IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTIAN DORAN WALKER,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35996

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of second-degree murder with the use of a deadly weapon and violation of a temporary protective order. The district court sentenced appellant to a term of life in prison with the possibility of parole after ten years, enhanced with an equal and consecutive term for the use of a deadly weapon, and a concurrent term of one year in jail.

First, appellant contends that the district court abused its discretion in allowing evidence regarding: (1) the attempted murder of David Dimas; (2) the domestic violence committed by appellant upon the victim, including the temporary protective order and appellant's conviction for two counts of misdemeanor battery; and (3) the graffiti investigation.

The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong.[1] Prior 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."[2] The district court's determination under this test is to be made outside the presence of the jury.[3]

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[1]See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

[2]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[3]Id.

We conclude that appellant has failed to demonstrate that the district court's assessment of the evidence was manifestly wrong or that the district court otherwise abused its discretion in admitting the evidence. Moreover, we agree with the district court's reasoning for admitting the evidence. While the attempted murder evidence presents a much closer question than the other evidence, we are nevertheless not convinced that the district court abused its discretion.

Next, appellant argues that the district court committed reversible error in denying his request for a jury instruction regarding manslaughter. Appellant contends that he was entitled to this instruction since there was evidence supporting a manslaughter verdict as a lesser-included offense. Specifically, appellant contends that the State's evidence portraying the relationship between appellant and the victim as jealous, mistrustful, and highly volatile supports a defense theory that appellant simply snapped at one point and killed the victim in "a sudden heat of passion," pursuant to NRS 200.040(2). Appellant also includes in his discussion of this issue an argument that a voluntary intoxication instruction should have also been given, since intoxication can influence the ability to reason and work in conjunction with an impulse in the heat of passion to yield manslaughter instead of murder.

Because appellant's argument represents a change in theory from that asserted at trial, we need not consider the argument.[4] At trial, appellant requested a voluntary intoxication instruction and a manslaughter instruction under the theory that the consumption of drugs or alcohol could cause a "mitigation of a level of intent" required for murder, reducing the intent from murder to that required for manslaughter. On appeal, appellant contends that the instructions should have been allowed under a "heat of passion" theory. As such, this constitutes a new theory and this court need not consider it. In any event, the intoxication instruction was properly disallowed because "'mere intoxication cannot reduce murder to manslaughter.'"[5] Further, appellant was not entitled to a manslaughter instruction because there was no

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[4]See McCall v. State, 97 Nev. 514, 516, 634 P.2d 1210, 1212 (1981).

[5]Leaders v. State, 92 Nev. 250, 252, 548 P.2d 1374, 1375 (1976) (quoting State v. Fisko, 58 Nev. 65, 77, 70 P.2d 1113, 1117 (1937)).

evidence that appellant was subjected to a sudden irresistible impulse without acts of deliberation between the provocation and the shooting.[6] Rather, the evidence showed that appellant had repeatedly been violent and insulting to the victim with no provocation. Absent evidence that appellant was provoked or otherwise angered immediately before the shooting, the district court correctly denied appellant's request for additional instructions.

Appellant next contends that he was prejudiced when certain pieces of excluded evidence were inadvertently given to the jury along with admitted evidence; this evidence also contained police acronyms (listing the contemplated charges) which were to have been redacted prior to submission to the jury but were not. Appellant maintains that he was thereby exposed to the prejudicial impact of being branded a drug dealer (via the police acronyms on the evidence bags), and that he was prejudiced by the jury considering evidence which had been expressly disallowed by the district court. Appellant relies primarily on Winiarz v. State,[7] wherein this court stated that "[t]he potential for substantial prejudice exists when a jury is permitted to consider evidence not admitted at trial." Appellant argues that, pursuant to Winiarz, a new trial must be granted in this case because it does not appear, beyond a reasonable doubt, that no prejudice has resulted.[8]

Winiarz also provides that the "determination of whether reversible prejudice has resulted from the jurors' consideration of inadmissible evidence in a given case 'is a fact question to be determined by the trial court'" and will only be reversed upon a showing of abuse of discretion.[9] This court considers three factors in deciding whether to reverse: "'whether the issue of guilt or innocence is close, the quantity and character of the error, and the gravity of the crime charged.'"[10]

Notwithstanding the considerable gravity of the crime charged, we conclude that -- given the overwhelming evidence of guilt and

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[6]See Jackson v. State, 84 Nev. 203, 438 P.2d 795 (1968).

[7]107 Nev. 812, 814, 820 P.2d 1317, 1318 (1991).

[8]Id.

[9]Id.

[10]Id.

the relative insignificance of the error -- the district court did not abuse its discretion in denying the motion for a mistrial. We conclude that the jury's exposure to the police acronyms and excluded evidence is relatively insignificant when compared with the inadmissible evidence the jury was exposed to in Winiarz. There, the jury in the defendant's second trial was inadvertently allowed to see the court clerk's notes from the original trial, which notes contained the original verdict and sentence. The Winiarz court concluded that the error was highly prejudicial because "a wavering jury could look to this document for reassurance that another group of twelve jurors . . . arrived at the stated conclusion."[11] Here, on the other hand, the jury was exposed to practically undecipherable acronyms and several minor pieces of evidence. Further, the overwhelming evidence of guilt leads us to conclude that, "beyond a reasonable doubt, . . . no prejudice has resulted."[12]

Next, appellant contends that the State's repeated eliciting of testimony regarding appellant's in-custody status substantially prejudiced him and warrants reversal of his conviction. However, this argument is belied by the record. First, the State neither sought after testimony of this sort, nor did it repeatedly. Rather, on two occasions witnesses made unexpected references to jail and on three occasions witnesses made vague comments about being unable to see or call appellant. The first two instances -- where the word "jail" was actually mentioned -- were clearly volunteered by the witnesses, were not sought after by the State, and only indicated that appellant may have been in jail previously, not necessarily that he was still in jail at the time of trial. The other three instances were too vague to lend themselves to a clear inference that appellant was in custody. We conclude that the references failed to have the prejudicial impact spoken of in Haywood v. State.[13] Haywood held that "[i]nforming the jury that a defendant is in jail raises an inference of guilt, and could have the same prejudicial effect as bringing a shackled defendant into the courtroom."[14] Here, no such inference of guilt was made.

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[11]Id. at 816, 820 P.2d at 1319.

[12]Id. at 814, 820 P.2d at 1318.

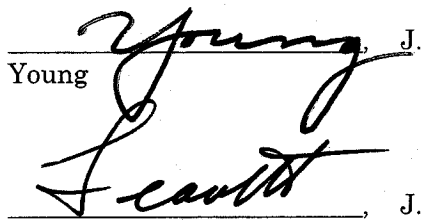
[13]107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991).

[14]Id.

Finally, appellant argues that the cumulative effect of all of the purported errors above denied him of his right to a fair trial. We disagree and conclude that the above errors, either individually or cumulatively, do not warrant reversal of appellant's conviction.

Having reviewed all of appellant's arguments and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Young

_____, J.
Leavitt

cc: Hon. Donald M. Mosley, District Judge
Attorney General
Clark County District Attorney
Patti & Sgro
Clark County Clerk

BECKER, J., concurring:

I concur with the majority that the judgments of conviction be affirmed. I write separately only to indicate my disagreement with the majority's analysis regarding the admissibility of the David Dimas attempted murder evidence. The facts of the Dimas case are not sufficiently similar to the facts involving the murder of the victim in the instant case, and the Dimas case should not have been admitted.

I conclude that the district court's decision to permit the admission of the Dimas evidence was manifestly wrong. However, given the overwhelming evidence against appellant, I further conclude that any error was harmless beyond a reasonable doubt.

Becker, J.
Becker