IN THE SUPREME COURT OF THE STATE OF NEVADA

RAVEN NAVAJO A/K/A MICHAEL SCOTT HARMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51636

FILED

SEP 28 2009

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Appellant Raven Navajo and the victim, Brenda Schmalfeld, were acquaintances who patronized Zodie's bar in Las Vegas. After drinking for several hours and becoming extremely intoxicated, Navajo agreed to drive Schmalfeld to Navajo's home where the two planned to watch a movie. Once there, a disagreement ensued and Navajo killed Schmalfeld. Although not admitted at trial, Navajo's statement to the police indicated she believed Schmalfeld stole money from her purse while she was in the bathroom.

Navajo's appeal raises two primary issues. First, she argues that the district court erred by refusing to provide jury instructions on the lesser included offense of voluntary manslaughter and the defenses of self-defense and accident. Second, she claims that the district court's refusal to admit her police statement denied her a fair trial and the right to present a defense. We affirm, concluding that admitted evidence did not

support the proposed instructions and the police statement was inadmissible hearsay.[1]

Jury instructions

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (citing Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). "'An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.'" Id. (quoting Jackson, 117 Nev. at 120, 17 P.3d at 1000).

"If a defense theory of the case is supported by some evidence which, if believed, would support a corresponding jury verdict, failure to instruct on that theory totally removes it from the jury's consideration and constitutes reversible error." Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). Therefore, "[a] defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it." Id.; see also Honeycutt v. State, 118 Nev. 660, 669, 56 P.3d 362, 368

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[1]Navajo also raises several other arguments on appeal: the State committed prosecutorial misconduct warranting reversal, the district court constrained her ability to conduct voir dire, the district court erred in denying her challenges for cause, there was insufficient evidence to sustain a murder conviction, the district court erroneously denied a directed verdict on first-degree murder, the district court erroneously allowed a State's witness to offer a legal conclusion, and cumulative error warrants reversal. We have considered these arguments and conclude they lack merit.

(2002), overruled in part on other grounds by Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005).

Voluntary manslaughter

Voluntary manslaughter occurs if there is "a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing." NRS 200.050 (emphasis added).

The jurors heard evidence that Navajo and Schmalfeld were intoxicated and that they were talking and getting along just prior to the killing. They also heard that the two women appeared to be discussing a problem Schmalfeld was having with her boyfriend. Admitted evidence further indicated that Navajo had wounds on her body consistent with being in a fight. The testimony regarding the wounds implied that Navajo was the primary or initial aggressor. Since the State did not offer Navajo's police statement and Navajo did not testify, the jury did not hear that Navajo believed Schmalfeld stole her money. Nonetheless, Navajo asserts that the only reasonable conclusion, based on the admitted evidence, is that something suddenly provoked her. However, since the evidence of record provides no indication of what provoked her, Navajo expects the court to base a voluntary manslaughter instruction on speculation there was a provoking injury.

We conclude that this is an insufficient basis for a voluntary manslaughter instruction. Rather, the admitted evidence must show a "serious and highly provoking injury." NRS 200.050. Here, the admitted evidence showed no provocation. Without at least some evidence as to the nature of the claimed provoking injury, the jury is unable to evaluate

whether the injury would excite irresistible passion in a reasonable person.

Moreover, contrary to Navajo's assertion, the district court did not condition a voluntary manslaughter instruction on her testifying. The district court merely noted that Navajo's testimony could provide the evidence needed to support the instruction. This situation is unlike McCraney v. State, 110 Nev. 250, 255, 871 P.2d 922, 925 (1994), where the State argued that, in addition to other supporting evidence, the defendant had to testify to receive an instruction. Thus, the district court did not violate Navajo's Fifth Amendment right against self-incrimination.

Accordingly, we conclude that the district court did not err in refusing the voluntary manslaughter instruction.

Self-defense

Navajo argues that testimony about visible scratches and bruises on her body is sufficient to warrant an instruction on self-defense. However, the fact that she and Schmalfeld fought does not show that Schmalfeld attacked her or that she believed Schmalfeld would attack her. The injuries could have resulted from Schmalfeld defending herself, from Navajo attacking Schmalfeld, or from other causes altogether. The only evidence on the circumstances of the struggle suggested that Navajo acted as the primary or initial aggressor. Without more, self-defense is not an available defense. See Mirin v. State, 93 Nev. 57, 59, 560 P.2d 145, 146 (1977); Williams v. State, 91 Nev. 533, 535, 539 P.2d 461, 462 (1975). Therefore, we conclude the district court did not abuse its discretion in denying the instruction.

Accident

Navajo argues that detective testimony about blood transfer on the garage wall and on Navajo's car supports an accident instruction.

She further asserts that the State did not disprove accidental death. Despite these assertions, the testimony in question merely creates the possibility that Schmalfeld accidentally fell against the wall or the car, transferring her blood. The testimony did not indicate that the blows causing Schmalfeld's death may have been accidentally delivered. Rather, detectives testified that they found large amounts of blood in the garage consistent with a murder scene. To reach the result Navajo urges, speculation beyond the admitted evidence is necessary. Therefore, we also conclude the district court did not abuse its discretion in refusing the accident defense instruction.

Navajo's police statement

We will not overturn a district court's decision to admit or exclude evidence absent an abuse of discretion. Johnson v. State, 118 Nev. 787, 795, 59 P.3d 450, 456 (2002).

Navajo's police statement was hearsay, NRS 51.035, unless offered by the State as the admission of a party opponent, which the State declined to do. NRS 51.035(3)(a). Navajo does not identify a hearsay exception that would have given her a basis to introduce her police statement. Nonetheless, she argues she had a constitutional right to have the jury hear her entire statement to support her defense theories.

Detectives revealed that Navajo helped them locate the dumpster where she left Schmalfeld's body and that they found Schmalfeld's blood on that dumpster. However, the detectives discovered most of the evidence, including Schmalfeld's blood in Navajo's garage and on her clothes and car, independent of the statement. Nonetheless, Navajo contends that since the State used the fruits of her statement, she should be able to introduce the statement into evidence. This argument fails, because the rule of completeness, which Navajo invokes, "does not

compel admission of otherwise inadmissible hearsay evidence." United States v. Collicott, 92 F.3d 973, 983 (9th Cir. 1996).

Navajo cites DePetris v. Kuykendall, 239 F.3d 1057 (9th Cir. 2001), and Chia v. Cambra, 360 F.3d 997 (9th Cir. 2004), to argue that she had a due process right to introduce her prior statement to the police, regardless of its hearsay status. Neither case applies. Both DePetris and Chia involved the admission of an unavailable third-party's out-of-court statements, not the prior exculpatory statement of a non-testifying defendant. DePetris, 239 F.3d at 1063-64; Chia, 360 F.3d at 1000-1002. The excluded statement in DePetris was offered, not for the truth of what it asserted, but for the impact it had on the defendant's state of mind, which was critical to the defendant's imperfect self-defense theory; the declarant was dead and the statement's exclusion crippled the defense. 239 F.3d at 1063-64.

Chia involved statements against penal interest by a witness as he was wheeled into surgery following a shooting and, thereafter, to the police. Chia, 360 F.3d 1000-1002. The statements in Chia completely exonerated the defendant, who was charged with conspiracy, and bore strong assurances of trustworthiness, in that they were wholly against the declarant's penal interest and, in one instance, made under fear of imminent death. Id. at 1004-1006. Since the declarant later invoked his Fifth Amendment rights, the defendant had no other way to prove their contents unless the statements were admitted. See id. at 1002.

In this case, by contrast, Navajo wanted to have her self-serving prior statement to the police admitted without subjecting herself to cross examination. A party's self-exculpatory statements are inadmissible because the law deems them untrustworthy, especially

where, as here, they were made after a motive to fabricate has arisen. See NRS 51.035; Williamson v. United States, 512 U.S. 594, 599 (1994) (noting that "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts [which are hearsay]"). "If the district court were to have ruled in [her] favor, [Navajo] would have been able to place [her] exculpatory statements 'before the jury without subjecting [herself] to cross-examination, precisely what the hearsay rule forbids.'" United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000) (quoting United States v. Fernandez, 839 F.2d 639, 640 (9th Cir.1988).

"Although a criminal defendant has a due process right to 'introduce into evidence any testimony or documentation which would tend to prove the defendant's theory of the case,' that right is subject to the rules of evidence." Rose v. State, 123 Nev. 194, 205 n.18, 163 P.3d 408, 416 n.18 (2007) (quoting Vipperman v. State, 96 Nev. 592, 596, 614 P.2d 532, 534 (1980)). Navajo's constitutional claim does not override the rules of evidence. The district court did not abuse its discretion in excluding Navajo's police statement.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.

Douglas, J.

Pickering, J.

cc: Eighth Judicial District Court Dept. 8, 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