IN THE SUPREME COURT OF THE STATE OF NEVADA

LONNIE JOSEPH DENNIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 34870

FILED

AUG 21 2002

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment and jury verdict finding appellant Lonnie Joseph Dennis guilty of two counts of murder in the first degree with use of a deadly weapon and guilty of one count of burglary with possession of a firearm.

Lonnie argues that the district court gave a jury instruction on first degree murder that violated this court's holding in Byford v. State.[1] We disagree.

The record reveals that the district court instructed the jury on what is known as a Kazalyn instruction[2] at the conclusion of Lonnie's trial on March 1, 1999. Lonnie did not object to this instruction and, therefore, we review Lonnie's argument for plain or constitutional error.[3] Our holding in Byford was published on February 28, 2000. We have stated that the "[u]se of the Kazalyn instruction in trials which predate

[1]116 Nev. 215, 994 P.2d 700 (2000).

[2]See Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

[3]See Walch v. State, 112 Nev. 25, 34, 909 P.2d 1184, 1189 (1996).

Byford does not constitute plain or constitutional error."[4] Therefore, we conclude that Lonnie's argument on this issue is without merit.

Lonnie argues that the district court committed reversible error by allowing Las Vegas Metropolitan Police Department ("LVMPD") Detective James Vaccaro to testify as an expert witness without expressly declaring him an expert witness. We disagree.

We will not disturb a district court's determination that a witness is qualified as an expert "absent a clear abuse of discretion."[5] "[T]he threshold test for the admissibility of expert testimony turns on whether the expert's specialized knowledge will assist the trier of fact in understanding the evidence or an issue in dispute."[6]

Here, Detective Vaccaro's qualifications as an expert in the area of firearms and wounds were as follows: he had considerable experience dealing with homicides as a detective for six years; he was a SWAT member; attended various three-day and five-day school programs regarding firearm wounds characteristics; and attended schools sponsored by state police organizations and firearms authorities. The district court concluded, "I think, on balance, Detective Vaccaro's testimony could lend something to these proceedings." We conclude that this decision was within the district court's discretion.

Even if the district court improperly qualified Detective Vaccaro as an expert witness, we see no prejudice to Lonnie's defense.

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[4]Garner v. State, 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000).

[5]Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

[6]Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 243, 955 P.2d 661, 667 (1998); see NRS 50.275.

Detective Vaccaro testified that he believed that Lonnie shot Elfie Dennis while the firearm was within three to six inches of her face. Detective Vaccaro's testimony did not necessarily contradict the testimony of the State's other experts. The district court also instructed the jury that they could assign whatever credibility they wished to Detective Vaccaro's testimony.

Additionally, we note that we have instructed district courts to refrain from making overt comments as to whether a witness is a qualified expert. In Mulder v. State,[7] we stated that "[i]n ruling on whether . . . a witness may testify as an expert . . . [t]he court should simply state that 'the witness may testify,' or sustain any objection to a request to permit the witness to testify as an expert." Here, after an objection by Lonnie as to whether Detective Vaccaro was an expert, the district court simply stated, "I'm going to allow it." We see no error in the district court's actions.

Lonnie argues that he should be granted a new trial because the State made improper remarks during opening and closing statements. We disagree.

We have stated that "[a] prosecutor may not argue facts or inferences not supported by the evidence" or "make statements intended improperly to influence the outcome of a case."[8] "The test for evaluating whether an inappropriate comment by the prosecutor merits reversal of the defendant's conviction is whether the inappropriate comments 'so

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[7]116 Nev. at 13 n.2, 992 P.2d at 852 n.2.

[8]Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987).

infected the trial with unfairness as to make the resulting conviction a denial of due process.'"[9]

Here, we reviewed the State's opening and closing statements and conclude they were based upon evidence presented at trial and, therefore, conclude that they were proper. The only questionable comment we found was the statement the State made during closing that "Lonnie . . . pulled her to the corner of the bed. For what purposes, I suppose we will never know, but the reasonable inference from the evidence was that it was something very, very sick." We conclude that the State's comment was inflammatory. However, given that this was an isolated comment, we conclude that it was not so inflammatory or prejudicial as to warrant reversal.[10]

Lonnie argues that there was insufficient evidence admitted during his trial to support his convictions. We disagree.

The test for evaluating the sufficiency of the evidence is whether "'after reviewing 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.'"[11]

NRS 200.030(1)(a) and (b) provide that murder in the first degree is murder "[p]erpetrated by . . . any . . . kind of willful, deliberate

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[9]Castillo v. State, 114 Nev. 271, 281, 956 P.2d 103, 110 (1998) (quoting Bennett v. State, 111 Nev. 1099, 1105, 901 P.2d 676, 680 (1995)).

[10]See Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991) (stating that if a guilty verdict is free from reasonable doubt, "even aggravated prosecutorial remarks will not justify reversal").

[11]Guy v. State, 108 Nev. 770, 776, 839 P.2d 578, 582 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

and premeditated killing" or "[c]ommitted in the perpetration or attempted perpetration of . . . burglary." Here, Lonnie admitted that he shot Elfie and John Ludvigson. Evidence admitted at trial showed the following: Lonnie and Elfie were married but estranged; Lonnie was trying to reconcile with Elfie; after a conversation with Elfie at her apartment, Lonnie went to his house and returned to the apartment complex with a loaded gun; Lonnie unlawfully entered into an apartment; Elife was shot in the head; John was severely beaten and had his throat cut while trying to flee the apartment; John ultimately died of a gunshot wound to the chest; and after the shootings, Lonnie locked the apartment door and destroyed the gun, a knife, and his bloody clothes in the desert. Given this evidence, we conclude that a reasonable jury could find Lonnie guilty of first degree murder in the deaths of Elfie and John.

Additionally, NRS 205.060(1) provides that "[a] person who, by day or night, enters any . . . apartment . . . with the intent to commit . . . any felony, is guilty of burglary." Here, again, evidence admitted at trial showed that Lonnie unlawfully entered an apartment with a loaded gun and shot Elfie and John. Based on this evidence, we conclude that a reasonable jury could find Lonnie intended to commit a felony when he entered the apartment and, therefore, could find Lonnie guilty of burglary. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Young, J.

Agosti, J.

Leavitt, J.

cc: Hon. Donald M. Mosley, District Judge
Sciscento & Montgomery
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk