IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD W. COLLINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37061

FILED

MAY 10 2002

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

ORDER OF AFFIRMANCE

Appellant Ronald W. Collins appeals from a judgment of conviction entered after a jury found him guilty of first-degree murder with the use of a deadly weapon. Collins challenges his conviction on various grounds. We conclude that all of his arguments lack merit, and we affirm his conviction.

Collins first contends that the district court erred in admitting Melanie Collins' written statement as an excited utterance. We conclude that the district court's determination was not manifestly wrong.[1] Indeed, the record supports the district court's finding that Melanie's written statement was an excited utterance: Melanie found her husband lying next to the victim; Melanie called 911 and she remained at the scene of the crime when the police arrived; and when she made her written statement, the stand-off between the police and her husband was still in progress.

Collins next contends that the State indirectly placed Melanie's verbal statement to Officer Melissa Chavez before the jury in

[1]See Keeney v. State, 109 Nev. 220, 228, 850 P.2d 311, 316 (1993) (noting that the determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed on appeal unless manifestly wrong), overruled on other grounds, Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000).

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violation of the State's agreement not to do so. In particular, Collins asserts that the district court erred by permitting the prosecutor to preface his questions to the police officers: "Without telling me what she said." We first note that Collins failed to object to the prosecutor's prefaces. However, this court may consider sua sponte plain error which affects the defendant's substantial rights, if the error either: "(1) had a prejudicial impact on the verdict when viewed in the context of the trial as a whole; or (2) seriously affects the integrity or public reputation of the judicial proceedings."[2] We conclude that contrary to Collins' contention, the prosecutor was actually protecting Collins' rights by attempting to control the police officers' testimonies. Thus, we conclude that there was no plain error.

Collins next asserts that the prosecutor, while cross-examining Collins, improperly commented on Melanie's decision to invoke her marital privilege when the prosecutor referred to Melanie's statements to Collins. We conclude that Collins' contention lacks merit because the district court cured any prejudice that may have resulted when it sustained Collins' objection and instructed the jury to disregard the reference.[3]

Collins next argues that when the prosecutor cross-examined Dr. Mortillaro, he improperly commented on Collins' post-arrest silence.

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[2]Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993) vacated on other grounds, 516 U.S. 1037 (1996); see also NRS 178.602.

[3]See Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980) (noting that a statement made during trial that may have resulted in prejudice to the defendant may be cured by the trial court's admonition to the jury).

Even assuming the comment was improper, we conclude that any prejudice that may have resulted was cured by the district court's admonition to the jury.[4]

While acknowledging his failure to object, Collins next contends that the district court committed plain error by failing to cure instances of prosecutor misconduct.[5] Specifically, Collins directs our attention to three instances from the prosecutor's closing argument in which Collins alleges that the prosecutor impermissibly stated his opinion, improperly argued to the jury that Collins was a liar, and impermissibly argued matters not supported by evidence. We conclude that even if there was any prosecutor misconduct, it was insufficient to amount to reversible plain error.[6]

Collins next challenges the sufficiency of evidence that supports his conviction. His specific concern is that there was insufficient evidence of deliberation, pointing to the chaotic nature of his house, and Dr. Mortillaro's testimony that Collins' ability to make decisions was impaired because of Collins' head injury and the consumption of alcohol. The State presented evidence that several knives from Collins' kitchen were found in his truck. Correspondingly, two witnesses testified that the

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[4]See Allen v. State, 91 Nev. 78, 83, 530 P.2d 1195, 1198 (1975) (stating that the trial court's admonition to the jury "adequately cured the error"); see also Owens, 96 Nev. at 883, 620 P.2d at 1238.

[5]See Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986) (noting that this court may review errors that are "patently prejudicial," regardless of counsel's failure to object); see also Libby, 109 Nev. at 911, 859 P.2d at 1054; NRS 178.602.

[6]See Libby, 109 Nev. at 911, 859 P.2d at 1054.

knife that killed Agnes Ready looked like a kitchen knife. Also, there was blood and fingerprint evidence found in Collins' truck. Based on this, we conclude that after viewing the evidence in the light most favorable to the prosecution and even though the evidence was circumstantial, there was sufficient evidence of deliberation to sustain Collins' conviction.[7] Although Collins presented expert testimony that his ability to make decisions was impaired, we note that the jury was entitled to reject this theory and draw the conclusion that Collins had the ability to deliberate first-degree murder.[8]

Collins alleges various instances of error regarding the jury instructions given at his trial: the premeditation instruction was improper; the refusal to give his proposed conflicting evidence instruction was error; and, the malice and reasonable doubt instructions were unconstitutional. First, we conclude that the district court did not abuse its discretion in giving its premeditation instruction and in refusing

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[7]See Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (noting that if the sufficiency of evidence is challenged, this court must view the evidence in the light most favorable to the prosecution, and determine whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'" (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original))); see also Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981) (stating that "the jury must be given the right to make logical inferences which flow from the evidence"); Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980) (noting that "circumstantial evidence alone may sustain a conviction").

[8]See Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994) (noting that "it is exclusively within the province of the trier of fact to weigh evidence and pass credibility of witnesses and their testimony").

Collins' conflicting evidence instruction.[9] Next, we recently addressed the constitutionality of the same malice instruction in Leonard v. State,[10] in which we rejected similar arguments made by Collins and concluded, "[T]he malice instructions as a whole were sufficient."[11] Finally, we have previously addressed the constitutionality of Nevada's statutory instruction on reasonable doubt, the instruction given here, and we have consistently held that it meets constitutional standards.[12] Thus, we conclude that Collins' jury instruction challenges lack merit.

Collins next argues that the district court erred in allowing the prosecutor to question him on cross-examination concerning the details of his prior felony conviction. We disagree.[13] Collins' counsel opened the door on direct examination when he asked Collins about the facts surrounding his prior conviction. The prosecutor did not exceed the scope of direct examination because the prosecutor was permitted to impeach Collins regarding his characterization of the facts surrounding his prior conviction.

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[9]See Jackson v. State, 117 Nev. ___, ___, 17 P.3d 998, 1000 (2001) (reviewing the district court's decision regarding jury instructions under an abuse of discretion standard). We encourage the district court to continue using the Byford instruction without any modification. See Byford v. State, 116 Nev. 215, 237, 994 P.2d 700, 714 (2000).

[10]117 Nev. ___, ___, 17 P.3d 397, 413 (2001).

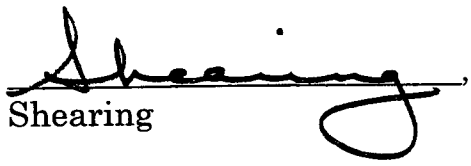
[11]Id.

[12]See Chambers v. State, 113 Nev. 974, 982-83, 944 P.2d 805, 810 (1997); Hutchins v. State, 110 Nev. 103, 112, 867 P.2d 1136, 1142 (1994); Riley v. State, 107 Nev. 205, 214, 808 P.2d 551, 556 (1991); Lord v. State, 107 Nev. 28, 40, 806 P.2d 548, 556 (1991).

[13]See Keeney, 109 Nev. at 228, 850 P.2d at 316.

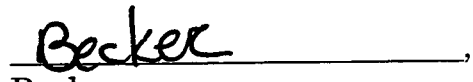
Finally, we conclude that Collins' cumulative error argument lacks merit. Accordingly we,

ORDER the judgment of the district court AFFIRMED.



_____, J.
Shearing

_____, J.
Rose



_____, J.
Becker

cc: Hon. Joseph T. Bonaventure, District Judge
David M. Schieck
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk