

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHAZ HIGGS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49883

FILED

MAY 19 2009

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 first-degree murder. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge.

The jury found Chaz Higgs guilty of first-degree murder for the death of his wife, Kathy Augustine, and sentenced Higgs to life in prison with the possibility of parole. On appeal, Higgs raises five arguments. First, Higgs contends that the district court abused its discretion when it denied his motion to continue the trial. Second, Higgs asserts that the evidence does not support his conviction for first-degree murder. Third, Higgs argues that pursuant to the admissibility standards of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and/or Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the district court abused its discretion when it admitted the testimony of the State's scientific expert, Madeline Montgomery. Fourth, Higgs contends that the district court abused its discretion when it refused to give Higgs' proffered jury instruction regarding the spoliation of a tissue sample. Finally, Higgs argues that numerous alleged instances of plain error deprived him of his rights to a fair trial and due process and therefore warrant reversal of the conviction.

For the reasons set forth below, we conclude that Higgs' contentions fail, and therefore, affirm the judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

DISCUSSION

Motion to Continue the Trial

Higgs argues that the district court violated his Fifth, Sixth, and Fourteenth Amendment rights when it denied the motion to continue the trial. Higgs asserts that his defense expert did not have adequate time to evaluate the conclusions of the Federal Bureau of Investigation's toxicology report that confirmed the presence of succinylcholine in Augustine's urine. The State's theory of the case was that Higgs killed Augustine by injecting her with a lethal dose of succinylcholine, a paralytic drug. Higgs claims that proper evaluation of the report was central to his defense.

"This court reviews the district court's decision regarding a motion for continuance for an abuse of discretion." Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). Each case turns on its own particular facts, and much weight is given to the reasons offered to the trial judge at the time the request for a continuance is made. Zessman v. State, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978). This court has held that generally, a denial of a motion to continue is an abuse of discretion if it leaves the defense with inadequate time to prepare for trial. See id. In other instances, we have held that a denial of a motion to continue was an abuse of discretion if "a defendant's request for a modest continuance to procure witnesses . . . was not the defendant's fault." Rose, 123 Nev. at 206, 163 P.3d at 416. However, if a defendant fails to demonstrate that he was

prejudiced by the denial of the continuance, then the district court's decision to deny the continuance is not an abuse of discretion. Id.

We conclude that the district court did not abuse its discretion when it denied Higgs' motion to continue because Higgs has failed to demonstrate that he was prejudiced by the denial. Specifically, we hold that no prejudice resulted from the denial of the continuance for the following three reasons.

First, Higgs' expert witness, Chip Walls, had approximately six months to question, evaluate, and determine whether additional information about the FBI toxicology report would be necessary for his consideration. During the hearing on the motion to continue, the State explained that Walls had received the FBI toxicology report on December 7, 2006, yet Higgs failed to ask for additional information about the report until May 2007. Higgs argued that Walls was one of the few foremost experts in succinylcholine testing in the country and had been busy. Therefore, Higgs asserted that Walls needed more time to review the FBI's conclusions.

The district court noted that the defense had the FBI's toxicology report in its possession for 24 weeks. It further observed that the prosecution had the burden of proving its case beyond a reasonable doubt, and therefore, there was no reason for the defense to disprove the State's evidence or to find an alternative theory. The district court also noted that there was no reason why Walls could not testify that, based on his expertise, he did not trust the validity of the FBI's toxicology report. Accordingly, the district court denied the motion to continue.

We agree with the district court. There is nothing on the record that shows Higgs was prejudiced by the denial of the continuance

because Walls was not prevented from testifying as to his opinions regarding the FBI toxicology report. Denial of the motion to continue the trial did not affect or hinder the scope of Walls' testimony. The district court's decision did not deny Higgs the use of his expert witness. In fact, Walls did testify at a pre-trial motion in limine hearing, giving his opinions about the FBI's toxicology report. Moreover, Higgs had more than six months to prepare an effective cross-examination of the State's witness regarding the FBI's toxicology report.

Next, we conclude that if Higgs needed more time to evaluate the toxicology report, he could have again raised the issue at a pretrial hearing. The district court held several pretrial hearings on motions, including a motion in limine dealing with admission of the FBI's toxicology report. Higgs could have sought additional time to review the evidence at that motion in limine hearing but failed to do so.

Finally, we note that the motion to continue was based on the defense's need for more time to investigate evidence relating to the cause of death. This court has held that cause of death can be shown by circumstantial evidence. West v. State, 119 Nev. 410, 416, 75 P.3d 808, 812 (2003). A continuance of the trial allowing the defense to investigate a report as to cause of death is not prejudicial when the State could prove cause of death with circumstantial evidence. Even if Higgs had more time to investigate the FBI toxicology report, it would not change the fact that the State had enough circumstantial evidence to prove Augustine's cause of death.

We therefore conclude that the district court did not abuse its discretion when it denied Higgs' motion to continue.

Sufficiency of the evidence

Higgs argues that the evidence presented at trial does not support a conviction of first-degree murder. We disagree.

In reviewing the sufficiency of the evidence, we must decide ““whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”” Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979))).

We conclude there was sufficient evidence to support Higgs’ conviction. Kim Ramey, a temporary nurse who worked with Higgs, testified that the day before Augustine was found unconscious, Ramey had a conversation with Higgs during which he commented on a local murder trial saying, “[t]hat guy did it all wrong. If you want to get rid of somebody you just hit them with a little succs.”¹ Ramey testified that Higgs then made a gesture mimicking giving a person an injection. She further testified that Higgs explained to her that succinylcholine could not be detected post-mortem. Her comment ultimately caused police to investigate Augustine’s death as something other than just a massive heart attack.

In addition to Ramey’s testimony, the State presented circumstantial evidence of Higgs’ access to succinylcholine. The substance is just one of the resources available to hospital staff like Higgs, who was

¹“Succs” is medical vernacular for succinylcholine.

an experienced nurse. It is stored on crash carts,² in emergency intubation kits in emergency rooms, and in secured refrigerators along side other drugs such as etomidate, a short acting intravenous anesthetic agent. Marlene Swanbeck, a registered nurse working at the same hospital as Higgs, testified that while a nurse needed to type in a security code to get to the refrigerated drugs, once accessed, the nurse could take any other drug instead of, or in addition to, what the nurse listed he or she was taking, and there would be no way of tracking such misuse of controlled access. Accordingly, the State offered evidence that sometime after the death of Augustine, police searched the home of Higgs and Augustine and found a backpack in the master bedroom with a vial of etomidate. Higgs claimed he did not know where the vial came from. Further, there was no record of a missing vial of etomidate.

City of Reno police officer David Jenkins testified that he initially found the vial of etomidate while conducting a preliminary search of the Higgs-Augustine home. He later again found the backpack when executing an arrest warrant for Higgs in Hampton, Virginia. Then, police found more items in the backpack, including a nursing book with a bookmark at the page concerning the administration of succinylcholine, and a laminated 3x5 card with information concerning succinylcholine.

The State further presented testimony establishing that Augustine was not administered any succinylcholine at the hospital. Moreover, Dr. Ellen Clark, a forensic pathologist who performed the autopsy on Augustine, testified that, in her opinion, Augustine died from

²Generally, crash carts contain defibrillators and intravenous medications.

succinylcholine toxicity. Dr. Clark also testified that if a nurse is good at delivering an injection, there will be no resultant bruise or large bloody track underneath the skin. She concluded that the succinylcholine could have been injected into Augustine in such a manner that she would not be able to identify it during an autopsy. Dr. Clark also testified that her autopsy did not reveal damage to Augustine's heart that would be reflective of a massive heart attack. The State presented two other witnesses, Dr. Stanley Thompson and Dr. Paul Katz, who ruled out a heart attack or stroke as a cause of death.

There was also evidence presented about the nature of Higgs and Augustine's marriage. Several witnesses confirmed that Higgs routinely referred to Augustine in derogatory terms, namely "bitch." Witnesses testified that Higgs appeared unemotional after his wife died. One friend testified about a particularly nasty phone call between Higgs and Augustine's mother following the death, during which Higgs strongly disparaged Augustine. Higgs' apparent strong dislike for Augustine was further bolstered by the testimony of Linda Ramirez, another hospital employee who worked with Higgs. She testified that the two of them began a flirtatious relationship via e-mail. At trial, Ramirez read one of Higgs' e-mails to her in which he explained, "it is my quest in life to drive this bitch [Augustine] crazy . . . I have things in motion . . . I will be free, and I will be with you."

Accordingly, we conclude that, in addition to the medical evidence and the FBI toxicology report, there was other significant evidence presented to the jury—namely, Higgs' deteriorating relationship with his wife, his access to the succinylcholine, and his own comments to

Ramey—that was sufficient evidence for any rational trier of fact to find the essential elements of first-degree murder beyond a reasonable doubt.

Expert testimony and the Frye and Daubert standards

Higgs next contends that the district court abused its discretion when it allowed Madeline Montgomery, an FBI forensic examiner, to testify about the presence of succinylcholine in Augustine's urine, although Higgs acknowledges that, pursuant to current Nevada law, the district court was correct in admitting the testimony. He urges, however, that this court adopt the standards of admissibility for expert testimony established in either Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), or Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). We decline to adopt the Frye or Daubert standards. Nevada's statute on the admissibility of expert witness testimony tracks the language of its federal counterpart, and we see no reason to part with our existing legal standard.

In Frye, the Court of Appeals of the District of Columbia (now known as the United States Court of Appeals for the District of Columbia Circuit) held that an expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community.

In Daubert, however, the United States Supreme Court held that the Federal Rules of Evidence, and not Frye, provide the standard for admitting expert scientific testimony in a federal trial. 509 U.S. at 588-89. In particular, the Court held that Frye had been superseded by Federal Rules of Evidence 702, which provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in

issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise

Further, the Court in Daubert held:

That the Frye test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

509 U.S. at 589 (footnote omitted).

In Nevada, NRS 50.275 governs expert witness admissibility.

NRS 50.275 states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

NRS 50.275 is nearly identical to Federal Rules of Evidence 702, with the exception that it provides, in pertinent part, that “a witness qualified as an expert . . . may testify to matters within the scope of such knowledge.” This court construes NRS 50.275 to track Federal Rule of Evidence 702. Hallmark v. Eldridge, 124 Nev. ___, ___, 189 P.3d 646, 650 (2008). While this court has not adopted Daubert, we have stated that it, and federal court decisions discussing it, “may provide persuasive authority in determining whether expert testimony should be admitted in Nevada courts.” Id.

“This court reviews a district court’s decision [regarding] expert testimony for abuse of discretion.” Id. “The district court is in a better position than this court to determine the helpfulness of proposed testimony in light of the material facts in issue.” Krause Inc. v. Little, 117 Nev. 929, 934, 34 P.3d 566, 569 (2001). When the district court’s exercise of discretion is not manifestly wrong pursuant to NRS 50.275, we will not reverse. Id.

Higgs concedes that the district court’s decision to admit the Montgomery testimony was correct. We agree. Montgomery had specialized knowledge in toxicology based on a science degree, had ongoing training in the field, and had authored dozens of publications and given numerous presentations on matters relevant to her field. The main issue in this case was Augustine’s cause of death. The State’s theory was that Higgs poisoned her with succinylcholine. Montgomery worked at an FBI laboratory that had dealt with the unique drug in the past and had procedures for its testing. Montgomery’s testimony likely assisted the jury in determining the cause of death. She explained the procedure for testing for succinylcholine and the drug’s volatile nature. Montgomery’s testimony was properly limited to matters within the scope of her knowledge as a toxicologist.

We conclude, therefore, that pursuant to NRS 50.275, the district court did not abuse its discretion when it admitted the expert testimony of Montgomery regarding the succinylcholine found in Augustine’s body.

Jury instructions regarding spoliation of evidence

Higgs contends that the district court abused its discretion when it refused to give Higgs’ proffered spoliation instruction regarding

the State's alleged failure to properly preserve evidence of an injection site tissue sample from Augustine's body. Higgs urges this court to apply the spoliation rule set forth in Bass-Davis v. Davis, 122 Nev. 442, 452-53, 134 P.3d 103, 109-10 (2006), to criminal cases. In Bass-Davis, a civil case, this court determined that even when missing evidence is not willfully destroyed, but rather is only negligently destroyed, the party prejudiced by the loss of evidence is entitled to an "adverse inference instruction." Id.

We reject Higgs' suggestion that we extend the spoliation rule set forth in Bass-Davis to criminal cases. In criminal cases, if the defense challenges the manner in which the State collects and/or preserves material evidence, then the district court must decide if the State's actions constituted negligence, gross negligence, or bad faith. See Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). "In the case of mere negligence, no sanctions are imposed, but the defendant can examine the State's witnesses about the investigative deficiencies" Id. We "review a district court's decision to give a particular [jury] instruction for an abuse of discretion or judicial error." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

Higgs argues that because the tissue with the injection site was not completely destroyed, but rather, inadequately inspected and preserved, the State acted negligently. Higgs offered three adverse-inference jury instructions to the district court; each was rejected.

We conclude that the district court did not abuse its discretion in rejecting Higgs' proffered adverse-inference jury instructions because, as in Randolph, Higgs had adequate opportunity to cross-examine Montgomery about her methodology and to illustrate possible problems with the tissue sample, the testing, and/or the results. We note further

that the record reveals no negligence in the handling of the tissue sample. Even if the State had been negligent with the handling and presentation of the evidence, then Higgs could have questioned the State's witnesses about the investigative deficiencies. Therefore, we conclude that the district court did not abuse its discretion in refusing to give Higgs' proffered spoliation instructions. We further refuse to extend the Bass-Davis adverse-inference analysis to criminal cases.

Accumulation of plain error

Higgs argues that a "prodigious" amount of plain error occurred during trial. Higgs asserts 11 instances of alleged plain error, although he does not fully brief the instances in detail, and admits that counsel did not object to any of the 11 alleged instances of plain error. The 11 claims of error are as follows: (1) during Ramey's testimony, she described Higgs as a "player" and testified that she thought he was a "liar"; (2) Ramey testified that when she learned that Augustine had died, she thought Higgs had killed Augustine; (3) during Higgs' testimony, the trial was delayed due to his second suicide attempt; on cross-examination, the State asked Higgs whether some people might think that his during-trial suicide attempt was a ploy for sympathy, and demonstrated consciousness of guilt; (4) during the same cross-examination, the State asked Higgs what motive Ramey would have to make up her testimony; (5) during the same cross-examination, the State asked Higgs if he disagreed with Dr. Clark's testimony, and Higgs said he did; (6) State witness Michelle Ene, Augustine's executive assistant, testified that Higgs told her that he and Augustine had worked out their differences the night before Augustine was found dead; Ene testified that she "didn't believe that for one minute" and was suspicious that Higgs may have had

something to do with Augustine's death and that he "might have murdered her"; (7) Nancy Vinnek, one of Augustine's best friends, testified in the rebuttal case that Augustine frequently described Higgs as a "Doctor Jeckyl & Mr. Hyde";³ (8) during closing arguments, the State noted that Ramey was a good witness; (9) during closing arguments, the State noted that Higgs could not explain why Ramey would testify as she did, and that Dr. Richard Sehar, a State witness, who ordered the test to check for succinylcholine levels in Augustine's body, had testified that he believed Ramey's testimony; (10) the State argued that Higgs admitted that his toxicologist, Walls, did not disagree with the FBI's conclusion that succinylcholine was in Augustine's urine; and (11) during closing argument, the State said, "I know the defendant doesn't have the burden . . . but he doesn't have a leash on him that prevents him from doing any of these things either."

"When an error has not been preserved," as is the case here because Higgs failed to object to any of the instances of alleged error, "this court employs a plain-error review." Valdez v. State, 124 Nev. ____, ____, 196 P.3d 465, 477 (2008). Pursuant to our plain-error review standard, "an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of

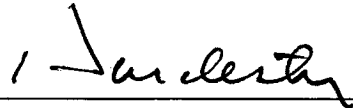
³We note that Higgs misstates Ramey's testimony. Ramey testified, "And I [Ramey] would frequently describe [Higgs] to [Augustine] as a Dr. Jekyll and a Mr. Hyde." Therefore, it was Ramey who described Higgs as a Dr. Jekyll and Mr. Hyde, not Augustine.

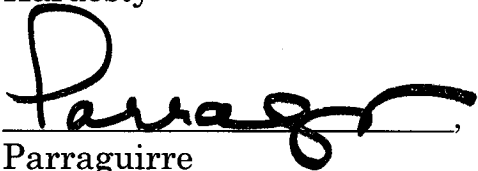
justice.” Id. (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

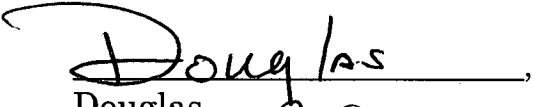
We have reviewed each of Higgs’ claims of error and conclude that Higgs has failed to demonstrate how any of the alleged errors affected his substantial rights by causing actual prejudice or a miscarriage of justice. Accordingly, we conclude Higgs’ plain-error argument is without merit.

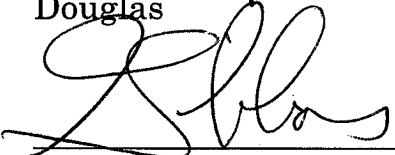
Therefore, having considered Higgs’ arguments, and having concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.⁴


_____, C.J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Gibbons

⁴The Honorable Kristina Pickering, Justice, did not participate in the decision of this matter.

cc: Hon. Steven R. Kosach, District Judge
Richard F. Cornell
Law Office of David R. Houston
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Peter Chase Neumann
Washoe District Court Clerk

SAITTA, J., with whom, CHERRY, J., agrees, dissenting:

I would reverse the judgment of conviction, because I conclude that the denial of Higgs' motion to continue the trial resulted in a violation of his due process rights.

Higgs' motion to continue the trial was based upon the fact that his expert, Chip Walls, did not have adequate time to evaluate the conclusion of the FBI toxicology report. The conclusion of the report, that succinylcholine was found in Augustine's urine, formed the basis of the State's theory of the case.

This court reviews a district court's decision with regard to a motion to continue for an abuse of discretion. Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007). While each case turns on its own circumstances, this court has long recognized the cornerstone principle of due process, that "[a]ccuseds have the right to be informed of the nature and cause of the accusation against them and must be afforded a reasonable opportunity to obtain witnesses in their favor." Zessman v. State, 94 Nev. 28, 31, 573 P.2d 1174, 1177 (1978) (citing Cole v. Arkansas, 333 U.S. 196 (1948)).

The majority concludes that Higgs failed to demonstrate that he was prejudiced by the denial. I disagree. I conclude that Higgs was prejudiced because his expert, Walls, one of the country's few experts on succinylcholine, did not testify at trial. While it is true that the defense had the toxicology report in its possession for 24 weeks, Walls did not believe the State had sent a complete report. Walls stated that the packet was incomplete and did not include back-up data or documentation. The full report was the crux of the State's case against Higgs. Therefore, pursuant to Zessman, Higgs had the right to be informed of the nature

and the accusation against him, including the complete FBI toxicology report. The lack of information not only affected Higgs' ability to obtain witnesses in his favor, it affected his ability to cross-examine the State's expert witness, Madeline Montgomery.

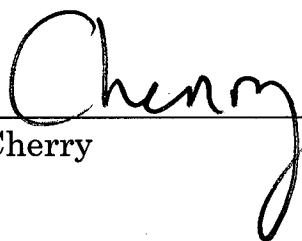
This court has observed that a defendant's right to discovery is tangentially related to the right of confrontation. See Stamps v. State, 107 Nev. 372, 376, 812 P.2d 351, 354 (1991). Here, I conclude that in order for Higgs' counsel to have prepared an effective cross-examination of Montgomery regarding the succinylcholine found in Augustine's urine, Higgs should have been afforded more time. The continuance would have allowed Walls time to evaluate Montgomery's technique and conclusions, and to draw his own inferences. While Walls had the packet from the FBI toxicology lab for months before the trial, I note that it was not until the district court issued an order directing the State to provide Higgs with the FBI toxicology report that the State sent the report to the defense. Moreover, Walls stated that the packet the FBI sent was incomplete and that significant data was missing. Walls felt the FBI packet was missing important information to his verification process, such as back-up data. This was vital information for Walls because during the testing of Augustine's urine for succinylcholine, one of the FBI's testing machines had malfunctioned. Given the volatile nature of succinylcholine and the fact that there were questions regarding the preservation of the urine sample, I find that due process required that Higgs be given more time to prepare what was arguably the most important piece of evidence. I am not persuaded by the majority's argument that Higgs could have effectively presented his arguments regarding the FBI toxicology report by

merely cross-examining Montgomery. An effective cross-examination itself requires time and preparation.

For the reasons set forth above, I dissent and would reverse the judgment based on the fact that the district court abused its discretion when it denied Higgs' motion to continue.


_____, J.
Saitta

I concur:


_____, J.
Cherry