

IN THE SUPREME COURT OF THE STATE OF NEVADA

MYRDUS ARCHIE A/K/A MARY
SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49248

FILED

FEB 25 2010

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge. We reverse the conviction for attempted murder due to insufficient evidence but affirm the judgment of conviction in all other respects.

Sufficiency of the evidence

Archie contends that insufficient evidence supports her conviction for attempted murder because no evidence was adduced proving that she possessed the requisite intent to kill. We review the evidence in the light most favorable to the prosecution to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Mitchell v. State, 124 Nev. ___, ___, 192 P.3d 721, 727 (2008) (internal quotations and citations omitted). We “will not disturb a jury verdict where there is substantial evidence to support it,

and circumstantial evidence alone may support a conviction.” Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

Attempted murder is a specific intent crime, and the State therefore had to prove that Archie intended that the victim be killed. See Lee v. State, 107 Nev. 507, 508, 813 P.2d 1010, 1011 (1991). The State failed to meet that burden.

The evidence shows that after the codefendant, James Walker, and the victim, Kirk Cole, reached an agreement to provide Cole and his girlfriend a ride home from a Food 4 Less grocery store, Archie appeared on the scene in her car and introduced herself to Cole as Barbara. Cole loaded his groceries into the trunk of the car and the two couples left, with Archie driving the car. When Archie pulled up to Cole’s residence, Cole’s girlfriend exited the car with a few items and walked to the front door of the couple’s residence. Cole testified that Archie acted strangely when he attempted to retrieve his groceries from the trunk. In particular, he described that he exited the car, moved to the trunk, and waited for Archie to get out of the car and open the trunk. Only when Cole tapped on her window did Archie exit the car and open the trunk. Cole gave her \$20 for the ride. According to Cole, after opening the trunk, Archie “moved kind of rapidly around the side of the car.” As Cole bent over the trunk to retrieve his groceries, Walker came up behind him and cut Cole’s throat with a knife. Once he realized what had happened, Cole ran down the street with Walker chasing him and demanding money. While running

away, Cole heard Archie say, "Hell no, not like this."¹ After which Archie drove away, leaving Walker behind.

While the evidence adduced certainly supports a conclusion that Archie was aware that Walker planned to rob Cole and she participated in that activity, the evidence does not manifest an intent to kill Cole such that any rational juror could find beyond a reasonable doubt that Archie attempted to murder Cole under any theory the State advanced at trial.² "Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused." NRS 193.200. At most, the evidence shows that Archie was aware of the possibility that Walker would stab or otherwise injure Cole to effectuate the robbery, considering Walker's attack on Anziano approximately 24 hours earlier. However, the evidence does not support a finding that Archie possessed the specific intent to kill Cole. Therefore, we are compelled to reverse Archie's conviction for attempted murder.

Severance

Archie argues that the district court erred by refusing to sever her trial from Walker's on two grounds—(1) she was tried by a death qualified jury and (2) spillover evidence and a prejudicial inference rendered her trial unfair. "The decision to sever a joint trial is vested in

¹Cole's girlfriend testified at trial that Archie said, "Oh no, not this again."

²The State charged Archie with attempted murder of Cole as a direct actor, an aider or abettor, or co-conspirator. No evidence was introduced suggesting that Archie stabbed Cole.

the sound discretion of the district court and will not be reversed on appeal unless the appellant carries the heavy burden of showing that the trial judge abused his discretion.” Chartier v. State, 124 Nev. ___, ___, 191 P.3d 1182, 1185 (2008) (internal quotations omitted).

Death qualified jury

Archie contends that the district court erred by refusing to sever the defendants’ trial because although she did not face the death penalty, she was tried before a death qualified jury.

The United States Supreme Court has rejected the argument that a defendant tried with a codefendant who is facing the death penalty is deprived of her right to an impartial jury when tried by a death qualified jury, recognizing the state’s interest in joint trials. See Buchanan v. Kentucky, 483 U.S. 402, 419-20 (1987). And this court has observed that under Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968), it is “not required to presume that a death-qualified jury is biased in favor of the prosecution.” McKenna v. State, 101 Nev. 338, 344, 705 P.2d 614, 618 (1985). Rather, a defendant bears “the burden of establishing the non-neutrality of the jury.” Id. Because Archie fails to show that any juror was biased against her in this regard, we conclude that her claim lacks merit.³

³We further reject Archie’s claim that she was deprived of her right to a jury that represents a fair cross section of the community due to the exclusion of jurors who could not qualify for a capital jury due to their views on the death penalty.

Spillover effect

Archie asserts that the district court should have severed the trial because Walker was tried for an offense with which she was not charged. Several hours before Anziano's murder and Cole's stabbing, Walker reached into Susan Simon's car while she was parked in a Food 4 Less parking lot late at night and absconded with her purse. Archie was not charged in this event. However, she contends that the inclusion of the evidence of Walker's crime against Simon in the joint trial raised "a clear inference" that she "must have been involved as some type of get away driver in the Susan Simon incident based on the facts" and created an "incredible spillover" effect.

The theory behind the spillover effect "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." Lisle v. State, 113 Nev. 679, 689, 941 P.2d 459, 466 (1997) (quoting State v. Rendon, 715 P.2d 777, 782 (Ariz. 1986)) (alteration in original). However, "[s]everance of defendants will not be granted if based on 'guilt by association' alone." Id. (quoting United States v. Boffa, 513 F. Supp. 444, 487 (D. Del. 1980)).

We are not persuaded by Archie's contention in this regard for three reasons. First, the State did not intimate, nor did the evidence suggest, that Archie participated in any way in Walker's theft of Simon's purse. Second, the district court instructed the jury that "[e]ach charge and the evidence pertaining to it should be considered separately." Third, the State presented overwhelming evidence of Archie's guilt on the charged offenses other than attempted murder and thus there is no reason to believe that the jury convicted her based on an unfavorable impression

of Walker. In fact, the jury showed its ability to consider the defendants separately when it convicted Archie of second-degree murder rather than first-degree murder, which was warranted by her participation in the plan to rob Anziano. Under these circumstances, we conclude that the district court did not err by refusing to sever the trial on this basis.

Batson challenge

Archie argues that the district court erroneously denied her challenge to the State's peremptory challenge of an African-American prospective juror pursuant to Batson v. Kentucky, 476 U.S. 79 (1986). Archie also complains that the jury venire did not represent a fair cross section of the community in terms of the racial makeup of the jury.

As to Archie's Batson challenge, the district court employs a three-step analysis in considering these matters: "(1) the opponent of the peremptory challenge must make out a prima facie case of discrimination, (2) the production burden then shifts to the proponent of the challenge to assert a neutral explanation for the challenge, and (3) the trial court must then decide whether the opponent of the challenge has proved purposeful discrimination." Ford v. State, 122 Nev. 398, 403, 132 P.3d 574, 577 (2006); see Purkett v. Elem, 514 U.S. 765, 767 (1995); Kaczmarek v. State, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004).

Here, the State's race neutral reasons centered on the prospective juror's statements that he had family members who were imprisoned and a nephew who had been murdered and his expressed unhappiness with the police investigation of his nephew's murder because his nephew was a gang member. Other than to contend that the prospective juror was a qualified juror, Archie fails to explain how the State engaged in purposeful discrimination or why the district court erred

by denying her Batson challenge. Accordingly, we conclude the district court did not err by denying her Batson challenge.

As to her claim respecting the racial makeup of the jury venire, a defendant is constitutionally entitled to a jury selected from a fair cross section of the community, meaning that “venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.” Williams v State, 121 Nev. 934, 939-40, 125 P.3d 627, 631 (2005) (internal quotations omitted). However, the Sixth Amendment does not require a jury or venire to reflect a perfect cross section of the community. Id. at 939, 125 P.3d at 631. “[A]s long as the jury selection process is designed to select jurors from a fair cross section of the community, then random variations that produce venires without a specific class of persons or with an abundance of that class are permissible.” Id. at 940, 125 P.3d at 631. Because Archie has not shown that the venire was selected in a manner that systematically excluded a distinctive group, we reject this claim.

Juror questioning of witnesses

Archie contends that the district court erred by allowing jurors to ask questions of witnesses without first consulting with counsel and without following the strict limitations of Flores v. State, 114 Nev. 910, 913, 965 P.2d 901, 902-03 (1998), which set forth safeguards respecting jurors’ questioning of witnesses. “Flores violations generally will amount to nonconstitutional trial error under NRS 178.598 and will be subject to review for harmlessness” under the standard set forth in Kotteakos v. United States, 328 U.S. 750, 776-77 (1946), which requires this court to determine whether the error “had substantial and injurious effect or influence in determining the jury’s verdict.” Knipes v. State, 124 Nev.

___, ___, 192 P.3d 1178, 1184 (2008) (quoting Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1133 (2001)).

Although it appears that the district court did not rigorously adhere to the Flores safeguards, we conclude that Archie failed to establish prejudice. She has not identified any improper question from the jury or explained how any disregard by the district court of the Flores safeguards had a substantial and injurious effect on the jury's verdict. Therefore, we deny relief on this claim.

Alleged inadmissible evidence

Archie contends that the district court admitted prejudicial inadmissible evidence, namely that the police discovered 17 purses in Archie's apartment during a search and Archie had used an alias. She argues that these matters constituted evidence of prior bad acts requiring a hearing under Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985) before admission. Having carefully reviewed the submissions before this court, we conclude that Archie failed to demonstrate error, or if error occurred, any prejudicial effect. Therefore, we deny relief.

Jury instructions

Archie challenges the instructions on express and implied malice and malice aforethought as unconstitutionally vague. However, the instructions given comport with relevant statutes and this court's jurisprudence. See NRS 200.020; Leonard v. State, 117 Nev. 53, 78, 17 P.3d 397, 413 (2001); Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000); Leonard v. State, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1998). We therefore deny relief on this claim.

Habitual criminality

Archie challenges her adjudication as a habitual criminal on two grounds—(1) the use of her prior convictions to support habitual criminality violates double jeopardy principles and (2) her punishment is cruel and unusual.

As to Archie's double jeopardy claim, this court has rejected a similar claim. See Carr v. State, 96 Nev. 936, 940, 620 P.2d 869, 871 (1980) (concluding that twice adjudicating defendant habitual criminal based on same prior convictions does not violate double jeopardy principles). Accordingly, we deny relief.

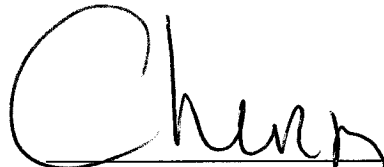
We also reject Archie's claim that the habitual criminality adjudication constitutes cruel and unusual punishment because of the multiple use of the same prior felony convictions to support two habitual criminality adjudications. Although Archie's sentence is harsh, we conclude that adjudicating Archie a habitual criminal under the circumstances of this case does not constitute cruel and unusual punishment. See Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

Cumulative error


Archie argues that cumulative error warrants reversal of her convictions. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). Although Archie's trial was not free from error, we conclude that no error considered individually or cumulatively rendered her trial unfair.

Having considered Archie's claims, we

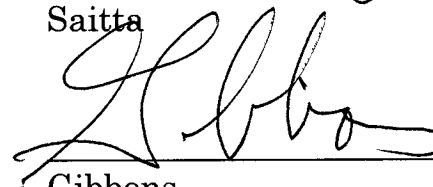
ORDER the judgment of conviction REVERSED as to the attempted murder count and AFFIRMED in all other respects and REMAND this matter for the entry of an amended judgment of conviction consistent with this order.

 _____, J.

Cherry

 _____, J.

Saitta

 _____, J.

Gibbons

cc: Hon. Valerie Adair, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk