

IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIUS BRADFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50630

FILED

JUN 30 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

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 and attempted robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Julius Bradford was charged with attempted robbery and felony murder in the shooting death of Benito Zambrano-Lopez. After a 5-day trial, Bradford was convicted by a jury on both counts charged.¹ The district court sentenced Bradford to serve two consecutive life sentences with the possibility of parole after 20 years for the murder conviction, to be served concurrently with two consecutive terms of 24 to 72 months for the attempted robbery conviction. The

¹The trial from which Bradford now appeals was a retrial. Bradford was originally convicted of both counts charged but we reversed those convictions because we concluded that certain jury instructions regarding accomplice and co-conspirator liability and adoptive admissions amounted to plain error, which affected Bradford's substantial rights. We also considered the issue of the use of gang-affiliation evidence in our order of reversal and remand, and cautioned the district court about the admission of such evidence. See Bradford v. State, Docket No. 43446 (Order of Reversal and Remand, April 18, 2006).

parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

On appeal, Bradford argues that his convictions should be reversed for five reasons: 1) because the district court abused its discretion in admitting evidence of prior bad acts, 2) because the district court abused its discretion in instructing the jury, 3) because he was denied his constitutional right to be present at all critical stages of the proceeding, 4) because there was insufficient evidence to support his convictions, and 5) because of cumulative error.

We conclude that Bradford's arguments are without merit and, as such, we conclude that Bradford's convictions should be affirmed.

Prior bad acts evidence

Bradford argues that the district court abused its discretion by admitting evidence of two prior bad acts. First, Bradford contends that the district court abused its discretion in admitting evidence of his gang affiliation. Second, Bradford contends that the district court abused its discretion in admitting evidence of his participation in a prior alleged robbery. We disagree because we conclude that Bradford made a misleading statement to the jury regarding his gang affiliation and opened the door to questioning on the alleged robbery by stating that he had never robbed anyone.

"District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-8 (1998). We will respect a district's courts determination to admit evidence unless there is a showing of manifest error. Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995).

Gang-affiliation evidence

Bradford argues that the district court abused its discretion by allowing the State to inquire on cross-examination about his gang affiliation, especially in light of our warnings in our April 18, 2006, order of reversal and remand. We disagree because we conclude that Bradford made a misleading statement to the jury that gave the jury a false impression of his character. Based on this statement, it was within the district court's discretion to admit evidence of Bradford's gang affiliation.

Evidence that is obviously prejudicial to a defendant is not admissible unless it is brought into issue by the defendant and the issue raised by the defendant is one to which the prejudicial evidence is relevant. Roever v. State, 114 Nev. 867, 871, 963 P.2d 503, 505 (1998). As a general rule, it is error to allow the prosecution to impeach a defendant's credibility using extrinsic evidence on a collateral matter. Jezdik v. State, 121 Nev. 129, 136-7, 110 P.3d 1058, 1063 (2005).

However, we have recognized an exception to the collateral-fact rule when a defendant introduces evidence which gives the jury a false impression of the defendant's good character through an absolute denial of misconduct. Id. at 139, 110 P.3d at 1065. This limited exception allows the prosecution to introduce extrinsic evidence specifically rebutting only the defendant's misleading testimony that may have given the jury a false impression of the defendant's good character. Id. at 139-40, 110 P.3d at 1065.

We conclude that Bradford made a misleading statement that gave the jury a false impression of his good character when he stated that he was scared when he witnessed Zambrano-Lopez being shot. Bradford's statement regarding his demeanor when witnessing Zambrano-Lopez being shot was misleading in the sense that it may have given the jury the

false impression that Bradford had not witnessed violence before. As such, the limited exception to the collateral-fact rule applies, and the district court did not abuse its discretion in allowing the prosecution to specifically rebut Bradford's statement with evidence of his gang affiliation.

Evidence of another alleged robbery

Bradford also argues that the district court abused its discretion in allowing the State to impeach him with evidence of his involvement in an alleged robbery at a 7-11. We disagree because we conclude that Bradford opened the door to questioning on this alleged robbery.

The prosecution can impeach a witness on collateral matters during cross-examination with questions about specific acts as long as the impeachment pertains to truthfulness. Jeidik v. State, 121 Nev. 129, 137, 110 P.3d 1058, 1063 (2005).

We conclude that Bradford opened the door to questioning on the alleged robbery by stating on direct examination that he had never robbed anyone. As such, the district court did not abuse its discretion by allowing the prosecution to impeach Bradford with evidence of the alleged robbery once Bradford had put his character for truthfulness into issue.

Jury instructions

Bradford argues that the district court abused its discretion in instructing the jury on three issues. First, Bradford contends that the district court abused its discretion in instructing the jury concerning the prior bad acts evidence. Second, Bradford contends that the district court abused its discretion in instructing the jury concerning the deadly-weapon enhancement. Third, Bradford contends that the district court abused its discretion in instructing the jury concerning adoptive admissions.

“A district court has broad discretion with respect to jury instructions, and absent an abuse of discretion or judicial error, this court will uphold a district court's decision regarding a jury instruction.” Brooks v. State, 124 Nev. ___, ___, 180 P.3d 657, 658-9 (2008). When an appellant fails to object to a decision of a district court, “this court may review plain error or issues of constitutional dimension sua sponte despite a party's failure to raise an issue below.” Murray v. State, 113 Nev. 11, 17, 930 P.2d 121, 124 (1997). “[P]lain error is error which either ‘had a prejudicial impact on the verdict when viewed in context of the trial as a whole’ or ‘seriously affects the integrity or public reputation of the judicial proceedings.” Parodi v. Washoe Medical Ctr., 111 Nev. 365, 368, 892 P.2d 588, 590 (1995) (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996)).

Jury instruction concerning prior bad acts

Bradford argues that, even if it were proper for the district court to admit evidence of his gang affiliation and alleged prior robbery, the jury was not properly instructed on these issues. Bradford contends that, in line with our decision in Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001), the district court erred in failing to give the jury a proper instruction concerning the use of the prior bad acts evidence. We disagree.

We review limiting instructions regarding prior bad act evidence for error under NRS 178.598. Tavares, 117 Nev. at 731-2, 30 P.3d at 1132. NRS 178.598 provides that “[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.” Id. at 732, 30 P.3d at 1132. Further, this court will not disturb a decision of a district court not to give a limiting instruction in such cases unless the error is shown to have “‘had substantial and injurious effect or influence in

determining the jury's verdict.” Id. (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

The district court gave the jury an instruction concerning the use of evidence of prior uncharged bad acts. Jury instruction number 28 stated

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of uncharged prior bad acts is admissible as long as the evidence is introduced for a limited purpose other than to show the defendant's bad character. Id. at 730, 30 P.3d at 1131. Further, NRS 48.045(2) sets forth a non-exhaustive list of purposes for which uncharged prior bad act evidence is admissible, including “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

We conclude that the district court did not err because the jury instruction given concerning the use of prior bad acts evidence was sufficient to protect Bradford's substantial rights. The instruction given to the jury by the district court was an accurate and fair statement of the law concerning the use of prior bad act evidence under NRS 48.045(2). Additionally, Bradford has failed to show how the given jury instruction had an injurious effect or influence on the jury's verdict. As such, we conclude that Bradford's convictions should not be reversed on this issue.

Jury instruction concerning the deadly-weapon enhancement

Bradford argues that the district court abused its discretion in failing to properly instruct the jury with regard to a deadly-weapon

enhancement for an unarmed offender. Bradford contends that, had a proper instruction that explained the law for deadly-weapon enhancement for an unarmed accomplice been given, there was insufficient evidence presented to sustain an enhancement conviction.

We conclude that, because Bradford failed to object to this issue at trial, he must show that the district court committed plain error in instructing the jury on the deadly-weapon enhancement. We further conclude that the district court did not commit plain error as it properly instructed the jury on the deadly-weapon enhancement and Bradford has failed to show that the instruction had a prejudicial effect on the jury's verdict. Specifically, Bradford has failed to show that there was insufficient evidence presented to prove a weapons enhancement was not warranted. As such, we conclude that Bradford's convictions should not be reversed on this issue.

Jury instruction regarding adoptive admissions

Bradford argues that the district court committed plain error in the instruction given to the jury regarding adoptive admissions. Bradford contends that, absent a proper instruction on the issue of adoptive admissions, the statements of others used to establish attempted robbery and the plan to commit this crime became inadmissible hearsay. We disagree.

The jury instruction given by the district court regarding adoptive admissions, instruction 33, stated

If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and were of such a nature that, in ordinary experience, dissent would have been expected if the communications were incorrect, or if he makes an evasive or equivocal reply, both the accusatory

statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.

NRS 51.035(3)(b) states that a statement is not hearsay if that statement is offered against a party and that statement is “[a] statement of which he has manifested his adoption or belief in its truth.” In Maginnis v. State, 93 Nev. 173, 175, 561 P.2d 922, 923 (1977) (quotation omitted), we stated that:

If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of the silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.

Further, in Harrison v. State, 96 Nev. 347, 349, 608 P.2d 1107, 1108 (1980), we held that, under NRS 51.035(3)(b), “[i]f an incriminating statement is heard and understood by an accused, and his response justifies an inference that he agreed or adopted the admission, then evidence of the statement is admissible at trial.”

We conclude that the district court did not commit plain error in instructing the jury on adoptive admissions. The instruction given to the jury by the district court is a correct statement of the current law under NRS 51.035(3)(b) and the caselaw stated above. In fact, the given instruction is almost an exact restatement of our holding in Maginnis. As such, we conclude that Bradford’s convictions should not be reversed on this issue.

Presence at all critical stages

Bradford argues that he was denied his constitutional right to be present at all proceedings by being excluded from the in-chambers conferences in which the decisions on whether the district court would allow evidence of gang affiliation and another alleged robbery were made. We disagree.

“The rights to a public trial and to due process generally include the right of defendants and their counsel to be present at all stages of trial.” Miller v. Stagner, 757 F.2d 988, 995 (9th Cir. 1985). However, “[v]iolation of a defendant's right to be present does not require reversal if in the particular case the defendant's absence was harmless beyond a reasonable doubt.” Miller at 995. The Confrontation Clause of the Sixth Amendment is not provoked in this situation unless the proceeding involves the presentation of evidence. United States v. Gagnon, 470 U.S. 522, 526-7 (1985).

The right to be present is subject to harmless-error analysis. Rushen v. Spain, 464 U.S. 114, 117 n.2 (1983). The defendant must show that he was prejudiced by his absence from the specific proceeding. Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996). Further, the proper inquiry into whether a defendant was deprived of his constitutional rights is “whether there has been any interference with the defendant's opportunity for effective cross-examination.” Kentucky v. Stincer, 482 U.S. 730, 744 n.17 (1987).

We conclude that Bradford's constitutional rights were not violated by his not being personally present during the in-chambers conferences at issue here. Bradford's counsel was present at these conferences, so Bradford would have had the opportunity to know what had taken place during the in-chambers conferences through his counsel

before cross-examination began. In regards to Bradford's argument that his rights were violated by not personally being present at these conferences, Bradford has failed to show that his opportunity for an effective cross-examination was hurt by him not being present at these proceedings. As such, we conclude that Bradford's convictions should not be reversed on this issue.

Sufficiency of the evidence

Bradford argues that there was insufficient evidence adduced at trial to support the jury's verdicts of guilty for the charged offenses of attempt robbery and felony murder. We disagree.

We will not reverse a jury's verdict on appeal if that verdict is supported by sufficient evidence. Moore v. State, 122 Nev. 27, 35, 126 P.3d 508, 513 (2006). In reviewing a claim of insufficient evidence, "[t]he relevant inquiry is "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."” Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979))).

We conclude that there was sufficient evidence presented to the jury to support Bradford's convictions of attempt robbery and felony murder. Specifically, testimony was presented that Bradford and the two other men involved all simultaneously beat Zambrano-Lopez and, therefore, there was evidence presented that a rational trier of fact could believe was an attempt to rob Zambrano-Lopez as all three men worked together. In addition to this testimony, Bradford admitted to knowing that one of the other men involved usually carried a gun and that the other man had been carrying a gun on the day of the incident, which gave

the jury enough evidence to support a conviction on the felony-murder charge. As such, a rational trier of fact could have reasoned from the evidence presented that all the elements of the crimes charged were proved beyond a reasonable doubt. Accordingly, we conclude that Bradford's convictions should not be reversed on this issue.

Cumulative error

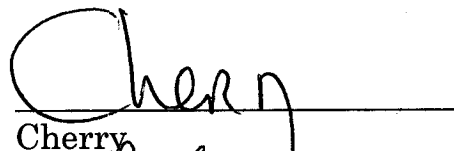
Bradford argues that even if an error by the district court by itself is not enough to warrant reversal of his convictions, the cumulative effect of those errors warrants reversal of his convictions.

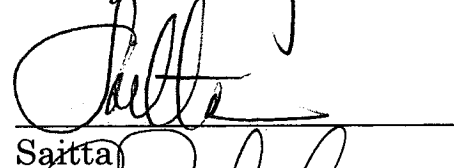
Cumulative error results when an individual error, standing alone, is not enough to reverse but the cumulative effect prevents the defendant from receiving a fair trial. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

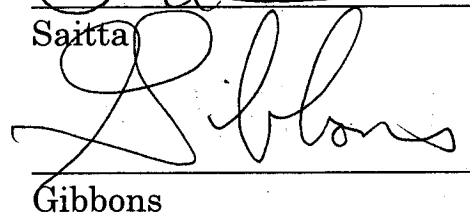
As we conclude that the district court did not commit error on any issue presented by Bradford, the cumulative error doctrine is inapplicable. As such, we conclude that Bradford's convictions should not be reversed on this issue.

In light of the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED.

 _____ J.
Cherry

 _____ J.
Saitta

 _____ J.
Gibbons

cc: Hon. Michelle Leavitt, District Judge
Susan D. Burke
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk