

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES EDWARD JENNINGS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38044

FILED

DEC 11 2002

ORDER OF AFFIRMANCE

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

Charles Edward Jennings appeals from a judgment of conviction entered after a jury found him guilty of first-degree murder with the use of a deadly weapon. Jennings challenges his conviction on various grounds. We conclude that all of his arguments lack merit, and we affirm his conviction.

Jennings first contends that the district court violated his due process rights in not requiring the jury to be unanimous with regard to the theory of first-degree murder. It is well settled that jury unanimity is not required on the theory of first-degree murder.<sup>1</sup> Therefore, we conclude that the district court did not abuse its discretion in not requiring the jury

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<sup>1</sup>See Moore v. State, 116 Nev. 302, 304, 997 P.2d 793, 794 (2000) (concluding that the district court properly permitted the State to proceed under alternative theories of first-degree murder, and the jury need not reach unanimity with respect to either theory); Holmes v. State, 114 Nev. 1357, 1364, 972 P.2d 337, 342 (1998) (same); Evans v. State, 113 Nev. 885, 895-96, 944 P.2d 253, 260 (1997) (holding that the Constitution does not require jury unanimity regarding theories of first-degree murder); Walker v. State, 113 Nev. 853, 870, 944 P.2d 762, 773 (1997) (concluding that the district court did not err in instructing the jury that it did not have to unanimously agree upon a theory of first-degree murder).

to be unanimous with respect to the theory of first-degree murder.<sup>2</sup>

Jennings next challenges the district court's decision permitting the State to proceed on its theory of felony murder based on kidnapping. Jennings raises two arguments in support of his challenge: (1) that the killing of the victim did not occur within the res gestae of a kidnapping but that the alleged kidnapping was part of the killing itself; and (2) that there was insufficient evidence to support the corpus delicti of kidnapping. We first conclude that the killing of the victim occurred within the res gestae of a kidnapping because Jennings used the gun to entice the victim over to his car for the purpose of killing the victim or to cause the victim substantial bodily harm.<sup>3</sup> We next conclude that there was sufficient evidence adduced at trial to establish the corpus delicti of kidnapping. Indeed, the victim's body was found two parking spaces over from where his van was parked, Jennings testified that he beckoned the victim over to his car using a gun, a witness heard a voice yell the victim's name followed by gunshots, and Jennings testified that he yelled the victim's name and then beckoned him over. Therefore, we conclude that the district court did not abuse its discretion in permitting the State to advance its theory of felony murder based on kidnapping.<sup>4</sup>

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<sup>2</sup>See Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (reviewing a district court's decision regarding jury instructions under an abuse-of-discretion standard).

<sup>3</sup>See NRS 200.310.

<sup>4</sup>See State v. Shade, 111 Nev. 887, 895, 900 P.2d 327, 332 (1995) (reviewing a district court's determination regarding a motion in limine for abuse of discretion).

Next, Jennings contends that the district court erred in admitting the tape-recorded message he left on his answering machine. Jennings asserts that this message fell within the purview of the marital privilege, and thus should have been inadmissible. We disagree for three reasons. First, the message was not a confidential communication because, although Jennings intended the message for his wife, it was a communication that could be heard in the presence of others.<sup>5</sup> Second, the tape-recorded message was not an “examination” of Jennings’ wife as contemplated by NRS 49.295(1). Finally, even assuming that the tape-recorded message fell within the protection of the marital privilege, Jennings waived the privilege when he failed to assert it prior to the admission of the tape-recorded message.<sup>6</sup> Therefore, we conclude that the district court did not abuse its discretion when it admitted the tape-recorded message.<sup>7</sup>

Jennings next contends that the district court erred in denying his motion to suppress his statements and consent to search his house. However, in looking at the totality of the circumstances, we conclude that

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<sup>5</sup>See Foss v. State, 92 Nev. 163, 167-68, 547 P.2d 688, 691 (1976) (noting that the marital privilege only protects confidential communication between a husband and wife, and when a spouse speaks in the known presence of others, this is not a confidential communication).

<sup>6</sup>See Peck v. State, 116 Nev. 840, 847, 7 P.3d 470, 474 (2000) (concluding that the marital privilege must be specifically invoked beforehand and “[t]he failure to do so waives the privilege”).

<sup>7</sup>See Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000) (noting that the determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed on appeal unless there has been an abuse of discretion).

substantial evidence supports the district court's determination that Jennings' confession and consent to search were freely and voluntarily made.<sup>8</sup>

Jennings next contends that the prosecutor engaged in several instances of misconduct. Jennings acknowledges that he failed to object to some instances of alleged prosecutorial misconduct but argues that the district court committed plain error in failing to cure the alleged misconduct.<sup>9</sup> After a thorough review of the record on appeal, we conclude that the alleged instances of prosecutorial misconduct do not amount to reversible plain error.

Jennings next contends that the district court erred during the penalty hearing in admitting a video depicting a dedication of a post office in the name of the victim. We conclude that the district court did not abuse its discretion in admitting the video because the video was relevant. The State specifically limited the video to five minutes and eliminated speeches from prominent political figures, and the district court struck the music to avoid undue prejudice and emotional appeal.<sup>10</sup>

At oral argument, Jennings claimed that error occurred when the district court permitted his testimony from the first trial to be read to

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<sup>8</sup>See Steese v. State, 114 Nev. 479, 488, 960 P.2d 321, 327 (1998) (upholding a district court's determination that a confession is voluntary if it is supported by substantial evidence).

<sup>9</sup>See Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986) (noting that this court may review errors that are "patently prejudicial" regardless of counsel's failure to object).

<sup>10</sup>See Milligan v. State, 101 Nev. 627, 636, 708 P.2d 289, 295 (1985) (reviewing admission of evidence in the penalty hearing for abuse of discretion).

the jury in this, the second trial. After Jennings testified at his first trial, the district court permitted the State to amend the information, adding the theory of felony murder to support the first-degree murder charge. The felony murder theory had become viable in light of Jennings' testimony. However, we reversed his conviction after the first trial, concluding that the district court erroneously allowed the State to amend the information after Jennings testified, as it violated Jennings' fundamental right to be clearly informed of the nature and cause of the charges in order to permit adequate preparation of his defense.<sup>11</sup> We further concluded that this error was prejudicial because Jennings probably would not have testified had he known his testimony would be used against him for a first-degree murder charge based upon felony murder.

Because in this second trial, Jennings was charged with first-degree murder based upon alternate theories including felony murder, and because Jennings did not testify at the second trial, Jennings now argues that the same error that infected the first trial has infected the second trial. Namely, Jennings argues error in the State's use of his testimony when he was not on notice that the State would pursue a felony murder theory. We note that Jennings did not brief this argument on appeal and did not make this specific objection at trial. Under these circumstances, we decline to rule on the possible error committed here.<sup>12</sup> We believe the issue is better decided in the context of a post-conviction proceeding.

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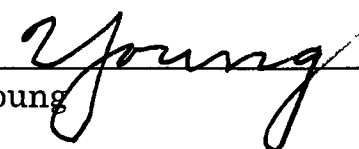
<sup>11</sup>Jennings v. State, 116 Nev. 488, 491, 998 P.2d 557, 559-60 (2000).

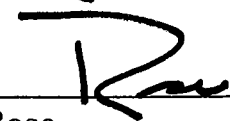
<sup>12</sup>See Talancon v. State, 102 Nev. 290, 302 n.4, 721 P.2d 764, 769 n.4 (1986) (declining to address issues raised for the first time on appeal).

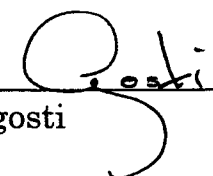
Finally, Jennings contends that the district court erred in instructing the jury during the penalty phase to review the jury instruction in regard to its question. We conclude that this argument is without merit.

Having considered Jennings' arguments and concluding that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Young

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Agosti

cc: Hon. Donald M. Mosley, District Judge  
Pike & Associates  
Attorney General/Carson City  
Clark County District Attorney  
Clark County Clerk