IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSEMARY VANDECAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61649

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder of a person 60 years of age or older. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Appellant Rosemary Vandecar asserts that her conviction should be reversed for the following reasons: (1) the district court abused its discretion by denying her motion for a new trial based on reports of a sleeping juror, a witness' reference to appellant's prior custody status, the district court's removal of a juror, and a typographical error in the Information; (2) the district court abused its discretion by admitting cumulative and gruesome photos and by issuing improper jury instructions; (3) the State violated appellant's confrontation-clause right and that violation was prejudicial; and (4) the cumulative effect of errors was egregious. We determine that these assertions lack merit and affirm the decision below.

During appellant's trial, the prosecution called expert forensic scientist Kellie Gauthier to testify about her analysis of relevant DNA evidence. In testifying, Gauthier compared her results to those obtained by another forensic scientist, Christina Paulette, who had analyzed DNA from the same evidence before being terminated. On direct examination, Gauthier stated that hers and Paulette's conclusions were the same in most instances, but offered some detail about one differing result. Appellant's counsel did not object to Gauthier's testimony about Paulette's results. Instead, during the cross-examination of Gauthier, appellant's counsel elicited detailed testimony about a second discrepancy in the experts' results. Later, during closing arguments, appellant's counsel used the discrepancies in the experts' conclusions to support the defense's theory.

At another point in the trial, two observers, and friends of appellant, informed appellant's counsel that they witnessed one of the juror's sleeping. One observer stated that she had notified the marshal of the issue. Neither appellant's counsel nor the marshal reported any concern that there was a sleeping juror to the district court judge during trial. After trial, however, appellant's counsel raised his concern about the sleeping juror to the district court judge, admitting that he had not witnessed the juror sleeping himself. The prosecutor attested that she, too, had not observed the juror sleeping. Finally, the district court judge acknowledged that while she observed the juror closing her eyes, she was unconvinced that the juror was sleeping. The marshal was not available at this hearing.

Subsequently, appellant filed a motion for a new trial, which raised the sleeping-juror issue. When examined about the issue during the hearing on the motion, the marshal indicated that he never received any information about a sleeping juror and would have reported it immediately if he had. The district court denied appellant's motion, finding, among other things, that the juror had not fallen asleep during the trial.

Sleeping Juror

We review a district court's denial of a motion for a new trial based upon juror misconduct for abuse of discretion and will not disturb the district court's findings absent a showing of clear error. *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003). With that said, to merit a new trial, a party must show that the alleged juror misconduct occurred and was prejudicial. *Maestas v. State*, 128 Nev. ___, ___, 275 P.3d 74, 84 (2012).

Appellant contends that the district court abused its discretion by refusing to grant a new trial because of the evidence that a juror was sleeping during the trial.[1] Applying the aforementioned standards,

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[1]We note that appellant also contends that the district court abused its discretion by failing to conduct a *sua sponte* hearing or make an investigation into the alleged juror misconduct. We reject this contention because the record shows that the district court judge paid close attention to the juror in question and appellant's counsel failed to raise the issue upon learning about it during trial. *Cf. United States v. Barrett*, 703 F.2d 1076 (9th Cir. 1983) (remanding with instructions that the trial judge hold a hearing to determine whether a juror was sleeping during trial when the juror personally told the judge that he had been asleep and the judge failed to investigate the issue further).

appellant must demonstrate that the juror in question actually slept during the trial and that appellant was prejudiced by this misconduct. Because the district court found that the juror was not asleep during the trial, our inquiry into this matter is complete, unless appellant demonstrates that this finding was clear error.

During the initial post-trial hearing, upon learning about the trial observers' allegations that a juror was sleeping, the district court judge indicated that she had paid particular attention to the juror in question and was not convinced that the juror had ever fallen asleep. Additionally, attorneys for both sides stated that they did not observe the juror sleeping. Later, the marshal testified that the two observers never informed him of a sleeping juror during trial. In light of these facts, we conclude that the two observers' affidavits are insufficient to show that the district court committed clear error when finding that the juror in question did not sleep during trial. We therefore conclude that the district court did not abuse its discretion by denying appellant's motion for a new trial.[2]

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[2]We also conclude that the district court did not abuse its discretion by denying appellant's motion for a new trial based on (1) witness Wright's reference to appellant's prior custody status, *see Thomas v. State*, 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998), (2) the removal of juror McDonald, *see Viray v. State*, 121 Nev. 159, 163-64, 111 P.3d 1079, 1082-83 (2005), or (3) the Information's one-digit typographical error in its attempted citation to NRS 193.167, *see* NRS 178.598; *State v. Jones*, 96 Nev. 71, 73-76, 605 P.2d 202, 204-206 (1980).

Confrontation Clause

Appellant contends that Gauthier's testimony comparing her results to those of Paulette was inadmissible for violating the Confrontation Clause of the Sixth Amendment of the United States Constitution. Because appellant failed to object to this testimony at trial, our review is for plain error. *Vega v. State*, 126 Nev. ___, ___, 236 P.3d 632, 636 (2010). Accordingly, appellant must show that the alleged error was legitimate, unmistakable, and prejudicial. *See id.* at ___, 236 P.3d at 637.

Under *Crawford v. Washington*, the United States Supreme Court concluded that a testimonial hearsay statement of an unavailable witness is inadmissible except when the defendant had a previous opportunity to cross-examine the witness. *See* 541 U.S. 36, 59 n.9, 68 (2004). In considering appellant's argument, therefore, we must first determine whether Gauthier's statements related to Paulette's results were hearsay. Hearsay is "[a]n out-of-court statement offered to prove the truth of the matter asserted in the statement . . . and is inadmissible unless it falls within one of the recognized exceptions to the hearsay exclusionary rule." *Franco v. State*, 109 Nev. 1229, 1236, 866 P.2d 247, 252 (1993); *see also* NRS 51.035; NRS 51.065.

Gauthier's statements about Paulette's results can be broken down into two types—statements that Gauthier's and Paulette's results *were* the same and statements explaining *how* their results were different. Given its superficial and non-substantive nature, we conclude that Gauthier's testimony indicating that she and Paulette reached similar results was not offered to prove the truth of the matter asserted in Paulette's report. However, we determine that Gauthier's statements

explaining the substantive differences between certain results in hers and Paulette's reports for purposes of comparison were offered to prove the truth of the matter asserted and were therefore hearsay statements that could be subject to a Confrontation Clause challenge.

Our next question is whether the hearsay statements at issue were testimonial in nature. *Vega*, 126 Nev. at ___, 236 P.3d at 637. We have explained that "a statement is testimonial if it would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." *Id.* (internal quotations omitted). We are convinced that Paulette's DNA analysis of evidence for a case involving a second-degree murder charge would lead an objective witness to reasonably believe that the analysis would be available for use at a later trial. Accordingly, the hearsay statements at issue were testimonial in nature. Because Paulette was unavailable at appellant's trial and appellant did not previously have an opportunity to cross-examine her, Gauthier's testimonial hearsay statements were inadmissible for violating the Confrontation Clause.

While the next portion of our analysis would generally consider whether this violation was prejudicial, we need not reach that issue. Instead, we determine that appellant is estopped from raising her Confrontation Clause argument because she invited the error by eliciting and exploiting the inconsistencies between the experts' results during cross-examination and closing arguments for the benefit of her defense.[3]

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[3]We reject appellant's argument that the district court abused its discretion by admitting cumulative and gruesome photos and by issuing improper jury instructions. *See Archanian v. State*, 122 Nev. 1019, 1031,

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See Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002); *Jones v. State*, 95 Nev. 613, 618, 600 P.2d 247, 250 (1979). If we were to continue with our plain error analysis, however, we would conclude that appellant's exploitation of the Confrontation Clause violation eviscerates any possible prejudice and thereby negates appellant's claim of plain error. Finally, we note that because the only actual error was invited by appellant, there is no basis for reversing appellant's conviction for cumulative error. *See Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). We therefore reject her arguments on these issues and ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

. . . *continued*

145 P.3d 1008, 1017-18 (2006); *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003) (explaining that absent plain error "the failure to clearly object on the record to a jury instruction precludes appellate review").

cc: Hon. Jennifer P. Togliatti, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk