IN THE SUPREME COURT OF THE STATE OF NEVADA

LEVENRAL DEMARLO POLK,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34816

FILED

MAY 16 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of first-degree murder with the use of a deadly weapon and discharging a firearm out of a motor vehicle. The district court sentenced appellant to two consecutive life terms in prison without the possibility of parole and a consecutive term of 40 to 180 months. The district court credited appellant with 189 days for time served.

Appellant first contends that the prosecutor's non-racial basis for exercising a peremptory challenge on an African-American juror was pretextual and therefore the district court erred in overruling appellant's objection to the peremptory challenge. Because discriminatory intent was not inherent in the prosecutor's explanation for exercising the peremptory challenge, we deem the reason to be race neutral.[1] Furthermore, we perceive no abuse of discretion in the district court's determination that the prosecutor's explanation was not pretextual.[2] Because the juror admitted that her prior jury service in a murder trial was an emotional

[1]See Doyle v. State, 112 Nev. 879, 888, 921 P.2d 901, 908 (1996).

[2]Id. at 889-90, 921 P.2d at 908 (stating that the district court's determination "should ordinarily be accorded great deference by the reviewing court").

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experience she did not like, and that she would feel uncomfortable participating in the present case, we conclude that the prosecutor had a race-neutral reason for questioning whether emotion could affect the juror's impartiality, despite the juror's statement that she could nevertheless be fair and impartial.

Next, appellant argues that the district court abused its discretion in admitting highly prejudicial evidence that appellant owned a gun and that he had made threats against the victim. We disagree. Based on our review of the record, we conclude that the evidence was relevant to the crime charged, was proven under the clear and convincing standard of proof, and had probative value which was not substantially outweighed by the danger of unfair prejudice.[3] Accordingly, the district court's decision to admit this evidence was not "manifestly wrong."[4]

Appellant next contends that the prosecutor committed misconduct depriving him of a fair trial by asking appellant on cross-examination if seven of the State's witnesses were liars. Because appellant failed to object at trial to the questioning, we will not review the issue absent plain error.[5] We conclude that the questioning did not amount to plain error because it was not "patently prejudicial" and did not "inevitably inflame or excite the passions of the

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[3]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (citing Walker v. State, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996)).

[4]See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

[5]See Parodi v. Washoe Medical Center, 111 Nev. 365, 368, 892 P.2d 588, 590 (1995); see also Hewitt v. State, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997) overruled on other grounds by Martinez v. State, 115 Nev. 9, 974 P.2d 133 (1999).

jurors against the accused."[6] Further, we are not persuaded that the questioning affected appellant's substantial rights,[7] and in any event, we conclude that any error was harmless beyond a reasonable doubt, given the overwhelming evidence of guilt.[8]

Next, appellant contends that the district court erred in giving an instruction this court approved in Kazalyn v. State[9] regarding premeditation and deliberation because the instruction is clearly erroneous under this court's subsequent holding in Byford v. State.[10] Appellant also argues that the district court erroneously rejected a proposed premeditation instruction which separately defined premeditation and deliberation. We recently clarified Byford, as follows: "Our opinion in Byford concludes that the Kazalyn instruction does not fully define 'willful, deliberate, and premeditated,' and it provides other instructions for future use--but it does not hold that giving the Kazalyn instruction constituted error, nor does it articulate any constitutional grounds for its decision."[11] Further, "[u]se of the Kazalyn instruction in trials which predate Byford does not constitute plain or constitutional error. Nor do the new instructions required by Byford have any retroactive effect on convictions which are not yet final: the instructions are a new requirement with

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[6]Garner v. State, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962).

[7]See United States v. Olano, 507 U.S. 725, 731-32 (1993).

[8]Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64 (1997) (stating that "where there is overwhelming evidence of guilt presented to the jury, even aggravated misconduct may be deemed harmless error").

[9]108 Nev. 67, 75, 825 P.2d 578, 583 (1992).

[10]116 Nev. 215, 994 P.2d 700 (2000).

[11]Garner v. State, 116 Nev. ___, ___, 6 P.3d 1013, 1024 (2000).

prospective force only."[12] Because appellant's trial predated Byford, we conclude that the district court's use of the Kazalyn instruction, rather than appellant's proposed instruction, was not error. Accordingly, appellant's argument lacks merit.

Appellant next argues that the district court erred in disallowing his proposed jury instruction which was offered to purportedly clarify the reasonable doubt standard. Appellant cites Tucker v. State,[13] wherein this court discouraged clarifying instructions but acknowledged that they had previously been permitted, provided the clarification could not have misled the jury. However, appellant's reliance on Tucker is misplaced. Tucker does not require the district court to allow a clarifying instruction. Moreover, a clarifying instruction runs the risk of violating NRS 175.211(2), which states that "no other definition of reasonable doubt may be given." Because no authority requires the district court to allow a clarifying instruction, we conclude that the district court did not err in refusing appellant's proposed instruction.

Next, appellant contends that the district court abused its discretion in denying his motion to argue last at the penalty hearing. Appellant argues that there is no burden of proof on the State in the penalty phase of a murder trial, because the jury would impose a sentence regardless of whether the State presents evidence or not. This absence of a burden of proof, argues appellant, gave him the right to argue last at the penalty hearing. We conclude that the argument lacks

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[12]Id. at ___, 6 P.3d at 1025.

[13]92 Nev. 486, 490, 553 P.2d 951, 953-54 (1976).

merit. In Williams v. State,[14] we stated that "NRS 175.141 mandates that the State open and close the argument [in a penalty hearing]. The district court is bound by statute and does not have the authority to allow [defendant] to argue last."

Finally, appellant contends that the district court erred in denying his motion to find the penalty hearing void for vagueness. We need not consider this argument because it is unsupported by citations to relevant authority.[15]

Having considered all of appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Young, J.

Leavitt, J.

Becker, J.

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General
Clark County District Attorney
Special Public Defender
Clark County Clerk

[14]113 Nev. 1008, 1024, 945 P.2d 438, 448 (1997) (citing Witter v. State, 112 Nev. 908, 921 P.2d 886 (1996) (footnote omitted)).

[15]See Cunningham v. State, 94 Nev. 128, 130, 575 P.2d 936, 937 (1978).