IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD LYNN DELONEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53068

FILED

NOV 30 2009

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. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

This appeal arises out of the murder of David Johnson in Reno, Nevada. Police arrested appellant Donald Deloney after James Marcel Purifoy ("Cel") offered substantial assistance to the police. Cel reported that while driving in his car with his father, James Purifoy, Jr. ("Mojo") and Deloney, Deloney shot Johnson. Deloney's first trial, in January 2008, ended in a mistrial. His second trial, in September 2008, resulted in a jury verdict that Deloney is guilty of first-degree murder with the use of a deadly weapon. Deloney waived jury sentencing and the district court sentenced Deloney to one life term, enhanced by a second life term.

Deloney now appeals, arguing that: (1) the evidence produced by the State at trial was insufficient to support a verdict of first-degree murder; (2) the district court violated his Fifth and Sixth Amendment rights by failing to properly instruct the jury on (a) the testimony of a jailhouse informant, (b) the evaluation of accomplice testimony and necessary corroboration, and (c) the correct definition of "willful"; (3) the State violated his Fifth Amendment due process rights and right to a fair

trial through discovery violations; (4) prosecutorial misconduct affected his substantial rights including, (a) violation of his Fifth Amendment due process and fair trial rights when the State vouched for its witnesses, and (b) violation of his Fifth, Sixth, and Fourteenth Amendment rights when the State commented on the fact that Deloney did not testify and called him a liar; (5) cumulative error warrants reversal and a new trial; and (6) this court should reconsider its decision in State v. Dist. Ct. (Pullin), 124 Nev. ___, 188 P.3d 1079 (2008), and apply NRS 193.165 retroactively to Deloney's sentencing. For the reasons set forth below, we disagree with these contentions. Accordingly, we affirm the jury verdict.

The parties are familiar with the facts and we do not recount them here except as is necessary for our disposition.

DISCUSSION

Insufficiency of the evidence

Deloney argues that the State presented insufficient evidence at trial to support the jury verdict of first-degree murder. We disagree.

In considering an appeal based on insufficiency of the evidence, this court inquires whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,'" after viewing the evidence in the light most favorable to the prosecution. Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Deloney asserts that premeditation separates first- and second-degree murder. He further asserts that the State failed to present evidence showing why he would shoot Johnson, and hence, failed to demonstrate premeditation. Premeditation is a determination to kill "formed in the mind by the time of the killing." Byford v. State, 116 Nev. 215, 237, 994 P.2d 700, 714 (2000). It can be instantaneous and the act

can rapidly follow these thoughts. Id. at 237, 994 P.2d at 714-15. Accordingly, the State was not required to present evidence regarding Deloney's motive for the killing to demonstrate that premeditation, or a determination to kill, existed in this case.

Investigators never found DNA, fingerprints, or a murder weapon. Nevertheless, evidence weighing in favor of Deloney's guilt includes testimony from Mojo and Cel, who were with Deloney when he shot Johnson; an eyewitness account from Priscilla Chopper, who later identified Deloney; a confession by Deloney to Ken Roberts; testimony from Shylee McNair, who observed Deloney after Johnson's death; and testimony from Deloney's ex-girlfriend Alice Cooper, who could not account for his whereabouts during the time of the murder. Based on this evidence, a rational trier of fact could find Deloney guilty of first-degree murder. Therefore, we conclude that sufficient evidence exists to uphold the jury verdict.

Jury instructions

Jailhouse informant testimony

Deloney argues that the district court violated his due process rights under the Fifth Amendment when it failed to instruct the jury regarding the testimony of Ken Roberts, a convicted felon who was housed with both Mojo and Deloney on separate occasions. Because Deloney failed to object below, we review this claim for plain error and disagree.

A cautionary instruction to the jury "is required when an informant's testimony is uncorroborated and favored when the testimony is corroborated in critical respects." Buckley v. State, 95 Nev. 602, 604, 600 P.2d 227, 228 (1979).

But the facts of this case reveal that Ken Roberts is not an informant in the usual sense, which would trigger the need for such a

cautionary instruction. While in prison, and at different times, Roberts bunked with both Mojo and Deloney. Roberts testified that he considered himself friends with Mojo, but not with Mojo's son, Cel, nor with Deloney. Roberts also testified that he did not receive a deal from the State in exchange for his statements regarding Deloney's confession. Moreover, Roberts did not act under instructions from the government in an attempt to illicit such a confession from Deloney during their time in jail together. In pretrial motions, the district court stated that it did not find Roberts to be a credible witness, and barred Roberts from testifying regarding Deloney's prior bad acts. However, the district court allowed Roberts to testify regarding Deloney's confession, concluding that it was a statement against interest.

This court has held that incriminating statements made by an accused should not be suppressed where the informant is not an unannounced police presence or eliciting information for the police pursuant to a prior agreement. Thompson v. State, 105 Nev. 151, 156, 771 P2d. 592, 596 (1989). Here, Roberts did not act in the capacity of a police informant and, as in Thompson, the district court gave a general cautionary instruction concerning testimony of witnesses and their credibility, including the testimony of convicted felons. Id. Therefore, the district court did not err in this regard.

Accomplice testimony and corroboration requirement

Deloney asserts that the district court violated his due process rights under the Fifth Amendment when it failed to instruct the jury on accomplice testimony and the requirement for corroboration from those witnesses. Because Deloney failed to raise this issue below, we review for plain error and disagree.

Under NRS 175.291, testimony of an accomplice must be corroborated by other evidence which tends to connect the defendant with the commission of the crime. The corroboration is not sufficient if it merely shows the commission or the circumstances of the offense. NRS 175.291(1). The statute defines an accomplice as one who is liable to prosecution for the identical offense charged as the defendant in the cause in which the accomplice's testimony is given. NRS 175.291(2).

In this case, prosecutors decided not to charge Cel with murder after he gave his statement to police. Even if Cel was a corrupt participant that night, whether the witness is an accomplice is a question for the jury under proper instructions. Globensky v. State, 96 Nev. 113, 117, 605 P.2d 215, 218 (1980). Because it is incumbent upon the defendant to request such an instruction, and Deloney's counsel did not request one, appellate consideration is precluded unless the failure to give the instruction was "'patently prejudicial.'" Id. (quoting Gebert v. State, 85 Nev. 331, 333-34, 454 P.2d 897, 899 (1969)).

In considering whether an accomplice instruction was necessary, we first note that it is not clear whether Cel and Mojo were accomplices because there is no evidence to implicate either one as the shooter, and the State did not charge them in connection with this crime. Second, the State presented evidence from a variety of sources, not only Cel and Mojo, connecting Deloney with the crime charged. Third, we indicate again that the district court gave instructions to the jury generally regarding witnesses and their credibility. Here, we conclude that failure to instruct the jury on accomplice testimony and corroboration was not patently prejudicial. Thus, the district court did not err by failing to give the instruction.

"Willful" jury instruction

Deloney argues that the district court improperly gave two instructions on the term "willful," relieving the State of its burden on this element of first-degree murder. We review for plain error and conclude the district court properly instructed the jury regarding the definition of the term "willful."

A defendant is deprived of due process if a jury instruction "has the effect of relieving the State of the burden of proof . . . on the critical question of petitioner's state of mind." Sandstrom v. Montana, 442 U.S. 510, 521 (1979). Jury Instruction No. 16, which defines the word "willfully" in criminal statutes as "an act or omission which is done intentionally, deliberately, or designedly, as distinguished from an act or omission done accidentally, inadvertently or innocently," explains the word "willfully" as it relates to Jury Instruction No. 13.[1]

Jury Instruction No. 19 offers definitions of the three elements required to prove murder of the first-degree—a killing which is willful, deliberate, and premeditated. The definitions set forth in Jury Instruction No. 19 mirror those promulgated by this court in Byford v. State, and make clear the burden of the prosecution in proving all three elements of first-degree murder. 116 Nev. 215, 236-37, 994 P.2d 700, 714-15. (2000). See also Nika v. State 124 Nev. ___, ___, 198 P.3d 839, 847-50 (2008) (discussing the change in Nevada law stemming from Byford).

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[1]Jury Instruction No. 13 states, "The elements of the crime of Murder are: (1) [t]he defendant did willfully and unlawfully; (2) kill a human being; (3) with malice aforethought, either express or implied."

Accordingly, we decide that the district court's instructions regarding the term "willful" did not misstate the prosecution's burden, and presented the jury with a correct statement of Nevada law. Further, the district court, in its jury instructions, properly stated the prosecution's burden of proof.[2]

Discovery violations

Deloney argues that the state's failure to turn over details of "dealings" with witness Ken Roberts and the jailhouse letters written by Deloney constitute discovery violations affecting his due process and fair trial rights under the Fifth Amendment, as recognized by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 87 (1963), and its statutory duties under NRS 174.235. We disagree that the State violated its duties under Brady. However, we conclude that the State did violate its statutory duties by failing to disclose the jailhouse letters prior to Deloney's first trial, but this violation was harmless.

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[2]Deloney argues that the district court improperly instructed the jury regarding consideration of lesser included offenses. This argument is without merit. The district court gave the proper transition instructions in accordance with Green v. State, 119 Nev. 542, 547-48, 80 P.3d 93, 96 (2003).

Deloney also contends that the district court should have given the jury a limiting instruction on bad act evidence. In pre-trial motions, the district court precluded the State from introducing evidence regarding Deloney as a purchaser in a gun sale, that Deloney had a temper and acted as an "enforcer" for Cel during drug transactions, and that Deloney sought out Roberts to fabricate testimony, portraying Cel as the shooter, to forgive a previous drug debt. Because the district court so ruled regarding these bad acts, we decline to address this issue further. But, the district court did admit Roberts's testimony regarding Deloney's confession as a statement against interest.

Ken Roberts

In Brady, the United States Supreme Court ruled that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. A Brady violation contains three components: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the prosecution intentionally or inadvertently; and (3) the evidence was material, thereby prejudicing the defendant. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). Whether the evidence is material depends partly upon whether or not the defendant made a general or specific request for the withheld information. Id. at 600, 81 P.3d at 8. If the request was a general one, the evidence is material "when a reasonable probability exists that the result would have been different had it been disclosed." Id. But, if the request was specific, the evidence is material if a reasonable possibility exists of a different result had the evidence been disclosed. Id.

Concerning the testimony of Ken Roberts, the first question under Brady is whether his testimony or the State's "dealings" with Roberts, constitutes evidence favorable to the accused. Id. at 599, 81 P.3d at 8. We conclude that it does not. During the trial, Roberts stated that Deloney admitted to shooting Johnson while they bunked together in prison. This testimony represented a change in testimony, because previously, in interviews with investigators, Roberts stated that Mojo told him that Cel was the shooter, but Mojo implicated Deloney so Cel would not go to jail. However, it is not evidence that is favorable to Deloney.

Moreover, to the extent that the evidence may have been favorable in light of a deal with the State on Roberts's pending robbery

charges, we conclude that it was not intentionally or inadvertently withheld by the State.[3] Bennett, 119 Nev. at 599, 81 P.3d at 8. Here, the State thought for two years that Roberts would be a defense witness. Roberts's defense counsel learned that Roberts was subpoenaed as a witness in the Deloney matter and contacted prosecutors on his client's behalf only a week before Deloney's trial. The State interviewed Roberts on September 8, 2008, gave oral notice of its intent to call Roberts as a witness on September 10, 2008, and written notice on September 15, 2008. Deloney's second trial began on September 16, 2008. Because of the close timing and circumstances surrounding the State's discovery of Roberts's changed testimony, we conclude that the State did not withhold this evidence from the defense.

Finally, we turn to the third question under Brady of whether Roberts's testimony is material. Id. Because of the condensed timeframe, the defense did not make a specific request for this material, so we examine materiality under the standard of whether a reasonable probability exists that the result would have been different had the evidence been disclosed. We are unconvinced that a reasonable probability exists that Deloney's verdict would have been different had the defense known sooner that Roberts planned to change his testimony. Defense counsel had notice that the State planned to use Roberts as a witness. Deloney's trial counsel cross-examined Roberts under oath and chose to ask him only about his pending armed robbery charges and

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[3]Roberts testified that he had no promise of leniency in exchange for his testimony against Deloney. Roberts's defense counsel corroborated this in a pre-trial hearing.

whether he had been a witness for the State before. But, counsel had this opportunity to question Roberts and to attempt to impeach Roberts before the jury. In the absence of any evidence of an agreement or promise between the State and Roberts in exchange for his testimony implicating Deloney, the State's knowledge of Roberts's changed story and its untimeliness in including him on its witness list do not amount to a violation under Brady.

Jailhouse letters

Deloney argues that the State had a statutory duty to turn over the two letters Deloney wrote from jail, which include written statements that Mojo and Cel "ratted" him out. Under NRS 174.235(1)(a) and (1)(c), the prosecuting attorney has a duty to permit the defendant to inspect and copy any written statements or confessions made by the defendant, and any papers or documents which the prosecuting attorney intends to introduce in the State's case-in-chief. The defense made a specific request for these items prior to Deloney's first trial.

We agree with Deloney that the letters written from jail fall under this statute. The State noticed the letters to the defense for the first time in March 2008, when it sought an exemplar of handwriting from Deloney. But the State had knowledge of, and planned to use, the letters in the January 2008 trial, had it not ended in mistrial. The State failed to disclose the letters to the defense despite counsel's specific request before the January 2008 trial in violation of the State's duty under NRS 174.235.

However, defense counsel did not object to admission of the letters and even stipulated to them in Deloney's second trial. Because the defense had knowledge of the letters well before the second trial and had ample time to file a motion to suppress, possible earlier knowledge of the letters, but for the misconduct of the prosecutors, would not have

substantially affected Deloney's right to a fair trial. A Brady analysis yields the same result: although the State did withhold the letters, the letters are not favorable to the accused and, even under the less stringent standard for materiality, earlier knowledge of them would not have changed the outcome.

Prosecutorial misconduct

Deloney argues that the State violated his Fifth, Sixth, and Fourteenth Amendment rights by calling him a liar, repeatedly vouching for the credibility of State witnesses, and commenting on Deloney's refusal to testify. We review for plain error and determine that any instances of prosecutorial misconduct were minor and, therefore, harmless.

Calling Deloney a "liar"

Although we have held that calling a defense witness a "liar" constitutes improper prosecutorial argument, this court decided that "when a case involves numerous material witnesses and the outcome depends on which witnesses are telling the truth," the prosecutor is allowed reasonable latitude to argue the credibility of the witnesses. Rowland v. State, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002). This may include "occasionally stating . . . that a witness is lying." Id.

Here, Deloney did not take the stand and was not a defense witness in the case. The prosecutor's comment in closing referred to Deloney misleading the court. This comment referenced the fact that Deloney, in his first trial, planned to offer the testimony of Alice Cooper as an alibi defense (which both parties had stipulated to), and then, at the second trial, Cooper discredited Deloney's stipulated alibi by testifying that she could not account for Deloney's whereabouts at the time of the murder. We conclude that this was characterization of a stipulated fact during closing and not prosecutorial misconduct.

Vouching for witnesses

The prosecution cannot vouch for the credibility of its witnesses. United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980). Vouching occurs when the prosecution places the prestige of the government behind the witness, or when the prosecution indicates that information not in evidence exists to support that witness's testimony. Id.

Here, the State announced the plea agreement Cel made in exchange for substantial assistance from the State in this case. Specifically, Cel's drug trafficking sentence was reduced to probation when the detectives in Deloney's case reported that Cel had offered substantial assistance. The prosecutor mentioned Cel's obligation to testify truthfully in the first few questions of his direct examination. In closing, the prosecutor made references to Cel's requirement to testify truthfully under the terms of his plea agreement.

The United States Court of Appeals for the Ninth Circuit in Roberts stated that "[a] strong case can be made for excluding a plea agreement promise of truthfulness." Id. at 536. An untrustworthy witness may appear to have come forward and be truthful, and the suggestion is that the prosecutor knows what the truth is and is assuring that the witness is telling the truth. Id. "The prosecution may not portray itself as a guarantor of truthfulness." Id. at 537. Because the references to truthful testimony did not come in response to attacks on Cel's credibility, this constituted improper vouching. See U.S. v. Shaw, 829 F.2d 714, 717 (9th Cir. 1987) (concluding that the message of truth raised before an issue of bias constitutes improper vouching).

In reviewing for plain error, we determine that although the prosecutor vouched for the credibility of Cel in referencing his truthful testimony as a condition of the plea agreement, this misconduct does not

warrant reversal. The prosecutor did not refer to any facts outside the record concerning Cel's truthful testimony. Nor did the prosecution give any indication that he knew of Cel's truthfulness from extrinsic sources other than the plea agreement. Again, we note that the district court gave instructions to the jury concerning the credibility of witnesses in this case, including instructions on weighing the credibility of convicted felons.[4]

Commenting on Deloney's silence

The Fifth Amendment, through its application to the states by the Fourteenth Amendment, forbids comment by the prosecution on the defendant's silence. Griffin v. California, 380 U.S. 609, 615 (1965). Indirect references to the defendant's failure to testify are constitutionally impermissible if "the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify." United States v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968). See Barron v. State, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989).

Here, in closing, the prosecutor said, "the one person you didn't hear about, about whether or not he had a gun, how he feels about guns, is the defendant." (Emphasis added.) This constitutes an indirect reference to the defendant's right to refuse to testify, and was the only remark of this kind. We conclude that this single comment during closing was not one that the jury would naturally and necessarily take to be a comment on the defendant's failure to testify. The district court also properly instructed the jury on the defendant's right to remain silent.

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[4]We decline to address Deloney's argument that the state vouched for witness Priscilla Chopper and conclude that it is without merit.

Under a plain-error analysis, this comment by the prosecutor was minor and did not affect Deloney's substantial rights.

Cumulative error

Deloney contends that cumulative error precluded a fair trial in violation of his Fifth Amendment rights. We disagree.

Although errors are harmless individually, the cumulative effect of those errors may violate a defendant's right to a fair trial. Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 481 (2008). The factors for considering a claim of cumulative error are: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged. Id. (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).

Undoubtedly, the crime here is serious. But, as discussed in this order, Deloney's claims largely lack merit. We conclude that error was apparent in the prosecution's failure to turn over the jailhouse letters to the defense prior to Deloney's first trial, and in the prosecution's vouching for the truthfulness of Cel's testimony relating to his plea agreement. But these errors were harmless and did not affect Deloney's substantial rights. Thus, the quantity and quality of error is not great enough to warrant reversal based on cumulative error. We conclude that

Deloney's right to a fair trial was not violated due to cumulative error.[5] Accordingly, we ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Jenny Hubach
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

[5]We decline to address Deloney's request for this court to revisit our decision in State v. Dist. Ct. (Pullin), 124 Nev. ___, 188 P.3d 1079 (2008).