IN THE SUPREME COURT OF THE STATE OF NEVADA

ALLEN STANISLOUIS HEUSNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52023

FILED

MAY 03 2010

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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary while in possession of a deadly weapon, home invasion while in possession of a deadly weapon, first-degree murder with the use of a deadly weapon, and first-degree arson. Eighth Judicial District Court, Clark County; David Wall, Judge.

The district court sentenced appellant Allen Heusner to 2 to 10 years for burglary while in possession of a deadly weapon; life in prison with the possibility of parole after 20 years for first-degree murder, plus an equal and consecutive term for the use of a deadly weapon, to run consecutively to the burglary sentence; and 2 to 10 years for first-degree arson, to run concurrently with the murder sentence.[1] Heusner appeals his convictions on multiple grounds: (1) sufficiency of the evidence; (2) prosecutorial misconduct; (3) violation of his Fifth Amendment right to remain silent; (4) admission of hearsay evidence; (5) admission of prior bad acts; (6) jury instructions that allegedly were prejudicial; (7) admission of cumulative and gruesome autopsy photographs; (8) application of the

[1]The district court dismissed the home invasion conviction without prejudice; thus, we do not address it.

felony murder doctrine when the predicate felony of burglary is based upon entering the residence with the intent to commit murder; and (9) cumulative error. We conclude that any error in this case does not warrant relief, and we affirm the judgment of conviction.[2]

Sufficiency of the evidence

Heusner argues that the State failed to present sufficient evidence to support his convictions of burglary, first-degree murder, and first-degree arson.[3] There is sufficient evidence if "'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Higgs v. State, 126 Nev. ___, ___, 222 P.3d 648, 654 (2010) (quoting Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007)). It is the jury's task to weigh the evidence and evaluate the credibility of witnesses. See West v. State, 119 Nev. 410, 418, 75 P.3d 808, 814 (2003). "'[I]ntent . . . may be inferred from the conduct of the parties and the other facts and circumstances disclosed by the evidence.'" Moore v. State, 122 Nev. 27, 36, 126 P.3d 508, 513 (2006) (quoting Larsen v. State, 86 Nev. 451, 453, 470 P.2d 417, 418 (1970)).

Burglary conviction

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[2]Heusner also challenges the constitutionality of Nevada's deadly weapon enhancement statute. We conclude that Heusner's argument lacks merit. See Hernandez v. State, 118 Nev. 513, 528, 50 P.3d 1100, 1110 (2002).

[3]Heusner does not challenge the sufficiency of the evidence regarding his deadly weapon enhancements.

Heusner was convicted of burglary while in the possession of a deadly weapon in violation of NRS 205.060. NRS 205.060(1) provides, in pertinent part, that a person commits burglary when he "enters any house . . . with the intent to commit . . . assault or battery on any person or any felony."

Heusner appears to argue that this court should reverse his burglary conviction because the State failed to prove that he entered the home he had once shared with his wife, Tiffany, with the intent to commit a felony. Heusner contends that his only intent in entering the house was to figure out why Tiffany wanted a divorce. We disagree. Heusner testified that, although he knew he would be in violation of a temporary protective order (TPO), he went to Tiffany's house after midnight one evening. Heusner testified that when he saw an unfamiliar car in the driveway (which belonged to the victim, Michael Clark), he became so angry he went to Wal-Mart to buy a baseball bat. He testified further that he then returned to the home and used the bat to break through the glass living room door hoping to "catch [Tiffany and Clark] in the act." We conclude that the State presented sufficient evidence to prove that Heusner entered the house with the intent to commit assault, battery, or murder.

First-degree murder conviction

Heusner also challenges the sufficiency of the evidence for his conviction of first-degree murder with the use of a deadly weapon in violation of NRS 200.010, NRS 200.030, and NRS 193.165. The indictment specified that the murder charge rested on alternative theories

of liability, including: (1) premeditation and deliberation, and (2) killing during the commission of a burglary and/or home invasion.[4]

Heusner argues that the State did not present sufficient evidence to prove that he intended to kill or acted with deliberation and premeditation. Instead, he contends that the evidence demonstrates that he committed voluntary manslaughter resulting from an act of passion in finding his wife with another man in their home. However, we conclude that the State presented overwhelming evidence showing that any passion inflamed in Heusner had subsided and that he acted with premeditation and deliberation in beating Clark to death. See NRS 200.030(1)(a); Byford v. State, 116 Nev. 215, 234, 994 P.2d 700, 713 (2000) (noting that to prove first-degree murder, the State must prove that the defendant acted with "willful[ness], deliberat[ion] and premeditat[ion]," and concluding that "if [the deliberate determination is] formed in passion, it must be carried out after there has been time for the passion to subside and deliberation to occur"); Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 485-86 (2008) (stating that the State can "prove[ ] premeditation through circumstantial evidence, including the nature and extent of the [victim's] injuries").

In violation of the TPO, Heusner drove to Tiffany's house. When Heusner first arrived at the home, he saw an unfamiliar car in the driveway, jumped over the backyard fence and became angered when he saw that only the bathroom light was on. Heusner testified that his passions were inflamed at that point; however, he did not confront Tiffany and her unknown guest (Clark) then, but instead drove 2.5 miles to Wal-

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[4]Only the premeditation and deliberation theory is discussed in this section. The felony murder theory of liability is discussed infra.

Mart to buy a baseball bat, allegedly to protect himself. Notably, Heusner testified that while he was in Wal-Mart, he "was contemplating whether [he] should do it or not" and was "contemplating going back to the house." Ultimately, he decided to drive the 2.5 miles back to the house after purchasing the baseball bat and several other items.

Upon returning to Tiffany's house, Heusner parked down the street so that he could catch Tiffany and Clark by surprise. Heusner then broke into the house and encountered an unarmed Clark. Heusner testified that he and Clark engaged in an initial struggle and that he struck Clark with the baseball bat. He further testified that he was going to leave but then decided to walk around the house where he allegedly came across Clark again, so he inflicted more blows with the bat. The medical examiner testified that Clark suffered at least 20 strikes to his body, including at least 12 strikes to the head.

We conclude that the State presented overwhelming evidence to support Heusner's first-degree murder conviction.

First-degree arson conviction

Heusner also argues that there was insufficient evidence to support his conviction of first-degree arson in violation of NRS 205.010 because he only intended to burn a blanket he placed on top of the stove's burners, not the house. NRS 205.010 provides, in pertinent part, that "[a] person who willfully and maliciously sets fire to or burns or causes to be burned . . . [a] [d]welling house" is guilty of first-degree arson. "Malice" is defined as "an evil intent, wish or design to vex, annoy or injure another person," and it "may be inferred from . . . an act wrongfully done without just cause or excuse." NRS 193.0175. NRS 205.005 further provides that a person "'set[s] fire to' a [dwelling] . . . whenever any part thereof or anything therein shall be scorched, charred or burned."

According to Heusner's testimony, after the second scuffle with Clark, he left Tiffany's house and began to drive away. However, he returned to the home and, upon seeing pictures of Tiffany and Clark, he again became angry so he grabbed a blanket, turned on all the stove burners, and placed the blanket on top. Heusner testified that he intended to burn the blanket but not the house.

Heusner's claim that he did not intend to burn the house is of no consequence because NRS 205.005 only requires that "anything therein" be burned. Moreover, Heusner's anger at seeing pictures of Tiffany and Clark did not provide "just cause or excuse" for setting the blanket on fire. See NRS 193.0175. Accordingly, we conclude that the State presented sufficient evidence to support Heusner's first-degree arson conviction.

Prosecutorial misconduct

Heusner next argues that prosecutorial misconduct violated his constitutional rights. To determine whether prosecutorial misconduct occurred, we "must determine whether the prosecutor's conduct was improper," and then, "we must determine whether the improper conduct warrants reversal." Valdez, 124 Nev. at ___, 196 P.3d at 476. Reversal of a conviction is not warranted if the prosecutorial misconduct amounts to harmless error. Id.

For misconduct of a constitutional nature, "we apply the Chapman v. California[, 386 U.S. 18, 24 (1967),] standard and will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." Valdez, 124 Nev. at ___, 196 P.3d at 476. When the misconduct is not of a constitutional nature, "we will reverse only if the error substantially affects the jury's verdict." Id.

Harmless-error review is only appropriate if the error has been properly preserved for review. Id. at ___, 196 P.3d at 477. Generally, the failure to object to the prosecutorial misconduct at trial precludes appellate review. Id. However, even if the error was not preserved, we will consider prosecutorial misconduct under plain-error review. Id. We will not reverse a conviction under this standard "unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Id. (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

Testimony from one witness regarding another witness

Heusner argues that the State improperly elicited testimony from a police officer that vouched for the credibility of another witness. On direct examination, the State asked the officer about the demeanor of two neighbors (a husband and wife to whose house Tiffany fled after Heusner broke in to her house) as they were writing out their police statements. In response, the officer said:

> They were—they were very helpful, kind of in the dark, wondering what was going on. They didn't realize all the circumstances. I do not recall if they had just woken up or anything like that.
>
> The wife's—my impression was the wife . . . seemed to have a better account of what happened than [the husband]. Not to say—he didn't have a bad account, but her account seemed very, very good.

We conclude that Heusner failed to demonstrate plain error. See Valdez, 124 Nev. at ___, 196 P.3d at 477. Here, the officer simply testified that the wife's recollection of events seemed better than that of the husband, not that she was more believable. As such, we determine that the officer did not improperly vouch for the credibility of another

witness. Marvelle v. State, 114 Nev. 921, 931, 966 P.2d 151, 157 (1998), abrogated on other grounds by Koerschner v. State, 116 Nev. 1111, 1114-17, 13 P.3d 451, 454-55 (2000) (noting that a witness may not vouch for the credibility of another witness). Accordingly, we conclude that the prosecutor's conduct was not improper and that Heusner's argument is without merit.

The prosecutor's cross-examination of Heusner

During cross-examination, the State asked Heusner a number of questions to which the defense objected. For example, after Allen testified that Tiffany did not have a good reason for seeking a divorce, the prosecutor said "[s]o [Tiffany] owed you an explanation and you're the one to determine whether her explanation is good enough for you?" 2 AA 316. The district court sustained the defense's objection. Allen then testified that Tiffany's reason for getting divorced "didn't make sense," and the prosecutor asked "[s]o if somebody doesn't want to be married, it is for you to say whether they have the right to get out or not?" Id. Once again, the district court sustained the defense's objection. Heusner argues that, through this questioning, the prosecutor "badgered and harassed" him while he was on the stand. It is improper for a prosecutor to make disparaging remarks, McGuire v. State, 100 Nev. 153, 158, 677 P.2d 1060, 1064 (1984), or "to ridicule or belittle the defendant." Earl v. State, 111 Nev. 1304, 1311, 904 P.2d 1029, 1033 (1995). However, even when a prosecutor engages in condemnable tactics and "foul blows," we will not overturn a conviction that is supported by overwhelming evidence. Yates v. State, 103 Nev. 200, 205-06, 734 P.2d 1252, 1255-56 (1987).

Although the form of the State's questions was improper, we conclude that the questions, considered in the context in which they were asked, were not disparaging or harassing. Moreover, since the district

court sustained the defense's objections and Heusner did not answer the questions, Heusner was not prejudiced by the State's line of questioning. See Leonard v. State, 114 Nev. 1196, 1212, 969 P.2d 288, 298 (1998). Thus, we conclude that the error was harmless and reversal is not warranted.

The prosecutor's comment about the "smell test"

Heusner argues that the State disparaged his theory of the case and minimized the State's burden of proof when the prosecutor stated during closing argument that

> if a reasonable person was going to this particular house at 1:00 A.M. in the morning [sic] to catch someone in the act, you're going in through the back door, and you have to have a baseball bat because you're concerned that the occupants at one in the morning are going to threaten you, that don't pass the smell test. That doesn't make sense.

(Emphasis added).

Heusner did not object to the State's use of "smell test" and, thus, plain-error review applies. We conclude that the State's use of "smell test" was not improper because immediately preceding that comment, the prosecutor stated the evidence that would allow the jury to infer that Heusner's testimony was incredible. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990). Thus, we conclude that this challenge does not rise to the level of plain error and reversal is not warranted.

The prosecutor's comments made in rebuttal closing argument

During his closing argument, defense counsel stated that it would be "insulting" for him to argue to the jury that Heusner should be found not guilty. He then suggested that instead of first-degree murder,

Heusner committed voluntary manslaughter. In rebuttal, the prosecutor argued that defense counsel "says he wouldn't insult you by suggesting this is self-defense. With all due respect to [defense counsel], this is an insult to claim this beating of Michael Clark was anything less than murder. It is not a case of voluntary manslaughter." The prosecutor's final remark during rebuttal was "[a]fter that we'll ask you to find him guilty of first-degree murder with use of a deadly weapon and get of[f] the other charges. To do anything less would be insulting." Heusner argues that the prosecutor's statements disparaged the defense theory of the case. Again, Heusner failed to object to either comment, so plain-error review applies.

Here, we conclude that the prosecutor's remarks were not improper because he was responding to defense counsel's argument, not questioning the jury's courage or fortitude. Williams v. State, 113 Nev. 1008, 1018-19, 945 P.2d 438, 444-45 (1997) (determining that it is not improper for the State to respond to an argument set forth by the defense), receded from on other grounds by Byford, 116 Nev. at 245-49, 994 P.2d at 720-22. However, even if the remarks were improper, Heusner has failed to show that he was prejudiced or that his substantial rights were affected. Thus, we conclude that this challenge does not rise to the level of plain error and reversal is not warranted.

The prosecutor's comments about Heusner's alleged suicide attempt

Heusner next argues that the prosecutor shifted the burden of proof by injecting his personal opinion and making improper comments about Heusner's alleged suicide attempt.

During his closing argument, defense counsel indicated that Heusner's alleged suicide attempt by drinking cleaning solution was evidence of his state of mind during the killing. In response to this

argument, the prosecutor commented about Heusner's lack of symptoms from allegedly drinking the solution and then stated, "I think the suicide is an attempt to plan your [sic] sympathy to again portray himself as the victim and to take your eyes off the true victim in this case, Michael Clark." Heusner once again failed to object to the prosecutor's comments.

While the prosecutor's comment expressing his view on Heusner's alleged suicide attempt was improper, Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001) (stating that it is generally improper for a prosecutor to "comment on a defendant's failure to present witnesses or produce evidence"), we conclude that it does not warrant reversal because Heusner has failed to demonstrate prejudice or that his substantial rights were affected. See Valdez, 124 Nev. at ___, 196 P.3d at 477.

Heusner's Fifth Amendment right to remain silent

Heusner next contends that the prosecutor violated his Fifth Amendment right to remain silent by making numerous comments regarding his post-arrest silence. A prosecutor is prohibited from "'comment[ing] upon an accused's election to remain silent following his arrest and after he has been advised of his [Miranda] rights.'" Diomampo v. State, 124 Nev. ___, ___, 185 P.3d 1031, 1039 (2008) (quoting Gaxiola v. State, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005)). But, when a prosecutor makes a "'mere passing reference'" to a defendant's silence after arrest, the comments do not necessitate reversal. Id. at ___, 185 P.3d at 1040 (quoting Shepp v. State, 87 Nev. 179, 181, 484 P.2d 563, 564 (1971), overruled on other grounds by Stowe v. State, 109 Nev. 743, 746, 857 P.2d 15, 17 (1993)).

Comments regarding the post-arrest silence of a defendant constitute constitutional error. Diomampo, 124 Nev. at ___, 185 P.3d at

1040. But the erroneous comments may not warrant reversal if "the error is harmless beyond a reasonable doubt." Id. However, if the error is not objected to below, then plain-error review applies. Valdez, 124 Nev. at ___, 196 P.3d at 477. We now review Heusner's specific claims of misconduct to determine whether reversal is warranted.

Questioning of police officers

While conducting direct examination of a police officer, the prosecutor asked what occurred after he read Heusner his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). Heusner immediately objected and the district court sustained the objection. The prosecutor then inquired as to whether Heusner asked about the victim's condition and, without an objection from the defense, the officer replied in the negative. The officer also described Heusner's conduct as "[d]efiant" and stated that Heusner "didn't want to deal with the police." Heusner did not object to this testimony.

Additionally, when the prosecutor questioned another police officer about moving Heusner from one patrol car to another, the officer testified at length and stated that "[Heusner] would . . . just give me this thousand mile blank stare like he just didn't care. He didn't have any remorse at all for what was going on or what—." Heusner objected, and the district court sustained the objection, instructed the jury to disregard the statement, and ordered it stricken.

We determine that the police officers' comments were improper; however, even considering all the improper comments together, we conclude that any error was harmless beyond a reasonable doubt for two reasons: (1) the district court sustained the defense's objections when made and ordered one of the statements stricken from the record, and (2) overwhelming evidence supports Heusner's convictions. See Diomampo,

124 Nev. at ___, 185 P.3d at 1040. Thus, reversal is not warranted on this issue.

Questioning of Heusner

During cross-examination, the prosecutor was questioning Heusner about the effects his suicide attempt had on him. In response to a question about whether he had to have his stomach pumped, Heusner answered, "No because I never mentioned anything of [the suicide attempt]." The prosecutor then asked, "[y]ou never told anyone until today?" The defense objected. The district court sustained the objection, instructed the jury to disregard the answer and the question and ordered them stricken.

Although the prosecution's question was a "mere passing reference" regarding Heusner's post-arrest silence, see Diomampo, 124 Nev. at ___, 185 P.3d at 1040 (internal quotations omitted), and was in response to Heusner's unsolicited statement that he did not tell anyone about his suicide attempt, we determine that the question was improper because it concerned Heusner's right to remain silent. We nonetheless conclude that the error was harmless beyond a reasonable doubt because the district court sustained the objection, instructed the jury to disregard the objected-to answer and question and ordered them stricken from the record, and Heusner's convictions are supported by overwhelming evidence. Thus, reversal is not warranted on this issue.

Hearsay evidence

The State submitted into evidence Heusner's receipt from Wal-Mart reflecting his purchase of a baseball bat, wine, cleaning solution, and chapstick, as well as surveillance footage of Heusner making his purchases. Heusner contends that the district court erred in admitting

this hearsay evidence because the State failed to establish the proper foundation for its admission. We disagree.

Generally, a district court's decision to admit evidence will not be disturbed on appeal absent an abuse of discretion. Chavez v. State, 125 Nev. ___, ___, 213 P.3d 476, 487 (2009). Heusner did not object below, so plain-error review applies. Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 74 (2008).

Hearsay is generally inadmissible, see NRS 51.065; however, the business records exception provides, in pertinent part, that a

> record or compilation of data, in any form, of acts, events, [or] conditions . . . made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is [admissible].

Here, a Wal-Mart employee, who works in video surveillance and loss prevention, testified that she met with investigators and provided them with a copy of the surveillance footage depicting Heusner. She further explained how the Wal-Mart surveillance system operated and how she was able to locate the video showing Heusner.

We conclude that the Wal-Mart employee was qualified to authenticate the evidence even though she did not actually record the surveillance video or create the receipt. NRS 52.015(1); NRS 51.135. She testified that surveillance video and receipts are kept in the ordinary course of business, and she demonstrated her familiarity with Wal-Mart's surveillance system and receipt-keeping process. Thomas v. State, 114 Nev. 1127, 1148, 967 P.2d 1111, 1124 (1998) (noting that a "qualified person" under NRS 51.135 is "anyone who understands the record-keeping system involved"). As such, the State made its "prima facie showing of

authenticity so that a reasonable juror could find that the document[s] [are] what [they] purport[ ] to be." Id. Thus, we conclude that the district court did not err in admitting the surveillance video and receipt and Heusner's claim is without merit.

Evidence of prior bad acts

Heusner next argues that the district court erred by admitting evidence of prior bad acts, including evidence that Tiffany obtained a TPO against him.[5] "The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference. It will not be reversed absent manifest error." Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). Under NRS 48.045(2), such evidence "is not admissible to prove the character of a person," but may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Here, the district court held a hearing outside the presence of the jury and determined that evidence of Tiffany obtaining a TPO against Heusner was admissible. Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (the district court must conduct a hearing outside the presence of the jury). However, the State did not request a limiting instruction at the time the evidence was admitted or in the final instructions to the jury, and the district court failed to issue one sua

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[5]Heusner also argues that the district court erred in admitting evidence regarding his reaction to being served with the TPO and evidence regarding the domestic violence incident underlying the TPO. We conclude that the district court did not abuse its discretion in admitting this evidence.

sponte as required pursuant to Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001). But the absence of a limiting instruction "did not have a substantial or injurious effect on the jury's verdict" in light of the independent overwhelming evidence supporting Heusner's convictions. See Mclellan v. State, 124 Nev. 263, 271, 182 P.3d 106, 112 (2008). Thus, we conclude that any error was harmless and reversal is not warranted.

Jury instructions

Heusner argues that the district court erred by giving prejudicial jury instructions. "District courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. ___, ___, 195 P.3d 315, 319 (2008). We review that decision for an abuse of discretion or judicial error; however, we apply de novo review when determining "whether a particular instruction . . . comprises a correct statement of the law." Id.

Heusner first challenges the jury instruction regarding theory of liability. The instruction at issue provides as follows:

> Although your verdict must be unanimous as to the charge, you do not have to agree on the principle of liability. Therefore, even if you cannot agree on whether the facts establish premeditated and deliberate murder or felony murder, so long as all of you agree that the evidence establishes Defendant's guilty of murder in the first degree, your verdict shall be Murder of the First Degree.

Heusner argues that jurors are required to be unanimous regarding the theory of liability. However, Heusner's argument fails as we have consistently held that "[w]here the State proceeds on alternative theories of first-degree felony murder and willful, deliberate, and premeditated first-degree murder, . . . the jury need not unanimously agree on a single theory of the murder." Crawford v. State, 121 Nev. 744, 750, 121 P.3d

582, 586 (2005); see also Moore v. State, 116 Nev. 302, 304, 997 P.2d 793, 794 (2000); Walker v. State, 113 Nev. 853, 870, 944 P.2d 762, 773 (1997). Heusner's urges this court revisit its position. We decline to do so and conclude that the district court properly instructed the jury regarding agreeing on a theory of liability.

Next, Heusner argues that the district court erred when instructing the jury on premeditation because instruction "improperly emphasized the rapidity with which premeditation can be formed." The challenged instruction provides, in pertinent part:

> [p]remeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

Heusner further argues that this definition of premeditation undermines the instruction's definition of deliberation—"[d]eliberation is the process of determining upon a course of action to kill as a result of thought, including weighing the reasons for and against the action and considering the consequences of the action[ ]."

However, the jury instruction's language tracks verbatim the instructions "we set forth . . . for use by the district courts in cases where defendants are charged with first-degree murder based on willful, deliberate, and premeditated killing." Byford v. State, 116 Nev. 215, 236, 994 P.2d 700, 714 (2000). Accordingly, we conclude that Heusner's argument lacks merit, and we see no reason to disturb Byford.

Photographs of the victim

Heusner argues that the district court erred by admitting cumulative and gruesome autopsy photographs that served to inflame the jury. We disagree and conclude that the district court did not abuse its discretion when it admitted the photographs. Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006).

A review of the record reveals that the photographs challenged by Heusner demonstrate the extent and gravity of Clark's injuries, which goes to the question of premeditation. Castillo v. State, 114 Nev. 271, 278, 956 P.2d 103, 108 (1998) ("[E]ven gruesome photographs are admissible if they aid in ascertaining the truth."); see also Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 485-86 (2008) (stating that "the State [can] prove[ ] premeditation through circumstantial evidence, including the nature and extent of the injuries"). Therefore, we conclude that the district court did not abuse its discretion in admitting the autopsy photographs.

Felony murder doctrine

The indictment charging Heusner specified that the murder charge rested on alternative theories of liability, including felony murder—killing during burglary and/or home invasion. The burglary charge alleged that Heusner entered the home with the "intent to commit battery and/or assault and/or murder." Heusner argues that the felony murder doctrine should not be applied when, as here, the predicate felony of burglary is based upon entering the residence with the intent to commit murder.

In State v. Contreras, we held that Nevada's statutory scheme allows a felony murder allegation where the predicate felony is burglary,

alleging an entry with the intent to assault and/or batter. 118 Nev. 332, 337, 46 P.3d 661, 664 (2002).[6] In reaching that conclusion, we adopted the rationale in People v. Miller, 297 N.E.2d 85 (N.Y. 1973), and stated that "[w]e do not believe it is appropriate to apply the merger doctrine to felony murder when the underlying felony is burglary, regardless of the intent of the burglary." 118 Nev. at 336-37, 46 P.3d at 663-64. Heusner argues, however, that in People v. Cahill, 809 N.E.2d 561 (N.Y. 2003), the New York Court of Appeals "retreated from an overly-expansive interpretation of the felony-murder doctrine" in Miller, thus undermining our decision in Contreras.

In Cahill, the court determined that the New York statute that "elevates intentional murder [committed during a burglary] to capital-eligible murder" requires that the defendant's intent underlying the burglary be independent of the intent to murder. 809 N.E.2d at 587. Otherwise, "the class of those eligible for the death penalty . . . would widen." Id. at 589. Understandably, the Cahill court emphasized that because Miller interpreted New York's felony murder statute, not its capital-punishment statute, "Miller is distinguishable on the facts and in its legal premise." Id. The court further stated that "we leave our body of felony murder jurisprudence intact." Id. However, even if Cahill modified or overruled Miller, that case is not binding on this court and, thus, we

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[6]Nevada's felony murder statute provides, in pertinent part, that "[m]urder of the first degree is murder which is . . . [c]omitted in the perpetration or attempted perpetration of . . . burglary." NRS 200.030(1).

conclude that Heusner's argument lacks merit[7] and we need not revisit our decision in Contreras.[8]

Cumulative error

Lastly, Heusner argues that the cumulative effect of the district court's errors caused irreparable harm and sufficient prejudice to warrant reversal. We 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, 124 Nev. at ___, 196 P.3d at 481.

After reviewing the entire record, we conclude that any error in this case, when considered either individually or cumulatively, does not warrant relief. As a result, we conclude that Heusner's cumulative error challenge is unavailing.

Having considered Heusner's contentions and concluded that they do not warrant reversal, we

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[7]Heusner argues that our decision in Nay v. State, 123 Nev. 326, 167 P.3d 430 (2007), dictates that felony murder may not be based upon burglary with the intent to murder. However, we conclude that Nay is inapposite to the issue in this case.

[8]Recently, the California Supreme Court cited to Contreras in noting that the majority of states now support the Miller approach to felony murder. See People v. Farley, 210 P.3d 361, 408 n.23 (Cal. 2009).

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. David Wall, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk