IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDRICK MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51646

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon, burglary while in possession of a firearm, attempted robbery with the use of a deadly weapon, and conspiracy to commit robbery. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Fredrick Martinez and his co-defendant, Francisco Escamilla, conspired to rob Allon Iny, a supplier to Escamilla's shoe store. During the robbery, Martinez shot and killed Iny. Martinez appeals his conviction, arguing that the district court violated his Fifth Amendment rights by admitting his statement to the police and by refusing to sever his trial from Escamilla's.[1]

Miranda rights

Under the Fifth Amendment, "'a suspect may not be subjected to an interrogation in official "custody" unless that person has previously been advised of, and has knowingly and intelligently waived [his or her

[1]We have also considered Martinez's arguments that the district court erred by prohibiting expert testimony on eyewitness identifications and that there was insufficient evidence to support his conviction. We conclude these arguments lack merit.

Miranda rights].'" Mitchell v. State, 114 Nev. 1417, 1423, 971 P.2d 813, 817-18 (1998) (quoting Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 251 (1996), overruled on other grounds by Rosky v. State, 121 Nev. 184, 191 & n.10, 111 P.3d 690, 694 & n.10 (2005)), overruled on other grounds by Rosky, 121 Nev. at 191 & n.10, 111 P.3d at 694 & n.10, and Sharma v. State, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002). "Whether a defendant is constitutionally entitled to Miranda warnings is a question of law reviewed de novo." Mitchell, 114 Nev. at 1423, 971 P.2d at 817 (citing U.S. v. Turner, 28 F.3d 981, 983 (9th Cir. 1994)). Additionally, a trial court's custody and voluntariness determinations present mixed questions of law and fact that we review de novo. Rosky, 121 Nev. at 190, 111 P.3d at 694. To determine whether a defendant who has not been arrested is in custody we look to whether "a reasonable person in the suspect's position would feel 'at liberty to terminate the interrogation and leave.'" Id. at 191, 111 P.3d at 695 (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)). "The court will consider the totality of the circumstances, including: (1) the site of interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning." Mitchell, 114 Nev. at 1423, 971 P.2d at 818 (citing Alward, 112 Nev. at 154-55, 912 P.2d at 252).

During their investigation, the police interviewed Martinez twice at a juvenile detention center where he was in custody for an unrelated robbery. Before the first interview, the police believed Martinez had information about the crime, but they did not suspect his involvement. The police read Martinez his Miranda rights before the interview. Miranda v. Arizona, 384 U.S. 436 (1966). Martinez admitted that Escamilla solicited him to commit the robbery and that he intended to go

through with it. However, he denied committing the murder and claimed to have abandoned the robbery plot after Iny did not show up when originally expected.

After revealing this information, Martinez became a suspect. The police added Martinez's photo to their lineup and an eyewitness positively identified him as the shooter. The police then conducted a second interview with Martinez. This time, they did not read him his Miranda rights, but instead only asked him if he remembered the rights they previously read.

Martinez moved to suppress his statements to the police, and the district court conducted an evidentiary hearing pursuant to Jackson v. Denno, 378 U.S. 368, 376-77 (1964). The district court concluded that Miranda warnings were not required under Mitchell. In Mitchell, we held that police were not required to "Mirandize" Mitchell when they interviewed him for two hours in an unlocked room where he was incarcerated for a separate offense. 114 Nev. 1417, 1424, 971 P.2d 813, 818. The detectives in Mitchell also testified that they advised Mitchell that although he was a suspect, he was free to leave at any time. Id.

The circumstances here are somewhat similar to Mitchell. As in Mitchell, Martinez was incarcerated for a separate offense. The detectives also claim that the interview room was unlocked and Martinez was free to leave at any time. However, unlike Mitchell, this case involved two interviews. By the second interview, Martinez had become a suspect and the investigation had shifted focus to him. Given the information Martinez had provided to the police in the first interview, we conclude that a person in his situation would reasonably believe he was not free to leave the interview room. Therefore, Martinez was in police custody at the

time of the second interview and the police were obligated to read him his Miranda rights.

Since the police failed to "Mirandize" Martinez before the second interview, we conclude that the district court erred in admitting Martinez's second police statement. Nonetheless, the court's error was harmless because Martinez's second interview only produced evidence cumulative to that which had already been obtained through Martinez's first statement or other witnesses. See Davies v. State, 95 Nev. 553, 558, 598 P.2d 636, 640 (1979) (citing Brown v. United States, 411 U.S. 223, 230-32 (1973)) (holding that where independent evidence of guilt is truly overwhelming and improperly admitted evidence is cumulative, the resulting conviction will not be reversed).

Here, there was significant independent evidence against Martinez. An eyewitness identified Martinez as the shooter from a photo lineup. The police had not previously publicized Martinez's photo. Another witness, whom Escamilla simultaneously solicited to commit the crime, corroborated Martinez's police statements. An acquaintance of Martinez saw him before the shooting wearing all black and then saw him again after the shooting wearing different clothing. Martinez's apartment manager saw Martinez running through the apartment complex just after the shooting. Therefore, based on the weight of evidence against Martinez and the merely cumulative effect of his second police statement, we conclude that the district court's error in admitting the second statement was harmless.

Refusal to sever the joint trial

Martinez next claims error in the district court's refusal to sever his trial from Escamilla's. NRS 174.165(1) provides that the trial judge may sever a joint trial "[i]f it appears that a defendant or the State

of Nevada is prejudiced by a joinder." The decision to sever is vested in the sound discretion of the trial judge and will not be reversed on appeal unless the appellant "carr[ies] the heavy burden" of showing that the district court abused its discretion. Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990). "[M]isjoinder requires reversal only if it has a substantial and injurious effect on the verdict." Marshall v. State, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002) (citing Middleton v. State, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998)).

"[D]efenses must be antagonistic to the point that they are 'mutually exclusive' before they are to be considered prejudicial." Rowland v. State, 118 Nev. 31, 45, 39 P.3d 114, 122 (2002) (quoting Amen, 106 Nev. at 756, 801 P.2d at 1359). The Ninth Circuit Court of Appeals has stated that defenses become "mutually antagonistic" when "the core of the codefendant's defense is so irreconcilable with the core of [the defendant's] own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant." United States v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996).

Martinez asserts that he and Escamilla presented antagonistic defenses. He also contends that admission of portions of his redacted police statements unconstitutionally diminished his ability to present his defense theory that Escamilla recruited someone else to commit the crime after Martinez abandoned the plot.

Here, Martinez and Escamilla both defended on the theory that there was insufficient evidence presented and that reward money motivated State witnesses to lie. We conclude that these defenses are not antagonistic to the point of being mutually exclusive.

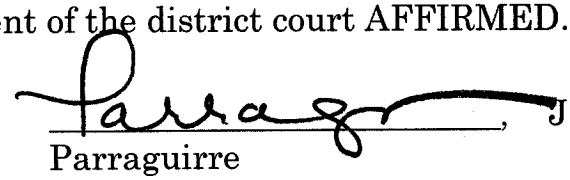
Martinez further relies on Chartier v. State. 124 Nev. ___, 191 P.3d 1182 (2008). In Chartier, we held that the cumulative effect of joinder warranted reversal because Chartier and his co-defendant, Wilcox, presented antagonistic defenses and joinder impaired Chartier's ability to present the full theory of his defense. Id. at ___, 191 P.3d at 1187. Specifically, joinder prevented Chartier from introducing wiretapped conversations between himself and Wilcox in which Wilcox made inculpatory statements. Id.

We distinguish Chartier from this case. While joinder prevented Chartier from admitting an actual recorded conversation with his co-defendant, here joinder merely prevented introduction of Martinez's own self-serving statements that his co-defendant recruited someone else to commit the crime. Id. Moreover, redacting Martinez's statement did not prevent him from introducing evidence and argument that someone else murdered Iny. It only prevented Martinez from asserting that Escamilla recruited the killer. The idea that the redaction would preclude the jury from understanding Martinez's defense is dubious. Throughout trial, Martinez's counsel claimed that someone else committed the crime after Martinez abandoned the plan. Another witness testified that Escamilla solicited him and Martinez to rob and kill Iny. Based on that testimony, the jury could fill in the blanks in Martinez's redacted statement.

Therefore, the cumulative effect of joinder does not warrant reversal because the co-defendants did not present mutually exclusive

antagonistic defenses and joinder did not prevent Martinez from presenting his full defense theory. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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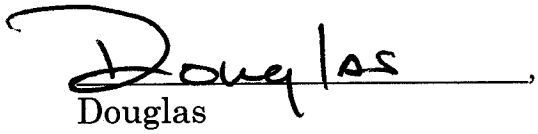

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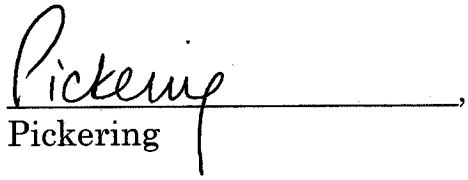

_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 7, District Judge
Dan Winder
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk