IN THE SUPREME COURT OF THE STATE OF NEVADA

KENSHAWN JAMES MAXEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36253

FILED

SEP 09 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Rubald
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of robbery with the use of a deadly weapon and one count each of conspiracy to commit robbery, first-degree murder with the use of a deadly weapon, second-degree murder with the use of a deadly weapon, second-degree kidnapping with the use of a deadly weapon, battery with the use of a deadly weapon, and burglary while in possession of a firearm. Appellant Kenshawn James Maxey claims that a number of errors occurred at his trial. We conclude that none of his claims has merit but remand this case for correction of certain errors in Maxey's sentence.

The basic facts of the crimes are not disputed. Early in the morning on May 18, 1998, Maxey agreed with his friends Lawshawn Levi and Atris Moore to rob a bar. They picked the O'Aces Bar and Grill in Las Vegas. At about 4:30 a.m., Maxey and Levi walked to the rear entrance of the bar while Moore waited in a car parked at an apartment complex behind the bar. Maxey was armed with a .40 caliber Glock semiautomatic

handgun, and Levi had a shotgun. When a dishwasher at the bar came out the back door, Maxey and Levi threatened him with their guns and entered the building. Maxey entered the bar, pointed his gun at the patrons, and ordered them to the floor. The two robbers forced the dishwasher, a cook, and a waitress onto the floor and had them put their money in a satchel. Levi also kicked the waitress in the head, then took her to the cash register, and told her to open it. When she was unable to, he struck her in the face with the shotgun. The bartender, Salvatore Zendano, Jr., then started to try to open the register, but Levi shouted for him to hurry and repeatedly jabbed him in the back of the head with the shotgun. Zendano then grabbed the shotgun and struggled with Levi. The gun discharged during the struggle. Levi screamed for Maxey to shoot the bartender. Maxey fired a total of six shots, fatally wounding Zendano with five and Levi with one. Maxey tried unsuccessfully to get Levi up, then grabbed the satchel and ran to the waiting car. Moore drove them both up to the bar, and Maxey went back in and tried to carry Levi out but again failed. Meanwhile, Moore drove away, and the police arrived and arrested Maxey without further incident. Maxey was seventeen years old at the time.

After a jury trial, Maxey was convicted on eight felony counts, including first-degree murder with the use of a deadly weapon. The State sought a death sentence for the murder, but the jury chose a term of life in

prison without the possibility of parole. The district court sentenced Maxey accordingly and to consecutive prison terms on the other counts.

Maxey contends first that the prosecutor committed misconduct during cross-examination of a defense expert. Psychologist Lewis Etcoff, Ph.D., testified that Maxey had significant brain dysfunction; his reading, spelling, and arithmetic skills were about third-grade level; and his verbal IQ was 82. When asked how Maxey might process information during a situation like the struggle between his fellow robber and the bartender at the crime scene, Dr. Etcoff answered, "Not rationally, not logically, not sensibly. He might just react." During cross-examination, the prosecutor asked Dr. Etcoff if he knew that a court-appointed psychologist, Brad Garrett, had tested Maxey and placed him at a fifth-grade level and if that knowledge would have made a difference in Dr. Etcoff's opinion. Dr. Etcoff said that he did not know about the other testing and said it might have made a difference. Dr. Etcoff also asked if Garrett was licensed, and the prosecutor said he was. The next day defense counsel unsuccessfully moved for a mistrial, claiming that the prosecutor had improperly testified, instead of introducing Garrett's report directly, and had incorrectly said that Garrett was a licensed psychologist when he was not.

On appeal, Maxey concedes that a prosecutor may inquire as to the facts on which an expert bases an opinion. Because the State had provided a copy of the report in question to the defense before trial, we

conclude it was not improper for the prosecutor to ask the expert whether he was aware of it.[1] However, Maxey now accuses the prosecutor of deliberately lying when he characterized Garrett as a licensed psychologist. We see nothing in the record that supports this accusation. The prosecutor was in error, but it does not appear that the misstatements were intentional. Nor was the error prejudicial. Garrett was not a psychologist, but he was a marriage and family therapist with a master's degree; moreover, a licensed psychologist also signed the report. And the report showed deficiencies in Maxey's mental functioning, even if not quite as severe as those found by the defense expert. We conclude that the district court did not abuse its discretion in denying the motion for a mistrial.[2]

Maxey next asserts that the State introduced victim impact evidence which prompted jurors to make a comparative judgment between the value of the victim's life and his own. Therefore, he concludes, this evidence was so unduly prejudicial that it rendered his trial

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[1]See NRS 50.305.

[2]Smith v. State, 110 Nev. 1094, 1102-03, 881 P.2d 649, 654 (1994) (stating that denial of a motion for mistrial is within the district court's sound discretion and this court will not overturn a denial absent a clear showing of abuse).

fundamentally unfair and violated due process under Payne v. Tennessee.[3] He offers no specific authority for this argument, and we reject it. In a penalty hearing, "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence."[4] We conclude that the evidence in question was relevant and not unfairly prejudicial.

Maxey also complains that at the penalty phase the State introduced victim impact evidence related to his nonmurder offenses: testimony by four witnesses who were present when the crimes occurred but had limited or no relationship to or knowledge of Zendano, the murder victim. He argues that this evidence improperly influenced the jury, which should only have considered evidence relevant to a sentence for his first-degree murder. Maxey is incorrect that this evidence was irrelevant to the murder sentence simply because the witnesses lacked a close relationship to the murder victim. Although the four witnesses were not "victims" of Zendano's murder under NRS 176.015(5), relevant sentencing evidence is not restricted solely to testimony by victims.[5]

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[3]501 U.S. 808, 825 (1991).

[4]NRS 175.552(3).

[5]See NRS 176.015(6); Wood v. State, 111 Nev. 428, 892 P.2d 944 (1995); see also NRS 175.552(3).

Maxey claims that the district court erred in excluding evidence of international standards prohibiting the execution of a person who commits murder when less than eighteen years of age. We decline to address this issue because it makes no difference to this appeal since the jury did not sentence Maxey to death.[6] For the same reason, we decline to consider Maxey's following claims: NRS 200.030(4) impermissibly shifts the burden to the defense to prove that mitigating circumstances outweigh aggravating circumstances; the district court erred in refusing to bifurcate the penalty phase; and the district court erred in refusing to allow the defense to argue last at the penalty phase.

Maxey next claims that a new penalty hearing is required because the prosecution referred to his affiliation with a gang. During cross-examination of a defense psychologist, the prosecutor asked the psychologist if she had reviewed a report by Dr. Etcoff concluding that Maxey acted out his anger in part by "affiliating himself with a gang." Defense counsel objected and moved for a mistrial and dismissal of the death penalty. The district court denied the motion, but found the prosecution's remark improper and sustained the objection, directing the

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[6]See Phenix v. State, 114 Nev. 116, 119, 954 P.2d 739, 740 (1998) (declining to consider a challenge to jury instructions on aggravating circumstances because appellant was not sentenced to death and the challenge was relevant only to the determination of whether to impose death).

jury to disregard the prosecution's reference to a gang. We conclude that the court did not abuse its discretion in finding that the prosecutor's remark, though improper, did not warrant a mistrial.[7]

Citing this court's decision in Byford v. State,[8] Maxey complains that it was improper for the jury to receive the Kazalyn[9] instruction on deliberation and premeditation. However, Maxey's conviction preceded Byford, and we have held that with such convictions "neither the use of the Kazalyn instruction nor the failure to give instructions equivalent to those set forth in Byford provides grounds for relief."[10] Furthermore, regardless of the evidence of deliberation and premeditation in this case, the State also prosecuted Maxey under a theory of first-degree felony murder, the evidence for which was indisputable.[11]

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[7]Cf. Robins v. State, 106 Nev. 611, 627, 798 P.2d 558, 568 (1990) (concluding that given overwhelming evidence of the aggravated nature of appellant's crime, any error in admitting penalty-phase evidence of his gang affiliation was harmless beyond a reasonable doubt).

[8]116 Nev. 215, 994 P.2d 700 (2000).

[9]Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992).

[10]Garner v. State, 116 Nev. 770, 789, 6 P.3d 1013, 1025 (2000).

[11]See Rhyne v. State, 118 Nev. ___. ___. 38 P.3d 163, 169 (2002) (stating that as long as both prosecution theories are legally sufficient, a verdict will stand even if one theory is factually unsupported).

Finally, Maxey challenges the jury instruction on reasonable doubt, which is based on NRS 175.211(1). This challenge has no merit. We have upheld use of this instruction where the jury was also instructed concerning the presumption of innocence and the State's burden of proof.[12] Such was the case here.

None of Maxey's claims warrants relief. However, we remand this matter to the district court to correct the following errors in Maxey's sentence. First, the court enhanced the sentence for conspiracy to commit robbery (count II) for use of a deadly weapon. This enhancement must be vacated because a conspiracy charge cannot be enhanced in this manner.[13] Second, the court failed to enhance the sentence for first-degree murder (count V) for Maxey's use of a deadly weapon. An equal, consecutive prison term must be added on this count as required by NRS 193.165(1). Third, the court enhanced the sentence for battery with use of a deadly weapon (count XIV) for use of a deadly weapon. This enhancement must be vacated because use of a deadly weapon is a necessary element of the crime itself and cannot serve to enhance the sentence.[14] Accordingly, we

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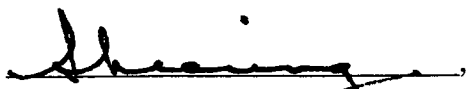
[12]See, e.g., Bollinger v. State, 111 Nev. 1110, 1115, 901 P.2d 671, 674 (1995).

[13]See Moore v. State, 117 Nev. ___, 27 P.3d 447 (2001).

[14]See NRS 200.481(2)(e); NRS 193.165(3).

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court to correct appellant's sentence as directed by this order.

 , J.
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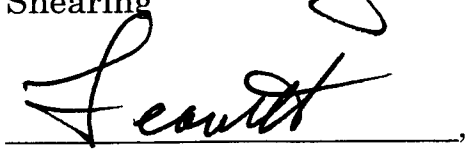 , J.
Leavitt

 , J.
Becker

cc: Hon. Mark W. Gibbons, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk