

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERASMO MORENO PENA A/K/A
ERASMO PENA MORENO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53470

FILED

FEB 04 2011

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

The district court sentenced appellant Erasmo Moreno Pena to life in prison with the possibility of parole after five years and a consecutive term of life with the possibility of parole after five years for the use of a deadly weapon. Pena appeals his conviction on multiple grounds, however, because we conclude that the district court committed reversible error when it excluded a witness whose testimony would tend to impeach one of the State's witnesses, we reverse the judgment of conviction and remand for further proceedings.¹

¹Pena also appeals his conviction based on: (1) sufficiency of the evidence, (2) denial of Pena's motion to bar retrial, (3) prosecutorial misconduct, (4) denial of Pena's motion for mistrial, (5) the constitutionality of NRS 174.234(1), (6) the introduction of Monica Sotelo's testimony from the first trial, (7) refusal of a proffered jury instruction, and (8) cumulative error. After considering Pena's sufficiency of the evidence claim, we conclude that it lacks merit. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (explaining that the standard of
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Pena argues that the district court erred when it refused to allow him to call as a witness Dan Silverstein, his counsel from his first murder trial.² Pena asserts that Silverstein would have testified that Veronica Garcia told him that she saw Pena shoot the gun at the victim inside the party, a statement which, at the second trial, Garcia denied making. Pena also claims that Silverstein would have further testified that when he asked Garcia if she could identify the person that shot the victim she stated, “who else could it be[?]” The district court ruled that Silverstein was a rebuttal witness and that Pena failed to give proper notice to the State of the rebuttal witness. Therefore, the district court refused to allow Silverstein to testify.

Evidentiary rulings are reviewed for an abuse of discretion. Chavez v. State, 125 Nev. ___, ___, 213 P.3d 476, 484 (2009). Regardless of how Pena characterized Silverstein’s testimony in his offer of proof, we determine that Silverstein’s testimony would have been admissible as impeachment evidence because it directly attacked the credibility of

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review when analyzing the sufficiency of the evidence “in a criminal case is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”) (internal quotations omitted). Because we reverse the judgment of conviction based on reversible error by the district court, we do not reach the merits of Pena’s other challenges raised on appeal.

²Pena was originally convicted of second-degree murder with the use of a deadly weapon in 2004, but this court overturned that conviction based on prosecutorial misconduct. See Pena v. State, Docket No. 44432 (Order of Reversal and Remand, July 5, 2006).

Garcia's testimony that she never told Silverstein that she saw Pena shoot a gun inside the house. See NRS 50.075. Therefore, because Silverstein's testimony is admissible as impeachment evidence, the district court abused its discretion when it failed to allow Pena to call Silverstein as a witness. The district court also erroneously relied on Grey v. State, 124 Nev. 110, 178 P.3d 154 (2008), in making its ruling as that case only applies to rebuttal evidence within NRS 174.234(2)'s purview, and not to impeachment evidence.

A district court's exclusion of a witness's testimony is reviewed for harmless error. See Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76 (2002). To determine whether an error is harmless or prejudicial, this court considers "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). If this court has any reservation "that the verdict would have been the same in the absence of the error," reversal is warranted. Witherow v. State, 104 Nev. 721, 724-25, 765 P.2d 1153, 1156 (1988). Here, we conclude that the district court's error in excluding Silverstein's impeachment evidence was not harmless.

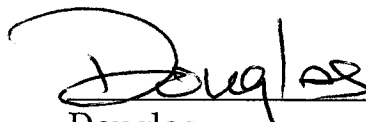
Our review of the record indicates that the issue of guilt or innocence was close given the weakness of the totality of evidence presented against Pena. Garcia was the only witness that identified Pena, per se, as the shooter. The State's other key witness, Monica Sotelo, repeatedly testified that she could not remember what happened the night of the shooting, nor could she recall her testimony from the first trial. In the first trial Sotelo testified that she heard Pena state, in reference to the victim, that he was going to "kill that fool," but at the second trial Sotelo

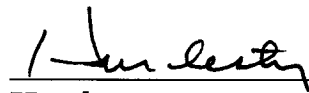
testified that she did not currently recall hearing Pena say that. Additionally, Sotelo testified during the first trial that she saw Pena hold a gun up to the victim's head inside the party, but when she testified at the second trial she claimed that she never saw Pena with a gun on the night in question.

Additionally, the character of the error was great because if the district court had allowed Silverstein to impeach Garcia, a rational jury may have reached a different verdict due to the perceived unreliability of Garcia's testimony and the lack of other uncontroverted evidence linking Pena to the shooting. Based on the foregoing and the grave nature of the crime for which Pena is charged, we conclude that this error was not harmless.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

 _____, C.J.
Douglas

 _____, J.
Hardesty

 _____, J.
Pickering

cc: Hon. Jackie Glass, District Judge
Dayvid J. Figler
Bailus Cook & Kelesis
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk