

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRENCE KARYIAN BOWSER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50851

FILED

FEB 26 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit murder, first-degree murder with the use of a deadly weapon, conspiracy to discharge a firearm at or into a structure or vehicle, discharging a firearm at or into a structure or vehicle, conspiracy to discharge a firearm out of a motor vehicle, and discharge of a firearm out of a motor vehicle. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellant Terrence Bowser and Jamar Green were involved in a road altercation with John McCoy in North Las Vegas. While Bowser was driving, Green fired his gun at McCoy's car and those gunshots ultimately led to McCoy's death. Bowser was sentenced by a jury to a term of life in prison with the possibility of parole after 40 years.¹

On appeal, Bowser contends that the district court abused its discretion in admitting his statements to the police when he had previously invoked his Miranda rights and that the district court violated his federal and state constitutional rights by allowing the bailiff to

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

perform a demonstration for the jury that generated new evidence outside his presence and without his knowledge and consent.² We conclude that the bailiff's demonstration violated Bowser's constitutional rights and we reverse Bowser's conviction and remand to the district court.

Bowser's admitted statements

Bowser contends that the district court erred in determining he had not unequivocally invoked his right to counsel and thus, admitted statements made by Bowser to the police during an interrogation. Bowser argues that he unequivocally invoked his right to counsel when he stated to the police at the time of his arrest that "[y]ou guys got me. I'm going to make you work for it. I'll see what my attorney can do for me." We disagree.

²On appeal, Bowser also raises the following issues: (1) the state committed multiple acts of prosecutorial misconduct, (2) the district court abused its discretion in denying his motion to dismiss, (3) the district court abused its discretion in providing misleading and prejudicial jury instructions, (4) the district court erred in denying defense challenges for cause, (5) the evidence introduced at trial failed to prove the crimes charged beyond a reasonable doubt, (6) the district court abused its discretion in admitting irrelevant and prejudicial evidence, (7) the district court violated his federal and state constitutional rights by refusing to strike the notice of intent to seek the death penalty, (8) the district court's rulings during the penalty phase violated his federal and state constitutional rights, (9) the sentence imposed amounts to cruel and unusual punishment, and (10) cumulative error warrants reversal of his conviction. We conclude that these arguments are without merit and require no further discussion.

Standard of review

“A district court's determination of whether a defendant requested counsel prior to questioning will not be disturbed on appeal if supported by substantial evidence.” Harte v. State, 116 Nev. 1054, 1065, 13 P.3d 420, 427-28 (2000). “Substantial evidence is that which a reasonable mind might consider adequate to support a conclusion.” Steese v. State, 114 Nev. 479, 488, 960 P.2d 321, 327 (1998).

Bowser did not unequivocally invoke his right to counsel

In Edwards v. Arizona, 451 U.S. 477, 484-85 (1981), the United States Supreme Court held that in order to protect the Fifth Amendment right to counsel recognized in Miranda, that once an accused has expressed a desire to deal with police only through counsel, he is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication with police. Based on this holding, we have held that “a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel’ is not sufficient. The Court explained that the Edwards rule is designed to ensure that police will not badger a defendant into waiving his previously asserted Miranda rights.” Harte at 1066, 13 P.3d at 428 (quoting Davis v. United States, 512 U.S. 452 (1994)).

“However, requiring cessation of an interview when the questioning officers do not reasonably know whether the suspect wants an attorney, ‘would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity.” Id. (quoting Michigan v. Mosley, 423 U.S. 96, 102 (1975)). “The Court recognized that when a suspect makes an ambiguous or equivocal statement ‘it will often

be good police practice for the interviewing officers' to ask clarifying questions." Id. at 1067, 13 P.3d at 428-29 (quoting Davis, 512 U.S. at 461). "The Court declined, however, to adopt a rule requiring officers to ask clarifying questions, instead holding that 'after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.'" Id. at 1067, 13 P.3d at 429 (quoting Davis, 512 U.S. at 461).

We conclude that Bowser failed to unequivocally invoke his right to counsel. Bowser's statement to the arresting officers that "[y]ou guys got me. I'm going to make you work for it. I'll see what my attorney can do for me," was not an unambiguous invocation of his right to counsel. We conclude that Bowser's statements were such that a reasonable officer would not have known if Bowser was actually seeking to invoke his right to counsel. Therefore, we further conclude that the district court did not err in determining that Bowser's right to counsel under the Fifth Amendment was not violated and in admitting Bowser's statements to the police that resulted from his interrogation.

The bailiff's shotgun demonstration for the jury

Bowser argues that the district court violated his federal and state constitutional rights by allowing the bailiff to perform a demonstration for the jury that generated new evidence outside his presence and without his knowledge and consent. We agree.

Standard of review

Where "misconduct at trial involves allegations that the jury was exposed to extrinsic evidence in violation of the Confrontation Clause, de novo review of a trial court's conclusions regarding the prejudicial effect of any misconduct is appropriate." Meyer v. State, 119 Nev. 554, 561-562, 80 P.3d 447, 453 (2003).

The bailiff's demonstration was a violation of Bowser's constitutional rights

During Bowser's trial, a state firearm expert explained the operation of shotguns to the jury. Subsequently, the jury asked for a demonstration of the shotgun during deliberations. The bailiff, without informing the court or counsel for either party, performed a demonstration with the shotgun for the jurors in the jury room. At the juror's request the bailiff's shotgun demonstration included pumping the gun and firing it as fast as he could and repeating the demonstration while seated. After the demonstration in the jury room, the bailiff provided a similar presentation in the courtroom. Bowser objected to the demonstration in the jury room as an improper supplementing of the evidence by the bailiff, however, the district court denied Bowser's motion for mistrial.

We have instructed district courts on the issue of when it is appropriate to grant a new trial based on juror misconduct and held that

Before a defendant can prevail on a motion for a new trial based on juror misconduct, the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial. Once such a showing is made, the trial court should grant the motion. Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict.

Meyer, 119 Nev. at 563-64, 80 P.3d at 455.

Nevertheless, "[n]ot every incidence of juror misconduct requires the granting of a motion for a new trial." Id. at 562, 80 P.3d at 453 (quoting Barker v. State, 95 Nev. 309, 313, 594 P.2d 719, 721 (1979)). "Each case turns on its own facts, and on the degree and pervasiveness of the prejudicial influence possibly resulting." Id. at 562, 80 P.3d at 453-54.

(quoting U.S. v. Paneras, 222 F.3d 406, 411 (7th Cir. 2000)). “[S]ome types of extrinsic influences are, by their very nature, more likely to be prejudicial.” Id. at 565, 80 P.3d at 455. “However, other types of extrinsic material . . . do not raise a presumption of prejudice.” Id. at 565, 80 P.3d at 456. Therefore, “the extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict.” Id.

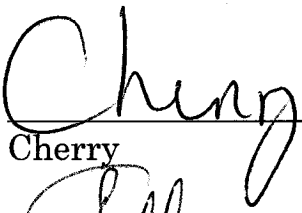
“To determine whether there is a reasonable probability that juror misconduct affected a verdict, a court may consider a number of factors” such as: (1) how the material was introduced to the jury, (2) the length of time it was discussed by the jury, (3) the timing of its introduction, (4) whether the information was ambiguous, vague, or specific in content, (5) whether it was cumulative of other evidence adduced at trial, (6) whether it involved a material or collateral issue; (7) whether it involved inadmissible evidence, and (8) the extrinsic influence in light of the trial as a whole and the weight of the evidence. Id. at 566, 80 P.3d at 456. “These factors are instructive only and not dispositive.” Id. In sum, “the district court must determine whether the average, hypothetical juror would be influenced by the juror misconduct.” Id.


We conclude that the shotgun demonstration given by the bailiff to the jurors without the court’s or counsel’s knowledge was a violation of Bowser’s constitutional rights. Although the bailiff performed a similar presentation in the courtroom after the misconduct occurred, the bailiff’s presentation in the jury room was a form of juror misconduct. Furthermore, Bowser has adequately shown that he was prejudiced by the bailiff’s actions because the average, hypothetical juror would be influenced by the misconduct here. Specifically, Bowser was prejudiced

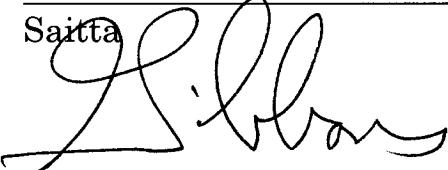
because the bailiff gave the demonstration to the jury in the deliberation without the knowledge of the court or the parties' attorneys. Thus, Bowser has shown that he was prejudiced as the demonstration certainly had an effect on the verdict in this case. Therefore, we conclude that the district court erred in denying Bowser's motion for a mistrial based on the bailiff's shotgun demonstration to the jury.

In light of the foregoing discussion, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 8, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk