IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH JOSEPH SHANLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37120

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of discharging a firearm at or into a structure, conspiracy to commit murder, burglary while in possession of a firearm, attempt murder with use of a deadly weapon, and first degree murder with use of a deadly weapon. Following the jury's verdict, the district court sentenced appellant Keith Shanley to twenty-four to sixty months for discharging a firearm into a structure, twenty-four to ninety-six months for the conspiracy count, thirty-five to 156 months for the burglary count, forty-three to 192 months for the attempt murder count, and life with the possibility of parole after twenty years for the murder count. Shanley was given equal and consecutive terms for the weapon enhancement for the attempt murder and murder counts. These counts were also ordered to run consecutively.

Shanley first argues that the testimony of Rosa Licea and Lupe Harris regarding statements that they overheard while eavesdropping on conversations between Johnson, Acosta and Shanley constituted inadmissible hearsay.

In order to preserve an issue for appeal, the defendant must lodge objections to alleged errors at trial.[1] Furthermore, "[w]here evidence is admitted over a defendant's objection at trial, new grounds for objection may not be raised on appeal."[2] Here, Shanley objected to Licea's testimony based on speculation and foundation grounds, but never made a hearsay objection with respect to Licea's testimony. Since no objection on hearsay grounds was launched at trial with regard to Licea's testimony, we need not consider this argument.

Harris testified that she overheard conversations between Johnson, Acosta and Shanley regarding Shanley's desire to get back at Conley by beating him up, and that these conversations took place before the murder.

> NRS 51.035(3)(e) provides that:
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> "Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless:
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> . . .
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> 3. The statement is offered against a party and is:
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> . . .
>
> (e) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

"For NRS 51.035(3)(e) to apply, the existence of the conspiracy must be established by independent evidence."[3] Furthermore, "statements made

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[1]McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

[2]Geer v. State, 92 Nev. 221, 224, 548 P.2d 946, 947 (1976) (citing O'Briant v. State, 72 Nev. 100, 295 P.2d 396 (1956)).

[3]Crew v. State, 100 Nev. 38, 46, 675 P.2d 986, 991 (1984).

by a coconspirator to a third party who is not then a member of the conspiracy are in furtherance of the conspiracy only if they are designed to induce that party to join the conspiracy or act in a way that would assist the conspiracy's objectives."[4]

Here, evidence was provided that Johnson, Acosta and Shanley met several times to discuss killing Conley. Shanley and Acosta agreed that Acosta would be paid $7,000.00 and a van. Johnson was also to receive $1,200.00 and a 1986 Chevrolet Camaro IROC for his role. Shanley also told Renda that he was going to kill Conley. We conclude that there was substantial independent evidence presented of the existence of a conspiracy. Shanley claims that Harris was a third party who was not being induced to join a conspiracy, and therefore, the statements she overheard were inadmissible hearsay. However, the statements of which Harris provided testimony were not made to Harris as a third party. Rather, they were made to coconspirators and overheard by Harris. Since Harris testified that she overheard statements made by the coconspirators before the crime was committed, the statements were made during the course and in furtherance of the conspiracy, and were offered against Shanley pursuant to NRS 51.035(3)(e). Therefore, we conclude that the district court did not err in allowing Harris' testimony.

Shanley next contends that the State violated Brady v. Maryland[5] when it failed to provide the statements to Shanley before Harris took the stand. We disagree.

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[4]Wood v. State, 115 Nev. 344, 349, 990 P.2d 786, 789 (1999) (quoting United States v. Shores, 33 F.3d 438, 444 (4th Cir. 1994)).

[5]373 U.S. 83 (1963).

Whether the State adequately disclosed information under Brady involves both factual and legal questions and requires a de novo review by this court.[6] Brady established the rule that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.[7] Failure to disclose such information violates due process regardless of the prosecutor's motive.[8] Further, "materiality does not require demonstration by a preponderance that disclosure of the . . . evidence would have resulted [in] acquittal."[9] A reasonable probability is shown when the non-disclosure undermines confidence in the outcome of the trial.[10] Evidence must also be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the State's witnesses.[11]

Here, the State did not provide Shanley with any notice regarding Harris' testimony of the statements she overheard while eavesdropping. Shanley objected, and outside the presence of the jury, the State admitted that the statements had been elicited the day before the witness took the stand. The State also admitted to taking notes of the

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[6]See Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

[7]373 U.S. at 87; see Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996).

[8]Id.

[9]Kyles v. Whitley, 514 U.S. 419, 434 (1995).

[10]Id.

[11]See id. at 442 n.13, 445-51.

interview with Harris the day before she took the stand. The district court questioned the public defender regarding whether or not his office had interviewed Harris. The public defender responded affirmatively, explaining that an investigator had spoken with Harris months prior to her testimony. The district court then overruled Shanley's objection, and allowed the testimony.

Brady specifically applies to evidence "favorable" to the defense. In addition, NRS 174.235(1)(a) provides that the prosecutor must allow the defendant to inspect written and recorded statements or confessions made by the defendant. Here, the information Shanley complains of being denied is hardly favorable to his defense. Also, Shanley's statements were neither written nor recorded. Rather, Harris overheard the statements while eavesdropping. Harris also made no written record of what she heard. The prosecutor merely took notes from the interview with Harris. NRS 174.235(2)(a) provides that "[t]he defendant is not entitled . . . to the discovery or inspection of . . . [a]n internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case." Therefore, we conclude that the State did not violate Brady and that the district court did not err in allowing Harris' testimony.

Shanley also claims that the Las Vegas Metropolitan Police Department had possession of the vehicle which the State alleges was used to pay Johnson for his role in the murder but failed to preserve the vehicle, thereby causing undue prejudice to Shanley. We disagree.

Failure to preserve evidence is reversible error when there is prejudice or when the state has acted in bad faith.[12] In order to establish that a defendant has been deprived of due process, he must show that the state acted in bad faith, or the failure to preserve the evidence caused undue prejudice to the defendant's case and "the evidence possessed an exculpatory value that was apparent before the evidence was destroyed."[13]

Here, the State alleged that Shanley paid Johnson for his participation in the murder with cash and a 1986 Chevrolet Camaro IROC. On January 12, 2000, the district court heard arguments on Shanley's motion to dismiss for failure to preserve evidence. Shanley argued that none of the witnesses could testify to the actual value of the car, and that he was prejudiced because he was unable to show that the car was not of sufficient value to be consideration. The district court disagreed, concluding that the State properly returned the vehicle to its rightful owner, and that any expert could provide an opinion as to the value of the car based on descriptions provided by people who saw the car at the time of the transfer. We conclude that the loss of the vehicle was not due to bad faith, and that Shanley suffered no undue prejudice. The precise value of the car in no way exculpated Shanley, and was only significant to the extent that it was partial consideration for Johnson's participation in the crime.

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[12]Cook v. State, 114 Nev. 120, 125, 953 P.2d 712, 714 (1998).

[13]Mortensen v. State, 115 Nev. 273, 283, 986 P.2d 1105, 1112 (1999) (quoting Sheriff v. Warner, 112 Nev. 1234, 1239-40, 926 P.2d 775, 778 (1996) (citations omitted)).

In addition, Shanley contends that a new trial should be granted due to the gross disparity between the plea negotiations offered to Acosta and Shanley's sentence in this case. We disagree.

Pursuant to NRS 176.515(1), a district court may grant a new trial due to newly discovered evidence. The decision to grant or deny a motion for new trial on this ground will not be disturbed absent an abuse of discretion.[14] Here, Shanley filed a motion for a new trial on September 22, 2000, based on information regarding Acosta's plea agreement. The district court denied Shanley's motion for a new trial, holding that Shanley did not present any new evidence. Upon a review of the record, we conclude that Shanley presented no new evidence that would warrant a new trial, and that fundamental fairness does not require reversal merely because Acosta obtained a better negotiation for his cooperation than Shanley. When a criminal trial involves multiple defendants, "the innocence or guilt of each [defendant] must depend upon the evidence introduced against him and if convicted the lack of evidence or the miscarriage of justice insofar as his co-defendant is concerned is immaterial."[15]

Shanley also claims that there was insufficient evidence to support the existence of a conspiracy involving Johnson, and that the district court erred in allowing Johnson's testimony regarding statements made by Acosta in the absence of evidence to support a conspiracy. Shanley further claims that the Confrontation Clause of the Sixth

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[14]McCabe v. State, 98 Nev. 604, 608, 655 P.2d 536, 538 (1982).

[15]Hilt v. State, 91 Nev. 654, 662, 541 P.2d 645, 650-51 (1975) (quoting People v. Taylor, 199 P.2d 751, 754-55 (Cal. App. 2 Dist. 1948)).

Amendment of the United States Constitution was violated due to this use of hearsay evidence when Acosta did not testify.

"[B]efore an out-of-court statement by an alleged co-conspirator [sic] may be admitted into evidence against a defendant, the existence of a conspiracy must be established by independent evidence, and the statement must have been made during the course of and in furtherance of the conspiracy."[16] In addition, this court has held that the coconspirator exception is applicable upon a showing, by at least slight independent evidence, that a conspiracy existed.[17]

As discussed above, there was more than slight independent evidence of a conspiracy in this case. Therefore, Johnson's testimony was not inadmissible hearsay, and the district court properly allowed the testimony.[18]

Shanley argues that Nevada's statutory reasonable doubt instruction pursuant to NRS 175.211 is unconstitutional because it improperly quantifies reasonable doubt. This court, as well as the United States Ninth Circuit Court of Appeals, has held that this jury instruction,

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[16]Wood, 115 Nev. at 349, 990 P.2d at 789; see also Carr v. State, 96 Nev. 238, 239, 607 P.2d 114, 116 (1980).

[17]See Fish v. State, 92 Nev. 272, 275, 549 P.2d 338, 340 (1976); Peterson v. Sheriff, 95 Nev. 522, 598 P.2d 623 (1979).

[18]Shanley also argues that Bruton v. United States, 391 U.S. 123 (1968) was violated due to the admission of Acosta's testimony. However, Bruton involved the Court's concern for a jury's ability to consider one statement against a defendant, but ignore the same statement against a co-defendant in the same trial. Here, there is no concern for jury confusion regarding the statement. Therefore, Bruton is inapplicable.

as recited in NRS 175.211, is constitutional.[19] Therefore, we conclude that this argument is without merit.

Lastly, Shanley argues that the jury instruction provided was improper because it instructed the jury that a person is in constructive possession of a thing if he has both the "power and intention" to exercise control of the thing.

This court held that "the possession necessary to justify statutory enhancement may be actual or constructive . . . . Constructive . . . possession may occur only where the unarmed participant has knowledge of the other offender's being armed, and where the unarmed offender has . . . the ability to exercise control over the firearm."[20] Quoting Black's Law Dictionary, this court stated that "[a] person, who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or [indirectly], is then in constructive possession of it."[21]

In Anderson v. State, the deadly weapon enhancement to the defendant's conviction was upheld because, although the defendant was unarmed during the perpetration of the crime, he had knowledge that a gun would be used by his accomplice. This court concluded that when "the unarmed assailant has knowledge of the use of the gun and by his actual presence participates in the robbery, the unarmed offender benefits from

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[19]See Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1999); Ramirez v. Hatcher, 136 F.3d 1209, 1211 (9th Cir. 1998), cert. denied, 525 U.S. 967 (1998).

[20]Anderson v. State, 95 Nev. 625, 630, 600 P.2d 241, 244 (1979); see also United States v. Cousins, 427 F.2d 382, 384 (9th Cir. 1970).

[21]Palmer v. State, 112 Nev. 763, 768, 920 P.2d 112, 116 (1996).

the use of the other robber's weapon, adopting derivatively its lethal potential."[22]

Here, witnesses testified that Shanley arranged for the crime to take place. However, Shanley did not have actual possession of a deadly weapon, nor was he present during the commission of the crime. We conclude that the circumstances here, unlike Anderson, do not demonstrate that Shanley exercised constructive control over the weapon, Therefore, the district court erred in providing the constructive possession instruction. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to amend the judgment of conviction consistent with this order.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Sally L. Loehrer, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

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[22]95 Nev. at 630, 600 P.2d at 244.