IN THE SUPREME COURT OF THE STATE OF NEVADA

DELBERT CHARLES COBB,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50346

FILED

JUL 06 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 conspiracy to commit a crime, first-degree murder with the use of a deadly weapon, and attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

The district court sentenced appellant Delbert Charles Cobb to life in prison without the possibility of parole for first-degree murder, plus an equal and consecutive term for the deadly weapon enhancement; 20 years with the possibility of parole after 8 years for attempted murder with the use of a deadly weapon, plus an equal and consecutive term for the deadly weapon enhancement; and one year for conspiracy to commit a crime, all counts to run concurrently. Cobb appeals his convictions on multiple grounds: (1) the district court's error in overruling his Batson objections to two of the State's peremptory challenges, (2) violation of his constitutional right to a venire selected from a fair cross section of the community, (3) the district court's refusal to sever the charges against him, (4) admission of evidence of prior bad acts, (5) admission of the preliminary hearing testimony of an unavailable witness, and (6) admission of hearsay evidence. We conclude that any error in this case does not warrant relief, and we 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.

Batson claims

Cobb contends that the district court erred in overruling his objections pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), because the State exhibited discriminatory motive in using peremptory challenges to remove two African-American prospective jurors from the jury pool. In evaluating a Batson challenge, whether the State exhibited discriminatory intent is a determination of fact for the district court that this court "accord[s] great deference." Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008) (quoting Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997) (internal quotation marks omitted)). We will not reverse the district court's decision "unless clearly erroneous." Kaczmarek v. State, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004).

The district court denied Cobb's Batson challenges after determining that he failed to demonstrate purposeful discrimination by the State. Nothing in the record indicates that the State's reasons for excusing the two contested jurors were motivated by racial discrimination. Both potential jurors provided inconsistent answers in their juror questionnaires and during voir dire, and the son of one of the potential jurors had been prosecuted twice by the State. Such factors would be cause for concern from the State's perspective. Accordingly, we conclude that the district court's decision was not clearly erroneous in this instance, and reversal is not warranted on this issue.

Jury venire

Cobb also argues that his constitutional rights were violated because his jury venire did not adequately represent a cross section of the community with regard to African Americans. The Sixth Amendment of

the United States Constitution "requires that '"venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."'" Williams v. State, 121 Nev. 934, 939-40, 125 P.3d 627, 631 (2005) (quoting Evans v. State, 112 Nev. 1172, 1186, 926 P.2d 265, 274 (1996) (quoting Taylor v. Louisiana, 419 U.S. 522, 538 (1975))). To show that his right to a fair cross section has been violated, a defendant must demonstrate:

> "(1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."

Id. at 940, 125 P.3d at 631 (quoting Evans, 112 Nev. at 1186, 926 P.2d at 275) (internal quotation marks omitted) (emphases omitted)).

Assuming arguendo that Cobb satisfied the first and second steps, we evaluate whether African Americans are systematically excluded from the Clark County jury selection process. At trial, Cobb examined the Clark County jury commissioner about the jury selection process. The jury commissioner testified that jurors are currently selected from a list provided by the Department of Motor Vehicles but that a senate bill was pending at that time that would expand the pool of potential jurors to include those who are customers of Nevada Power.[1] This attempt to expand the juror list is Cobb's sole argument that minorities are

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[1]There is no evidence in the record indicating whether the bill passed.

systematically excluded from the juror pool. We conclude that Cobb's argument falls short of demonstrating systematic exclusion and, thus, Cobb has failed to show that his right to a venire selected from a fair cross section of the community was violated.

District court's refusal to sever the charges

Cobb contends that the charges he faced for shootings that occurred on November 13 and December 16, 1999, should have been severed because they could not reasonably be considered as connected to one another, and, thus, a new trial should be granted. The district court has discretion to join or sever charges. Weber v. State, 121 Nev. 554, 570, 119 P.3d 107, 119 (2005). NRS 173.115(2) specifies that joinder of charges is permissible if the offenses are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Cobb argues, and our review of the record indicates, that the only evidence introduced at trial exhibiting a commonality between the November 13 and December 16 shootings was that the shootings occurred near each other in an area where Cobb's gang had a known presence and that the two rifles used in each incident were found together at a fellow gang member's home. This connection is tenuous at best. As such, we conclude that the district court abused its discretion by not severing the charges. However, we deem the error to be harmless as it did not "ha[ve] a substantial and injurious effect on the jury's verdict." Weber, 121 Nev. at 570-71, 119 P.3d at 119. Cobb was acquitted of the charges resulting from the December 16 shooting, thus indicating that the jury carefully considered the evidence relating to each charge and did not infer from the joinder of charges that Cobb had a criminal disposition.

Evidence of prior bad acts

Cobb next argues that the district court erred by admitting evidence of two attempted murder convictions that occurred on November 4 and December 11, 1999. "The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference. It will not be reversed absent manifest error." Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). Under NRS 48.045(2), such evidence "is not admissible to prove the character of a person," but may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Here, the district court held a hearing outside the presence of the jury and determined that evidence of Cobb's prior bad acts was relevant, the acts were "established by clear and convincing evidence," and "the probative value [was] not substantially outweighed by the danger of unfair prejudice." See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (instructing that the district court must conduct a hearing outside the presence of the jury to determine the admissibility of prior bad act evidence). Cobb only challenges the district court's determination that the probative value of the prior bad act evidence was not substantially outweighed by the danger of unfair prejudice. See id.

The State presented evidence at trial to show that on December 11, Cobb was a passenger in a white Astro van and was involved in an attempted murder and that the shooter in the November 13 incident was also a passenger in a white Astro van. Additionally, the prior bad acts that occurred on November 4 and December 11 and the charged crimes that occurred on November 13 and December 16 all occurred within approximately four blocks of each other in an area that is occupied by

Cobb's gang. The evidence further indicated that the same rifle was used in both the November 4 prior bad act shooting and November 13 shooting. In addition, a second rifle used in the December 16 shooting was recovered at the same time and from the same location as the aforementioned rifle.

Thus, we determine that the probative value of evidence of Cobb's prior bad acts was not substantially outweighed by the danger of unfair prejudice, especially with regard to proving the identity of the shooter in and the motive behind the charged crimes. As a result, we conclude that it was not manifest error for the district court to admit evidence of Cobb's prior bad acts.

Preliminary hearing testimony of unavailable witness

Cobb next contends that the district court erred in admitting the preliminary hearing testimony of Angela Orozco, who the State claimed was unavailable for trial, because "the State's effort to locate Ms. Orozco was not sufficient." A district court's decision to admit prior testimony of a witness whom the State is unable to locate presents a mixed question of law and fact. Hernandez v. State, 124 Nev. 639, 646-47, 188 P.3d 1126, 1131-32 (2008). This court "give[s] deference to the district court's findings of fact but will independently review whether those facts satisfy the legal standard of reasonable diligence." Id. at 647, 188 P.3d at 1132.

Prior testimony is admissible at trial "if three preconditions exist: first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial." Drummond v. State, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970); see also NRS 171.198, NRS 51.325. "[A] witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his

presence at trial." Barber v. Page, 390 U.S. 719, 724-25 (1968); accord Drummond, 86 Nev. at 7-8, 462 P.2d at 1014.

A review of the record demonstrates that Cobb was represented by counsel at the preliminary hearing and that he effectively cross-examined Orozco. At trial, the State's investigator testified that in attempting to locate and subpoena Orozco, he visited her alleged place of employment and went to every residence to which he knew she had been linked. In addition, the investigator testified that he questioned Orozco's aunt about her whereabouts and was informed that she was transient. We conclude that the State's efforts to locate Orozco constituted good faith and reasonable diligence. See Quillen v. State, 112 Nev. 1369, 1374-76, 929 P.2d 893, 897-98 (1996). Thus, we conclude that the district court did not err in determining that Orozco was unavailable and admitting her preliminary hearing testimony.

Hearsay evidence

Lastly, Cobb argues that the district court erred in admitting two separate hearsay statements. Both instances involve communications between Jorge Contreras, the victim in the December 16 shooting who later died from his wounds, and his girlfriend Beatriz Hernandez. Prior to trial, Cobb moved to exclude Hernandez's testimony regarding both hearsay communications, and the district court ultimately concluded that they were admissible. A district court's decision to admit hearsay evidence will not be disturbed on appeal absent an abuse of discretion. Fields v. State, 125 Nev. ___, ___, 220 P.3d 709, 716 (2009). "Hearsay is inadmissible" absent a statutory exception to the hearsay rule. NRS 51.065.

Statement prior to the December 16 shooting

Cobb first challenges the district court's admission of a hearsay statement relating to an incident that occurred months before the December 16 shooting. Hernandez testified at trial that she was walking to meet Contreras when she observed him a few blocks away from her talking to a man. As she approached, the man with whom Contreras was speaking drove off in a car. Hernandez asked Contreras who he was talking to and he responded "that was Shady," a moniker by which Cobb was also known.

In denying Cobb's pretrial motion to exclude this hearsay statement, the district court determined that the statement was admissible under the present sense impression exception. See NRS 51.085 (providing that "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" may be admissible). We conclude from our review of the trial record that the district court did not abuse its discretion in admitting this hearsay statement under the present sense impression exception because Contreras's statement was made contemporaneously with the event as perceived by Hernandez. See Browne v. State, 113 Nev. 305, 312, 933 P.2d 187, 191 (1997) (noting that the policy underlying the present sense impression "exception is that the statement is more trustworthy if made contemporaneously with the event described").

Statement after the December 16 shooting

The second communication that Cobb argues was improperly admitted hearsay evidence relates to an incident that occurred while Contreras was in the hospital before he passed away. The district court permitted Hernandez to testify that Contreras was in the hospital for approximately one month and that she visited him almost daily during

that time. On one of her visits, she asked Contreras "[d]id Shady do this to you," and, although he was unable to speak, Contreras "pointed at [her]." Hernandez testified that she immediately left Contreras's room to call the police. Cobb argues that the district court erred in admitting this hearsay communication in violation of his constitutional right to confrontation. We agree but conclude that the error was harmless beyond a reasonable doubt, see Medina v. State, 122 Nev. 346, 355, 143 P.3d 471, 476-77 (2006) (stating that harmless-error analysis applies to Confrontation Clause errors and that the error must be harmless beyond a reasonable doubt), thus reversal of Cobb's convictions is not warranted.

A defendant's Sixth Amendment right to confront witnesses against him is not violated by the admission of statements that are not testimonial in nature. Harkins v. State, 122 Nev. 974, 979, 143 P.3d 706, 709 (2006).[2] Testimonial hearsay statements are only admissible under the Sixth Amendment if the declarant is unavailable and the defendant had an opportunity to cross-examine him. Crawford v. Washington, 541 U.S. 36, 68 (2004). This court has enumerated several factors to be utilized in evaluating whether a statement is testimonial, including

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[2]The State argues, among other things, that Hernandez's testimony is admissible under the dying declaration hearsay exception. See NRS 51.335. Statements admitted under the dying declaration hearsay exception do not violate a defendant's Sixth Amendment confrontation right. Harkins, 122 Nev. at 979, 143 P.3d at 709. We conclude that Contreras's communication with Hernandez was not admissible as a dying declaration because there is no evidence in the record to indicate that he believed he was going to die soon. See NRS 51.335 (providing that a dying declaration is "[a] statement made by a declarant while believing that his . . . death was imminent").

> (1) to whom the statement was made, a government agent or an acquaintance; (2) whether the statement was spontaneous, or made in response to a question . . .; (3) whether the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial, or whether it was to provide assistance in an emergency; and (4) whether the statement was made while an emergency was ongoing, or whether it was a recount of past events.

Harkins, 122 Nev. at 987, 143 P.3d at 714.

Here, Contreras's communication to Hernandez was not spontaneous but was instead prompted by her specific question. Additionally, there is no evidence in the record demonstrating that Hernandez's question and Contreras's response occurred in an emergent situation. At that time, Contreras had been in the hospital for over one week and his condition was improving. In addition, immediately after Contreras communicated his response to Hernandez, she left his hospital room to call the police, which appears to indicate that she was merely attempting to discover the identity of the shooter.

Therefore, we conclude that Contreras's communication to Hernandez was testimonial in nature, rendering it inadmissible under Crawford because Cobb was not afforded the opportunity to cross-examine Contreras. Thus, we conclude that the district court abused its discretion in admitting this hearsay communication. However, we conclude that the error was harmless beyond a reasonable doubt as the jury acquitted Cobb on the charges stemming from the December 16 shooting of Contreras. See Medina, 122 Nev. at 355, 143 P.3d at 477 (concluding that erroneously admitted testimony was harmless because it did not contribute to the jury's verdict).

Having considered Cobb's contentions and concluded that they do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Jennifer Togliatti, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk