

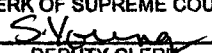
IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO GABRIEL ESCAMILLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51725

FILED

MAY 12 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with 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. The district court sentenced appellant Francisco Gabriel Escamilla to prison terms of 240 months to life for murder, plus an equal and consecutive term for the deadly weapon enhancement, 72 to 180 months for burglary, 48 to 120 months for attempted robbery, and 28 to 72 months for the conspiracy conviction. The sentences for first-degree murder with the use of a deadly weapon and conspiracy to commit robbery were imposed to run consecutively to each other. The sentences imposed for the remaining counts were imposed to run concurrently.

Escamilla appeals his judgment of conviction on two grounds—the district court erred by denying his motion to sever and his motion for a new trial.

Respecting the motion to sever his trial from his codefendant, Frederick Martinez, Escamilla argues that the district court erred by denying his motion for five related reasons: (1) Escamilla and Martinez

presented antagonistic defenses, (2) misjoinder diminished Escamilla's ability to present a defense, (3) prejudicial "spillover" resulted from the joint trial, (4) the jury could not have been expected to compartmentalize the evidence as it related to the separate defendants in this case, and (5) Martinez's inculpatory statement was admitted in violation of Bruton v. United States, 391 U.S. 123 (1968), because Escamilla was not able to cross-examine Martinez regarding his statement.

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 "carries 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). "Some form of prejudice always exists in joint trials and such occurrences are subject to harmless error review." Ewish v. State, 110 Nev. 221, 234, 871 P.2d 306, 315 (1994). Accordingly, "[t]o establish that joinder was prejudicial requires more than simply showing that severance made acquittal more likely; misjoinder 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)).

First, Escamilla contends that severance was required because he and Martinez asserted antagonistic defenses. Escamilla purports that he defended on the basis that he was not involved in the crimes while Martinez may or may not have committed the murders of his own volition, while Martinez defended on the basis that Escamilla was the mastermind of the attempted robbery, but that Martinez never completed the crime. We disagree with Escamilla's contention.

“[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, 122-23 (2002). The Ninth Circuit Court of Appeals has stated that defenses become “mutually exclusive” 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.” U.S. v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996).

Our review of the record establishes that Escamilla’s defense theory was that there was insufficient evidence presented, he had no motive to murder his business supplier, Allon Iny, and the State’s witnesses were motivated to lie because of the reward money offered upon conviction. On the other hand, Martinez’s defense theory was that there was insufficient evidence presented placing him at the scene of the crime and the State’s witnesses were motivated to lie because of the reward money offered upon conviction. We conclude that these defenses were not antagonistic to the point that they were mutually exclusive and therefore the district court did not abuse its discretion in denying severance in this regard.

Second, Escamilla contends that the district court erred in denying his severance motion because it diminished his ability to present his defense theory. In particular, Escamilla was precluded from cross-examining Martinez regarding his inculpatory statement to the police and from presenting other evidence of Escamilla’s reputation as a law-abiding businessman with no motive to rob or kill Iny. We do not agree with Escamilla’s contention.

Evidence that Escamilla solicited Martinez to rob or kill Iny was admitted through Joshua Tupua’s testimony while Martinez’s

statement did not mention Escamilla, so Escamilla was not prejudiced by the inability to cross-examine Martinez. Further, Escamilla has not explained how the joint trial precluded him from presenting evidence of his good character and he presented one witness who testified that Escamilla had no motive to rob or kill Iny. Thus, Escamilla has not demonstrated that the presentation of his defense theory was diminished by the joint trial.

Third, Escamilla contends that the district court erred in denying his severance motion because the joint trial created a “spillover” effect. See United States v. DeRosa, 670 F.2d 889, 899-900 (9th Cir. 1982). In particular, Escamilla contends that the bulk of the evidence presented was damaging to Martinez and thus prejudicially impacted the jury’s perception of Escamilla’s innocence. We disagree.

Although evidence was presented identifying Martinez as the person who shot Iny, the State also presented evidence implicating Escamilla, including that Escamilla was facing financial problems, that he was upset with Iny for not supplying merchandise to his business promptly as scheduled, and that Escamilla proposed a scheme to Martinez and Tupua in which Martinez would rob and murder Iny.¹ Thus, evidence was sufficient to demonstrate that Escamilla participated in orchestrating the crimes apart from the evidence presented demonstrating that Martinez actually robbed and murdered Iny. There was no prejudicial “spillover effect” resulting in a “substantial and injurious” influence on the verdict.

¹Escamilla also asked Tupua to participate in the scheme, but Tupua refused.

Fourth, Escamilla contends that the district court abused its discretion in denying his severance motion because the jury could not compartmentalize the evidence that applied to only Escamilla's guilt. We disagree. The trial was short (three days) and the evidence presented was not complicated. This argument "amount[s] to nothing more than his opinion that he would have a better chance at acquittal" if he and Martinez were tried separately, which is not an adequate basis for severance. Rowland, 118 Nev. at 46, 39 P.3d at 123. Thus, we conclude that the district court did not err in denying Escamilla's motion to sever his trial.

Fifth, Escamilla contends that the district court erred by denying his severance motion because it admitted Martinez's redacted inculpatory statement in violation of Bruton, 391 U.S. 123. Escamilla argues that he was denied his right to confront Martinez and examine him regarding the truthfulness of the statement because Martinez did not testify. A criminal defendant's constitutional right to cross-examine a witness is violated when hearsay statements of a non-testifying codefendant, which inculcate the defendant, are admitted at trial. Id. at 137. Here, the redacted statement was not facially incriminating to Escamilla because it made no reference to him and other substantial evidence was presented of Escamilla's guilt. Ducksworth v. State, 114 Nev. 951, 954-55, 966 P.2d 165, 166-67 (1998). Further, to the extent that Escamilla argues that the statement should have been inadmissible as a statement by a co-conspirator, Martinez's statement was offered pursuant to NRS 51.035(3)(a) as his own admission offered against him. And, as noted above, Escamilla was not implicated in Martinez's redacted statement. The district court did not err in denying Escamilla's motion to sever because of the admittance of Martinez's statement.

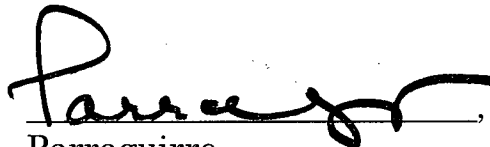
Regarding Escamilla's claim that the district court abused its discretion by denying his motion for a new trial, he argues that the cumulative effect of the prejudice resulting from the joinder mandated a new trial. "[The] cumulative effect [of accumulation of evidence of guilt which comes from being tried with other defendants] may indeed become so unfairly prejudicial that severance is warranted." U.S. v. Koon, 34 F.3d 1416, 1429 (9th Cir. 1994), rev'd in part on other grounds by Koon v. United States, 518 U.S. 81 (1996). Escamilla relies primarily on this court's decision in Chartier v. State, 124 Nev. ___, 191 P.3d 1182 (2008) to support his claim. In Chartier this court determined that cumulative prejudice resulted from a refusal to sever. Unlike in this case, Chartier was denied the ability to present recorded phone conversations in which his codefendant, Wilcox, implicated himself—the phone conversations were deemed unduly prejudicial to Wilcox. This court further found that the two defendants' defenses were antagonistic. As discussed above, the defenses here were not antagonistic and Martinez's statement was redacted in order to avoid implicating Escamilla, and Escamilla has not demonstrated that because of the joint trial he was precluded from presenting evidence that would have been admissible if he had been tried separately.

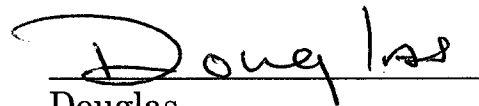
In addition to the above arguments regarding the court's denial of his severance motion, Escamilla contends that two of Martinez's witnesses prejudiced his defense: Daniel Kliever and Christopher Cross. Kliever testified that he witnessed the shooting and Martinez was not the perpetrator. Kliever also testified that he would lie for Martinez. Cross testified that he saw Martinez before and after the shooting, and Martinez had changed his clothes, which bolstered the testimony of a State witness. Escamilla appears to contend that because Martinez's defense witnesses

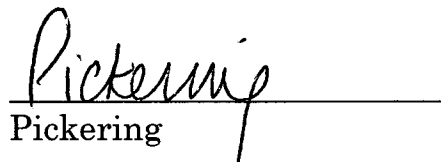
allegedly damaged Martinez's defense, that Escamilla's defense was damaged through association. However, as discussed above, Escamilla failed to demonstrate that he was unfairly prejudiced by the joinder—there is no cumulative prejudicial effect requiring a new trial and there was sufficient evidence of Escamilla's guilt to support the jury's verdict. Thus, the district court did not err in denying Escamilla's motion for a new trial.

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

ORDER the judgment of conviction AFFIRMED.


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 7, District Judge
Draskovich & Oronoz, P.C.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk