IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS KEITH KIEREN, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36345

FILED

FEB 8 2002

JANETTE M BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction of first degree murder with the use of a deadly weapon and from a district court order denying a motion for a new trial. The district court sentenced appellant Kieren to serve two consecutive terms of life in prison without the possibility of parole. On appeal, Kieren makes several arguments.

First, Kieren argues that the trial court abused its discretion by prohibiting him from presenting character evidence of Broyles' propensity for violence. We disagree.

At trial, during direct examination of Kieren, the following testimony was solicited:

> Q What occurred next after [Broyles] grabbed the knife?
>
> A [Broyles] made some off hand comment about me going to the police about a murder that he committed in San Bernardino.

Upon hearing Kieren's response, the State objected to the comment as self-serving and totally improper. The court sustained the objection. The parties approached the bench, and an off-the-record discussion was held. After the discussion, the district court struck Kieren's last statement and admonished the jury to disregard it in its entirety.

In Petty v. State,[1] this court stated it "will overturn a district court's decision to admit or exclude evidence only when there has been an abuse of discretion." This court has also observed that

> [w]hen it is necessary to show the state of mind of the accused at the time of the commission of the offense for the purpose of establishing self-defense, specific acts which tend to show that the deceased was a violent and dangerous person may be admitted, provided that the specific acts of violence of the deceased were known to the accused or had been communicated to him.[2]

We find that Kieren's characterization of the statement as an "off-hand comment" profoundly undermines his assertion that the statement was to be offered to show that he was afraid of Broyles and thus acted in self-defense at the time of the shooting. On the contrary and unlike Petty, the evidence showed that Kieren was not afraid of Broyles as he retrieved his gun, began looking through the rooms, commando style, in search of Broyles until he found Broyles in the garage, and shot him multiple times at close range. Thus, we conclude that the district court did not abuse its discretion in excluding the evidence because the statement was not offered to show that Kieren was in fear of Broyles at the time of the shooting.

Second, Kieren argues that misconduct of the prosecutor in improperly referencing Kieren's prior arrest for impersonating a police officer prejudiced him and the district court abused its discretion by denying his motion for a mistrial. We disagree. Although the prosecutor's

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[1]116 Nev. 321, 325, 997 P.2d 800, 802 (2000).

[2]Burgeon v. State, 102 Nev. 43, 45-46, 714 P.2d 576, 578 (1986).

reference to the prior arrest was improper, Kieren was not prejudiced due to the overwhelming evidence proffered against him.[3] We, therefore, conclude that the district court did not abuse its discretion by denying Kieren's motion for a mistrial.

Third, Kieren argues that the district court committed reversible error by giving self-defense jury instructions that were confusing, ambiguous, and which both shifted and reduced the State's burden of proof. We disagree. We conclude that this argument lacks merit because Kieren did not object to the instructions during trial and we find that there was no plain error affecting substantial rights belonging to Kieren.[4]

Fourth, Kieren argues that the district court erred by denying his motion for a new trial based upon newly-discovered evidence. We disagree. We conclude that the district court did not err because Kieren knew about the alleged conversation between Woods and Ogletree prior to trial and solicited testimony concerning the contents of the conversation at trial. Moreover, we find that a different result is not probable on retrial, and the proffered evidence would simply be an attempt to contradict or impeach Woods.[5]

Finally, after careful consideration, we conclude that Kieren's remaining arguments that the statutory reasonable doubt instruction is unconstitutional, that he was denied a fair trial when the jury was not

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[3]State v. Carroll, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993).

[4]Cordova v. State, 116 Nev. 664, 6 P.3d 481 (2000).

[5]Hennie v. State, 114 Nev. 1285, 1290, 968 P.2d 761, 764 (1998).

instructed on the element of deliberation in first degree murder, and that the cumulative effect of errors denied him a fair trial lack merit.

Having considered Kieren's contentions, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

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