IN THE SUPREME COURT OF THE STATE OF NEVADA

GREG TAKUNG CHAO A/K/A GREG TUKUNG CHAO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50336

FILED

JUN 23 2010

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 robbery with the use of a deadly weapon and first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Appellant Greg Chao raises multiple challenges to his judgment of conviction for robbery and first-degree murder. We are not persuaded that any prejudicial error occurred, and therefore, affirm the district court's judgment of conviction.[1] However, three of Chao's challenges warrant a more detailed discussion by this court.

[1]In addition to the challenges discussed in detail later in this order, Chao contends that (1) his constitutional rights were violated while he was in Canada awaiting extradition, (2) the district court committed multiple errors associated with the testimony of Michael Prascak, (3) the State committed multiple Brady violations and failed to preserve a key piece of evidence, (4) the district court committed various evidentiary errors, (5) the district court improperly instructed the jury in multiple respects, (6) the State engaged in repeated prosecutorial misconduct, (7) there were multiple errors associated with the penalty phase of the trial, and (8) cumulative error warrants reversal. Having thoroughly reviewed all of these alleged errors, we are not convinced that any of them have merit or warrant further discussion by this court.

The district court did not err by refusing to suppress Chao's statements in Canada

Chao raises two challenges to the admission of statements that he made while in custody in Canada. First, Chao contends that his statements to Las Vegas Metropolitan Police Department (LVMPD) detectives were obtained in violation of the Mutual Legal Assistance Treaty (MLAT) between the United States and Canada, and therefore, inadmissible under the treaty. Second, Chao argues that his extradition hearing testimony was inadmissible because such testimony is akin to testimony given during a preliminary hearing to suppress evidence under NRS 47.090. For the following reasons, we disagree with both of Chao's challenges.

Chao does not have a judicially recognized right to challenge evidence allegedly obtained in violation of the MLAT

The MLAT between the United States and Canada is a cooperation treaty designed to "improve the effectiveness of both countries in the investigation . . . and suppression of crime through cooperation and mutual assistance in law enforcement matters." Treaty on Mutual Legal Assistance in Criminal Matters, Canada-U.S., Mar. 18, 1985, 24 I.L.M. 1092. The treaty specifically states that "[t]he provisions of this Treaty shall not give rise to a right on the part of a private party to obtain, suppress or exclude any evidence." Id. art. II(4), 24 I.L.M. at 1093.

Federal courts that have construed similar MLAT provisions have concluded that an individual does not have a private right to enforce the terms of the treaty. See U.S. v. Rommy, 506 F.3d 108, 130-31 (2d Cir. 2007) (construing an MLAT between the United States and the Netherlands that stated that "[t]he provisions of this Treaty shall not give rise to a right on the part of any person to take any action in a criminal

proceeding to suppress or exclude any evidence."); U. . v. $734,578.82 In U.S. Currency, 286 F.3d 641, 659 (3d Cir. 2002) (construing an MLAT between the United States and the United Kingdom and Northern Ireland that provided that "[t]he provision of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence . . ."); U.S. v. Al Kassar, 582 F.Supp.2d 488, 493 n.3 (S.D.N.Y. 2008) (concluding that defendants did not have standing to argue that the government violated the MLAT between the United States and Spain).

Here, the MLAT between the United States and Canada is almost identical to those construed in the federal courts. Thus, consistent with the federal court's handling of this issue, we conclude that Chao does not have a right to challenge evidence that was allegedly obtained in violation of the MLAT. Accordingly, this argument fails.

An extradition hearing is not akin to a hearing to suppress evidence under NRS 47.090

We review Chao's contention that the district court should not have admitted his extradition hearing testimony de novo. See Hernandez v. State, 124 Nev. ___, ___, 188 P.3d 1126, 1131 (2008) ("[W]e review various issues regarding the admissibility of evidence that implicate constitutional rights as mixed questions of law and fact subject to de novo review.").

Under NRS 47.090, testimony given by the accused at a preliminary hearing regarding the admissibility of statements by the accused or evidence allegedly unlawfully obtained "is not admissible against [him] on the issue of guilt at the trial." This statute evolved from the seminal case of Simmons v. United States, 390 U.S. 377 (1968), where the United States Supreme Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds,

his testimony may not thereafter be admitted against him at trial on the issue of guilt . . . ." 390 U.S. at 394 (finding it intolerable that one constitutional right—i.e., the right to remain silent—should have to be surrendered in order to assert another—i.e., the right to suppress unlawfully obtained evidence); Stuard v. Stewart, 401 F.3d 1064, 1069 (9th Cir. 2005) (referring to this scenario rather appropriately as a "Catch-22").

During the "voir dire" phase of Canadian extradition proceedings, Chao sought to exclude statements that he made to Las Vegas Metropolitan Police Department (LVMPD) detectives as being obtained involuntarily. After cautioning Chao that his testimony might be used in subsequent legal proceedings, the Canadian court ultimately excluded the statements.

Despite the obvious similarities between the "voir dire" phase of the extradition hearing and an NRS 47.090 hearing, there is an important distinction between the two types of proceedings. Unlike NRS 47.090 hearings, which are necessarily criminal proceedings that occur after an accused has been charged with a crime, extradition proceedings are a hybrid—part administrative, part civil, and part criminal in nature. See, e.g., Snider v. Seung Lee, 584 F.3d 193, 203 n.2 (4th Cir. 2009) ("Extradition is sui generis, neither civil nor criminal in nature."); Martin v. Warden, Atlanta Pen, 993 F.2d 824, 828 (11th Cir. 1993) ("An extradition proceeding [is an executive function and] . . . [i]t clearly is not a criminal proceeding."); Matter of Extradition of Pazienza, 619 F.Supp 611, 618 (S..D.N.Y. 1985) ("An extradition proceeding is neither strictly criminal nor civil; it is a hybrid."). Therefore, because the constitutional rights guaranteed by Simmons and codified by NRS 47.090 only apply to

criminal proceedings, and extradition hearings are distinct hybrid proceedings, see, e.g., Martin, 993 F.2d at 829 ("Constitutional procedural protections which by their terms are applicable only in criminal cases, however, are unavailable in extradition proceedings."); Taylor v. Jackson, 470 F. Supp 1290, 1292 (S.D.N.Y. 1979) (concluding that the Sixth Amendment's guarantee of a speedy trial and the right to assistance of counsel do not apply to extradition proceedings), we cannot conclude that an extradition hearing and a NRS 47.090 hearing are one and the same. Accordingly, the district court did not err in admitting Chao's testimony from his extradition hearing.

Sufficient evidence supported Chao's conviction

Chao contends that there was insufficient evidence to sustain his first-degree murder conviction. We disagree.[2]

When reviewing challenges to the sufficiency of evidence, we look to "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." See Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006) (internal quotations omitted). Circumstantial evidence alone may be sufficient to support a conviction and "[t]his court will not disturb a jury verdict where there is substantial evidence to support it." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

There was evidence submitted at trial indicating that the victim, Don Idiens, attempted to recoup money that he had previously

---

[2]We similarly reject Chao's sufficiency challenge to his robbery conviction.

loaned Chao on December 8, 1997. After receiving a phone call while he was playing poker at the Mirage casino in Las Vegas, there was evidence that Idiens told his gambling buddy, Michael Praczak, that he had to "go across the street . . . to collect some money . . . [from] a Canadian . . . an Asian guy that he had played [with] in a casino." Shortly after he left the Mirage, surveillance tapes showed Idiens entering the Imperial Palace Casino. Surveillance footage also indicated that Chao entered the Imperial Palace around the same time as Idiens.

Idiens' dead body was found the next morning on a balcony at the Imperial Palace. A plastic bag was wrapped over his head and he was only wearing underwear and socks. LVMPD detectives testified that they believed that Idiens had been struck multiple times in his head by a blunt object, causing a substantial loss of blood. A county coroner testified that Idiens was hit in the head with a blunt object 12 to 14 times with such force that portions of his skull were found in his brain, his eye socket was fractured, and his ear was nearly severed from his head.

Traces of Idiens' blood were found in the room where Chao stayed. Several employees identified Chao as the occupant of the room. Notably, a hotel service maid testified that she had seen Chao enter the room on December 8, 1997, in a peculiar manner. Specifically, she testified that he covered his hand with his shirt before opening the door.

The front desk clerk at Imperial Palace also testified that when Chao checked out of the room on December 9, 1997, he requested that she change the name on the room to Joe Galloway and that she remove any reference to his credit card. The clerk also testified that Chao returned to the front desk two more times requesting that she remove any

reference to his name from the phone records, and that Chao paid for all his room charges with cash.

Based on this evidence, we conclude that a rational jury could have found Chao guilty of first-degree murder beyond a reasonable doubt.

Failing to instruct the jury that afterthought robbery cannot serve as a valid predicate offense to first-degree felony murder was harmless

Chao contends that the district court committed reversible error by failing to instruct the jury that robbery cannot serve as a valid predicate offense to first-degree felony murder unless the evidence shows that the intent to rob was formed prior to the time of the killing pursuant to this court's holdings in Nay v. State, 123 Nev. 326, 333, 167 P.3d 430, 435 (2007), and Cortinas v. State, 124 Nev. ___, ___, 195 P.3d 315, 326 (2008), cert. denied, 130 S. Ct. 416 (2009). While we agree that it was an error not to instruct the jury that afterthought robbery cannot serve as valid predicate offense to first-degree felony murder in light of our recent decisions in Nay and Cortinas, we conclude that the error was harmless.

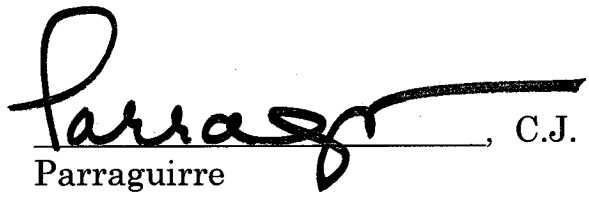
We must review whether the instructional error in this case is harmless beyond a reasonable doubt. See Cortinas, 124 Nev. at ___, 195 P.3d at 324. In reviewing this type of error for harmlessness, "we are not confined to considering whether the jury actually determined guilt under a valid theory, but may look beyond what the jury actually found to what a rational jury would have found if properly instructed." Id. at ___, 195 P.3d at 325. Thus, we must look to whether there is sufficient evidence to indicate that a rational jury, if properly instructed, would have found Chao guilty of willful, premeditated, and deliberate murder. See id. at ___, 195 P.3d at 325-26 ("[T]he evidence presented to the jury . . . [is] relevant to our harmless-error review."); NRS 200.030(1)(a) (Willful, deliberate, and premeditated killing is murder in the first degree.).

Upon reviewing the evidence adduced at trial as to the nature and extent of Idiens' injuries, we can be confident that the jury would have found that Chao killed Idiens in a willful, deliberate, and premeditated manner if it had been properly instructed. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 485-86 (2008) ("Generally, the State proves premeditation through circumstantial evidence, including the nature and extent of the injuries."); Hern v. State, 97 Nev. 529, 533, 635 P.2d 278, 281 (1981) (stating that "[t]he nature and extent of the injuries, coupled with repeated blows, constitutes substantial evidence of willfulness, premeditation and deliberation.").

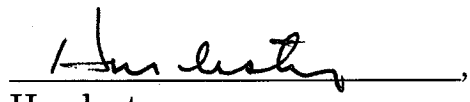
As we mentioned in the previous section, the evidence adduced at trial indicated that Chao struck Idiens in the head 12 to 14 times with such force that portions of Idiens' skull were found lodged in his brain, his eye socket was fractured, his ear was nearly severed from his head, and, upon being discovered, Idiens' body was devoid of any blood. By repeatedly striking Idiens with a blunt force object that resulted in the brutal and extensive nature of Idiens' injuries, we conclude that a jury would have found Chao guilty of first-degree murder by means of a willful, deliberate, and premeditated killing if it had been properly instructed. See Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714 (2000) ("Willfulness is the intent to kill. There need be no appreciable space of time between the formation of the intent to kill and the act of killing. Deliberation is the process of determining upon a course of action to kill as a result of thought . . . . Premeditation is a design, a determination to kill, distinctly formed in the mind by the time of the killing.").

Thus, we conclude that the failure to instruct the jury that afterthought robbery cannot serve as a valid predicate offense to first-degree felony murder was harmless. Accordingly, we,

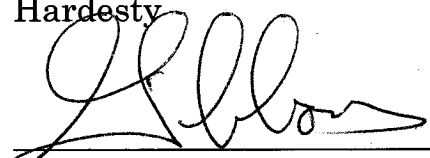
ORDER the judgment of the district court AFFIRMED.[3]



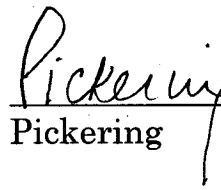
_____, C.J.
Parraguirre



_____, J.
Hardesty



_____, J.
Gibbons



_____, J.
Pickering

cc: Hon. David B. Barker, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

---

[3]The Honorable Nancy M. Saitta, Justice, voluntarily recused herself from participation in the decision of this matter.

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

Pursuant to Nay v. State, 123 Nev. 326, 333, 167 P.3d 430, 435 (2007), and Cortinas v. State, 124 Nev. 1013, 1029-30, 195 P.3d 315, 326 (2008), failing to instruct the jury that robbery cannot serve as a valid predicate offense to first-degree felony murder, unless the evidence shows that the intent to rob was formed prior to the time of the killing, is error. That is what transpired in this case.

The district court rejected Chao's proposed instructions that the intent to rob must be formed prior to or during the killing. Instead, the jury was only generically instructed that "a killing which is committed in perpetration of such a robbery is deemed to be [first-degree murder]," without requiring that the intent to rob was formed prior to, or during the killing. The State concedes that the jury was improperly instructed, but nevertheless contends that reversal is unwarranted because the error was harmless.

As to harmless error; does the record as a whole establish that the constitutional error was harmless beyond a reasonable doubt? See Cortinas, 124 Nev. at 1028, 195 P.3d at 325. The majority concludes that sufficient evidence supported Chao's conviction and harmless error, I can not agree. There was not any smoking gun as to his motive or mode, law enforcement was never able to obtain a confession or locate the murder weapon.

Therefore, the improper jury instruction was not harmless in light of the evidence presented. Thus, I dissent because I believe a

properly instructed rational jury would not have found Chao guilty of premeditated murder.

Douglas, J.

I concur:

Cherry, J.