IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS A. HIDALGO, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54272

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, second-degree murder with use of a deadly weapon, and two counts of solicitation to commit murder. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Luis A. Hidalgo, III, was convicted of the above crimes following a jury trial regarding his alleged involvement in a conspiracy resulting in the death of T.J. Hadland and his subsequent attempts to secure the killings of two witnesses to Hadland's murder.[1]

Hidalgo now appeals, arguing that the district court erred by (1) issuing a jury instruction referring to "slight evidence," (2) failing to admit the tape-recorded statement of an unavailable coconspirator for its truth, and (3) excluding the former testimony of an unavailable witness. Hidalgo also argues that reversal of his convictions is warranted due to the State's failure to (4) sufficiently corroborate accomplice testimony and (5) memorialize a coconspirator's plea negotiation. We conclude that Hidalgo's arguments are unpersuasive, and we therefore affirm.

[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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A jury instruction referring to "slight evidence" does not warrant reversal

Hidalgo first argues that Jury Instruction No. 40's reference to "slight evidence" is a misstatement of the applicable law because it provided the incorrect burden of proof for establishing a conspiracy. We disagree.

Whether a proffered jury instruction is an accurate statement of law is a legal question for de novo review. Nay v. State, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). NRS 51.035(3)(e) defines as nonhearsay the statements uttered by coconspirators of the defendant during the course and in furtherance of the conspiracy. Preliminary questions concerning the admissibility of evidence shall be determined by the judge. NRS 47.060. In determining the admissibility of coconspirator statements, the district court may determine the existence of a conspiracy by a "slight evidence" standard. McDowell v. State, 103 Nev. 527, 529, 746 P.2d 149, 150 (1987).

Here, the instruction informed the jury on a permitted use of hearsay under NRS 51.035(3)(e). Thus, it did not misstate the law, as it provided the relevant admissibility standard for consideration of coconspirator statements under McDowell.[2]

Nevertheless, Hidalgo next contends that the instruction's language created a risk that the jury would improperly confuse the

[2]Because the jury instruction did not actually reduce the State's burden of proof, we reject Hidalgo's argument that it amounted to structural error. Cage v. Louisiana, 498 U.S. 39, 40 (1990) (finding structural error where a jury instruction reduced the State's burden by equating reasonable doubt with grave uncertainty).

standard for admissibility of coconspirator statements with the standard of beyond a reasonable doubt for convicting him of conspiracy.

"This court evaluates appellate claims concerning jury instructions using a harmless error standard of review." Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003). An erroneous instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. 62, 72, (1991) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). As such, Hidalgo must show a "reasonable likelihood" that the jury would have concluded that this jury instruction, when read in context with other instructions, authorized a conviction based on slight evidence. See Boyde v. California, 494 U.S. 370, 381 (1990).

Here, the jury was repeatedly instructed regarding the applicable burden of proof: guilt beyond a reasonable doubt. As the district court explained in denying Hidalgo's motion for new trial, "it seems inconceivable that the jury could have misunderstood those six (6) words in instruction 40 considering that the jury was instructed more than ten (10) times on the State's burden of proof."

Thus, we conclude that any error in the jury instruction's reference to "slight evidence" was harmless.

The tape-recorded statement of an unavailable coconspirator was properly excluded

In the days following Hadland's murder, Deangelo Carroll, who was one of Hidalgo's coconspirators but who also acted as a police informant, was recorded as saying to Hidalgo in Anabel Espindola's presence: "[D]on't worry about it . . . you didn't have nothing [sic] to do with it." At trial, Hidalgo sought to introduce this potentially exculpatory statement for its substantive truth. On hearsay grounds, the district court

prohibited Hidalgo from introducing the statement for its truth, but instead permitted Hidalgo to read the statement into the record and argue that Espindola believed it to be true based on her silence.

On appeal, Hidalgo contends that he was improperly prohibited from introducing the statement as exculpatory evidence. This argument is two-prong, as Hidalgo argues that: (1) Carroll's statement should have been admitted for its truth as an admission of a party-opponent under NRS 51.035(3)(d); and (2) even if not, due process required it to be admitted regardless of its hearsay status.

The statement was properly excluded as hearsay

Hidalgo contends that because Carroll was operating as a State agent, his statement should have been admitted for its truth as an admission of a party-opponent. We disagree.

Under NRS 51.035(3), an admission by a party is not hearsay and is admissible for the truth of the matter asserted. This doctrine extends to statements made by the party's "agent or servant concerning a matter within the scope of the party's agency or employment." NRS 51.035(3)(d).

Nevada has never considered whether statements made by a police informant qualify under the agency exception to the hearsay rule. However, even among other jurisdictions to consider this issue, "it appears fairly well-settled that statements by government agents at the investigative level are not admissible" under the agency exception. State v. Asbridge, 555 N.W.2d 571, 576 (N.D. 1996) (emphasis added) (setting forth the majority view among federal courts).[3] Thus, because Carroll's

[3]Hidalgo cites U.S. v. Branham, 97 F.3d 835, 851 (6th Cir. 1996), for the proposition that the statements of a paid informant are admissible

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statement occurred at the investigative level, the district court properly determined that it was only admissible for context and impeachment purposes, and not for its truth as substantive evidence of innocence.[4]

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against the government. We find this argument unpersuasive. The case at hand is markedly distinguishable from Branham, which has not been extended beyond the scenario of paid informants. Moreover, Branham stands in stark contrast to the majority of courts that have considered this narrow issue and concluded that the out-of-court statements of a government informant are not admissible in a criminal trial as an admission by the agent of a party-opponent. See U.S. v. Yildiz, 355 F.3d 80, 81-82 (2nd Cir. 2004); Lippay v. Christos, 996 F.2d 1490, 1499 (3rd Cir. 1993) (holding that statements by informers are generally not intended to fall under the agency exception given the tenuous relationship between informers and police officers).

[4]Hidalgo makes two alternative arguments that are unpersuasive. First, he argues that Carroll's statement should have been admitted under NRS 51.315. As discussed in more detail below, this argument fails due to the statement's unreliable nature. See NRS 51.315(1)(a) (requiring that the "circumstances under which [the statement] was made offer strong assurances of accuracy").

Second, Hidalgo contends that the statement should have been admitted for its truth as an "adoptive admission" under NRS 51.035(3)(b) because Espindola's silence was an adoption of Carroll's proclamation. We disagree, as the statute only allows for statements made by a party opponent, and Espindola would not qualify as such. To the extent that Hidalgo also argues that a different portion of Jury Instruction No. 40 improperly allowed the jury to consider Carroll's tape-recorded statements as adoptive admissions but not for their truth, we conclude that any error was harmless. The record shows that Hidalgo was permitted to read the statement to the jury and argue that Espindola believed it to be true, implicitly arguing that he had nothing to do with the conspiracy.

Exclusion of the statement did not violate due process

Hidalgo argues that he was constitutionally entitled to have Carroll's statement admitted for its truth. See Chia v. Cambra, 360 F.3d 997, 1003 (9th Cir. 2004) ("[W]hen a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation.").

Here, we conclude that the district court did not commit a due process violation in excluding this evidence, as Carroll's tape-recorded statement does not bear the requisite assurances of trustworthiness. Although probative on the issue of whether Hidalgo was aware of the hit on Hadland prior to the killing, the circumstances surrounding Carroll's statement render the statement unreliable because he was acting as a police informant and had been prompted to make false statements to elicit incriminating responses. Also, Carroll's statement was not against his penal interest, as he had already provided a full confession and his apparent purpose for meeting with Hidalgo was to gain favor with law enforcement.

The prior testimony of an unavailable witness was properly excluded

Hidalgo argues that the district court abused its discretion in excluding a portion of Jason Taoipu's former testimony from the Kenneth Counts murder trial, in which Taoipu stated that Espindola (instead of Hidalgo) had instructed Carroll to bring baseball bats and trash bags to the Palomino on the night of Hadland's murder.[5]

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[5]Hidalgo also challenges the district court's determination that a partial admission of Taoipu's former testimony would allow the State to admit any other relevant portion. This argument lacks merit, as NRS 47.120 provides that when a writing or recorded statement is admitted,

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District court evidentiary rulings are reviewed for an abuse of discretion. Hernandez v. State, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008). NRS 51.325 provides that prior testimony is not excluded by the hearsay rule if (1) the declarant is unavailable as a witness, (2) the party against whom the former testimony is offered was a party or is in privity with one of the former parties, and (3) the issues are substantially the same.

Here, it is undisputed that Taoipu was unavailable in Hidalgo's trial and that the State was a party in both trials. Thus, the relevant inquiry becomes whether the issues were substantially the same. We conclude that they were not. Counts was the direct perpetrator of the murder and there was abundant evidence of his conspiracy with Carroll and Taoipu. Accordingly, the State had no motive in the Counts trial to impeach Taoipu's statement for the superfluous goal of identifying further members of the conspiracy. Further, in the Counts trial, the origin of the statement Hidalgo sought to admit was largely irrelevant for proving Counts' culpability. In the instant case, the origin of the statement is at issue. Because the issues are not substantially the same, the district court properly excluded Taoipu's former testimony.

Accomplice testimony was sufficiently corroborated

Hidalgo argues that the non-accomplice evidence presented at trial was insufficient to corroborate Espindola's testimony. We disagree.

NRS 175.291 mandates that accomplice testimony be independently corroborated and that "corroborative evidence must,

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any part of it that is relevant to the part introduced may be admitted as well.

without the aid of the accomplice, tend to connect the defendant with the commission of the offense." Eckert v. State, 91 Nev. 183, 185-86, 533 P.2d 468, 470 (1975). This court reviews the record independent of the accomplice testimony to determine whether that testimony has been sufficiently corroborated. Heglemeier v. State, 111 Nev. 1244, 1252, 903 P.2d 799, 804 (1995).

At trial, Espindola's testimony largely indicated that Hidalgo was not involved in the conspiracy. However, she did state that Hidalgo was in her office when she and Hidalgo's father learned that Hadland was disparaging the club, and that Hidalgo angrily criticized his father for not taking action against Hadland.

As corroborative evidence of Hidalgo's involvement, the State elicited testimony from Rontae Zone regarding a phone conversation in which Hidalgo indicated that his father wanted someone killed, and that Hidalgo had instructed Zone and Carroll to bring baseball bats and trash bags to the Palomino.[6] Also, phone records show that Hidalgo called Carroll several hours before the murder, and then repeatedly in the hours after Hadland was killed. In the recorded statements obtained by Carroll, Hidalgo discussed the penalties for a conspiracy, instructed Carroll to get

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[6]We reject Hidalgo's argument that Zone was also an accomplice. NRS 175.291(2) provides that an accomplice is "one who is liable to prosecution, for the identical offense charged against the defendant," and a witness's status as an accomplice is a question for the jury. Cutler v. State, 93 Nev. 329, 334, 566 P.2d 809, 812 (1977). Here, the record demonstrates that a rational jury could have concluded that Zone was not an accomplice, as he testified that he played no role in the conspiracy to harm Hadland and because he received no payment after the fact. Thus, the jury could have properly treated Zone's testimony as corroborative of Espindola's.

an attorney, and suggested lies that Carroll could tell the police. Notably, Hidalgo did not appear surprised or ask questions when Carroll demanded money to keep the witnesses silent. Instead, Hidalgo suggested putting rat poison in the food of other witnesses. See People v. Avila, 133 P.3d 1076, 1127 (Cal. Ct. App. 2006) ("Defendant's initial attempt to conceal from the police his involvement in the activities culminating in the murders implied consciousness of guilt constituting corroborating evidence.")

Because the evidence necessary to corroborate accomplice testimony may be slight and need only connect the accused to the offense, we conclude that the State met its burden. Fish v. State, 92 Nev. 272, 275, 549 P.2d 338, 340 (1976) (noting that the "amount of independent evidence necessary to prove the existence of a conspiracy may be slight").

Permitting Espindola to testify was not plain error

For the first time on appeal, Hidalgo alleges that he was denied his due process right to a fair trial by the State's failure to memorialize Espindola's proffered trial testimony during plea negotiations.[7]

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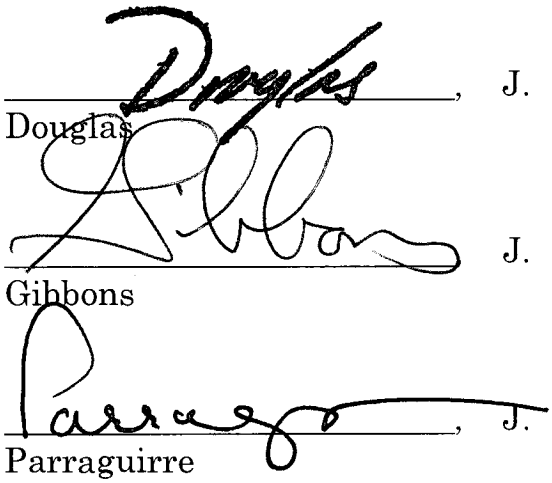
[7]Hidalgo also argues that the State deliberately failed to record the proffered testimony in an attempt to frustrate the full cross-examination mandated by the Constitution. Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998) (noting that the State's failure to preserve material evidence can lead to dismissal of charges if the defendant can show that the State acted in bad faith). For support, Hidalgo notes that other witnesses were taped during their initial interrogations but that Espindola was not taped during her subsequent plea negotiation, and that the State later asserted a work product privilege for the related negotiation notes. We conclude that this conduct does not rise to the requisite level of bad faith to reverse Hidalgo's convictions.

Previously unraised challenges predicated on constitutional provisions are reviewed for plain error to determine if a violation was prejudicial and affected substantial rights. Ramirez v. State, 126 Nev. ___, ___, 235 P.3d 619, 623 (2010). This court has held that "bargaining for specific trial testimony, i.e., testimony that is essentially consistent with the information represented to be factually true during negotiations with the State, . . . is not inconsistent with the search for truth or due process." Sheriff v. Acuna, 107 Nev. 664, 669, 819 P.2d 197, 200 (1991). In reaching this decision, we set forth certain safeguards requiring that: "[(1)] the terms of the quid pro quo must be fully disclosed to the jury, [(2)] the defendant or his counsel must be allowed to fully cross-examine the witness concerning the terms of the bargain, and [(3)] the jury must be given a cautionary instruction." Id.

On appeal, Hidalgo relies on these safeguards as the foundation for his due process violation. However, under Acuna, neither written nor recorded memorialization of pre-trial negotiations is mandated. Because Hidalgo fails to provide legal support for his view that the State is obligated to record plea negotiation proffers, we conclude that the district court did not commit plain error. Moreover, the record indicates that Hidalgo received a copy of the final plea agreement terms, he was provided with ample opportunity to cross-examine Espindola regarding the terms of the plea agreement, and the jury was expressly informed that her testimony was bargained for. Thus, the Acuna safeguards were satisfied, and permitting Espindola to testify was not plain error.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Valerie Adair, District Judge
Christopher W. Adams
Arrascada & Arrascada, Ltd.
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk