IN THE SUPREME COURT OF THE STATE OF NEVADA

THAYER JOSEPH BURTON, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54170

FILED

JUN 01 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

The district court sentenced appellant Thayer Joseph Burton, Jr. to life in prison without the possibility of parole. Burton appeals on multiple grounds: (1) the district court's denial of his Batson v. Kentucky objections to two of the State's peremptory challenges, (2) improper references to a tip by the State and a State's witness, (3) admission of hearsay evidence, (4) admission of certain testimony from the State's expert witness, (5) inability to present a defense, (6) the State's improper comments regarding Burton's right to remain silent, (7) the district court's improper instructions to the jury on reasonable doubt, (8) the district court's refusal to allow his expert witness to testify during the penalty phase, (9) ineffective assistance of counsel, (10) his sentence amounts to cruel and unusual punishment, and (11) cumulative error.

Batson challenge

Burton contends that the district court erred in denying his objections pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), to the State's use of peremptory challenges to remove two African-American

prospective jurors because the State had a discriminatory basis for doing so. In evaluating a Batson challenge, this court "accord[s] great deference" to the district court's determination of whether the State exhibited discriminatory intent. Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008). Indeed, such findings "will not be overturned unless clearly erroneous." Kaczmarek v. State, 120 Nev. 314, 334, 91 P.3d 16, 30 (2004). In this case, we determine that the State provided race-neutral reasons for excusing the two prospective jurors, and we thus conclude that the district court's rejection of Burton's Batson challenge was not "clearly erroneous."

Improper references to a tip

In its opening statement, the State commented that "[e]ventually the police receive a tip. That tip identified Thayer Burton as the murderer." Then, during direct examination of Las Vegas Metropolitan Police Department (LVMPD) Detective Laura Andersen, the State asked her if she received information that led her to investigate Burton as a potential suspect, and she replied, "[y]es." Burton argues that these references to a tip constituted prosecutorial misconduct and was inadmissible hearsay that violated his constitutional rights. We reject these arguments.[1]

Prosecutorial misconduct

Burton argues that the State's opening statement comment about the tip amounted to prosecutorial misconduct because it was not

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[1]The parties dispute whether harmless-error or plain-error review applies. We conclude that, because Burton properly preserved this issue for appeal, harmless-error review applies. Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). However, because we perceive no error, we need not determine whether any alleged error was harmless.

proved at trial. "In general, the district attorney has a duty to refrain from stating facts in his opening statement that he cannot prove at trial." Riley v. State, 107 Nev. 205, 212, 808 P.2d 551, 555 (1991). However, "[e]ven if the prosecutor overstates in his opening statement what he is later able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith." Rice v. State, 113 Nev. 1300, 1312-13, 949 P.2d 262, 270 (1997), abrogated on other grounds by Rosas v. State, 122 Nev. 1258, 1265 n.10, 147 P.3d 1101, 1106 n.10 (2006). After Burton objected to the comment, the State explained that it had a good faith belief that Detective Andersen would testify that the investigation continued because of the tip, which she did. We conclude that it was not misconduct for the State to reference the tip in its opening statement. See State v. Alexander, 875 P.2d 345, 348 (Mont. 1994) (holding that opening statements "chronicl[ing] the development and investigation of the case" were permissible).

Admissibility of Detective Andersen's testimony

Burton argues that Detective Andersen's testimony regarding the tip was inadmissible hearsay and violated his constitutional rights because the tipster did not testify.[2] The Sixth Amendment's Confrontation Clause allows the accused to confront all witnesses against him. Chavez v. State, 125 Nev. 328, 337, 213 P.3d 476, 483 (2009). However, "[t]he Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford v. Washington, 541 U.S. 36, 59-60 n.9 (2004). Moreover, "[i]t is well

[2]Burton appears to argue that the State's reference to a tip in its opening statement also violated the Confrontation Clause and was thus inadmissible hearsay. We conclude that this argument lacks merit. See State v. Alexander, 875 P.2d 345, 348 (Mont. 1994).

established that so long as a police officer does not testify to the substance and content of information he has received from a confidential source, it is permissible for him to testify that he acted pursuant to an informant's tip." State v. Williams, 569 So. 2d 1031, 1033 (La. Ct. App. 1990); see also State v. Brooks, 618 S.W.2d 22, 25 (Mo. 1981) ("It is well established that [an officer's testimony that he received information from an informant] is admissible to explain the officer['s] conduct, supplying relevant background and continuity to the action.").

Here, the State elicited testimony from Detective Andersen that she received a tip and that tip caused her to investigate Burton. The State did not ask, nor did Detective Andersen testify, about the substance or the content of the information received pursuant to the tip. Accordingly, we conclude that Detective Andersen's testimony regarding the tip was not hearsay nor did it violate Burton's constitutional rights. Furthermore, as the State contended, Detective Andersen's testimony regarding the tip was not offered to prove the truth of the matter, but rather to explain why Detective Andersen began investigating Burton. Cf. Weber v. State, 121 Nev. 554, 578, 119 P.3d 107, 124 (2005) ("[T]he hearsay rule does not exclude a statement 'merely offered to show that the statement was made and the listener was affected by the statement.'") (quoting Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990)).

Hearsay evidence

Burton makes several hearsay arguments regarding various statements that were admitted into evidence at trial. Relevant to each of Burton's arguments, hearsay is defined as an out-of-court "statement offered in evidence to prove the truth of the matter asserted." NRS 51.035. A district court's decision to admit hearsay evidence will not be disturbed on appeal absent an abuse of discretion. Fields v. State, 125

Nev. 785, 795, 220 P.3d 709, 716 (2009). "Hearsay is inadmissible" absent a statutory exception to the hearsay rule. NRS 51.065.

Course-of-investigation testimony

Burton argues that Detective Andersen's testimony regarding the course of the investigation was an overall summary, much like a closing argument, and constituted hearsay. However, Burton does not identify any out-of-court statements testified to by Detective Andersen that were offered to prove the truth of the matter asserted. NRS 51.035. Furthermore, her testimony relating to the course of the investigation was permissible, because it was offered to rebut Burton's assertion that the police investigation was not sufficiently thorough. See U.S. v. Hawkins, 905 F.2d 1489, 1495 (11th Cir. 1990). As such, we conclude that the district court did not abuse its discretion in admitting this evidence.[3]

[3]Burton cites to several federal appellate circuit court cases to support his contention that testimony regarding the course of investigation is inadmissible hearsay. See U.S. v. Williams, 133 F.3d 1048 (7th Cir. 1998), U.S. v. Reyes, 18 F.3d 65 (2d Cir. 1994); United States v. Lamberty, 778 F.2d 59 (1st Cir. 1985). However, these cases do not provide a brightline rule for when course-of-investigation testimony is admissible. Cf. Sheriff v. Blasko, 98 Nev. 327, 330 n.2, 647 P.2d 371, 373 n.2 (1982) (explaining that "evidence was not inadmissible hearsay, since it was offered not to prove the truth of the matter asserted, . . . but rather to show why the police were observing the van"); U.S. v. Holmes, 620 F.3d 836, 841 (8th Cir. 2010) (explaining that although the exception is limited, "out-of-court statements are not hearsay if they are offered 'to explain the reasons for or propriety of a police investigation'" (quoting U.S. v. Malik, 345 F.3d 999, 1001 (8th Cir. 2003))). As discussed, Detective Andersen did not present any hearsay testimony.

Testimony regarding Lucia Reveles

Burton next argues that the State improperly elicited hearsay evidence about Lucia Reveles from Ashley Furniture employees.[4] Specifically, Burton challenges separate exchanges between the State and two Ashley Furniture employees. First, he challenges the following exchange:

> Q Ma'am, once an arrest was made of Thayer Burton, did Lucia Reveles ever indicate to anybody at the store that she knew Thayer Burton?
>
> A No Ma'am.

And, second, he challenges the following exchange:

> Q Okay. Did [Reveles] ever come forward and say she had information?
>
> A No.
>
> Q Okay. And, in fact, you learned that she was later identified as being the inside source; correct?
>
> A Yes.

Reveles's denial that she knew Burton and her failure to offer information do not constitute statements. Nor does this conduct constitute an adoptive admission because her silence was not in response to an accusatory comment. Fields, 125 Nev. at 797, 220 P.3d at 717. Burton further argues that the State improperly characterized Reveles as a coconspirator; however, we note that the State did not proceed on a

[4]Burton also contends that the Ashley Furniture employees should not have been allowed to testify about his arrest, but he provides no support for this argument.

conspiracy theory.[5] Rather, it offered the testimony about Reveles's non-statements to show that the perpetrator likely knew an Ashley Furniture employee. Therefore, the testimony of the Ashley Furniture employees was not hearsay, and the district court did not abuse its discretion in admitting this evidence.

Dying declaration

Finally, Burton argues that the district court erred in admitting statements from the deceased victim Robert Bills regarding a description of the assailant because such comments were inadmissible hearsay that did not qualify for the dying declaration exception, and they violated his Sixth and Fourteenth Amendment rights to confront witnesses. Nevada law recognizes a dying declaration exception to a defendant's constitutional confrontation right and to hearsay statements. See Bishop v. State, 92 Nev. 510, 517, 554 P.2d 266, 271 (1976); NRS 51.335. To qualify for this exception, the declarant must believe that his or her death is imminent. Bishop, 92 Nev. at 517, 554 P.2d at 271. In assessing whether a declarant believed death was imminent, a court may consider the surrounding circumstances, including the nature of the declarant's injury. Harkins v. State, 122 Nev. 974, 978-80, 143 P.3d 706, 709-10 (2006). A declarant's statement should be admitted "'[i]f the declarant subjectively senses impending death without any hope of recovery.'" Id. at 980, 143 P.3d at 710 (quoting Bishop, 92 Nev. at 518, 554 P.2d at 271-72).

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[5]The State proceeded on the theory that the murder and attempted robbery were the result of an inside job, perpetrated by Lucia Reveles, who was an Ashley Furniture employee and the girlfriend of Burton's cousin.

In this case, Bills sustained serious injuries before describing the assailant to the first responding LVMPD police officer. The officer testified that Bills was covered in his own blood, crying, turning yellow, and having difficulty breathing. He twice asked if he was dying and, in fact, he did die several hours later. Because of the seriousness of Bills's injuries and the fact that he clearly perceived that his injuries could result in his imminent death, we conclude that the district court did not abuse its discretion in admitting his description of his assailant.[6]

Admissibility of certain testimony from the State's expert witness

The State called crime scene analyst Randall McPhail as an expert witness during trial. Burton argues that McPhail was not qualified to testify as an expert on blood spatter because he did not possess the requisite training, knowledge, or experience, and he was not qualified to opine that blood would have likely splattered onto the arm of the assailant who hit Bills. We disagree.

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[6]Burton also summarily argues that Bills's statements are inadmissible because they were testimonial and made to a police officer during the course of an investigation and not during an ongoing emergency. However, in the context of statements made to police officers, a declarant's comments are not testimonial "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," Davis v. Washington, 547 U.S. 813, 822 (2006), and here, the officer testified that she treated her interaction with Bills as a necessary part of addressing an emergency. Moreover, even if the statements were testimonial, the dying declaration exception would still allow them. See generally Harkins v. State, 122 Nev. 974, 980-82, 143 P.3d 706, 709-11 (2006) ("[S]everal state courts have adopted the view that the admission of dying declarations, including those that are testimonial, does not violate the Confrontation Clause. . . . We agree with the states that recognize dying declarations as an exception to the Sixth Amendment confrontation right.").

McPhail testified he had never previously been admitted as an expert in blood spatter analysis and had never testified on that subject before, but he also testified that blood spatter analysis was a large part of his job, that he attended classes related solely to blood spatter, that he participated in mock exercises to test his knowledge of blood spatter, and that he had written reports on the subject. Additionally, McPhail's curriculum vitae indicated that he had more than 10 years of experience in crime scene and blood analysis at the time of trial. McPhail's knowledge, experience, and training sufficiently qualify him as an expert. Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650; NRS 50.275. Accordingly, the district court did not abuse its discretion in permitting McPhail to testify as an expert on blood spatter. Hallmark, 124 Nev. at 498, 189 P.3d at 650.

Further, Burton argues that McPhail's testimony that his supervisor, a qualified blood spatter expert, approved of his report violated Burton's Sixth and Fourteenth Amendment rights to confront witnesses. We decline to address this argument because Burton's counsel elicited the objected-to testimony.[7] See Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) ("[A] party will not be heard to complain on appeal of errors which he himself induced or provoked the court . . . to commit." (internal quotation marks omitted)).

Burton's inability to present a defense

Burton argues that the district court prevented him from presenting a defense because it precluded him from introducing the

[7]Burton also argues that the State failed to provide notice pursuant to NRS 174.234(2) that it would call McPhail as an expert. However, our review of the record demonstrates that the State provided the required statutory notice, and this argument thus lacks merit.

specific circumstances of his cousin's previous robbery convictions. He argues that his cousin's prior crimes were "eerily similar" to the facts of this case, and could have been used as evidence to prove a modus operandi that could create reasonable doubt as to Burton's guilt. "The determination of whether to admit or exclude [evidence of prior convictions] rests in the sound discretion of the trial court and will not be disturbed unless manifestly wrong." Anderson v. State, 92 Nev. 21, 23, 544 P.2d 1200, 1201 (1976). Here, Burton's counsel admitted that it would have been impossible for Burton's cousin to commit the murder because he was on house arrest at the time. Thus, we conclude that the district court was not manifestly wrong in excluding specific details about Burton's cousin's prior robbery convictions.

Burton's right to remain silent

Burton argues that during its closing argument the State impermissibly opined on his right to remain silent at the time of his apprehension. Specifically, he argues that the following comments by the prosecutor were in error:

> How do you prove something you didn't do? Maybe you come up with a story a year and a half after a murder and come up with a story that conveniently fits all the pieces of the puzzle, that explains away every piece of incriminating evidence. Maybe that's what you do.
>
> . . . .
>
> How are we supposed to contest a story that we're hearing for the first time a year and a half later?
>
> . . . .
>
> That's the first time we heard that statement yesterday. That's the first time the defendant came in and said I just love Mr. Bill[s]'s car, and I

> couldn't help myself but to place my hands all over Mr. Bill[s]'s car.

The parties do not dispute that defense counsel failed to object to the contested statements at trial; thus, plain-error review applies. See Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) ("[F]ailure to object precludes appellate review of the matter unless it rises to the level of plain error."). "'In conducting plain error review, we must examine whether there was "error," whether the error was "plain" or clear, and whether the error affected the defendant's substantial rights.'" Id. (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

A prosecutor is prohibited from directly commenting on a defendant's decision to remain silent. Sheriff v. Walsh, 107 Nev. 842, 845, 822 P.2d 109, 110-11 (1991); Murray v. State, 105 Nev. 579, 583-84, 781 P.2d 288, 290-91 (1989). However, "most Courts of Appeals . . . have refused to reverse convictions where prosecutors have responded reasonably in closing argument to defense counsel's attacks, thus rendering it unlikely that the jury was led astray." United States v. Young, 470 U.S. 1, 12 (1985). "'[I]f the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.'" U.S. v. Wilkes, 662 F.3d 524, 538 (9th Cir. 2011) (alteration in original) (quoting Young, 470 U.S. at 12-13). See also Ybarra v. State, 103 Nev. 8, 15-16, 731 P.2d 353, 358 (1987) (concluding that there was "no reversible error," in part because "most of the prosecutor's improper remarks were invited"); Pacheco v. State, 82 Nev. 172, 179-80, 414 P.2d 100, 104 (1966) (concluding that it was not reversible error for the State to make an objectionable remark in its closing argument when "the objectionable remark was provoked by defense counsel").

In this case, defense counsel argued during his closing argument that the State did not contradict or impeach Burton's testimony during trial. The State objected and, at a bench conference, expressed concern that it could not counter the defense's comments without referring to Burton's prior silence. After the conference, defense counsel again told the jury that the State failed to contradict Burton's testimony. Then, during its rebuttal closing argument, the State made the contested comments—comments invited by and made in reasonable response to attacks from defense counsel.

While the State's comments may have risen to the level of plain error, Anderson, 121 Nev. at 516, 118 P.3d at 187, Burton has failed to show how those comments prejudiced him such that his substantial rights were affected because the State presented overwhelming evidence of his guilt. See id. ("'[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice.'" (quoting Green, 119 Nev. at 545, 80 P.3d at 95)); U.S. v. Whitehead, 200 F.3d 634, 638-39 (9th Cir. 2000) (concluding that while the prosecutor's improper comments on a defendant's silence constituted "error that [was] plain," such error did not affect the defendant's substantial rights because "the independent, overwhelming physical evidence of [the defendant's] guilt [was] determinative" of the case (internal quotation marks omitted)). Thus, because the State's comments were invited and Burton has failed to demonstrate prejudice, we conclude that reversal is not warranted on this issue.

The reasonable doubt instruction

Burton challenges the reasonable doubt instruction given to the jury. However, as Burton acknowledges, this court has already approved of the instruction given in this case, as it mirrors the statutory

language in NRS 175.211 and it is constitutional. Mason v. State, 118 Nev. 554, 558, 51 P.3d 521, 523-24 (2002); Elvik v. State, 114 Nev. 883, 897-98, 965 P.2d 281, 290-91 (1998). Thus, Burton's argument is without merit.

Burton's penalty phase expert witness

Burton argues that the district court violated his constitutional rights by not allowing his expert witness to testify during the penalty phase of the trial. However, it is undisputed that Burton did not provide the State with notice of this expert witness. In Floyd v. State, this court held that the defense must provide notice of the experts it intends to call during the penalty phase of a capital case. 118 Nev. 156, 169, 42 P.3d 249, 258 (2002), abrogated on other grounds by Grey v. State, 124 Nev. 110, 118, 178 P.3d 154, 160 (2008). Moreover, pursuant to NRS 175.552, which sets forth the requirements for penalty phase hearings where the defendant is found guilty of first-degree murder, the hearing process is the same "whether or not the death penalty is sought," NRS 175.552(1), and, necessarily, the parties' respective burdens are also the same. Because the same notice rules apply in capital and non-capital first-degree murder cases, we conclude that Burton was required to provide the State with notice of his penalty phase expert witness and the district court properly excluded the witness from testifying.

Ineffective assistance of counsel

In a related argument, Burton contends that if he was required to notify the State of his expert witness, his trial counsel's failure to do so was ineffective assistance of counsel.[8] However, "the more

[8]Burton acquired new counsel during this appeal. Burton v. State, Docket No. 54170 (Substitution of Attorneys, April 16, 2010).

appropriate vehicle for presenting a claim of ineffective assistance of counsel is through post-conviction relief' because such claims involve questions of fact that are usually better resolved by the district court after an evidentiary hearing and not based on this court's review of the trial record. Gibbons v. State, 97 Nev. 520, 523, 634 P.2d 1214, 1216 (1981). While we will consider claims for ineffective assistance of counsel when an evidentiary hearing is unnecessary, Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001), that is not the case here. We conclude that Burton's claim is not properly before us on direct appeal.

Burton's sentence and punishment

Burton argues that a sentence of life without the possibility of parole is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article I, Section 6 of the Nevada Constitution. Burton does not, however, argue that the sentencing statutes are unconstitutional, and we are not convinced that the sentence imposed is "'so unreasonably disproportionate to the offense as to shock the conscience.'" Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 222 (1979)); accord Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (plurality opinion).

Moreover, the cases that Burton relies upon do not necessarily stand for the proposition he promotes—that life without the possibility of parole for a homicide crime will be the next sentence the United States Supreme Court categorically deems cruel and unusual punishment for juveniles. See, e.g., Graham v. Florida, 560 U.S. ___, ___, 130 S. Ct. 2011, 2023 (2010) ("Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. . . . The instant case

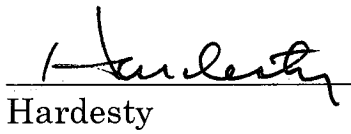
concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." (emphasis added)). Therefore, because Burton's imposed sentence is within the statutory limits for the crimes charged, we conclude that it does not constitute cruel and unusual punishment.

Cumulative error

Burton argues that the cumulative effect of the district court's errors violated his right to a fair trial. We will not reverse a conviction based on cumulative error unless a defendant's constitutional right to a fair trial was violated as a result. Rose v. State, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007). "A defendant is not entitled to a perfect trial, only a fair trial." Rudin v. State, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). In examining whether cumulative error warrants a reversal, we consider: "'(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'" Rose, 123 Nev. at 211, 163 P.3d at 419 (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)). Despite the serious nature of the crimes charged, the State presented ample evidence of Burton's guilt, and any errors were harmless. As a result, we conclude that Burton's cumulative error challenge is unavailing.

Having considered Burton's contentions and concluded that they do not warrant reversal, we ORDER the judgment of the district court AFFIRMED.

_____, J.
Douglas



_____, J.
Hardesty

_____, J.
Parraguirre

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