IN THE SUPREME COURT OF THE STATE OF NEVADA

OMAR RUEDA-DENVERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55296

FILED

FEB 24 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 the use of a deadly weapon, attempted murder with the use of a deadly weapon, two counts of possession of an explosive or incendiary device, and transportation or receipt of explosives for unlawful purpose with substantial bodily harm. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Omar Rueda-Denvers (Denvers) was charged with numerous crimes stemming from his alleged involvement in a 2007 bombing at the Luxor Hotel. Denvers acknowledged being with his friend and codefendant, Porfirio Duarte-Herrera (Herrera), when Herrera planted the bomb. However, Denvers disavowed any knowledge of what Herrera was doing, contending instead that Herrera acted on his own accord out of a sense of misguided loyalty to Denvers.[1]

A jury convicted Denvers of all charges. He now appeals, contending that the following alleged errors warrant reversal of his convictions: (1) the district court improperly excluded evidence of Herrera's prior bomb-related activities, (2) the district court improperly refused to sever the two codefendants' trials, (3) the district court

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

improperly admitted evidence that Denvers disliked Mexican people, (4) the district court improperly admitted Denvers' voluntary police statements into evidence, and (5) Denvers' Confrontation Clause rights were violated when a portion of Herrera's police statement was introduced into evidence.[2] We conclude that Denvers' contentions fail, and we therefore affirm.

Evidence of Herrera's prior bomb-related activities was properly excluded

In pursuit of his theory of defense, Denvers sought to introduce evidence that Herrera had a history of engaging in indiscriminate bomb-related activities. Most prominent of these previous activities was a bombing that Herrera had orchestrated in a Home Depot parking lot.[3] To this end, Denvers sought to introduce a portion of Herrera's own police statement in which Herrera admitted to carrying out the Home Depot bombing on his own and to doing so for no reason. From this evidence, Denvers planned to argue the inference that Herrera had placed the Luxor bomb indiscriminately and without Denvers' knowledge.

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[2]Denvers also makes four arguments regarding jury instructions, three of which we have expressly rejected in previous cases and will not revisit here. Denvers' remaining argument pertains to Byford v. State's definition of "premeditation and deliberation," which, he contends, collapses the distinction between first- and second-degree murder and violates due process. See Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714-15 (2000). Because the record demonstrates that Denvers premeditated and deliberated throughout the entire night of the bombing, this argument is inapplicable to the facts at hand, and we do not consider it. See Picetti v. State, 124 Nev. 782, 795, 192 P.3d 704, 712 (2008) (refusing to entertain a constitutional question that was inapplicable to the case's facts).

[3]The district court properly excluded evidence of Herrera's other bomb-related activities for the same reasons given below.

The district court prohibited Denvers from introducing this evidence, concluding that it would be inadmissible for a variety of reasons. On appeal, Denvers contends that this was error. We disagree.

This court reviews 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).

As a general rule, all relevant evidence is admissible. NRS 48.025(1). This general rule, however, is subject to numerous exceptions. NRS 48.025(1)(a). One such exception is NRS 48.045, which provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." NRS 48.045(2).[4]

Here, the district court believed that Denvers was attempting to use Herrera's history of indiscriminate bombings to show that Herrera had indiscriminately planted the Luxor bomb—i.e., that he acted in conformity with his prior acts. This is the quintessential type of evidence that NRS 48.045(2) is meant to exclude. Accordingly, the district court was within its discretion in excluding evidence of Herrera's prior bomb-related activities.

This evidence was also properly excluded because its marginal relevance was substantially outweighed by its risk of misleading the jury. NRS 48.035(1). Namely, "relevant" evidence is that which has "any tendency to make the existence of any fact that is of consequence to the

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[4]Such evidence may be admissible for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). Because Denvers has not argued that Herrera's bomb-related activities should have been admissible for another purpose, we do not consider the issue.

determination of the action more or less probable than it would be without the evidence." NRS 48.015. Here, the primary "fact . . . of consequence" was whether Denvers was truly unaware of what Herrera was doing when Herrera exited the car for a full minute in the middle of the parking garage.[5] Herrera's history of indiscriminate bombings does little to explain why Denvers did not see what Herrera was doing, or how Herrera effectively concealed a pipe bomb from Denvers while sitting next to him in the car. If anything, Denvers' knowledge that Herrera had previously blown up a car should have alerted Denvers that something might be amiss with the situation.[6]

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[5]Denvers also contends that evidence of Herrera's prior bomb-related activities should have been admitted because it was relevant to refute Herrera's argument that Denvers was actually the one who made the Luxor bomb. We disagree.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence." NRS 48.035(2). During his police interview, Herrera drew a diagram of the bomb from memory. This diagram was introduced into evidence as an exhibit at trial. Thus, if Denvers were truly interested in refuting Herrera's claim that Denvers was the actual bomb-maker, Denvers could have directed the jury's attention toward this exhibit, which he had already done earlier in the trial.

Consequently, permitting Denvers to introduce evidence of Herrera's prior bomb-related activities to refute Herrera's argument would have been needlessly cumulative. NRS 48.035(2).

[6]We reject Denvers' argument that NRS 47.120 permitted him to introduce a portion of his own May 14 custodial interview in which he acknowledged that Herrera carried out the Home Depot bombing. NRS 47.120 provides: "When any part of a writing or recorded statement is introduced by a party, the party may be required at that time to introduce any other part of it which is relevant to the part introduced . . . ." (Emphases added).

Whatever marginal relevance this evidence had was substantially outweighed by its risk of confusing the jury. The district court had already severed Herrera's Home Depot-related charges because of the lack of connection between the Home Depot and Luxor incidents. Thus, if Denvers were permitted to introduce evidence of Herrera's Home Depot bombing, the jury would likely have been misled as to which incident—Home Depot or Luxor—was actually being tried.

In sum, the district court acted within its discretion in excluding Herrera's prior bomb-related activities.

The district court properly refused to sever Denvers' trial

On appeal, Denvers contends that the district court erred in refusing to sever his trial from codefendant Herrera's. We disagree.

"'[T]he 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.'" Chartier v. State, 124 Nev. 760, 764, 191 P.3d

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In Patterson v. State, 111 Nev. 1525, 907 P.2d 984 (1995), we concluded that NRS 47.120 applies only to writings or recorded statements—not to interviews or conversations. 111 Nev. at 1530-31, 907 P.2d at 988 (discussing NRS 47.120's federal analog and the rationale behind it).

Even assuming NRS 47.120 applied to interviews, the portions of Denvers' May 14 interview that he sought to introduce would not have been "'relevant to the part [of the interview] introduced.'" Patterson, 111 Nev. at 1530, 907 P.2d at 988 (quoting NRS 47.120). Namely, in conducting its direct examination of the interviewing detective, the State was careful to discuss Denvers' presence at the Luxor parking garage in superficial terms and deliberately did not allude to Herrera. Denvers has not identified a single portion of the detective's testimony that he believes was misleading, and we have found none. Cf. id. at 1531 n.4, 907 P.2d at 988 n.4 (indicating that NRS 47.120's purpose is to prevent "the misleading impression created by taking matters out of context").

1182, 1185 (2008) (quoting Buff v. State, 114 Nev. 1237, 1245, 970 P.2d 564, 569 (1998) (internal quotation marks omitted)).

Generally speaking, severance may be proper when two criteria are satisfied. First, the codefendants' theories of defense must be so antagonistic to the point where they are "'mutually exclusive'"—i.e., to the point where "'the core of the codefendant's defense is so irreconcilable with the core of the defendant's own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant.'" Marshall v. State, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002) (alteration omitted) (quoting Rowland v. State, 118 Nev. 31, 45, 39 P.3d 114, 122-23 (2002)).

Here, although little evidence supports either codefendant's theory, Denvers likely satisfies this criterion. That is, if the jury believed Herrera's theory that Denvers built the bomb and was the mastermind behind the plan, it would be impossible to accept Denvers' theory that he was unaware of what Herrera was doing when Herrera exited the car for an entire minute in the Luxor parking garage.

However, even when this first criterion is satisfied, a defendant must also show that there is "'a serious risk that a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable judgment about guilt or innocence.'" Id. at 647, 56 P.3d at 379 (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

Denvers cannot satisfy this criterion. His argument that he had a "specific trial right" compromised when he was prohibited from introducing evidence of Herrera's past bomb-related activities fails for the same reasons described above. Namely, this evidence would have been inadmissible even at a separate trial, and it could just as easily have been

viewed by the jury as inculpating Denvers. See Zafiro v. United States, 506 U.S. 534, 539 (1993) ("[A] defendant might [have a specific trial right compromised] if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial."); cf. Chartier, 124 Nev. at 765, 767, 191 P.3d at 1185, 1187 (concluding that a specific trial right was compromised when a codefendant was prevented from introducing evidence that was admissible and exculpatory).

Nor did the joint trial render the jury's verdict unreliable. Given Denvers' own voluntary police statements and the surveillance videos placing him at the scene of the bombing, we are confident in the verdict's reliability.

In sum, Denvers has not satisfied the "heavy burden" of showing that the district court abused its discretion in refusing to sever his trial. Chartier, 124 Nev. at 764, 191 P.3d at 1185.

Evidence that Denvers disliked Mexican people was properly admitted

Prior to the first witness being called, Denvers asked the district court to prohibit the State from eliciting testimony regarding Denvers' dislike of Mexican people. Because the victim in this case was Mexican, the State contended that Denvers' dislike of Mexican people was relevant to his motive. The district court agreed with the State and permitted the State to introduce a brief portion of pre-recorded testimony from a witness regarding Denvers' dislike of Mexican people.

On appeal, Denvers contends that this evidence should have been inadmissible under NRS 48.045.[7] We conclude that the district court

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[7]Denvers also contends that certain conduct on the part of codefendant Herrera amounted to inadmissible prior-bad-act evidence. Because this conduct was limited to statements made by Herrera's attorney during opening argument and a brief question directed toward a

was within its discretion to admit this evidence. Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004).

Although we question whether Denvers' low opinion of Mexican people falls within NRS 48.045's scope, the State apparently concedes the point. That said, Denvers' dislike for Mexican people was clearly relevant to his motive. As mentioned previously, although NRS 48.045 prohibits introduction of prior-bad-act evidence to show action in conformity therewith, NRS 48.045(2) permits introduction of such evidence to show, among other things, motive. Thus, the district court acted within its discretion in permitting the State to elicit this testimony.[8]

Denvers' police statements were properly admitted into evidence

While in custody after his arrest, Denvers provided two statements to police detectives. Before trial, Denvers filed a motion to suppress both statements on the ground that the detectives failed to inform him of his right under the Vienna Convention to contact the Panamanian consulate.

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witness, no "evidence" was actually introduced. Instead, Denvers' argument in this regard is more akin to an allegation of prosecutorial misconduct.

"[P]rejudice from prosecutorial misconduct results when 'a prosecutor's statements so infect the proceedings with unfairness as to make the results a denial of due process.'" Browning v. State, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) (alteration omitted) (quoting Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)). Here, Herrera's complained-of conduct was confined to a few seconds throughout a 14-day trial, and it did not deny Denvers his right to due process.

[8]Denvers also contends that this same witness's pre-recorded testimony improperly included a statement that he entered the United States illegally. A review of this witness's testimony reveals no such statement.

This court has chosen not to apply the exclusionary rule to this type of Vienna Convention violation, Garcia v. State, 117 Nev. 124, 128-29, 17 P.3d 994, 996-97 (2001), and the Supreme Court has since held that it is constitutionally "unnecessary" to do so. Sanchez-Llamas v. Oregon, 548 U.S. 331, 350 (2006). Thus, even in the event that Denvers' Vienna Convention rights were violated, the district court properly admitted his police statements into evidence.[9]

Violation of Denvers' Confrontation Clause rights constituted harmless error

At trial, the detective who conducted both codefendants' police interviews relayed portions of these interviews to the jury. During the State's direct examination, the following question-and-answer took place:

> State: Did you ask [Herrera] if they had gone to look for the car before going back to his house to get the bomb?
>
> Detective: Yes, I did.
>
> State: And did he say that they had.
>
> Detective: Yes.
>
> State: Okay. And did he say that the reason they went back to his house was to get the bomb?
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> Detective: Yes.

(Emphases added). Denvers timely objected to this line of questioning on the ground that the testimony violated his Confrontation Clause rights.

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[9]Denvers' appellate briefs do not make clear whether he is also challenging the validity of his two Miranda waivers. After reviewing the record, we are confident that both waivers were given "'voluntarily'" and "'knowingly and intelligently.'" Moran v. Burbine, 475 U.S. 412, 421 (1986) (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)).

We agree that this testimony violated Denvers' Confrontation Clause rights, but we conclude that the error was harmless.

"[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)).

In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that a non-testifying codefendant's confession cannot be introduced into evidence if the confession implicates another codefendant. 391 U.S. at 135-36. In light of Bruton, we considered the constitutionality of introducing a non-testifying codefendant's confession in which references to the appellant were simply replaced with a blank space. Stevens v. State, 97 Nev. 443, 444, 634 P.2d 662, 663 (1981). Given that the appellant in Stevens had been jointly tried with the non-testifying codefendant, we concluded that it was "not only natural, but seemingly inevitable, that the jury would infer appellant to be the person referred to in the blanks in [the codefendant's] statements." Id. Consequently, we determined that a Bruton violation had occurred. Id. at 445, 634 P.2d at 664; cf. Gray v. Maryland, 523 U.S. 185, 195-96 (1998) (finding a Bruton violation under a similar fact pattern).

Here, we believe that the references to "they" during the detective's testimony likewise violated Bruton, as the jury likely inferred that Denvers was the person accompanying Herrera when Herrera retrieved the bomb from his house.

Nonetheless, we conclude that this was harmless error.[10] See Harrington v. California, 395 U.S. 250, 254 (1969) (stating that Bruton violations are subject to harmless-error review). Denvers had already acknowledged being with Herrera throughout the night of the bombing, and the detective's passing reference to Denvers' knowledge of the bomb was just as strongly established by other evidence introduced at trial.

Specifically, Denvers was captured twice on videotape driving by the victim's car. The second time, he stopped for roughly a full minute while Herrera exited Denvers' vehicle and walked toward the victim's car. See 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."). Similarly, it belies common sense to think that Herrera was able to conceal from Denvers the fact that he was sitting in Denvers' passenger seat with a pipe bomb in his possession. Id.

Given the overwhelming evidence of Denvers' guilt, we conclude that the Bruton violation was harmless beyond a reasonable doubt. Corbin v. State, 97 Nev. 245, 247, 627 P.2d 862, 863 (1981) ("In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error."). Accordingly, we

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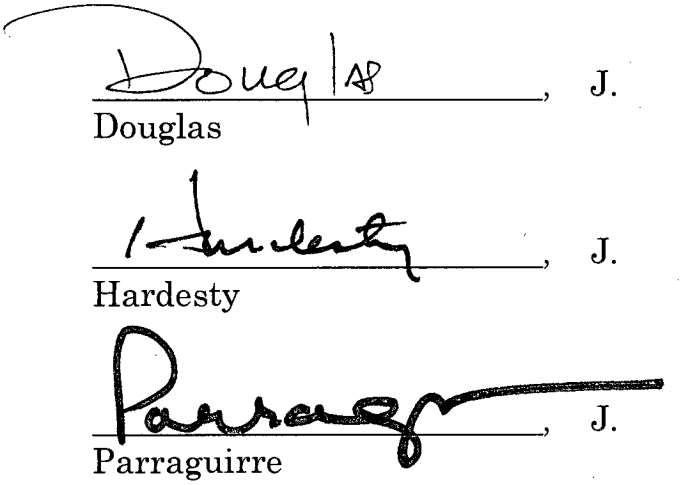
[10]Because the Bruton violation was the only error in this case, Denvers' allegation of cumulative error fails.

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. Michael Villani, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk