IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK DAVID GETZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36107

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 in the death of Rayburn Ware and a sentence of two consecutive life terms without the possibility of parole.

Appellant Jack David Getz raises four arguments on appeal: (1) the district court erred by not giving separate jury instructions regarding premeditation and deliberation in light of Byford v. State;[1] (2) there was insufficient evidence to support his conviction; (3) the district court erred by failing to instruct the jury on involuntary manslaughter; and (4) the district court erred by admitting statements Getz made to police on the night of the shooting in violation of Miranda v. Arizona.[2]

First, Getz cites to our holding in Byford in arguing that the district court's jury instruction regarding premeditation and deliberation

[1]116 Nev. 215, 994 P.2d 700 (2000).

[2]384 U.S. 436 (1966).

as separate elements of first degree murder pursuant to Kazalyn v. State[3] was prejudicial and impaired his due process rights. We disagree.

However, we have expressly rejected this argument in Garner v. State[4] by stating that the use of the Kazalyn instruction in trials that pre-date Byford does not constitute plain error. Here, as Getz's jury instruction was given on February 14, 2000, and our decision in Byford was published on February 28, 2000, the Kazalyn instruction in this case pre-dated the Byford opinion, and therefore, this argument fails. Moreover, Getz has failed to provide this court with a copy of any proposed alternative jury instruction; and therefore, the issue is not properly before this court on appeal.[5]

Second, Getz argues that the State failed to prove every element of first degree murder and there was insufficient evidence to support his conviction. Specifically, Getz argues that there was no evidence of malice aforethought and there was no evidence presented to refute his theory of self-defense. We disagree.

We have consistently stated that we will not disturb a jury's finding of guilt where it is supported by substantial evidence.[6] The test for evaluating the sufficiency of evidence is whether reviewing the evidence in a light most favorable to the prosecution, "any rational trier of fact could

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[3]108 Nev. 67, 825 P.2d 578 (1992).

[4]116 Nev. 770, 788, 6 P.3d 1013, 1025 (2000).

[5]See Byford, 116 Nev. at 238, 994 P.2d at 715; Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

[6]See Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996).

have found the essential elements of the crime beyond a reasonable doubt."[7] Issues of witness credibility and the weight to afford testimony are exclusively within the province of the jury.[8]

Here, according to Getz's own testimony, he shot Ray. Although Getz claimed that the shooting was in self-defense, testimony at his trial showed otherwise. Testimony showed that Getz had previously made statements threatening to kill Ray and his friends, as well that he was unhappy that his daughter was dating Ray, who was the likely father of her unborn child. Testimony also showed that Getz had owned and received training on how to use handguns; whereas, Ray, who was afraid of guns, had never been seen with one.

Moreover, expert testimony showed that Ray was brutally shot four times at close range. These shots included one to the top of the head, one to the neck/chin, and two in the shoulder while he was on the ground. This shooting occurred while Ray was outside in a parking lot late on a particularly cold Christmas night without a coat.

We find the following testimony particularly relevant: Getz was out driving late on Christmas night for no logical reason; Getz and his family were planning to move out of state within a number of days; even though Getz was a trained private detective, he did not immediately report the shooting to police or call 9-1-1 for help; instead, Getz drove home to change his clothes and then drove from Las Vegas to Arizona to dispose of the bloody clothes he wore during the shooting; according to

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[7]Guy v. State, 108 Nev. 770, 776, 839 P.2d 578, 582 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[8]Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1071 (1972).

Getz, he just left the gun and Ray's body lying on the parking lot; the gun was never found; and Getz was not entirely forthcoming to police about the night's events.

In sum, although Getz correctly notes that this case presents some conflicting testimony and he is the only known eye-witness to the shooting, we have held that circumstantial evidence may be sufficient to sustain a guilty verdict,[9] and, again, issues involving the credibility and weight to give conflicting testimony is within the discretion of the jury.[10] Given the evidence in the record, we conclude that there was sufficient evidence presented at trial such that a rational trier of fact could find beyond a reasonable doubt that Getz acted with malice aforethought and met the elements of first degree murder to reach a verdict of guilty.

Third, Getz argues that the district court erred by failing to offer an instruction on involuntary manslaughter. Specifically, Getz argues that our holding in Parsons v. State[11] requires that an involuntary manslaughter instruction is warranted whenever there is a theory of self-defense. We disagree.

Contrary to the facts in Getz's case, in Parsons, the defendant argued that the district court erred by instructing the jury on involuntary manslaughter.[12] We reviewed the instruction in light of the facts of that

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[9]State v. Rhodig, 101 Nev. 608, 610, 707 P.2d 549, 550 (1985).

[10]Hankins v. State, 91 Nev. 477, 478, 538 P.2d 167, 168 (1975).

[11]74 Nev. 302, 329 P.2d 1070 (1958).

[12]Id. at 304, 329 P.2d at 1071.

case and held that the giving of an involuntary manslaughter instruction was proper.[13]

However, Parsons did not stand for the general proposition that an instruction on involuntary manslaughter is required whenever a defendant presents a theory of self-defense.

Moreover, we have held that the "[f]ailure to object to or request a jury instruction precludes appellate review unless the error is patently prejudicial and requires the court to act sua sponte to protect the defendant's right to a fair trial."[14] For example, in Turpen v. State,[15] we held that the failure to include a proposed jury instruction of involuntary manslaughter in the record precludes appellate review and accordingly dismissed the claim. Here, there is no evidence in the record that Getz ever made a request for an involuntary manslaughter instruction. Given the fact that the jury found that Getz acted with intent, which is not an element of involuntary manslaughter, we conclude that any failure by the district court to give this instruction was not patently prejudicial, and therefore, we decline to act sua sponte to remedy any alleged error.

Finally, Getz argues that he was in custody when he made statements to police and therefore, the failure of police to give him a Miranda warning before these statements were given excluded them from being admitted at trial. We disagree.

We have held that when a defendant fails to specifically object to questions or testimony at trial, we will not consider an argument on

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[13]Id. at 307-09, 329 P.2d at 1073-74.

[14]McKenna v. State, 114 Nev. 1044, 1052, 968 P.2d 739, 744 (1998).

[15]94 Nev. 576, 577-78, 583 P.2d 1083, 1084 (1978).

appeal as a proper assignment of error.[16] However, we may sua sponte address issues raised for the first time on appeal which involve plain error of constitutional dimensions.[17] To make this determination, we employ a balancing test where due process and public confidence in the judicial system is balanced against encouraging litigation on the relevant issues and discouraging silence during trial for tactical reasons, so that the losing party cannot get a second chance on appeal after a verdict has been rendered.[18]

Here, although a Miranda warning is a right of constitutional dimension, Getz failed to move to suppress or object to the admissibility of his statements either before or during trial. This appears to be a tactical decision, and for this reason alone, we conclude that Getz's argument fails.

Moreover, the public safety exception to Miranda recognizes that the need for answers in situations that threaten public safety outweigh the need for the privilege against self-incrimination.[19] Here, Getz's statements were voluntarily made and questioning by police was related to public safety issues, such as the location of the shooting, the gun, and the victim; the nature of the events; and the extent of the victim's injuries.

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[16]Wilson v. State, 86 Nev. 320, 326, 468 P.2d 346, 350 (1970).

[17]See McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

[18]See Todd v. State, 113 Nev. 18, 22, 931 P.2d 721, 723 (1997).

[19]See New York v. Quarles, 467 U.S. 649, 657 (1984); Smith v. State, 646 So. 2d 704, 708 (Ala. Ct. App. 1994).

We conclude that Getz was not subject to custodial interrogation by police warranting a Miranda warning. Rather, Getz's statements were voluntary. Any interrogation by police was related to public safety concerns and, therefore, was admissible under the public safety exception to Miranda.[20] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General
Clark County District Attorney
Kirk T. Kennedy
Clark County Clerk

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[20]We have carefully reviewed all arguments raised on appeal and conclude that we do not need to address the merits of these arguments.