

IN THE SUPREME COURT OF THE STATE OF NEVADA

CASSANDRA ANN THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51821

FILED

DEC 23 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 second-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and embezzlement. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

The district court sentenced appellant Cassandra Thomas as follows: count I – life in prison with the possibility of parole after 10 years for second-degree murder, plus an equal and consecutive term for the use of a deadly weapon; count II – 36 to 180 months for robbery to run consecutive to count I, plus an equal and consecutive term for the use of a deadly weapon; and count III – 24 to 60 months for embezzlement, to run concurrently with counts I and II. Thomas appeals these convictions on multiple grounds, including the district court's denial of Thomas's request to sever her trial; the district court's refusal to suppress Thomas's confession or, alternatively, refusal to grant Thomas a mistrial based on the ground that the police improperly coerced her into confessing; and cumulative error. We conclude that all of Thomas's contentions are without merit. Therefore, we affirm the lower 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.

Denial of Thomas's request to sever her trial

Thomas was tried with codefendant Joey Salas for the murder of Michael McClain. Thomas argues that the district court erred by denying her motion to sever her trial from codefendant Salas for two reasons: (1) Thomas and Salas asserted antagonistic defenses; and (2) her redacted statement resulted in an imbalance of relative fault attributed to her and misled the jury.

The evidence presented at trial indicated that Thomas, Salas, and Corey Pearce, a third defendant who was tried separately, consumed drugs together with McClain over a period of several days. At some point during this timeframe, McClain was beaten, restrained, and eventually killed. While the exact cause of death was disputed, the evidence suggested that McClain suffered a skull fracture in the back of his head and sharp-force injury to the side of his skull. Thomas and Pearce were apprehended on other charges in Florida. Based on entries in a journal discovered after searching the vehicle in which they were apprehended, Thomas and Pearce were questioned about the killing. Thomas gave a detailed confession regarding the killing, which was admitted against her at trial, with all references to Salas redacted.

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” of defendants for trial. On appeal, this court will not reverse the decision of the trial judge “unless the appellant carries the heavy burden of showing that the trial judge abused his discretion.” Chartier v. State, 124 Nev. ____, ____, 191 P.3d 1182, 1185 (2008) (quoting Buff v. State, 114 Nev. 1237, 1245, 970 P.2d 564, 569 (1998) (internal quotation marks omitted)). “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).

Antagonistic defenses

Thomas contends that severance was required because she and Salas presented antagonistic defenses. For defenses to be considered mutually exclusive for severance purposes, the codefendant’s defense must be “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.” Rowland v. State, 118 Nev. 31, 45, 39 P.3d 114, 123 (2002) (alteration in original) (quoting U.S. v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996)).

Thomas asserted at trial that although she was present at the scene, she did not physically participate in the crimes. Salas argued at trial that, after striking McClain one time, he left the premises and was not present for the subsequent abuse and killing. The jury’s acceptance of Thomas’s or Salas’s defense does not preclude acquittal of the other. Thus, we conclude that Thomas’s and Salas’s defenses were not so antagonistic that they were mutually exclusive, and therefore, do not establish that the district court abused its discretion in denying severance.

Redacted statement

Thomas next argues that severance was required because the redacted version of her confession imparted additional culpability to her and misled the jury. Our review of the redacted version establishes that Thomas’s admitted confession does not improperly attribute Salas’s actions to her, as a plain reading of the redacted version does not allude to

Thomas committing any physical act upon McClain. We conclude that the district court did not abuse its discretion by denying Thomas's motion to sever her trial because the redacted version of her confession does not imply additional culpability on Thomas's part.

Even if the redacted confession improperly imputed Salas's actions to Thomas, and the district court erred by admitting that version of the confession as a result, we conclude that the error was harmless because the State presented overwhelming evidence of Thomas's guilt on all counts.¹ See Abram v. State, 95 Nev. 352, 356, 594 P.2d 1143, 1145 (1979) (concluding that an error will be deemed harmless if the evidence of the defendant's guilt is overwhelming).

Robbery conviction

Thomas was convicted of one count of robbery with the use of a deadly weapon under NRS 200.380 and NRS 193.165. Robbery is defined, in relevant part, as the "unlawful taking of personal property . . . by means of force or violence or fear of injury, immediate or future, to his person or property." NRS 200.380(1). Further, "[a] taking is by means of force or fear if force or fear is used to: (a) [o]btain or retain possession of the property; (b) [p]revent or overcome resistance to the taking; or (c) [f]acilitate escape." Id.

The State established that Thomas indirectly participated in disabling McClain and, while McClain was disabled or dead, obtained

¹Because Thomas's confession was not used to support her embezzlement conviction, and because Thomas does not appear to challenge her redacted confession with respect to this charge, we do not address the evidence supporting the embezzlement conviction.

possession of his truck. In her confession, Thomas admitted that she blocked McClain's exit, unlocked the upstairs room so that Pearce could hold McClain in it, filled a syringe with Novocain, and obtained a rope—thus assisting Pearce in harming McClain. Additionally, Thomas expressly admitted to using McClain's vehicle after McClain was killed.

The fact that Thomas took the vehicle after McClain was dead does not assist her challenge because this court has established that “the taking required for robbery may occur after the victim is dead so long as the defendant's use of force or coercion—for whatever purpose—occurs while the victim was alive and the defendant took advantage of the terrifying situation [s]he created” to take the victim's property. Cortinas v. State, 124 Nev. ___, ___, 195 P.3d 315, 327 (2008). Since Thomas facilitated Pearce in disabling McClain and admitted to taking advantage of the situation they created by using McClain's vehicle, we conclude that the State presented overwhelming direct evidence of Thomas's guilt of robbery.²

²Moreover, because the robbery charge was alternatively based on Thomas's liability as an aider and abettor, Thomas could have been liable for robbery if she either “directly or indirectly, counsel[ed], encourage[d], hire[d], command[ed], induce[d] or otherwise procure[d] another to commit [the] felony.” See NRS 195.020. We conclude that Thomas's actions facilitated Pearce and Salas in disabling McClain and, therefore, induced or encouraged them to take his property.

Thomas additionally challenges the district court's admission of the redacted version of her confession on the ground that the redacted version inferred that Thomas was alone for various periods of time and was free to leave or summon authorities for assistance—an error that warrants a new trial, according to Thomas. As discussed, the State presented overwhelming evidence of Thomas's participation in the murder and

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Murder conviction

Thomas was also convicted of second-degree murder with the use of a deadly weapon in violation of NRS 200.010, NRS 200.030 and NRS 193.165. NRS 200.010(1) provides, "Murder is the unlawful killing of a human being . . . [w]ith malice aforethought, either express or implied." The different degrees of murder are defined in NRS 200.030 as follows:

1. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing; [or]

(b) Committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, [or] invasion of the home

. . . .

2. Murder of the second degree is all other kinds of murder.

The murder charge rested on alternative theories of liability, including: (1) premeditation and deliberation, (2) killing during the perpetration of a kidnapping or robbery, (3) aiding and abetting, and (4) acting in concert with Salas and another with the intent that McClain be killed.

. . . continued

robbery of McClain. Therefore, we conclude that any inference was harmless and does not warrant a new trial.

The State presented overwhelming evidence of Thomas's guilt under the last three theories.³ Thomas located and provided Pearce with the rope used to restrain McClain, and she filled the syringe with Novocain and gave it to Pearce to use against McClain. Thomas admitted to police that the night before the killing, she was involved in a discussion about killing McClain and that after the killing, she drafted a false lease and a note instructing Salas what to tell police if they came to the house with questions. Thomas also rented the vehicle that was used to dispose of McClain's body, and she accompanied Pearce during the disposal of McClain's body. Based on this evidence, a rational juror could have found that Thomas (1) participated in the first-degree kidnapping of McClain, NRS 200.310(1), and that McClain was murdered in the commission of that felony, NRS 200.030(1)(b); (2) directly or indirectly encouraged or induced Pearce to complete the killing, NRS 195.020; or (3) acted in concert with the other participants with the intent that McClain be killed. Whether the jury could have returned a verdict of first-degree murder based on this evidence is irrelevant because the jury was "entitled to extend lenity and convict [Thomas] of the lesser offense" of second-degree murder. Fiegehen v. State, 121 Nev. 293, 301, 113 P.3d 305, 310 (2005) (quoting Graham v. State, 116 Nev. 23, 31 n.8, 992 P.2d 255, 260 n.8 (2000)). In any event, we are convinced that the redactions to Thomas's statement did not have a substantial and injurious effect or influence in determining the jury's verdict on the murder charge given the

³We express no opinion as to whether the State presented sufficient evidence of premeditation and deliberation to have supported a conviction under that theory.

overwhelming evidence of her guilt. See Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001), modified on other grounds by Mclellan v. State, 124 Nev. ___, 182 P.3d 106 (2008).

Deadly weapon enhancement

NRS 193.165(6)(a) and (b) define a deadly weapon as an instrument that by its design is readily capable of causing, or under the circumstances in which it is used is likely to cause, substantial bodily harm or death. An unarmed offender is subject to a deadly weapon enhancement when “the unarmed offender is liable as a principal for the offense that is sought to be enhanced, another principal to the offense is armed with and uses a deadly weapon in the commission of the offense, and the unarmed offender had knowledge of the use of the deadly weapon.” Brooks v. State, 124 Nev. ___, ___, 180 P.3d 657, 661 (2008).

Thomas admitted in her confession that she observed Pearce hit McClain with a baseball bat and that Salas hit McClain with a wooden dowel. Moreover, Thomas told police that she watched Pearce repeatedly come downstairs to sharpen a pencil and obtain a wooden mallet; the head wound McClain suffered was consistent with a pencil being driven into his skull. Therefore, we conclude that the State presented overwhelming evidence that Thomas was liable as a principal and that she had knowledge that Pearce and Salas were armed with and used deadly weapons during the commission of the robbery and killing.

Refusal to suppress confession or grant mistrial

Thomas next argues that the district court should have suppressed her confession or granted her a mistrial because Nevada and Florida detectives coerced her confession by promising her immunity. This court reviews a district court’s decision to admit or exclude a confession for abuse of discretion. See Chambers v. State, 113 Nev. 974,

981, 944 P.2d 805, 809 (1997) (stating that a district court's determination on the admissibility of a confession will not be overturned if it is supported by substantial evidence). Similarly, a district court's determination as to whether a mistrial is warranted is reviewed for abuse of discretion. Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996).

While Thomas moved for specific performance of the alleged immunity agreement at the trial level, the record does not reflect that Thomas moved for a mistrial based on the court's denial of that motion. Thus, it appears that Thomas's argument on appeal is that the district court erred by failing to grant Thomas a mistrial sua sponte after the statement was admitted. This court has stated that the district court is required to sua sponte grant a mistrial when evidence is admitted that is so inherently prejudicial that a mistrial is compelled. See Baker v. State, 89 Nev. 87, 88, 506 P.2d 1261, 1261 (1973).

When considering immunity agreements, it is generally recognized that before a district court will enforce such a contract, "the accused must make a prima facie showing that an immunity agreement was in fact made." 22 C.J.S. Criminal Law § 111 (2006). If an agreement was made and the court approves of the agreement, upon the accused's compliance with the terms of the agreement, "[t]he government must perform its part" of the agreement. Id. We conclude that substantial evidence supports the district court's determination that an immunity agreement did not exist. Therefore, the district court did not abuse its discretion by admitting the confession and was not required to sua sponte grant Thomas a mistrial. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (stating that the verdict in a criminal case will not be overturned if it is supported by substantial evidence).

At trial, Thomas conceded that the Florida detectives did not discuss immunity with her. Rather, Thomas testified that they said that she would not “be in trouble,” which she understood to mean that she would not be charged for the Florida crimes (which included grand theft auto and possession of marijuana). Additionally, the State presented testimony from two Nevada detectives. Both detectives attested that they questioned Thomas in Florida but that neither of them had discussions with her about immunity or any other deals prior to her arrival in Las Vegas, contrary to Thomas’s contentions.

It was only when Nevada authorities were unable to locate McClain’s body that they returned to Florida to ask for Thomas’s cooperation. Thomas agreed and flew to Las Vegas. After arriving in Nevada, Thomas then refused to lead the Nevada authorities to the body until she received immunity, which the Nevada authorities declined to give. Because Thomas had initially given the Florida detectives her confession and directions as to the location of McClain’s body without any promise of immunity, and had given the Nevada detectives the same information before she came to Las Vegas, we conclude that the record supports the district court’s determination that Thomas failed to prove the existence of an immunity agreement. Moreover, even had there been a promise of immunity, we conclude that Thomas failed to perform her part of the agreement by refusing to take Nevada detectives to the body. Therefore, the government’s performance would have been excused. See 22 C.J.S. Criminal Law § 111 (2006).

Accordingly, we conclude that the district court did not abuse its discretion by admitting Thomas's confession or by failing to sua sponte grant Thomas a mistrial.⁴

Cumulative error

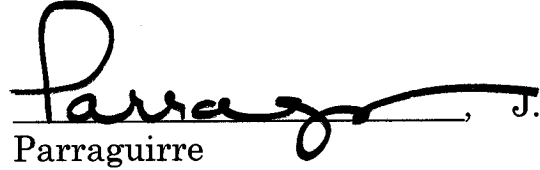
Lastly, Thomas argues that the cumulative effect of the district court's errors caused irreparable harm and sufficient prejudice to warrant reversal. This court will reverse a conviction if the defendant's right to a fair trial was violated by the cumulative effect of errors, even if the individual errors are harmless. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 481 (2008).

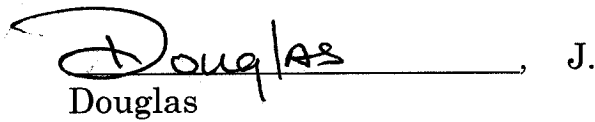
While the gravity of the crimes charged is serious, after reviewing the entire record, we determine that Thomas's assignments of error are meritless and that the State established Thomas's guilt by overwhelming evidence. As a result, we conclude that Thomas's cumulative error challenge is unavailing.

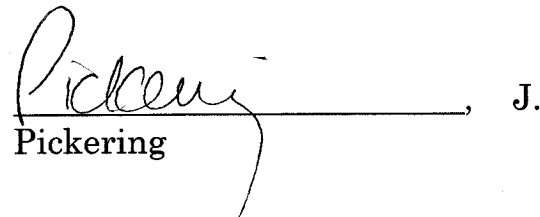
⁴In addition, we conclude that Thomas's claim of detrimental reliance is meritless because Thomas's claim essentially consists of the fact that she flew to Las Vegas voluntarily, as opposed to the State having to issue a warrant for her arrest and have her extradited from Florida.

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

ORDER the judgment of the district court AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Valerie Adair, District Judge
Mueller Hinds & Associates
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk