

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES R. WALKER A/K/A JAMES RAY
WALKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49507

FILED

MAR 03 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction in a death penalty case. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant James Ray Walker stabbed to death Christine Anziano as she exited a drug store in Las Vegas and stole her purse and purchased items. About 24 hours later, Walker slit the throat of Kirk Cole, absconding with Cole's money. Walker's girlfriend, Myrdus Archie, assisted him in the perpetration of these crimes. Several hours before Anziano's murder, Walker approached 17-year-old Susan Simon while Simon was sitting in a car in a store parking lot. Walker approached Simon, reached into the car, and stole her purse. Archie did not participate in this event. A jury convicted Walker of conspiracy to commit robbery, burglary, two counts of robbery with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and murder with the use of a deadly weapon and sentenced Walker to death. We affirm the judgment of conviction.

Guilt-phase issues

Walker argues that the district made numerous erroneous rulings on matters related to (1) jury selection, (2) the refusal to sever the defendants and charges, (3) the admission of evidence or discovery, (4) jury instructions, and (5) prosecutorial misconduct.

Jury selection

Walker challenges the district court's rulings on four jury related matters: (1) limiting counsel's questioning of the jury, (2) denying a Batson challenge, (3) refusing to empanel a jury reflecting a cross section of the community, and (4) allowing improper jury questions.

First, Walker asserts that the district court erroneously limited his counsel's questioning of potential jurors. In three of the four instances he identifies, after the jurors unequivocally expressed that they could not impose death, counsel queried each juror whether any circumstance existed whereby the juror could impose a death sentence. The district court sustained the State's objections to this inquiry. Because these prospective jurors expressed unequivocal opposition to the death penalty, the district court did not abuse its discretion by restricting counsel in this manner. See Salazar v. State, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991). In the final instance Walker identifies, counsel sought to question a prospective juror as to whether the juror would change the law regarding punishment for murder if he could. Because counsel's inquiry was not relevant to determining whether a juror will be able to adjudicate the facts fairly or is biased toward either party, the district court did not unreasonably restrict counsel's voir dire of the juror. See id.

Second, Walker argues that the district court erroneously denied his challenge to the State's peremptory challenge of an African-

American prospective juror pursuant to Batson v. Kentucky, 476 U.S. 79 (1986). His claim stems from a colloquy in which the prosecutor questioned whether a juror would feel community pressure not to return a death sentence because the defendant is also African American. Considering the context of the prosecutor's question, we conclude that it was not grounded in racial discrimination, thereby invoking Batson, but rather was designed to expose bias. Accordingly, the district court did not err in this regard.

Third, Walker argues that his conviction and sentence are constitutionally infirm because the jury venire did not represent a cross section of the community. Nothing in our review of the record on appeal or Walker's argument suggests a systematic exclusion of African Americans from the venire. Williams v State, 121 Nev. 934, 939-40, 125 P.3d 627, 631 (2005). Accordingly, Walker's convictions and sentence are not invalid on this ground.

Fourth, Walker contends that the district court erred by allowing jurors to ask questions of witnesses without following the safeguards set forth in Flores v. State, 114 Nev. 910, 913, 965 P.2d 901, 902-03 (2005). Although the district court did not strictly comply with Flores, none of the instances Walker identifies suggest that the error had a substantial or injurious effect on the jury's verdict. See Knipes v. State, 124 Nev. ___, ___, 192 P.3d 1178, 1184 (2008).

Severance of trial

Walker contends that trying him and Archie jointly was prejudicial because he was unable to present his defense of mistaken identity. We conclude that the district court did not abuse its discretion. See Chartier v. State, 124 Nev. ___, ___, 191 P.3d 1182, 1185 (2008).

Walker's defense centered on the State's failure to prove that he committed the charged crimes and overzealousness on law enforcement's part to solve the crimes, while Archie defended on the theory that she was merely a bystander, unaware of the impending attacks or robberies. Walker could certainly pursue his defense of mistaken identity without inference of guilt or prejudice from Archie's defense, particularly considering that she did not implicate Walker as the person who stabbed Anziano and Cole. And the jury was instructed to consider the defendants separately.

Severance of charges

Walker contends that the three incidents were distinct because they occurred at different times and locations and involved three different methodologies and, therefore, should have been prosecuted separately. We disagree.

The offenses are parts of a common scheme or plan as contemplated by NRS 173.115 as the evidence illustrates a "purposeful design" on Walker's part to trawl for robbery victims. See Weber v. State, 121 Nev. 554, 572, 119 P.3d 107, 120 (2005). All three incidents involved Walker taking personal property or money from the victims and occurred within about a 24-hour period, either late at night or in the wee hours of the morning. And the incidents occurred in the same general geographical area.¹ Further, Walker used a knife in two of the incidents.²

¹Although Walker attacked Cole in front of Cole's residence, Walker met Cole in front of the same Food 4 Less store where the Simon incident occurred.

Additionally, the offenses are connected together as contemplated by NRS 173.115 in that the evidence of each offense would have been cross-admissible in separate trials to show intent to incapacitate potential robbery victims and identity by revealing Walker's modus operandi, in addition to a common scheme or plan as explained above. See NRS 48.045(2). Accordingly, the district court did not abuse its discretion in this instance. Weber, 121 Nev. at 570, 119 P.3d at 119.

Evidentiary rulings

Walker contends that the district court erroneously ruled on several evidentiary matters, including (1) summarily denying his motion to suppress evidence, (2) denying his challenge to discovery violations, (3) admitting a videotape showing Anziano after the attack, (4) admitting victim impact testimony, and (5) admitting prior-bad-act evidence. We conclude that the district court did not err in any of these matters.

First, Walker contends that the district court erred by denying his motion to suppress evidence without an evidentiary hearing. In particular, he argues that police detectives made false statements to support their affidavits for search warrants, rendering the search warrants illegal. However, nothing in the record on appeal indicates that the detectives' search warrant affidavits contained any intentional or reckless falsehoods. See Garrettson v. State, 114 Nev. 1064, 1068, 967

... continued

²Although Walker did not use a knife, or any other weapon, to relieve Simon of her purse, no weapon was necessary to subdue her, as Walker merely reached through an open car window to retrieve her purse.

P.2d 428, 430 (1998); Weber, 121 Nev. at 584, 119 P.3d at 127. Because we are not left with a “definite and firm conviction” that an error was committed in this instance, we conclude that the district court did not abuse its discretion by denying Walker’s motion to suppress. State v. McKellips, 118 Nev. 465, 469, 49 P.3d 655, 658 (2002) (quoting United States v. Gypsum Co., 333 U.S. 364, 395 (1948)).

Second, Walker argues that numerous discovery violations were committed before and during trial with respect to several pieces of evidence, including a number of videotapes, an audiotape of Walker’s statement to the police, “validation documents” concerning the DNA laboratory, a still photograph purportedly depicting Walker and Archie walking toward the Food 4 Less where Walker met Cole, and a photocopy of Anziano’s social security card.

As to the videotapes, the audiotape, and “validation documents,” absent from Walker’s claim is any explanation of prejudice resulting from any alleged discovery violation.

As to the photograph, Walker objected to its admission on the ground that he did not have a copy of the videotape from which the photograph was taken. The district court allowed the State to use the photograph in its opening statement but ruled that it must be authenticated before its admission. Whether the photograph was admitted is unclear, but even if it was, we discern no error.

As to the copy of Anziano’s social security card, Walker has no basis to complain as the original card was admitted without objection.

Third, Walker contends that the district court erred by admitting the Sav-On surveillance videotape showing Anziano after the attack, lying on the floor bleeding and dying, because the evidence was

highly prejudicial but not probative of any fact at issue. We disagree. The videotape was relevant as it assisted the testimony of a Sav-On employee in describing Anziano's condition, his actions in seeking help, and the circumstances of Anziano's death, and showed the layout of the store, how Anziano came to be inside the store when the stabbing occurred outside, and that she was no longer carrying her purse or purchases after the stabbing. Its relevance was not substantially outweighed by the danger of unfair prejudice. See NRS 48.035(1). Accordingly, the district court did not abuse its discretion by admitting this evidence. See Libby v. State, 109 Nev. 905, 910, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996).

Fourth, Walker complains that the district court erred by allowing several references to Anziano's children. Although there were scattered references to her children, to the extent this testimony can be considered victim impact evidence, no prejudice resulted considering the overwhelming evidence supporting Walker's guilt and the infrequency of the comments during the course of a lengthy trial.

Fifth, Walker argues that the district court erred by admitting evidence of 17 purses discovered during the search of Archie's apartment and a cut on his hand because the evidence suggested that he and Archie had committed other purse snatchings or robberies, and he therefore was entitled to a Petrocelli³ hearing prior to its admission. As to the purses

³Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified in part on other grounds by Sonner v. State, 112 Nev. 1328, 1333-34, 930 P.2d 707, 711-12 (1996), and superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004).

found during the search, we review this claim for plain error because Walker failed to object at trial. NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003). To the extent that the purses constituted prior bad act evidence, any error did not affect Walker's substantial rights given the overwhelming evidence of guilt and the brevity of the testimony.

As to the cut on Walker's hand, which apparently predated Anziano's murder, the district court sustained Walker's objection. And he has not shown prejudice in light of a videotape depicting the murder and Walker's identification as the man on the videotape stabbing Anziano.

Jury instructions

Walker argues that the district court erroneously instructed the jury on robbery, felony murder, and "equal and exact justice" and improperly refused a voluntary intoxication instruction. We review a district court's decision on jury instructions for an abuse of discretion or judicial error. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Walker's challenge to the robbery and felony-murder instructions lacks merit as the jury convicted him of premeditated murder as well as felony murder. His challenge to the "equal and exact justice" instruction also lacks merit. See Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 824 (2004).

The district court did not err in refusing the involuntary intoxication instruction because, although a defendant is entitled to an instruction on his theory of the defense as disclosed by the evidence, no matter how weak or incredible the evidence, see Rosas v. State, 122 Nev. 1258, 1262, 147 P.3d 1101, 1104 (2006), there was no evidence of the intoxicating effect of any substance Walker ingested or the resultant effect

on his mental state at the time of the crimes. See Nevius v. State, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985).

Prosecutorial misconduct

Walker argues that prosecutorial misconduct requires reversal of his convictions because the prosecutor disparaged counsel and him during closing argument. See Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 72 (2008) (providing that prosecutor may not “disparage defense counsel or legitimate defense tactics”), cert. denied, ___ U.S. ___, 129 S. Ct. 1625 (2009). Although Walker preserved one instance for review, he failed to object to several other challenged comments. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008) (providing that harmless-error standard is applied to review of prosecutorial misconduct; however, unpreserved allegations of error are subject to plain error review). Having carefully considered the comments, we conclude that none of them merit relief.

Penalty-phase issues

Walker contends that the district court erred in several rulings related to the penalty hearing, including refusing to bifurcate the penalty hearing, denying him relief on evidentiary matters, and allowing prosecutorial misconduct.

Bifurcation

Walker complains that the district court abused its discretion by denying his motion to bifurcate the penalty hearing. He recognizes that this court has never required a district court to bifurcate a penalty hearing, Johnson v. State, 118 Nev. 787, 806, 59 P.3d 450, 462 (2002), but urges this court alter its course and require penalty hearings to be bifurcated as a matter of law. We decline to do so.

Evidentiary rulings

Walker argues that the district court erred respecting four evidentiary rulings concerning evidence inadmissible under Crawford v. Washington, 541 U.S. 36, 68-69 (2004), victim impact testimony, evidence related to the appellate process, and the admission of presentence investigation reports.

Respecting his Crawford claim, Walker acknowledges that we have rejected Crawford's application to capital sentencing hearings, Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006), but urges this court to overrule this authority. We decline to do so.

Regarding victim impact evidence, Walker argues that constitutionally improper evidence was admitted because the State provided inadequate notice, some of the testimony was inadmissible under Sherman v. State, 114 Nev. 998, 1014, 965 P.2d 903, 914 (1998), and the evidence exceeded the scope of permissible victim impact testimony. However, Walker does not identify the problematic testimony and nothing in our review of the record shows that improper victim impact testimony was admitted.

As to evidence related to the appellate process, Walker argues that his death sentence is unconstitutional because the jury was misled to believe that the responsibility for determining the appropriateness of the death sentence rested with the appellate court rather than the jury. He identifies three episodes—an exchange between the prosecutor and a prospective juror and the prosecutor's cross-examination of two attorneys who testified for the defense. Our review of the record reveals that in none of these instances did the State mislead the jury regarding its responsibility in deciding the appropriate sentence. And the jury was

instructed that “the possibility of appellate review of your verdict cannot enter into your deliberations in any way. The appropriate sentence is your personal decision alone.” There was no error in this respect.

Next, Walker contends that the admission of presentence investigation reports was improper under Herman v. State, 122 Nev. 199, 128 P.3d 469 (2006), and NRS 176.156(5). Because he inadequately explains this claim, his precise complaint is unclear. Further, he lodged no objection at trial, and we discern no error from the record on appeal.⁴ See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003).

Prosecutorial misconduct

Walker challenges as improper several comments by the prosecutor made during closing argument. His claim encompasses five areas—the prosecutor improperly (1) argued that the jury’s function was to weigh the lives of the victim and her family against Walker’s life (comparative worth), (2) blamed the criminal justice system for Walker’s conduct, (3) trivialized the concept of mitigating evidence, (4) argued that society’s problems would be addressed by the jury’s verdict, and (5) argued that the jury would be responsible for future victims if it did not impose death.

Regarding the comparative worth argument, the comments identified, to which there was no objection, were not improper but rather a message to the jury that Anziano’s death was significant and that

⁴It is unclear from the record on appeal whether any presentence investigation reports were admitted at trial.

although imposing death is a weighty matter, her murder warranted a death sentence. Walker failed to show plain error in this regard. See id.

Similarly, Walker's claim that the prosecutor improperly blamed society and the prison system for his conduct must be reviewed for plain error, and we conclude that no error occurred. Instead, the challenged comments reflected the idea that Walker was provided opportunities to curb his violent conduct but instead escalated his violence.

Next, Walker argues that the prosecutor trivialized the concept of mitigating evidence by arguing that he blamed his family, poverty, drugs, alcohol, prison, the victims, and correctional and probation officers rather than accept the decisions he made in his life, including killing Anziano. We conclude that none of the comments were improper.

Walker next argues that the prosecutor improperly suggested that society's problems would be addressed through the jury's verdict. However, considering the argument in context, the prosecutor merely related to the jury the importance of its participation in this case.

As to future dangerousness, although a prosecutor may argue a defendant's future dangerousness where the evidence supports it, he may not exhort the jury to return a death sentence or take responsibility for the death of a future victim. Blake v. State, 121 Nev. 779, 797, 121 P.3d 567, 579 (2005). Here, the prosecutor ventured beyond portraying Walker as a future danger by suggesting that the jurors would feel responsible if they did not impose death and Walker harmed another person. Nonetheless, considering the brevity of the comment and the compelling evidence in aggravation supporting a death sentence, the

comment was not so unfair as to deny Walker due process. See Browning v. State, 124 Nev. at ___, 188 P.3d at 72.

Constitutionality of the death sentence

Walker contends that the death penalty is unconstitutional on four grounds—(1) the death penalty scheme is unconstitutional as it fails to genuinely narrow death eligibility, a contention we have rejected, see State v. Harte, 124 Nev. ___, ___, 194 P.3d 1263, 1265 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 2431 (2009); (2) the reweighing analysis violates equal protection due to conflicting opinions regarding Nevada’s reweighing equation; (3) the death penalty is cruel and unusual, an argument we have rejected, see Gallego v. State, 117 Nev. 348, 370, 23 P.3d 227, 242 (2001); and (4) the death penalty is unconstitutional because executive clemency is unavailable. Walker’s death sentence is not unconstitutional on any of these grounds.

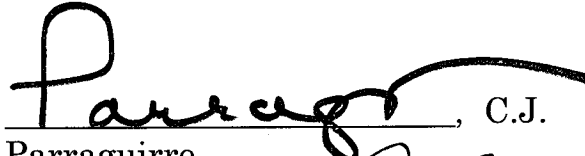
Mandatory review

NRS 177.055(2) requires that this court review every death sentence and consider whether (1) sufficient evidence supports the aggravators found, (2) the verdict was rendered under the influence of passion, prejudice or any arbitrary factor, and (3) the death sentence is excessive. First, sufficient evidence supports the six aggravators found—five of which involve prior violent felonies, including Walker’s convictions for the attempted murder and robbery of Cole, his 1978 convictions for attempted murder and robbery, his 1987 conviction for attempted battery by a prisoner, and that Walker killed Anziano during the commission of a robbery or attempted robbery. Second, nothing in the record indicates that the jury reached its verdict under the influence of passion, prejudice or any arbitrary factor. And third, considering the viciousness of the

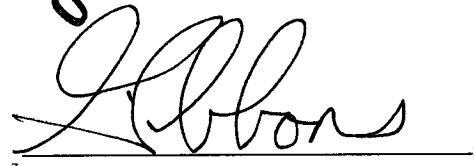
murder along with Walker's mitigation evidence, albeit credible, and his violent history, we conclude that the death sentence was not excessive.

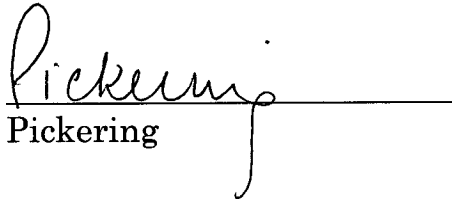
Having considered Walker's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.⁵


Parraguirre, C.J.


Hardesty, J.


Gibbons, J.


Pickering, J.

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

⁵We reject Walker's contention that cumulative error necessitates reversal of his convictions and death sentence. Although Walker's trial was not free from error, no error considered individually or cumulatively rendered his trial unfair. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 481 (2008).

CHERRY, J., with whom DOUGLAS and SAITTA, JJ., agree, concurring in part and dissenting in part:

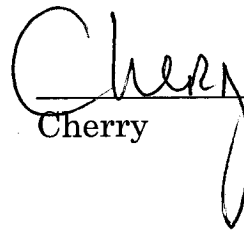
I concur in the court's decision to affirm Walker's conviction. I dissent, however, from the conclusion that prosecutorial misconduct committed during the penalty hearing did not prejudice Walker. Although Walker did not object to the challenged misconduct, I conclude that he demonstrated plain error affecting his substantial rights. See Gaxiola v. State, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005).

During closing argument in the penalty hearing, the prosecutor expressed the sentiment that no punishment, even death, would remedy the loss of Anziano to her family, that Anziano's family will "never be paroled" from her murder, that "Anziano's trial lasted a couple of seconds," with Walker being her only juror, and when addressing confinement and lethal injection, the prosecutor commented that "there was no lethal injection employed with regard to Christine." These comments served no purpose other than to inflame the passions of the jury and were improper. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 478 (2008) ("A prosecutor may not 'blatantly attempt to inflame a jury.'" (quoting Collier v. State, 101 Nev. 473, 479, 705 P.2d 1126, 1130 (1985))).


In a more troublesome instance, the prosecutor argued to the jurors that if they did not impose death, they would feel responsible if Walker harmed another person. This comment far exceeded the bounds of proper argument. See Blake v. State, 121 Nev. 779, 797, 121 P.3d 567, 579 (2005). We have recognized that "[p]resenting the jury's decision as a choice between killing a guilty person or an innocent person will likely result in a juror's decision to impose the death penalty more often than if the jury's decision had been portrayed in its proper light." Castillo v.

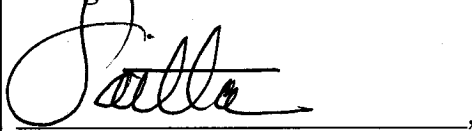
State, 114 Nev. 271, 280, 956 P.2d 103, 109 (1998). Where, as here, the murder is particularly brutal and the defendant has a significant history of violence, suggesting to the jurors that they would feel responsible for future victims unduly distorted their sentencing decision.

Although the inflammatory and improper comments considered individually are insufficient to warrant relief, when considered together, the resulting prejudice affected Walker's substantial rights by denying him a fair penalty determination. Therefore, I would reverse the death sentence and remand for a new penalty hearing.

 _____, J.
Cherry

We concur:

 _____, J.
Douglas

 _____, J.
Saitta