

IN THE SUPREME COURT OF THE STATE OF NEVADA

DEANGELO MARON MALONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51301

FILED

MAR 04 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant DeAngelo Malone to two consecutive terms of life in prison without the possibility of parole and two consecutive terms of 40 to 180 months in prison with 1,137 days' credit for time served. In this appeal from the judgment of conviction, Malone raises three issues.

First, Malone argues that the State presented insufficient evidence to support the jury's verdict. We disagree. Our review of the record reveals sufficient evidence to support the jury's verdict. In reviewing the sufficiency of the evidence, we must determine "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." McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Here, two witnesses testified that Malone approached the victim, demanded his wallet or tried to grab his pocket, and shot at the victim

multiple times when the victim refused to hand over his wallet or pushed Malone's hand away from his pocket. One of the witnesses heard Malone comment after shooting the victim about the victim's refusal to hand over his wallet and saw Malone reach into the victim's back pocket after the victim was on the ground. The victim's wallet was missing when he was found by police. One of the witnesses testified that after she, Malone, and two other males present during the shooting left the area, Malone gave her \$200 from a brown wallet to "keep her mouth closed." The victim died of three gunshot wounds—one each to his chest, abdomen, and hip. Testing of the jacket worn by Malone revealed gunshot residue. Based on this evidence, considered in the light most favorable to the State, a rational trier of fact could have found beyond a reasonable doubt that Malone was guilty of first-degree murder based on a willful, premeditated, and deliberate killing or felony murder and of robbery. See id. at 56, 825 P.2d at 573 ("[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."); Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) ("[C]ircumstantial evidence alone may support a conviction.").

Second, Malone argues that the district court abused its discretion in failing to order a mistrial after a witness inadvertently stated that an officer told him that one of the defendants—apparently referring to codefendant Jeremy Taylor—had confessed. Although Taylor objected to the testimony and moved for a mistrial, when the district court asked for Malone's position on the situation, his counsel responded, "No position." 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. In this case, we conclude that Malone has not demonstrated actual prejudice given the strength of the State’s case against Malone and that the reference to a confession was inadvertent, fleeting, and appeared to involve the codefendant rather than Malone. And we are not convinced that the curative instruction given by the court left the impression that Malone had confessed.

Third, Malone argues that the district court erred by allowing a forensic pathologist to testify regarding the autopsy based on a report that was not prepared by the witness. As with the second issue, Malone failed to preserve this issue for this court’s review. In particular, Malone failed to object when the State called Dr. Lary Simms to testify regarding the autopsy performed by Dr. Gary Telgenhoff, who was not available to testify at trial.¹ We therefore review the issue under the plain error standard. See Green, 119 Nev. at 545, 80 P.3d at 95.

¹We note, in particular, that when given an opportunity to object to autopsy photographs used during Dr. Simms’ testimony, Malone’s trial counsel responded, “No objection.” And we decline to address Malone’s claim that Dr. Simms’ testimony provided insufficient foundation to admit the autopsy photographs given his failure to raise any such objection
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In this case, we see no plain error in the admission of Dr. Simms' testimony for three reasons. First, to the extent that Malone complains that Dr. Simms was not included in the pretrial notice of expert witnesses, we conclude that Malone has not demonstrated plain error affecting his substantial rights given that Malone was aware that the autopsy evidence would be presented at trial and there is nothing in the record to suggest that he was unprepared for Dr. Simms' testimony. Second, to the extent that Malone challenges Dr. Simms' testimony because Dr. Simms lacked personal knowledge of the autopsy, we conclude that Malone's claim lacks merit because Dr. Simms testified as an expert witness to matters "within the scope of [his specialized] knowledge," NRS 50.275, based on facts or data "made known to him at or before the hearing," NRS 50.285(1), that are "of a type reasonably relied upon by experts in forming opinions or inferences" and therefore "need not be admissible in evidence," NRS 50.285(2). Finally, even assuming that the autopsy report was testimonial hearsay and therefore that Dr. Simms' testimony based on that report violated Malone's confrontation rights,² we

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below, which would have allowed the State an opportunity to cure any defect.

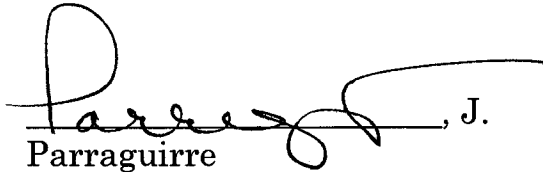
²We note that other courts are split on the issue of whether autopsy reports are testimonial under Crawford v. Washington, 541 U.S. 36 (2004). Compare U.S. v. De La Cruz, 514 F.3d 121, 133 (1st Cir. 2008) (concluding that autopsy reports fall within business records hearsay exception and that "business records are expressly excluded from the reach of Crawford"), and U.S. v. Feliz, 467 F.3d 227, 233-37 (2d Cir. 2006) (similar), with People v. Lonsby, 707 N.W.2d 610, 619-29 (Mich. Ct. App. 2005) (concluding that notes and report prepared by nontestifying crime

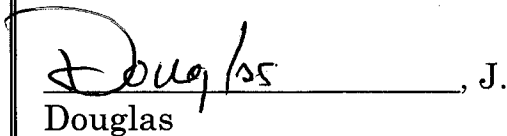
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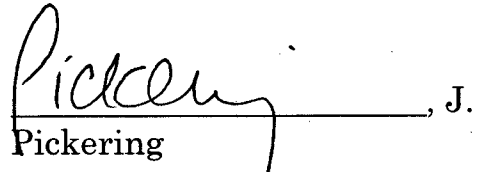
conclude that Malone's claim lacks merit because he has not demonstrated prejudice. In particular, Dr. Simms' testimony was not pivotal to the outcome of this case in that other witnesses testified that the victim had died and that his death appeared to be the result of multiple gunshot wounds and the facts concerning the cause and manner of death were uncontested. Also contributing to our conclusion is the defense's decision not to challenge the State's theory that Malone was the shooter.

Having considered Malone's claims and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


Parraguirre, J.


Douglas, J.


Pickering, J.

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lab serologist were testimonial hearsay and therefore admission of the notes through another serologist's testimony violated defendant's confrontation rights), and State v. Johnson, 756 N.W.2d 883, 889-92 (Minn. Ct. App. 2008) (similar but as to autopsy report), and People v. Rawlins, 884 N.E.2d 1019, 1033-35 (N.Y. 2008) (similar but as to fingerprint reports). We decline to reach the issue as doing so is unnecessary to a resolution of this appeal.

cc: Hon. Valorie Vega, District Judge
Law Office of Jeannie N. Hua, Inc.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk