IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTHA FLORES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49832

FILED

OCT 22 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder by child abuse. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Following a first trial, appellant Martha Flores was convicted of first-degree murder by child abuse for the killing of her five-year-old stepdaughter, Zoraida.[1] On appeal, this court reversed Flores' conviction and remanded for a new trial on grounds that certain out-of-court statements made by Flores' daughter, Silvia, violated Crawford v. Washington.[2] After a second trial, Flores was, again, convicted of first-degree murder by child abuse. She now appeals from this conviction, raising issues of judicial bias, the spoliation of evidence, and certain deficiencies regarding Silvia's testimony.[3] The parties are familiar with

[1]Flores v. State, 121 Nev. 706, 120 P.3d 1170 (2005).

[2]541 U.S. 36 (2004).

[3]Flores also challenges the admission of evidence concerning Zoraida's non-lethal injuries and Flores' failure to attend Zoraida's funeral. Having carefully reviewed these separate challenges, we conclude that neither warrants reversal.

the facts and we do not recount them here except as necessary to our disposition.

Judicial bias—motion to disqualify

Flores moved to disqualify Judge Bonaventure from presiding over her second trial based on certain remarks that Judge Bonaventure made during the sentencing phase of her first trial. After refusing to recuse himself, Judge Bonaventure submitted the matter to Chief Judge Kathy Hardcastle, who denied Flores' motion.

At Flores' first sentencing hearing, Judge Bonaventure admired Flores's husband, Jose, for his sacrifices and for enduring a "distasteful" defense theory that blamed him for Zoraida's death. Judge Bonaventure, by contrast, criticized Flores for taking advantage of Jose's good will, considered her "disgraceful," remarked that she was—by comparison to past women defendants—the "worst of the lot," and expressed his wish that Flores' hatred would torment her the rest of her natural life, which he hoped would be spent in prison.

Under Canon 3E(1) of the Nevada Code of Judicial Conduct, a judge "shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including . . . instances where . . . the judge has a personal bias or prejudice concerning a party." However, when a motion to disqualify is denied, that decision is given substantial weight and will not be overturned absent a clear abuse of discretion.[4] In denying Flores' motion, Judge Hardcastle relied on In re Petition to Recall Dunleavy, in which this court stated that the conduct of

[4]PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 437, 894 P.2d 337, 341 (1995).

a judge "during the course of official judicial proceedings" could "not establish legally cognizable grounds for disqualification."[5] Since Judge Bonaventure's remarks at sentencing stemmed from what he learned during Flores' first trial, they are not cognizable grounds for disqualification since they are not rooted in an extrajudicial source.[6] Additionally, although an exception to the extrajudicial source rule exists if a judge's conduct in a prior proceeding "displays a deep-seated favoritism or antagonism that would make fair judgment impossible,"[7] Judge Bonaventure's remarks fail to rise to this extreme level.[8] Thus, under these circumstances, we conclude that denying Flores' motion to disqualify Judge Bonaventure was not an abuse of discretion.

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[5]104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988).

[6]See Walker v. State, 113 Nev. 853, 864, 944 P.2d 762, 769 (1997) ("Generally, what a judge learns in his official capacity does not result in disqualification." (internal quotation marks omitted)); Liteky v. United States, 510 U.S. 540, 551 (1994) (stating that the opinions of judges based on what they learned in earlier proceedings are not "bias" or "prejudice" requiring recusal, and it is normal and proper for judges to sit in the same case upon remand and successive trials involving the same defendant).

[7]Walker, 113 Nev. at 864, 944 P.2d at 769 (internal quotation marks omitted).

[8]Nevertheless, Flores argues that Dunleavy is the wrong standard, and instead her motion to disqualify should have been resolved under the test for determining objective bias set forth in PETA v. Bobby Berosini, Ltd., 111 Nev. at 438, 894 P.2d at 341. Flores, however, overlooks the interrelationship between Dunleavy and PETA, as there is no reason to reach the issue of bias until the source of the bias is determined. Thus, in applying the extrajudicial source rule under Dunleavy, Judge Hardcastle disposed of Flores' motion as a threshold matter, obviating the need to determine whether bias existed under PETA.

Spoliation of evidence—autopsy slides

Flores argues that the district court abused its discretion in denying her motion for a mistrial, which was based on the State's alleged mishandling of certain autopsy slides.[9] We disagree.

Since Flores does not allege that these slides were lost or destroyed in bad faith, she must demonstrate that their unavailability caused her undue prejudice, which requires a showing that their exculpatory value was apparent before they were lost or destroyed.[10]

Any exculpatory value of the mishandled slides is speculative. According to Flores, had the State's pathologist been able to evaluate these slides, a vital reaction would have been evident, which would have suggested that Zoraida's contrecoup injury was inflicted before Jose left for work—not afterwards when she was the household's only supervising adult. This scenario, however, offers only a "hoped-for conclusion from examination of the [mishandled slides]," which is insufficient to demonstrate prejudice.[11] Thus, we conclude that the district court did not improperly deny Flores' motion for a mistrial.

Silvia's testimony

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[9]See Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001).

[10]See Daniel v. State, 119 Nev. 498, 520, 78 P.3d 890, 904 (2003).

[11]Id. (internal quotation marks omitted). Similarly unpersuasive is Flores' claim that, because certain slides were mishandled, the pathologist may have mistakenly based his findings on a slide containing tissue from a different area of Zoraida's body. Yet Flores does not purport to know which slides were missing, which were mislabeled, let alone which were exculpatory. She therefore fails to substantiate any connection between the mishandled slides and the accuracy of the pathologist's findings.

Flores argues that the testimony of her natural daughter, Silvia, who witnessed the events leading to Zoraida's death, was inherently unreliable,[12] and that Silvia could not be meaningfully cross-examined as an eleven-year old about statements that she had made to authorities as a five-year-old. We disagree.

Although deficiencies existed in Silvia's testimony, the core narrative that Silvia presented at trial did not significantly diverge from that presented in her deposition testimony—Flores took Zoraida into the bathroom, Flores struck Zoraida, Zoraida fell to the floor, and later Zoraida died. To the extent that there were reasons to doubt Silvia's reliability, those reasons were properly the subject matter of cross-examination, not grounds for excluding this child witness's testimony.

Alternatively, Flores argues that Silvia could not be meaningfully cross-examined about statements that she made to State investigators as a five-year-old, since Silvia—as an eleven-year-old—was not cognitively the same person for confrontation purposes. Since, however, Silvia appeared for cross-examination, there were "no constraints at all on the use of [her] prior testimonial statements,"

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[12]Notably, Flores did not request a voir dire examination of Silvia's competency to testify at trial and no on-the-record competency finding was made below. Thus, to the extent that Flores also challenges Silvia's testimony on competency grounds, we decline to review this separate issue. See Griego v. State, 111 Nev. 444, 448, 893 P.2d 995, 998 (1995) (failure to object or request to voir dire child witness resulted in waiver of competency issue on appeal), overruled on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000).

including for purposes of impeachment.[13] Therefore, impeaching Silvia with evidence of her prior inconsistent statements to State investigators does not run afoul of Crawford v. Washington.[14]

Conclusion

Based on the above, we conclude that each of Flores' arguments fails. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Chief Judge, Eighth Judicial District
Hon. Joseph T. Bonaventure, Senior Judge
Sandra L. Stewart
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[13]Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004); see also Pantano v. State, 122 Nev. 782, ___, 138 P.3d 477, 482 (2006).

[14]541 U.S. at 59 n.9 (the opportunity to cross-examine will satisfy the Confrontation Clause, even if it occurs years after out-of-court statements are made).