IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN LAMONT ALFORD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53415

FILED

JUL 22 2010

TRACIE K. LINDEMAN
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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 firearm. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

Appellant Brian Lamont Alford was charged with one count of open murder in the death of Jerome Castro stemming from an incident that took place at Castro's home in Reno, Nevada. Alford was called by his brother, Brandon, to accompany Brandon and Brandon's girlfriend, Melissa Simcoe, to Castro's house to get Simcoe's children, one of which was Brandon's child. Brandon and Simcoe believed they needed to pick up the children because Castro was upset with Brandon and Simcoe for getting Castro's sister, Shanika Thompson, very intoxicated earlier in the night.

On the way to Castro's house, Alford and Brandon stopped to pick up weapons because Brandon told Alford that Castro made threats against him and Simcoe. Upon arriving at Castro's house, a fight broke out, with Alford and Brandon fighting with Castro and his friend, Loren Dudley. During this fistfight, Alford's gun came out of it holster. Alford beat Castro with the butt of the gun, and a single shot was fired. The bullet went through Castro's arm and hit him in the forehead, but did not

penetrate or fracture his skull. Castro died from his injuries later that evening.

Alford was bound over for trial on the charges of open murder with the use of a deadly weapon and attempted robbery with the use of a deadly weapon. However, the magistrate dismissed the third charge against Alford, burglary.

After being bound over for trial, Alford filed a pretrial writ of habeas corpus. Alford challenged the State's ability to allege felony murder based upon a burglary count that was dismissed without probable cause by the magistrate, as well as on other grounds. The district court denied Alford's writ of habeas corpus.

Following a five-day jury trial, Alford was convicted of first-degree murder with the use of a deadly weapon. The district court sentenced Alford to life in prison with the possibility of parole after 20 years, with a consecutive sentence of 192 months for the use of a deadly weapon, and with parole eligibility after 43 months.[1]

On appeal, Alford argues that: (1) the district court abused its discretion in denying his pretrial writ of habeas corpus, (2) there was insufficient evidence to sustain his conviction, (3) the district court abused its discretion in giving certain jury instructions, (4) the district court abused its discretion in admitting certain evidence, (5) the district court erred in curtailing the cross-examination of key witnesses, (6) the district court abused its discretion in granting the State's motion to amend the information, (7) the district court abused its discretion in denying his

[1]The parties are familiar with the additional facts and we do not recount them further except as is necessary for our disposition.

motion for a new trial, (8) his convictions should be reversed because of prosecutorial misconduct, and (9) his convictions should be reversed under the doctrine of cumulative error. We conclude that all of Alford's arguments are without merit and thus affirm the judgment of the district court.

Pretrial writ of habeas corpus

Alford argues that the district court abused its discretion in denying his pretrial writ of habeas corpus because requiring him to face trial based upon the evidence received at the preliminary hearing violates the rule of corpus delicti.[2] Alford further argues that if there is insufficient evidence to demonstrate probable cause on the underlying felony, prosecution under the felony-murder rule should not be permitted to go forward. We disagree.

Standard of review

"The sole function of this court is to determine whether all of the evidence received [during the preliminary hearing] . . . establishes probable cause to believe that an offense has been committed and that the defendant[ ] committed it." Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). This court is "not now concerned with the prospect that the evidence presently in the record may, by itself, be insufficient to sustain a conviction." Id.

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[2]Corpus delicti means "body of the crime" in Latin. Black's Law Dictionary 395 (9th ed. 2009).

Corpus delicti

NRS 171.206 deals with the procedure for binding a defendant over for trial after a preliminary hearing and states:

> If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall forthwith hold [him] to answer in the district court; otherwise the magistrate shall discharge [him]. The magistrate shall admit the defendant to bail as provided in this title. After concluding the proceeding the magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail [taken by him].

The corpus delicti rule is a "doctrine that prohibits a prosecutor from proving the corpus delicti based solely on a defendant's extrajudicial statements" and forces the prosecution to "establish the corpus delicti with corroborating evidence." Black's Law Dictionary 395 (9th ed. 2009). We have held that "[i]t has long been established that the corpus delicti must be demonstrated by evidence independent of the confessions or admissions of the defendant." Sheriff v. Dhadda, 115 Nev. 175, 180-81, 980 P.2d 1062, 1065 (1999). Further "[t]he corpus delicti may be established by purely direct evidence, partly direct and partly circumstantial evidence, or entirely circumstantial evidence." Sheriff v. Middleton, 112 Nev. 956, 962, 921 P.2d 282, 286 (1996). We have also held that:

> Although medical evidence as to the cause of death is often critical in establishing that a death occurred by criminal agency, there is no requirement that there be evidence of a specific cause of death. The state is required only to show

> a hypothesis that death occurred by criminal agency; it is not required to show a hypothesis of a specific cause of death.

Id.

We conclude that Alford's argument is without merit because the evidence presented by the State at the preliminary hearing was sufficient to establish that Castro may have died from criminal agency. Specifically, there was evidence that: (1) Alford was in possession of a gun when Castro was shot, (2) Castro was shot through the arm and struck in the forehead with a bullet, and (3) Castro died while in surgery that centered on the bullet wound sustained to his forehead. As such, the district court did not err in denying Alford's pretrial writ of habeas corpus.

The felony-murder rule

"Pursuant to NRS 200.030, the commission of a felony and premeditation are merely alternative means of establishing the single mens rea element of first degree murder, rather than constituting independent elements of the crime." Holmes v. State, 114 Nev. 1357, 1363-64, 972 P.2d 337, 341 (1998). In Holmes, we held that:

> premeditation and felony-murder are alternate theories upon which the State may rely in its attempt to establish the mens rea element of the crime of first degree murder. Although the justice's court had dismissed the felony robbery charge due to insufficient evidence, the State was not precluded from advancing the theory at trial that [the defendant] had murdered [the victim] during the commission of a robbery.

Id. at 1364, 972 P.2d at 342.

We conclude that Alford's argument regarding the underlying felony is without merit because we have long held that a defendant does not need to be bound over on the underlying felony charge for the State to

present a theory of felony murder. See id. Thus, even though Alford was not bound over on the burglary charge, it was proper for the district court to allow the State to advance the theory of felony murder. As such, the district court did not err in denying Alford's writ of habeas corpus based on the fact that the State had advanced a theory of felony murder.

Sufficient evidence

Alford argues that there was insufficient evidence presented by the State at trial to sustain his first-degree murder conviction. We disagree.

Standard of review

We will not reverse a jury's verdict on appeal if that verdict is supported by substantial evidence. Moore v. State, 122 Nev. 27, 35, 126 P.3d 508, 513 (2006). "There is sufficient evidence [to support a conviction] if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998).

We have also held "'that where 'there is conflicting testimony presented, it is for the jury to determine what weight and credibility to give to the testimony.'" Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981) (quoting Stewart v. State, 94 Nev. 378, 379, 580 P.2d 473, 473 (1978) (quoting Hankins v. State, 91 Nev. 477, 477, 538 P.2d 167, 168 (1975))). Additionally, an entry into a dwelling with the intent to commit battery may support a felony-murder charge. State v. Contreras, 118 Nev. 332, 337, 46 P.3d 661, 664 (2002).

We conclude that there was sufficient evidence presented to support Alford's conviction for first-degree murder with the use of a deadly weapon. There was evidence presented to the jury that as Castro

attempted to shut his front door on Alford, Alford spit on Castro and prevented Castro from shutting the door by pushing the door in. Additionally, evidence was presented that Alford started the fight that ultimately led to Castro's death. While Alford did present his theory of the case that the fight started on Castro's front porch and then moved inside during the mutual combat, the jury determined that the State's evidence was more credible. As such, we cannot say that any rational trier of fact could not have found Alford guilty on the facts as presented at trial. Thus, we conclude that Alford's argument is without merit.

Jury instructions

Alford argues that the district court abused its discretion in both improperly instructing the jury on the felony-murder rule to imply malice and in failing to instruct the jury regarding the State's burden of proof. Alford further argues that the felony-murder rule should be set aside by this court because the rule leads to the denial of due process by relieving the State of the burden of proving a defendant's state of mind. We disagree.

Standard of review

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (citing Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). If the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason, then the district court abused its discretion. Id.

Felony-murder rule jury instruction

"Pursuant to NRS 200.030, the commission of a felony and premeditation are merely alternative means of establishing the single mens rea element of first degree murder, rather than constituting independent elements of the crime." Holmes v. State, 114 Nev. 1357, 1363-64, 972 P.2d 337, 341 (1998). In Holmes, we held that:

> premeditation and felony-murder are alternate theories upon which the State may rely in its attempt to establish the mens rea element of the crime of first degree murder. Although the justice's court had dismissed the felony robbery charge due to insufficient evidence, the State was not precluded from advancing the theory at trial that [the defendant] had murdered [the victim] during the commission of a robbery.

Id. at 1364, 972 P.2d at 342.

We conclude that Alford's argument is without merit because we, along with other jurisdictions, have continued to hold that the underlying felony need not be proved or even be pleaded to sustain a prosecution for felony murder. See id. (stating that "[c]onsistent with our approach, many jurisdictions have held that the State may seek a conviction for murder based on a theory of felony-murder without even charging the underlying predicate felony.") As such, we conclude that the district court did not abuse its discretion in instructing the jury to utilize the burglary allegation against Alford to substantiate malice for the purpose of a first-degree murder charge.

Manslaughter jury instruction

Alford argues that the district court abused its discretion in instructing the jury on the State's burden of proof to prove beyond a reasonable doubt that he did not act in the heat of passion with the requisite legal provocation. We disagree.

We have held that "the district court may refuse a jury instruction on the defendant's theory of the case which is substantially covered by other instructions." Runion v. State, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000). Further, "'[a] jury is presumed to follow its instructions.'" Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (quoting Weeks v. Angelone, 528 U.S. 225, 234 (2000)).

We conclude that Alford's argument is without merit because the jury was properly instructed on the State's burden of proof. Additionally, since Alford did not object to the instructions given by the district court, and did not provide the district court with a proposed jury instruction on manslaughter, it is inappropriate for him now to complain that the district court erred in failing to give such an instruction. As such, we conclude that the district court did not abuse its discretion in instructing the jury concerning manslaughter.

Setting aside the felony-murder rule

The felony-murder rule has been codified by statute in this state since the days of statehood. See State v. Gray, 19 Nev. 212, 219, 8 P. 456, 460 (1885) (stating the felony-murder rule and citing 1 Compiled Laws of Nevada, § 2323 at 560 (Bonnifield & Healy 1873)).

We conclude that Alford's argument is without merit because it is not our place to rewrite a statute, especially one that has been around since the days of statehood. See City of Las Vegas v. Dist. Ct., 118 Nev. 859, 867, 59 P.3d 477, 483 (2002). As such, we further conclude that we

should not set aside the felony-murder rule and should leave this task to the Legislature if it sees fit to do so.

Admission of evidence

Alford argues that the district court abused its discretion in admitting: (1) the testimony of Detective Jenkins regarding a conversation between Alford and his girlfriend, Tarina Weatherhead; (2) the testimony of Detective Jenkins regarding a second interview between Alford and Detective Jenkins; and (3) bad acts evidence.

Standard of review

"District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998). We will not disturb a trial court's ruling on this issue without a showing of a clear abuse of discretion. Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996), overruled on other grounds by Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006).

The testimony of Detective Jenkins regarding a conversation between Alford and Weatherhead

Alford argues that the district court abused its discretion in admitting into evidence a conversation, videotaped by Detective David Jenkins, between Alford and Weatherhead at the police station following his arrest. Alford further contends that Weatherhead was used as an agent of the police and he was interrogated while in custody without having been informed of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). We disagree because Alford failed to file a motion to suppress this evidence or object to its admission at trial.

"[T]his court may review plain error or issues of constitutional dimension sua sponte despite a party's failure to raise an issue below." Murray v. State, 113 Nev. 11, 17, 930 P.2d 121, 124 (1997). "[P]lain error is error which either had a prejudicial impact on the verdict when viewed in context of the trial as a whole or seriously effects the integrity or public reputation of the judicial proceedings." Parodi v. Washoe Medical Ctr., 111 Nev. 365, 368, 892 P.2d 588, 590 (1995) (citing Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), judgment vacated on other grounds by Libby v. Nevada, 516 U.S. 1037 (1996)) (internal quotations omitted).

NRS 174.125(1) addresses the filing of a motion to suppress and states:

> All motions in a criminal prosecution to suppress evidence, for a transcript of former proceedings, for a preliminary hearing, for severance of joint defendants, for withdrawal of counsel, and all other motions which by their nature, if granted, delay or postpone the time of trial must be made before trial, unless an opportunity to make such a motion before trial did not exist or the moving party was not aware of the grounds for the motion before trial.

We have held that a civilian may be deemed a police agent when that civilian makes an express agreement with the police to speak to a suspect who is then in custody. Boehm v. State, 113 Nev. 910, 913, 944 P.2d 269, 271 (1997).

We conclude that all of Alford's arguments are without merit because he failed to file a motion to suppress or object to the admission of the evidence at issue. Specifically, since Alford failed to file a motion to suppress the videotaped conversation, there is no order from the district court ruling on the admissibility of the interview for this court to review.

Further, Alford has shown no evidence that Weatherhead made an agreement with Detective Jenkins to elicit statements from Alford during the conversation, thus failing to show that Weatherhead should be seen as an agent of the police. Additionally, Alford failed to make any argument which shows that the district court committed plain error, failed to show that the admission of this evidence had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or seriously affected the integrity or public reputation of the judicial proceedings. As such, we conclude that the district court did not abuse its discretion in admitting the videotaped conversation between Alford and Weatherhead.

The testimony of Detective Jenkins regarding an interview between Alford and Detective Jenkins

Following Alford's conversation with Weatherhead, he was interviewed by Detective Jenkins. During this interview, Alford told Detective Jenkins that the gun had gone off accidently and that he never intended to kill anyone. However, due to a recorder malfunction Alford's interview was not recorded and Detective Jenkins then had to re-interview Alford after replacing the broken tape recorder with a tape recorder that worked.

Alford argues that the district court improperly admitted testimony from Detective Jenkins regarding the interview between him and Alford because of the gross negligence of the police in losing or failing to properly record that interview. Alford thus contends that the district court abused its discretion in admitting the taped interview that Detective Jenkins took from him after learning that the original interview had not been recorded. Alford further argues that while he may not be able to show bad faith on the part of Detective Jenkins, he certainly can show

that Detective Jenkins's conduct was grossly negligent, thus establishing a due process violation. We disagree.

To establish a due process violation based upon the State's failure to gather evidence, a defendant must show: (1) that the State failed to gather evidence that is constitutionally material, i.e., that raises a reasonable probability of a different result if it had been available to the defense; and (2) that the failure to gather the evidence was the result of gross negligence or a bad faith attempt to prejudice the defendant's case. See Steese v. State, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998).

We conclude that Alford's argument is without merit because he has failed to show bad faith or gross negligence on the part of Detective Jenkins in failing to record the interview between Alford and Detective Jenkins. Specifically, Alford has shown nothing that indicates that Detective Jenkins purposefully failed to tape the interview or that Detective Jenkins knew, or had reason to know, that the tape recorder would fail during the interview. Further, Alford has failed to show that he was prejudiced by the interview failing to be recorded. Upon realizing that the tape recording equipment had failed, Detective Jenkins immediately placed new equipment in the interview room and re-interviewed Alford based on the previous interview. As such, we conclude that the district court did not abuse its discretion in admitting the taped interview.

Uncharged bad acts evidence

NRS 48.045(2) addresses the admission of uncharged bad acts evidence and states that:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for

> other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Our "principal concern with admitting such [uncharged bad] acts is that the jury will be unduly influenced by the evidence, and thus convict the accused because the jury believes the accused is a bad person." Walker v. State, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000); see Berner v. State, 104 Nev. 695, 696-97, 765 P.2d 1144, 1145-46 (1988).

The uncharged bad acts of others

On the night of the incident, Brandon was introduced to Dudley and Thompson by Simcoe at a club in downtown Reno. After the four left the club, they continued drinking, took ecstasy, and ended up at Simcoe's house. On the way to her house, Simcoe asked Thompson if she would be interested in engaging in a threesome with her and Brandon, to which Thompson said no. All of these events were admitted into evidence at trial by the district court.

Alford argues that the district court abused its discretion in admitting into evidence the uncharged bad acts of others the night of the incident. Alford contends that the uncharged bad acts of Brandon, Simcoe, Dudley, and Thompson were far more prejudicial than probative because it portrayed him as someone who would engage in such deviant sexual behavior, even though he was not present for any of these alleged incidents.

We conclude that Alford's argument is without merit because our principle concern in the exclusion of such bad acts evidence is not present here. Specifically, all of the evidence Alford takes issue with was

about other people, and we cannot say that this is the type of bad acts evidence we seek to keep from being admitted.[3] Furthermore, this evidence goes directly to show Alford's motive for bringing a gun with him to Castro's house. As such, we conclude that the district court did not abuse its discretion in admitting this evidence.

Arrest evidence

Alford argues that the district court abused its discretion in admitting evidence of police activity in the arrest setting of the case and evidence of Brandon resisting arrest. Alford contends that the evidence of Brandon's escape, recapture, and location were completely irrelevant to Alford's own arrest.

We conclude that Alford's argument is without merit because the evidence of his and Brandon's arrest were specifically used to demonstrate how other evidence was collected in this case. As such, we conclude that the district court did not abuse its discretion in admitting this evidence.

Destruction of evidence by Brandon

Alford argues that the district court abused its discretion in admitting evidence that Brandon had burned the jersey he was wearing the night of the incident prior to his arrest.

We conclude that Alford's argument is without merit because he has failed to show he was prejudiced by this evidence. Further, this

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[3]Under NRS 48.045(2) evidence of uncharged bad acts is inadmissible to prove the character of a person in order to prove he acted in conformity therewith. Evidence regarding the prior bad acts of others does not relate to Alford, who was on trial in this instance.

evidence certainly goes to Brandon's credibility as a witness. As such, we conclude that the district court did not abuse its discretion in admitting this evidence.

Cross-examination of key witnesses

Alford argues that the district court improperly curtailed cross-examination of key witness, thereby depriving him of his Sixth Amendment right to confrontation. Alford contends that the district court erred in not allowing him to cross-examine Brandon about the facts underlying Brandon's felony conviction for battery with a deadly weapon for his role in the fight between Brandon and Dudley. Alford further contends that the district court erred in failing to allow him to impeach Dudley with a probation violation from a 2006 burglary conviction. We disagree.

Standard of review

"Determinations of whether a limitation on cross-examination infringes upon the constitutional right of confrontation are reviewed de novo." Mendoza v. State, 122 Nev. 267, 277, 130 P.3d 176, 182 (2006).

"The Sixth Amendment's Confrontation Clause provides: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' This right is secured for defendants in state as well as in federal criminal proceedings." Kentucky v. Stincer, 482 U.S. 730, 736 (1987) (quoting Pointer v. Texas, 380 U.S. 400, 400-01 (1965) (alteration in original)). "The Court has emphasized that 'a primary interest secured by [the Confrontation Clause] is the right of cross-examination.'" Id. (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965) (alteration in original)). An "accused [has the right] to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656 (1984).

We conclude that Alford's argument is without merit because he has failed to show that he was entitled to cross-examine either Brandon or Dudley on the specific issues complained of. Alford has failed to cite to any caselaw that supports his proposition that the jury had a right to hear the underlying facts regarding Brandon being found guilty of battery with a deadly weapon. Further, evidence of Dudley's parole violation, which was in no way relevant to Alford's trial, would only have been introduced to show Dudley's general bad character. This type of character evidence is not admissible under NRS 48.045.[4] As such, we conclude that the district

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[4]NRS 48.045 states:

> 1. Evidence of a person's character or a trait of his . . . character is not admissible for the purpose of proving that [he] acted in conformity therewith on a particular occasion, except:
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> (a) Evidence of [his] character or a trait of his . . . character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence;
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> (b) Evidence of the character or a trait of character of the victim of the crime offered by an accused, subject to the procedural requirements of NRS 48.069 where applicable, and similar evidence offered by the prosecution to rebut such evidence; and
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> (c) Unless excluded by NRS 50.090, evidence of the character of a witness, offered to attack or support his . . . credibility, within the limits provided by NRS 50.085.
>
> 2. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that [he] acted in conformity

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court did not improperly curtail Alford's ability to cross-examine Brandon or Dudley.

The State's motion to amend the information

The State filed its original information on February 26, 2008. On June 12, 2008, the State filed its first amended complaint, without leave from the district court. On December 26, 2008, the State moved the district court for leave to file a second amended information. On January 8, 2009, the district court granted the State's motion for leave to file a second amended information and the State filed a second amended complaint on January 9, 2009.

Alford argues that the district court abused its discretion in granting the State's motion to amend the information because it was filed too late, thus denying Alford his Fifth Amendment right to a fair trial and to due process. We disagree.

Standard of review

The decision to allow the State to amend an information rests soundly within the discretion of the district court. Viray v. State, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005).

NRS 173.095(1), which concerns the amendment of an indictment or information in a criminal prosecution, states: "[t]he court may permit an indictment or information to be amended at any time

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> therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." "The State is required to give adequate notice to the accused of the various theories of prosecution." State v. Dist. Ct., 116 Nev. 374, 377, 997 P.2d 126, 129 (2000). As such, "[a]mendment of the information prior to trial is an appropriate method for giving the accused the notice to which he or she is entitled." Id. at 378, 997 P.2d at 129.

We conclude that Alford's argument is without merit because he has failed to show that he was prejudiced by the district court's granting of the State's motion to amend the information. Specifically, the State's new theory of prosecution was that there may have been an alternative way that Castro died and this theory was consistent with Alford's theory of defense. Thus, Alford cannot claim that he was unprepared for the State's new theory of prosecution since it was the integral argument he used in his defense. Additionally, the State did not charge Alford with an additional or different offense but only added a new theory of prosecution. As such, we conclude that the district court did not abuse its discretion in granting the State's motion to amend the information as Alford has failed to show that his Fifth Amendment right to a fair trial was violated.

Alford's motion for a new trial

Alford argues that the district court abused its discretion in denying his motion for a new trial based on conflicting evidence. Alford contends that the evidence presented in this case did not equate to a first-degree murder conviction and, as such, the district court should have granted his motion for a new trial. We disagree.

Standard of review

"'The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse.'" Domingues v. State, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996) (quoting Pappas v. State, Dep't Transp., 104 Nev. 572, 574, 763 P.2d 348, 349 (1988)).

"Motions for a new trial in criminal cases are governed by NRS 176.515." State v. Purcell, 110 Nev. 1389, 1393, 887 P.2d 276, 278 (1994). NRS 176.515(4) states that "[a] motion for a new trial based on any other grounds [other than newly discovered evidence] must be made within 7 days after verdict or finding of guilt or within such further time as the court may fix during the 7-day period." We have consistently held that pursuant to NRS 176.515(4) regarding 'other grounds,' a district court may grant a motion for a new trial based on an independent evaluation of the evidence, and stated that "'"[h]istorically, Nevada has empowered the trial court in a criminal case where the evidence of guilt is conflicting, to independently evaluate the evidence and order another trial if it does not agree with the jury's conclusion that the defendant has been proven guilty beyond a reasonable doubt."'" Purcell, 110 Nev. at 1393, 887 P.2d at 278 (quoting Washington v. State, 98 Nev. 601, 604, 655 P.2d 531, 532 (1982) (quoting State v. Busscher, 81 Nev. 587, 589, 407 P.2d 715, 716 (1965))).

We have also held that:

> [A] conflict of evidence occurs where there is sufficient evidence presented at trial which, if believed, would sustain a conviction, but this evidence is contested and the district judge, in resolving the conflicting evidence differently from

> the jury, believes the totality of evidence fails to prove the defendant guilty beyond a reasonable doubt.

State v. Walker, 109 Nev. 683, 685-686, 857 P.2d 1, 2 (1993).

Here, the district court evaluated the evidence presented to the jury and determined that the totality of the evidence presented proved Alford's guilt beyond a reasonable doubt. This decision was well within the district court's discretion and Alford has failed to show that the district court's decision was clearly an abuse of that discretion. As such, we conclude that the district court did not abuse its discretion in denying Alford's motion for a new trial based on conflicting evidence.

Alleged prosecutorial misconduct

Alford argues that his Fifth Amendment right to a fair trial was violated by specific acts of prosecutorial misconduct. Alford assigns error to the prosecutor improperly: (1) vouching for a State witness during closing argument, and (2) arguing that Alford was a liar during closing argument. Specifically, Alford takes issue with the prosecutor vouching for the accuracy and credibility of the testimony of a witness and the prosecutor stating that Alford told an untruth and fabricated his story of the night in question. We disagree. We also note that Alford failed to object to either of the prosecutor's statements at trial.

Standard of review

When determining if "prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (citing Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)). "This court must consider the context of such statements and [note that the]

'criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" Id. (quoting Thomas, 120 Nev. at 47, 83 P.3d at 825) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

> When an error has not been preserved, this court employs plain-error review. Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.

Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). "Vouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." U. S. v. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1993).

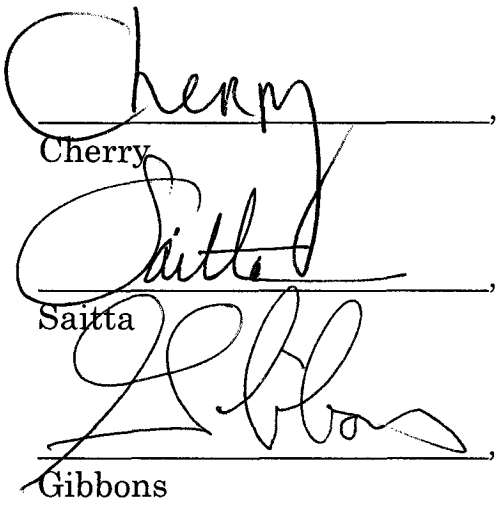
We conclude that Alford's argument is without merit because he has failed to show that the prosecutor's statements rise to the level of plain error. Specifically, the prosecutor did not necessarily vouch for the witness's testimony but merely stated that it appeared that Alford's testimony seemed to corroborate the witness's testimony. Further, the prosecutor did not specifically call Alford a liar, but merely alluded to the fact that Alford had changed his story several times. As such, we conclude that Alford's conviction should not be overturned because of prosecutorial misconduct because, even if there was any misconduct present here, Alford has failed to show that it rises to the level of plain error.

Cumulative error

We conclude that, because the district court did not err on any issue presented by Alford, the cumulative error doctrine does not apply.

In light of the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Patrick Flanagan, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk