

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARMANDO RAMIREZ, JR. A/K/A
ARMANDO RAMIREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49657

FILED

OCT 17 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit murder and one count of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; James M. Bixler, Judge. Appellant Armando Ramirez, Jr., was sentenced to serve a prison term of two to ten years for conspiracy to commit murder and a concurrent prison term of life with parole eligibility for first-degree murder, with an equal and consecutive term for the deadly weapon enhancement.

Sufficiency of the evidence

Ramirez raises several claims on appeal. First, he claims that there was insufficient evidence to support his convictions for conspiracy to commit murder and first-degree murder with the use of a deadly weapon. In particular, he argues that the evidence showed that his codefendant Alejandro Manzo shot Miguel Ortega and that there was no evidence of a plan or scheme to kill Ortega.

Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a

rational trier of fact.¹ In particular, evidence presented at trial showed that on July 14, 2003, Brandi Robinson-Monge, her brother, Robert Monge, Manzo, and Ramirez were present at Ortega's apartment. Further, prior to arriving at Ortega's apartment Ramirez expressed anger with Ortega, threatened to run Ortega over, and asked his companions, "Do you got my back?" On the way to Ortega's apartment, Ramirez instructed his companions to conceal his identity while there. Immediately prior to entering Ortega's apartment, Robinson-Monge observed Manzo loading or fixing a gun. Shortly thereafter, Ortega and Ramirez engaged in a verbal dispute, after which witnesses heard two sets of gunshots. Robinson-Monge testified that she saw Manzo firing towards Ortega. Monge testified that when he first heard the shots he could see Ramirez, and Ramirez did not have a gun in his hands.

A maintenance man who was working on an air conditioning unit on the roof of a nearby building observed a Hispanic male fire three to four shots at Ortega as Ortega appeared to beg for his life. He also stated that he saw the shooter get into the driver's side of a white truck along with a woman and another man and drive off.

Robinson-Monge testified that after the shooting, she and her brother got in a truck with Ramirez, who was driving. She testified that they pulled up a few yards and Manzo got in the front passenger side. She also testified that a short time later she saw Ramirez throw what she thought was a gun into a nearby dumpster. Two days later, a very

¹See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

emotional Ramirez came to her apartment and told her that he had never killed anyone before. Additionally, Elaine Gibbs testified that Ramirez admitted to killing Ortega. Finally, Ortega died from multiple gunshot wounds and forensic evidence showed that at least two different guns were used in the shooting.

The jury could reasonably infer from this evidence that Ramirez was guilty of conspiracy to commit murder and Ortega's murder. It is for the jury to determine the weight of the evidence and the credibility of the witnesses,² and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.³

Jury Instructions

Second, Ramirez claims that the district court erred when it gave an instruction on vicarious coconspirator liability that included reference to the "natural and probable consequences" doctrine,⁴ an instruction that this court found erroneous in Bolden v. State.⁵ Ramirez failed to object to this instruction at trial. Generally, the failure to object

²Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006).

³Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

⁴Jury Instruction 8 advised that "[e]very conspirator is legally responsible for an act of a co-conspirator that follows as one of the probable and natural consequences of the object of the conspiracy even if it was not intended as part of the original plan and even if he was not present at the time of the commission of such act." This language is identical to the instruction that we found mandated reversal in Bolden.

⁵121 Nev. 908, 922-23, 124 P.3d 191, 200-01 (2005).

at trial precludes appellate review of an issue.⁶ Nonetheless, this court may address an error if it was plain and affected a defendant's substantial rights.⁷ To establish that his substantial rights were affected, the appellant bears the burden of showing that the error was prejudicial.⁸

In Bolden, we concluded that it was error to instruct the jury on the natural and probable consequences doctrine of coconspirator liability in relation to specific intent crimes because that instruction allowed the prosecution to obtain a conviction for those crimes without proving the requisite intent.⁹ Because Bolden was established law at the time of Ramirez's trial, it was error not to instruct the jury regarding the specific intent required to establish liability under a theory of vicarious coconspirator liability.

However, Ramirez must also demonstrate that the error affected his substantial rights. Here, in addition to finding Ramirez guilty of first-degree murder, the jury also convicted Ramirez of conspiracy to commit murder. The jury was correctly instructed that "[t]o be guilty of conspiracy, a defendant must intend to commit, or to aid in the commission of, the specific crime agreed to." Accordingly, in convicting Ramirez of conspiracy to commit murder, the jury necessarily found that Ramirez possessed the specific intent to murder Ortega. Further, the jury was instructed that "[i]f you find that . . . the defendant was a party to the

⁶Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

⁷Id.; NRS 178.602.

⁸Gallego, 117 Nev. at 365, 23 P.3d at 239.

⁹Bolden, 121 Nev. at 921, 124 P.3d at 200.

conspiracy and possessed the intent to kill the victim then he is also guilty of First Degree Murder.” When viewing the jury instructions as a whole and the jury’s findings of guilt as to conspiracy to commit murder, we conclude that the jury would have convicted Ramirez of first-degree murder even without the erroneous instruction. Accordingly, Ramirez has failed to demonstrate that the error affected his substantial rights.

Third, Ramirez complains that the jury was erroneously instructed on aiding and abetting liability for the deadly weapon enhancement. Specifically, he argues that the jury instructions did not inform the jury that the State had to prove that he had knowledge of the firearm used and actual or constructive possession of it in order to be subject to the enhancement as an unarmed offender. Trial counsel did not object to the instruction that was given, and thus Ramirez’s claim is reviewed for plain error affecting his substantial rights.¹⁰

In Anderson v. State, which was the law at the time of Ramirez’s trial, we held that a deadly weapon enhancement can be based on either actual or constructive possession and that constructive possession existed where an unarmed participant in a crime had both knowledge that the other offender was armed and the ability to exercise control over the firearm.¹¹ Here, jury instruction 10 read simply that “[t]he participation of a defendant not actually in possession of the weapon by aiding or abetting the actual user in the unlawful use of the weapon,

¹⁰Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 71 (2008).

¹¹95 Nev. 625, 630, 600 P.2d 241, 244 (1979), abrogated by Brooks v. State, 124 Nev. ___, 180 P.3d 657 (2008).

makes a defendant equally subject to the added weapon enhancement available.” The instruction fails to inform the jury that the unarmed participant must have had knowledge of and control over the weapon used to commit the crime in order to be subject to the deadly weapon enhancement. Accordingly, we conclude that it was error to give this instruction.

However, Ramirez is not entitled to relief unless he can demonstrate that his substantial rights were violated. In light of the evidence presented at trial, we conclude that if the jury had been instructed on the elements of actual and constructive possession it still would have convicted Ramirez of the deadly weapon enhancement. In particular, the evidence at trial was such that the jury could have found that Ramirez and Manzo both shot the victim. The forensic evidence showed that two different firearms were used in the shooting. A witness testified that the shooter got into the driver’s seat of the truck, which was testified to by others as the seat occupied by Ramirez. Robinson-Monge testified that she thought Ramirez threw a gun in a dumpster shortly after the shooting, and there was testimony at trial that Ramirez later confessed to the murder.

Moreover, even if the jury did not believe that Ramirez fired a gun at the victim, it convicted him of conspiracy to commit murder. This determination indicates that it found that Ramirez had knowledge of the plan and the weapons used to shoot Ortega. Moreover, Ramirez was present with Manzo at all relevant times, and thus had the ability to exercise control over the firearms. Thus, we conclude that the erroneous

jury instruction did not affect Ramirez's substantial rights, and he is not entitled to relief.¹²

Fourth, Ramirez asserts that the district court erred in failing to instruct the jury that the State had the burden to prove that he did not act in self-defense or in the heat of passion. In Crawford v. State, upon which Ramirez relies, we stated that a defendant is entitled to an instruction on the State's burden to prove the absence of heat of passion.¹³ We also reaffirmed our prior decision in Runion v. State, approving a similar instruction on the State's burden to prove the absence of self-defense.¹⁴ However, we stated that such instructions should be provided "upon request."¹⁵ Ramirez did not request such instructions. Therefore,

¹²Recently, in Brooks v. State, 124 Nev. ___, ___, 180 P.3d 657, 661 (2008), we abrogated our holding in Anderson and stated that an unarmed offender is subject to a deadly weapon enhancement when (1) the unarmed offender is liable as a principal for the offense, (2) another principal is armed and uses a deadly weapon in the commission of the offense, and (3) the unarmed offender had knowledge of the use of the deadly weapon. We conclude that, based on the reasoning above, even if Brooks is applicable to this appeal and the jury had been correctly instructed pursuant to that case, it would have found Ramirez liable for the deadly weapon enhancement.

¹³Crawford v. State, 121 Nev. 744, 754, 121 P.3d 582, 589 (2005).

¹⁴Id. at 753, 121 P.3d at 588 (quoting Runion v. State, 116 Nev. 1041, 1052, 13 P.3d 52, 59 (2000)).

¹⁵Id. at 754, 121 P.3d at 589.

he has no basis for appeal,¹⁶ and we conclude that he is not entitled to relief.

Fifth, Ramirez argues that the district court erred in refusing to give a proposed instruction on express malice. He contends that the instructions given by the district court erroneously permitted the jury to convict him of first-degree murder without finding express malice and included “obscure superfluous and misleading language.” First, as stated above, the jury convicted Ramirez of conspiracy to commit murder and thus there is no doubt that it found he possessed express malice. Second, this court has repeatedly upheld the instructions given by the district court.¹⁷ Inasmuch as Ramirez asks us to overrule those cases, we decline to do so. Accordingly, we conclude that Ramirez is not entitled to relief on these grounds.

Severance

Finally, Ramirez claims that the trial court abused its discretion when it failed to sever his trial from Manzo’s. Specifically, Ramirez claims that he was prejudiced because the evidence against Manzo was stronger than the evidence against him, they had antagonistic defenses, and he was not permitted to cross-examine Robinson-Monge

¹⁶Etcheverry v. State, 107 Nev. 782, 784-85, 821 P.2d 350, 351 (1991).

¹⁷See Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001); Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000); Byford v. State, 116 Nev. 215, 232, 994 P.2d 700, 712 (2000); Doyle v. State, 112 Nev. 879, 900-02, 921 P.2d 901, 915-916 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004).

about a statement that he made to her. Ramirez also contends that the conduct of his codefendant's counsel prejudiced him.

“The decision to sever is left to the discretion of the trial court,”¹⁸ and “[i]t is the appellant's ‘heavy burden’ to show that the district court abused its discretion in failing to sever the trial.”¹⁹ We have stated that “where persons have been jointly indicted, they should be tried jointly, absent compelling reasons to the contrary.”²⁰ “[S]everance should only be granted when there is a ‘serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent that jury from making a reliable judgment about guilt or innocence.’”²¹

Because Ramirez did not file a motion to sever, or join in Manzo's motion, the district court's failure to sever the joint trial will be reviewed for plain error.²² “In conducting plain error review, we must determine whether there was ‘error,’ whether the error was ‘plain’ or clear, and whether the error affected the defendant's substantial rights.”²³

Ramirez first contends that he was prejudiced because there was great disparity in the amount of evidence against him and Manzo. The Ninth Circuit Court of Appeals has held that “[g]reat disparity in the

¹⁸Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990).

¹⁹Rodriguez v. State, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001).

²⁰Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995).

²¹Rodriguez, 117 Nev. at 808, 32 P.3d at 779.

²²Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992).

²³Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

amounts of evidence introduced against joint defendants may, in rare cases, be grounds for severance,” but that severance is only justified by “clear, manifest, or undue’ prejudice.”²⁴ As explained above, a dispute existed between Ramirez and Ortega, Ramirez was the only one who commented on his desire to kill Ortega, and he later confessed the murder to a third party. Thus, the record does not support Ramirez’s assertions that the evidence weighed more against Manzo than himself.

Ramirez also contends that the district court erred in denying Manzo’s motion because he and Manzo had antagonistic defenses. Even assuming Ramirez has standing to challenge the denial of Manzo’s motion to sever, his claim is without merit. “Inconsistent or antagonistic defenses . . . do not necessarily entitle defendants to severance, and ‘[i]nconsistent defenses must be antagonistic to the point that they are mutually exclusive.”²⁵ Ramirez fails to describe the manner in which he and Manzo had antagonistic defenses. Our review of closing and opening arguments reveals that defense counsels’ strategy was the same in both cases—to challenge the credibility of the witnesses.

Ramirez next contends that he was prejudiced by the failure to sever because he was unable to cross-examine Robinson-Monge about a statement that he made to her. Specifically, during her testimony, Robinson-Monge stated that two days after the shooting Ramirez came to

²⁴United States v. Patterson, 819 F.2d 1495, 1502-03 (9th Cir. 1987) (quoting United States v. Escalante, 637 F.2d 1197, 1201 (9th Cir. 1980)).

²⁵Rodriguez, 117 Nev. at 810, 32 P.3d at 780-81 (quoting Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990)) (internal citations omitted).

her apartment and told her that "I never killed anybody before." She further testified that at one point "[Ramirez] was like emotional, and he said that he felt like he was a man and that he wasn't like somebody else."²⁶ Later, Ramirez's counsel inquired, "[w]ho did you think he was referring to?" The State objected, and the district court sustained the objection. Later, in chambers, the district court stated, "You're asking her to theorize what she thinks he means by some statement that's unclear and vague, and I think the court has properly sustained the objection, and I don't think any prejudice as [sic] occurred."

Despite the district court's statements, Ramirez's counsel again raised the issue during closing argument when he commented, "[Ramirez] breaks down, he cries in [Robinson-Monge]'s arms, he tells [her] he is not a man, he tells her that he's never killed anyone before, and he tells her he's not like him. Who is him?" Manzo's counsel objected, and a bench conference was held. No further reference was made to the testimony.

Ramirez claims that precluding him from asking Robinson-Monge to whom she thought he was referring was prejudicial to his defense. We disagree. First, as the district court pointed out, Ramirez's counsel asked Robinson-Monge to guess as to what Ramirez meant by his unclear and vague statement. Any response would have been speculative. Second, even if Robinson-Monge had been permitted to state her opinion that Ramirez thought he was not "like" Manzo, this was not directly relevant to Ramirez's guilt or innocence. Ramirez had already told

²⁶Later during cross-examination Robinson-Monge clarified that she misspoke and that Ramirez had stated that "he didn't feel like a man."

Robinson-Monge that he had never killed anyone before. Precluding Ramirez from inferring that he was reacting differently to the events that had transpired and that he “didn’t feel like a man” because he was different than Manzo did not prevent the jury from making a reliable judgment about guilt or innocence.

Finally, Ramirez claims that he was prejudiced due to the misconduct of Manzo’s counsel. Specifically, Ramirez complains that Manzo’s counsel asked a detective to comment on the credibility of Robert Monge and elicited damaging testimony from Robinson-Monge that Ramirez and Manzo were traveling in what she thought was a stolen vehicle and that such an occurrence was not unusual. Ramirez contends that this testimony was highly prejudicial to him and that it would not have been heard by the jury had the trial been severed.

With respect to questions regarding the credibility of Robert Monge, he testified at trial that his sister had provided him with a transcript of her deposition and that his statements to police were based on his sister’s prior statements. During cross-examination of Detective Dean O’Kelley, Manzo’s counsel asked, “How would you evaluate the credibility of Robert Monge?” O’Kelley responded that during the investigation he believed Monge to be a credible witness. Manzo’s counsel asked, “Would it surprise you if he testified that he tailored his testimony based on what [Robinson-Monge] did?” O’Kelley responded, “No, it wouldn’t surprise me.” Ramirez did not object to any of the testimony and has not explained in what way this testimony was prejudicial.

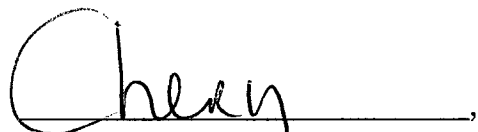
In regard to Robinson-Monge’s testimony about the white Ford F150 driven by Ramirez, her testimony on direct examination was that she thought the truck was stolen and that it was weird because “there was


keys in the vehicle.” On cross-examination, Manzo’s counsel elicited testimony from Robinson-Monge that she had previously been convicted of several felonies, including possession of a stolen vehicle and evading the police. She also admitted that it was natural for her to be in a stolen vehicle. Her words were that, “We live in the hood, and that’s what we did, you know.” Manzo’s counsel then asked, “And who was driving this stolen F-150?” Ramirez objected on the ground that there was no evidence that the truck was stolen. The district court sustained the objection.

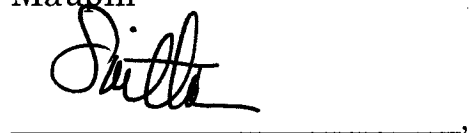
Robinson-Monge’s testimony that she thought the truck was stolen was first elicited by the prosecution. Manzo’s counsel simply restated it during cross-examination in an attempt to question Robinson-Monge’s credibility. Accordingly, there is no support in the record for Ramirez’s claim that this evidence would not have been elicited had the trial been severed. Therefore, we conclude that the district court did not err in denying the motion to sever.

Having considered Ramirez’s claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.


Cherry, J.


Maupin, J.


Saitta, J.

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