IN THE SUPREME COURT OF THE STATE OF NEVADA

CALVIN D. DIXON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35318

FILED

FEB 11 2002

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 one count each of murder with the use of a deadly weapon and attempt murder with the use of a deadly weapon. The district court sentenced appellant Calvin D. Dixon to serve life in prison with the possibility of parole after twenty years on the murder charge, and a concurrent term of 86-384 months in prison on the attempt murder charge, with equal and consecutive terms for the deadly weapon enhancements.

On appeal, Dixon contends that the evidence at trial did not show beyond a reasonable doubt that he committed murder or attempted murder. Dixon also argues that the district court abused its discretion by refusing to instruct the jury on a lesser-related criminal charge. In addition, Dixon claims that the district court erred in refusing to grant a mistrial based on United States. v. Bruton.[1] Dixon further claims that his constitutional rights were violated when Cornell Madison, an individual with limited police training but who is not a police officer, questioned him without issuing a Miranda warning. Dixon also contends that the district

[1]391 U.S. 123 (1968); see also, Ducksworth v. State, 114 Nev. 951, 966 P.2d 165 (1998) (recognizing the validity of Bruton).

court erred by admitting a photograph of the victim that was taken five years earlier. Finally, Dixon argues that Nevada's statutory scheme for juvenile certification is unconstitutional because, among other things, it denies a juvenile defendant a hearing before transferring jurisdiction out of the juvenile court to the district court. We conclude that all of Dixon's contentions lack merit.

The standard of review in considering the sufficiency of the evidence is that "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."[2] On appeal, a jury verdict will not be disturbed if there is substantial evidence to support the verdict.[3] "Moreover, it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony."[4]

Dixon argues that since he was not the shooter, his criminal liability is premised on an accomplice, or aider and abettor theory of liability. Further, since murder is a specific intent crime, Dixon asserts that he can only be found liable for murder or attempt murder if he had express or implied malice. Since Dixon claims that he was not aware that the shooter intended to shoot at either individual, he argues that he cannot be guilty of murder. We conclude that Dixon's argument is without merit.

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[2]Davis v. State, 110 Nev. 1107, 1116, 881 P.2d 657, 663 (1994) (citations omitted).

[3]Smith v. State, 112 Nev. 1269, 1280, 927 P.2d 14, 20 (1996).

[4]Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994).

Here, there was testimony from several witnesses that contradicted Dixon's assertion that he lacked specific intent. In addition, Dixon himself admitted to Cornell Madison, and later to the police, that the shooter asked him for the gun in order to shoot the victim, and that he obliged. A rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt.

Dixon asserts that the district court abused its discretion and violated federal and state due process and fair trial guarantees by refusing to instruct the jury on a lesser-related criminal charge that described Dixon's criminal liability according to his version of events in this matter. Dixon relies on Moore v. State,[5] to suggest that his proposed instructions, including NRS 202.300, permitting a child to possess a firearm, should have been given.

In Moore, we held "that the jury should receive instruction on a lesser-related offense when three conditions are satisfied: (1) the lesser offense is closely related to the offense charged; (2) defendant's theory of defense is consistent with a conviction for the related offense; and (3) evidence of the lesser offense exists."[6] However, in Peck v. State[7] we "expressly overrule[d] Moore as it pertains to the necessity of giving a jury instruction on a lesser-related offense."[8] Therefore, we conclude that

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[5]105 Nev. 378, 776 P.2d 1235 (1989).

[6]Moore, 105 Nev. at 383, 776 P.2d at 1239.

[7]116 Nev. 840, 7 P.3d 470 (2000).

[8]Id. at 845, 7 P.3d at 473. While Peck was decided after Dixon's case was adjudicated, we conclude that Peck should be applied retroactively. People v. Birks, 960 P.2d 1073, 1091 (Cal. 1998), on which we relied in our re-examination of the "lesser-related" doctrine, held that "due process does

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Dixon's reliance on Moore is misplaced, and his argument is without merit.

Dixon next argues that the district court erred in refusing to grant a mistrial based on United States. v. Bruton.[9] In Bruton, the United States Supreme Court held that the admission of a co-defendant's confession inculpating the other defendant in a joint trial constituted a violation of the confrontation clause, and this violation could not be overcome by an instruction to the jury to disregard the statement.[10] Dixon maintains that his trial was severed from the case against the shooter due to Bruton concerns, and that the district court should have declared a mistrial after the state elicited testimony regarding the shooter's statement, "Hey man, I can't believe we did it." We conclude that Dixon's contention is without merit.

Here, the district court acknowledged that the statement may have been an exception to the hearsay rule, but concluded that its prejudicial effect outweighed any possible probative value.[11] The district court instructed the jury to disregard the witness' testimony regarding the

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. . . *continued*
not preclude [retroactive application] since the new rule . . . neither expands criminal liability nor enhances punishment for conduct previously committed."

[9]391 U.S. 123 (1968).

[10]Id. at 135.

[11]Specifically, the district court found that the statement was not admissible as a statement by a co-conspirator during the course of a conspiracy, but might be admissible as a present sense impression, present mental condition, or excited utterance.

shooter's statement. Unlike Bruton, the jury here was not instructed to consider the statement against one defendant, and then completely ignore the statement against a co-defendant. Rather, the jury was instructed to completely disregard the testimony regarding the shooter's statement. This instruction, combined with the additional evidence against Dixon, cured any violation of the confrontation clause.

Furthermore, the shooter's statement is not incriminating on its face because it does not, in and of itself, reference Dixon. The record indicates that a car full of individuals approached the shooter shortly before the murder took place. The jury could have believed that "we" referred to one or all of the individuals in that car. Only when other evidence introduced at trial linked that statement to Dixon did it incriminate him. Accordingly, under Bruton, admitting testimony regarding this statement is not a violation of Dixon's constitutional rights.

Even if there was a Bruton violation against Dixon, we have held that "[b]oth hearsay and Confrontation Clause errors are subject to harmless error analysis."[12] Furthermore, where the independent evidence of guilt is overwhelming, the harmless error rule applies.[13] Here, we conclude that any error with regard to the district court's refusal to declare a mistrial is harmless due to the other independent evidence of guilt.

Dixon claims that his constitutional rights were violated when Cornell Madison questioned him regarding the location of the weapon used in the shooting without issuing a Miranda warning. Moreover, Dixon

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[12]Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993).

[13]See Davies v. State, 95 Nev. 553, 558, 598 P.2d 636, 640 (1979).

claims that his statements to Madison were not voluntary. We conclude that Dixon's claim lacks merit.

A defendant's statement to the police is not admissible as evidence unless the defendant is advised of his right to remain silent or to obtain a lawyer prior to the defendant making the statement.[14] Furthermore, a "[f]ailure to administer Miranda warnings creates a presumption of compulsion."[15] We have recognized that individuals acting on behalf of law enforcement can also be considered agents of the state for Miranda purposes.[16]

Here, Madison, who took courses at a California police academy and served as a military police officer, approached police officers and asked if he could talk to Dixon about the location of the gun. While Dixon claims that Madison asked if he could talk to Dixon "on their behalf," this is not reflected in the record. Madison's testimony indicates that he asked if he could speak to Dixon, and that the police were reluctant since Madison was not a police officer in the state of Nevada. However, the police agreed to allow Madison the opportunity to speak with Dixon.

While Dixon was handcuffed and sitting in the back seat of a police car, Madison spoke with him with no police officer present. The record reflects that Madison and Dixon were friends, and that during the conversation, Dixon asked Madison to wipe off the fingerprints before turning the weapon over to the police. The nature of the relationship with

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

[15]Oregon v. Elstad, 470 U.S. 298, 307 (1985).

[16]See Boehm v. State, 113 Nev. 910, 944 P.2d 269 (1997).

Madison, combined with his request that Madison remove fingerprints, suggests that Dixon did not perceive Madison as an agent of the state, Dixon's statements were not the result of coercion, and that Miranda was not violated.

Even if Madison was acting as an agent of law enforcement, the evidence was admissible under the public safety exception to Miranda. In New York v. Quarles,[17] the United States Supreme Court concluded that the need to protect the public outweighed the need to provide Miranda warnings.[18] Here, the record indicates that, as Dixon and the shooter were brought out of the home, a crowd began to assemble nearby. Among the crowd assembling were children in the neighborhood. Police were concerned that one of the children gathering around might find the weapon. Madison testified that he knew Dixon would not likely tell the police where the gun was located. We conclude that the district court did not err in allowing evidence into the case that flowed from a statement in the absence of a Miranda warning because public safety required that the gun be located.

Dixon also argues that the district court erred by admitting a photograph of the victim because the photograph of the victim was taken five years prior, when the victim was twelve. Dixon claims that this photograph was offered to appeal to the jury's sympathy in violation of Calvin's rights to due process and a fair trial. We conclude that Dixon's claim lacks merit.

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[17]467 U.S. 649 (1984).

[18]Id. at 656.

Absent an abuse of discretion, a decision on the admissibility of photographs lies within the sound discretion of the district court and will not be overturned.[19] Here, in the presence of the jury, the state explained that the photograph of the victim was taken when he was in the seventh grade. The district court found that the photograph was more probative than prejudicial. This decision was within the sound discretion of the district court and we conclude that the district court did not abuse its discretion.

Dixon next argues that Nevada's statutory scheme for juvenile certification violates the equal protection clause and due process clause because, among other things, it denies a juvenile defendant a hearing before transferring jurisdiction out of the juvenile court to the district court.[20] In addition, Dixon argues that Nevada's certification statute is not based on rational reasons. Dixon was sixteen years old when the crime occurred. We conclude that his arguments are without merit.

We have held that "the transfer statute does not implicate a suspect classification or fundamental right, and therefore, will be unconstitutional only if it does not bear a rational relationship to a legitimate legislative purpose."[21] Furthermore, we concluded that "the transfer statute is rationally related to, and effectuates, the legitimate

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[19]Domingues v. State, 112 Nev. 683, 695, 917 P.2d 1364, 1373 (1996).

[20]See NRS 62.040 (providing that juvenile courts have no jurisdiction over juveniles charged with murder or attempted murder).

[21]Anthony Lee R., A Minor v. State, 113 Nev. 1406, 1418 n.6, 952 P.2d 1, 8 (1997) n.6.

legislative purposes of public protection and social control."[22] As we have previously held, the juvenile certification statute does not violate equal protection of the law.[23]

Dixon further alleges that the Nevada juvenile certification statute violates due process because it vests jurisdictional discretion with the prosecutor, not a neutral magistrate. In addition, Dixon claims that since twenty-six states do not have Nevada's juvenile exclusion policy, Nevada's statutory scheme denies equal protection to a class of persons based on the location of the juvenile's conduct. However, Dixon provides no legal authority for these arguments. While we disagree with Dixon's conclusory allegations, this court need not consider novel propositions of law unsupported by relevant authority.[24]

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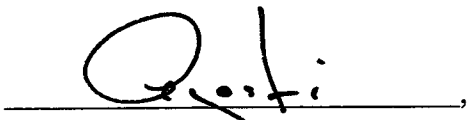
[22]Id.

[23]Id.

[24]See Cunningham v. State, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978) (declining "to consider appellant's constitutional challenge . . . because he [had] failed to cite any relevant authority in support of that argument"); see also NRAP 28(a)(4) (requiring the argument in the appellant's brief to contain citation to relevant authorities).

Having considered Dixon's arguments and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Mark W. Gibbons, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

MAUPIN, C.J., concurring:

I agree with the result reached by the majority. I would add my view that the statement made by Dixon's co-perpetrator was admissible as an excited utterance, a recognized exception to the hearsay rule. Thus, no confrontation issues implicating Bruton are raised in this appeal.

Maupin, C.J.
Maupin