IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, JR. A/K/A LUIS A. HIDALGO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54209

FILED

JUN 21 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit battery with a deadly weapon and second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Luis Hidalgo, Jr., was charged with conspiring to murder his former employee, T.J. Hadland. In his defense, Hidalgo contended that any incriminating evidence merely suggested that he learned of the murder after the fact and attempted to help his alleged coconspirators cover up the murder.[1]

Hidalgo's jury found that although he did not conspire to have Hadland killed, he did conspire to have Hadland severely beaten. Concluding that Hadland's death was a reasonably foreseeable consequence of such a beating, the jury convicted Hidalgo of second-degree murder in addition to conspiracy to commit battery with a deadly weapon.

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

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Hidalgo now appeals, contending that the following alleged trial errors warrant reversal of his convictions: (1) his Confrontation Clause rights were violated when statements from a non-testifying coconspirator were admitted into evidence, (2) testimony from an accomplice was not sufficiently corroborated by other evidence, (3) a jury instruction referring to "slight evidence" confused the jury as to the State's burden of proof, and (4) the district court committed plain error in permitting a witness to testify even though the State failed to tape-record its plea negotiation with the witness.[2] We conclude that Hidalgo's contentions fail, and we therefore affirm.

Hidalgo's Confrontation Clause rights were not violated

In the days following Hadland's murder, law enforcement officers procured the cooperation of one of Hidalgo's coconspirators, Deangelo Carroll. Namely, Carroll agreed to tape-record his conversations with other coconspirators in an attempt to obtain incriminating statements from the coconspirators.

At trial, the State sought to introduce two tape-recorded conversations between Carroll, Anabel Espindola, and Luis Hidalgo, III. Because Carroll was unavailable to testify at trial, Hidalgo objected to

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[2]Hidalgo also contends that the district court committed reversible error when it gave the jury a verdict form that did not separate battery with substantial bodily harm from battery with a deadly weapon. Because Hidalgo repeatedly told the district court that he had no problem with these two theories being combined on the verdict form, we do not consider this argument on appeal. Carter v. State, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) ("A party who participates in an alleged error is estopped from raising any objection on appeal.").

Carroll's statements being introduced into evidence.[3] The district court admitted Carroll's statements but instructed the jury that it should consider Carroll's statements for context only. On appeal, Hidalgo contends that this limiting instruction was insufficient to avoid a violation of his Confrontation Clause rights.[4] We disagree.

"[W]hether a defendant's Confrontation Clause rights were violated is 'ultimately a question of law that must be reviewed de novo.'" Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (quoting United States v. Larson, 495 F.3d 1094, 1102 (9th Cir. 2007)).

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[3]Hidalgo's appellate briefs do not make clear whether he is also challenging the admission of Espindola's and Hidalgo, III's statements. To the extent that he is, we agree with the district court's conclusion that these statements were admissible under NRS 51.035(3)(e), the coconspirator exception to the hearsay rule.

Hidalgo's suggestion that the conspiracy to harm Hadland ended upon his death is in direct conflict with Nevada law. Crew v. State, 100 Nev. 38, 46, 675 P.2d 986, 991 (1984) ("[T]he duration of a conspiracy is not limited to the commission of the principal crime, but extends to affirmative acts of concealment."). Nor does Hidalgo's reliance on federal law help his argument. See Dutton v. Evans, 400 U.S. 74, 82-83 (1970) (concluding that it is constitutional for a state to admit statements made in the concealment phase of a conspiracy even though the Supreme Court has construed Fed. R. Evid. 801(d)(2)(e), the federal counterpart to NRS 51.035(3)(e), more narrowly).

[4]Hidalgo also argues that the district court improperly instructed the jury that Carroll's statements could be considered as "adoptive admission[s]." A review of the record demonstrates that it was Hidalgo who first equated "context" with "adopt[ive] admission" and acquiesced throughout trial in treating these two concepts as synonymous. Thus, Hidalgo cannot properly raise this argument on appeal. Carter, 121 Nev. at 769, 121 P.3d at 599 ("A party who participates in an alleged error is estopped from raising any objection on appeal.").

In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause prohibits introduction of testimonial hearsay when the declarant is unavailable to testify. Id. at 51, 59 n.9; see also NRS 51.035(1) (defining "[h]earsay" as an out-of-court statement that is used "to prove the truth of the matter asserted"). Thus, if a testimonial statement is introduced for a purpose other than its substantive truth, no Confrontation Clause violation occurs. Crawford, 541 U.S. at 59 n.9 ("The Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

In light of Crawford, several federal courts have addressed the identical issue presented here. These courts have held that no Confrontation Clause violation occurs if a non-conspirator's statements are introduced simply to provide "context" for the coconspirators' statements. See, e.g., United States v. Hendricks, 395 F.3d 173, 184 (3d Cir. 2005) ("[I]f a Defendant or his or her coconspirator makes statements as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the Confrontation Clause does not bar the introduction of the informant's portions of the conversation as are reasonably required to place the defendant or coconspirator's nontestimonial statements into context."); United States v. Tolliver, 454 F.3d 660, 666 (7th Cir. 2006) ("Statements providing context for other admissible statements are not hearsay because they are not offered for their truth."); United States v. Eppolito, 646 F. Supp. 2d 1239, 1241 (D. Nev. 2009) ("[The informant's] recorded statements have been offered [to] give context to Defendants' statements. Because [the

informant's] statements are not hearsay, the Confrontation Clause and Crawford do not apply.").

Consequently, Hidalgo's Confrontation Clause rights were not violated when the district court instructed the jury to consider Carroll's statements for context only.[5]

Accomplice testimony was sufficiently corroborated

Espindola, who was an accomplice to the Hadland conspiracy, testified for the State at Hidalgo's trial. On appeal, Hidalgo argues that the only evidence of his guilt came from Espindola's testimony. Because Nevada statutorily prohibits the conviction of a defendant based solely on

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[5]Nor did the district court abuse its discretion in denying Hidalgo's motion for a new trial based on the jurors' alleged disregard for the context-only instruction. Meyer v. State, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003) ("A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court.").

In order to show that juror misconduct warrants a new trial, "[t]he defendant must, through admissible evidence, demonstrate the nature of the juror misconduct and that there is a reasonable probability that it affected the verdict." Id. at 565, 80 P.3d at 456 (emphases added). Here, Hidalgo failed to satisfy this standard. His only evidence that the jurors considered Carroll's statements for their truth was an affidavit from his own attorney stating that a juror had told her as much. This affidavit, as the district court pointed out, was inadmissible hearsay.

Nor did Hidalgo demonstrate how considering Carroll's statements for their truth may have affected the verdict. The only onerous statement that Hidalgo has identified is the following: "[Hidalgo] wanted [Hadland] . . . taken care of [and] we took care of him." If the jurors had considered this statement for its truth and had factored it into their deliberation, they would have convicted Hidalgo of first-degree murder.

the testimony of an accomplice, see NRS 175.291(1), Hidalgo concludes that his convictions must be reversed.[6] We disagree.

NRS 175.291(1) states that an accomplice's testimony must be "corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." Id. As explained below, significant incriminating evidence corroborated Espindola's testimony.

The strongest corroborating evidence was the fact that Hidalgo paid Carroll $5,000 immediately after Hidalgo learned of Hadland's murder. Hidalgo's actions in the days following the murder further corroborated his guilt. Namely, upon speaking with detectives on the afternoon following the murder, Hidalgo told the detectives nothing about the previous night's $5,000 payment and chose not to give them Carroll's contact information. Hidalgo's repeated visits with his attorney in the days thereafter likewise suggested that Hidalgo was concerned about some legal troubles.

Hidalgo's guilt was further corroborated by the fact that detectives, upon searching Hidalgo's place of business in the wake of his coconspirators' arrests, discovered a note in Hidalgo's handwriting that

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[6]We reject Hidalgo's argument that Rontae Zone was also an accomplice. NRS 175.291(2) defines "accomplice" as "one who is liable to prosecution[] for the identical offense charged against the defendant." Based upon the evidence presented at trial, the jury could easily have found that Zone played no role in the conspiracy to harm Hadland, and it therefore could have treated Zone's testimony as corroborative. Cutler v. State, 93 Nev. 329, 334, 566 P.2d 809, 812 (1977) (stating that a witness's status as an accomplice is a question for the jury). In this regard, Zone's testimony provided an evidentiary basis for the deadly-weapon enhancements.

said, "[W]e may be under surveill[ance]. Keep your mouth shut." If this were not enough, Espindola's tape-recorded statements prior to being arrested clearly implicated Hidalgo in the conspiracy. See Cheatham v. State, 104 Nev. 500, 505-06, 761 P.2d 419, 423 (1988) (accepting as corroborative an "unguarded, thought-to-be-confidential statement" made by an accomplice prior to testifying).

In sum, and without recounting additional incriminating evidence, Espindola's testimony was more than sufficiently corroborated for purposes of satisfying NRS 175.291(1).[7]

A jury instruction referring to "slight evidence" did not confuse the jury

"A statement by a coconspirator of a [defendant] during the course and in furtherance of the conspiracy" may be considered as substantive evidence that the defendant was likewise a member of the conspiracy. NRS 51.035(3)(e). Before admitting such a statement into evidence, however, the district court must determine that "slight evidence" of a conspiracy existed at the time the coconspirator uttered the statement. McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149, 150 (1987).

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[7]Hidalgo's reliance upon Heglemeier v. State, 111 Nev. 1244, 903 P.2d 799 (1995), is misplaced. In Heglemeier, we held that "[w]here the connecting evidence . . . is equally consonant with a reasonable explanation pointing toward innocent conduct on the part of the defendant, the evidence is to be deemed insufficient." 111 Nev. at 1250-51, 903 P.2d at 803-04 (quotation omitted). Here, Hidalgo's explanation for all of the aforementioned evidence is that he was in fear of an unknown gang member. This explanation belies common sense in numerous respects, and Hidalgo's attempt to analogize his facts to those in Heglemeier is therefore unavailing.

While finalizing jury instructions, the State proffered the following jury instruction to encapsulate the aforementioned law:

> Whenever there is slight evidence that a conspiracy existed, and that the defendant was one of the members of the conspiracy, then the statements and the acts by any person likewise a member may be considered by the jury as evidence in the case as to the defendant found to have been a member [of the conspiracy] . . . .

(Emphasis added). Over Hidalgo's objection, the district court gave this instruction to the jury. On appeal, Hidalgo contends that the instruction's reference to "slight evidence" improperly reduced the State's beyond-a-reasonable-doubt burden of proof.

"'The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error.'" Rose v. State, 127 Nev. ___, ___, 255 P.3d 291, 295 (2011) (quoting Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005)).

Here, the instruction in question accurately described the standard that a district court must apply when considering whether to admit a statement into evidence under the coconspirator exception to the hearsay rule. Thus, the instruction did not misstate the law, and the district court did not commit judicial error in giving it. Id.

Nonetheless, Hidalgo contends that the district court committed reversible error by giving the instruction because its reference to "slight evidence" may have confused the jury as to the State's burden of proof. While we agree that it was unnecessary to instruct the jury regarding the evidentiary threshold applied by a district court in

admitting coconspirator statements, we disagree that the jury was confused as to the State's burden of proof.[8]

The record demonstrates that the complained-of instruction was 1 of 52 that were given to the jury. Of this 52, 10 referred to "reasonable doubt." Most notably, one of these instructions expressly specified that "the State [has] the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense." The instruction that followed immediately thereafter proceeded to define "reasonable doubt" and reminded the jury, "If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty."

Moreover, Hidalgo repeatedly emphasized in his closing argument that the State had the burden of proving his guilt "beyond a reasonable doubt," going so far as to tell the jury that "the concept of reasonable doubt is sacred." For its part, the State did not comment on the "slight evidence" instruction during its closing arguments.

Because "we presume that the jury followed the district court's orders and instructions," Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004), we conclude that the jury was not confused as to the State's burden of proof.

Permitting Espindola to testify was not plain error

As part of a plea agreement reached with the State, Espindola testified against Hidalgo prior to her own sentencing. The State did not

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[8]For this reason, we reject Hidalgo's contention that this jury instruction amounted to structural error. In contrast to Sullivan v. Louisiana, 508 U.S. 275, 278-80 (1993), in which the Supreme Court found structural error in a burden-of-proof jury instruction, the instruction at issue here did not actually reduce the State's burden of proof.

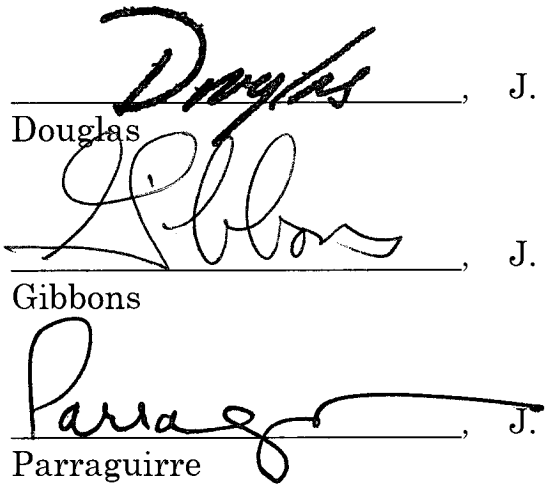
tape-record its plea negotiation with Espindola, which Hidalgo believes was deliberate. Specifically, Hidalgo contends that the State chose not to tape-record the negotiation so that it could conceal the fact that it was negotiating for scripted testimony. For the first time on appeal, Hidalgo contends that the district court should have prevented Espindola from testifying due to the State's allegedly improper motive in not tape-recording the plea negotiation.

"When an error has not been preserved, this court employs plain-error review." Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). In conducting plain-error review, the complained-of error must, "[a]t a minimum, . . . be clear under current law." Saletta v. State, 127 Nev. ___, ___, 254 P.3d 111, 114 (2011) (quotation omitted).

Here, current law squarely contradicts Hidalgo's stance. Namely, in Sheriff v. Acuna, 107 Nev. 664, 819 P.2d 197 (1991), we held that a prosecutor may negotiate a plea bargain with a potential witness and withhold the witness's bargained-for benefit until after the witness has testified in favor of the State. Id. at 669, 819 P.2d at 200. To prevent the State from "bargain[ing] for testimony so particularized that it amounts to following a script," we held that district courts should employ three safeguards: (1) make sure the terms of the plea agreement are fully disclosed to the jury, (2) allow defense counsel to fully cross-examine the witness concerning the plea bargain's terms, and (3) give the jury a cautionary instruction. Id.

The record in this case demonstrates that the district court employed all three of these safeguards. Thus, absent any legal duty on the State's part to tape-record its plea negotiation with Espindola, the district court did not commit plain error in allowing her to testify. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Valerie Adair, District Judge
Gordon & Silver, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk