

IN THE SUPREME COURT OF THE STATE OF NEVADA

PACHALO CRISPIN CHIPETA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52359

FILED

JUN 23 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 first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

The district court sentenced appellant Pachalo Crispin Chipeta to two consecutive terms of life in prison with the possibility of parole after 20 years. On appeal, Chipeta raises two primary issues and assigns numerous errors to various jury instructions. First, he argues that the district court erred when it admitted his statement to police because his confession was not voluntary. Next, Chipeta assigns error to the district court's decision not to assign an interpreter.

Finally, Chipeta assigns four errors with regard to the jury instructions: (1) the district court erred when it instructed the jury that an axe was a deadly weapon; (2) the district court erred when it incorrectly instructed the jury that the State only had to prove material elements of the crimes charged; (3) the district court gave an erroneous self-defense instruction, omitting the no-duty-to-retreat language; and (4) the district

court erred when it failed to give a limiting instruction regarding Chipeta's prior bad act.¹

From the onset, we note that except for the first two issues involving the voluntariness of his confession and his right to an interpreter, Chipeta did not preserve any of the other issues raised for appellate review. Therefore, we review those issues for plain error.² Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008). For the reasons set forth below, we conclude that all of Chipeta's arguments fail,

¹Chipeta also argues that respondent State of Nevada engaged in prosecutorial misconduct in closing arguments when it pointed out inconsistencies in his statements. He did not preserve the issue for appeal, and therefore, this court will apply plain-error review. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008). Chipeta fails to demonstrate that the alleged prosecutorial misconduct in question caused him actual prejudice or resulted in a miscarriage of justice, because the prosecutor was simply repeating parts of Chipeta's own testimony. See id. (explaining that if prosecutorial misconduct is not preserved for appeal, reversal is not warranted, "unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice'" (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003))). There were key inconsistencies between Chipeta's statements to detectives and his testimony at trial. The prosecutor was doing no more than highlighting this fact. Therefore, we conclude that the argument is meritless.

²In addition to these issues, Chipeta argues that the district court abused its discretion in admitting portions of the search warrant and its affidavit. A review of the record reveals that Chipeta never objected to the evidence, thereby not preserving it for appellate review. Moreover, we determine that Chipeta fails to demonstrate how the evidence caused him actual prejudice or resulted in a miscarriage of justice in light of the substantial evidence against him. See Valdez, 124 Nev. at ___, 196 P.3d at 477.

and we therefore affirm the judgment of conviction. The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

Chipeta's confession was voluntary

Chipeta argues that his confession was not voluntary. In a confusing argument, Chipeta appears to also argue that the waiver of his Miranda rights was invalid because he did not understand them. We conclude that his arguments are without merit.

In Nevada, a confession is admissible if it is made freely and voluntarily without any coercion. Passama v. State, 103 Nev. 212, 213-14, 735 P.2d 321, 322-23 (1987). To determine a statement's voluntariness, we look at the totality of the circumstances. Id. at 214, 735 P.2d at 323. This due process requirement is independent of issues concerning a defendant's Miranda rights. "A valid waiver of rights under Miranda must be voluntary, knowing, and intelligent." Mendoza v. State, 122 Nev. 267, 276, 130 P.3d 176, 181 (2006); see Miranda v. Arizona, 384 U.S. 436, 444 (1966). Whether a suspect has validly waived these rights depends on the totality of the circumstances of the case, including whether the statement was a result of a free choice rather than coercion. Mendoza, 122 Nev. at 276, 130 P.3d at 181-82. "The inquiry as to whether a waiver is knowing and intelligent is a question of fact, which is reviewed for clear error." Id. at 276, 130 P.3d at 181. "[T]he question of whether a waiver is voluntary is a mixed question of fact and law that is . . . reviewed de novo." Id.

For the following reasons, we determine that Chipeta's confession was voluntary, as was his waiver of rights under Miranda. During the first interview, once Chipeta confessed to killing Sanjay

Makhijani, the detectives stopped their questioning. Chipeta was read his Miranda rights from a card and was given the card to read and sign, if he chose to do so. Chipeta said he understood his rights and signed the card. The day after his confession, it was Chipeta who called detectives and asked to speak with them. During this second interview, the detectives again read him his Miranda rights. Chipeta acknowledged that he understood his rights and never expressed difficulty understanding the nature of those rights or the English language. On each occasion, he signed a rights advisement form and proceeded to speak in English, displaying no difficulty in comprehending the questions. Moreover, Chipeta never stated that he did not wish to talk with the detectives.

At trial, Chipeta testified that he did not understand his Miranda rights and was coming off of drugs both times he spoke with detectives. However, the record does not support this contention. The transcript of both interviews portrays Chipeta as clear and thoughtful. He was forthcoming and did not express any sense of fear or paranoia caused by drug use. For example, Chipeta provided detectives with such clear and detailed information that the detectives were able to find Makhijani's car and discovered bloodstains in the apartment. During the interviews, Chipeta had no difficulty remembering his trip to Home Depot to buy the axe with which he murdered Makhijani. His ability to recall detailed information about his relationship with Makhijani, the days leading up to the murder, and the murder itself is evidence that Chipeta was thinking clearly. Accordingly, there is nothing in the record supporting Chipeta's contention that a coercive police atmosphere rendered his statement involuntary and the district court did not err in determining that Chipeta's statements were voluntary.

Chipeta's due process rights were not violated

Chipeta argues that his due process rights were violated when the district court denied him an interpreter. We disagree.

In Nevada, an interpreter “must be appointed at public expense for a person with a communications disability who is a party to or a witness in a criminal proceeding.” NRS 50.051. This court has stated that a “criminal defendant has a due process right to an interpreter at all crucial stages of the criminal process, irrespective of NRS 50.051, if that defendant in fact does not understand the English language.” Ton v. State, 110 Nev. 970, 971, 878 P.2d 986, 987 (1994) (emphasis added). It reviews a district court’s decision regarding the appointment of an interpreter for an abuse of discretion. See id. at 972, 878 P.2d at 987.

The district court properly decided that an interpreter would be of no benefit because Chipeta is fluent in English. Chipeta easily communicated with detectives, the court, and both his counsel and the prosecutor. There is no evidence on the record that Chipeta was deprived of due process because he did not understand English; rather, the record is replete with evidence that Chipeta has a good command of the English language. He was raised in a country in which English is taught in schools and spoken as the official language; received the equivalent of a high school degree; and even helped his father, who was acting as his interpreter, understand what certain words meant in English. Because we determine that Chipeta was sufficiently fluent in English to comprehend his trial in a meaningful way, we conclude that the district court did not err when it decided not to appoint an interpreter.

The jury instructions were proper

Chipeta assigns error to four different jury instructions. Each argument is meritless. We first address the appropriate standard of review and then address each contention in turn.

Standard of review

Because Chipeta did not object to any of the instructions, he must demonstrate plain error for this court to reverse the judgment. Ouanbengboune v. State, 125 Nev. ___, ___, 220 P.3d 1122, 1129 (2009). “Under plain error review, the error must be clear from the record and adversely affect a party’s substantial rights.” Id.

Jury Instruction No. 16

Chipeta asserts that Jury Instruction No. 16, which instructed the jury that an axe is a deadly weapon, warrants reversal because it takes the decision-making process on the deadly weapon element away from the jury and results in judicial fact-finding.

Jury Instruction No. 16 defines deadly weapon pursuant to NRS 193.165(6) but included a final sentence instructing the jury that an axe is a deadly weapon. This court previously has approved of jury instructions that a knife is a deadly weapon as a matter of law depending on the type of knife at issue. See, e.g., Thomas v. State, 114 Nev. 1127, 1146, 967 P.2d 1111, 1123 (1998); Steese v. State, 114 Nev. 479, 499, 960 P.2d 321, 334 (1998). Since then, the United States Supreme Court has held that any fact that increases the maximum penalty available for an offense must be submitted to a jury and proved beyond a reasonable doubt. Appendi v. New Jersey, 530 U.S. 466 (2000); accord Abrego v. State, 118 Nev. 54, 60, 38 P.3d 868, 871 (2002) (applying Appendi to a sentencing enhancement); see also State v. Dist. Ct. (Pullin), 124 Nev. 564, 571 & n.38, 188 P.3d 1079, 1084 & n.38 (2008) (indicating that Appendi

applies to the finding that a deadly weapon was used pursuant to NRS 193.165). The instruction given in this case thus violates the rule set forth in Apprendi in that the enhancement statute does not define an axe as a deadly weapon as a matter of law and the instruction took that factual determination from the jury. Although it is arguable whether this error is “plain” for purposes of plain-error review given our pre-Apprendi case law, see Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005), we need not resolve that issue because Chipeta cannot demonstrate that the error affected his substantial rights, see Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). In particular, the uncontroverted evidence establishes that under the circumstances in which the axe was used to strike the victim in the head and neck, the axe was readily capable of causing substantial bodily harm or death, making it a deadly weapon under NRS 193.165(6)(b). Because Chipeta cannot demonstrate that any error in the instruction affected his substantial rights, we conclude that he is not entitled to relief on this claim.

Jury Instruction No. 27

Chipeta argues that Jury Instruction No. 27 lowered the burden of proof beyond a reasonable doubt and lessened the presumption of innocence. Specifically, he asserts that instructing the jury that the State needed to prove the “material element” of the crime charged, but not providing a definition of “material,” was improper. Further, Chipeta argues that because Jury Instruction No. 27 did not include a complete wording of the presumption of innocence, his conviction warrants reversal.

As to Chipeta’s argument regarding the word “material” and how it lowered the State’s burden by instructing the jury that the prosecutor only had to prove material elements, our review of the record shows that the other jury instructions fully instructed the jury as to what

type of evidence it needed to consider. Moreover, Chipeta fails to provide any evidence as to how the use of the word “material” affected his substantial rights.

As to the presumption of innocence, Jury Instruction No. 27 tracks the language of NRS 175.191 and instructed the jury that if it had a reasonable doubt, then Chipeta was entitled to a verdict of not guilty. Moreover, it used the exact language of NRS 175.211 in defining reasonable doubt. Because of the forgoing reasons and the fact that Jury Instruction No. 27 contemplated that guilt might not be proven, reversal is not warranted. Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005).

Self-defense jury instruction

Chipeta next argues that the jury instructions on self-defense should have included language instructing the jury that Chipeta had no duty to retreat.


First, there is no evidence that the lack of the no-duty-to-retreat instruction affected Chipeta’s substantial rights, given the fact that he testified that he hit Makhijani with an axe as Makhijani lay silent on the couch. Furthermore, Jury Instruction Nos. 18 through 24 fully instruct the jury on Nevada’s jurisprudence regarding self-defense. The district court acted properly in not instructing the jury with regard to the no-duty-to-retreat rule because there was no evidence presented at trial that Chipeta was indeed acting in self-defense and had a right to stand his ground. See Runion v. State, 116 Nev. 1041, 1051, 13 P.3d 52, 58-59 (2000) (explaining that whether a specific self-defense instruction is appropriate “depends upon the testimony and evidence of that case [and that] district courts should tailor instructions to the facts and circumstances of a case”). Accordingly, his argument fails.

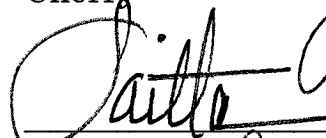
Limiting instruction

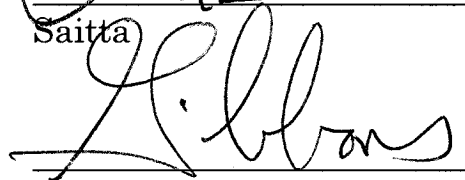
Chipeta argues that he was prejudiced by the lack of a limiting instruction regarding evidence of a prior bad act. His argument lacks merit.

The admitted evidence at issue was that, at the time of his confession, Chipeta was already in police custody. He had been arrested on an unrelated charge. At the time the evidence was introduced, the district court allowed the defense to read a stipulation to the jury that Chipeta was arrested for a nonviolent, unrelated offense. The district court then instructed the jury that the stipulation was conclusively proven, thereby giving a limiting instruction. Chipeta argues that the district court had a duty, sua sponte, to repeat the limiting instruction at the close of trial. In so doing, Chipeta merely argues the issue and does not provide any evidence as to how the district court's failure to repeat a limiting instruction affected his substantial rights. As such, we determine that the district court acted properly and reversal is not warranted. We therefore

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

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