

IN THE SUPREME COURT OF THE STATE OF NEVADA

JERRY EMMANUEL WHITE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37422

FILED

MAR 08 2002

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 entered pursuant to a jury verdict of one count each of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and conspiracy to commit robbery. The district court sentenced appellant Jerry White to two consecutive terms of life imprisonment without the possibility of parole on the murder conviction and concurrent terms of 35 to 156 months and 13 to 60 months in prison on the robbery and conspiracy to commit robbery convictions.

On October 8, 1999, Ramon Navarro was robbed and bludgeoned to death in his home in Elko, Nevada. Navarro was seen earlier in the morning drinking at a local bar with two individuals later identified as White and co-defendant Michael Woomer. Navarro left the bar in the company of White and Woomer.

Based on additional witness information, White and Woomer were identified as suspects. Woomer was arrested in Battle Mountain, Nevada, on October 9, 1999. White turned himself in to the custody of Santa Cruz, California, officials two days later on October 11, 1999. Each man gave statements to police officials. Each man asserted that, while

present, the other had delivered the fatal blows to Navarro's head with an aluminum baseball bat.

Prior to White's trial, Woomer entered a plea agreement in which he pleaded guilty to one count of principal to first-degree murder in exchange for dismissal of all other charges and the deadly weapon enhancements. As part of the plea bargain, Woomer agreed to testify truthfully at White's trial regarding White's involvement in Navarro's murder. The agreement did not contain language indicating that a failure to testify truthfully could result in a violation of the agreement that would permit Woomer to be tried on the original charges. Woomer was sentenced to life imprisonment with the possibility of parole in 20 years. Woomer began serving his sentence prior to the commencement of White's trial.

Woomer gave two statements to the police. One was given at the time of his arrest and one as a part of his plea agreement. The statements identified White as the person who beat Navarro to death. At trial, Woomer claimed that he had suffered a head injury and could not remember many of the details of his involvement with White and Navarro.

However, in a hearing outside the presence of the jury, Woomer was questioned about the validity of his memory loss. Based upon his responses, the district court found that Woomer was feigning memory loss due to a fear that he would be labeled as an informant and subject to retaliation by other prison inmates.

The district court concluded that Woomer's prior statements were admissible under NRS 51.035(2)(a). The district court found that Woomer was willing to answer enough to meet the standard of availability

for cross-examination. The district court stated that it would limit reference to Woomer's prior statements to those instances that were inconsistent with his testimony. Finally, the district court concluded that White lacked standing to challenge the validity of Woomer's plea agreement and declined to strike Woomer's testimony on that ground.

Woomer testified about his relationship with White. When asked questions about the murder itself, Woomer would answer that he didn't remember or he didn't know. The State would then read the pertinent portion of the prior statement and ask Woomer if that is what he told the police. Woomer either acknowledged the prior statement or indicated that his prior statement on that issue was false and he had just made it up.

On cross-examination, White pointed out that Woomer's plea agreement carried no sanctions for testifying falsely, that Woomer entered into a deal with the State that resulted in a reduction of his charges and sentence, and that Woomer lied to the police about portions of his statements.

White first contends the terms of Woomer's plea agreement violate the provisions of NRS 174.061<sup>1</sup> because Woomer was not explicitly

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<sup>1</sup>NRS 174.061 states, in pertinent part:

1. If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser

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advised in the plea agreement that he must testify truthfully or the agreement would be void. Because the plea agreement does not comply with the statute, White argues it was invalid. Therefore, Woomer should not have been permitted to testify, nor should his prior out-of-court statements have been admitted. White also requested that the agreement be stricken and the charges reinstated against Woomer so as to insure there would be serious consequences to Woomer if he testified.

The State contends that the district court did not err in refusing to strike the plea agreement because White does not have standing to enforce the agreement between the State and Woomer. We agree. NRS 174.061 is intended on its face to apply to the contract between the State and Woomer. White has no standing to challenge the validity of Woomer's plea agreement.

Next, White argues that the failure of the district court to strike the plea agreement, and the admission of the prior out-of-court statements, violates his Sixth Amendment right to confront the witnesses against him. White contends that Woomer was not subject to cross-examination within the meanings of NRS 51.035(2) or the Sixth Amendment. White asserts that the presence of the witnesses on the

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charge or for a recommendation of a reduced sentence, the agreement:

(a) Is void if the defendant's testimony is false.

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witness stand is not enough where the witness' responses to questions results in "don't remember" or "don't know" answers. The State contends that Woomer was subject to an effective cross-examination, and therefore, there is no Sixth Amendment violation.

The United States Supreme Court has stated that the Sixth Amendment's Confrontation Clause "does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories."<sup>2</sup> The Supreme Court further concluded that "the confrontation clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense might wish.'"<sup>3</sup> As noted in Green, memory loss or recalcitrance on the part of a witness does not automatically equate to an inability to effectively question a witness on cross-examination.

We conclude that the district court did not err in allowing the admission of Woomer's prior out-of-court statements and that such admission did not violate White's Sixth Amendment rights. As noted

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(b) Must be in writing and include a statement that the agreement is void if the defendant's testimony is false.

<sup>2</sup>California v. Green, 399 U.S. 149, 164 (1970).

<sup>3</sup>United States v. Owens, 484 U.S. 554, 559 (1988).

above, Woomer admitted that he had motivation to lie and testified that the statement he made subsequent to the entry of his plea agreement was, in part, a fabrication. He was also subject to substantial cross-examination regarding his motive to lie in light of the plea agreement and his alleged memory loss.

Finally, White contends that the district court erred in allowing persons other than those defined as “victims” under NRS 176.015<sup>4</sup> to testify at White’s sentencing hearing. White argues that the

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<sup>4</sup>NRS 176.015(5) and (6) state, in pertinent part:

5. For the purposes of this section:
  - (a) “Relative” of a person includes:
    - (1) A spouse, parent, grandparent or stepparent;
    - (2) A natural born child, stepchild or adopted child;
    - (3) A grandchild, brother, sister, half brother or half sister; or
    - (4) A parent of a spouse.
  - (b) “Victim” includes:
    - (1) A person, including a governmental entity, against whom a crime has been committed;
    - (2) A person who has been injured or killed as a direct result of the commission of a crime; and
    - (3) A relative of a person described in subparagraph (1) or (2).

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State erred in allowing Navarro's former employer, a co-worker and Woomer's best friend, to testify at White's sentencing as those persons did not meet the definition of either "victim" or "relative" as defined in NRS 176.015.

We have previously stated that the victim impact statute merely designates who has a "right" to speak at a sentencing proceeding. It does not limit the type of evidence a court may consider at sentencing.

NRS 176.015(3) grants certain victims of crime the right to express their views before sentencing; it does not limit in any manner a sentencing court's existing discretion to receive other admissible evidence.<sup>5</sup>

Thus, while the individuals who gave statements were not guaranteed a right to speak, it was not automatic error for the district court to permit their statements so long as the statements had relevancy to the sentencing proceedings.

The record reflects that the statements at issue involved testimony about the individuals' perceptions about Navarro as well as the impact his life and death had on their lives. Although the admission of victim impact statements is not unconstitutional, the United States Supreme Court has indicated courts should be cautious in admitting such statements lest the objectivity of the sentencing process be impaired.

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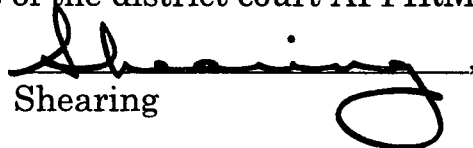
6. This section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing.

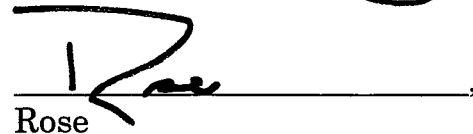
<sup>5</sup>Wood v. State, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995).

Statements which are unduly inflammatory should not be admitted.<sup>6</sup> We conclude that the statements in this case did not result in a fundamentally unfair sentencing process and the district court did not err in admitting them.

Because we have determined that White's issues on appeal are without merit, we

ORDER the judgment of the district court AFFIRMED.<sup>7</sup>

 J.  
Shearing

 J.  
Rose

 J.  
Becker

cc: Hon. Jack B. Ames, District Judge  
Lockie & Macfarlan, Ltd.  
Attorney General/Carson City  
Elko County District Attorney  
Elko County Clerk

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<sup>6</sup>Payne v. Tennessee, 501 U.S. 808, 831 (1991).

<sup>7</sup>White raises several other issues, including the waiver of his Miranda rights, the admission of autopsy photos, the sufficiency of jury instructions, and the admission of a victim impact statement that referenced White's potential for future dangerousness. Based upon the record and the briefs filed herein, we conclude that White's remaining contentions on appeal are without merit. Accordingly, we affirm White's convictions.