IN THE SUPREME COURT OF THE STATE OF NEVADA

SIKIA L. SMITH,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35133

CORRECTED ORDER OF AFFIRMANCE[1]

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary while in the possession of a firearm, one count of conspiracy to commit robbery and/or kidnapping and/or murder, four counts of robbery with the use of a deadly weapon, four counts of first-degree kidnapping with the use of a deadly weapon, and four counts of first-degree murder with the use of a deadly weapon. The district court sentenced appellant to serve sixteen terms of life in prison without the possibility of parole, nine terms of 40-180 months in prison, and one term of 26-120 months in prison; all prison terms were ordered to be served consecutively. Appellant was also ordered to pay restitution in the amount of $33,605.00 jointly and severally with accomplices Donte Johnson and Terrell Young, and he was given credit for 416 days time served. Appellant raises a number of issues on appeal, none of which we conclude warrant relief.

Appellant's confession

Appellant contends that the district court erred in refusing to suppress his confession to the police as involuntary. Appellant argues that (1) in determining that the confession was voluntarily given, the district court failed to consider his background, experience, and conduct as

[1]This Corrected Order of Affirmance is issued in place of the Order of Affirmance filed on December 5, 2001. The time for filing a petition for rehearing and the issuance of the remittitur shall run from the date of this order.

01-20927

required by Edwards v. Arizona,[2] and Rowbottom v. State[3]; and (2) his Sixth Amendment right to counsel was violated when detectives questioned him about the murders because he was already represented by counsel in another case. Appellant's contentions are without merit.

Voluntariness of confession

A confession is inadmissible unless freely and voluntarily given.[4] Further, "[i]n order to be voluntary, a confession must be the product of a 'rational intellect and a free will.'"[5] "[A] confession obtained by physical intimidation or psychological pressure is inadmissible."[6]

In determining whether a confession is the product of free will, this court employs a "totality of the circumstances test" to determine "whether the defendant's will was overborne when he confessed."[7] Relevant factors include: the age of the accused; his level of education and intelligence; whether he was advised of his constitutional rights; the length of any detention; the repeated or prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food or sleep.[8] While each factor should be evaluated in assessing voluntariness, no single factor is in and of itself determinative.[9] Where the district court's determination is supported by substantial evidence, it will not be disturbed on appeal.[10]

Appellant contends that he is mentally retarded and that the detectives took advantage of him resulting in an involuntary confession. Appellant argues that he was coerced and "worn down" during an

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[2]451 U.S. 477 (1981).

[3]105 Nev. 472, 779 P.2d 934 (1989).

[4]Steese v. State, 114 Nev. 479, 488, 960 P.2d 321, 327 (1998).

[5]Passama v. State, 103 Nev. 212, 213-14, 735 P.2d 321, 322 (1987) (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)).

[6]Thompson v. State, 108 Nev. 749, 753, 838 P.2d 452, 455 (1992), overruled on other grounds by Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000), cert. denied 121 S. Ct. 1617 (2001).

[7]Passama, 103 Nev. at 214, 735 P.2d at 323; see also Schneckloth v. Bustamonte, 412 U.S. 218, 226-27 (1973).

[8]Passama, 103 Nev. at 214, 735 P.2d at 323.

[9]See Schneckloth, 412 U.S. at 226-27.

[10]Steese, 114 Nev. at 488, 960 P.2d at 327.

approximately twenty-four minute untaped conversation that took place immediately prior to the taped interview. These arguments were not raised before the district court during its consideration of the motion to suppress appellant's confession, or during the evidentiary hearing on the motion, and therefore need not be considered by this court on appeal.[11]

Upon consideration of the totality of the circumstances attendant to appellant's confession, we conclude that the district court's determination that the confession was voluntarily made is supported by substantial evidence. A review of the transcript of the interview with the detectives reveals that the interview was of a short duration; there was no indication that appellant was coerced or intimidated by the detectives; and there is no evidence that the detectives made any promises to appellant as consideration for answering their questions. At the evidentiary hearing, Detective Buczek testified that appellant was able to read aloud the pre-printed rights card, and that he understood and waived his Miranda[12] rights before the questioning began. Therefore, we conclude that substantial evidence supports the district court's determination that appellant's confession was voluntary.

