IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN DAVID DULA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 63792

FILED

MAR 12 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

First, appellant Bryan David Dula contends that insufficient evidence supports his conviction. We disagree because the evidence, when viewed in the light most favorable to the State, was sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008).

The State presented evidence that Dula regularly bought prescription pills from the victim and owed him $1,000. On the day in question, Dula's brother attempted to buy pills for Dula but the victim refused to supply him. Dula contacted the victim and offered to meet him and pay towards his debt. Later that day, the victim's body was found in his truck. He had been stabbed 33 times, mostly in the back, neck, and head. At least 17 of the wounds occurred after he had died or immediately prior. Many of the wounds were in the same location and were directed towards lethal areas, which suggested that the victim had not been moving when the blows were delivered. Evidence also suggested that the

killer had pushed the victim's body over, gotten into the driver's seat, and drove the truck behind a berm to obscure it from the road. The victim's keys, wallet, and cell phone were missing. In addition, the victim frequently hid pills behind the truck's dashboard, and the dashboard's cover had been removed. Dula initially told law enforcement, his friends, and his family that the victim never showed up for their meeting and he had nothing to do with his death. But Dula's hand had been cut and a surveillance video showed that the injury occurred around the time of the incident. Dula's fingerprints were also found on the truck's door handle. At trial, Dula admitted that he killed the victim but claimed he did so in self-defense.

We conclude that the jury could reasonably infer from the evidence presented that Dula committed first-degree murder, either because the killing was willful, deliberate, and premeditated or because it was committed during the perpetration or attempted perpetration of robbery. *See* NRS 200.030(1); *see also Holmes v. State*, 114 Nev. 1357, 1364, 972 P.2d 337, 341 (1998); *State v. Herron*, 189 P.3d 1173, 1178 (Kan. 2008) ("[T]he fact that a defendant is acquitted of an underlying felony does not automatically require reversal of a felony-murder conviction.").[1] Although Dula argues that the State's version of events was illogical and the more logical explanation was that he killed the victim impulsively or in self-defense after the victim confronted him regarding his drug debt, "it is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of [the witnesses]," *Walker v. State*, 91 Nev.

[1]Dula was acquitted of robbery with the use of a deadly weapon.

724, 726, 542 P.2d 438, 439 (1975), and a verdict will not be disturbed where, as here, it is supported by sufficient evidence, *see Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); *Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) ("[C]ircumstantial evidence alone may sustain a conviction").

Second, Dula contends that the prosecutor inappropriately commented on his right to remain silent and shifted the State's burden of proof to him on two occasions. *See Neal v. State*, 106 Nev. 23, 25, 787 P.2d 764, 765 (1990) ("The prosecution is forbidden at trial to comment upon a defendant's election to remain silent following his arrest and after being advised of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966)."); *see also Whitney v. State*, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996) ("[I]t is generally improper for a prosecutor to comment on the defense's failure to produce evidence or call witnesses[.]"). First, the prosecutor asked Dula's brother if Dula had told him what happened in the truck. Then, during closing argument, the prosecutor stated, "[T]wo and a half years ago, Bryan Dula picked a defense. Two and a half days ago, he changed it." Dula argues that these statements implied he "had a duty to pick and inform the State of his defense and then had no right to change it." We disagree. The statements merely pointed out that when Dula opted not to remain silent and chose to talk about incident, he gave false narratives. *See Coleman v. State*, 111 Nev. 657, 665, 895 P.2d 653, 658 (1995) (finding no error in the prosecutor's statement that the defendant "'had nine months to think about what his theory would be'"). We also note that Dula did not contemporaneously object to the first statement and his objection to second statement was sustained. We conclude that no relief is warranted on this claim.

Third, Dula contends that the district court abused its discretion by admitting two unnecessarily gruesome autopsy photographs. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). "We have repeatedly held that photographs that aid in the ascertainment of truth may be received in evidence, even though they may be gruesome." *Scott v. State*, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976). The first photograph, which showed wounds to the victim's back, was appropriately admitted because it demonstrated the manner in which the victim's body had been positioned in the truck. The second photograph, which showed a ruler protruding through two stab wounds on the victim's head with the skin pulled away from the scalp, was appropriately admitted because it showed that what appeared to be two wounds were actually one. Regardless, the challenged photographs were no more gruesome than the many other admissible photographs which showed the nature of the victim's injuries, and we do not believe that their admission had any inappropriate impact on the verdict. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). We conclude that no relief is warranted on this claim.

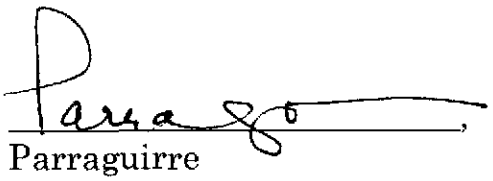
Fourth, Dula contends that the district court abused its discretion by rejecting his request for the jury to visit the crime scene. Dula asserts that a visit to the scene was necessary because it would prove that the victim's brother's testimony, in which he claimed he was able to see the victim's truck over the berm, was incredible. We conclude that the district court did not abuse its discretion for several reasons. First, the State asserted that the scene had changed since the time of the incident

and Dula did not dispute this assertion. Second, the record reflects that jurors received numerous pictures of the scene and Dula fails to demonstrate that visiting the scene was necessary to understand the pictures. *See Spillers v. State*, 84 Nev. 23, 28-29, 436 P.2d 18, 21 (1968), *overruled on other grounds by Bean v. State*, 86 Nev. 80, 89-90, 465 P.2d 133, 139 (1970). Finally, Dula cross-examined many witnesses regarding the difficulty of seeing the truck from the main road. *See Bundy v. Dugger*, 850 F.2d 1402, 1422 (11th Cir. 1988) (holding that denial of defense request for jury to visit scene did not deprive defendant of right to a fair trial where scene had been altered, photographs of scene were admitted and cross-examination as to scene was allowed).

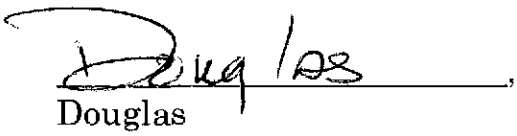
Fifth, Dula contends that the district court abused its discretion by giving instructions 4 (reasonable doubt), 12 (implied malice), 13 (premeditation), and 44 (equal and exact justice). "This court reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error; however, whether the instruction was an accurate statement of the law is a legal question that is reviewed de novo." *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009) (internal citations omitted). We have previously affirmed the use of these instructions, *Johnson v. State*, 118 Nev. 787, 806, 59 P.3d 450, 462 (2002) (reasonable doubt), *overruled on other grounds by Nunnery v. State*, 127 Nev. ___, 263 P.3d 235 (2011); *Leonard v. State*, 117 Nev. 53, 79, 17 P.3d 397, 413 (2001) (implied malice); *Leonard v. State*, 114 Nev. 1196, 1208-09, 969 P.2d 288, 296 (1998) (premeditation and equal and exact justice); and Dula fails to convince us that departure from our prior holdings is warranted. We conclude that no relief is warranted on this claim.

Sixth, Dula contends that cumulative error entitles him to relief. Because he has not demonstrated that error occurred, no relief is warranted on this claim. Accordingly, we

ORDER the judgment of conviction AFFIRMED.



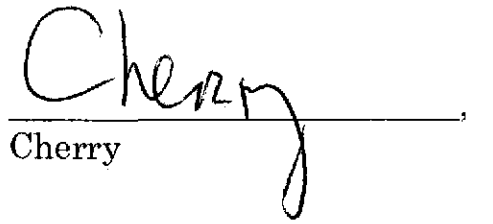
_____, J.
Parraguirre



_____, J.
Douglas

CHERRY, J., concurring:

I concur in the disposition of this case. However, I disagree with the majority's analysis of the question posed to Dula's brother and the prosecutor's statement during closing argument. In my view, these comments constitute prosecutorial misconduct. Nevertheless, I conclude that neither comment rises to the level of reversible error. *See Diomampo v. State*, 124 Nev. 414, 428, 185 P.3d 1031, 1040 (2008).



_____, J.
Cherry

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