IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL LEON WILLIAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53641

FILED

MAY 28 2010

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 attempted robbery, battery with substantial bodily harm, and destroying evidence. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Michael Leon Williams was sentenced to consecutive terms of 10 years to life for attempted robbery and battery with substantial bodily harm, and a concurrent one year term for destroying evidence.[1]

On appeal, Williams argues: (1) the State committed prosecutorial misconduct by commenting on his post-Miranda silence, (2) the district court committed error by failing to adhere to mandatory procedural safeguards for juror questions, and (3) the district court

[1]Williams represented himself at trial and had standby counsel, Mark Bailus, to assist him. The district court conducted a Faretta v. California, 422 U.S. 806 (1975), canvass of Williams and then granted him permission to represent himself. None of Williams's arguments on appeal relate to his competence to represent himself.

committed error by communicating to the jury without Williams being present. We conclude all three of these arguments lack merit.[2]

First, the State did not comment on Williams's silence after being advised of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). In Gaxiola v. State, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005), we held that "'the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights.'" (quoting McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986)). However, questioning only rises to the level of commentary when the prosecution engages in acts such as, but not limited to, cross-examining a defendant as to why he was silent after being read his Miranda rights or using his post-Miranda silence for impeachment purposes. Id. (discussing Doyle v. Ohio, 426 U.S. 610 (1976)). At trial, the State did not comment on Williams's invocation of his right to remain silent when it argued that Williams had fabricated his claim of self-defense. As evidence of that fabrication, the State pointed to Williams's jail telephone calls in which he never claimed he was acting in self-defense. Williams's telephone calls were not subject to Miranda,

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[2]Williams also argues that: (1) the district court abused its discretion by admitting recordings of his telephone conversations from jail, (2) the district court committed error by allowing a witness to testify regarding the witness's contact with Williams in prison, (3) the State committed prosecutorial misconduct by eliciting testimony of his prior incarceration in prison, (4) the evidence is insufficient to sustain a conviction for destroying evidence, and (5) an accumulation of error deprived him of the right to a fair trial and due process under the Fifth and Fourteenth amendments of the United States Constitution. After considering these issues, we conclude that they are also without merit.

Williams was not subject to custodial interrogation, and the State did not improperly comment on Williams's post-Miranda silence.

Second, while the district court abused its discretion by failing to conduct hearings to determine the admissibility of the juror questions on the record pursuant to Knipes v. State, 124 Nev. ___, 192 P.3d 1178 (2008), and by failing to instruct the jurors on the record pursuant to Flores v. State, 114 Nev. 910, 965 P.2d 901 (1998), we conclude that this error was harmless.

During the trial, the district court permitted jurors to ask questions of witnesses but discussed the admissibility of the questions with counsel during unrecorded bench conferences. Hearings to determine the admissibility of juror questions must be conducted on the record. Knipes, 124 Nev. at ___, 192 P.3d at 1182. Failure to maintain such a record is an abuse of discretion, subject to nonconstitutional harmless error review under NRS 178.598. Knipes, 124 Nev. at ___, 192 P.3d at 1183-84. Under this nonconstitutional error analysis, the test is whether the error "'"had substantial and injurious effect or influence in determining the jury's verdict."'" Id. at ___, 192 P.3d at 1183 (quoting Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))). The district court abused its discretion in failing to conduct the hearings to determine admissibility of the juror questions on the record. However, we conclude that the error was harmless; it did not have a substantial and injurious effect or influence in determining the jury's verdict.

The record reflects that the district court judge did give the jury some instructions at the start of trial, which she referred to as her "opening spiel." However, these instructions were not transcribed, so it is not clear whether the district court instructed the jury pursuant to Flores.

Jurors must be instructed that their questions must be factual in nature and designed to clarify information already presented, that only questions permitted under the rules of evidence may be asked, and that they must not place undue weight on the response to their questions. Flores, 114 Nev. at 913, 965 P.2d at 902-03. However, Williams was able to examine the juror questions; when he objected, the questions were not asked of the witness.[3] None of the juror questions that the district court did ask of the witnesses violated the Flores instructions, nor was there evidence that the jury gave undue weight to their own questions. We conclude that, under these circumstances, the district court's failure to comply with the Flores mandate constitutes harmless error.

Third, the district court did not commit reversible error by communicating with the jury without Williams being present when the district court judge refused to address the jury's questions during deliberation and instead referred the jury to the instructions and verdict form. NRS 175.451 states: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the cause, . . . the information required shall be given in the presence of, or after notice to, the district attorney and the defendant or the defendant's counsel." However,

> [t]he trial judge has wide discretion in the manner and extent he answers a jury's questions during deliberation. If he is of the opinion the instructions

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[3]Here there was one juror question that was not asked, and was instead placed on the record, but the record is silent as to why the question was not asked or if Williams objected to it. However, we conclude that the district court was correct in refusing to ask this question of the witness.

> already given are adequate, correctly state the law and fully advise the jury on the procedures they are to follow in their deliberation, his refusal to answer a question already answered in the instructions is not error.

Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968). "The mandatory word 'shall' in [NRS 175.451] applies only to the presence of counsel if the information requested is given." Id.

Here, the court sent its letter responses to the jury without notice to the district attorney or Williams. Under Tellis, 84 Nev. at 591, 445 P.2d at 941, the refusal to answer a question already answered in the instructions is not error. However, Williams argues that he should have been notified about the jury's questions before the letter responses directing them to the instructions and verdict form were sent, so he could have been heard as to possible alternative responses; Williams may have a point. But the error, if any, in not notifying the State and the defendant before responding to the juror notes was harmless, since the district court's direction to the jury to consult the instructions and the verdict form was correct. See Daniels v. State, 119 Nev. 498, 511, 78 P.3d 890, 899 (2003). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Jackie Glass, District Judge
Mark P. Chaksupa
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk