IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO TARROSA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58008

FILED

OCT 01 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of assault with a deadly weapon, conspiracy to commit robbery, robbery with use of a deadly weapon, attempted robbery with the use of a deadly weapon, and first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Seventeen-year-old[1] appellant Antonio Tarrosa, accompanied by several friends, attempted to rob an unknown male. Shortly thereafter, the group encountered Dominic "Dom" Evans and Lindsey Subin. Tarrosa pointed a gun at the couple and demanded all of their belongings. Although Evans complied by emptying his pockets, Tarrosa pistol-whipped him in the head until he fell to the ground. Terrified, Subin ran to find help; while running she heard a gunshot. Evans bled to death where he lay.

[1]Tarrosa committed these crimes ten days before his eighteenth birthday.

A jury convicted Tarrosa of multiple crimes, including first-degree murder, for which the district court sentenced him to life with the possibility of parole, and several consecutive and concurrent terms of imprisonment. Tarrosa timely appealed. On appeal, he raises three principal arguments: (1) that his confession was improperly admitted at trial, (2) there was insufficient evidence to sustain a conviction of first-degree murder, and (3) there was insufficient evidence to sustain a conviction of attempted robbery. We affirm.

Confession to police–Miranda

This court ordinarily will not address an argument that was not made before the district court. See McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998). Even though we may exercise discretion to address unpreserved issues, we decline to do so when plain error did not affect the defendant's substantial rights. Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001).

Tarrosa argues that Miranda warnings are ineffective when law enforcement officers question a minor without his or her parent present. However, Tarrosa did not make this argument to the district court, so the district court did not consider its merit.[2] See McKenna, 114

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[2]Tarrosa maintains that he preserved this issue in a motion to suppress. We disagree. Tarrosa's motion focused on the Fifth Amendment right against self-incrimination in coercive circumstances; it did not adequately address the Miranda exclusionary rule. Although there is some overlap between the Fifth Amendment and Miranda's requirements, "[t]he Miranda exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation." Oregon v. Elstad, 470 U.S. 298, 306 (1985). Thus, a party must raise both issues if he wishes to preserve them for appeal.

Nev. at 1054, 968 P.2d at 746. Furthermore, there was no plain error affecting Tarrosa's substantial rights, making it inappropriate to address it for the first time on appeal. In Shaw v. State, we explained that minors are not entitled to the protections enumerated in NRS Chapter 62C, including parental notification, when they face murder charges. 104 Nev. 100, 104, 753 P.2d 888, 890 (1988), overruled on other grounds by Alford v. State, 111 Nev. 1409, 1415 n.4, 906 P.2d 714, 717 n.4 (1995); see also Ford v. State, 122 Nev. 796, 802, 138 P.3d 500, 504 (2006). Moreover, an accused's express acknowledgment of Miranda rights demonstrates knowing, voluntary waiver—even if the accused is a minor. See Elvik v. State, 114 Nev. 883, 890-93, 965 P.2d 281, 285-87 (1998) (discussing a juvenile version of the admonishment card and holding that 14-year-old murder suspect voluntarily made exculpatory statements). Because Tarrosa was charged with murder and expressly acknowledged his rights, we find no plain error.

Confession to police—coercion

The question of whether a confession is voluntary "present[s] a mixed question[ ] of law and fact subject to this court's de novo review," Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005), based on a totality of the circumstances test, Allan v. State, 118 Nev. 19, 24, 38 P.3d 175, 178 (2002). Factors relevant to our analysis include: "the youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987). We also consider a suspect's

prior experience with law enforcement. Dewey v. State, 123 Nev. 483, 492, 169 P.3d 1149, 1155 (2007).

Tarrosa argues that his confession was involuntary for four reasons: (1) the detectives told Tarrosa's friend that Tarrosa would receive leniency if he turned himself in; (2) he was psychologically abused because police officers handcuffed him to a pole, left him alone in an interrogation room for three hours, and yelled at one of his friends in the room next door; (3) his age, lack of sophistication, and inexperience with the adult criminal justice system led him to believe that "the only way out [of incarceration] was to confess"; and (4) he abuses recreational drugs.

We disagree. Even accepting that Tarrosa was scared, the record does not contain evidence that police handcuffed Tarrosa to a pole for three hours[3] or that the loud exchange was a police tactic.[4] Furthermore, Tarrosa's prior experience with law enforcement—albeit in the juvenile system—makes it unlikely that he was psychologically overwhelmed by isolation and a ruckus in the neighboring room. The interrogation itself was not coercive because Tarrosa confessed within a

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[3]The only evidence of this claim is Tarrosa's motion to suppress. Tarrosa never testified or provided an affidavit supporting this claim, and so, Tarrosa failed to prove this claim. See, e.g., 56 Am. Jur. 2d Motions, Rules, and Orders § 2 practice tip (2010) ("A motion cannot prove itself; allegations and statements made in motions are not evidence and allegations in motions do not amount to any proof of the facts stated." (footnotes omitted)).

[4]The police officers yelled at Tarrosa's friend, "What the hell is wrong with you, answer me," after he attempted to pour water into an electrical socket.

minute after receiving his Miranda rights. The detectives said very little to Tarrosa, and there is no indication that he was overcome by prolonged or tricky questioning. Tarrosa also admitted that he was sober during the interview. Lastly, even though Tarrosa was technically a minor, he was not a naïve child, but rather a mature young adult with plenty of exposure to the realities of adult life.

Thus, a review of the totality of the circumstances reveals that Tarrosa voluntarily gave a statement to the police.

Sufficiency of the evidence

"The Due Process Clause of the United States Constitution requires that an accused may not be convicted unless each fact necessary to constitute the crime with which he is charged has been proven beyond a reasonable doubt." Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). To determine whether due process requirements are met, we consider "'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.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

The State charged Tarrosa with open murder, but focused almost exclusively on felony murder. Tarrosa correctly explains that the critical inquiry in felony murder cases is whether a killing occurred during the perpetration or attempted perpetration of a felony. See NRS 200.030(1)(b). Tarrosa then argues that the State could not prove felony murder because the robbery was already over when he shot Evans as punishment for Subin's escape.

The term "committed in the perpetration or attempted perpetration [of a felony]" is inherently imprecise, and it is often tricky to determine when a felony is complete. See 2 Wayne R. LaFave, Substantive Criminal Law § 14.5 (2d ed. 2003 & Supp. 2011-12). Nonetheless, this court has previously upheld felony murder convictions with robbery as the underlying felony where the killing occurred after the accused took the victim's property. See Payne v. State, 81 Nev. 503, 406 P.2d 922 (1965); State v. Fouquette, 67 Nev. 505, 221 P.2d 404 (1950). Our rationale is consistent with the majority rule on felony murder—that a felony is not completed until the defendant has reached a temporary place of safety. See LaFave, supra; Erwin S. Barbre, Annotation, What Constitutes Termination of Felony for Purpose of Felony-Murder Rule, 58 A.L.R. 3d 851 (1st ed. 1974 & Supp. 2012).

Here, the killing occurred while Evans and Subin were subjected to Tarrosa's violence. At the time, Evans laid on the ground due to the injury Tarrosa inflicted, Tarrosa still held a gun in his hand, and Subin ran because she feared Tarrosa would kill her. Additionally, two of Tarrosa's companions got out of their vehicle in an effort to assist with the robbery, or at least take some of the loot. Finally, even if the actual taking aspect of the robbery was complete, Tarrosa and his cohorts had not reached a temporary place of safety.

Thus, we reject Tarrosa's argument that the robbery was over by the time he killed Evans. And because Tarrosa confessed to the robbery and the shooting, there was sufficient evidence to support the first-degree murder conviction.

Next, Tarrosa claims that the State did not prove, beyond a reasonable doubt, that he attempted to rob Subin. He argues that Subin

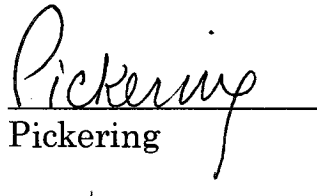
was not the targeted robbery victim, that his focus was on Evans, and that he had no interaction with Subin. So, Tarrosa argues that the State did not prove specific intent for every person alleged to be the object of an attempt as required by Powell v. State, 113 Nev. 258, 262-63, 934 P.2d 224, 227 (1997).

We disagree. Tarrosa knew that Subin was near Evans and that she dropped to the ground after he said "Freeze." Moreover, Tarrosa told both parties, "Give me everything or I'll fucking shoot you," and Subin testified that Tarrosa repeatedly told both her and Evans to give him everything they had. Admittedly, Subin's testimony contradicted Tarrosa's theory of the case. Nonetheless, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." McNair, 108 Nev. at 56, 825 P.2d at 573.

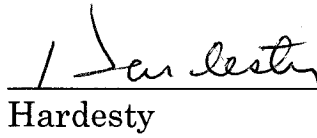
In light of the standard of review and the jury's verdict, we hold that sufficient evidence supported the attempted robbery conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Saitta



_____, J.
Pickering



_____, J.
Hardesty

cc: Hon. Linda Marie Bell, District Judge
Mario D. Valencia
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Clark County District Attorney
Eighth District Court Clerk