

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN JOSEPH SEKA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37907

FILED

APR 08 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury trial, for first-degree murder with use of a deadly weapon, second-degree murder with use of a deadly weapon, and two counts of robbery. After finding the defendant, John Joseph Seka guilty of the above charges, the jury was unable to reach a decision as to sentence on the first-degree murder charge during the penalty phase of the trial. Therefore the district court requested the establishment of a three-judge panel pursuant to statute. Prior to the convening of the panel, Seka and the State stipulated to a sentence on Count I of life without the possibility of parole for first-degree murder, plus an equal and consecutive sentence for use of a deadly weapon.

Seka was also sentenced as follows: Count II: life with the possibility of parole for second-degree murder plus an equal and consecutive sentence for use of a deadly weapon to run consecutive with Count I; Count III: a maximum of one hundred fifty-six months with a minimum parole eligibility of thirty-five months to run consecutive to Count II; Count IV: a maximum of one hundred fifty-six months with a minimum parole eligibility of thirty-six months to run consecutive to Count III; \$5,325.00 in restitution and 720 days credit for time already served.

FACTUAL BACKGROUND

John Joseph Seka ("Seka"), also known as "Jack", was convicted of the murder and robbery of two individuals, Peter Limanni ("Limanni") and Eric Hamilton ("Hamilton"). Seka was a friend of Limanni and an employee for Limanni's heating and air conditioning business, Cinergi HVAC, Inc., located at 1933 Western Avenue, Las Vegas, Nevada. Seka and Limanni were in the process of setting up a cigar business out of the same location. Seka and Limanni also resided at 1933 Western Avenue.

Hamilton, an African American gentleman, appeared at Cinergi around the latter part of 1998. He had only recently come to Las Vegas from California and had in his possession approximately \$3,000 (three thousand dollars). Limanni hired Hamilton to do some casual labor (clean-up work) for Cinergi.

On November 16, 1998, pursuant to a report, the police discovered a body that was later identified as Hamilton, with three gun shot wounds. The body was covered with wood, lying face down near a set of tire tracks. Hamilton had a piece of paper in his front pocket with the name Jack written on it and a phone number. Police determined the number was to Jack's (Seka's) cell phone for Cinergi.

The following day, police responded to a call for a possible break-in at a vacant business, located at 1929 Western Avenue, the business next door to Cinergi's office. At the scene, officers Nogess and Kroll observed that glass was broken out of the front of the business and blood was visible on the sidewalk, on the glass and inside the business. Inside, the officers found several items, among which were three spent

bullets, a jacket, a hat and a bracelet. The jacket had three bullet marks in it.

While police were investigating the premises of 1929, Seka arrived at 1933 Western in a small brown pickup. Seka granted the police permission to look inside the business at 1933. While there, police saw what appeared to be a .357 cartridge, which subsequently disappeared.

Later that same day, the premises of 1933 Western were searched a second time pursuant to written consent, after it was decided that the bullets, blood and jacket recovered at 1929 could be related to the homicide of Hamilton, whose body was discovered the day before. During the second search at 1933 Western, the police discovered new lumber that was being used to build a walk-in humidor. This wood was similar to the wood found on top of Hamilton. Police later determined that the wood on top of Hamilton bore latent fingerprints matched to Seka and Limanni. The police noted several locations with droplets of apparent blood. Also, police recovered a bullet from a piece of drywall directly behind a couch with a hole and a .32 cartridge from the inside of the toilet. In the false ceiling, the police also found .357 ammunition, a couple of .32 cartridges and a wallet containing a Nevada driver's license, a social security card, a birth certificate and some credit cards bearing the name Peter Limanni. In a dumpster located out back, which was empty earlier in the day, police located burnt clothing and a checkbook with Limanni's name on them.

As a result of their search and believing the evidence might be relevant to Hamilton's homicide, police asked Seka to come to the detective bureau for questioning. Seka consented, was Mirandized and police conducted a taped interview. During the interview, Seka explained that Limanni owned the business at 1933, but that Seka had not seen

Limanni since November 5, 1998. This was about the time Limanni's landlord had seen Limanni with \$2,000 to \$3,000 (two to three thousand dollars) cash in his possession. Seka also informed police that a black male named Seymour (Hamilton) had done some odd jobs at 1933 Western, but that he had last seen Seymour about a month before. He further explained to police that Cinergi had two white Dodge vans and a brown Toyota pickup that they utilized.

After questioning, police explained to Seka that while he was a suspect in the killing of Hamilton, they would not arrest him because they had to wait for the return of all the forensic evidence. The police drove Seka back to 1933 Western. Seka claimed he had a dinner appointment, but he would return to the premises later. Police allowed Seka to leave in one of the white vans belonging to Cinergi, but impounded the brown truck and the remaining white van after they discovered blood in both vehicles. Seka never returned to the premises.

That evening, Seka spoke with Limanni's girlfriend, Jennifer Harrison ("Harrison"), and told her that some black guy had been killed and he had to get out of town. He wanted to borrow Harrison's car because he was being followed; she declined, and he left. Several weeks later, Seka called Harrison and indicated that he was "going underground".

In the meantime, on December 23, 1998, police found Limanni's decomposing body, partially buried and partially uncovered. The body was discovered in California, approximately five miles from the California-Nevada state boundary, roughly a forty-five minute drive from Las Vegas and a several hour drive from any city in California. The San Bernadino County Coroner's Office ruled that Limanni died from gunshot

wounds; 10 (ten) in all. They also estimated that Limanni had been dead for several weeks.

Thereafter, Seka was charged with: (1) one count of murder with use of a deadly weapon, alleging the murder of Hamilton; (2) one count of murder with use of a deadly weapon, alleging the murder of Limanni; and (3) two counts of robbery with use of a Deadly Weapon, alleging Hamilton and Limanni were robbed as part of each murder. In March of 1999, Seka was arrested in Pennsylvania and stood trial on these charges.

At trial, the prosecution presented testimony supporting the above-referenced facts. The prosecution also presented the results of the forensic analysis conducted on the items of evidence, as follows:

1. DNA testing conducted on the blood recovered from glass fragments at 1929 Western revealed that Hamilton could not be excluded as the source;
2. The bullet holes in the jacket found at 1929 Western were consistent with the gunshot wounds in Hamilton's body;
3. DNA testing on the blood from the white Cinergi van revealed that Limanni could not be excluded as the source;
4. DNA testing on the blood from the brown Toyota pickup revealed that Hamilton could not be excluded as the source;
5. The tire marks found at the location of Hamilton's body were consistent with the type of tire on the brown Toyota pickup;

6. A .32 caliber weapon was used to kill Limanni, and the .32 bullets recovered from Limanni's body matched some found at 1933 Western; and

7. A .357 magnum was used to kill Hamilton, and a bullet fragment from 1933 Western matched the bullet recovered from Hamilton's body.

Additionally, the prosecution offered testimony from a friend of Seka's, Thomas Cramer ("Cramer"), which indicated Seka's responsibility for Limanni's murder. Cramer testified that, on January 23, 1999, during a fight with Seka, Seka asked Cramer, "Do you want me to do to you what I did to Pete Limanni?" Cramer also testified that Seka had told him that Limanni came at him with a gun over missing money and that he wrestled the gun from Limanni and shot him several times. As a result of his wounds, Limanni began to gurgle blood out of his mouth, at which point Seka continued to shoot.

After hearing this evidence, the jury returned a verdict on March 1, 2001, finding Seka guilty of: (1) count one - first degree murder with use of a deadly weapon; (2) count two - second degree murder with use of a deadly weapon; and (3) counts three and four - robbery.

DISCUSSION

Seka first contends that the district court improperly admitted evidence that Seka left Nevada for Pennsylvania in order to avoid criminal prosecution. We disagree. Evidence of flight may be admissible to demonstrate consciousness of guilt.¹ This court has reviewed flight

¹See Walker v. State, 113 Nev. 853, 870-71, 944 P.2d 762, 773 (1997) (quoting Miles v. State, 97 Nev. 82, 85, 624 P.2d 494, 496 (1981)).

instructions to ensure that the record supported the conclusion that the defendant's leaving the scene was with a consciousness of guilt and for the purpose of avoiding arrest.²

In the present case, the record supports the inference that Seka's flight to Pennsylvania was related to his criminal involvement in the murders of Limanni and Hamilton. Seka's conversation with LVMPD demonstrates that he was on notice that he was a target of a pending criminal investigation into the disappearance and murders of Limanni and Hamilton. Also, Seka's request to borrow Harrison's car because he was wanted for murder and his subsequent call to her a few weeks later informing her of his plans to go "underground" clearly indicate an intent to evade the police. Thus, we conclude that the district court properly admitted evidence of Seka's flight from the police.³

Next Seka argues that the district court lacked jurisdiction to prosecute him for Limanni's murder, because the State did not prove that Limanni was murdered in California, not Nevada. We disagree. Pursuant to NRS 171.020, any person who commits a crime within Nevada may be

²See id.

³Additionally, we conclude that Seka's position that his case is factually inapposite to that in Santillanes v. State, 104 Nev. 699, 700, 765 P.2d 1147, 1148 (1988), is without merit. In Santillanes, we concluded that flight evidence was properly admitted where the defendant twice consented to meet with authorities and after failing to appear for both meetings, fled the jurisdiction. Here, Seka expressly promised the police that he would return to the scene of the crime after attending a dinner appointment. Seka subsequently disappeared before reemerging in Pennsylvania a year later. Thus, we find Seka's situation analogous to that in Santillanes and evidence pertaining to his flight properly admitted.

punished for that crime in Nevada.⁴ Notwithstanding a lack of direct evidence, we conclude that there was sufficient circumstantial evidence admitted at trial to support the conclusion that Limanni was killed in Las Vegas, his body loaded into a Cinergi Dodge van, and then dumped over the border in California.

DNA testing revealed that Limanni's blood was found inside the Dodge van located at 1933 Western Avenue. Several expended bullets matching those found in Limanni's body were located at 1933 Western Avenue. Limanni's body was discovered in a remote area only five miles from the Nevada state line. The location where his body was found was approximately forty-five minutes away from Las Vegas. Lastly, Limanni's body was situated a great distance away from any California city. Thus, we conclude that there is sufficient evidence to support a finding that the murder of Limanni was committed in Nevada and the district court's exercise of jurisdiction on the Limanni murder was proper.

Seka's next assertion of error involves the joinder of the Limanni and Hamilton charges. Seka argues that the charges against him for the robbery and murders of Limanni and Hamilton were improperly joined by the district court. We disagree. NRS 173.115 defines

⁴NRS 171.020 states:

Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state, such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state.

when joinder of charges is appropriate.⁵ Decisions to sever charges “are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion.”⁶ We review alleged errors by the district court under a harmless error analysis.⁷

However, even if joinder is permissible under NRS 173.115, it may still be inappropriate if joinder would have unfairly prejudiced the defendant.⁸ To establish that joinder was prejudicial “requires more than

⁵NRS 173.115 states:

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:

1. Based on the same act or transaction; or
2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

⁶Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990) (citing Lovell v. Sate, 92 Nev. 128, 132, 546 P.2d 1301, 1303 (1976)).

⁷See Robins, 106 Nev. at 619, 798 P.2d at 563 (citing Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342-43 (1989)).

⁸See NRS 174.165(1), which provides in pertinent part:

If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

See also Middleton v. State, 114 Nev. 1089, 1107, 968 P.2d 296, 309 (1998).

a mere showing that severance might have made acquittal more likely.”⁹ Reversal for misjoinder is required only if the error “has a substantial and injurious effect on the jury’s verdict.”¹⁰

In the present case, we conclude that the district court did not err in finding that there was sufficient evidence to support a conclusion that the murders of Limanni and Hamilton were conducted and concealed by Seka in roughly the same manner as part of a common scheme or plan for financial gain. Both individuals disappeared in November of 1998. Both bodies were transported in Cinergi vehicles and were discovered partially concealed by dirt or wood in shallow graves. An intensive amount of forensic evidence was introduced at trial, including bullets, fingerprint evidence, and DNA evidence indicating that both men were murdered at the businesses owned by Limanni at 1929 and 1933 Western Avenue. Also, both victims died as a result of gunshot wounds. Lastly, witnesses testified that both victims had large amounts of cash in their possession shortly before they were missing and no such cash was found on their bodies or amongst their personal possessions. Finally the State presented evidence linking Seka to the victims, Cinergi and the Western Avenue locations.

We also conclude that the district court’s decision to join charges was appropriate because evidence of Limanni’s murder would have been cross-admissible in a separate trial for Hamilton’s murder.

⁹Floyd v. State, 118 Nev. ___, ___, 42 P.3d 249, 255 (2002) (quoting United States v. Wilson, 715 F.2d 1164, 1171 (7th Cir. 1983)).

¹⁰Middleton, 114 Nev. at 1108, 968 P.2d at 309 (citing Mitchell, 105 Nev. at 739, 782 P.2d at 1343).

This court has held that, “if . . . evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed.”¹¹ Evidence of Limanni’s murder would have been admissible in a separate trial for Hamilton’s murder to prove the identity of his killer, pursuant to NRS 48.045(2).¹² Both victims were robbed, shot, stripped naked, and left covered by dirt or wood in shallow graves and there is evidence from which a reasonable trier of fact could conclude that the murders took place at the same time and place. Thus, we conclude that the district court did not abuse its discretion in joining charges against Seka for the murders of Hamilton and Limanni.

Next Seka contends that he was prejudiced because the State exhausted the blood samples that were identified at trial as belonging to Limanni and Hamilton. We disagree. This court has held that the State’s failure to preserve evidence does not warrant dismissal unless the defendant can either show: (1) bad faith by the government or (2) prejudice from the loss of the evidence.¹³

¹¹Tillema v. State, 112 Nev. 266, 268, 914 P.2d 605, 606 (1996) (quoting Mitchell, 105 Nev. at 738, 782 P.2d at 1342.)

¹²NRS 48.045(2) states:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

¹³See Williams v. State, 118 Nev. ___, ___, 50 P.3d 1116, 1126 (2002) cert denied ___ U.S. ___, 123 S. Ct. 569 (U.S. 2002); Leonard v. State, 117

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Seka does not show that the State acted in bad faith. Dr. Welch, a forensic chemist with LVMPD, testified that at the time the DNA samples were tested, the department's testing system required a large amount of a sample. Also, Dr. Welch testified that at the time the samples were tested there was no formal or informal procedure in place to alert the district attorney's office before using the entire sample. Currently, according to Dr. Welch, the department tries to preserve at least half the sample for the defense. Therefore, we conclude that the record demonstrates that the State did not destroy the DNA samples in bad faith.

Also, Seka does not show that he was prejudiced by the loss of the evidence. Other blood samples were available from the various crime scenes that contained DNA of both Limanni and Hamilton, which Seka could have re-tested. In addition, Seka does not point to any evidence that demonstrates that the first tests done on the DNA samples that matched Seka's DNA were flawed. Thus, we conclude the destruction of these samples, which clearly identify both Seka's and the victims' DNA, did not prejudice his case.

Finally Seka asserts that the record contains insufficient evidence to support the jury's verdicts. We disagree. "We review a claim of sufficiency of evidence by looking at the facts in the light most favorable

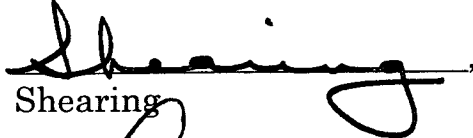
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Nev. 53, 68, 17 P.3d 397, 407 (2001); see also Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988).

to the State.”¹⁴ In addition, this court has specifically stated that “[c]ircumstantial evidence alone may sustain a conviction.”¹⁵

The jury convicted Seka of all four counts after considering the evidence presented by the parties. After examining the facts in the light most favorable to the State, we conclude that sufficient evidence exists for the jury to have convicted Seka of the robbery and murder of Limanni and Hamilton.

Accordingly, we ORDER the judgment of the district court AFFIRMED.

 J.
Shering

 J.
Leavitt

 J.
Becker

cc: Hon. Donald M. Mosley, District Judge
Kajioka, Christiansen & Toti
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁴Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) (citing Koza v. State, 100 Nev. 245, 250-51, 681 P.2d 44, 47 (1984)).

¹⁵McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992) (citing Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980); Crawford v. State, 92 Nev. 456, 457, 522 P.2d 1378, 1379 (1976)).