IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES DEJUAN MORRIS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35030

FILED

NOV 13 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING IN PART

Appellant Charles Dejuan Morris appeals from a judgment of conviction in which a jury found him guilty of first-degree murder with a deadly weapon, robbery with the use of a firearm, and conspiracy with the use of a firearm. Morris challenges various aspects of the verdict and sentence. We conclude that all of Morris's arguments lack merit except one – the district court erroneously applied the deadly weapon enhancement to Morris's sentence for conspiracy.

Morris first contends that the district court erred by enhancing his sentence for conspiracy. We recently addressed this issue in Moore v. State, and concluded that a person cannot "use" a weapon to commit the agreement-based crime of conspiracy, and therefore it is improper to enhance the sentence for conspiracy under NRS 193.165.[1] Accordingly, we reverse that portion of Morris's sentence.

Morris next contends that his Miranda[2] rights were violated because he was "in custody" for the first part of his interview and was not given Miranda warnings. We disagree. The district court determined that – considering the totality of circumstances – Morris's freedom had not been so restrained that it could be objectively said that a reasonable person in his situation would not feel free to leave.[3] We have reviewed the record and the videotapes of Morris's interview with the police and

[1]117 Nev. ___, 27 P.3d 447 (2001).

[2]Miranda v. Arizona, 384 U.S. 436 (1966).

[3]See State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998).

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conclude that substantial evidence supports the district court's determination.[4]

Morris next contends that he did not validly waive his Miranda rights at any point during his interview with the police. We must examine the totality of circumstances to determine whether Morris validly waived his rights.[5] Although Morris arguably waived his rights implicitly at an earlier point, we conclude that he knowingly and voluntarily waived his rights during the dialogue recorded at page 756 of volume IV of the joint appendix.[6]

Morris next contends that his statements following the advisement of his rights were the product of interrogation and should have been excluded. For purposes of our analysis, because we conclude that Morris validly waived his rights, the part of the interview relevant to this argument is that small portion before he waived his rights. This part of the interview comprises merely a few pages of written transcript and contains no unduly prejudicial information. Thus, even assuming that part of the interview was improperly admitted, we conclude that the error was harmless because Morris suffered no prejudice by its admission.[7]

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[4]See Mitchell v. State, 114 Nev. 1417, 1423, 971 P.2d 813, 817 (1998) ("[A] district court's determination as to whether a defendant was 'in custody' will not be disturbed where there is substantial evidence in support of its determination.").

Morris urges us to adopt a non-deferential standard of review for this issue because we have the videotapes of the interview and can therefore review it for ourselves. We decline to change the standard of review because the district court was clearly in the better position to view and assess, not only the videotapes, but also, the witnesses during the hearing of this issue.

[5]Koger v. State, 117 Nev. ___, ___, 17 P.3d 428, 430 (2001).

[6]We decline Morris's invitation to require the police to use written advisement and waiver forms. See Criswell v. State, 84 Nev. 459, 462, 443 P.2d 552, 554 (1968) (noting that the "Supreme Court did not prescribe an exact format or postulate the precise language that must be used in advising a suspect of his constitutional right to remain silent" and that "the substance and not the form of the warnings should be of primary importance" (quoting Tucker v. United States, 375 F.2d 363 (8th Cir. 1967))).

[7]See Weathers v. State, 105 Nev. 199, 201, 202, 772 P.2d 1294, 1296, 1297 (1989) (holding that when the district court improperly admits statements that were procured outside of a valid waiver of Miranda rights, this court will not reverse if the error is harmless).

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On this point, Morris argues further that the conversation that took place in the absence of an effective waiver served to taint any subsequent statements. The essence of this argument appears to be that there was some causal connection between Morris's unwarned statements and his statements following his waiver. We conclude that any connection between the two is "speculative and attenuated at best"[8] and, in any event, the relevant inquiry is whether Morris validly waived his Miranda rights. Likewise, we conclude that there was substantial evidence supporting the district court's determination that Morris's statements were given voluntarily.[9]

Morris next contends that the district court abused its discretion by not allowing him to present evidence of Ryan Moore's criminal history and certain prior bad acts to show that it was more likely that Moore, rather than Morris, was the one who actually killed the victim. In this particular instance, we conclude that this evidence "would have little or no probative value, because [Moore's] guilt does not preclude [Morris's] criminal liability."[10] This is especially true in light of the fact that, regardless of who actually pulled the trigger, Morris would have been equally liable under the State's aiding and abetting theory. Thus, the district court did not abuse its discretion by refusing to admit the evidence.[11]

Morris next contends that the State did not properly plead its aiding and abetting theory. We require the State to provide "information as to the specific acts constituting the means of the aiding and abetting so as to afford the defendant adequate notice to prepare his defense."[12] Here the State did so by alleging that "defendants directly or indirectly

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[8]Oregon v. Elstad, 470 U.S. 298, 313-14 (1985).

[9]See Silva v. State, 113 Nev. 1365, 1369, 951 P.2d 591, 593 (1997) (noting that we will uphold the district court's voluntariness finding unless it is "clearly untenable"); see also Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987).

[10]Walker v. State, 113 Nev. 853, 863, 944 P.2d 762, 768 (1997).

[11]See Koerschner v. State, 116 Nev. ___, ___, 13 P.3d 451, 457 (2000) ("Absent an abuse of discretion, a district court's decision whether to admit evidence will not be set aside.").

[12]Barren v. State, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983).

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encouraged or commanded the other to shoot BRANSON CLARK thereby causing his death." That allegation is sufficient. On this issue, Morris also argues that there should have been a unanimous theory as to Morris's murder conviction in the jury's verdict. We have, however, previously rejected this unanimity argument, and Morris offers no new arguments persuading the contrary result.[13]

Morris next contends that the district court abused its discretion by admitting the videotape of Morris's interview with the police without redacting certain portions. We cannot say that the district court's decision was "manifestly wrong" as to the portions Morris is concerned about because, when viewed in context, they are neither unduly prejudicial nor a violation of Morris's constitutional rights.[14]

Morris next contends that the district court should have given the jury a special verdict form fully presenting the question of whether Morris's statements to the police were given voluntarily. Morris cites Jackson v. Denno[15] in support. But Jackson simply requires that "the trial judge, another judge, or another jury, but not the convicting jury" fully determine, independent of the general verdict, that the defendant's confession was voluntarily given.[16] Complying with Jackson, we require the following procedure: "the trial judge first hears the evidence of voluntariness and if the court finds it was voluntary, then the jury is instructed that it must also find that the confession was voluntary before it may be considered."[17] As we noted in Grimaldi v. State, by requiring this we have adopted a practice that is more stringent than what the Constitution requires.[18] Because Nevada has taken these extra

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[13]See, e.g., Holmes v. State, 114 Nev. 1357, 1363-64, 972 P.2d 337, 342 (1998) (citing Schad v. Arizona, 501 U.S. 624, 631 (1991)); Evans v. State, 113 Nev. 885, 896, 944 P.2d 253, 260 (1997) (holding that the district court did not err in failing to require unanimity on any of three theories of culpability "premeditated murder, felony murder, and aiding and abetting murder").

[14]Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

[15]378 U.S. 368 (1964).

[16]Id. at 391 n.19.

[17]Grimaldi v. State, 90 Nev. 83, 85, 518 P.2d 615, 616 (1974).

[18]Id. at 85-86, 518 P.2d at 616-17.

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precautionary measures to ensure that admitting the defendant's inculpatory statements into evidence does not violate due process, it is unnecessary to burden the district court with the additional requirement of submitting a special verdict form to the jury as Morris suggests.

Morris next contends that there was no evidence showing that Moore conspired with Morris to commit the crimes charged. "[A]fter viewing the evidence in the light most favorable to the prosecution," we conclude that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[19]

Morris next contends that the district court committed reversible error by refusing to instruct or by failing to adequately instruct the jury on various issues such as "mere association," "mere presence," the State's burden of proof, and aiding and abetting liability. He also argues that the district court should have accepted his proposed instructions regarding eyewitness identification, the identity of Clark's murderer, and Morris's duty to stop Moore from killing Clark. We find no error in refusing to give any of these instructions.

Morris next contends that the district court abused its discretion by admitting pre- and post-mortem photographs of the victim. We find no abuse of discretion in the district court's determination that the probative value of the photographs was not substantially outweighed by any unfair prejudicial effect the photographs might have had on the jury.[20] Furthermore, the fact that Morris was willing to stipulate to the facts for which the photographs were admitted does not require the district court to keep them out of evidence.[21]

Morris next argues that instances of prosecutorial misconduct so affected the fairness of the trial that reversal is required. We disagree. The prosecutor's comment about the victim's cheerleading scholarship implied nothing about who killed him, and in any event, the district court sustained Morris's immediate objection to the comment. The prosecutor's

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[19]Guy v. State, 108 Nev. 770, 776, 839 P.2d 578, 582 (1992).

[20]See Browne v. State, 113 Nev. 305, 313-14, 933 P.2d 187, 192 (1997).

[21]See Sonner v. State, 112 Nev. 1328, 1338-39, 930 P.2d 707, 714 (1996).

comment on his view of the murder, "if that doesn't get you hot, I don't know what will," was improper, but the district court sustained Morris's prompt objection and instructed the jury to disregard the comment. The district court properly alleviated the prejudicial effect of the prosecutor's comments.

Morris next contends that reversal is required under Batson v. Kentucky[22] because the State used a peremptory challenge to remove the only black prospective juror. We conclude that the district court did not abuse its discretion in determining that the State presented a race-neutral reason for removing the juror.[23] The State had legitimate concerns regarding the prospective juror's ability to understand the evidence and her ability to be fair and impartial.

Finally, Morris contends that the district court unreasonably restricted his canvass of the prospective jurors in various lines of questioning. We have reviewed the transcript of the voir dire in light of the applicable law and conclude that the district court did not abuse its discretion.[24]

In summary, we conclude that the district court erred by increasing Morris's sentence for conspiracy with the firearm enhancement. We also conclude that the district court did not err or abuse its discretion in any other instance. Accordingly, we

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[22]476 U.S. 79 (1986); see also Purkett v. Elem, 514 U.S. 765, 767 (1995) (outlining the steps required for a Batson challenge).

[23]See Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998) (holding that the district court's ruling as to whether the State had a race-neutral reason for excusing a prospective juror is reviewed for abuse of discretion).

[24]Whitlock v. Salmon, 104 Nev. 24, 28, 752 P.2d 210, 213 (1988) ("Both the scope of voir dire and the method by which voir dire is pursued remain within the discretion of the district court.").

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ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMANDED for entry of an amended judgment of conviction consistent with this decision.

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

cc: Hon. James W. Hardesty, District Judge
Attorney General/Carson City
Washoe County District Attorney
Dennis E. Widdis
Washoe County Clerk