IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL RUIZ-MUNOZ A/K/A JOEL RUIZMUNOZ A/K/A JOSE RUIZ-MUNOZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50592

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of one count of driving under the influence causing substantial bodily harm and one count of leaving the scene of an accident. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

The district court sentenced appellant Joel Ruiz-Munoz to a maximum of 135 months with a minimum parole eligibility of 54 months for count 1 and a maximum of 120 months with a minimum parole eligibility of 48 months for count 2, to run concurrently. The parties are familiar with the facts and we do not recount them here except as pertinent to our disposition.

On appeal, Ruiz-Munoz argues that (1) the district court erred by refusing to excuse a prospective juror for cause, (2) the State's use of peremptory challenges violated his Due Process and Equal Protection rights, (3) the district court erred in admitting his un-Mirandized statements, (4) the district court erred in admitting hearsay evidence in violation of his constitutional rights, (5) the district court erred by admitting opinion testimony that improperly embraced an ultimate issue and bolstered other government testimony, (6) the district court erred by allowing expert testimony in the absence of the statutorily required pre-

trial notification, (7) the district court erred by refusing to give his proposed jury instructions, (8) the State failed to prove the charged crimes beyond a reasonable doubt, (9) the State committed prosecutorial misconduct in its closing arguments by interjecting personal opinions and vouching for witnesses, and (10) cumulative error warrants reversal of his conviction. We conclude each of these arguments lack merit, however, we specifically address the admissibility of Ruiz-Munoz's statements, the hearsay evidence, and the proposed jury instructions in more detail below.

Admissibility of Ruiz-Munoz's statements

Ruiz-Munoz contends that the statements he made to a police officer after being apprehended were admitted at trial in violation of Miranda v. Arizona, 384 U.S. 436 (1966). We disagree.

Following the accident, Ruiz-Munoz fled the scene on foot and was apprehended several blocks away. The officer detained Ruiz-Munoz and placed him in handcuffs. Without reading him his Miranda warnings, the officer questioned Ruiz-Munoz about the traffic accident and Ruiz-Munoz made incriminating statements. Ruiz-Munoz contends it was reversible error to admit his statements as he was subject to custodial interrogation without first receiving Miranda warnings.

The Fifth Amendment privilege against self-incrimination provides that statements made by a suspect during a custodial interrogation are inadmissible unless the police first provide a Miranda warning. State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998); see also Miranda, 384 U.S. at 478-79. In determining whether there was a custodial interrogation, a court will consider the totality of the circumstances and consider several factors, with no single factor being dispositive, including: (1) the site of interrogation, (2) whether the investigation has focused on the suspect, (3) whether the objective indicia

of arrest[1] are present, and (4) the length and form of questioning. Taylor, 114 Nev. at 1082, 912 P.2d at 323.

"[A]n individual is deemed 'in custody' where there has been a formal arrest, or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave." Taylor, 114 Nev. at 1082, 968 P.2d at 323. This court has clarified that "a trial court's custody and voluntariness determinations present mixed questions of law and fact subject to this court's de novo review." Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). We conclude that Ruiz-Munoz was in custody for Miranda purposes; he was ordered to the ground, handcuffed, and detained by multiple officers. Ruiz-Munoz was not free to leave and no reasonable person in similar circumstances would feel free to leave.

The term "interrogation" is defined as not only express questioning, but any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 301-02 (1980); see also Koza v. State, 102 Nev. 181, 186, 718 P.2d 671, 674-75 (1986). This court

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[1]The objective indicia of arrest include: (1) whether the suspect was told that the questioning was voluntary or that he was free to leave, (2) whether the suspect was not formally under arrest, (3) whether the suspect could move freely during questioning, (4) whether the suspect voluntarily responded to questions, (5) whether the atmosphere of questioning was police-dominated, (6) whether the police used strong-arm tactics or deception during questioning, and (7) whether the police arrested the suspect at the termination of questioning. See Taylor, 114 Nev. at 1082 n.1, 968 P.2d at 323 n.1 (citing U.S. v. McKinney, 88 F.3d 551, 554 (8th Cir. 1996)).

has stated that "[t]he district court's purely historical factual findings pertaining to the 'scene- and action-setting' circumstances surrounding an interrogation is entitled to deference and will be reviewed for clear error." Rosky, 121 Nev. at 190, 111 P.3d at 694.

In this case, the district court found that Ruiz-Munoz's statements to the officer, while in custody, were spontaneous and not made in response to a question by the officer. The district court's determination that Ruiz-Munoz's statements were spontaneous was not clearly erroneous. There were no deceptive questions that were intended to elicit an incriminating response. Ruiz-Munoz spontaneously blurted out he was "fucked" and asked how the driver was during questioning. Because his statements were spontaneous, the district court properly allowed Ruiz-Munoz's un-Mirandized statements into evidence.

Hearsay evidence

Ruiz-Munoz contends that because Dee Dee Stovall, did not testify at trial, the district court erred by admitting the police officers' testimony describing Stovall's identification of Ruiz-Munoz. Ruiz-Munoz argues two separate instances of hearsay were impermissibly admitted. We conclude that only Officer Smaistrla's testimony, which actually described Stovall's identification of Ruiz-Munoz, was erroneously admitted hearsay.[2]

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[2]Officer Wagner's testimony was properly admitted as it was not introduced for the truth of the matter asserted but rather to show the effect on the listener. See Rowland v. State, 118 Nev. 31, 43, 39 P.3d 114, 121 (2002).

Ruiz-Munoz failed to object to the hearsay testimony at trial. The failure to object during trial precludes appellate consideration of an issue unless it rises to the level of plain error. See Estes v. State, 122 Nev. 1123, 1131, 146 P.3d 1114, 1120 (2006). Under plain error review, this court determines whether there was an error, whether the error was "plain" or clear, and whether the error affected the defendant's substantial rights. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."). The latter inquiry requires that the defendant demonstrate actual prejudice. Green, 119 Nev. at 545, 80 P.3d at 95.

NRS 51.035 excludes from evidence hearsay testimony. "Hearsay" is defined as an out of court statement "offered in evidence to prove the truth of the matter asserted." NRS 51.035. Officer Smaistrla's testimony included an out of court statement by Stovall which was offered to prove the truth of the matter asserted, that is, Ruiz-Munoz was the driver of the vehicle. Admitting this hearsay evidence was plain error.

However, admitting the hearsay testimony did not affect Ruiz-Munoz's substantial rights. The circumstantial evidence supported Ruiz-Munoz's conviction; the properly admitted eyewitness testimony described the driver and stated there was only one person in the car. Additionally, Ruiz-Munoz matched the description of the suspect, he tried to flee when he saw the officer, and Ruiz-Munoz said he would take full responsibility at the scene. The remaining evidence of guilt is overwhelming. The out of court identification was cumulative and Ruiz-Munoz has failed to demonstrate actual prejudice. Thus, the error in admitting the hearsay testimony was harmless.

Proposed jury instructions

Ruiz-Munoz argues the district court erred in refusing to give defense instructions that (1) negatively phrased the jury instructions on the State's burden, (2) advised the jury regarding their duty when there are two reasonable interpretations of the evidence, and (3) instructed the jury to disregard his un-Mirandized statements to the police. Ruiz-Munoz argues that together, these errors amount to reversible error.

District courts have broad discretion in settling jury instructions and this court reviews their decisions for an abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Negatively phrased instructions

Ruiz-Munoz requested that the district court proffer jury instructions explaining his entitlement to not guilty verdicts upon the State's failure to prove the elements of each charge beyond a reasonable doubt.

Proposed jury instructions 2 and 3 read, in pertinent part: "If the State fails to prove beyond a reasonable doubt that Defendant, on or about the 6th of January, 2006, did drive or was in actual physical control of a 1999 Mercury, bearing Oregon License No. 877BUW, then Defendant is entitled to a verdict of not guilty . . . ."

Ruiz-Munoz relies on Crawford v. State in which this court stated: "'[a] positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased 'position' or 'theory' instruction.'" Id. at 753, 121 P.3d at 588 (quoting Brooks v. State, 103 Nev. 611, 614, 747 P.2d 893, 895 (1987)). However, in Crawford this court also reaffirmed that "the conclusion that district courts must provide instructions upon request incorporating the significance of a defendant's

theory of the defense does not mean that the defendant is entitled to instructions that are misleading, inaccurate, or duplicitous." Id. at 754, 121 P.3d at 589.

Ruiz-Munoz's theory of defense was that he was not the driver of the Mercury. The instructions proposed by the defense centered upon that one element that was challenged by the defense and central to the defense theory of the case. While the proposed instruction was accurate and instructed the jury on legal inferences and the defense theory, the instruction was duplicative of those already given.

Two reasonable interpretations instruction

Ruiz-Munoz also requested an instruction informing the jury about two reasonable interpretations of the evidence. Requested jury instruction number 4 reads in relevant part:

> If the evidence in this case is subject to two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to innocence, it is your duty, to adopt the interpretation which will admit of defendant's innocence, and reject that which points to guilt.

Ruiz-Munoz argues that even though this court has concluded it is not error to refuse such an instruction when the jury is properly instructed on reasonable doubt, this court has indicated that such an instruction is permissible in certain cases. Ruiz-Munoz argues it was error not to give the requested instruction in this case because the district court refused to give the Crawford instructions and the defense theory centered upon the fact that the lack of physical evidence gave rise to the reasonable interpretation that Ruiz-Munoz's brother was driving the car.

Bails v. State clearly states it is not error to refuse this instruction where the jury is properly instructed regarding reasonable

doubt. 92 Nev. 95, 96-97, 545 P.2d 1155, 1156 (1976). The district court properly instructed the jury about reasonable doubt, and thus, the additional jury instruction proposed by Ruiz-Munoz was unnecessary and duplicative. The district court did not abuse its discretion by refusing the proposed jury instruction.

Miranda instruction

Finally, Ruiz-Munoz argues that the district court erred in refusing to give his requested instruction to disregard his un-Mirandized statements. Ruiz-Munoz requested this instruction to correct the alleged Miranda violation.

Because the statements were properly admitted, the district court did not abuse its discretion by refusing to give the requested jury instruction.

Having considered Ruiz-Munoz's arguments and concluding that they lack merit and that any error committed by the district court was harmless, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.

Douglas, J.

Pickering, J.

cc: Hon. Michael Villani, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk