

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUGLAS LEE MILLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49357

FILED

MAR 28 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY W. W. W. W.
DEPUTY CLERK

ORDER OF AFFIRMANCE

This an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of assault with the use of a deadly weapon and one count of maiming the animal of another person. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge. The district court sentenced appellant Douglas Lee Miller to a prison term of 19 to 48 months for assault with the use of a deadly weapon and a concurrent prison term of 12 to 34 months for maiming the animal of another. The district court suspended the sentence and placed Miller on probation for a period not to exceed three years. As a special condition of probation, Miller was required to serve 90 days in the county jail.

First, Miller contends that evidence presented at trial was insufficient to support his convictions. He specifically claims that the State failed to prove beyond a reasonable doubt that he was not acting in self-defense when he shot the dog and pointed his handgun at James Stroud. Our review of the record on appeal, however, reveals sufficient

evidence to establish Miller's guilt beyond a reasonable doubt as determined by a rational trier of fact.¹

In particular, we note that the jury heard testimony that an 85-pound mixed-breed dog escaped from its chain and wandered into Miller's backyard. Miller shot the dog with a handgun, striking it in the hindquarters and causing it to suffer a permanent limp. Miller then placed the handgun on the hood of a pick-up truck and began to walk in circles. When Stroud approached and asked why Miller had shot the dog, Miller retrieved the handgun and pointed it at Stroud. After Stroud left, Miller hid the handgun in his attic.

Miller testified that he shot the dog because it was trying to bite him. Miller stated that the dog had previously attacked him and his girlfriend's daughter and that he had reported these attacks to the dog's owner, the Sheriff's Department, and the Animal Control Officer. The dog's owner testified that Miller had only complained about the dog's barking. The Sheriff's Department did not have any records indicating that Miller filed a vicious dog complaint; however, it did have a record of a noise complaint that was filed against Miller, during which Miller complained to the responding officer about a vicious dog. The Animal Control Officer testified that she was unaware of any complaints made by

¹See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Miller about the dog and that she would have remembered a complaint involving a dog bite.

Miller also testified Stroud approached him in a threatening manner and that he pointed the handgun at Stroud to avoid being beaten-up. Stroud testified that he did not threaten Miller at anytime, he was 10 or 15 feet away from Miller when Miller pointed the handgun at him, and Miller told him that he shot the dog because it barks too much.

We conclude that a rational juror could reasonably infer from this evidence that Miller was not acting in self-defense when he shot the dog and pointed the handgun at Stroud.² It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.³

Second, Miller contends that the district court abused its discretion by relying upon undisclosed conversations with the jury to determine his sentence. Miller observes that the district court ordered him to serve 90 days in the county jail as a condition of probation "even though both defense counsel and the prosecutor agreed that jail time as a condition of probation would serve no purpose." Miller argues that this

²See NRS 200.471; NRS 206.150.

³See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

condition was the result of an improper off-the-record discussion between the district court and the jury after his trial concluded.

We have consistently afforded the district court wide discretion in its sentencing decision.⁴ The district court may “consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant.”⁵ We will not interfere with the district court’s sentencing decision unless the record on appeal demonstrates “prejudice resulting from consideration of information or accusations founded on facts supported only by palpable or highly suspect evidence.”⁶

Here, the district court read the Division of Parole and Probation’s presentence investigation report and heard from Miller, his attorney, and the State. The district court noted that Miller had been in the Navy, worked as a prison guard, and had a “pretty clean record.” The district court stated that “the case is really on the bubble, because I heard the testimony, and I talked to the jury and – and I kind of agree, the dog lived, it’s sort of on the lower end of the seriousness of the scale.”

⁴See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

⁵Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998); see also NRS 176.015(6).

⁶Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

The district court asked Miller if he understood that the recommendations were for probation. And, while announcing the conditions of probation, the district court stated that it initially thought that this was a prison case, but after reading about Miller's history and background it decided to go with the Division's recommendations. The district court determined that some deterrent was necessary and ordered Miller to serve 90 days in the county jail, instead of the 6 months recommended by the Division.

Under these circumstances, Miller has not demonstrated that the district court relied upon impalpable or highly suspect evidence, and we conclude that the district court did not abuse its discretion at sentencing.

Third, Miller contends that the district court erred by not following the procedures for jury-questioning that were adopted by this court in Flores v. State.⁷ Specifically, Miller claims that the district court failed to give counsel an opportunity to object to a jury question and determine the admissibility of the question outside the presence the jury.

In Flores, we held that the decision to allow juror-inspired questions was committed to the sound discretion of the district court.⁸ However, to minimize the risk of prejudice, we determined that the trial

⁷114 Nev. 910, 965 P.2d 901 (1998).

⁸Id. at 913, 965 P.2d at 902.

court's procedure for jury-questioning must include the following safeguards:

(1) initial jury instructions explaining that questions must be factual in nature and designed to clarify information already presented; (2) the requirement that jurors submit their questions in writing; (3) determinations regarding the admissibility of the questions must be conducted outside the presence of the jury; (4) counsel must have an opportunity to object to each question outside the presence of the jury; (5) an admonition that only questions permissible under the rules of evidence will be asked; (6) counsel is permitted to ask follow-up questions; and (7) an admonition that jurors must not place undue weight on the responses to their questions.⁹

Here, after the prosecutor and defense counsel had finished examining Stroud, the district court asked if the jurors had any questions. A juror had a question and the district court instructed the juror to write it down. Then, without determining the admissibility of the question and providing counsel with an opportunity to object to the question outside the presence of the jury, the district court stated "I'm going to ask the question, if you know the answer. What are the specific addresses of the properties involved?" Stroud responded that he did not know the answer. The district court erred by failing to incorporate all of the procedural safeguards in its jury questioning procedure. However, under these

⁹Id.

circumstances we conclude that the error was harmless beyond a reasonable doubt.

Fourth, Miller contends that the district court erred by not canvassing him regarding the right to testify until after he had testified. Miller claims that the error was prejudicial because the prosecutor elicited damaging testimony during cross-examination. And Miller argues that if he had been canvassed by the district court before he testified it is possible that this damage could have been prevented.

“Criminal defendants have the right to testify on their own behalf under the due process clause of the fourteenth amendment, the compulsory process clause of the sixth amendment and the fifth amendment’s privilege against self-incrimination.”¹⁰ While it is good practice for the district court to advise a defendant of his right to testify on the record, outside the presence of the jury, and towards the end of the State’s case-in-chief, the district court’s failure to give this advisement is not a reversible error.¹¹

Here, after Miller testified, the defense rested, and the jury left the courtroom, the district court canvassed Miller regarding his decision to testify. Miller acknowledged that he discussed the right with

¹⁰Phillips v. State, 105 Nev. 631, 632, 782 P.2d 381, 382 (1989) (citing Rock v. Arkansas, 483 U.S. 44, 49 (1987)).

¹¹Id. at 633, 782 P.2d at 382.

counsel, understood that he did not have to testify, and knew that he would be cross-examined if he chose to testify. Miller further stated that it was his decision to testify. Pursuant to Phillips, the district court's failure to canvass Miller before he took the witness stand did not constitute reversible error.

Fifth, Miller contends that that the district court erred by allowing the State to elicit improper testimony during the trial and thereby deprived him of a fair trial. Miller specifically claims that (1) testimony about a spent cartridge case that was found to be stuck in the handgun's chamber was beyond the scope of cross-examination, (2) testimony concerning the use of pepper spray was irrelevant because there was no evidence that Miller possessed pepper spray, and (3) testimony regarding calls made to the police and the removal of the bullet from the dog's leg were made without a proper foundation. Miller did not object to the admission of this testimony.

"When an appellant fails to specifically object to questions asked or testimony elicited during trial, but complains about them, in retrospect upon appeal, we do not consider his contention as a proper assignment of error."¹² We may nevertheless address an alleged error if it was plain and affected the appellant's substantial rights.¹³ "To be plain,

¹²Wilson v. State, 86 Nev. 320, 326, 468 P.2d 346, 350 (1970).

¹³See NRS 178.602.

an error must be so unmistakable that it is apparent from a casual inspection of the record.”¹⁴ And, as a general rule, an appellant must demonstrate that the error was prejudicial in order to prove that it affected his substantial rights.¹⁵ Based on our review of the record on appeal, we conclude that Miller’s allegations of error do not rise to the level of plain error.

Sixth, Miller contends that the district court erred by failing to limit the State’s improper comments at trial and thereby deprived him of a fair trial. Miller specifically claims that the prosecutor (1) mischaracterized his self-defense argument to mean that he “was entitled to kill because he thought somebody was going to attack him;” (2) misstated the evidence by criticizing him “for not calling the police and for not reporting the dog as vicious;” and (3) improperly injected himself into the trial, during his cross-examination of a defense witness, by commenting, “I called and checked with the Sheriff’s Office if any complaints were filed in March of two thousand five, or two thousand six about this incident. They said you never contacted them and filed a complaint. Do you know why?” Miller did not object to these comments.

¹⁴Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

¹⁵See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

District courts have a duty to ensure that criminal defendants receive a fair trial.¹⁶ In fulfilling this duty, district courts must “exercise their discretionary power to control obvious prosecutorial misconduct sua sponte.”¹⁷ “In determining whether prosecutorial misconduct has deprived a defendant of a fair trial, we inquire as to whether the prosecutor’s statements so infected the proceedings with unfairness as to make the results a denial of due process.”¹⁸ We have considered the prosecutor’s comments in context and we conclude that they did not deprive Miller of a fair trial.

Seventh, Miller contends that the accumulation of multiple errors deprived him of a fair trial and due process of law. “The cumulative effect of multiple errors may violate a defendant’s constitutional right to a fair trial even though errors are harmless individually.”¹⁹ However, only one of Miller’s claims had merit and we determined that the error was harmless beyond a reasonable doubt. Accordingly, we conclude that Miller was not deprived of a fair trial and due process of law.

¹⁶Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126, 1128 (1985).


¹⁷Id.

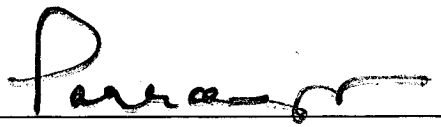
¹⁸Rudin v. State, 120 Nev. 121, 136-37, 86 P.3d 572, 582 (2004) (internal footnotes and quotation marks omitted).

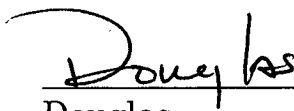
¹⁹Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 524 (2001).

Having considered Miller's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Steve L. Dobrescu, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General Catherine Cortez Masto/Carson City
White Pine County District Attorney
White Pine County Clerk