

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY LAMAR BAGLEY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35100

**FILED**

**JUN 12 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
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. The district court sentenced appellant to two consecutive life terms in prison with the possibility of parole and credited appellant with 418 days for time served.

First, appellant contends that the district court improperly admitted evidence that appellant had a handgun in his automobile and was looking for the decedent approximately two weeks prior to the murder. Appellant argues that this evidence was inadmissible as prior bad act evidence under NRS 48.045 and the district court did not conduct a hearing outside the presence of the jury to make a determination on its admissibility. Appellant further contends that this evidence is inadmissible as uncharged misconduct under the holdings in Cipriano v. State<sup>1</sup> and Taylor v. State.<sup>2</sup> Because appellant admitted to accidentally shooting the decedent, the issue of whether appellant was the shooter was not at issue, and therefore, appellant argues, the evidence was irrelevant, prejudicial, and improperly inflamed the passions of the jury.

<sup>1</sup>111 Nev. 534, 894 P.2d 347 (1995).

<sup>2</sup>109 Nev. 849, 858 P.2d 843 (1993).

01-09759

We disagree. The evidence did not establish that the handgun was illegally in appellant's possession, nor that appellant acted illegally in trying to contact the decedent. As such, we conclude that the evidence did not constitute prior bad act evidence and the district court properly ruled on its admissibility without first conducting a hearing outside the presence of the jury. Based on our review of the record, it is clear that the evidence was relevant to motive, because it supported the State's theory of the case that the decedent owed a debt to appellant and that appellant was trying to contact the decedent in order to collect the debt. Therefore, based on the entire record, we conclude that the district court did not abuse its discretion in admitting the evidence.<sup>3</sup>

Next, appellant contends that the prosecutor improperly questioned Jeff Hall about his concerns with testifying. Appellant contends that this repeated questioning left a clear implication that appellant may have intimidated the witness. As such, appellant argues that the questioning constitutes reversible error.<sup>4</sup>

However, despite appellant's characterization of the prosecutor's questions, nothing in the record intimates that appellant was the source of the witness's reluctance to testify. On the contrary, the State presented evidence to the jury that the witness was reluctant to testify because he was afraid of being labeled a "snitch" in prison. Because the prosecutor did not imply that appellant was the source of the

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<sup>3</sup>Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

<sup>4</sup>See Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997); Meek v. State, 112 Nev. 1288, 930 P.2d 1104 (1996); Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996).

witness's reluctance, we conclude that the questioning was proper.

Appellant next contends that the district court erred in giving the Kazalyn<sup>5</sup> instruction regarding premeditation and deliberation, because the instruction improperly blurred the distinction between first-degree and second-degree murder. Appellant contends that this instruction was clearly erroneous based on this court's decision in Byford v. State.<sup>6</sup>

We recently clarified Byford in Garner v. State: "Use of the Kazalyn instruction in trials which predate Byford does not constitute plain or constitutional error. Nor do the new instructions required by Byford have any retroactive effect on convictions which are not yet final: the instructions are a new requirement with prospective force only."<sup>7</sup> Accordingly, this issue lacks merit.

Finally, appellant contends that the prosecutor committed misconduct during closing argument in two respects: (1) by stating that appellant lied on the witness stand, thereby improperly stating a personal opinion as to appellant's veracity; and (2) by shifting the burden of proof to the defense with respect to the missing handgun, in commenting twice on appellant's failure to produce the gun to substantiate the defense's intimation that the gun had a hair trigger.

Initially, we note that a prosecutor's comments should be viewed in context and "a criminal conviction is not

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<sup>5</sup>Kazalyn v. State, 108 Nev. 67, 75, 825 P.2d 578, 583 (1992).

<sup>6</sup>116 Nev. 215, 994 P.2d 700 (2000).

<sup>7</sup>116 Nev. \_\_\_, \_\_\_, 6 P.3d 1013, 1025 (2000).

to be lightly overturned on the basis of a prosecutor's comments standing alone."<sup>8</sup> With this principle in mind, we conclude that the incidents of purported misconduct do not warrant reversal of appellant's conviction.

The prosecutor's remarks concerning appellant's testimony were proper argument and therefore did not constitute misconduct. We stated in Ross v. State that "[a] prosecutor may demonstrate to a jury through inferences from the record that a defense witness's testimony is palpably untrue. It was within the parameters of proper argument to point out to the jury that [a defense witness's] testimony might be incredible."<sup>9</sup> Ross further explains that it is permissible argument to explain to the jury why a witness might be lying, provided the prosecutor does not state "both as a fact and as a conclusion" that a witness is a liar.<sup>10</sup>

Here, the prosecutor detailed specific inconsistencies between appellant's testimony and the other evidence presented at trial, and argued the inference therefrom that appellant's testimony was palpably untrue. Because the prosecutor's remarks are supported by the evidence in the record, and because the remarks were offered in the context of his detailed discussion of the conflicting testimony, we do not construe the remarks as an improper personal opinion regarding appellant's truthfulness. Rather, we view the remarks as falling within the permissible bounds of argument articulated in Ross.

Also, we conclude that the prosecutor's remarks regarding the disappearance of the gun did not shift the

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<sup>8</sup>United States v. Young, 470 U.S. 1, 11 (1985).

<sup>9</sup>106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990).

<sup>10</sup>Id.

burden of proof. The district court sustained appellant's objections, both in closing argument and in rebuttal closing argument, thereby preventing the prosecutor from further arguing the point. Moreover, on both occasions, the district court offered a curative instruction to the jury to disregard the argument. Given these curative instructions, the burden of proof was not shifted to appellant. In any event, given the overwhelming evidence of appellant's guilt, we conclude that any error in the prosecutor's remarks would be harmless.<sup>11</sup>

Having considered all of appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Young J.  
Young  
Leavitt J.  
Leavitt  
Becker J.  
Becker

cc: Hon. Joseph T. Bonaventure, District Judge  
Attorney General  
Clark County District Attorney  
Wolfson & Glass  
Clark County Clerk

<sup>11</sup>See Byford, 116 Nev. at 228, 994 P.2d at 709 (concluding that overwhelming evidence of guilt rendered error harmless where prosecutor impermissibly shifted burden of proof to the defense by commenting on defendant's failure to call a witness).