IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAUNTAY WHEATON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37553

FILED

MAY 14 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Shauntay Wheaton appeals a judgment of conviction for burglary while in possession of a firearm, conspiracy to commit robbery, robbery with the use of a deadly weapon, and two counts of murder with a deadly weapon.[1] Wheaton asserts that: (1) the district court erred by admitting certain incriminating statements, claiming they were involuntary; (2) his conviction should be overturned because of misconduct committed by the prosecutor during the State's closing argument; (3) the district court erred by using an impermissibly vague jury instruction pertaining to malice that shifted the burden of proof to Wheaton; and (4) the district court erred by using a jury instruction that did not require jury unanimity as to the theory of criminal liability. None of Wheaton's arguments have merit. Accordingly, the judgment of conviction should be affirmed.

First, Wheaton asserts that the district court erred when it admitted evidence of Wheaton's statements to a detective and a booking officer because the statements were made involuntarily. According to

[1]Although Wheaton was a minor, he was tried and convicted in district court because the juvenile courts do not have jurisdiction over individuals charged with murder. See NRS 62.040(2)(a).

02-08473

Wheaton, the statements were given involuntarily because he was not accompanied by a parent during the interrogation and the detective did not tell him about the possibility of an adult trial until the conclusion of the interrogation. We disagree.

Under Nevada law, a confession cannot be admitted into evidence unless it was freely and voluntarily given.[2] For a confession to be voluntary it must be the result of a free will and a rationale intellect.[3] In making this determination, a court must examine the totality of the circumstances in order to determine whether the defendant's will was overcome when he confessed.[4] When obtaining a confession from a minor, the government must be especially careful not to mislead the youth and should inform him of the possibility of an adult trial.[5] However, failure to so inform a juvenile is not alone sufficient to render inculpatory statements involuntary.[6] On appeal, a district court's decision regarding the voluntariness of a defendant's confession is final unless such a finding is plainly untenable.[7]

In Elvik v. State we concluded that a minor's confession given under circumstances similar to those presented here was voluntary.[8] Like

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[2]Elvik v. State, 114 Nev. 883, 891, 965 P.2d 281, 286 (1998).

[3]Id. at 892, 965 P.2d at 286.

[4]Id. at 892, 965 P.2d at 287.

[5]Quiriconi v. State, 96 Nev. 766, 771, 616 P.2d 1111, 1114 (1980).

[6]Elvik, 114 Nev. at 891, 965 P.2d at 286.

[7]Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 109 (1979).

[8]114 Nev. 883, 891, 965 P.2d 281, 286 (1998).

Elvik, Wheaton argues that his confession was involuntary because the interrogation was coercive and he did not have a parent present while being questioned. The absence of a minor's parent or guardian is a relevant consideration in determining the voluntariness of a minor's confession; however, it is merely one consideration under the totality of the circumstances.[9] In Elvik, we upheld the district court's finding that Elvik's confession was voluntary, despite the fact that Elvik did not have a parent present during the interrogation, because he was aware of the adversarial nature of his surroundings and there was no evidence of false promises or intimidation.[10] Similarly, despite the fact that Wheaton did not have a parent present during his interrogation, he was aware of the nature of the interrogation because he was given a Miranda warning and the interrogation occurred at the detective bureau shortly after the crime took place. Moreover, there is no evidence of physical or psychological intimidation at the hands of either the detective or the booking officer. Therefore, we conclude that there was adequate evidence to support the district court's finding that the statements were, under the totality of the circumstances, voluntarily made.

Second, Wheaton asserts that he was deprived of his right to fair trial by two separate instances of misconduct committed by the State during its closing argument. In particular, Wheaton argues that the State made an improper reference to the Bible and also improperly vouched for the credibility of a witness. We disagree.

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[9]See id. at 893, 965 P.2d at 287.

[10]Id. at 891-92, 965 P.2d 286-87.

Prosecutors must be free to express their perceptions of the record, evidence and inferences properly drawn therefrom.[11] Accordingly, a criminal conviction will not be lightly overturned based upon the prosecutor's comments standing alone.[12] However, it is improper for a prosecutor to inject his personal beliefs or opinion into his argument.[13] When examining alleged misconduct, the misconduct must be viewed in context to determine whether the prosecutor's conduct infected the fairness of the trial.[14] Here, the State's reference to a little known passage in the Bible did not amount to misconduct because the reference merely implied that Wheaton should be tried as an adult, which was already the case.[15] Additionally, the State did not vouch for the credibility of the witness, but merely suggested that her testimony was believable in light of the evidence before the jury. Accordingly, we conclude that there was no prosecutorial misconduct by the State.

Third, Wheaton asserts that the district court erred when it gave the following instruction to the jury:

> Express malice is that deliberate intention unlawfully to take away the life of a fellow

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[11]Jimenez v. State, 106 Nev. 769, 773, 801 P.2d 1366, 1368 (1990).

[12]Rippo v. State, 113 Nev. 1239, 1260, 946 P.2d 1017, 1030 (1997).

[13]Flanagan v. State, 104 Nev. 105, 109, 754 P.2d 836, 838 (1988).

[14]Rippo, 113 Nev. at 1260, 946 P.2d at 1030.

[15]Moreover, it does not appear that the jury was even aware of the reference to the Bible before the district admonished the jury to disregard the statement. Apparently, Wheaton was also unaware of the obscure reference given his failure to object.

> creature, which is manifested by external circumstances capable of proof.
>
> Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

Wheaton argues that the instruction impermissibly shifted the burden of proof to Wheaton by granting the prosecution a presumption of malice. Additionally, Wheaton claims that the term "abandoned and malignant heart" is unconstitutionally vague because the term no longer has any meaning in modern language. We disagree.

Since Wheaton failed to object to the jury instruction at trial, appellate review is generally precluded; however, we may always address plain error on appeal.[16] First, the jury instruction did not create an impermissible presumption in favor of the State. We recently rejected an identical challenge to the above jury instruction in Leonard v. State.[17] In Leonard, we concluded that the instruction did not create a mandatory presumption in favor of the State because the instruction merely states that malice "may" be implied.[18] Accordingly, the instruction did not impermissibly shift the burden of proof to Wheaton. Second, Wheaton claims that the term "abandoned and malignant heart" is archaic, meaningless and vague and, therefore, that it violated his right to due

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[16]See Mitchell v. State, 114 Nev. 1417, 1426, 971 P.2d 813, 819 (1998); see also NRS 178.602 (providing that "defects affecting substantial rights may be noticed although they were not brought to the attention of the court").

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

[18]Id.

process. In Leonard, we noted that the term "abandoned and malignant heart" was concededly archaic, but also essential under Nevada law.[19] Wheaton does not attempt to prove that the jury was actually confused by the instruction, but merely rests his argument upon the archaic nature of the term "abandoned and malignant heart." Accordingly, we conclude that the malice instruction was not unconstitutionally vague and that the district court did not commit plain error by using the instruction.

Finally, Wheaton asserts that the district court erred when it instructed the jury that although its verdict must be unanimous as to the charge, it did not have to be unanimous as to the theory of guilt. Wheaton argues that by not requiring unanimity on each theory of criminal liability, the State's burden of proof was lessened and Wheaton's right to due process was violated. We disagree.

Since Wheaton did not object to the jury instruction at trial, appellate review is generally precluded unless the defect amounted to plain error.[20] We have consistently held that the jury need not be unanimous as to the theory of guilt.[21] Therefore, we conclude that the district court did not commit plain error by using the instruction.

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[19]Id.

[20]See Mitchell, 114 Nev. at 1426, 971 P.2d at 819; see also NRS 178.602.

[21]See, e.g., Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296-97 (1998) (holding that district court properly instructed jury that it need not be unanimous in its theory of criminal liability); Evans v. State, 113 Nev. 885, 896 944 P.2d 253, 260 (1997) (holding that there was no constitutional requirement of unanimity as to theories of criminal liability); Walker v. State, 113 Nev. 853, 869-70, 944 P.2d 762, 773 (1997)

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Based on the above we conclude that all of Wheaton's arguments lack merit and, accordingly, we

ORDER that the judgment of conviction be AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Lee A. Gates, District Judge
Attorney General
Clark County District Attorney
David M. Schieck
Clark County Clerk

. . . *continued*
(holding that the jury did not have to be unanimous on the theory of murder);