IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRIS TREMEL TAYLOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36653

FILED

AUG 21 2002

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

ORDER OF AFFIRMANCE

Darris Taylor appeals from his conviction of robbery with the use of a deadly weapon and first-degree murder with the use of a deadly weapon. We conclude that none of Taylor's arguments has merit, and accordingly, we affirm the district court's judgment of conviction.

First, Taylor argues that there was insufficient evidence presented at trial to support the convictions because no physical evidence linked him to the crime. The conviction will stand if "'after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[1]

Although Taylor's conviction was based on circumstantial evidence, this court has consistently upheld convictions based on circumstantial evidence.[2] Additionally, although Taylor asserts that he offered a reasonable explanation for why he possessed Rayford's belongings, "[t]he jury is at liberty to reject the defendant's version of

[1]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[2]Crawford v. State, 92 Nev. 456, 457, 552 P.2d 1378, 1379 (1976).

events."[3] Generally, "'it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony.'"[4]

After Charles Rayford's death, Taylor was in possession of many of Rayford's belongings including clothes. Rayford was found dead in his underwear and undershirt. Additionally, the State produced a witness that testified that Taylor solicited her help in committing the murder. Based on this evidence, in addition to statements made by both Taylor and Rayford, a rational trier of fact could have found the essential elements of murder in the first degree and robbery. Accordingly, sufficient evidence existed to sustain Taylor's convictions.

Second, Taylor argues that the jury instruction regarding circumstantial evidence was improper because the law makes a distinction between direct and circumstantial evidence. We have already determined that circumstantial evidence should not be subjected to stricter scrutiny than direct or testimonial evidence.[5] Additionally, a conviction can be based on circumstantial evidence alone.[6] Accordingly, the district court properly instructed the jury regarding circumstantial evidence.

Third, Taylor argues that the State improperly quantified the reasonable doubt standard during closing argument. The State commented that the perception of the standard for reasonable doubt was

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[3]Porter v. State, 94 Nev. 142, 146, 576 P.2d 275, 278 (1978).

[4]DeChant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000) (quoting Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994)).

[5]Bailey v. State, 94 Nev. 323, 325, 579 P.2d 1247, 1249 (1978).

[6]Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980).

that of Mt. Everest. When erroneous attempts to quantify reasonable doubt are made, this court must address whether the error caused prejudice to the appellant.[7] We have previously concluded that when, as here, the jury receives the instruction defining reasonable doubt as mandated by NRS 175.211, then an improper quantification of reasonable doubt made in argument is not prejudicial.[8] Since the jury here received the definition from NRS 175.211, the State's comments amounted to harmless error.

Fourth, Taylor argues that the district court abused its discretion by admitting testimony from a parole and probation officer during the sentencing hearing. The parole and probation officer read from a presentence investigation report that she had prepared, which listed all of Taylor's prior arrests. The officer also testified from the report that Taylor had been adjudicated as a habitual criminal.

NRS 175.552 provides that during 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 the sentence, whether or not the evidence is ordinarily admissible. "So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed."[9] Taylor's prior arrest record is relevant to his sentencing and is not "highly

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[7]Lord v. State, 107 Nev. 28, 35, 806 P.2d 548, 552 (1991).

[8]Id.

[9]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

suspect" evidence. Further, the record does not reflect that the admission of the presentence report prejudiced Taylor. Accordingly, the district court did not abuse its discretion by admitting testimony regarding Taylor's presentence report.

Finally, Taylor argues that the district court abused its discretion by admitting: (1) the bullet found in Taylor's bedroom ceiling; (2) testimony as to statements Akilah City made to the police; (3) a police officer's opinion testimony as to the identification of the killer; (4) testimony mentioning Taylor and Rayford's gang affiliations; and (5) testimony of statements Rayford made to J. B. Starks.

Taylor argues that the bullet found in his bedroom ceiling lacked relevance and probative value, was highly prejudicial and was admitted for the sole purpose of showing Taylor's violent nature. "NRS 48.035 provides that evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or confusing the jury."[10] The district court erred in admitting the bullet into evidence. Although the bullet came from the same caliber handgun as that used to kill Rayford, the bullet in Taylor's bedroom ceiling was too deformed to determine if it came from the same handgun used to kill Rayford. Additionally, the State could not determine how long the bullet had been lodged in Taylor's ceiling, or whether Taylor had been responsible for firing the bullet into the ceiling.

We deem the admission of the bullet to be harmless error. The improper admission of evidence constitutes harmless error "[w]here the

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[10]Sonner v. State, 112 Nev. 1328, 1339, 930 P.2d 707, 714 (1996).

independent evidence of guilt is overwhelming."[11] Here, Taylor possessed Rayford's clothes and personal effects shortly after Rayford's murder. Approximately three hours after Rayford's murder, Taylor called Rayford's girlfriend on Rayford's cellular phone and lied to her, telling her that he had not seen Rayford during his stay in Las Vegas. Additionally, Taylor solicited Akilah City's help in a robbery and murder, and admitted to a friend that he had participated in the murder. Taken together, these facts provide overwhelming evidence of Taylor's guilt, and therefore, the admission of the bullet from Taylor's ceiling constituted harmless error.

Next, Taylor argues that the district court erred in admitting testimony of Akilah City's statements to the police. The district court admitted statements City made to police under NRS 51.075. NRS 51.075(1) provides that "[a] statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though [s]he is available." Since the police officer told City before she gave a statement that he could not help her in regard to other charges for which she was in custody at the time of her statement, City did not have any motive to lie to the police in exchange for a reduced sentence on her pending charges. Accordingly, it was within the proper exercise of discretion of the trial judge to determine that there was a sufficient aspect of trustworthiness in City's statement to the police.

Although City did not testify to it at trial, the police officer testified that City stated that Taylor had a small caliber handgun either before or after Rayford's murder. The admission of this testimony

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[11]Turner v. State, 98 Nev. 243, 246, 645 P.2d 971, 972 (1982).

constituted harmless error, as it was one sentence over the course of a six-day trial and as there was other overwhelming evidence to convict Taylor.

Next, Taylor argues that the district court erred by allowing a police officer's opinion testimony. The officer testified that based on the evidence he had seen, Taylor was the suspect who shot Rayford. NRS 50.265 provides that when a witness is not an expert, yet offers opinion testimony, the testimony is limited to opinions that are "[r]ationally based on the perception of the witness" and "[h]elpful to a clear understanding of his testimony or the determination of a fact in issue." Here, the district court admonished the jury that the detective was merely stating his opinion as a homicide investigator, not as an expert. Further, the detective's response sought to clarify a jury member's question. Accordingly, the district court did not err in admitting the police officer's opinion testimony.

Taylor's last argument with respect to the district court's admission of testimony is in regard to testimony from J.B. Starks. Starks testified to statements, which the district court allowed under the "state of mind" hearsay exception, made by Rayford about his intention to stay in Las Vegas to receive drugs from Taylor. Starks also discussed Taylor and Rayford's gang affiliation, in violation of a court order precluding all gang references. However, the district court denied Taylor's request for a mistrial based on Starks' testimony.

"Denial of a mistrial is within the sound discretion of the district court, and that ruling will not be reversed unless it was an abuse of discretion."[12] In determining whether the district court abused its

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[12]Lisle v. State, 113 Nev. 679, 700, 941 P.2d 459, 473 (1997).

discretion in denying Taylor's request for a mistrial, Taylor must prove that the reference to Taylor's gang affiliation "'was so prejudicial as to be unsusceptible to neutralizing by an admonition to the jury.'"[13] In determining this, four factors may be considered: "(1) whether the remark was solicited by the prosecution; (2) whether the district court immediately admonished the jury; (3) whether the statement was clearly and enduringly prejudicial; and (4) whether the evidence of guilt was convincing."[14]

Applying the above factors, the district court did not abuse its discretion in denying Taylor's request for a mistrial. The remark was not solicited by the State, the district court immediately admonished the jury to ignore the comment, the statement was one brief statement over the course of a six-day trial and there was sufficient evidence, albeit circumstantial, to support the conviction. Accordingly, the district court did not abuse its discretion.

Taylor also contends that the district court improperly admitted "numerous statements" by Rayford, most of which concern telephone conversations between Rayford and Starks, under the state of mind hearsay exception. NRS 51.105(1) provides that "[a] statement of the decedent's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health, is not admissible under the hearsay rule." In Lisle, a

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[13]Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996) (quoting Allen v. State, 99 Nev. 485, 490, 665 P.2d 238, 241 (1983)).

[14]Id. at 942, 920 P.2d at 995-96 (citing Allen, 99 Nev. at 490-91, 665 P.2d at 241-42).

murder victim's statements that he was to go out with the appellant were admitted to show the victim's intention to perform that act.[15] Here, Starks' testimony of his conversation with Rayford is likewise admissible as evidence of Rayford's intention to stay in Las Vegas to receive cocaine from Taylor as payment for posting bail.

We conclude that none of Taylor's arguments has merit. Accordingly, we ORDER the judgment of the district court AFFIRMED.

Young, J.
Young

Agosti, J.
Agosti

Leavitt, J.
Leavitt

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

[15]113 Nev. at 691, 941 P.2d at 467.