Sixth Amendment right to counsel

Appellant contends that the district court erred in failing to suppress his confession on the ground that his Sixth Amendment right to counsel was violated when detectives questioned him about his involvement in the quadruple homicide because he was already represented by counsel in a prior case. We conclude that appellant's contention is without merit.

The United States Supreme Court in McNeil v. Wisconsin held that the Sixth Amendment right to counsel is offense specific and "cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced."[13] A criminal proceeding is commenced "by

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[11]Cf. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (stating that ground for relief which was not part of appellant's petition for post-conviction relief in the district court "need not be considered by this court").

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

[13]501 U.S. 171, 175 (1991); see also Coleman v. State, 109 Nev. 1, 4, 846 P.2d 276, 278 (1993) (recognizing that Sixth Amendment right to counsel does not attach until formal judicial proceedings have been initiated).

way of formal charge, preliminary hearing, indictment, information, or arraignment."[14] Further, the Court has held that "'[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses.'"[15] The Court recently held that the Sixth Amendment right to counsel attaches to uncharged offenses that "would be considered the same offense under the Blockburger test."[16]

Appellant was represented by counsel in a drug possession prosecution when he was arrested and questioned in this case in September 1998. It is clear that appellant's participation in the quadruple homicide was not in any way related to his drug possession case. Further, no judicial proceedings had yet been initiated pertaining to the murders. Therefore, we conclude that appellant's Sixth Amendment right to counsel had not yet attached and that the district court did not err in refusing to suppress his confession.

Batson violation

Appellant contends that the district court erred by rejecting his objection to the prosecutor's use of peremptory challenges to strike two African-American venirepersons in violation of Batson v. Kentucky.[17] He argues that the State's explanations for the exercise of the peremptory strikes were pretextual and prove purposeful discrimination. We conclude that the district court did not err and that appellant's contentions are without merit.

Pursuant to Batson and its progeny, there is a three-step process for evaluating race-based objections to peremptory challenges: (1) the opponent of the peremptory challenge must make a prima facie showing of racial discrimination; (2) upon a prima facie showing, the proponent of the peremptory challenge has the burden of providing a race-neutral explanation; and (3) if a race-neutral explanation is tendered, the trial court must decide whether the proffered explanation is merely a

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[14]Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion).

[15]McNeil, 501 U.S. at 176 (quoting Maine v. Moulton, 474 U.S. 159, 180 n.16 (1985)).

[16]Texas v. Cobb, 532 U.S. 162, ___, 121 S. Ct. 1335, 1343 (2001) (citing Blockburger v. United States, 284 U.S. 299 (1932)).

[17]476 U.S. 79 (1986).

pretext for purposeful racial discrimination.[18] The ultimate burden of proof regarding racial motivation rests with the opponent of the strike.[19] The trial court's decision on the question of discriminatory intent is a finding of fact to be accorded great deference on appeal.[20]

We conclude that a review of the jury voir dire transcripts reveals that the State adduced sufficiently race-neutral explanations for striking the two jurors. With juror no. 576, the State argued that the juror possessed a negative attitude towards the Las Vegas Metropolitan Police Department. With juror no. 593, the State argued that the juror indicated that she did not believe in the death penalty, and that the juror worked with inmates and preferred rehabilitation.[21] Appellant failed to prove that these explanations were a pretext for purposeful discrimination. It is also worth noting that ultimately the jury included three African-Americans, and although the State possessed a total of ten peremptory strikes, it exercised only four.

The State's expert witnesses

Dr. Louis F. Mortillaro

Appellant contends that the district court erred by either not striking the testimony of State expert witness Dr. Mortillaro, or by not granting appellant's motion for a mistrial based on the admission of Dr. Mortillaro's testimony. Dr. Mortillaro testified that appellant was not mentally retarded and was able to discern right from wrong. Appellant argues that the admission of the testimony was error because the State failed to inform the defense that Dr. Mortillaro had also been retained by appellant's accomplice Donte Johnson in his upcoming trial, thus violating the mandate of Brady v. Maryland.[22] Appellant also argues that his Sixth

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[18]See Purkett v. Elem, 514 U.S. 765, 767 (1995); Batson, 476 U.S. at 96-98; see also Grant v. State, 117 Nev. ____, ___, 24 P.3d 761, 766 (Adv. Op. No. 38, June 13, 2001).

[19]See Purkett, 514 U.S. at 768.

[20]See Hernandez v. New York, 500 U.S. 352, 364-65 (1991) (plurality opinion); Thomas v. State, 114 Nev. 1127, 1137, 967 P.2d 1111, 1118 (1998).

[21]See Leonard v. State, 114 Nev. 1196, 1205, 969 P.2d 288, 294 (1998) (proper to permit strike of venireperson based on equivocal responses to questions about imposition of death penalty).

[22]373 U.S 83 (1963).

Amendment right to representation and confrontation was violated when the district court limited the scope of his cross-examination of Dr. Mortillaro.

Brady violation

This court reviews de novo a district court's determination of whether the State adequately disclosed information pursuant to Brady.[23] A prosecutor must disclose evidence favorable to an accused when that evidence is material either to guilt or to punishment.[24] "[T]he duty to disclose such evidence is applicable even though there has been no request by the accused."[25] Further, evidence that would enable effective cross-examination and impeachment of a witness may be material and nondisclosure of such evidence may deprive a defendant of a fair trial.[26] In sum, there are three components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the State failed to disclose the evidence, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material.[27]

When the defense makes no request or a general request for evidence, withheld evidence is material for Brady purposes "if there is a reasonable probability that the result would have been different if the evidence had been disclosed."[28] This court has stated that "[a] reasonable probability is one sufficient to undermine confidence in the outcome."[29] In Nevada, where the defense makes a specific request, withheld evidence is material if "there exists a reasonable possibility that the claimed evidence would have affected the judgment of the trier of fact, and thus the outcome

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[23]Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

[24]Brady, 373 U.S. at 87; accord Roberts v. State, 110 Nev. 1121, 1127, 881 P.2d 1, 5 (1994), overruled on other grounds by Foster v. State, 116 Nev. ___, 13 P.3d 61 (2000).

[25]Strickler v. Greene, 527 U.S. 263, 280 (1999); United States v. Agurs, 427 U.S. 97, 107 (1976).

[26]See United States v. Bagley, 473 U.S. 667, 676-78 (1985); Giglio v. United States, 405 U.S. 150, 154 (1972).

[27]Strickler, 527 U.S. at 281-82.

[28]Mazzan, 116 Nev. at 66, 993 P.2d at 36.

[29]Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996).

of the trial."[30] In this case, a review of the trial transcript reveals that appellant made a general pretrial request for any Brady material, and therefore the "reasonable probability" test is applicable.

It was not disclosed until after Dr. Mortillaro testified as a rebuttal witness for the State that he was also retained by the defense in the case against one of appellant's accomplices, Donte Johnson; in fact, it was not the State but rather counsel for Johnson who informed the district court. The State argued that it was only able to retain Dr. Mortillaro on short notice, and that he did not inform the State of his potential participation in the Johnson case until the morning in which he was to testify. Outside the presence of the jury, appellant objected to the doctor's testimony, claiming that Dr. Mortillaro interviewed Johnson on two separate occasions in regard to his upcoming case.

In the district court, appellant argued that the doctor violated his profession's rules of ethics by not disclosing sooner to the court and State the potential for conflict, and that the State had a duty to disclose the potential conflict as soon as it was informed. Appellant argued that pursuant to Brady, the State has a continuing duty to disclose possible impeachment information as soon as it is made known to it, and that in this case "it was devastating to Dr. Mortillaro's credibility that he is able to come in here and be paid on both sides of the same case." Without being privy to this information, appellant contended that during cross-examination he was unable to explore (1) any possible bias on the part of Dr. Mortillaro based on his supposed loyalty to Johnson, and (2) to what degree the information gleaned from his interactions with Johnson was damaging to appellant's case. Appellant asked the district court to either strike the doctor's testimony in its entirety or to declare a mistrial. Appellant raises the same arguments on appeal.

We conclude that this information was favorable impeachment evidence in the possession of the State that was not disclosed to the defense. The evidence was favorable because it could have been used to impeach the doctor's credibility. We further conclude, however, that appellant has failed to demonstrate a reasonable probability that disclosure of the information would have affected the outcome of the trial. Although Dr. Mortillaro provided damaging testimony suggesting that

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[30]Roberts, 110 Nev. at 1132, 881 P.2d at 8.

appellant was not mentally retarded and that he was able to discern right from wrong, the doctor's testimony was not the only expert testimony presented by the State to state as much. Dr. Thomas E. Bittker, a professor of psychiatry and forensic psychiatrist, testified similarly that appellant "is above the level of what we would call mild mental retardation," and that "I believe he has the capacity to form criminal intent." So, even if appellant had impeached Dr. Mortillaro with the information about the doctor's dual roles in representing both appellant and his accomplice and the jury subsequently chose to discount the doctor's testimony, the substance of his testimony would still have been in evidence. Appellant has not shown a reasonable probability that impeaching or even striking Dr. Mortillaro's testimony would have affected the outcome. Therefore, we conclude that the district court did not err in ruling that no Brady violation occurred or in denying appellant's motion to strike Dr. Mortillaro's testimony and his motion for a mistrial.

Sixth Amendment right to confrontation

Appellant also contends that the district court erred and violated his Sixth Amendment right to confrontation by not allowing him to cross-examine Dr. Mortillaro in regard to his participation in the Johnson case. Appellant argues that the court's in camera review and conversation with Dr. Mortillaro and attorneys for Johnson merely resolved the due process issue under Brady, and not whether appellant should be allowed to confront and cross-examine the doctor about his conversations with Johnson. And because it was made known that Dr. Mortillaro, at the advice of counsel for Johnson, would have asserted the doctor-patient privilege if asked about his role in the Johnson case, appellant contends that the district court erred in not striking his testimony or granting appellant's motion for a mistrial.

The Sixth Amendment right to confrontation requires that a defendant must be able to expose facts from which the jury can draw inferences regarding the reliability of a witness.[31] A trial court's discretion to restrict the scope of cross-examination is "limited . . . when the purpose of the cross-examination is to expose bias, and counsel must be permitted

[31]See Davis v. Alaska, 415 U.S. 308, 318 (1974).

to elicit any facts which might color a witness's testimony."[32] Moreover, the trial court's discretion "only comes into play if as a matter of right sufficient cross-examination has been permitted to satisfy the sixth amendment."[33]

In this case, the district court ruled that the fact that Dr. Mortillaro was retained by Johnson was not relevant evidence. Therefore, the court precluded appellant from recalling the doctor and denied him the opportunity to impeach the doctor with questioning about any potential bias formed as a result of that relationship. The district court erred in restricting appellant in this manner.[34]

Nevertheless, we conclude that the error by the district court was harmless beyond a reasonable doubt. Violations of a defendant's rights under the confrontation clause, including denying the opportunity to impeach for bias, are subject to Chapman harmless error analysis.[35] While Dr. Mortillaro's testimony was damaging to appellant, similar testimony had already been presented by the State in its case-in-chief by Dr. Bittker, so the information was cumulative. Although appellant was restricted from cross-examining Dr. Mortillaro about any potential bias relating to his role in the upcoming Johnson trial, any questioning allowed likely would not have proven helpful to appellant because the doctor would have invoked the doctor-patient privilege and refused to answer any questions on the topic. Finally, even without Dr. Mortillaro's testimony, overwhelming evidence supports the jury's finding of guilt, most significantly appellant's detailed confession.[36]

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[32]Crew v. State, 100 Nev. 38, 45, 675 P.2d 986, 990 (1984); see also Buff v. State, 114 Nev. 1237, 1247, 970 P.2d 564, 570 (1998).

[33]Crew, 100 Nev. at 45, 675 P.2d at 990.

[34]See Davis, 415 U.S. at 318; Crew, 100 Nev. at 45-46, 675 P.2d at 990-91.

[35]See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986); Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993); see also Chapman v. California, 386 U.S. 18 (1967).

[36]Cf. Robins v. State, 106 Nev. 611, 623-24, 798 P.2d 558, 566 (1990) (due to overwhelming evidence of defendant's guilt, any error in restricting cross-examination was harmless beyond a reasonable doubt); see also NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

Dr. Thomas E. Bittker

Appellant contends that the district court erred by allowing into evidence at trial the testimony of State expert witness, Dr. Bittker. Appellant cites to Wrenn v. State[37] for support and argues that Dr. Bittker relied upon assumptions provided by the State rather than objective facts in forming the opinion that appellant knew right from wrong during the commission of the crime and was not mildly mentally retarded. Appellant did not object to the admission of Dr. Bittker's testimony at trial but did properly preserve the issue for appeal by raising it in his motion for a new trial.[38] We conclude that appellant's contention is without merit.

Dr. Bittker testified at trial that he was asked by the State to consider five principal issues regarding appellant. In considering these issues, Dr. Bittker relied upon his interview with appellant, and a number of documents provided to him by the State, including, among others, the voluntary statements of appellant and an accomplice, and most significantly the report of appellant's own expert witness, Dr. Philip Colosimo. Therefore, we conclude that Dr. Bittker based his expert opinion on facts and not assumptions provided by the State.

Jury instructions

First, appellant contends that the district court erred in providing instruction no. 37 to the jury. Instruction no. 37 informed the jury that felony murder "carries with it conclusive evidence of premeditation and malice aforethought." Appellant objected to the instruction and argued in the district court against "the jury being instructed as to anything that was conclusive." We conclude that appellant's contention is without merit.

A similar instruction was approved by this court in Ford v. State.[39] In Ford, this court stated that when the State seeks to prove felony murder under NRS 200.030(1)(b),[40] as the State did in the instant

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[37]89 Nev. 71, 506 P.2d 418 (1973).

[38]Cf. Larson v. State, 104 Nev. 691, 692 n.3, 766 P.2d 261, 261 n.3 (1988).

[39]99 Nev. 209, 660 P.2d 992 (1983).

[40]At the time of appellant's crimes, NRS 200.030(1)(b) provided: "Murder of the first degree is murder which is . . . [c]ommitted in the perpetration or attempted perpetration of . . . kidnaping, . . . robbery, burglary[.]" See 1999 Nev. Stat., ch. 319, § 3 at 1335.

case, "[t]he felonious intent involved in the underlying felony may be transferred to supply the malice necessary to characterize the death a murder."[41] The instruction here incorrectly included "premeditation" as well as "malice," but this error was not prejudicial because premeditation need not be proven for felony murder. Therefore, there was no reversible error in providing instruction no. 37 to the jury.

Second, appellant contends the district court erred in not providing to the jury his proposed instruction (D-1) on duress. Appellant argues that evidence adduced at trial indicated that his accomplice, Johnson, was a "scary individual" and that according to appellant's expert witnesses, appellant was a "mentally challenged individual who is a follower." Therefore, an instruction on duress should have been provided to the jury because "[a] criminal defendant is entitled to a jury instruction if the instruction goes to the defendant's theory of the case and is supported by some evidence produced at trial, no matter how weak or even incredible the evidence appears to be."[42] We conclude that appellant's contention is without merit.

While the evidence does in fact suggest that appellant was a follower and that accomplice Johnson was a "scary individual," nevertheless, there is no evidence indicating that appellant participated in the crime under duress. Appellant's confession admitted into evidence at trial belies his contention and does not suggest that he was coerced into participating or did anything that was not voluntary. Further, there is no indication from appellant's confession that he was in fear of or was under any threat of death or bodily injury or was unable to escape. Therefore, we conclude that the district court did not err in refusing to provide the jury with appellant's proposed instruction on duress.

Finally, appellant contends that a number of other errors occurred in the district court with regard to the jury instructions, including the submission of the entire indictment, and the instructions on "guilt or innocence," voluntary statements, ignorance of the law, and

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[41]99 Nev. at 215, 660 P.2d at 995; see also Collman, 116 Nev. at 713, 7 P.3d at 442.

[42]Riley v. State, 107 Nev. 205, 214, 808 P.2d 551, 556 (1991).

voluntary intoxication. We conclude that none of appellant's contentions have merit.[43]

Testimony of Detective Buczek

Elicitation of improper testimony

Appellant contends that the district court erred in denying his motion for a mistrial. Appellant argues that a mistrial should have been granted after the State attempted to elicit improper testimony from Detective Buczek establishing that the voluntariness of appellant's confession was the subject of a prior pretrial evidentiary hearing. At that pretrial hearing, the district court determined that the confession was admissible. Appellant fails to note, however, that his defense counsel opened the door for this line of questioning when he raised for the first time the subject of the evidentiary hearing during his cross-examination of Det. Buczek.[44]

Even assuming that the State's questioning went beyond the scope necessary to respond to defense counsel's earlier questions, we conclude that appellant has failed to demonstrate that he was prejudiced by the complained-of exchange between the prosecutor and Det. Buczek. The district court sustained appellant's objection before the witness could answer, and no prejudicial statement was heard; therefore, none of the testimony could have affected the outcome of the trial.[45] Furthermore, "even aggravated misconduct may be deemed harmless error" where there is overwhelming evidence of guilt.[46] Therefore, we conclude that the

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[43]See Bolin v. State, 114 Nev. 503, 529, 960 P.2d 784, 800-01 (1998) ("the district court does not err by refusing to give a jury instruction that is substantially covered by another instruction provided to the jury"); Stroup v. State, 110 Nev. 525, 529, 874 P.2d 769, 771 (1994) (defendant does not have an "absolute right to have his own instruction given"); see also Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

[44]See Rippo v. State, 113 Nev. 1239, 1253, 946 P.2d 1017, 1026 (1997) ("Where counsel opens the door to the disputed questions . . . opposing counsel may properly question the witness in order to rehabilitate him or her.").

[45]See NRS 47.040(1) (unless the error is plain, "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected").

[46]Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64 (1997).

district court did not abuse its discretion in denying appellant's motion for a mistrial.[47]

Sixth Amendment right to confrontation

Appellant contends that the district court erred and violated his Sixth Amendment right to confrontation by limiting his re-cross-examination of Det. Buczek. The district court cut appellant off when he attempted to reopen the subject of appellant's waiver of his Miranda rights prior to giving the detective his statement admitting to his participation in the crime. The district court denied appellant's motion for a mistrial.

The Sixth Amendment right to confrontation requires that a defendant must be able to expose facts from which the jury can draw inferences regarding the reliability of a witness.[48] Further, the trial court's discretion to limit cross-examination "only comes into play if as a matter of right sufficient cross-examination has been permitted to satisfy the sixth amendment."[49]

In this case, appellant was able to question Det. Buczek about the waiver of rights form and appellant's waiver of his Miranda rights during his cross-examination. It was only when appellant pursued the same line of questioning on re-cross-examination that the district court limited appellant. Further, during the cross-examination of Det. Thowsen the day before, appellant pursued the same line of questioning regarding the waiver form and the waiver of appellant's Miranda rights. Therefore, we conclude that the district court did not abuse its discretion in this regard,[50] or in denying appellant's motion for a mistrial.[51]

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[47]See McKenna v. State, 114 Nev. 1044, 1055, 968 P.2d 739, 746 (1998) ("Denial of a motion for a mistrial is within the sound discretion of the district court, and that ruling will not be reversed absent a clear showing of abuse of discretion.").

[48]See Davis, 415 U.S. at 318.

[49]Crew, 100 Nev. at 45, 675 P.2d at 990.

[50]See id. at 45-46, 675 P.2d at 990-91; see also NRS 48.035 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of . . . waste of time or needless presentation of cumulative evidence.").

[51]See McKenna, 114 Nev. at 1055, 968 P.2d at 746.

Improper victim impact evidence

Appellant contends that he was unduly prejudiced during the penalty phase when the jury was exposed to victim impact evidence not contemplated by NRS 176.015. Appellant argues that he was unduly prejudiced when, after emotional victim impact testimony by the families of the victims, the jury was escorted out of the courtroom by the bailiff who "literally walked them almost bumping through all the victims' family members as they were crying." The district court denied appellant's motion for a mistrial. Appellant compares the encounter to improper victim impact evidence and contends that the jury's witnessing of such emotion by the victims' families immediately prior to deliberations tainted the sentencing decision.

We conclude that although it was inappropriate, appellant has failed to demonstrate that he was prejudiced by the jury witnessing the emotional family members of the victims outside the courtroom. The record shows that many of the jurors themselves were emotional during the victim impact testimony, and many of them were crying. Further, the jury refused to return the maximum sentence of death, and instead imposed life without the possibility of parole. We conclude that the district court did not abuse its discretion in denying appellant's motion for a mistrial.[52]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Joseph S. Pavlikowski, Senior Judge
Attorney General/Carson City
Clark County District Attorney
Patti & Sgro
Clark County Clerk

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[52]See id.