IN THE SUPREME COURT OF THE STATE OF NEVADA

CLAYTON LAVELL WRENCHER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56853

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon and two counts of child abuse and neglect. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Emotional displays during trial

Appellant Clayton Wrencher first contends that his due process rights were violated by the district court's admonishments to him for crying and showing remorse and emotion during trial, which prejudiced him before the jury. Wrencher did not object to the district court's conduct at the time it occurred, and he has failed to show plain error affecting his substantial rights. See Oade v. State, 114 Nev. 619, 621-22, 960 P.2d 336, 338 (1998). We conclude that the district court's admonishments did not prejudice Wrencher's right to a fair trial. See Rudin v. State, 120 Nev. 121, 140, 86 P.3d 572, 584 (2004). The admonishments were made to maintain order and decorum during trial and served to prevent Wrencher from disrupting the proceedings, not from demonstrating emotion and remorse. See id. at 140, 86 P.3d at 584-85.

Further, the record indicates that Wrencher expressed emotion and remorse during his own testimony.

Evidence of prior bad acts

Wrencher contends that the district court erred by admitting evidence that he committed prior acts of domestic violence against the victim. At trial, the State introduced evidence through the testimony of the victim's daughter that Wrencher had punched a hole in the victim's bedroom door and threatened to kill the victim approximately three weeks before the murder. During cross-examination of the defense's expert witness (a psychiatrist), the State introduced evidence about (1) a temporary protective order that the victim obtained against Wrencher approximately three weeks before the murder, (2) Wrencher's prior conviction for domestic battery against the victim, and (3) three uncharged incidents of domestic abuse by Wrencher against the victim.

Wrencher first argues that the State deliberately violated a pretrial agreement by introducing the prior bad act evidence, and thus the district court should have granted his motion for a mistrial based on prosecutorial misconduct. We disagree. The record shows that the State agreed not to use the temporary protective order in its case-in-chief as long as the defense did not open the door to it. In introducing the prior bad act evidence during its case-in-chief, the State did not attempt to admit the temporary protective order, nor did the witness reference or rely on the protective order. Furthermore, the State introduced the temporary protective order and other bad act evidence during its cross-examination of the expert witness only after the district court found that the defense had opened the door to such evidence. Thus, we conclude that the State did

not breach the pretrial agreement, and the district court did not abuse its discretion in refusing to grant a mistrial on this basis.[1]

To the extent that Wrencher contends that the defense did not open the door to such prejudicial evidence, we disagree and conclude that the State's reference to the prior instances of domestic violence constituted proper cross-examination of the defense expert to test the validity and credibility of the expert's opinion that Wrencher did not have the capacity to act rationally at the time of the murder. See Singleton v. State, 90 Nev. 216, 219, 522 P.2d 1221, 1222-23 (1974) (the credibility of a source used by an expert to form an opinion is an underlying fact properly pursued on cross-examination); Blake v. State, 121 Nev. 779, 790 & n.2, 121 P.3d 567, 574 & n.2 (2005) ("It is a fundamental principle in our jurisprudence to allow an opposing party to explore and challenge through cross-examination the basis of an expert witness's opinion."); NRS 50.305 (an expert may be "required to disclose the underlying facts or data on cross-examination"). Accordingly, we conclude that the district court did not abuse its discretion in admitting the prior bad act evidence. See Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

Wrencher also contends that the district court improperly admitted prior bad act evidence during the State's cross-examination of

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[1]Wrencher also argues that the State improperly elicited testimony from his son that Wrencher had threatened the victim. However, Wrencher fails to show that he was prejudiced, as he declined the district court's offer to instruct the jury to ignore the testimony, and evidence of his threat was properly elicited from the victim's daughter.

the defense expert because the court did not hold a Petrocelli[2] hearing and find that the bad acts were proven by clear and convincing evidence, and the State did not file a pretrial motion to admit the evidence. However, because the evidence was not admitted pursuant to NRS 48.045(2), the requirements of Petrocelli do not apply here. See Blake, 121 Nev. at 789, 121 P.3d at 574. Further, Wrencher fails to provide any legal support for his assertion that the State was required to give pretrial notice of its intent to use prior bad acts during cross-examination of a defense witness, and Wrencher does not explain how he was prejudiced by this alleged inadequate notice. See id. at 790-91, 121 P.3d at 575.[3]

Jury instructions

First, Wrencher contends that the district court erred by failing to provide the jury with a limiting instruction before allowing the State to cross-examine the expert witness about prior bad act evidence. While the district court did not instruct the jury prior to the admission of the evidence, it did instruct the jury as to the use of the evidence on the

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[2]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 1333-34, 930 P.2d 707, 711-12 (1996), and superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

[3]We note that Wrencher also appears to argue that the district court erred with regard to the admission of prior bad acts during the victim's daughter's testimony by holding a Petrocelli hearing during, rather than before, trial. This argument lacks merit, as we require only that the hearing be held before the admission of the bad act evidence. We also reject Wrencher's assertion that the prior bad acts testified to by the victim's daughter were not proven by clear and convincing evidence.

morning after the expert testified, prior to deliberations. See Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (providing that this court presumes that the jury follows the district court's instructions). We conclude that any error by the district court in failing to give the limiting instruction at the time of admission was harmless because it "did not have a substantial and injurious effect or influence the jury's verdict." Rhymes v. State, 121 Nev. 17, 24, 107 P.3d 1278, 1282 (2005); see also Blake, 121 Nev. at 790, 121 P.3d at 574. Wrencher also argues that the jury instruction was erroneous because it assumed that the prior bad acts were relevant, credible, and substantiated, and because it conflicted with the previous jury instruction. Wrencher did not object to the jury instruction on these grounds, and we conclude that he failed to demonstrate plain error entitling him to relief. See Berry v. State, 125 Nev. 265, 282-83, 212 P.3d 1085, 1097 (2009), abrogated on other grounds by State v. Castaneda, 126 Nev. ___, 245 P.3d 550 (2010); NRS 178.602.

Second, Wrencher argues that the district court erred by refusing to give his proposed instructions on the definition of "passion" as used in the definition of deliberation. Although Wrencher's proposed instructions were correct statements of law, we conclude that the principles of law described in his proposed instructions were "fully, accurately, and expressly stated in the other instructions." Crawford v. State, 121 Nev. 744, 754, 121 P.3d 582, 589 (2005); see also Byford v. State, 116 Nev. 215, 236, 994 P.2d 700, 714 (2000) (setting forth jury instructions for first-degree murder based on willful, deliberate, and premeditated killing). Therefore, we conclude that the district court did

not abuse its discretion in denying the requested instructions. See Crawford, 121 Nev. at 748, 121 P.3d at 585.

Third, Wrencher contends that the district court erred during the penalty phase by rejecting his proposed jury instructions on mitigating evidence. Specifically, he sought an instruction that (1) the jury could consider eight specific mitigating circumstances and (2) the jury's finding of mitigating circumstances did not need to be unanimous, and each juror had a duty to weigh and consider any mitigating circumstance. However, these instructions are required only in a capital penalty hearing. See NRS 175.554. We conclude that the district court did not abuse its discretion by declining to give these instructions because they contained inaccurate or misleading statements of the law in a non-capital penalty hearing. See Crawford, 121 Nev. at 754, 121 P.3d at 589; NRS 175.552.

Fourth, Wrencher appears to argue that the district court erred by refusing to add the words "and background" to the instruction on mitigating evidence—"The jury is instructed in determining the appropriate penalty to be imposed in this case it may consider all evidence, including any evidence introduced in mitigation, and any other evidence that bears on the defendant's character." The district court properly instructed the jury that it could consider all evidence, including evidence in mitigation, when deciding on a penalty. See NRS 175.552(3). We conclude that any error in refusing to modify the instruction was harmless, as both defense counsel and the State informed the jury during closing arguments that the jury could consider evidence of Wrencher's background.

Sufficiency of the evidence

Wrencher argues that there was insufficient evidence of premeditation and deliberation to support his conviction for first-degree murder. We disagree. The State produced substantial circumstantial evidence of premeditation and deliberation at trial, which included that: (1) Wrencher threatened to kill the victim less than a month before the murder; (2) after arguing with the victim, Wrencher walked into the kitchen, took the largest knife out of a drawer, walked down the hallway to the victim's bedroom, and began stabbing the victim in her bed; and (3) the victim was stabbed 10 times and had defensive wounds on her hands. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Wrencher was guilty of premeditated and deliberate first-degree murder. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); NRS 200.030(1)(a); Leonard v. State, 117 Nev. 53, 75, 17 P.3d 397, 411 (2001) (circumstantial evidence alone may support an inference of premeditation and deliberation). Although Wrencher presented expert testimony that his ability to make a deliberate rational decision was impaired, and Wrencher himself testified that he "lost it," the jury was entitled to reject this theory and conclude that Wrencher acted with deliberation and premeditation. See McNair, 108 Nev. at 56, 825 P.2d at 573; cf. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Evidence of prior bad acts during penalty phase

Wrencher contends that, during the penalty phase, the district court erred by admitting police reports and a protective order detailing the victim's allegations of domestic violence by him, which allowed the jury to

sentence him based upon "materially untrue information." He argues that the evidence was unreliable because it contained unsubstantiated allegations and he was unable to cross-examine the deceased victim about her statements in the police reports and protective order. We disagree.

To the extent that Wrencher argues that the records were inadmissible because he could not confront the victim about her statements, this argument is meritless because the Confrontation Clause does not apply to sentencing hearings. See Summers v. State, 122 Nev. 1326, 1332-33, 148 P.3d 778, 782-83 (2006); see also U.S. v. Littlesun, 444 F.3d 1196, 1199-200 (9th Cir. 2006) (Crawford[4] does not bar the admission of hearsay evidence at a non-capital sentencing proceeding as long as the evidence has "some minimal indicia of reliability" (internal quotation marks omitted)). We further conclude that the district court did not abuse its discretion in admitting the temporary protective order and incident reports at the penalty hearing. See NRS 175.552; Gallego v. State, 117 Nev. 348, 369, 23 P.3d 227, 241 (2001) (evidence of police investigations and uncharged crimes is admissible at a penalty hearing as long as the evidence is not "impalpable or highly suspect"), abrogated on other grounds by Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011). Wrencher did not demonstrate that the evidence was "impalpable or highly suspect," and he had the opportunity to rebut the allegations in the records in front of the jury.

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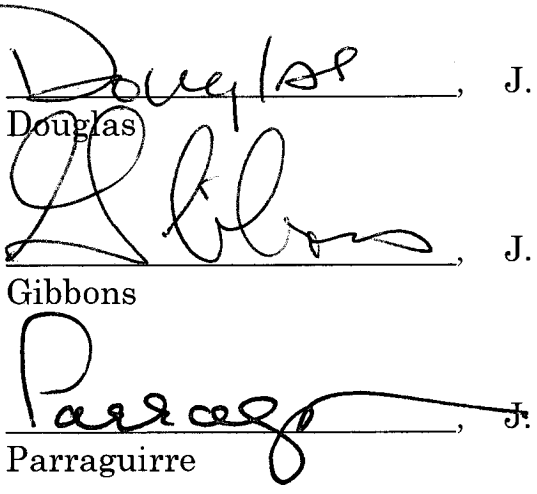
[4]Crawford v. Washington, 541 U.S. 36 (2004).

Cumulative error

Finally, Wrencher contends that the effect of cumulative errors warrants reversal of his conviction. We conclude that any errors committed, considered together, do not warrant relief. See Pascua v. State, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006). Accordingly, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk