

IN THE SUPREME COURT OF THE STATE OF NEVADA

MAURICIO ISRAEL MELENDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54770

FILED

JUL 29 2011

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. Ingerson*
DEPUTY CLERK

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

Appellant Mauricio Melendez was charged with the murder of his wife, Chennel, after he shot her once in the forehead while she was sitting at the couple's kitchen table. Melendez acknowledged to police that he shot and killed Chennel, but he contended that he did so unintentionally and that he did not know the gun was loaded.¹ Because Melendez was the only witness to the shooting, the State sought at trial to establish his premeditation and deliberation through circumstantial evidence.

The jury convicted Melendez of first-degree murder. He now appeals, contending that the following alleged trial errors warrant reversal of his conviction: (1) the district court improperly prohibited him from impeaching the credibility of one of the State's witnesses, (2) the district court improperly permitted the State to elicit expert opinion

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

testimony from a police detective, (3) the State engaged in several instances of prosecutorial misconduct during its closing argument, and (4) the district court improperly admitted hearsay testimony.² For the following reasons, we conclude that Melendez's contentions fail, and we therefore affirm.

The district court did not improperly restrict Melendez's ability to impeach the State's witness

At trial, the State elicited testimony from Melissa Hill, who was Melendez's co-worker. Hill testified regarding a statement Melendez made to her prior to the shooting in which Melendez told Hill that he was going to kill his wife. Hill also testified that she relayed this statement to her co-workers after the shooting and that her human resources department expressed to her its displeasure that she was discussing the shooting.

²Melendez also raises the following arguments with regard to the State's alternate theory of second-degree murder: (1) the district court unreasonably restricted his ability to question prospective jurors regarding their stances on gun-control, (2) the State's charging document failed to give him constitutionally adequate notice of the State's intent to pursue a second-degree felony murder conviction, and (3) the jury instructions describing second-degree felony murder and involuntary manslaughter contained errors.

Because the jury convicted Melendez of first-degree, premeditated and deliberate murder after being properly instructed on this theory, Melendez's arguments relating to the State's alternate theory of liability are moot. Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004) ("[W]e presume that the jury followed the district court's orders and instructions.").

On cross-examination, Melendez sought to question Hill regarding an incident prior to the shooting in which human resources had disciplined her for missing too many days of work. By introducing evidence of Hill's prior discipline, Melendez sought to draw a connection between Hill's pre- and post-shooting encounters with human resources. Specifically, Melendez sought to show that if Hill had made up the story about Melendez's statement simply to garner attention from her co-workers, she therefore may have had a motivation to continue the lie in order to avoid being further disciplined by human resources. The district court refused to allow Melendez to pursue this line of questioning. On appeal, Melendez contends that this refusal constitutes reversible error. We disagree.

We review a district court's decision to admit or exclude evidence for an abuse of discretion. Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004). "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).

All relevant evidence is admissible unless, among other things, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. NRS 48.025(1); NRS 48.035(1). Relevant evidence is that which has "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." NRS 48.015.

Here, the district court prohibited Melendez from impeaching Hill with her discipline record based upon both its lack of relevance and its potential to confuse the issues. Notably, with regard to its relevance,

Hill's prior discipline did not make it more probable that Hill had fabricated the story about Melendez's comment. Rather, this evidence simply assumed that her story was false and was meant to bolster this unestablished assumption.

Similarly, the inference that Melendez hoped the jury would draw from Hill's discipline record—that she had a motive to continue her lie—was so equivocal as to render it confusing. In excluding this evidence, the district court explained that Hill's prior run-in with human resources could have made it just as likely that she would have a motive to be wholly truthful with the department during her second encounter.

Moreover, prior to refusing to allow Melendez to impeach Hill regarding her discipline record, the district court permitted Melendez to impeach her credibility by cross-examining her on two other issues. First, Melendez elicited testimony from Hill in which she acknowledged that Melendez was not even at work on the day that she initially told police that Melendez had made his comment to her. Second, Melendez established that Hill had pleaded guilty to a misdemeanor forgery charge and that she had been arrested on suspicion of stealing personal property from her roommate.

Thus, given the substantial amount of time that both sides had already devoted to impeaching and bolstering Hill's credibility, the jury was able to accurately assess her testimony without further cross-examination regarding her discipline record. Because of the discipline record's lack of relevance and its potential to confuse the issues, the district court properly

refused to permit Melendez to pursue this line of questioning.³

The district court did not commit plain error in failing to strike sua sponte a police detective's opinion testimony

Detective Stephen Popp was among the law-enforcement personnel that investigated the crime scene. He also conducted

³For similar reasons, we reject Melendez's argument that his Confrontation Clause rights were violated. We recognize that, when reviewing a district court's decision to "curtail cross-examination where potential bias is at issue," a district court "has less discretion" than it normally would. Leonard v. State, 117 Nev. 53, 72, 17 P.3d 397, 409 (2001). Nevertheless, district courts still "retain wide latitude" to restrict cross-examination to explore potential bias 'based on concerns about . . . harassment . . . or interrogation that is repetitive or only marginally relevant.'" Id. (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).

The record demonstrates that concerns of harassment factored into the district court's decision to prohibit cross-examination regarding Hill's discipline record. In addition to impeaching Hill on the above two matters, Melendez also elicited testimony from Hill's co-workers regarding their opinions of Hill's truthfulness. When asked for their opinions, two of her co-workers indicated that Hill "tells a lot of stories" and is an "attention seeker." Having admitted this testimony and permitted cross-examination of Hill on the other two matters, the district court expressed concerns that Melendez simply wanted to use Hill's discipline record as a way to "dirty her up" rather than as a meaningful attempt to expose her bias or motive to lie.

Accordingly, when the entirety of the evidence directed toward impeaching Hill's credibility is considered, we conclude that the district court acted within its "wide latitude" in prohibiting Melendez from cross-examining Hill about her discipline record. Id. (quoting Van Arsdall, 475 U.S. at 679).

Melendez's custodial interview in which Melendez acknowledged shooting his wife. At trial, the State sought to elicit his testimony concerning these matters.

In conducting its direct examination of Detective Popp, the State asked him what he saw when he entered the couple's apartment. Detective Popp responded that he saw Melendez's driver's license and gun-registration card placed on the kitchen table. The State asked if he thought this was unusual, to which he replied: "Normally, I wouldn't expect to find identification in [the] name of a surviving member of an incident. Generally, people that leave identification leave it in suicide attempts, that type of thing, so that we know who they are."

Before Detective Popp's testimony continued the following day, defense counsel brought Detective Popp's comment to the court's attention, and the State indicated that it planned to elicit further testimony from Detective Popp to the effect that the shooting was a murder/suicide gone awry. Detective Popp's testimony continued, and on re-direct examination, the State asked Detective Popp if he "recall[ed] asking Mr. Melendez questions about [whether he was] planning on hurting himself." Defense counsel objected to the question, and the State indicated that it had no more questions for Detective Popp.

On appeal, Melendez contends that Detective Popp improperly provided an expert opinion as to his belief that Melendez planned to kill his wife and then himself, but that Melendez reconsidered after he was halfway done. Specifically, Melendez contends that the State did not notify him of its intent to call Detective Popp as an expert witness, and that if he knew Detective Popp were planning on opining that he was suicidal, he would have called his own expert witness to rebut the idea

that he had suicidal ideations. As explained below, we conclude that Melendez's argument fails.

Because Melendez did not timely object to Detective Popp's testimony, we review the argument for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). "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.

We conclude that Detective Popp's testimony more closely resembles lay opinion testimony than it does expert opinion testimony. Lay witnesses may offer opinion testimony if their opinions are "[r]ationally based on the[ir] perception." NRS 50.265(1). Only if a witness's opinion is based on "scientific, technical or other specialized knowledge" must he or she first be qualified and noticed as an expert. NRS 50.275; NRS 174.234(2). Here, while Detective Popp's past work-related experiences may have enabled him to describe what he saw on Melendez's kitchen table, this does not change the fact that his testimony was rationally based on what he perceived while investigating the 911 call. Cf. Thompson v. State, 125 Nev. ___, ___, 221 P.3d 708, 714 (2009) (concluding that a witness testifying as to what she perceived was not an "expert" simply because her ability to perceive may have been enhanced by training she had received as an artist). Thus, it was not error to admit this testimony, let alone plain error. Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) ("For an error to be plain, it must, at a minimum, be clear under current law." (quotations omitted)).

