IN THE SUPREME COURT OF THE STATE OF NEVADA

FABIAN FUENTES ROSAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37152

FILED

DEC 17 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of two counts of murder with the use of a deadly weapon and one count each of conspiracy to commit murder, ~~conspiracy to commit~~ robbery with ~~the~~ use of a deadly weapon, and conspiracy to violate the Uniform Controlled Substances Act. Appellant, Fabian Fuentes Rosas, was sentenced to multiple terms of imprisonment, including two terms of life in Nevada State Prison without the possibility of parole plus two equal and consecutive terms of life for the use of a deadly weapon.

Rosas first contends that the district court erred by denying his motion to dismiss because a plea agreement in an unrelated case precluded the state from charging him in this case.

When the State enters into a plea agreement, it "is held to 'the most meticulous standards of both promise and performance.' . . . The violation of the terms or 'the spirit' of the plea bargain requires reversal."[1] The usual remedies for violation of a plea bargain are to allow the criminal defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain.[2]

The record supports the district court's determination that ~~the~~ more of the ~~murder~~ charges in this case were ~~not~~ contemplated when the parties entered into the October 1997 plea agreement and thus, the ~~state~~ State did not breach the plea agreement by pursuing this case against Rosas.

[1]Citti v. State, 107 Nev. 89, 91, 807 P.2d 724, 726 (1991) (quoting Van Buskirk v. State, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986)).

[2]Citti, 107 Nev. at 92, 807 P.2d at 726.

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Accordingly, we conclude that the district court did not err by denying Rosas' motion to dismiss.

Rosas next contends that his convictions must be reversed because the prosecutor committed prejudicial misconduct during opening statements and closing arguments. Specifically, Rosas argues that the State erroneously shifted the burden of proof by informing the jury in opening statements that Rosas had filed a notice of alibi and summarizing the expected testimony of the alibi witnesses, and then commenting during closing arguments on Rosas' alleged lack of any alibi defense. Generally, prosecutorial comment on the failure of the defense to present witnesses or evidence impermissibly shifts the burden of proof.[3] However, "the Ninth Circuit Court of Appeals has held that as long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented."[4] Rosas did not object to the prosecutor's comments at trial and has therefore waived this issue on appeal.[5] Further, the prosecutor made no allusion to Rosas' failure to testify, and defense counsel suggested an alibi defense in both his opening statement and closing argument. Finally, even if the prosecutor's comments in this case were error, reversal is not mandated here because Rosas has failed to show that the remarks made by the prosecutor were patently prejudicial.[6]

Rosas also contends that it was reversible error for the State to elicit testimony from Jose Navarro that he had been intimidated and then to comment on Navarro's testimony during closing arguments. "Unless substantial credible evidence is presented that a defendant is the source of witness intimidation, implying that a defendant intimidated a

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[3]Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996).

[4]Evans v. State, 117 Nev. ____, ___, 28 P.3d 498, 513 (2001) (citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992)).

[5]See Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (in general, the defendant must raise timely objections and seek corrective instructions in order to preserve the issue of prosecutorial misconduct for appeal).

[6]See id. (if the defendant failed to object below, this court reviews alleged prosecutorial misconduct only if it is plain error and the defendant must show that the prosecutor's remarks were patently prejudicial).

witness is reversible error."[7] We conclude that the State's questioning of Navarro was not misconduct warranting reversal. The record reveals that the purpose of questioning Navarro about being threatened in connection with his testimony in this case was to impeach him. Further, the prosecutor never stated that Rosas threatened or intimidated Navarro, and defense counsel questioned Navarro about the alleged threats on cross-examination to rehabilitate his credibility. With regard to the prosecutor's remarks during closing arguments, the record reveals that the prosecutor made no direct references to intimidation or threats by Rosas. Moreover, even if the remarks implied intimidation and amounted to misconduct, they did not affect the fairness of Rosas' trial.[8]

Rosas further contends that his convictions must be reversed because the State solicited testimony from Liana Barraza that Rosas asked her to beat up another woman. Rosas argues that the evidence left the jury with the impression that he had a propensity for violence. Inadvertent references to other criminal activity not solicited by the prosecution, which are blurted out by a witness, can be cured by the trial court's immediate admonishment to the jury to disregard the statement.[9] The district court found that Barraza's statement was spontaneous. The record supports the finding and the district court cured any error by immediately admonishing the jury to disregard it. Accordingly, we conclude that Rosas was not denied a fair trial based on Barraza's brief statement.

Rosas next contends that the evidence adduced at trial was insufficient to support his convictions because the state offered no forensic evidence linking him to the crimes and the eyewitness testimony did not identify him as the assailant.

"[W]hen the sufficiency of the evidence is challenged on appeal in a criminal case, '[t]he relevant inquiry for this Court is "whether, after

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[7]Wesley v. State, 112 Nev. 503, 513, 916 P.2d 793, 800 (1996) (citing Lay v. State, 110 Nev. 1189, 1193, 886 P.2d 448, 450-51 (1994)).

[8]Jones v. State, 113 Nev. 454, 937 P.2d 55 (1997) (where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may be harmless error).

[9]Allen v. State, 91 Nev. 78, 83, 530 P.2d 1195, 1198 (1975).

viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime[s] beyond a reasonable doubt.'"'[10] Moreover, it is for the jury to determine what weight, credibility and credence to give to witness testimony and other trial evidence.[11] Finally, circumstantial evidence alone may sustain a conviction.[12]

Our review of the record reveals sufficient evidence from which the jury, acting reasonably and rationally, could have found the elements of two counts of first degree murder with the use of a deadly weapon, conspiracy to commit murder, conspiracy to commit robbery with the use of a deadly weapon, and conspiracy to violate the Uniform Controlled Substances Act beyond a reasonable doubt. Specifically, murder of the first degree is the "unlawful killing of a human being, with malice aforethought" and with "premeditation and deliberation."[13] Further, a person who aids or abets in the commission of a crime shall be charged and punished as a principal.[14] Additionally, this court has held that companionship and conduct before, during, and after the offense are circumstances from which a defendant's participation in a crime may be inferred.[15]

In this case, the State presented evidence that the victims both died of multiple gunshot wounds. Further, the State presented Travis Green's eyewitness testimony and physical description of the assailant which implicated Rosas. The jury also heard other testimony implicating Rosas as the shooter, including Barraza's testimony that Rosas told her that he committed the murders. The jury is entitled to

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[10]Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

[11]See Hutchins, 110 Nev. at 107, 867 P.2d at 1139.

[12]McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992).

[13]See NRS 200.010; NRS 200.020; NRS 200.030; NRS 200.033; and NRS 193.165.

[14]See NRS 195.020.

[15]See Merryman v. State, 95 Nev. 648, 650, 601 P.2d 53, 53 1979) (citations omitted).

draw reasonable inferences from the evidence,[16] and we conclude that the jury could reasonably infer from the evidence presented at trial that Rosas was guilty of two counts of first degree murder with the use of a deadly weapon.

Additionally, conspiracy is an agreement between two or more persons for an unlawful purpose.[17] "Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties."[18] Thus, "if a 'coordinated series of acts' furthering the underlying offense is 'sufficient to infer the existence of an agreement,' then sufficient evidence exists to support a conspiracy conviction."[19] Here, the jury could infer that an agreement was formed between Rosas and Michael Freed to commit murder from witness' testimony that Rosas borrowed a bag from Freed shortly before the murders, that he returned it to Freed shortly after the murders, and that Freed then disposed of a gun and jacket inside the bag.

"Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence."[20] In addition to the evidence presented that the victims both died of multiple gunshot wounds, Green testified that he observed the assailant exiting the front door of Domino's carrying a firearm. Further, David Ihde testified that the Domino's Pizza till was approximately $400.00 short following the murders. Thus, Rosas' conviction of robbery with the use of a deadly weapon is supported by substantial evidence.

Finally, "if two or more persons conspire to commit an offense which is a felony under the Uniform Controlled Substances Act or conspire to defraud the State of Nevada or an agency of the state in connection with its enforcement of the Uniform Controlled Substances Act, and one of the conspirators does an act in furtherance of the conspiracy," each

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[16]See Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981).

[17]See Thomas v. State, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998) (citations omitted); see also NRS 199.480.

[18]Id.

[19]Id.

[20]NRS 200.380.

conspirator is guilty of conspiracy to violate the Uniform Controlled Substances Act.[21] In this case, the state alleged that Rosas violated NRS 453.401 when he and Freed "agreed that Rosas would supply Freed with methamphetamines, and then did supply Freed with a substance purported to be methamphetamines." At trial, several witnesses testified that the instance alleged by the state occurred, that Rosas and Freed discussed Freed being "shorted" on his drug purchase, and that Rosas supplied Freed with methamphetamine. Although it was conflicting at times, the jury heard all the testimony in this case and weighed the credibility of the witnesses, apparently finding the state's witnesses somewhat credible and believing their testimony. Accordingly, we conclude that substantial evidence supports Rosas' conviction of conspiracy to violate the Uniform Controlled Substances Act.

Finally, Rosas contends that the district court erred by admitting at trial the testimony of Brandon Nyrehn, Katie Riley, Wendy Bousman, Chris Bousman, and J.J. Horner. Rosas argues that the witnesses' testimony was improper prior bad act evidence, and that the district court should have conducted a Petrocelli hearing before admitting it.

Generally, evidence of other crimes or bad acts cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question.[22] However, evidence of a prior bad act may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[23] Before evidence of a prior bad act can be admitted, the district court must determine, outside the presence of the jury, that: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[24] The district

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[21]NRS 453.401.

[22]NRS 48.045(1).

[23]NRS 48.045(2).

[24]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (citation omitted).

court has the discretion to admit or exclude evidence, including prior bad acts, and the district court's determination will be given great deference and will not be overturned absent an abuse of discretion.[25]

The failure to conduct the proper hearing on the record does not mandate reversal in all cases.[26] The district court's failure to conduct a proper hearing is cause for reversal on appeal unless: "(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence set forth in Tinch; or (2) where the result would have been the same if the trial court had not admitted the evidence."[27]

We conclude that Rosas is not entitled to a new trial based on the district court's admission of Brandon Nyrehn, Katie Riley, Wendy Bousman, Chris Bousman, and J.J. Horner's testimony. Specifically, Brandon Nyrehn testified that he and Rosas had a business relationship where he would buy drugs from Rosas and then either use them or sell them and that Rosas indicated to him that someone at Domino's Pizza owned him money, possibly $400.00. The record reveals that the evidence was admissible under Tinch: (1) Rosas' drug activity is relevant to his motive to commit murder; (2) Nyrehn made several statements to police and testified at the preliminary hearing and at trial to his drug relationship with Rosas; and (3) although evidence that Rosas was involved in drug dealing was prejudicial, it was highly probative of his motive to commit murder.

Additionally, Katie Riley testified that she distributed methamphetamine for Rosas and that she brought Rosas to Freed and Weise's residence shortly before the murders in this case to settle a dispute concerning a drug shortage because it involved Rosas' drugs. However, it was undisputed at trial that Rosas was involved in the drug culture in Elko as defense counsel conceded as much in opening statements and even told the jury that evidence of Rosas' drug activity

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[25]Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 505, 508 (1985); see also NRS 48.035.

[26]See Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).

[27]Id. (citation omitted).

would be presented at trial. Moreover, the defense asserted an alibi defense by suggesting that Rosas could not have committed the murders in this case because he was preoccupied with dealing drugs at the Elko Motel that night. Accordingly, we conclude that the result of Rosas' trial would have been the same had the district court not allowed Riley to testify regarding her "drug relationship" with Rosas.

Turning to the testimony of Wendy Bousman, Chris Bousman, and J.J. Horner, the record reveals that their testimony about drug dealing at the Elko Motel was also admissible under Tinch: (1) defense counsel filed a notice of alibi and suggested an alibi defense in opening statements so Wendy, Chris, and Horner's testimony was relevant to the murder charges; (2) Wendy, Chris, and Horner all testified that the drug activity occurred at the Elko Motel shortly before the murders; and (3) although evidence of prior bad acts is by nature prejudicial, Rosas' drug dealing was not contested at trial as defense counsel remarked during opening statements that evidence regarding drug activity would be presented at trial and that Rosas was involved in the drug culture in Elko.

With regard to Wendy and Horner's testimony that Rosas had a gun, we conclude that the evidence was not improper prior bad act evidence but was circumstantial evidence tending to establish Rosas' guilt in this case. However, Chris' testimony that Rosas brandished a gun when he showed up at the motel looking for Wendy was improper prior bad act evidence. Although Chris downplayed Rosas' actions by commenting that he was not frightened by Rosas' gesture, whether Rosas threatened Chris in an unrelated incident was not relevant to the murder charges in this case and implied that Rosas was "hotheaded" with a propensity for violence. Nonetheless, we conclude that reversal of Rosas' convictions is not mandatory here because the result in this case would have been the same if the evidence had not been admitted at trial. Substantial evidence supports Rosas' convictions, and Chris' testimony amounted to a brief statement in the middle of a ten-day trial.

Having reviewed Rosas' contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Shearing, J.

Rose, J.

Becker, J.

cc: Hon. J. Michael Memeo, District Judge
Lockie & Macfarlan, Ltd.
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk