

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT FITZGERALD SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51617

FILED

APR 22 2009

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, upon a jury verdict, of attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

A jury found appellant Robert Smith guilty of attempted murder with the use of a deadly weapon following an incident in which Smith beat victim Robyn Brooks with a hammer, causing significant trauma to Brooks' face and head. The district court sentenced Smith to two consecutive prison terms of 72 to 180 months. On appeal, Smith challenges the judgment of conviction on several grounds. For the following reasons, we conclude that each of Smith's arguments fails and we therefore affirm the district court's judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Failure to dismiss juror for cause

Smith argues that the district court's failure to remove a prospective juror for cause violated his right to a fair trial before an impartial jury. Specifically, Smith argues that he was compelled to "waste" a peremptory challenge to remove the prospective juror from the panel.

A district court has broad discretion to decide whether to remove a juror for cause. Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005). A juror should be removed for cause when the “prospective juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” Id. (internal quotation omitted).

During the voir dire, the prospective juror “flip-flopped” on whether her beliefs regarding domestic violence would impair her ability to impartially consider Smith’s case. After questioning by the district court, the juror ultimately concluded that she could fairly consider Smith’s case. Smith challenged the juror for cause, which the district court denied. We conclude that the district court abused its discretion by failing to excise the prospective juror for cause. See Weber, 121 Nev. at 580-81, 119 P.3d at 125 (“Detached language considered alone is not sufficient to establish that a juror can be fair when the juror’s declaration as a whole indicates that she could not state unequivocally that a preconception would not influence her verdict.”); see also Thompson v. State, 111 Nev. 439, 441-42, 894 P.2d 375, 376-77 (1995).

Nonetheless, “[t]he trial judge’s refusal to excuse [the challenged] juror did not deprive [Smith] of his constitutional right to a fair trial before an impartial jury.” Rivera v. Illinois, 556 U.S. ___, ___ (2009). See Weber, 121 Nev. at 581, 119 P.3d at 125-26; Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) (a defendant is not prejudiced by a “wasted” peremptory challenge unless the impaneled jury is not fair or impartial). With no showing of prejudice, Smith’s challenge to the district court’s refusal to remove the prospective juror for cause fails.

The State's nondisclosure of a rebuttal witness

Smith argues that the State had an obligation under NRS 174.234 to disclose potential witnesses to the defense, and that the State's failure to disclose a potential rebuttal witness—a "jailhouse snitch"—until after the State had presented most of its case-in-chief was prejudicial and warrants reversal.

"This court reviews a district court's decision whether to allow an unendorsed witness to testify for abuse of discretion." Mitchell v. State, 124 Nev. ___, ___, 192 P.3d 721, 729 (2008); see also Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 161 (2008)

NRS 174.234 requires the State and the defendant to disclose the identity of potential witnesses before trial. However, the statute does not explicitly address the State's obligation to disclose potential rebuttal witnesses. See NRS 174.234(1)(a)(2) and NRS 174.234(2) held unconstitutional by Grey, 124 Nev. ___, 178 P.3d 154. Although this court has held that notice of expert rebuttal witnesses is constitutionally required under NRS 174.234(2) (see Grey, 124 Nev. at ___, 178 P.3d at 161), the concerns underlying the nondisclosure of an expert rebuttal witness do not apply in the case of lay rebuttal witnesses. And, if necessary, a district court has the discretion to prohibit the rebuttal witness from testifying, or may enter an order that would adequately allow the opposing party the time and opportunity to prepare for cross-examination. See Grey, 124 Nev. at ___, 178 P.3d at 161.

Before calling its last case-in-chief witness, the State announced to the defense that if the defendant testified, the State would call a rebuttal witness who would testify as to the contents of a letter the witness wrote to the State. The district court considered the timeliness of the State's disclosure and determined that, so long as the evidence was not

introduced during the State's case-in-chief, it was proper rebuttal testimony. Therefore, we conclude that the district court did not abuse its discretion when it determined that the rebuttal witness would be permitted to testify.

Jury instructions

Smith raises two challenges to the jury instructions. First, Smith contends that the district court abused its discretion by failing to instruct the jury on his "heat of passion" defense to attempted murder. Second, Smith argues that the district court improperly instructed the jury on the issue of intent.

A district court has broad discretion to settle jury instructions. Brooks v. State, 124 ___, ___, 180 P.3d 657, 659 (2008). Normally, the failure to object to a jury instruction at trial precludes appellate review. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005). Nevertheless, if a jury instruction constitutes plain error affecting the defendant's substantial rights, this court may review the defendant's challenge. Id. Generally, a defendant "must demonstrate that the error was prejudicial in order to prove that it affected his substantial rights." Nelson v. State, 123 Nev. ___, ___, 170 P.3d 517, 524 (2007).

"Heat of passion" instruction

Smith contends that the district court abused its discretion by failing to instruct the jury on "heat of passion" as a defense to attempted murder. The district court refused to give the "heat of passion" instruction because Nevada law does not recognize attempted voluntary manslaughter. See Curry v. State, 106 Nev. 317, 319, 792 P.2d 396, 397 (1990). In Curry v. State, we determined that "[a]n attempt, by nature, is a failure to accomplish what one intended to do." 106 Nev. at 319, 792 P.2d at 397 (quoting Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 273

(1988)). On the other hand, “[o]ne cannot logically specifically intend to act pursuant to . . . truly irresistible passion.” Id.

In light of this court’s holding in Curry, we conclude that the district court did not abuse its discretion by denying Smith’s request for a “heat of passion” instruction for attempted murder.

Intent instruction

Smith also argues that the district court improperly instructed the jury to determine intent by considering the facts and circumstances underlying the “attempted killing.” Because Smith failed to object to the intent instruction, jury instruction number 13, at trial, we review the instruction for plain error. See Gaxiola, 121 Nev. at 648, 119 P.3d at 1232.

At trial, the district court instructed the jury that:

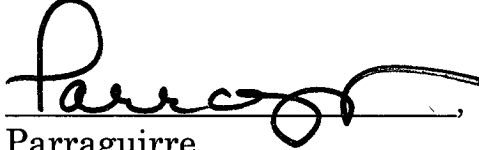
The intention with which an act is committed may be ascertained or deduced from the facts and circumstances of the attempted killing, such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act.

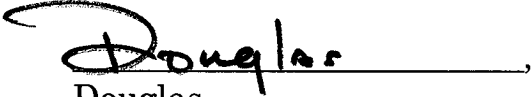
(Emphasis added.) We conclude that the district court’s use of the phrase “attempted killing” amounted to plain error because it erroneously informed the jury that, as a matter of law, the ultimate act in question constituted an attempted killing. The instruction thus reduced or eliminated the State’s burden of proof and the jury’s fact-finding function.

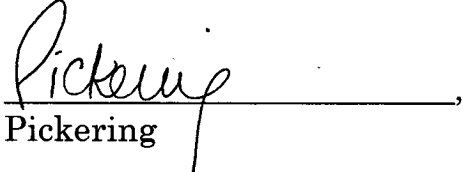
Nonetheless, we conclude that the error was not prejudicial in light of the overwhelming evidence of Smith’s guilt. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 484 (2008) (Gibbons, C.J., dissenting). Thus, the erroneous jury instruction does not warrant reversal on Smith’s conviction for attempted murder with a deadly weapon.

Having considered appellant's contentions and concluded that they are without merit,¹ we

ORDER the judgment of the district court AFFIRMED.


Parraguirre, J.


Douglas, J.


Pickering, J.

cc: Eighth Judicial District Court Dept. 7, 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

¹Smith also raises multiple challenges relating to the district court's denial of his motion to dismiss counsel, and the admission of hearsay evidence, undisclosed "expert" testimony, and inflammatory testimony. We conclude that each of these additional challenges fails. We further conclude that there was overwhelming evidence of Smith's guilt and cumulative error does not warrant reversal.