The State did not engage in prosecutorial misconduct during its closing argument

Melendez contends that the State engaged in three instances of prosecutorial misconduct during its closing argument: (A) the State improperly vouched for Melissa Hill's credibility, (B) the State repeatedly called Melendez a liar, and (C) the State improperly conducted a reconstruction of the shooting.

On review, this court takes a two-step approach to analyzing allegations of prosecutorial misconduct. First, we "must determine whether the prosecutor's conduct was improper." Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Second, if the conduct was improper, we "must determine whether the improper conduct warrants reversal." Id. As explained below, because the State's conduct in all three contested instances was proper, we need not consider whether such conduct warrants reversal.

Vouching for Hill's credibility

In his closing argument, Melendez commented extensively on the evidence pertaining to Hill's lack of credibility. Then, to begin its rebuttal, the State commented, "[defense counsel] wants you not to believe Melissa Hill, because if you believe the testimony of Melissa Hill, the defendant is guilty of murder." The State proceeded to comment further on why Hill lacked a motivation to lie about hearing Melendez say he was going to kill his wife. Notably, the State commented, "[i]f she were really trying to frame an innocent man, she would have added a lot more to that story, not to mention that there's been no evidence whatsoever throughout . . . this trial that she has a motive to come in here and perjure herself."

And to downplay Hill's poor reputation for truthfulness, the State argued, "[r]emember, Melissa Hill works at a casino, she handles cash. Obviously, casinos trust her, she can't be that dishonest."

On appeal, Melendez contends that the State improperly vouched for Hill's credibility by making these comments. We disagree.

In Rowland v. State, 118 Nev. 31, 39 P.3d 114 (2002), this court attempted to draw a distinction between improperly vouching for a witness and properly commenting on a witness's credibility. We noted that "vouching" occurs when the State "use[s] . . . the prestige of the district attorney's office" to sway the jury's determination as to the credibility of a particular witness. Id. at 39, 39 P.3d at 119.

Here, the State did not vouch for Hill's credibility under the framework provided in Rowland. Rather, the State merely tried to emphasize for the jury every possible reason why it should find Hill to be credible. Because all of its arguments were related to the evidence presented at trial, these comments during closing argument were not improper. Miller v. State, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) ("[T]he prosecutor may argue inferences from the evidence and offer conclusions on contested issues." (quotations omitted)).

Calling Melendez a "liar"

As part of Melendez's closing argument, he sought to comment on why the circumstantial evidence pointing to an intentional shooting was equally consistent with his claim that the shooting had been accidental. Then, in its rebuttal, the State sought to show that Melendez was only now claiming that the shooting was accidental because he had backed himself into such a theory of defense. The State's method for doing

so was to proceed chronologically through Melendez's 911 call and his custodial interview with Detective Popp, identifying along the way all the "untruth[s]" that Melendez had told. On appeal, Melendez contends that pointing out these "untruth[s]" was akin to calling him a liar, which amounted to prosecutorial misconduct. We disagree.

The State's purpose behind identifying Melendez's untruths was not to brand him as a liar, but to put Melendez's claim of an accidental shooting into the appropriate context. Because Melendez made numerous irreconcilable statements in his 911 call and in his custodial interview, the necessary implication was that at least some of those statements were untruthful. *Cf. Miller*, 121 Nev. at 100, 110 P.3d at 59 ("[O]ther jurisdictions have held that unflattering characterizations of a defendant will not provoke a reversal when such descriptions are supported by the evidence." (quotations omitted)).

Moreover, because much of the evidence regarding Melendez's intent was based upon the credibility of his and other witnesses' statements, the State necessarily had to explain why his interview statements were untrue in order to prove its case. *See Rowland*, 118 Nev. at 39, 39 P.3d at 119 ("[W]hen a case involves numerous material witnesses and the outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness—even if this means occasionally stating in argument that a witness is lying."). Consequently, the State did not

commit prosecutorial misconduct by identifying Melendez's untruths.⁴

Reconstruction of the shooting

To conclude the rebuttal portion of its closing argument, the State sought to reconstruct the shooting by placing two chairs a few feet apart from each other and by explaining that, for the bullet to have entered Chennel's forehead at the angle it did, Chennel must have been sitting down and looking up. Melendez objected on the ground that the reconstruction misstated the coroner's testimony, which, on appeal, he contends amounted to prosecutorial misconduct. Again, we disagree.

The use of demonstrative aides is appropriate so long as the aides do not misrepresent the evidence introduced at trial. Allred v. State, 120 Nev. 410, 419, 92 P.3d 1246, 1252-53 (2004). At trial, testimony indicated that Melendez shot Chennel from a distance of no further than 18 inches and that she was sitting at the kitchen table at the time. Moreover, the coroner testified that Chennel's head could have been pointed at any number of angles (upward, downward, or horizontally)

⁴Melendez also argues that the State committed prosecutorial misconduct during its direct examination of Detective Popp by asking Detective Popp if he thought Melendez was lying in his custodial interview. This argument lacks merit and misconstrues the basis for the State's question. After Melendez's custodial interview was played for the jury in which Detective Popp could be heard as telling Melendez, "[w]e believe you," the State asked Detective Popp whether he actually believed Melendez or if this was simply an interview technique to try and stay on Melendez's good side. In response, Detective Popp testified that this was simply an interview technique, and at no point did he testify that he believed Melendez was lying to him.

when Melendez shot her. Thus, the State's suggestion that this was an execution-style shooting was one of several inferences that could be drawn from the evidence. Miller, 121 Nev. at 100, 110 P.3d at 59 (“[T]he prosecutor may argue inferences from the evidence and offer conclusions on contested issues.” (quotations omitted)). Accordingly, the State did not commit prosecutorial misconduct by conducting this reconstruction.

Hearsay testimony elicited from Melendez's sister-in-law constituted harmless error

During its case in chief, the State elicited testimony from Melendez's sister-in-law, Claudine Eggleston. Eggleston testified that, in several conversations she had with Chennel in the months prior to Chennel's death, Chennel had mentioned that she was “just not happy” in the marriage and that “she was afraid that she wanted to leave, but she couldn't because [Melendez] would take her son away from her.”

The district court permitted the State to introduce Chennel's statements of dissatisfaction with her marriage as evidence that Melendez may have had a motive to kill her. On appeal, Melendez contends that this testimony was improper, both because it constituted inadmissible hearsay and because it was irrelevant. While we agree that this testimony was improperly admitted, we conclude that its admission constituted harmless error.⁵

⁵Melendez also argues that this testimony should have been excluded on the ground that the State instructed Eggleston not to speak with defense counsel prior to trial. We conclude that this argument lacks merit. While it is undisputed that Eggleston did not speak with defense counsel prior to trial, Eggleston's trial testimony demonstrates that this

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This court reviews a district court's decision to admit evidence for an abuse of discretion. Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004).

Here, the district court admitted Eggleston's statements under NRS 51.105(1), an exception to the hearsay rule, which provides: "A statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health, is not inadmissible under the hearsay rule." In Weber v. State, 121 Nev. 554, 119 P.3d 107 (2005), this court expanded the application of NRS 51.105(1), concluding that a declarant's statement as to her state of mind could be introduced as evidence of another person's motive. 121 Nev. at 579, 119 P.3d at 124; cf. State v. Alston, 461 S.E.2d 687, 704 (N.C. 1995) ("It is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant.").

Assuming Melendez was aware of Chennel's dissatisfaction with their marriage, Chennel's hearsay statements would have been admissible under NRS 51.105(1). However, nothing in the record indicates that the State took the additional step of introducing evidence to

... continued

was the result of a miscommunication rather than anything nefarious on the State's part.

this effect.⁶ Accordingly, this testimony was irrelevant, and the district court abused its discretion in admitting it.

Nonetheless, these remarks were harmless in light of the evidence presented during the course of the five-day trial. Notably, Melendez admitted in his custodial interview that he shot and killed Chennel, and he has never retreated from this admission. Thus, the only contested issues during trial were whether he shot Chennel intentionally and, if so, whether he did it with premeditation and deliberation. See NRS 200.030(1)(a) (“Murder of the first degree is [a] . . . willful, deliberate and premeditated killing.”); Byford v. State, 116 Nev. 215, 236, 994 P.2d 700, 714 (2000) (“Willfulness is the intent to kill.”).

The circumstantial evidence presented at trial demonstrated that Melendez shot Chennel intentionally and that he did so with

⁶The State may have been trying to do so when it elicited a one-sentence response from Eggleston indicating that Melendez on several occasions had been rude to her when she called to speak with Chennel. Without objecting at trial, Melendez now contends that this statement was unfairly prejudicial and was therefore improperly admitted. Although we agree that this statement had no relevance, we disagree that its introduction affected Melendez’s substantial rights. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (“In conducting plain error review, we must examine whether . . . the error affected the defendant’s substantial rights.”).

While the jury could have drawn a negative inference as to Melendez’s character from this statement, it could have just as easily inferred that Eggleston disliked Melendez and that the entirety of her testimony was biased. Because the risk of unfair prejudice inherent in this isolated statement was equivocal at best, Melendez has not established that his substantial rights were affected by its admission.

premeditation and deliberation.⁷ Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) (“Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence.”); DePasquale v. State, 106 Nev. 843, 848, 803 P.2d 218, 221 (1990) (“Premeditation is generally established by circumstantial evidence.”). Specifically, the circumstantial evidence demonstrated that the gun used to kill Chennel had multiple working safeties that would have prevented the gun from firing accidentally. Trial testimony further demonstrated that Melendez pulled the trigger from a distance of no further than 18 inches from Chennel’s head and that she was struck near the center of her forehead.

More significantly, Melendez’s actions following the fatal shot were entirely inconsistent with the possibility that Melendez was unaware that the gun was loaded or that he shot Chennel out of anger. Byford, 116 Nev. at 237, 994 P.2d at 714-15 (“The law does not undertake to measure in units of time the length of the period during which the thought must be

⁷Without objecting at trial, Melendez contends that testimony from one of his co-workers should have been excluded on the ground that it was irrelevant. Specifically, his co-worker testified regarding a conversation she had with Melendez two years before the shooting in which Melendez said, “if you’re going to go [to jail], you might as well go for good and do something crazy, and to have somebody think of you as being crazy.”

Although Melendez made this statement two years before the shooting, it was nevertheless relevant to rebut Melendez’s contention that the shooting was accidental. NRS 48.015 (“[R]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence . . . more or less probable . . .”). Thus, we cannot conclude that the district court committed plain error in failing to find that this statement’s relevance was substantially outweighed by its danger of unfair prejudice. NRS 48.035(1).

pondered before it can ripen into an intent to kill which is truly deliberate and premeditated.”). Rather than immediately calling 911 or seeking other help, Melendez instead took the time to wrap Chennel’s body in a blanket, transport her body from the kitchen table to the couch, and clean up the blood in the kitchen. Likewise, in the hours following her death, Melendez took multiple photographs of Chennel’s body.

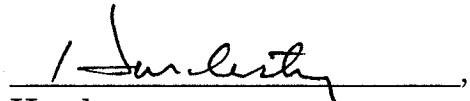
Consequently, even without Eggleston’s testimony regarding Melendez’s ostensible motive, the evidence presented was substantial enough to convict Melendez in an otherwise fair trial. Cf. Chavez v. State, 125 Nev. 328, 344-45, 213 P.3d 476, 487-88 (2009) (determining that the introduction of adult magazines at trial of the defendant in a sexual assault prosecution was harmless error “given the overwhelming evidence” against the defendant). Thus, we are confident that “the verdict would have been the same in the absence of error.”⁸ Weber, 121 Nev. at 579, 119

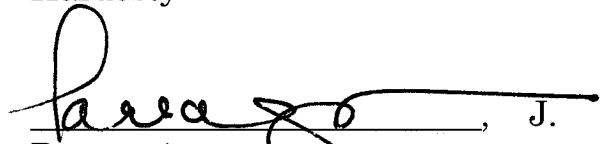
⁸For similar reasons, we reject Melendez’s argument that his conviction was not supported by sufficient evidence. “The standard of review when analyzing the sufficiency of evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006) (quotations and alterations omitted). As explained above, even if the jury chose not to believe Melissa Hill’s testimony regarding Melendez’s pre-shooting comment, a rational trier of fact could have found the essential elements of premeditation and deliberation beyond a reasonable doubt based upon the remaining evidence presented at trial.

P.3d at 124 (quotation omitted). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Saitta

 J.
Hardesty

 J.
Parraguirre

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