 Nev. 758, 759, 557 P.2d 1151, 1152 (1976) (finding no Bruton violation when "the statements admitted at trial contained no direct references to [the defendant] and posed no substantial threat to his right of confrontation").

[25]Hill v. State, 114 Nev. 169 177, 953 P.2d 1077, 1083 (1998).

and are incriminating only when linked with other evidence presented at trial, may be admitted.[26]

Here, the district court read an appropriate limiting instruction prior to each instance of testimony regarding incriminating statements by Snapp, Camacho and Ruiz. No statement admitted against Snapp, Camacho or Ruiz referenced Marquez by name. In fact, none of the statements admitted against Snapp and Camacho mentioned the presence of any other attackers. While the State also presented a statement by Ruiz that referred to the presence of other perpetrators, Ruiz stated only that he drove three "other guys" to the apartment, and when he got to the apartment complex, "the other three guys had jumped out before he even had time to park the car."

As indicated above, statements referring merely to "the other guy," are not considered to implicate a defendant. Thus, while these statements may have become incriminating when linked with evidence at trial, we conclude that the district court did not violate Bruton in admitting testimony related to the statements by Snapp, Camacho, or Ruiz.

CONCLUSION

In addition to the claims discussed above, we have also considered Marquez's remaining arguments, including those related to sufficiency of the evidence, failure to find a knowing waiver of Marquez's

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[26]Lisle v. State, 113 Nev. 679, 693, 941 P.2d 459, 468 (1997) (finding no Bruton violation where codefendant's statement referred to the defendant as "the other guy") (citing Richardson v. Marsh, 481 U.S. 200, 211 (1987); United States v. Enriquez-Estrada, 999 F.2d 1355, 1359 (9th Cir. 1993)).

Fifth Amendment right to testify, failure to sua sponte declare a mistrial, and misconduct by the state in the plea bargaining process and conclude that none of these alleged errors deprived Marquez of a fair trial.[27]

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[27]With respect to Marquez's argument regarding sufficiency of the evidence, we note that while evidence may have conflicted regarding whether or not Snapp had an ownership interest in the contents of the apartment safe, it is the task of the jury, not this court to determine the weight and credibility of evidence presented at trial. Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994). In this case, viewed in the light most favorable to the prosecution, sufficient evidence existed for a reasonable trier of fact to find Marquez guilty of all crimes charged, including robbery with a deadly weapon. See id.

We also reject Marquez's argument that potentially threatening comments by Snapp regarding Marquez's decision to testify violated his Fifth Amendment rights, and that these threats created a requirement that the district court canvass any defendant who alleges that he was threatened by a co-defendant. First, we have declined to adopt the minority viewpoint that a district court must conduct an on-record colloquy with each defendant to establish a knowing and voluntary waiver of the right to testify. See Phillips v. State, 105 Nev. 631, 633, 782 P.2d 381, 382 (1989). Second, we also reject the notion that such a colloquy is required if a district court learns of a potential threat regarding a defendant's decision to testify because such a requirement would cede control over the trial to a co-defendant in a criminal case. In addition, we conclude that in this case, the admonishment and warning given by the district court regarding the right to testify was sufficient to counter the effect of any threatening statements Snapp may have previously made in connection with Marquez's decision to testify.

Finally, we reject Marquez's argument that the State committed prosecutorial misconduct when it withdrew from what Marquez alleges to be a plea agreement prior to trial. Absent any detrimental reliance, an agreement to plea is merely an "offer," which the State is free to withdraw until the agreement is approved by the court. State v. Crockett, 110 Nev.

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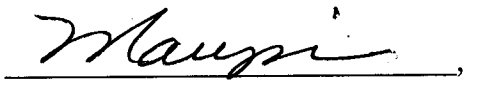
Therefore, for the reasons stated above, we

ORDER the judgment of the district court AFFIRMED.



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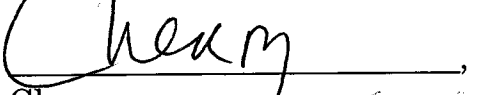

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cc: Hon. Brent T. Adams, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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838, 843, 877 P.2d 1077, 1079 (1994). As Marquez did not plead guilty or otherwise change his legal position in reliance on the alleged plea agreement, we conclude that the State was free to withdraw from any plea bargain negotiations prior to trial.