IN THE SUPREME COURT OF THE STATE OF NEVADA

COLBERT FREDERICK NICHOLS
A/K/A COLBERT NICHOLS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52157

FILED

JAN 08 2010

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. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. Appellant Colbert Nichols raises four issues in this appeal.

Uncharged conduct

Nichols argues that the district court erred in admitting testimony about uncharged acts without conducting a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), superceded by statute as stated in Thomas v. State, 120 Nev. 37, 44-45, 83 P.3d 818, 823-24 (2004). He asserts that the district court erred in admitting testimony from Charles Guadagnoli that, while in custody with Nichols, Nichols asked him to get one of the State's witnesses drunk and take him on vacation so that he could not testify at Nichols' trial.

We review the district court's decision for an abuse of discretion. See Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000). There was no abuse of discretion because evidence that a defendant threatened a witness is directly relevant to the question of that

defendant's guilt and does not constitute evidence of collateral acts that require a hearing prior to its admission, Evans v. State, 117 Nev. 609, 628, 28 P.3d 498, 511-12 (2001), and evidence of attempts to bribe witnesses or procure false testimony is admissible to show a consciousness of guilt, see Reese v. State, 95 Nev. 419, 423, 596 P.2d 212, 215 (1979).

Violent character of the victim

Nichols argues that the district court erred in prohibiting testimony from Kevin Emmert and Nichols about the victim's violent character, arguing that the testimony would have demonstrated that the victim was the initial aggressor and that Nichols reasonably believed that he needed to use force against the victim to avoid suffering substantial bodily harm or death.

We discern no abuse of discretion as to Emmert, because the defense abandoned further inquiry into the subject when examining Emmert.

The district court also did not abuse its discretion in precluding Nichols from testifying to Emmert's statements about Becker to the extent that the testimony was offered to show that Becker was the initial aggressor. While a defendant may "present evidence of a victim's character when it tends to prove that the victim was the likely aggressor," Daniel v. State, 119 Nev. 498, 514, 78 P.3d 890, 901 (2003), Nichols' testimony was hearsay when offered to demonstrate that Becker was the initial aggressor, see NRS 51.035. However, the district court abused its discretion in declining to admit the testimony to the extent that it was offered to demonstrate what Nichols had heard about Becker's propensity for violence and prior acts of violence. In this respect, the testimony was not offered for the truth of the matters asserted but to demonstrate how

Nichols was affected by hearing the statements. Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990); see Daniel, 119 Nev. at 514, 78 P.3d at 901 (providing that "specific acts showing that the victim was a violent person is admissible if a defendant seeks to establish self-defense and was aware of those acts"). Nevertheless, considering the remaining evidence presented at trial, we conclude that the outcome of the trial would have been the same even if the testimony had been admitted. See Chappell v. State, 114 Nev. 1403, 1407, 972 P.2d 838, 840 (1998) (providing that error in admission of evidence is harmless where outcome of trial would have been same).

Medical examiner testimony

Nichols argues that the district court erred in admitting the medical examiner's report through the testimony of a witness who was not present at the autopsy in violation of the Confrontation Clause because the medical examiner who performed the autopsy was not available to be cross-examined. See Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527 (2009); Crawford v. Washington, 541 U.S. 36 (2004); Medina v. State, 122 Nev. 346, 143 P.3d 471 (2006). He further contends that the district court erred in admitting the testimony of a medical examiner who did not perform the autopsy.

We conclude that the district court did not abuse its discretion in admitting Dr. Benjamin's expert testimony. Dr. Benjamin testified as an expert witness to matters "within the scope of [her specialized] knowledge," NRS 50.275, based on facts or data "made known to [her] at or before the hearing," NRS 50.285(1), that are "of a type reasonably relied upon by experts in forming opinions or inferences" and therefore "need not be admissible in evidence," NRS 50.285(2). Even assuming that the

autopsy report was testimonial hearsay and therefore the admission of the report or testimony regarding facts contained in the report violated Nichols' confrontation rights,[1] we conclude that the error was harmless. The facts concerning the manner in which the victim died were uncontested, and there was ample evidence in the form of testimony and autopsy photographs that the victim died as a result of the stab wounds.

Jury instructions

Nichols argues that the district court erred in refusing to give his proposed heat-of-passion instruction and a modified self-defense instruction. Although Nichols' proposed instructions were correct statements of law, we conclude that the principles of law described in Nichols' proposed instructions were "fully, accurately, and expressly stated

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[1]We note that other courts are split on the issue of whether autopsy reports are testimonial under Crawford v. Washington, 541 U.S. 36 (2004). Compare U.S. v. De La Cruz, 514 F.3d 121, 133 (1st Cir. 2008) (concluding that autopsy reports fall within business records hearsay exception and that "business records are expressly excluded from the reach of Crawford"), cert. denied, ___ U.S. ___, 129 S. Ct. 2858 (2009), and U.S. v. Feliz, 467 F.3d 227, 233-37 (2d Cir. 2006) (similar), with People v. Dungo, 98 Cal. Rptr. 3d 702, 704-05 (Ct. App. 2009) (concluding that under Melendez-Diaz, an autopsy report is testimonial), review granted and opinion superceded (Dec. 2, 2009), People v. Lonsby, 707 N.W.2d 610, 619-21 (Mich. Ct. App. 2005) (concluding that notes and report prepared by nontestifying crime lab serologist's testimony violated defendant's confrontation rights), State v. Johnson, 756 N.W.2d 883, 889-92 (Minn. Ct. App. 2008) (similar but as to autopsy report), People v. Rawlins, 884 N.E.2d 1019, 1033-35 (N.Y. 2008) (similar but as to fingerprint reports), cert. denied subnom. Meekins v. New York, ___ U.S. ___, 129 S. Ct. 2856 (2009), and State v. Locklear, 681 S.E.2d 293, 304-05 (N.C. 2009) (similar but as to pathologist report). We decline to reach the issue as doing so is unnecessary to a resolution of this appeal.

in the other instructions." Crawford v. State, 121 Nev. 744, 754, 121 P.3d 582, 589 (2005). Therefore, we conclude that the district court did not abuse its discretion in denying the requested instructions. See id. at 748, 121 P.3d at 585.

Having considered Nichols' contentions, and concluding that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Jackie Glass, District Judge
Thomas A. Ericsson, Chtd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk