IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ARTHUR DIETZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50168

FILED

SEP 09 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 second-degree murder with the use of a deadly weapon. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge. The district court sentenced appellant John Arthur Dietz to serve two consecutive terms of 25 years in prison with the possibility of parole after 10 years.

Dietz raises two claims: (1) the district court abused its discretion by excluding testimony regarding Dietz's out-of-court statements to his sister and a friend and (2) the district court erred in refusing to suppress statements Dietz made during his second custodial interrogation. We conclude that both claims lack merit.

First, Dietz argues that the district court abused its discretion when it precluded two witnesses from testifying about statements that Dietz had made to them. In particular, Dietz complains that his sister was not allowed to testify about statements Dietz made to her during a telephone conversation on the night of the murder and that one of his friends was not allowed to testify about statements Dietz had made regarding his inability to remember things after drinking to excess. The district court sustained the State's objections to this testimony on hearsay

grounds. Dietz takes issue with those rulings, arguing that the evidence was relevant and that "the hearsay rule may not be applied mechanically to defeat the ends of just[ice]."

As to Dietz's sister's testimony, the record indicates that, during argument about the scope of the sister's testimony, defense counsel agreed with the prosecutor's hearsay objection to testimony about Dietz's statements and defense counsel thereafter did not seek admission of such testimony. When Dietz's sister started to testify about Dietz's statements in response to a general question, defense counsel interrupted her in an apparent attempt to stop her from testifying about the statements. The district court then summarily sustained an objection and commented, "We are not going to repeat what [Dietz] said." Defense counsel did not argue the point or make an offer of proof. Under the circumstances, we conclude that this issue was not preserved for appeal and that we cannot reach the issue in the first instance because Dietz failed to make a sufficient record regarding the testimony to allow this court to evaluate its admissibility or the prejudicial effect, if any, of the district court's ruling.[1]

---

[1]See NRS 47.040(1)(b) (providing that when error is predicated on a ruling that excluded evidence, "the substance of the evidence [must be] made known to the judge by offer or [must be] apparent from the context within which questions were asked"); Van Valkenberg v. State, 95 Nev. 317, 318, 594 P.2d 707, 708 (1979) (disregarding claim that trial court erred by refusing to allow defense inquiry on cross-examination where defense counsel failed to make an offer of proof and, as a result, the supreme court had "no way of determining whether appellant's substantial rights were prejudiced by the trial court's refusal to allow the witness to respond").

As to the proffered testimony by Dietz's friend, we conclude that the district court did not abuse its discretion in excluding the testimony as inadmissible hearsay.[2] Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted in the statement.[3] The hearsay rule, codified in Nevada as NRS 51.065, provides that such a statement is inadmissible except as provided by statute. Here, the excluded testimony—that Dietz had told the witness that he could not recall an event that occurred when he had been drinking—was offered to prove the truth of the matter asserted, namely that Dietz could not recall events that occurred when he had been drinking. The testimony therefore constituted inadmissible hearsay. Dietz failed to identify below or on appeal any exception under which the evidence might be admissible; rather, on appeal, he refers to Chambers v. Mississippi[4] and summarily argues that the hearsay rule was applied "mechanically." But his reliance on Chambers is misplaced and not supported by any cogent argument.

The United States Supreme Court recognized in Chambers that the hearsay rule may be applied to exclude evidence offered by a criminal defendant in the exercise of his right to present witnesses in his own defense.[5] The Court further held, however, that "the hearsay rule

---

[2]See Harkins v. State, 122 Nev. 974, 980, 143 P.3d 706, 709 (2006) (stating that a district court's determination that statement fit exception to hearsay rule would not be disturbed absent an abuse of discretion).

[3]NRS 51.035.

[4]410 U.S. 284 (1973).

[5]Id. at 302.

may not be applied mechanistically to defeat the ends of justice" such as when the excluded testimony bears "persuasive assurances of trustworthiness and thus was well within the basic rationale" of an exception and was "critical" to the defense.[6] In contrast to the circumstances presented in Chambers, Dietz has not demonstrated that the excluded testimony bore assurances of trustworthiness consistent with the basic rationale of an exception to the hearsay rule or that exclusion of the evidence was inconsistent with the ends of justice. Under the circumstances, we conclude that the district court did not abuse its discretion in excluding this testimony.

Second, Dietz argues that the district court erred when it denied his motion to suppress his statements during his second custodial interrogation because the interviewing detective failed to cease the interview after Dietz invoked his right to counsel. We conclude that this claim lacks merit.

In Harte v. State,[7] this court adopted the rule announced by the United States Supreme Court in Davis v. United States,[8] that to require cessation of an interview based on invocation of the right to counsel, a "suspect must unambiguously request counsel" in a manner that is sufficiently clear "'that a reasonable police officer in the circumstances would understand the statement to be a request for an

---

[6]Id.

[7]116 Nev. 1054, 1067, 13 P.3d 420, 429 (2000).

[8]512 U.S. 452 (1994).

attorney.'"[9] If the request is ambiguous or equivocal, "'in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel,'" then the officers are not required to cease the interview.[10] When a suspect makes an ambiguous or equivocal request, officers may ask clarifying questions regarding the request but they are not required to do so before continuing the interview.[11]

It appears that Dietz's claim is based on the following exchange, which occurred about mid-way through the approximately 90-minute interview:

> Dietz: It's all right. Should I have an attorney here?
>
> [Detective] Burnum: Huh?
>
> Dietz: Should I have an attorney?
>
> [Detective] Burnum: It's up to you.
>
> Dietz.: Cuz, I don't know what I'm doing.
>
> [Detective] Burnum: If you don't want to speak with us anymore that's your right.
>
> Dietz: I don't know I just.
>
> [Detective] Burnum: Do you want to finish this up and talk about, get this out of what happened? You're so close to getting it all out there John I don't. I think you want to and I think it's hard and I understand that and I respect that. I do agree that you didn't have any intent to hurt her.

---

[9]116 Nev. at 1066, 13 P.3d at 428 (quoting Davis, 512 U.S. at 459).

[10]Id. (quoting Davis, 512 U.S. at 459).

[11]Id. at 1067, 13 P.3d at 428-29.

> But I think <u>things</u> went out of control that day. But I think you want to get it out and I think you deserve, I think Terry deserves it.

The interview then continued without further reference to an attorney. In denying Dietz's motion to suppress the statement, the district court heard testimony from the detective and then found that Dietz did not clearly invoke the right to counsel and therefore the detective did not violate Dietz's right to counsel by continuing to question him.

We conclude that the district court's determination in this case is supported by substantial evidence.[12] In particular, Dietz never clearly requested counsel, and his references to counsel were so equivocal and ambiguous that no reasonable police officer in the circumstances would have understood those references to be a request for an attorney. We therefore conclude that the district court did not err in denying the motion to suppress the statements made after the ambiguous references to counsel.

Having considered Dietz's claims and concluded that they lack merit or were not sufficiently preserved for appellate consideration, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Maupin

_____, J.
Cherry

_____, J.
Saitta

[12]<u>Id.</u> at 1065, 13 P.3d at 427-28 (stating that on appeal, the "district court's determination of whether a defendant requested counsel . . . will not be disturbed . . . if supported by substantial evidence").

cc: Hon. Andrew J. Puccinelli, District Judge
Elko County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Elko County District Attorney
Elko County Clerk