IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD GORDON BENNETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50499

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, and attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Edward Gordon Bennett was granted a new penalty hearing for the first-degree murder conviction as the result of post-conviction proceedings. Following the new penalty hearing, Bennett was sentenced to life without the possibility of parole plus an equal and consecutive term of life without the possibility of parole for the deadly weapon enhancement.

On appeal, Bennett argues: (1) the officer's testimony was improperly admitted in violation of the Sixth, Amendment to the United States Constitution, as well as Bruton v. United States, 391 U.S. 123 (1968); (2) the district court committed reversible error by admitting a newspaper article containing statements attributed to Bennett; (3) the district court erred in permitting the State to introduce evidence of his interest in the occult and lyric/poem evidence; and (4) the district court

09-13470

erred when it failed to grant a mistrial based upon improper argument by the prosecutor.[1] For the reasons set forth below, we conclude that Bennett's contentions fail, and therefore, affirm the judgment of conviction.

The parties are familiar with the facts and we do not recount them except as necessary for our disposition.

For the first three issues indentified above, the standard of review is the same; the district court's admission of evidence during the penalty phase of a capital trial is reviewed under an abuse of discretion standard. Wesley v. State, 112 Nev. 503, 519, 916 P.2d 793, 804 (1996).

Evidence that is not normally admissible may be allowed during the penalty phase so long as it "concern[s] aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence." NRS 175.552(3). "However, the district court may not admit evidence that is impalpable or highly suspect." Sherman v. State, 114 Nev. 998, 1012, 965 P. 2d 903, 913 (1998) (citing Young v. State, 103 Nev. 233, 237, 737 P.2d 512, 515 (1987)).

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[1]Bennett also argues that: (1) the State improperly exercised a peremptory challenge by excusing an African American prospective juror; (2) the district court erred when it failed to grant a mistrial because the State presented improper victim-impact evidence; and (3) the district court erred when it failed to give the jury instructions regarding the law of attempted murder and specific intent, as enunciated in Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002). Having fully considered these issues, we conclude that they are without merit.

Officer's testimony

Bennett argues that the testimony from the law enforcement officer violated the United States Supreme Court's ruling in Bruton v. United States, 391 U.S. 123. Bennett alleges that the officer's testimony was based on the confession of his codefendant, which violated his Sixth Amendment right to confrontation.

"Absent some hearsay exception, admitting a non-testifying co-defendant's confession against another co-defendant during the guilt phase generally violates the sixth amendment right to confrontation." Lord v. State, 107 Nev. 28, 43, 806 P.2d 548, 557 (1991) (citing Bruton v. United States, 391 U.S. at 137). This court concluded "that the right of cross-examination and the need for accuracy are as important, indeed more important, in the penalty phase than in the guilt phase" and thus Bruton applies to the penalty phase. Id. at 44, 806 P.2d at 558.

The district court found that the officer's testimony was not based on a codefendant's confession, but on a supplemental report the officer made, which included the statements the officer testified about. Since the officer's testimony was based on the supplemental report, and not the testimony or confession of a codefendant, there is no Bruton violation. The district court did not abuse its discretion by allowing the officer to testify because the evidence was neither impalpable nor highly suspect. See Wesley, 112 Nev. at 519, 916 P.2d at 804.

Newspaper article

Bennett also argues that a newspaper article, which included statements about his prior drug use and crimes that were attributed to him, should not have been admitted. Since the author is deceased and unable to testify, Bennett argues that the article cannot be considered

reliable or authentic. Bennett also argues that admitting the article into evidence was a clear violation of the Confrontation Clause because the author could not be cross-examined. We disagree.

The district court found that the article was not impalpable or highly suspect. See Sherman, 114 Nev. at 1012, 965 P.2d at 913. The statements made by Bennett in the newspaper article matched previous statements and details of the crime. The district court also made it clear to the jury that the statements being attributed to Bennett were coming from a newspaper article. Therefore, the district court did not abuse its discretion by admitting the statements from the newspaper article. See Wesley, 112 Nev. at 519, 916 P.2d at 804.

Evidence of interest in the occult

Bennett also argues the district court erred in permitting the State to introduce evidence of his interest in the occult because it was used only to show that he was morally reprehensible. Bennett argues that he committed the crime for pecuniary gain and therefore his constitutionally protected beliefs were not relevant to the hearing.

In Flanagan v. State, this court held that "[e]vidence of a constitutionally protected activity is admissible only if it is used for something more than general character evidence." 109 Nev. 50, 53, 846 P.2d 1053, 1056 (1993) (citing Dawson v. Delaware, 503 U.S. 159, 167 (1992)).

We have previously concluded in this case that "the poetry seized in Bennett's room does, in fact, support an inference that Bennett had white supremacist tendencies and that the murder committed by Bennett was ritualistic and satanic." Bennett v. State, 111 Nev. 1099, 1107, 901 P.2d 676, 682 (1995). This conclusion supports the State's

contention that the occult evidence was being offered for more than general character evidence; it was offered to show a motive and purpose for the murder and therefore was relevant. Because the evidence was relevant, the district court did not abuse its discretion in admitting it. See Wesley, 112 Nev. at 519, 916 P.2d at 804.

Prosecutor's argument

Finally, Bennett argues that the district court erred when it failed to grant a mistrial based upon an improper closing argument made by the prosecutor. He alleges that the prosecutor impermissibly shifted the burden of proof to the defendant when he stated, "[w]hat is the evidence of [the defendant's] change of life? . . . . He talks about letters he writes. He talks about how he talks to people. Where's the evidence of that?" Bennett's objection to this argument was sustained by the district court.

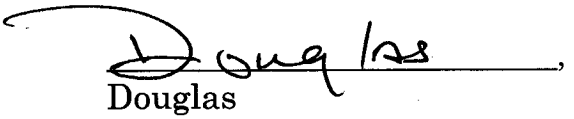
A district court's ruling on a motion for mistrial will not be overturned absent a clear showing of an abuse of discretion. Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001). This court has concluded that "[i]t is improper to suggest to the jury that it is the defendant's burden to produce proof by explaining the absence of witnesses or evidence." Lisle v. State, 113 Nev. 540, 553-54, 937 P.2d 473, 481 (1997) (citing Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989)). Where a prosecutor has committed misconduct, "the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process." Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997), overruled on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). Further, this court must decide "'whether the errors were harmless beyond

a reasonable doubt.'" Id. (quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988).

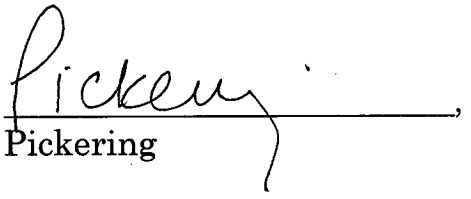
The prosecutor's statements were improper burden shifting, and the defense's objection was properly sustained. However, the district court had properly instructed the jury that "the burden rests upon the prosecution." We conclude the prosecutor's statements did not so infect the proceedings with unfairness as to make the results a denial of due process, and therefore, the prosecutorial misconduct was harmless. The district court did not abuse its discretion by denying Bennett's motion for a mistrial. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Hon. Valerie Adair, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk