IN THE SUPREME COURT OF THE STATE OF NEVADA

LLOYD ASKINS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36568

FILED

NOV 13 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF 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. Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

Last year, this court affirmed the conviction of appellant Lloyd Askins but vacated his sentence and remanded for a new penalty hearing.[1] After the second penalty hearing, Askins was again sentenced to two consecutive terms of life in prison without possibility of parole. Askins contends that he was improperly precluded from presenting mitigating testimony by some witnesses that it appeared the victim was reaching for a gun when the fatal confrontation occurred with Askins.

We discern two questions to be resolved. The first is whether testimony that the victim appeared to be reaching for a gun was admissible mitigating evidence or inadmissible evidence relating to the issue of guilt. If it was mitigating evidence, the second question is whether the district court excluded it.

The State argues that Askins was attempting to present evidence that he acted in self-defense and that this was improper because the issue of guilt had already been decided by the jury in the guilt phase. This court has ruled that "because the penalty phase of a capital case is conducted after the defendant has been found guilty of first-degree

[1]Askins v. State, Docket No. 33207 (Order of Remand, January 26, 2000).

01-18899

murder, the issue of guilt should not be addressed again by the jury."[2] Therefore, Askins was not entitled to raise the defense of self-defense again at the penalty hearing. This does not mean, however, that he could not present evidence to support a theory that he believed, unreasonably, that he was acting to protect himself.

A circumstance can be mitigating "even though [it] is not sufficient to constitute a defense or reduce the degree of the crime."[3] And a defendant can offer as a mitigating circumstance a statutorily enumerated circumstance or "[a]ny other mitigating circumstance."[4] Applying similar statutory provisions, the California Supreme Court recognized that a jury must be permitted to consider as a mitigating circumstance that the defendant held an unreasonable belief in the need for self-defense.[5] Therefore, even a mistaken, unreasonable belief in the need for self-defense is a less blameworthy state of mind than sheer revenge or anger or similar motivation, and Askins had a right to make this case to the jury.

The next question is whether the district court ruled that the defense could not present evidence of such an unreasonable belief. Before the jury heard any argument or evidence, the parties argued whether the defense could present such evidence. Several times the district court indicated its agreement with the State's argument that any evidence relating to "self-defense" should be excluded. At the same time, the court also indicated that it would allow the defense to present some evidence as to the "characteristics of the victim" and "the nature of the offense." The court's final statement on the issue was: "[T]here's some point in which the jury needs to know the nature of the offense, itself, as some relevance to a sentence, and we'll let it go in terms of making rulings on the bench." During the hearing, the defense did not attempt to present any testimony

---

[2]Evans v. State, 112 Nev. 1172, 1202, 926 P.2d 265, 284 (1996).

[3]NRS 200.035.

[4]Id.; see also NRS 175.552(3).

[5]See People v. Murtishaw, 773 P.2d 172, 181 (Cal. 1989); cf. State v. Walton, 650 P.2d 1264, 1277 (Ariz. Ct. App. 1982) (considering as mitigating circumstance evidence of provocation and need for self-defense although jury did not find evidence sufficient to justify acquittal or lesser offense).

that the victim appeared to be reaching for a gun when Askins shot him. We conclude that the district court's ruling was neither final nor strictly contrary to the defense's position.

This court has stated that a ruling on a motion in limine is advisory, not conclusive, and may be modified or reversed at trial.[6] In Staude v. State, this court held that "after denial of a pretrial motion to exclude evidence, a party must object at the time the evidence is sought to be introduced in order to preserve the objection for appellate review."[7] Here, even if the district court had definitively ruled before the hearing to exclude the evidence, under the above case law the ruling was only advisory and could have been modified or reversed during the hearing. Therefore, we conclude that the defense was obliged to proffer the evidence at issue to preserve the matter for appeal. Particularly given the tentative, qualified nature of the district court's ruling in this case, we consider it fair and proper to conclude that the issue is not properly presented on appeal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

cc: Hon. Steven P. Elliott, District Judge
Attorney General
Washoe County District Attorney
Washoe County Public Defender
Washoe County Clerk

---

[6]Rice v. State, 113 Nev. 1300, 1311, 949 P.2d 262, 269 (1997); Staude v. State, 112 Nev. 1, 5, 908 P.2d 1373, 1376 (1996).

[7]112 Nev. at 5, 908 P.2d at 1376.