

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RICHARD ABDIEL SILVA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81627-COA

FILED

FEB 24 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *S. Young*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Richard Abdiel Silva (Silva) appeals from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Responding to reports of shots being fired, Reno police officers found a car with the lights on, engine running, and front bumper resting against a building.¹ Inside the car, officers found an unresponsive woman with multiple gunshot wounds and pronounced her dead at the scene. The medical examiner identified that woman as Luz Linarez-Castillo (Luz).

To investigate the death, detectives spoke with neighbors that later testified at trial that there was a man in dark clothing that night near the scene of the crime. The neighbors also testified that a gray sport utility vehicle (SUV) was seen leaving the area. Detectives found bullet casings and what was believed to be Marlboro NXT cigarette butts at the crime scene.

¹We do not recount the facts except as necessary for our disposition.

Attempting to find the source of the cigarettes, detectives contacted a loss prevention associate at 7-Eleven, Inc. to search sales of Marlboro NXT cigarettes the day before Luz's death. That search rendered surveillance footage of a 7-Eleven convenience store in Sparks, Nevada. In that footage, Silva, and a man that would later be identified as his cousin Yiovannie Guzman, purchased Marlboro NXT cigarettes, and drove away in a gray SUV.

After obtaining this footage, detectives executed a search warrant on Silva's home and vehicle. Upon searching the home, detectives realized that Silva's brother, Bernard Silva-Guzman (Bernard), was married to Luz. Detectives also learned that just weeks prior to Luz's murder, Luz disclosed to Bernard that she was having an affair; and after hearing this, Bernard shot himself in the chest, requiring hospitalization. Subsequently, detectives called Silva in for questioning.

During Silva's first round of questioning, detectives gave him a bottle of water and began questioning him. During this interview, Silva was emphatic that he did not leave his house on the night Luz was murdered. Detectives then concluded the interview, and Silva discarded the empty water bottle in the trash. Detectives recovered the water bottle from the trash and ran a DNA profile test from saliva found on the bottle. The results of the test revealed Silva's DNA profile and that it matched DNA recovered from two of the cigarette butts found at the crime scene. Detectives then called Silva back in for further questioning. Bernard was also called in for questioning.

Early in the second round of the detectives' questioning, Silva told them, "I don't feel comfortable talking to you guys, and if I'm not being

detained at the moment, I just want to leave now with my brother.”² At that point detectives immediately ceased their interrogation and left Silva in the room alone. Minutes later, detectives returned and began interrogating Silva anew. Silva again, having yet to receive *Miranda*³ warnings, unequivocally stated, “I already said I don’t want to talk to you guys.” In response to Silva’s statement, detectives showed Silva a picture from the 7-Eleven surveillance footage and stated, “Okay, that’s fine. That’s fine. You telling me that you didn’t leave the house that night? There you are, [Silva].” Silva again repeated his desire to remain silent. At this moment, detectives placed Silva under arrest, photographed him, and moved him to a different interrogation room.

When detectives reentered the new interrogation room, they did not immediately advise Silva his *Miranda* rights. Instead, they explained they received a warrant to search his phone and that he needed to comply with the warrant by unlocking the phone. It was only after Silva agreed to comply with the warrant that detectives read him a *Miranda* warning. Then, after reading *Miranda*, detectives began to question Silva again as he then agreed to talk.

Shortly thereafter, however, Silva declared twice that he did not want to talk to detectives. Detectives then left the room, reentering an hour later. Upon reentering the room, and without re-issuing *Miranda*

²We note that, in the record on appeal, Silva did not provide transcripts of his interviews, or a video recording containing audio, wherein he confessed to police. Therefore, we rely on his motion to suppress his confession filed in the district court.

³*Miranda v. Arizona*, 384 U.S. 436 (1966).

warnings or Silva initiating conversation, detectives explained to Silva that his cousin Guzman was in a separate interview room making incriminating statements about Silva. Hearing this news, Silva confessed to detectives that he killed Luz.

At some point following Silva's confession, he asked detectives if he could speak with his brother, Bernard. Although reluctant at first, detectives allowed the brothers to speak in the interrogation room with no officers present. Surveillance cameras show Silva and Bernard embrace; and translated audio captures Silva telling Bernard that he was having an affair with Luz and that he "didn't want to kill her . . . [but] wanted to kill" another man she was seeing.

During pre-trial litigation, Silva filed a motion to suppress his confession to detectives, arguing that it was obtained in violation of his constitutional rights because detectives did not issue *Miranda* warnings and that detectives did not honor his unequivocal invocation of his right to remain silent; the State opposed that motion. After the district court held an evidentiary hearing, it ordered Silva's confession to detectives excluded from trial.

The State then filed a motion in limine asking the district court to allow Silva's statements to Bernard that he killed Luz, arguing that those statements were made voluntarily. Silva opposed that motion, and the district court again held a hearing. The district court ordered that the statements were allowed to be introduced at trial because derivative evidence obtained after a *Miranda* violation is not inadmissible and because Silva "voluntarily requested to speak to his brother after he confessed to the alleged crime" and because "[t]here is no indication the police initiated the conversation between [Silva] and [Bernard]."

The case proceeded to trial. After the first day of opening statements and testimony, Juror No. 1 sent a letter to the district court stating that he thought he recognized someone in the courtroom, a person he assumed to be a member of Silva's family. Upon receiving the letter, the district court excused the jury, and questioned Juror No. 1.⁴ After the questioning, the district court determined that there was no reason to excuse Juror No. 1 from the case, and neither party objected to the court's decision, nor is it an issue before us on appeal.

At the conclusion of the guilt phase of trial, the jury found Silva guilty of murder in the first degree with the use of a deadly weapon. The same day as the guilty verdict, Juror No. 1 was driving home and while stopped at a light made eye contact with a young Hispanic who was wearing a red hoodie and talking on the phone. Juror No. 1 then became concerned that someone might have been following him. After Juror No. 1 arrived at his house, and apparently after discussions with his wife, he decided to call the police. When Sparks police officers responded to Juror No. 1's call, he explained that he was a juror in a murder trial that had just rendered a guilty verdict. Juror No. 1 explained his uneasiness about the situation, and apparently out of an abundance of caution, Sparks police took a report and placed officers at Juror No. 1's home for the night.

When the jury returned for the first day of the penalty phase of trial, the district court again excused the jury so that it could question Juror

⁴The district court's questioning revealed that the person whom Juror No. 1 recognized previously worked with his wife. Juror No. 1, however, stated that he never socialized with this person, did not have her phone number, and had never been to her house.

No. 1 about the incident. After a series of questions by the district court and both parties, the court determined that nothing in Juror No. 1's responses showed he was ineligible to remain on the jury during the penalty phase. Silva objected, stating that Juror No. 1 could not be impartial and was biased because he felt that he had been threatened in relation to being on the jury, which had just rendered a guilty verdict. The district court, however, disagreed finding that "Juror No. 1 has unequivocally stated his ability to be fair." Over Silva's objection, Juror No. 1 was allowed to remain on the jury.

At the conclusion of the penalty phase of trial, the jury decided that Silva should serve life in prison with the possibility of parole after a minimum of 20 years served.⁵ The district court, not the jury, subsequently imposed a deadly weapon enhancement penalty of a minimum 60 months to a maximum 240 months in prison, which would run consecutive to Silva's life sentence.

Silva now appeals the judgment of conviction, arguing that the district court violated his Fifth, Sixth, and Fourteenth Amendment rights to a fair trial and due process by (1) allowing his confession to Bernard to be admitted at trial, when that confession was obtained in violation of his *Miranda* rights; and (2) by denying his right to an impartial jury by permitting Juror No. 1 to remain on the jury for the penalty phase. We disagree.

⁵We note that the jury did not select the sentence with the most severe penalty of no possibility of parole. Of the remaining two sentencing options available to the jury from which to choose, both permitted parole eligibility after 20 years. The jury selected the mid-range penalty of life in prison versus the definite term of 50 years before parole eligibility.

The district court did not err in allowing Silva's confession to Bernard because, at the time of the statements, he was not subjected to an interrogation, or its functional equivalent

Whether a confession was voluntary presents a mixed question of law and fact. *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). The district court's purely historical factual findings are given deference and thus reviewed for clear error, but the court's legal determination as to whether the statement was voluntary is a question of law that we review de novo. *Id.*

Silva argues his confession to Bernard was a result of express police questioning, or its functional equivalent, because police officers knew, or should have known, he was going to make inculpatory statements to Bernard, while still being subjected to video and audio recording. Thus, he argues that the confession operated as a functional equivalent of police questioning. We cannot agree.

The United States Supreme Court created the "functional equivalent" test when it was attempting to further define "interrogation" within the context of *Miranda*. See *Rhode Island v. Innis*, 446 U.S. 291, 297, 300-01 (1980). In *Innis*, the Court held that the goal of the *Miranda* safeguards is to protect individuals from a police officer's express questioning or its functional equivalent. *Id.* at 297. The Court then defined the functional equivalent of police questioning as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301 (footnote omitted).

The Supreme Court later clarified the functional equivalent test in *Arizona v. Mauro*, 481 U.S. 520 (1987). The defendant in *Mauro* was

arrested as a suspect for murdering his son. After he was arrested and given *Miranda* warnings, Mauro told officers that he did not want to speak to them without an attorney present. At the same time Mauro was being questioned, his wife was speaking to police and requested to speak with Mauro. At first, officers were reluctant to let the two speak. But after talking with supervisors, officers allowed Mauro's wife to speak with him. When officers brought her to Mauro, they placed a tape recorder on the table and one officer stayed in the room while Mauro spoke with his wife.

At trial, Mauro's defense was that he was insane at the time of the murder. Rebutting that claim, the prosecution played the tape-recorded conversation between Mauro and his wife, arguing that it showed Mauro was sane on the day of the crime. Mauro argued that the tape recording should be excluded at trial because it was a product of a police interrogation in violation of his *Miranda* rights. When the trial court refused to exclude the tape recording, Mauro filed an appeal. The Arizona Supreme Court agreed with Mauro and reversed the trial court because, in its opinion, allowing Mauro to speak with his wife in front of officers was an interrogation under *Miranda*.

The Supreme Court, however, disagreed. In its opinion, the Court stated, "We think it is clear under both *Miranda* and *Innis* that Mauro was not interrogated." *Mauro*, 481 U.S. at 527. The Court's reasoning relied on the fact that even though an officer was present, he did not ask any questions about the crime, and there was no evidence that officers used Mauro's wife as a "psychological ploy that properly could be treated as the functional equivalent of interrogation." *Id.* The present case is factually like *Mauro* because the record does not demonstrate that at the

time, he confessed to Bernard Silva was subjected to police interrogation, or its functional equivalent.

To begin, Silva was the one that requested to speak with Bernard, it was not a suggestion by police. Second, there is no evidence in the record to establish that police used Bernard as a “psychological ploy” to obtain a confession. The fact that Silva made the request suggests that there was not an unconstitutional action by the officers to get a confession.

Finally, it is true that officers likely knew Silva would make incriminating statements to Bernard when they spoke. However, Silva has not pointed to anywhere in Supreme Court jurisprudence that it has held that using a suspect’s voluntary statements to a third-party, outside of police presence, constitutes the functional equivalent of express police questioning. Instead, Silva voluntarily “[gave] himself up to the law and [became] his own accuser” at the time he made the statements to Bernard. *Ashcraft v. Tennessee*, 322 U.S. 143, 161 (Jackson, J., dissenting). Therefore, we cannot agree that the district court erred by allowing Silva’s voluntary statements to be admitted at trial because they were not made during the functional equivalent of express police interrogation.

Next, Silva argues that, even if he was not subject to the functional equivalent of express police questioning, his statements to Bernard are “fruit of the suppressed” confession he gave to police, and therefore, they should have been excluded at trial. We disagree.

The Self-Incrimination Clause of the Fifth Amendment contains its own exclusionary rule. That clause provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V. Thus, “[u]nlike the Fourth Amendment’s bar on unreasonable searches, the Self-Incrimination Clause is self-

executing.” *United States v. Patane*, 542 U.S. 630, 640 (2004). For that reason, the Supreme Court has repeatedly explained “that those subjected to coercive police interrogations have an automatic protection from the use of their involuntary statements (or any physical evidence derived from their statements) in any subsequent criminal trial.” *Chavez v. Martinez*, 538 U.S. 760, 769 (2003). Thus, it logically follows that the absence of any coercion or improper tactics on the part of the police would not support exclusion. *See generally Michigan v. Tucker*, 417 U.S. 433 (1974). That is because it would undercut the twin rationales for exclusion—trustworthiness and deterrence, *Oregon v. Elstad*, 470 U.S. 298, 308 (1985), and instead “would severely handicap law enforcement officials” in obtaining evidence. *Tucker*, 417 U.S. at 458 (Brennan, J., concurring).

In the present case, we have already explained that we agree with the district court’s assessment that at the time Silva spoke with Bernard, he was not subject to any police interrogation, or its functional equivalent. It is because of that conclusion that we conclude the alleged “fruit” of Silva’s confession is “neither a witness nor an article of evidence, but his own voluntary testimony.” *Elstad*, 470 U.S. at 308. Therefore, we cannot agree that the district court erred in allowing the State to introduce Silva’s voluntary statements to Bernard at trial.

Any error in allowing Silva’s confession to Bernard was harmless because a rational jury would have found Silva guilty due to the overwhelming evidence of his guilt

The State asserts that, even if the district court erred by allowing the admission of Silva’s confession to Bernard, that error was harmless considering the overwhelming evidence of his guilt. We agree and address this argument as an alternative basis to affirm.

We first note that Silva did not file a reply brief challenging the State's harmless error argument. Therefore, we can consider it an admission of its accuracy. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955). Nevertheless, with some exceptions, an error does not warrant reversal if it is harmless. *See* NRS 178.598. However, the test for determining whether an error is harmless depends on whether the error involves a constitutional violation. *Valdez v. State*, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008). If the error was constitutional, then it is harmless only if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999); *see also Chapman v. California*, 386 U.S. 18, 23-24 (1967); *Valdez*, 124 Nev. at 1189, 196 P.3d at 476. The State bears the burden of proving that the error was harmless—i.e., that the error did not contribute to the verdict. *See Chapman*, 386 U.S. at 24.

Here, the facts introduced at trial show there was overwhelming evidence of Silva's guilt, which demonstrates it is clear beyond a reasonable doubt that a rational jury would have found Silva guilty. As an example, the jury heard the following evidence at trial: (1) detectives found Marlboro NXT cigarette butts at the scene of the crime; (2) during the detectives' investigation they received surveillance footage from a local 7-Eleven, which showed Silva buying Marlboro NXT cigarettes and leaving in a gray Toyota SUV hours before the murder; (3) neighbors testified that a gray Toyota SUV was the only car leaving the area of the crime; (4) criminalists tested Silva's DNA profile against the DNA found on the cigarette butts and there was a match; and (5) detectives discovered that the gray Toyota SUV was registered to one of Silva's family members.

Moreover, and most persuasively, the jury heard evidence of Silva's guilt by Guzman, an accomplice to the murder, whose testimony was sufficiently corroborated by other witnesses and evidence. Guzman explained at trial that he drove Silva to the apartment complex that night at Silva's request so Silva could commit a murder, watched Silva get out of the car, and then watched him fire the first shot at Luz's red Dodge Charger. Guzman further testified that Silva fired five more times and then got back into the car. Therefore, any error by the district court in admitting Silva's confession to Bernard was harmless because, after weighing all the evidence, it is clear beyond a reasonable doubt that a rational jury would have found Silva guilty, absent any error.

The district court did not abuse its discretion by allowing Juror No. 1 to remain for the penalty phase of trial

Silva argues that the district court erred by not removing Juror No. 1, for the penalty phase, because he was denied his right to an impartial jury. In reviewing the record, we cannot conclude that the district court abused its discretion in permitting Juror No. 1 to participate in the penalty phase of the trial.

We review a district court's denial of a challenge for cause to either a venireperson or a sworn juror for an abuse of discretion. *See Jitnan v. Oliver*, 127 Nev. 424, 430, 254 P.3d 623, 628-29 (2011); *Blake v. State*, 121 Nev. 779, 795-96, 121 P.3d 567, 578 (2005); *see also Nelson v. Commonwealth*, 589 S.E.2d 23, 30-31 (Va. App. 2003) (applying the abuse of discretion standard to decisions regarding challenges for cause to both seated jurors and venirepersons). Juror bias or lack of impartiality is manifested when a juror's "views either prevent or substantially impair the juror's ability to apply the law and instructions of the court in deciding the

verdict.” *Sanders v. Sears-Page*, 131 Nev. 500, 507-08, 354 P.3d 201, 206 (Ct. App. 2015).

The district court canvassed Juror No. 1, concluding that Juror No. 1 did not show any signs of bias or a lack of impartiality. During questioning, Juror No. 1 declared that he could be fair during the penalty phase of trial. And because we agree that district courts are better suited to determine bias and impartiality, we defer to their decisions to allow a juror to stay on a panel unless there is an abuse of discretion clearly demonstrated in the record.⁶ See *Blake v. State*, 121 Nev. at 795-96 (explaining that there is no constitutional violation to a fair trial when the record is void of a juror’s bias or impartiality). Thus, based on a review of the record as a whole, we cannot conclude the court abused its discretion in allowing the juror to remain for the penalty phase.⁷

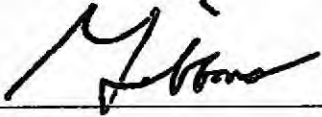
In summary, the district court did not err by allowing Silva’s confession to Bernard into evidence because, at the time he made the confession, he was not under police interrogation or its functional equivalent. Additionally, even if the district court did err, that error was


⁶Silva relied on *Sanders v. Sanders-Page*, 131 Nev. 500, 354 P.3d 201 (Ct. App. 2015), in arguing that the court should always err in favor of striking a juror if there was “even a hint or an inference” of bias or impartiality. The district court distinguished *Sanders* as a case involving what the court characterized as “implicit bias,” and specifically stated that it did not find any of “those significant facts” present in *Sanders* to suggest the existence of implicit bias in this case.


⁷We also note the sentence imposed was closer to the minimum sentence, rather than the maximum. Thus, we cannot conclude that based solely on the penalty imposed, Silva was prejudiced during the penalty phase because of Juror No. 1’s participation.

harmless in light of the overwhelming evidence introduced at trial of Silva's guilt. Finally, we cannot say that the district court abused its discretion in permitting Juror No. 1 to remain on the jury for the penalty phase, based on the record.

Therefore, we ORDER the judgment of conviction AFFIRMED.⁸


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. David A. Hardy, District Judge
Oldenburg Law Office
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

⁸To the extent Silva raises other arguments, we have considered the same and conclude that those arguments do not warrant relief.