

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN EDWARD BUTLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52260

FILED

FEB 25 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, sentencing appellant John Edward Butler to four consecutive terms of life in prison without the possibility of parole for two counts of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. Butler argues that he is entitled to a new penalty hearing on three grounds.

First, Butler claims that the prosecutor violated his constitutional rights by eliciting testimony that, although Butler had provided information to the police on other occasions, he failed to come forward with any information in this case prior to his arrest. Without deciding whether comments on a defendant's pre-arrest silence are permissible at a capital penalty hearing, we conclude that even if the prosecutor's questioning was improper it did not prejudice Butler. See Sampson v. State, 121 Nev. 820, 831-32, 122 P.3d 1255, 1262 (2005).

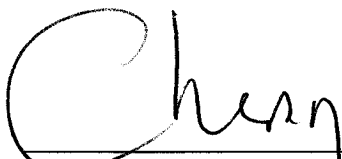


Second, Butler claims that the district court foreclosed legitimate mitigating evidence when it prevented him from arguing residual doubt, instructed the jury that it should only consider the evidence presented at the penalty hearing, and rejected instructions on two proposed mitigators. Because lingering doubt over a defendant's guilt

is not an aspect of his character, record, or the circumstances of the offense, the district court did not err by precluding Butler's residual doubt arguments and instructing the jury that Butler's guilt had already been decided. See Browning, 124 Nev. ___, ___, 188 P.3d 60, 67 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 1625 (2009). Nor did the district court err by instructing the jury to consider all of the evidence before it and refusing to instruct the jury on mitigating circumstances that lacked legal or evidentiary support. See Delo v. Lashley, 507 U.S. 272, 277 (1993); Franklin v. Lynaugh, 487 U.S. 164, 188 (1988).

Finally, Butler claims that the district court erred by admitting testimony regarding the contents of three PSI reports. Because the State proved an aggravating circumstance beyond a reasonable doubt, evidence of Butler's prior uncharged crimes, including evidence of prior arrests, was admissible. See Guy v. State, 108 Nev. 770, 781-82, 839 P.2d 578, 585-86 (1992); Robins v. State, 106 Nev. 611, 625-26, 798 P.2d 558, 567 (1990). Moreover, Butler did not object to the admission of this evidence and to the extent that there was any error, we conclude that it was not plain error affecting his substantial rights. See Moore v. State, 122 Nev. 27, 36-37, 126 P.3d 508, 514 (2006).

Therefore, we

ORDER the judgment of conviction AFFIRMED.


Cherry, J.

Saitta, J.

Gibbons, J.

cc: Hon. Michelle Leavitt, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk