IN THE SUPREME COURT OF THE STATE OF NEVADA

MONTRAIL DELVONTA SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50134

FILED

FEB 20 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Montrail Smith's post-conviction petition for a writ of habeas corpus filed pursuant to Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge, Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On May 24, 2005, the district court convicted appellant Montrail Smith, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve a term of life in the Nevada State Prison with the possibility of parole after 20 years, plus an equal and consecutive term for the use of a deadly weapon. Appellant's direct appeal was dismissed for lack of jurisdiction because the notice of appeal was untimely filed. Smith v. State, Docket No. 45867 (Order Dismissing Appeal, September 26, 2005).

On December 6, 2005, appellant filed a timely post-conviction petition for a writ of habeas corpus. In his petition, appellant claimed that he had been deprived of a direct appeal due to the ineffective assistance of counsel. The State opposed the petition. After conducting an evidentiary

hearing, the district court determined that appellant had been deprived of his right to a direct appeal and appointed counsel to assist appellant in filing a petition for a writ of habeas corpus raising any issues that appellant could have raised on direct appeal. Pursuant to the Lozada remedy, on April 5, 2007 appellant filed a Lozada petition. The State opposed the petition. On August 8, 2007, the district court denied the petition. This appeal follows.

Excited utterance

First, appellant argues that the district court erred by admitting out-of-court statements under the excited utterance exception. At trial, the victim's girlfriend testified that she was nearby sitting in her vehicle when the victim was approached by appellant and another individual. She could tell that there was a confrontation, but could not clearly hear all that was said. She testified that the parties were not yelling at each other, but she did hear the other individual tell appellant to "Shoot that nigger." She then heard gunshots. The district court overruled appellant's objection to the testimony and admitted the statement under the excited utterance exception to the hearsay rule. Appellant contends that the excited utterance exception is inapplicable because the witness stated that she did not hear anyone screaming while the shooting was happening, only that a person made the challenged statement. Appellant argues that there was no foundation for the district court to determine that the speaker was actually excited.

For a statement to be admissible as an excited utterance, it must have been made when the declarant was still "under the stress of the startling event." Medina v. State, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006); see NRS 51.085; NRS 51.095. We will not disturb the district

court's decision to admit or exclude evidence unless that decision was the result of manifest error. See Kazalyn v. State, 108 Nev. 67, 71-72, 825 P.2d 578, 581 (1992); see also State v. Anderson, 723 P.2d 464, 468 (Wash. Ct. App. 1986).

In this case, the statement was made during a confrontation that culminated in the shooting death of the victim; thus, the record supports the district court's conclusion that the declarant was under the influence of a startling event when speaking. We conclude that, under the facts of this case, the district court did not err in concluding that the excited utterance exception applied. See Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987); Dearing v. State, 100 Nev. 590, 592, 691 P.2d 419, 421.

In addition, even assuming error, we conclude that any error was harmless. This court has held that the admission of hearsay may be harmless if the court can conclude that the result would have been the same if the district court had not admitted the evidence. See Franco v. State, 109 Nev. 1229, 1239, 866 P.2d 247, 254 (1993); see also Schoels v. State, 115 Nev. 33, 35, 975 P.2d 765, 766 (1988). When deciding whether an error is harmless or prejudicial, the following considerations are relevant: "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). Here, there was substantial evidence of appellant's guilt given the testimony of the victim's girlfriend, the testimony of appellant's friend, and the lack of evidence to support appellant's claim that the victim possessed a weapon. Therefore, we conclude that, even assuming error, appellant was not prejudiced by

the district court's ruling to admit the statement under the excited utterance exception.

Prosecutorial misconduct

Next, appellant alleges several instances of prosecutorial misconduct. First, appellant argues that the prosecution elicited testimony from Detective Barry Jensen that amounted to improper vouching of the State's evidence. At trial, Detective Jensen discussed his experience in homicide investigations and crime scene investigations. The district court then determined that there was a proper foundation for Detective Jensen to testify as an expert witness. Detective Jensen then testified that, based on his training, experience, and the evidence found at the crime scene, it was his opinion that there was only one gun at the crime scene. Detective Jensen also stated that the unorganized manner in which the victim dropped his bags led Jensen to conclude that the victim was running away from the shooter.

Appellant argues that Detective Jensen's testimony was not supported by the evidence and that he gave an improper lay opinion. This argument is without merit. NRS 50.275 provides that a witness may be qualified to testify as an expert "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." This court reviews a district court's decision to allow expert testimony for abuse of discretion. Brown v. Capanna, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989).

A review of the record reveals that Detective Jensen was qualified to testify as an expert witness. When Detective Jensen's testimony is viewed as a whole, the district court did not abuse its discretion when it determined that Detective Jensen properly established

his expertise in crime scene investigations and then allowed Detective Jensen to base his conclusions on the evidence gathered. Therefore, we conclude that the district court did not err in allowing Detective Jensen's expert testimony of his opinion concerning the evidence. Further, even assuming error, any error was harmless beyond a reasonable doubt given the substantial evidence of appellant's guilt, due to the testimony of the eyewitnesses and the physical evidence recovered from the crime scene. Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001). Therefore, we conclude that appellant is not entitled to relief on this claim.

Second, appellant argues that the State improperly elicited testimony that appellant intimidated witnesses. At trial, Detective Jensen stated that, in general, people often do not want to get involved with an investigation and, due to the high gang activity in the area of the crime scene, people may have been afraid of retaliation. Thus, Detective Jensen felt it necessary to give potential witnesses additional opportunities to discuss the incident with him by going back to the apartment building a few days after the incident. Appellant argues that this testimony amounted to an allegation that appellant intimidated witnesses. When viewed in context, the testimony did not allege that appellant intimidated witnesses, but simply explained why detectives would return to the crime scene in the days after the incident to interview people and pass out their business cards. Further, even assuming error, we conclude that any error was harmless beyond a reasonable doubt due to the substantial evidence of appellant's guilt. Id. Therefore, we conclude that appellant is not entitled to relief on this claim.

Third, appellant argues that the State improperly shifted the burden of proof. Specifically, appellant argues that by questioning

witnesses about a lack of evidence supporting his claim that the victim possessed a weapon, the State shifted the burden of proof. At trial, a prosecutor "'enjoys wide latitude in arguing facts and drawing inferences from the evidence.'" Greene v. State, 113 Nev. 157, 177, 931 P.2d 54, 67 (1997) (quoting Jain v. McFarland, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993), receded from on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700 (2000)). Appellant fails to demonstrate that the State or its witnesses referred to facts and inferences that were not supported by the evidence. The State's challenge of appellant's claim that he shot the victim in self-defense did not improperly shift the burden of proof or otherwise constitute misconduct. Further, even assuming error, we conclude that any error was harmless beyond a reasonable doubt due to the substantial evidence of appellant's guilt. Tavares, 117 Nev. at 732, 30 P.3d at 1132. Therefore, we conclude that appellant is not entitled relief on this claim.

Fourth, appellant claimed that the State improperly implied that appellant had committed prior bad acts. Detective Jensen testified that "word on the street" was that appellant was involved in the shooting death of the victim. Jensen stated that he put a notification in SCOPE, a police computer database, so that if he was stopped by the police, appellant would be informed that Jensen wanted to talk with him. Appellant argues that this information improperly implied that he had a criminal history and committed prior bad acts. Even assuming error, we conclude that any error was harmless beyond a reasonable doubt due to the substantial evidence of appellant's guilt. Id. Therefore, we conclude that appellant is not entitled to relief.

Fifth, appellant claimed that the State improperly elicited hearsay testimony. Specifically, appellant challenges Detective Jensen's testimony that crime scene analysts communicated with each other and realized that a foot print probably belonged to the victim. Generally, the failure to object during trial will preclude appellate review of that issue. Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001) (citing Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000)). However, this court may review for plain error affecting the defendant's substantial rights. Id. at 63, 17 P.3d at 403-04. The burden rests with appellant to show actual prejudice or a miscarriage of justice. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Here, the challenged testimony was not concerning out-of-court statements, but rather a description of how the evidence collection was performed. Further, even assuming error, we conclude that any error was harmless beyond a reasonable doubt due to the substantial evidence of appellant's guilt. Tavares, 117 Nev. at 732, 30 P.3d at 1132. Therefore, we conclude that appellant has failed to demonstrate plain error in this regard.

Jury instructions

Next, appellant argues that jury instruction no. 19, a self-defense instruction,[1] was improper because it did not state that a defendant has a right to use force in self-defense if apparent danger

[1]Jury instruction no. 19 states as follows: "If a person kills another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of another was absolutely necessary; and the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow."

existed. Appellant argues that an absence of an apparent danger instruction may have caused the jury to conclude that actual danger is necessary for self-defense. A review of the record reveals that jury instruction no. 21 stated that "[a] person has a right to defend from apparent danger to the same extent as he would from actual danger." Thus, the jury was instructed concerning apparent danger. Therefore, we conclude that appellant is not entitled to relief on this claim.

Sufficiency of evidence

Appellant argues that the evidence does not support his conviction. 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 sufficient evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). "'The standard of review for sufficiency of evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt.'" Smith v. State, 112 Nev. 1269, 1280, 927 P.2d 14, 20 (1996) (quoting Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992)), abrogated on other grounds by City of Las Vegas v. Dist. Ct., 118 Nev. 589, 59 P.3d 477 (2002).

In this case, the victim's girlfriend observed appellant approach the victim, heard appellant's friend say "Shoot that nigger," heard gunshots, and viewed appellant with a weapon and smiling following the shooting. Further, a friend of appellant's testified that the victim did not present a weapon at the shooting, and the police officers testified that the evidence recovered from the crime scene did not support appellant's claim that the victim possessed a weapon. Based on this

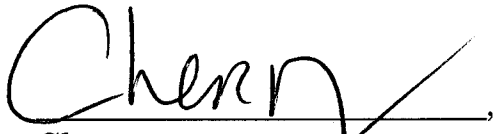
evidence, a reasonable jury could have been convinced of appellant's guilt. Accordingly, we conclude that substantial evidence supports appellant's conviction.

Cumulative error

Appellant also contends that he is entitled to relief due to cumulative error. However, as discussed above, appellant fails to demonstrate any error that would warrant relief. Therefore, appellant fails to demonstrate cumulative error.

Accordingly, having considered Smith's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

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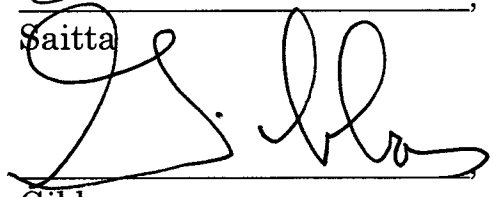

_____, J.
Gibbons

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Chief Judge, Eighth Judicial District
Hon. Joseph T. Bonaventure, Senior Judge
Bret O. Whipple
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Eighth District Court Clerk