

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN N. MURRAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54115

FILED

FEB 03 2011

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of DUI causing substantial bodily harm and vehicular homicide. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Steven Murray argues that the district court erred in: (1) admitting evidence that he did not express concern for his victims following the accident, (2) refusing to grant a mistrial based on the introduction of inadmissible evidence, and (3) allowing LVMPD officers to testify regarding his intoxication. We disagree and, thus, affirm Murray's conviction. We address each of Murray's arguments in turn.¹

Murray's lack of concern for the victims

Murray argues that the district court abused its discretion in admitting evidence that he did not express concern for the victims he injured in the collision for two reasons. First, Murray contends that the evidence was irrelevant and unduly prejudicial. Second, Murray contends

¹The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

that admission of the testimony violated his federal and state constitutional rights against self-incrimination. We disagree with both arguments.

Standard of review

We review “a district court’s decision to admit or exclude evidence . . . [for] an abuse of discretion.” Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000). “An abuse of discretion occurs if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

Relevance and undue prejudice

NRS 48.025 provides that relevant evidence, defined in NRS 48.015 as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence,” is generally admissible. However, relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” NRS 48.035.

Here, Murray elicited evidence from Detective William Redfairn that he had shown concern “about what was going to happen to his tools” following the accident. It was only after this evidence had been introduced that the State asked Detective Redfairn whether Murray had expressed concern for anything else. Detective Redfairn responded “[n]o.”

In this context, we conclude that the State’s questioning was proper to rebut an inference that, because Murray was concerned about what would happen to his tools, he was thinking clearly and was not intoxicated at the time of the accident. Moreover, the State’s question did

not directly address Murray's lack of concern for the victims, but only generally referenced his lack of concern for anything other than his tools. Accordingly, we conclude that the district court did not abuse its discretion in admitting the evidence.

Constitutional right to silence

Nevada caselaw has not addressed the question of whether a defendant's right against self-incrimination extends to pre-arrest silence, and federal law is split on the subject.² See U. S. v. Muhammad, 502 F.3d 646, 657 n.7 (7th Cir. 2007) (noting that federal appellate courts are split "as to whether the prosecution may [properly admit] evidence of a defendant's pre-arrest silence as substantive evidence of guilt").

However, we do not need to decide that question here because we do not believe that Murray's failure to show concern for the victims can be characterized as an attempt to invoke his right to silence. See, e.g., Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989) (noting that the court will examine the "entire context in which the claimant [of the privilege against self-incrimination] spoke" to determine whether the claimant's actions can reasonably be understood as an attempt to claim the privilege (quoting United States v. Goodwin, 470 F.2d 893, 902 (5th Cir. 1972))). To the contrary, Murray expressed concern for his tools and spoke with law enforcement officers regarding other aspects of the accident. At no point did he indicate, either verbally or through silence,

²We note that Murray's statements occurred prior to his arrest and the subsequent reading of his Miranda rights.

that he intended to invoke his right to silence. Accordingly, Detective Redfair's testimony cannot be construed as unfair commentary on the invocation of that right, and we see no constitutional violation.

Murray's request for a mistrial

Murray argues that the district court abused its discretion in refusing to grant a mistrial based on the admission of evidence that he had trace amounts of morphine sulphate in his system. Specifically, Murray contends that the indictment did not put him on notice that the State would introduce such evidence.³

"The trial court has discretion to determine whether a mistrial is warranted, and its judgment will not be overturned absent an abuse of discretion." Rudin v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004). While this court has stated that an "indictment should be sufficiently definite to prevent the prosecutor from changing the theory of the case," State v. Jones, 96 Nev. 71, 74, 605 P.2d 202, 204 (1980), we will only reverse in cases "where the variance between the charge and proof was such as to affect the substantial rights of the accused." Id. at 73-74, 605 P.2d at 204 (adopting the standard of review set forth in Berger v. United States, 295 U.S. 78, 82 (1935)).

Here, although the indictment did not specifically mention morphine sulphate, it nonetheless put Murray on notice that the State

³Murray also argues that the evidence was irrelevant. However, the presence of drugs in Murray's system would be relevant to proving the offense of driving under the influence.

intended to prosecute him for driving under the influence based on the prescription drugs found in his system at the time of the accident. Moreover, the morphine sulphate evidence was only mentioned in passing, and was not used by the State to bolster its argument of intoxication. In light of the low possibility that Murray was prejudiced by the introduction of the evidence, his failure to contemporaneously object at trial, and the district court's offer to provide a limiting instruction, which Murray rejected, we conclude that the district court did not abuse its discretion in refusing to grant a mistrial following admission of the evidence.⁴

LVMPD intoxication testimony

Murray argues that the district court abused its discretion in allowing Detective Redfairn to testify as an intoxication expert because the State only noticed Detective Redfairn as "an expert in the area of accident reconstruction."⁵ Over Murray's objection, the district court

⁴Murray also argues that the district court abused its discretion in refusing to grant a mistrial based on juror misconduct. Specifically, one juror indicated that he thought the attorneys were "hiding things from" the jury, and another juror allegedly referred to one of Murray's supporters in a disparaging tone. In light of the district court's extensive canvassing of the jury following the jurors' comments, and the jurors' expressed dedication to impartiality, we see no error.

⁵Murray also argues that the district court erred in allowing officers Kevin Conaway and Michael Lemley to testify as experts without pretrial notice. It appears from the record that the officers did not testify in an expert capacity, and, in any event, Murray specifically stated at trial that he had no objection to the officers' testimony. See Mitchell v. State, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008) (reviewing the nondisclosure of
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allowed Detective Redfairn to testify that the primary cause of the collision was Murray's impairment. Detective Redfairn based this conclusion on his personal observations of Murray at the crime scene and the investigatory work that followed. We conclude that portions of Detective Redfairn's testimony were admissible as proper lay witness testimony, while the remaining portions were properly admitted as expert witness testimony.

First, Detective Redfairn's observations of Murray at the crime scene were admissible as proper lay witness testimony. See NRS 50.265 (providing that a lay witness may testify in the form of opinions or inferences as long as that testimony is "[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue"); Crowe v. State, 84 Nev. 358, 362, 441 P.2d 90, 92 (1968) ("Lay witnesses . . . who are sufficiently trained and experienced, may testify at the discretion of the trial court relative to the use and influence of narcotics."), modified on other grounds by Tellis v. State, 84 Nev. 587, 590, 445 P.2d 938, 940 (1968).

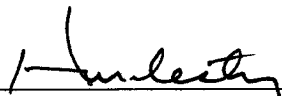
Second, as an accident reconstructionist, Detective Redfairn was allowed to provide expert testimony regarding what he believed to be the cause of the accident. See Townsend v. State, 103 Nev. 113, 118, 734 P.2d 705, 708 (1987) (noting that an expert witness may give an opinion

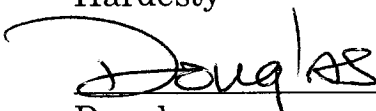
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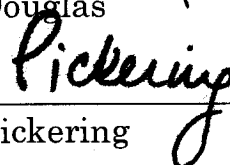
expert witnesses for plain error when the defendant fails to object). Accordingly, there was no error.

on issues that embrace the ultimate issue to be decided by the trier of fact so long as it is within his scope of expertise). His testimony in this respect was properly admitted as relating to matters within the scope of his expertise.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Michelle Leavitt, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Eighth Judicial District Court Clerk

⁶In addition to the arguments addressed above, Murray argues that (1) the district court abused its discretion in refusing to suppress evidence obtained as the result of an illegal detention, (2) the verdict form omitted the element of impairment from the charges, (3) the prosecutor committed misconduct by referencing inadmissible evidence in his opening statement, (4) the district court erred in denying his request to sequester the jury, (5) the district court provided erroneous jury instructions, (6) his conviction is not supported by sufficient evidence, and (7) cumulative error requires reversal. After carefully reviewing the record and relevant authority, we conclude that these arguments lack merit.