IN THE SUPREME COURT OF THE STATE OF NEVADA

TONY AMATI,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35794

FILED

OCT 05 2001

JANETTE M. BLOOM
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 one count each of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. The district court sentenced appellant to two terms of life in prison with the possibility of parole, plus two terms of 96-240 months in prison. The district court credited appellant with 728 days for time served.

First, appellant contends that the prosecutor's use of the phrase "something wicked" several times in opening statement constituted prosecutorial misconduct and denied appellant a fundamentally fair trial. We disagree.

"'[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[1] The evidence clearly showed that at least two of the killings charged were simply "thrill kills" motivated by pure malice -- as evidenced by the excessive number of times the victims were shot. Therefore, the prosecutor's characterization of the motive of the killer or killers as wicked was proper. Moreover, we conclude that the comments were not so prejudicial as to have denied appellant a fair trial, particularly since the jury was instructed that "statements, arguments and opinions of counsel are not evidence in this

[1]Jones v. State, 113 Nev. 454, 467, 937 P.2d 55, 64 (1997) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

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case."[2] Even assuming any error, we conclude without reservation that it did not affect the verdict.[3]

Next, appellant argues that the 9-1-1 recording should not have been admitted because it was overly prejudicial and had no probative value. Appellant also contends that the gruesome autopsy photographs should not have been admitted. Since he did not contest the cause of death, the manner of death, the number or locations of injuries, or the identity of the victims, appellant contends that the probative value of these photographs was outweighed by the danger of unfair prejudice.

"'Admission of evidence is within the trial court's sound discretion; this court will respect the trial court's determination as long as it is not manifestly wrong.'"[4] We conclude that appellant has failed to demonstrate that the district court was manifestly wrong in admitting the 9-1-1 recordings or the autopsy photographs. We further conclude that the credibility issue with the 9-1-1 caller made the recording particularly probative, but we would not necessarily perceive an abuse of discretion even absent the credibility issue. Last, we conclude that considering the use of the photographs to assist the medical examiner in testifying, the district court was within its discretion in admitting the photographs.[5]

Appellant next contends that admission into evidence of rap lyrics written by him after the crimes violated his right to freedom of expression under the First Amendment.[6] Appellant further contends that

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[2]See id.

[3]See Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (reversing conviction where prosecutor's improper arguments had cumulative effect such that it could not "be said without reservation that the verdict would have been the same in the absence of error").

[4]Byford v. State, 116 Nev. 215, 231, 994 P.2d 700, 711 (2000) (quoting Colon v. State, 113 Nev. 484, 491, 938 P.2d 714, 719 (1997)).

[5]See Doyle v. State, 116 Nev. 148, 161, 995 P.2d 465, 473 (2000).

[6]See Dawson v. Delaware, 503 U.S. 159 (1992) (holding that admission of evidence of a defendant's membership in the Aryan Brotherhood during a penalty hearing, when that evidence was admitted simply to show the defendant's general beliefs without actual relevance to the crime, was constitutionally barred); Flanagan v. State, 109 Nev. 50, 53, 846 P.2d 1053, 1056 (1993) (holding that admission of evidence of satanic cult membership where the State failed to link cult participation or beliefs with the crimes charged was improper).

a Brady violation[7] occurred when the State failed to provide the lyrics to him in a timely manner. Appellant asserts that the State cannot "hide" behind the FBI's failure to turn over the rap lyrics sooner.[8] Appellant also asserts that he was prejudiced by the delay because he could not address the lyrics in his opening statement and he was unable to provide testimony to explain the lyrics.

We conclude that the relevance of the rap lyrics to the crimes was clearly established, and thus, admission of this evidence did not violate any constitutionally protected right. One line from appellant's lyrics stands out in particular: "[n]ow I stand with frustration in my hand, shouldn't have pulled the trigger and killed that man." We additionally conclude that appellant has failed to show prejudice, particularly given the district court's accommodation in allowing appellant a full day to prepare to respond to the admission of the lyrics, and given trial counsel's statement that he had been given enough time to prepare. Therefore, appellant's claim of a Brady violation lacks merit.[9]

Next, appellant contends that the improper admission of prior bad act evidence deprived him of a fair trial. The challenged evidence showed that appellant had possession of a handgun and over $25,000 cash while he was a fugitive and that he had been among the FBI's ten most-wanted fugitives.

Other bad acts are admissible when three conditions are met: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[10] We conclude that the admissibility conditions were met here.

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[7]Brady v. Maryland, 373 U.S. 83, 87 (1963).

[8]See United States v. Scruggs, 583 F.2d 238, 242 (1978) (stating that "[n]or is the government excused from its obligation by the fact that the documents were in the possession of the FBI prior to trial," where discovery documents were not provided to defendant until the morning of trial, but declining to reverse the conviction for the discovery violation because defendant had not shown any prejudice).

[9]See id.

[10]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), (citing Walker v. State, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996)).

Specifically, we have recognized that conduct by a defendant occurring after a crime, such as flight, may be relevant to guilt.[11] The possession of a gun and $25,000 cash are not per se illegal acts. Further, the evidence of appellant's status as a wanted fugitive was not linked to any crimes other than those for which he was being tried. Therefore, admission of the evidence did not create any likelihood the jury would infer that appellant had a prior criminal history, and does not constitute grounds for reversal of appellant's conviction.[12]

Appellant next asserts that the district court erred in instructing the jury regarding the meaning of deliberation. Because appellant's trial predated our decision in Byford v. State,[13] the district court's use of the instructions to which appellant takes exception did not constitute reversible error.[14]

Next, appellant contends that the court erred in instructing the jury regarding implied malice. The challenged instruction stated that "[m]alice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." Appellant notes our recent decision in Cordova v. State,[15] wherein we approved of this instruction. Nevertheless, appellant maintains that the phrase "abandoned and malignant heart" is unconstitutionally vague.[16]

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[11]Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000).

[12]Cf. Emmons v. State, 107 Nev. 53, 59, 807 P.2d 718, 722 (1991) (applying similar reasoning to uphold admission of evidence that defendant was armed and dangerous and made an ambiguous statement after arrest that he would not "go back").

[13]116 Nev. at 231, 994 P.2d at 711.

[14]See Garner, 116 Nev. at 789, 6 P.3d at 1024 (holding that Byford has prospective application only).

[15]116 Nev. 664, 6 P.3d 481 (2000).

[16]Appellant argues that the California Supreme Court has criticized the phrase "abandoned or malignant heart" as "superfluous" and "cryptic." See People v. Phillips, 414 P.2d 353, 363-64 (Cal. 1966), overruled on other grounds by People v. Flood, 957 P.2d 869 (Cal. 1968).

We have recently considered and rejected similar arguments, and see no reason to revisit the issue here.[17]

Finally, appellant contends that cumulative error denied him of a fair trial. We disagree. To the extent that any individual errors are harmless in and of themselves, we similarly conclude that they are harmless in the aggregate.

Having considered all of appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Joseph T. Bonaventure, District Judge
Attorney General
Clark County District Attorney
David M. Schieck
Clark County Clerk

[17]See Leonard v. State, 117 Nev. ___, ___, 17 P.3d 397, 413 (2001).