IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY J. BURRIOLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34844

FILED

JUN 10 2002

J. Richards

ORDER GRANTING REHEARING AND MODIFYING ORDER

This is a petition for rehearing of an order of affirmance of Anthony Burriola's judgment of conviction for second-degree murder. We grant rehearing for the limited purpose of addressing issues raised in Burriola's petition, and issue this order modifying our previous order. We conclude that none of the points raised in the petition require reversal, and affirm the judgment of conviction.

Burriola killed John "Chip" Martinez with a knife after Martinez pointed a gun at Burriola. Although Burriola argued that he acted in self-defense, the State presented evidence that Martinez was no longer threatening Burriola at the time of the killing. A jury convicted Burriola of second-degree murder with the use of a deadly weapon. Following the jury's verdict, the district court sentenced Burriola to two consecutive life sentences with the possibility of parole after ten years. Burriola appeals the judgment entered upon the jury verdicts.

Instruction on causal relationship

The State argued several theories of second-degree murder, including murder in the commission of an unlawful act, to wit: assault

with a deadly weapon.[1] Burriola asserts that the district court erred in delivering a written instruction that a "casual" relationship between the unlawful act and the homicide would support a conviction. Burriola did not object to the incorrect instruction; therefore, we will only reverse for plain error.[2] The transcript of the oral instruction reveals that the district court correctly instructed the jury that it could only convict if it found a "causal" relationship. We reject Burriola's contention that the district court told the jury to ignore the oral instructions. The district court explained that it would provide written instructions, but this is not the equivalent of telling the jury to ignore the oral instructions.

The record also reveals that someone marked one of the misspellings in the written instruction. All of this suggests that the parties, the court and the jury understood that the operative word in the instruction was "causal," rather than "casual." Although the district court

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[1]Burriola argues that the assault merges with the homicide, such that he could not be convicted of murder in the course of an unlawful act. Despite his contention to the contrary, the record reveals that Burriola did not object to this instruction and the State's corresponding argument at trial. Burriola has therefore waived the issue. See Mitchell v. State, 114 Nev. 1417, 1426, 971 P.2d 813, 819 (1998) (absent plain error, failure to object below precludes appellate review).

[2]See, e.g., Doyle v. State, 112 Nev. 879, 900, 921 P.2d 901, 915 (1996).

should have corrected the written instruction,[3] we conclude that this error does not warrant reversal.[4]

Prosecutorial misconduct

Burriola argues that several incidents of prosecutorial misconduct tainted his trial. "A criminal conviction is not lightly overturned on the basis of a prosecutor's comments standing alone."[5] Rather, the inquiry is whether the prosecutor's misconduct deprived the defendant of his due process right to a fair trial.[6] We conclude that the alleged instances of prosecutorial misconduct raised in this appeal do not require reversal.

1. Claims of misconduct during opening statement

Burriola points to a brief reference by the prosecutor during opening statements to a "twenty-one foot rule," apparently alluding to the distance one must cover to effect harm during a confrontation of the type described by the percipient witnesses in this case. This "rule" was never proven during evidence or discussed thereafter. It was, thus, insignificant and did not deprive Burriola of any constitutional right.

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[3]See Harvey v. State, 78 Nev. 417, 420-21, 375 P.2d 225, 226-27 (1962) (error for district court to give conflicting oral and written instructions); accord Morris v. Woodford, 273 F.3d 826 (9th Cir. 2001).

[4]Cf. Lambert v. State, 94 Nev. 68, 69-70, 574 P.2d 586, 587 (1978) (district court's erroneous oral instruction was not plain error, because district court gave correct written instruction).

[5]Runion v. State, 116 Nev. 1041, 1053, 13 P.3d 52, 60 (2000) (citing United States v. Young, 470 U.S. 1, 11 (1985)).

[6]See Darden v. Wainwright, 477 U.S. 168, 181 (1986); Steese v. State, 114 Nev. 479, 490, 960 P.2d 321, 328 (1998).

2. Claims of misconduct during the evidentiary phase of the trial

Burriola contends on appeal that the prosecutor improperly asked Burriola on cross-examination to characterize another witness as a liar. However, the district court sua sponte intervened and terminated the line of inquiry, and the prosecutor did not pursue it further. Thus, this incident did not harm Burriola, even assuming the question was improper.[7]

3. Alleged misconduct during closing arguments

Burriola raises several claims with regard to comments made by the prosecutor during final arguments. Remarks serving no purpose other than to disparage a defendant or his counsel are misconduct, and can warrant reversal if pervasive.[8] Where, as here, the defendant does not object, this court will only reverse if the prosecutor's statements were patently prejudicial.[9] First, we conclude that there was only minimal misconduct in the prosecutor's remarks concerning Burriola and his attorney. The prosecutor called Burriola's counsel "a gentleman" and "a good attorney," and made similar remarks. Even if we assume that the prosecutor spoke in a sarcastic or patronizing tone, the remarks were brief

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[7]See Manley v. State, 115 Nev. 114, 124, 979 P.2d 703, 709 (1999) (citing Stewart v. State, 94 Nev. 378, 379-80, 580 P.2d 473, 474 (1978)) (reversal is generally not warranted where district court sustains an objection and the prosecutor does not pursue line of questioning).

[8]See McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1063-64 (1984); cf. also Earl v. State, 111 Nev. 1304, 1311-12, 904 P.2d 1029, 1033-34 (1995) (reversing conviction where prosecutor called defendant's testimony "malarkey," district court committed misconduct, and evidence of guilt was not overwhelming).

[9]See Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995).

and isolated. Similarly, the prosecutor's single argument that Burriola "thinks he's smarter than everybody else" was short and insignificant in the context of the entire trial.

We note that the prosecutor made some attempt at quantifying the reasonable doubt standard. Although this was improper,[10] the district court's correct instruction on the reasonable doubt standard cured this error.[11] Further, we find no merit in Burriola's argument that the prosecutor vouched for the validity of police witnesses. The prosecutor only argued that the evidence showed that the officers had been diligent in their investigation, and clearly did not assert a personal opinion as to their veracity.

Taking the instances of alleged prosecutorial misconduct cumulatively, we find only minimal impact, and conclude that Burriola was not deprived of due process.

Compulsory process

Burriola argues that the district court denied him his Sixth Amendment right to compulsory process, in that the district court allowed the State to arrest witnesses while denying Burriola's request to depose a witness. The Sixth Amendment grants a criminal defendant the right to compel witnesses to testify on his behalf, but this right is not absolute.[12] The State showed that the witnesses it sought to arrest had failed to

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[10]See Quillen v. State, 112 Nev. 1369, 1382, 929 P.2d 893, 902 (1996); see also Holmes v. State, 114 Nev. 1357, 1366, 972 P.2d 337, 343 (1998).

[11]See Randolph v. State, 117 Nev. ___, ___, 36 P.3d 424, 431 (2001); Quillen, 112 Nev. at 1382-83, 929 P.2d at 902.

[12]See Palmer v. State, 112 Nev. 763, 766, 920 P.2d 112, 113 (1996).

appear at the preliminary hearing, despite subpoenas. The district court did not abuse its discretion in putting these witnesses under house arrest to compel their testimony.

Burriola sought to depose a prospective witness, Robert Scriven, a homeless man who was temporarily detained in a Las Vegas detention facility. NRS 174.175 gives the district court discretion to allow a deposition of a prospective witness in a criminal case if it appears that the witness may be unable to attend the trial. Burriola's motion stated that Scriven moved frequently, had only recently been released from prison in Colorado and had proved difficult to locate in the past. The motion did not indicate that Burriola had made any effort to contact Scriven in jail in order to ensure his availability for trial. In fact, the motion characterized Scriven's availability for trial as "immaterial."

Burriola points out that other parts of the record discuss this issue. Burriola refers us to his ex parte motion to certify Scriven as a material witness, which, like the motion for leave to take Scriven's deposition, stated that Burriola had difficulty locating Scriven. He also refers us to the prosecutor's statement at a subsequent oral argument that Scriven had refused to testify[13] and that both the prosecution and defense listed Scriven as a witness.

The fact that Burriola had difficulty locating Scriven and that both the prosecution and defense were interested in Scriven's testimony

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[13]This oral argument addressed Burriola's later motion to introduce Scriven's hearsay statement. The district court had already denied Burriola's motion to depose Scriven by this time, and Scriven could no longer be found. Because this information was not available to the district court at the time of the motion for a deposition, it cannot be used to show that the district court abused its discretion in deciding that motion.

does not demonstrate error in the district court's ruling. Burriola needed to establish Scriven's unavailability for trial. Burriola was fully aware of Scriven's location at the time of the motion, and the district court had no information suggesting that Scriven would fail to appear at trial. Accordingly, we find no abuse of discretion in the district court's denial of the motion to depose Scriven.

A defendant's compulsory process rights are not unrestricted and must sometimes "'"bow to accommodate other legitimate interests in the criminal trial process."'"[14] Among those legitimate interests is the need to place reasonable limits on pre-trial litigation. Thus, NRS 174.175 limits pre-trial depositions to situations in which it is shown that a witness may be unavailable for trial. This interest exists even when the district court grants the State strong but appropriate measures to compel the testimony of its witnesses. Accordingly, we conclude that the district court did not abuse its discretion and did not act in a manner which deprived Burriola of his Sixth Amendment rights.

Catchall hearsay exception

Burriola argues that the district court erred in not admitting a written statement obtained from Scriven under NRS 51.315, the catchall hearsay exception.[15] The statement arguably exculpated Burriola, at least in part. This statute allows the admission of a hearsay statement if "[i]ts nature and the special circumstances under which it was made offer

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[14]U.S. v. Scheffer, 523 U.S. 303, 308 (1998) (quoting Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973))).

[15]We are not persuaded by Burriola's discussion of the corresponding Federal Rule of Evidence.

strong assurances of accuracy."[16] The party offering the statement must provide evidence to support a finding of trustworthiness.[17] The district court must decide whether, under the totality of circumstances, the statement is trustworthy.[18] The ultimate decision to admit or exclude evidence lies within the district court's discretion.[19]

Scriven gave his unsworn police statement while intoxicated. Scriven also had been drinking heavily when he witnessed the fight between Burriola and Martinez. Although Scriven had no apparent motive to lie, little else gives his statement any indicia of trustworthiness. We therefore find no abuse of discretion in excluding the statement as lacking in special circumstances indicating trustworthiness.

Imperfect self-defense

Burriola argues that, by allowing the State to prove murder by demonstrating that Burriola lacked a reasonable belief in the need for self-defense, the district court unconstitutionally relieved the State of the burden of proving malice. This court previously considered and rejected this argument in Hill v. State.[20] Although acknowledging the theory that an unreasonable belief in the need for self-defense might negate malice, we held in Hill that Nevada's statutes defining murder and self-defense differ from those of states that have adopted the notion of imperfect self-

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[16]NRS 51.315(1)(a).

[17]See Franco v. State, 109 Nev. 1229, 1240, 866 P.2d 247, 254 (1993).

[18]Cf. Walker v. State, 116 Nev. 670, 676, 6 P.3d 477, 480 (2000) (discussing trustworthiness under NRS 51.345).

[19]Koerschner v. State, 116 Nev. 1111, 1119, 13 P.3d 451, 457 (2000).

[20]98 Nev. 295, 647 P.2d 370 (1982).

defense. Thus we rejected the applicability of such a doctrine in this state.[21]

Burriola's argument simply reiterates the unsuccessful position taken by the appellant in Hill. We decline Burriola's invitation to revisit our holding in Hill.

Burriola also argues that the State was able to avoid its obligation to establish affirmative proof of malice through a "back highways" approach to proving murder. He claims that the state was allowed, by negative inference, to prove murder by simply disproving or eliminating theories of self-defense, involuntary manslaughter and voluntary manslaughter. Burriola argues that this creates four "statutes" inferentially defining murder, which can be proved properly either by establishing malice, or improperly by simply disproving the existence of self-defense or manslaughter. We disagree.

The State correctly points out that only one statute defines murder, but that numerous instructions drawn from other statutory provisions and our case authority are necessary to explain the nuances implicit in such a charge. The instructions given below made it clear that, regardless of the State's success in proving that Burriola did not act in self-defense or commit involuntary or voluntary manslaughter, the jury could not convict Burriola of murder without proof of malice, either express or implied.[22] Thus, we conclude that the district court correctly

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[21]Id. at 296-97, 647 P.2d at 370-71.

[22]See Barton v. State, 117 Nev. ___, ___, 30 P.3d 1103, 1109 (2001) (involuntary manslaughter statute not unconstitutional, as disproving manslaughter does not prove murder absent express or implied malice).

instructed the jury with regard to murder, voluntary manslaughter, involuntary manslaughter, and self-defense.

Instruction on malice

Burriola also argues that the district court erroneously included archaic language such as "cruel circumstances" and "wicked depraved and evil spirit" in its instruction defining malice. Burriola did not object to this instruction, so a plain error analysis applies. Burriola bases his argument on the California case of People v. Philips.[23] Philips, although disapproving the use of archaic language, held that such language was merely superfluous and found any error to be harmless.[24] Similarly, while we do not encourage the use of this language, we have held that it does not deprive a defendant of a fair trial.[25] Burriola argues that the instruction lacks a foundation in law. Yet the instruction, although employing dated rhetoric, explains to the jury that malice is not limited to premeditation, but can be implied from the circumstances.

Burriola contends, however, that this instruction allowed the jury to convict without considering his unlawful purpose, intent to kill and claim of self-defense. Burriola contends that the instruction allows the jury to convict upon finding that Burriola is a "bad or evil person." This argument lacks merit, as the instruction clearly defines malice as "an unlawful purpose and design in contradistinction to accident and

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[23]414 P.2d 353 (Cal. 1966), overruled on other grounds by People v. Flood, 957 P.2d 869 (Cal. 1998).

[24]See id. at 363-64.

[25]See Leonard v. State, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1998).

mischance." This instruction required the jury to find that Burriola had an unlawful purpose, not merely an evil character or hatred for Martinez, before convicting him of murder. Further, while the instruction explains that legally adequate provocation negates malice, it does not state that lack of provocation proves malice.

Burriola argues that the malice instruction given below differed from the definition of malice in NRS 200.020. We note, however, that the district court also issued a separate instruction setting forth the statutory definition. Considered as a whole, the instructions explained the concepts of express and implied malice, and placed on the State the burden of proving malice beyond a reasonable doubt. There was no plain error in the district court's instruction defining malice.

Further, the State's theories of second-degree murder were sufficiently similar in mens rea that the district court was not required to instruct the jury that it could only convict under a unanimous theory of guilt.[26] All theories presented by the State necessarily required proof of malice, either express or implied.

Martinez's prior bad acts

Burriola contends that the district court erroneously excluded evidence concerning Martinez's prior bad acts. The district court excluded this evidence because on hearsay considerations because the alleged "bad acts" were only identified via statements contained within a police report.

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[26]See Evans v. State, 113 Nev. 885, 895, 944 P.2d 253, 259 (1997) (citing Schad v. Arizona, 501 U.S. 624, 633 (1995)) (instruction requiring a unanimous theory of guilt is only required where theories involve important differences in mens rea such that they involve separate degrees of culpability).

"The recital of a statement of others in a police report is hearsay within hearsay or 'double hearsay,'. . . and is inadmissible upon proper objection unless it comes within a recognized exception to the hearsay rule independent of the business or public record exception[.]"[27] As no independent exception applies here, we conclude that the district court did not abuse its discretion in excluding this evidence.

Knife as a deadly weapon

Burriola argues that the district court erred in instructing the jury that his knife was a deadly weapon. Burriola's knife met the definition of a deadly weapon under NRS 193.165.[28] Yet, Burriola argues that the instruction violates Apprendi v. New Jersey,[29] which requires that all enhancing factors which are effectively separate elements of the crime to be submitted to the jury. The district court submitted to the jury the issue of whether Burriola killed Martinez with the use of a deadly weapon. The district court merely explained the definition of a deadly weapon adopted by the legislature, which makes a knife a deadly weapon.

Additionally, Burriola did not contest this point at trial; rather, his defense focused on creating a reasonable doubt as to whether Burriola's actions were criminal. Apprendi violations are subject to

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[27]Johnstone v. State, 92 Nev. 241, 246, 548 P.2d 1362, 1365 (1976) (Batjer, J., dissenting).

[28]See NRS 193.165(5)(b) (defining a deadly weapon as a device which, "under the circumstances in which it is used, . . . is readily capable of causing substantial bodily harm or death[.]").

[29]530 U.S. 466, 495 (2000) (existence of enhancing factor, which was effectively an element of the crime must be submitted to the jury); see also Castillo v. U.S., 530 U.S. 120 (2000) (use of a machine gun as an enhancing factor must be submitted to the jury).

harmless error analysis.[30] Had the district court not given this instruction, but rather simply set forth the language of NRS 193.165, the outcome would have been no different.[31]

Burriola also argues that the definition of a deadly weapon in NRS 193.165(5)(b) is unconstitutionally vague. We disagree. While the legislature enacted a broad definition of a deadly weapon, it has provided sufficient "guidelines to govern law enforcement" and has not encouraged "arbitrary and discriminatory enforcement."[32] Therefore, we conclude that the statute complies with constitutional requirements.

Sufficiency of evidence

Burriola challenges the sufficiency of the evidence supporting his conviction. In resolving such challenges, we must determine whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt based on the evidence.[33] In this case, witnesses provided differing testimony with regard to the fight; however, one witness testified that Burriola rushed Martinez after Martinez set down the gun, and another testified that Burriola walked past Martinez and then turned and attacked. The jury, believing either of these witnesses, could find that Burriola intentionally killed Martinez while not

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[30]See U.S. v. Sanchez-Cervantes, 282 F.3d 664, 670 (9th Cir. 2002).

[31]See Black v. State, 21 P.3d 1047, 1070 (Okla. Crim. App. 2001) (no plain error in instructing jury that pocket knife used to stab victim to death was a deadly weapon), cert. denied, 122 S. Ct. 483 (2001).

[32]Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[33]Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000).

acting in self-defense. We conclude that sufficient evidence supported the jury's verdict.

Post-argument issues

Burriola objects to the State's post-argument declaration. This declaration, in which the State merely acknowledged an unintentional misrepresentation at oral argument, was not considered in the rendition of our decision in this matter. Burriola also objects to the State supplementation of the record with a transcript of the portion of the trial during which the instructions were read to the jury. By order filed January 22, 2002, this court directed the district court reporter to provide a transcript of the reading of jury instructions. This transcript resolved issues that arose during oral argument. Burriola cannot complain of any conduct by the State in this regard.

Miscellaneous arguments

Burriola contends that he received ineffective assistance of counsel. This claim should await post-conviction proceedings, as Burriola's counsel did not act in a manner that was improper per se.[34] An evidentiary hearing will determine whether Burriola's counsel made rational tactical decisions at trial.

We find no merit in Burriola's argument concerning a pattern of prosecutorial misconduct. Brecht v. Abramson[35] concerned the standard

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[34]See Jones v. State, 110 Nev. 730, 737, 877 P.2d 1052, 1056 (1994) (considering ineffective assistance claim on direct appeal where defense counsel admitted defendant's guilt without defendant's consent); Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981) (ineffective assistance of counsel generally may not be raised on direct appeal).

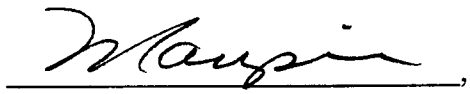
[35]507 U.S. 619 (1993).

of review for habeas corpus petitions under 28 U.S.C. § 2254[36] and has no bearing on this appeal.

Lastly, we decline to treat any failures by the State to address issues raised by Burriola as confessions of error.[37]

Having considered all of Burriola's arguments, we

ORDER the judgment of the district court AFFIRMED.



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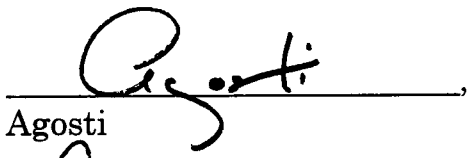

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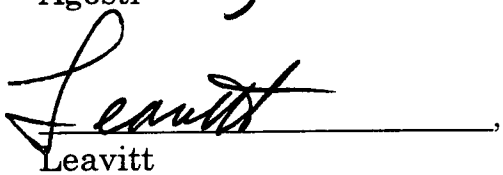

_____, J.
Leavitt

cc: Hon. Jeffrey D. Sobel, District Judge
JoNell Thomas
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[36]See id. at 638.

[37]See Hewitt v. State, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997) (this court is not required to treat a party's failure to address all issues as a confession of error).