

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL LORENZO SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54397

FILED

JAN 31 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 two counts each of conspiracy to commit robbery and robbery of a victim 60 years of age or older and one count each of robbery, battery with intent to commit a crime, first-degree murder of a person 60 years of age or older, battery, and possession of a stolen vehicle. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Appellant Michael Smith and two others participated in a crime spree that involved stealing a car, robbing a young woman outside her apartment, and robbing a married couple outside their time-share. During the second robbery, one of the robbers attacked the husband, causing severe injuries that resulted in his death. A jury convicted Smith, and the district court sentenced him to life in prison without the possibility of parole.

On appeal, Smith raises four arguments. First, he asserts that the district court and State made improper statements regarding the standard for burden of proof and reasonable doubt during voir dire, violating his constitutional rights. Second, he claims the district court erred in refusing to sever Smith's case from his codefendant's, and that this prejudiced him. Third, he contends that the district court admitted irrelevant and highly prejudicial evidence at trial. Finally, Smith argues

that the district court committed cumulative errors justifying reversal of his conviction. We disagree with Smith's arguments and therefore affirm.

Voir dire

Smith claims that the prosecutor made improper statements regarding reasonable doubt during voir dire. It is improper for attorneys to "explain, elaborate on, or offer analogies or examples based on the statutory definition of reasonable doubt." Evans v. State, 117 Nev. 609, 632, 28 P.3d 498, 514 (2001). Here, the prosecution did not do so—instead, the prosecutor simply stated, in response to a prospective juror's question about reasonable doubt:

You talked about we would have to really, really, really prove the case. That's not the burden of proof in a criminal case. That's not the law. The law is proof beyond a reasonable doubt, and the definition of that would be given to you by [the judge] in this case.

Moreover, even if that statement violated the rule against a lawyer explaining reasonable doubt, any error is harmless because the district court provided proper jury instructions on reasonable doubt. Id. at 631-32, 28 P.3d at 514.

Smith also complains that the judge misstated the burden of proof during voir dire by giving a civil litigation example, and that this amounted to judicial misconduct. Specifically, the district court asked a juror:

THE COURT: Well, let me ask you this. If someone brought a complaint against you for a traffic accident, do you feel you would have to prove that you didn't do it and they did it? Or do you think that they might have to prove that you were responsible?

PROSPECTIVE JUROR []: I don't know. I mean—

THE COURT: So if someone gets to the clerk's office first and files a complaint, you figure that if they filed one against you they should prevail?

Smith failed to object or move for a mistrial below. To preserve a judicial misconduct claim for appellate review, a party normally must object or move for a mistrial. Holderer v. Aetna Cas. and Sur. Co., 114 Nev. 845, 850, 963 P.2d 459, 463 (1998). However, failure to object does not preclude judicial review “where judicial deportment is of an inappropriate but non-egregious and repetitive nature that becomes prejudicial when considered in its entirety.” Parodi v. Washoe Medical Ctr., 111 Nev. 365, 370, 892 P.2d 588, 591 (1995).

Although the district court used civil case examples to explain the law to prospective jurors in a criminal case, we conclude that these actions did not rise to the level of prejudice required for reversal, especially given the lack of contemporaneous objection by Smith. Here, Smith failed to demonstrate that the jury erroneously applied the preponderance-of-the-evidence standard just because a civil case happened to be mentioned during voir dire. And even if the district court's statements caused some confusion during voir dire, it was remedied when the court provided the correct jury instructions on reasonable doubt and the applicable burden of proof in this criminal case.

Severance

Smith next complains about the district court's denial of his motion to sever his trial from that of his codefendant. “The decision to sever a joint trial is vested in the sound discretion of the district court and will not be reversed on appeal unless the appellant ‘carries the heavy burden’ of showing that the trial judge abused his discretion.” Buff v.

State, 114 Nev. 1237, 1245, 970 P.2d 564, 569 (1998) (citing Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990)). Although some prejudice may inhere in a joint trial, “error in refusing to sever joint trials is subject to harmless error review.” Chartier v. State, 124 Nev. 760, 764-65, 191 P.3d 1182, 1185 (2008). Reversal is only justified if refusal to sever a joint trial had “a substantial and injurious effect on the verdict.” Id. at 765, 191 P.3d at 1185 (quoting Marshall v. State, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002)).

The district court’s refusal to sever did not unfairly prejudice Smith. To the contrary, he was the beneficiary of a pretrial ruling, later reversed towards the end of the trial, that precluded his codefendant from implicating Smith but that did not limit Smith or prohibit him from blame-shifting in any way.

Smith argues that denial of a severance required the prosecution to ask leading questions during direct examination in order to avoid a problem under Bruton v. United States, 391 U.S. 123 (1968), resulting in prejudice. However, Smith failed to object to any of the leading questions below. Failure to object during trial generally precludes appellate review unless it rises to the level of plain error that affects substantial rights. NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003); Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997). In addition, this court has made plain that the district court has discretion to permit leading questions on direct examination. NRS 50.115(3)(a); Leonard v. State, 117 Nev. 53, 70, 17 P.3d 397, 408 (2001).

Here, we conclude that any prejudice that may have resulted from the leading questions did not rise to the level of affecting Smith’s substantial rights. In fact, the district court allowed leading questions to

the benefit of both Smith and his codefendant. Therefore, we reject Smith's claim.

Irrelevant evidence

Smith also complains that the admission of irrelevant evidence prejudiced him to the point of requiring reversal. The district court has discretion regarding the admission of evidence and this court will only reverse if the admission of evidence was an abuse of that discretion. Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Over Smith's hearsay objection, the district court admitted evidence regarding the victim's cause of death. The district court did not abuse its discretion in admitting evidence regarding the cause of death because the evidence met the requirements for relevancy and the medical diagnosis hearsay exception. NRS 48.025, 51.115.

Later, the State asked questions regarding the victim's family and organ donor status. Smith failed to object. Now Smith argues that he should not have been required to object because further objection would have been fruitless. However, the subsequent questions concerning the victim's family and organ donor status were unrelated to the victim's cause of death, and Smith needed to object to preserve the separate claim of error. Information about the victim's family and organ donor status may have aroused some sympathy from the jury. But the jury could have easily convicted Smith of felony murder based on the physical evidence and testimony in this case; therefore, admission of the evidence was not plain error. Extraneous testimony about the victim did not affect Smith's substantial rights so Smith's failure to object precludes appellate review.


Cumulative error

Cumulative error can violate a defendant's constitutional right to a fair trial. Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). This court considers the following factors for a cumulative error claim: (1) if the issue of guilt is close, (2) the errors' size and character, and (3) the severity of the charged crime. Id.

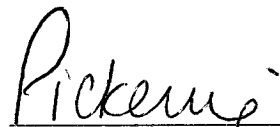
Although first-degree murder is a serious charge, we conclude that any error that may have occurred in this case was harmless and the issue of guilt was not close. Therefore, we reject Smith's cumulative error claim.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.

Cherry
 _____, J.

Gibbons
 _____, J.

Pickering
 _____, J.

cc: Hon. Donald M. Mosley, District Judge
Susan D. Burke
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk