IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN R. SANCHEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35099

FILED

MAY 21 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF 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, robbery, and grand larceny of a motor vehicle.

Steven R. Sanchez challenges his first-degree murder conviction on several grounds.[1] First, he contends that the district court erred by failing to instruct the jury on deliberation. Second, he argues that there is insufficient evidence to support the conviction. Finally, he claims that several of the prosecutor's statements during rebuttal argument deprived Sanchez of his constitutional right to a fair trial.

Murder is defined by NRS 200.010 as the unlawful killing of another, with malice aforethought. In addition to other enumerated situations, if the killing was willful, deliberate, and premeditated, or was committed in the course of a robbery, the defendant is guilty of first-degree murder.[2] Sanchez was charged with first-degree murder under both of these theories.

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[1]We note that Sanchez does not contest his convictions for robbery and grand larceny of a motor vehicle.

[2]NRS 200.030(1)(a)-(b).

As to the first theory, the district court instructed the jury using the instruction set forth in Kazalyn v. State.[3] Sanchez contends that this instruction is improper because it fails to define deliberation, an element of first-degree murder.

In Byford v. State,[4] we determined that "the Kazalyn instruction blurs the [line] between first- and second-degree murder," because it tells the jury that a finding of premeditation alone satisfies the requisites of first-degree murder.[5] Because the instruction "do[es] not do full justice to the phrase 'willful, deliberate, and premeditated,'" we set forth jury instructions for future use.[6]

After the parties in the instant matter submitted their briefs, we issued our opinion in Garner v. State.[7] Garner addressed the issue of Byford's application to convictions that are not final but were entered before we decided Byford. In Garner, we emphasized that giving the Kazalyn instruction in these situations is not error because Byford is not constitutionally based and, accordingly, need not be retroactively applied.[8] Thus, the district court's failure to provide the Byford instruction in this case does not warrant relief.[9]

Next, Sanchez contends that there is insufficient evidence to support his first-degree murder conviction.

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[3]108 Nev. 67, 75, 825 P.2d 578, 583 (1992).

[4]116 Nev. 215, 235, 994 P.2d 700, 712 (2000).

[5]Byford, 116 Nev. at 235, 994 P.2d at 712.

[6]Id. at 235, 994 P.2d at 713 (quoting State v. Brown, 836 S.W.2d 530, 539 (Tenn. 1992)).

[7]116 Nev. ___, 6 P.3d 1013 (2000).

[8]Id. at ___, 6 P.3d at 1025.

[9]Id.

In reviewing evidence supporting a jury's verdict, this court must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt based on the competent evidence.[10] Where conflicting testimony is presented, the jury determines what weight and credibility to give it.[11] Thus, our inquiry 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.'"[12] Evidence need not be direct to sustain a conviction for first-degree murder. Indeed, evidence of premeditation and deliberation is seldom direct, and circumstantial evidence may be taken into consideration when reviewing for sufficient evidence.[13]

As noted above, the State charged Sanchez with first-degree murder based upon two theories: 1) the killing was willful, deliberate, and premeditated, and 2) the killing occurred during the commission of a robbery. Sanchez contends that there is insufficient evidence to support either theory. We disagree.

The evidence presented at trial showed that Sanchez and Alfonso Marquez were involved in a physical altercation involving a drug-related dispute on the evening of the murder. After striking Marquez and rendering him unconscious, Sanchez transported him to a wash located twenty minutes away. Sanchez then dragged him down an embankment and struck him

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[10]Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).

[11]Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[12]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia , 443 U.S. 307, 319 (1979)).

[13]Briano v. State, 94 Nev. 422, 425, 581 P.2d 5, 7 (1978).

five or six times with a ten to fifteen pound rock. Although he testified that he believed that Marquez was dead before he struck him with the rock, Sanchez described Marquez as unconscious in his initial statement to the police. Further, the coroner testified that, in his expert medical opinion, Marquez was alive when Sanchez struck him with the rock. After the incident, Sanchez fled to New Mexico in the vehicle that had previously been in Marquez's possession.

We conclude that this evidence is sufficient for a reasonable jury to find that Sanchez formed a design to kill, weighed the reasons for and against his action, considered the consequences, and did not act from an unconsidered impulse when he struck Marquez with the rock.[14] Thus, there is sufficient evidence to support Sanchez's first-degree murder conviction under this theory.

Further, Sanchez ignores the fact that he was also charged with first-degree murder under the felony-murder rule. Nevada's felony-murder rule provides, among other things, that a killing committed in the perpetration of a robbery is first-degree murder.[15]

At trial, Sanchez argued that he could not be convicted of robbery because he did not have the specific intent to take the vehicle until after he killed Marquez. This argument is unsupported by Nevada case law. For example, in Chappell v. State,[16] we reaffirmed the principle that a defendant is guilty of robbery when his use of force provides him with the opportunity to steal the property of another, and

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[14]Kazalyn, 108 Nev. at 75, 825 P.2d at 583.

[15]NRS 200.030(1)(b).

[16]114 Nev. 1403, 1408, 972 P.2d 838, 841 (1998).

he takes advantage of that opportunity.[17] Thus, the use of force or violence need not be committed with the specific intent to commit robbery.

Here, Sanchez concedes that he killed Marquez. He further concedes that he took the vehicle after Marquez's death. This is sufficient evidence to convict Sanchez of robbery under Chappell. Because a killing committed during the course of a robbery is first-degree murder, a reasonable jury could have properly found Sanchez guilty under the felony-murder theory.

Finally, Sanchez contends that several of the prosecutor's statements during rebuttal argument deprived him of a fair trial.

In general, a defendant's failure to object to alleged prosecutorial misconduct precludes appellate review.[18] But the general rule is not strict; this court will review for plain error of constitutional dimensions in the absence of an objection.[19] This error, however, must be "'"so unmistakable that it reveals itself by a casual inspection of the record."'"[20] After reviewing the record, we conclude that only

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[17]Id. (citing Sheriff v. Jefferson, 98 Nev. 392, 394, 649 P.2d 1365, 1366-67 (1982) and Patterson v. Sheriff, 93 Nev. 238, 239, 562 P.2d 1134, 1135 (1977)); see also Norman v. Sheriff, 92 Nev. 695, 697, 558 P.2d 541, 542 (1976)).

[18]Snow v. State, 101 Nev. 439, 447, 705 P.2d 632, 638 (1985) (citing Mercado v. State, 100 Nev. 535, 688 P.2d 305 (1984)).

[19]Sipsas v. State, 102 Nev. 119, 125, 716 P.2 231, 234 (1986).

[20]Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (quoting Torres v. Farmers Insurance Exchange, 106 Nev. 340, 345 n.2, 793 P.2d 839, 842 n.2 (1990) (quoting Williams v. Zellhoefer, 89 Nev. 579, 580, 517 P.2d 789, 789 (1983))).

two of the alleged instances of prosecutorial misconduct warrant mention.[21]

The first is the prosecutor's repeated use of the word "we" when addressing the jury. This court has repeatedly held that it is impermissible for the prosecutor to use the words "we" and "us" in a way that suggests that the prosecution is aligned with the jury.[22] After reviewing the record, we cannot say that the prosecutor in this case was attempting to align himself with the jury; thus, there is no plain error. In fact, we are confident that any potential confusion could have been cured with a contemporaneous objection. Although we find no plain error here, use of "we" when addressing the jury is poor advocacy and may cause confusion. Consequently, we caution the State to refrain from using "we" and "us" when addressing the jury.

The second statement that troubles us is the prosecution's comparison of the victim's rights with the constitutional protections afforded to a criminal defendant. The prosecutor stated:

> Okay. You may be wondering to yourself, this guy confessed. Why do we even have a trial? Well, remember our systems [sic] protects the rights of the defendants.
>
> He gets to have a trial. He has Mr. LaPorta, a skilled attorney and a fine gentleman. He gets Judge McGroarty, he gets the presumption of innocence cloaked

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[21]Sanchez contends that the district court's failure to sua sponte prevent the prosecutor from making other statements was plain error. The alleged improper statements included interjecting personal opinion, misstating the law, disparaging defense counsel, mischaracterizing evidence, and ridiculing the defense case. We have considered these contentions and find them to be without merit.

[22]See, e.g., Schoels v. State, 114 Nev. 981, 987-88, 966 P.2d 735, 739 (1998); Lisle v. State 113 Nev. 540, 554, 937 P.2d 473, 481-82 (1997); Snow v. State, 101 Nev. 439, 447-48, 705 P.2d 632, 638-39 (1985).

> around him. He gets you 12 impartial jurors.
>
> And I submit to you none of these things did Alfonso Marquez get on the night of July 18th and into the morning hours of July 19th.

This was improper, and the district court most properly should have corrected the prosecutor and admonished the jury.[23] "[I]t is wrong to imply that the system coddles criminals by providing them with more procedural protections than their victims."[24] Statements such as these serve no purpose other than to prejudice and distract the jury from its fact-finding duty. Because we conclude that the prosecutor's statement was improper, we must determine whether that remark was harmless.[25] That is, in affirming the conviction, this court must conclude, "'without reservation that the verdict would have been the same in the absence of [the misconduct].'"[26]

Here, there is overwhelming evidence of guilt. We, therefore, have no reservation in concluding that the jury's verdict would have been the same in this case. To convict Sanchez of felony murder, the State only had to prove that he: 1) stole property when the opportunity to steal was the consequence of his use of force and 2) that someone died as a result.[27] At trial, Sanchez did not dispute the evidence

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[23]Collier v. State, 101 Nev. 473, 705 P.2d 1126 (1985) (holding that the district court has a duty to control prosecutorial misconduct sua sponte).

[24]Brooks v. Kemp, 762 F.2d 1383, 1411 (11th Cir. 1985), vacated on other grounds, 478 U.S. 1016 (1986); Carroll v. State, 599 So.2d 1253 (Ala. Crim. App. 1992).

[25]Steese v. State, 114 Nev. 479, 496, 960 P.2d 321, 332 (1998) (citing Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990)).

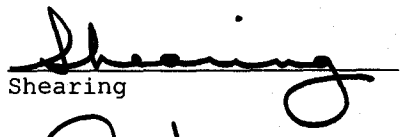
[26]Id. (quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988)).

[27]See Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998); NRS 200.030(1)(b).

supporting these elements; in fact, he conceded them. Thus, we conclude that the prosecutor's statements do not justify reversing Sanchez's conviction.

Having considered all of the issues raised in this appeal, we hereby

ORDER the judgment of the district court AFFIRMED.



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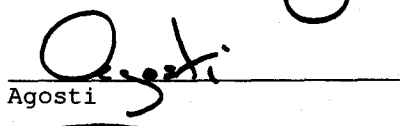

_____, J.
Agosti

_____, J.
Rose

cc: Hon. John S. McGroarty, District Judge
Attorney General
Clark County District Attorney
Special Clark County Public Defender
Clark County Clerk