IN THE SUPREME COURT OF THE STATE OF NEVADA

VINCENT DIBERARDINO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52789

FILED

AUG 04 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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 and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Vincent Diberardino killed his girlfriend Stephanie Zweig with a hammer. He then stole her car, drove to Colorado, attempted suicide, and was hospitalized. When officers came to the hospital to return him to Nevada, Diberardino blurted out inculpatory statements before receiving a Miranda warning. The State relied on these statements to convict him of first-degree murder.

Diberardino makes three main arguments on appeal.[1] First, he maintains that his statements to the officers at the hospital were involuntary and obtained in violation of Miranda v. Arizona and that

[1]Nay v. State, 123 Nev. 326, 331 n.8, 167 P.3d 430, 433 n.8 (2007), forecloses Diberardino's afterthought robbery argument, and the express terms of the governing statute, NRS 174.035, defeats his claim that he was entitled to plead guilty but mentally ill. We have reviewed his additional challenges to the jury instructions, the admissibility of certain evidence, and the prosecutor's statements in closing arguments and conclude that they lack merit.

Jackson v. Denno entitled him to an evidentiary hearing. Second, he contends that the district court violated his due process rights when it denied his for-cause challenges to two prospective jurors. Third, he challenges the evidence as insufficient to prove first-degree murder as opposed to a heat-of-passion killing. We affirm.

Diberardino's statements to the police

The prosecution may not use statements a defendant makes as the result of a custodial interrogation conducted without a Miranda warning. Miranda v. Arizona, 384 U.S. 436, 444 (1966); Dewey v. State, 123 Nev. 483, 488-89, 169 P.3d 1149, 1152 (2007). The admissibility of Diberardino's pre-Miranda statements to the police at the hospital depends on whether they were procured through custodial interrogation.

Diberardino made his statements just after the officers entered the room and introduced themselves. Because he was not responding to questions, his statements did not result from direct interrogation. However, coercive police tactics that elicit inculpatory statements from a suspect in custody can also trigger Miranda protection. Koza v. State, 102 Nev. 181, 186, 718 P.2d 671, 674 (1986). To make this claim, Diberardino must point to words or actions by the officers that were "'reasonably likely to elicit an incriminating response.'" Id. (quoting Rhode Island v. Innis, 446 U.S. 291, 302 (1980)). He has not.

Citing his admission to the hospital in critical condition after a suicide attempt, his two-and-one-half-week hospital stay, the pain medication he received, and his having been brought to meet the officers by his treating medical professionals, Diberardino asserts that the circumstances were inherently coercive and led him to make the statements involuntarily. But Diberardino proffered no evidence, only

speculation, that he did not know what he was saying when he made his statements, and the uncontroverted evidence undermines his claim. By the time the officers arrived, his treating professionals had already deemed him medically capable of making the return trip to Las Vegas. Further, Diberardino declined to make a statement after officers read him his Miranda rights. These circumstances suggest Diberardino had command of his faculties. Diberardino cites no authority to support his proposed rule that defendants who are hospitalized or on medication are presumed incapable of making a voluntary confession. Cases elsewhere hold the opposite, People v. Burton, 869 N.Y.S.2d 412 (App. Div. 2008); State v. Holland, 364 S.E.2d 535, 536, 539 (W.Va. 1987), and so do we.

Diberardino next argues that the lack of evidence to support his challenge shouldn't be held against him because, under Jackson v. Denno, he deserved an evidentiary hearing to develop evidence. 378 U.S. 368 (1964). Specifically, Diberardino claims that a hearing would have let him explore what the medical professionals had to say about his meeting with the officers and his condition. However, neither inquiry is material without the factual predicate of coercive conduct by the police, Colorado v. Connelly, 479 U.S. 157, 165-66 (1986), which Diberardino did not adduce.

Jackson does not hold that every voluntariness challenge merits an evidentiary hearing. Rather, a defendant is entitled to a "fair hearing and a reliable determination on the issue of voluntariness," 378 U.S. at 377 (emphasis added). "Without exception, the [Supreme] Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question." Miller v. Fenton, 474 U.S. 104, 110 (1985). Because

Diberardino alleged no definite, specific, detailed, and nonconjectural facts to suggest officer misconduct, his Jackson argument fails.[2]

Juror challenges

Diberardino challenged prospective jurors 6 and 24 for cause, which the district court denied, leading him to exercise peremptory challenges against them. Diberardino claims that the denial of his for-cause challenges offends due process.

A for-cause challenge depends on "whether a prospective juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Weber v. State, 121 Nev. 554, 580, 119 P.3d 107, 125 (2005) (citations and internal quotation marks omitted). Prospective jurors who question their own impartiality may be rehabilitated if they can "state without reservation that they had relinquished views previously expressed which were at odds with their duty as impartial jurors." Id. at 581, 119 P.3d at 125. A district court judge "has broad discretion in ruling on challenges for cause since these rulings involve factual determinations. The trial court is better able to view a prospective juror's demeanor than a subsequent reviewing court." Leonard v. State, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001) (citations omitted).

---

[2]Diberardino's citation to cases where this court has reversed and ordered an evidentiary hearing are inapposite. In Somee v. State, 124 Nev. 434, 441-43, 187 P.3d 152, 157-58 (2008), the record was inadequate to determine whether the officers had reasonable suspicion to conduct the challenged search. In State v. Ruscetta, 123 Nev. 299, 304, 163 P.3d 451, 455 (2007), the record was similarly inadequate to review whether the officers' search exceeded the scope of the defendant's consent.

Prospective juror 6 expressed misgivings about serving because her daughter had been the victim of violent crime and domestic violence. She stopped well short of saying she had preconceived notions that would make her unable to impartially decide the case. And, after the judge outlined her responsibilities as a juror, she affirmed that she could carry them out. Thus, we cannot say that the district court abused its discretion when it denied Diberardino's for-cause challenge of prospective juror 6. Weber, 121 Nev. at 581, 119 P.3d at 125.

The record as to prospective juror 24 is similar. Despite the concern she expressed in her jury questionnaire answers about judging others, she showed no equivocation or uncertainty in her oral responses to repeated questions about being able to serve impartially. Denying Diberardino's for-cause challenge to prospective juror 24 was not error.

Error in denying a for-cause challenge, moreover, does not amount to a denial of due process absent prejudice. Weber, 121 Nev. at 581, 119 P.3d at 125. Prejudice requires more than having had to exercise a peremptory challenge against a juror who should have been excused for cause. Rather, it must be shown that one or more of the "jurors actually empanelled [was] not fair and impartial." Id. "Any claim of constitutional significance must focus on the jurors who were actually seated, not on excused jurors." Id. (citing Ross v. Oklahoma, 487 U.S. 81, 88-89 (1988)). Diberardino has not argued, much less established, that the final panel was flawed.

Sufficiency of evidence

Diberardino admits killing Zweig. The contest at trial centered whether he did so willfully, with deliberation and premeditation (first degree murder), or in a sudden fit of passion (voluntary

manslaughter). He challenges the sufficiency of the evidence to support his conviction of first degree murder.

The evidence showed limited signs of a struggle in the apartment. Both Diberardino and Zweig smoked a cigarette before the murder. The hammer blows suggested that Diberardino struck Zweig from behind on the back of the head, as well as in her face, and on her hands as she warded off his blows. Viewed "in the light most favorable to the prosecution, [a] rational [juror] could have found . . . beyond a reasonable doubt," McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)), that Diberardino acted willfully, deliberately and with premeditation in killing Zweig. Nika v. State, 124 Nev. 1272, 1283-84, 198 P.3d 839, 847 (2008). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

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