

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLIFFORD MILLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38802

FILED

FEB 18 2004

ORDER OF REVERSAL AND REMAND

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

This is an appeal from a conviction, pursuant to a jury verdict, of two counts of first-degree murder with use of a deadly weapon. Appellant Clifford Miller was sentenced to life imprisonment without the possibility of parole plus a term of life imprisonment for the deadly weapon enhancement on each count, with all life sentences to be served consecutively.

On May 10, 1999, police responded to shots fired at an apartment building in Winnemucca, Nevada. They found the appellant, Clifford Miller, lying supine on the ground outside of the apartment complex, suffering from a self-inflicted gunshot wound to the head. Inside the apartment, they found the deceased bodies of Lisa Jenkins Miller, Clifford's estranged wife, and Leon Carlson, Lisa's boyfriend. Lisa had been shot in the head, and Leon had been shot in the groin and in the head. In spite of Clifford's attempted suicide, he survived and was found competent to stand trial for the killings.

The evidence adduced at trial showed that Lisa and Clifford Miller were married but separated at the time of the homicides, and Lisa and Leon Carlson were openly dating. On the evening of the incident, prior to the killings, Clifford had telephoned his father, Clarence Miller, saying that his car had broken down and asking his father to pick him up. Clarence drove to the spot that Clifford had indicated, but could not locate

Clifford or Clifford's vehicle. Clarence later discovered that his .45 Colt revolver was missing from his home. A .45 Colt automatic handgun was recovered from the scene of the shooting, and a magazine clip matching the handgun was recovered from Clifford's pants pocket during his transport to the hospital. It was determined that Clifford had shot Lisa and Leon before turning the gun on himself. Clifford asserted as a defense that he did not enter the apartment with the intent to shoot Lisa or Leon, but to commit suicide in front of them. He indicated he did not remember the actual shooting or why he decided to shoot them before shooting himself.

On June 11, 1999, Clifford was charged by information with two counts of first-degree murder with a deadly weapon. The information alleged that Clifford had deliberately, and with premeditation, killed Lisa and Leon. On August 28, 2000, Clifford pleaded not guilty to the charges. On December 7, 2000, the Humboldt County district attorney's office deputized two Clark County deputy district attorneys to try the case because Humboldt County's district attorney had a conflict of interest.

Under the direction of new counsel, the State filed an amended information on December 18, 2000, adding felony-murder as a theory for conviction by alleging burglary, kidnapping and/or home invasion. Clifford moved to strike the amended information. After a hearing, the district court denied the motion to strike. Clifford then filed a motion to dismiss the felony-murder charges, which the district court also denied. The State filed a second amended information on July 11, 2001, dropping the home invasion charge as a theory for felony-murder. As to the burglary, according to the pre-trial pleadings and arguments, the State was asserting that Clifford committed burglary by entering the apartment with intent to shoot at or into a building.

Clifford's trial began on July 23, 2001, and on August 9, 2001, the jury returned a verdict of guilty on two counts of murder in the first degree with the use of a deadly weapon.

Clifford now appeals the judgment of conviction, arguing that his substantial rights were prejudiced by: (1) the lack of sufficient evidence to sustain a felony-murder conviction coupled with a verdict form that failed to distinguish between a conviction based upon deliberate and premeditated killing and one based on felony-murder, (2) the district court's failure to instruct the jury on involuntary manslaughter, (3) the district court's failure to instruct the jury that physical contact was not necessary for provocation, (4) the district court's exclusion of his suicide note from evidence, (5) the district court's exclusion of character evidence regarding Leon once the State had opened the door to such evidence, (6) the district court's admission into evidence of a phone sex tape without sufficient foundation, (7) the district court's admission of evidence of domestic abuse and stalking behavior by Clifford, and (8) prosecutorial misconduct.¹

¹Clifford also asserts that the amended information failed to give him adequate notice because the State failed to describe the facts constituting grounds for burglary and kidnapping. We agree the amended information failed to conform to our ruling in Alford v. State, 111 Nev. 1409, 1412, 906 P.2d 714, 715 (1995) (holding that "in future murder cases the State must, if it is going to seek a murder conviction based on a felony-murder theory, give notice in its charging document that it is seeking conviction based on a felony-murder theory and must state specific facts which would support such a charge"), however, because we reverse on other grounds, we decline to consider whether Clifford was prejudiced by the improper information.

Sufficiency of the evidence

Clifford argues that there was insufficient evidence to sustain a felony-murder conviction and that the conviction must be overturned because the general verdict form failed to distinguish between a guilty verdict based upon premeditated killing and one based upon felony-murder.

Regarding the burglary theory, Clifford argues that the State improperly argued that Clifford entered Lisa's apartment with the felonious intent to discharge a firearm at or into a building in violation of NRS 202.285. He contends that the statute should be construed in his favor, under the doctrine of lenity,² and that NRS 202.285(1) is properly interpreted to prohibit standing outside of a building and shooting into it, not shooting at people while knowing that a bullet would likely exit a person's body and strike a wall or ceiling. Regarding the kidnapping theory, Clifford contends that the State's argument that merely closing the door behind him when he entered the apartment was sufficient to constitute kidnapping was improper. He contends that asportation is required when kidnapping is incidental to murder or of shooting at or into a building, but there was no evidence of asportation.

The State responds that there was overwhelming evidence of Clifford's guilt at trial, and that the jury could have concluded that Clifford was guilty of felony-murder because he entered the apartment with the intent to kill the victims. The State asserts that there was substantial evidence that Clifford entered the apartment with the intent to discharge a firearm, and that it is undisputed that discharging a firearm at or into a building is a felony, so the jury could have concluded

²Washington v. State, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001).

that Clifford committed felony-murder merely by intending to shoot the gun while he was in the apartment. The State further contends that Clifford waived this argument by failing to object to the prosecutor's comments at trial and to the jury instructions. The State fails to address Clifford's argument regarding the kidnapping felony-murder charge.

First, the State's assertion that Clifford waived this argument by failing to object at trial must fail. The record reflects that Clifford objected to all of the proposed jury instructions regarding felony-murder, burglary, kidnapping and discharging a firearm at or into a building during the settlement of jury instructions.

Next, we must consider whether Clifford's conviction can be sustained based on the general verdict form. We have previously upheld a conviction evidenced by a general verdict form where one of the State's theories was factually unsupported but sufficient evidence existed to support the alternative methods of committing the offense.³ However, where a theory is legally insufficient, and the general verdict form does not show upon which theory the conviction was based, we cannot sustain the verdict.⁴ Legal, as opposed to factual insufficiency, occurs when the jury is instructed on a theory that, as a matter of law, cannot be a crime.⁵ Unlike a situation in which a jury, properly instructed, can determine whether the evidence is sufficient to find the defendant guilty of the elements of the crime, in a legal insufficiency case:

"[t]he jury had no way of determining that the instruction misstated the law in defining the

³Rhyne v. State, 118 Nev. 1, 10, 38 P.3d 163, 169 (2002).

⁴Griffin v. United States, 502 U.S. 46, 56, 59-60 (1991).

⁵Id.

elements of one of the offenses. . . . Unlike a case where the possibility of error by the jury consists of considering a conviction on insufficient evidence . . . , here the possibility of error consisted of the jury following an erroneous instruction of the law."⁶

We conclude that the jury was improperly instructed on both the kidnapping and burglary felony murder theories.

Clifford's argument that jury instructions and the prosecution's closing argument improperly stated the law of kidnapping under NRS 200.310 has merit. Where the crime of kidnapping is incidental to the primary offense, asportation or physical restraint of the victim beyond that necessary to commit the primary offense is required.⁷ However, the district court did not instruct the jury regarding this added element. This, coupled with the prosecutor's closing argument that a kidnapping occurred when the defendant closed the door after entering the apartment, constituted a legally insufficient felony-murder theory. The district court's instruction was legally incorrect.

In this case, there was no evidence of asportation or physical restraint. The evidence showed that Clifford entered the apartment, briefly argued with the couple, and then shot them. The evidence was insufficient to support a felony-murder conviction based upon kidnapping. However, because the jury was improperly instructed and the prosecutor misstated the law during closing argument, the jury had no way of

⁶Thomas v. United States, 806 A.2d 626, 630 (D.C. Ct. App. 2002) (citations omitted) (quoting United States v. Palazzolo, 71 F.3d 1233, 1238 (6th Cir. 1995)).

⁷Doyle v. State, 112 Nev. 879, 893, 921 P.2d 901, 910-11 (1996).

knowing that there was insufficient evidence to support a felony-murder kidnapping conviction.

In addition, the State misstated the law with respect to the felony-murder charge based upon burglary, with shooting at or into a building as the predicate offense. The district court abused its discretion by allowing the jury instruction to stand over Clifford's objection. The State, in its closing argument, argued that regardless of whether Clifford went to the apartment to kill Lisa and Leon or whether he went there to kill himself in front of Lisa, he must have had the general intent of knowing that the bullet would likely pass through the victim and enter a wall, ceiling or floor of the building. The State argues this would constitute a violation of NRS 202.285. We disagree.

Shooting at persons inside the building with a mere inkling that the bullet may miss or pass through the victim to lodge in a part of the building is insufficient to constitute an offense under NRS 202.285. NRS 202.285 applies when a person intends to shoot at the structure, not at persons. Furthermore, the minutes regarding the passage of NRS 202.285 into law show that the Legislature contemplated standing outside of a building and shooting into the building, not shooting from within the building. Accordingly, we conclude that the district court erred by allowing the State to proceed on a felony-murder theory of burglary with the discharge of a firearm at or into a building as the predicate felony.

The State argues that the evidence supports a felony-murder theory involving burglary with the intent to commit murder or assault and battery. First, we note the State did not allege these as the predicate felonies in the information or at any of the pre-trial proceedings. Thus, Clifford was not put on proper notice of these theories. However, even if Clifford had notice, because at least one of the State's theories was legally

incorrect, and because the general verdict form does not show upon which theory Clifford was convicted, we are compelled to reverse and remand for a new trial.

Failure to instruct on involuntary manslaughter and provocation

Clifford claims that the district court erred by denying his request for an instruction on involuntary manslaughter because he had a due process right to jury instructions consistent with his theory of the case as disclosed by the evidence, no matter how weak the evidence.⁸ He claims that his theory was that he went to Lisa's apartment to kill himself in front of her, and, since suicide is not a crime, he lacked the requisite felonious intent for a burglary when he crossed the threshold to her apartment.

Involuntary manslaughter is a killing without the intent to do so during the commission of an unlawful act or of a lawful act that probably would result in a killing.⁹ Here, there was no evidence that the killings were unintentional, accidental or the result of criminal negligence. Hence, Clifford was not entitled to an instruction on involuntary manslaughter.

Clifford next argues that, although the district court gave a voluntary manslaughter jury instruction, it erred by rejecting his proffered instruction that provocation could occur without direct physical contact.¹⁰ Clifford claims that this instruction was consistent with his

⁸Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991); Wegner v. State, 116 Nev. 1149, 1157, 14 P.3d 25, 30 (2000).

⁹NRS 200.070.

¹⁰The proffered instruction was taken directly from Schoels v. State, 114 Nev. 981, 986, 966 P.2d 735, 738 (1998), rehearing granted on other grounds by Schoels v. State, 115 Nev. 33, 975 P.2d 1275 (1999).

defense theory that he became so enraged at the sight of Lisa and Leon together that he was provoked into killing them.

The record reflects that the district court gave the voluntary manslaughter instructions as defined in the statutes¹¹ and in Roberts v. State.¹² The district court, however, refused to give the instruction, required by this court in Schoels¹³ that a "serious provoking injury" does not require physical contact or a threat of physical contact. We conclude that failing to give the Schoels instruction was error, however, we need not consider whether the error was harmless in light of our decision to reverse on other grounds.

Exclusion of the suicide note

Clifford argues that since his theory of the case was that he went to Lisa's apartment to kill himself, the admission of his suicide note, found in his apartment, was crucial. The district court sustained the State's objection to the introduction of this evidence for lack of foundation. We conclude that the district court abused its discretion by failing to admit the suicide note into evidence.¹⁴

The record reflects that the writing on its face appeared to be a suicide note, which was sufficient to support a finding that the writing

¹¹NRS 200.040, NRS 200.050, NRS 200.060.

¹²102 Nev. 170, 173 n.1, 717 P.2d 1115, 1116 n.1 (1986).

¹³114 Nev. at 986, 966 P.2d at 738.

¹⁴Honeycutt v. State, 118 Nev. 660, 672, 56 P.3d 362, 370 (2002) (stating that "[t]he decision to admit or exclude evidence lies in the sound discretion of the district court, and such a decision will not be overturned absent manifest error").

was what it appeared to be.¹⁵ Furthermore, Clifford's father, who was familiar with Clifford's handwriting and signature, was able to identify the signature on the note as Clifford's.¹⁶ The fact that the note was undated went to its weight, not to its admissibility. Without the suicide note, the State was able to argue that Clifford intended to kill Lisa and Leon, as well as himself. However, the suicide note clearly contemplated that Lisa would survive Clifford. Hence, we agree with Clifford that this evidence was crucial, it was sufficiently authenticated, and the district court abused its discretion by excluding it.

Bad character evidence

The State filed a pre-trial motion to exclude testimony by Leon's ex-wife that Leon was a "cad." After a hearing, the district court concluded that her testimony would be irrelevant. Clifford contends that, while this ruling was appropriate before trial, it was no longer appropriate after the State, in its opening argument, vouched for Leon's good character. The record reflects that Clifford objected and asked the district court to reconsider its ruling excluding the testimony by Leon's ex-wife. The district court denied Clifford's request. Clifford alleges that the district court erred because, under the "invited error" doctrine, the State waived its objection to the bad character evidence by vouching for Leon's good character.

Leon's ex-wife's proposed testimony was that Leon was manipulative, beat her and her children, and lived off her earnings. The defense did not show how this evidence was relevant to Clifford's state of mind, intent or motive in killing Lisa and Leon. We conclude that the

¹⁵NRS 52.015.

¹⁶NRS 52.035.

district court correctly determined that the evidence was irrelevant.¹⁷ Even if it were relevant, its probative value was substantially outweighed by the danger of unfair prejudice.¹⁸

Evidence of Clifford's prior bad acts

Clifford contends that the district court erred by admitting evidence that Clifford had "stalked" Lisa because: (1) the evidence was introduced as part of its case-in-chief and not in response to Clifford's defense; (2) the evidence was irrelevant; and (3) the evidence was more prejudicial than probative, because the State tried to use it to show that stalkers are murderers. We conclude that Clifford's arguments are without merit.

First, the stalking evidence could be used in the State's case-in-chief because it was not offered to impeach Clifford or his witnesses, but as evidence of Clifford's intent, to show that the killings were premeditated. Second, the district court properly determined that the evidence was relevant to show that Clifford had the opportunity to kill Lisa and Leon and that he made preparations to do so. The district court determined that the acts were proven by clear and convincing evidence. Lastly, the record does not reflect that the district court abused its discretion by determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Clifford next contends that the district court erred by allowing the admission of evidence that he had battered Lisa. After a Petrocelli¹⁹

¹⁷NRS 48.015.

¹⁸NRS 48.035(1).

¹⁹Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

hearing, the district court allowed the State to introduce evidence of domestic violence committed by Clifford against Lisa. Clifford contends that the district court erroneously admitted hearsay statements that Clifford had beaten Lisa, that the only eyewitness account was irrelevant and that the probative value was substantially outweighed by the danger of unfair prejudice.

The statements made by Lisa to her friends that Clifford had beaten her were not made contemporaneously with the alleged beating, or immediately thereafter,²⁰ and there was no evidence that Lisa was still under the stress of the event.²¹ Nor was it admissible under the "then-existing state of mind" exception, as Lisa's state of mind was irrelevant.²² There was no hearsay exception by which these statements could be admitted, and the district court abused its discretion by admitting this evidence.

We reach a different conclusion, however, with respect to the testimony regarding bruises upon Lisa's body and the incident in which Lisa's baby-sitting charge saw Clifford strike Lisa. We conclude that the district court did not abuse its discretion by admitting this incident of domestic violence.

The phone sex tape

Clifford argues that a phone sex tape that was found in his apartment after the killings was improperly admitted due to lack of

²⁰NRS 51.085.

²¹NRS 51.095.

²²NRS 51.105(1); see Shults v. State, 96 Nev. 742, 750-51, 616 P.2d 388, 393-94 (1980).

foundation because there was a dispute regarding the identities of the voices on the tape. We disagree.

During the State's cross-examination of Clarence Miller, Clifford's father, the State sought admission of an audio tape recording of an episode of phone sex between a male and a female. Clarence testified that the voices belonged to Lisa and Leon. Although Clifford requested the State to stipulate to the identities of the voices, the State refused, and the district court admitted the tape without the stipulation. The State's rebuttal witnesses testified that the voices belonged to Clifford and an unknown female. We have previously held that disputes regarding the accuracy of voice identification go to the weight of the evidence, not to its admissibility.²³ The matter in question was determinable from the face of the tape as an episode of phone sex.²⁴ Clifford presented testimony as to the identities of the voices, which the State rebutted. The dispute as to identity went to the weight of evidence. Accordingly, we conclude that the district court did not abuse its discretion by admitting the tape.

Prosecutorial misconduct

Clifford contends that he and the prior district attorney stipulated to the defense's expert witness being deemed as an expert as a forensic neuropsychologist. The stipulation was signed into order. At trial, however, while the defense was qualifying Dr. Albert Globus, the special prosecutor objected to his qualifications as a forensic neuropsychologist. She argued that, because she was not the prosecutor who had stipulated to Dr. Globus as an expert witness, she was not bound by the agreement and order. Clifford alleges that the prosecutor's purpose


²³Emil v. State, 105 Nev. 858, 862, 784 P.2d 956, 959 (1989).

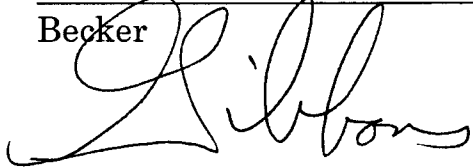
²⁴NRS 52.015(1).

was to make his expert look less qualified than the State's expert, that his expert was subsequently qualified outside of the presence of the jury and that the prosecutor wrongfully repudiated the stipulation at the last minute.

We agree that the prosecutor's repudiation of the stipulation was misconduct, as the prosecutor had a year in which to question the validity of the stipulation, rather than at the moment Clifford's expert was called. The State had entered into a binding agreement and should not have been able to renege on the agreement merely because the new prosecutor disagreed with the prior prosecutor's stipulation. However, we conclude that the error was harmless because, although Clifford's expert was qualified outside of the presence of the jury, Clifford could have inquired about the expert's qualifications again when the jury was present. Having considered Clifford's assignments of error, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for a new trial.


_____, J.
Becker


_____, J.
Gibbons

cc: Hon. John M. Iroz, District Judge
State Public Defender/Carson City
State Public Defender/Winnemucca
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Humboldt County District Attorney
Humboldt County Clerk

SHEARING, C.J., concurring:

I agree that the conviction must be reversed. However, I write separately to add comments regarding the use of the felony-murder rule.

Traditional first-degree murder requires the State to prove that the homicide was perpetrated "by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing."¹ The Legislature determined that certain types of violent crimes are so inherently dangerous that if a killing occurs during the commission of a violent crime, the offender should be held accountable for first-degree murder, even if the offender did not intend to kill. The Legislature denominated several crimes as inherently dangerous, including sexual assault, kidnapping, arson, robbery, burglary, home invasion, various kinds of child abuse, attempts to escape from custody, and terrorism.² This policy is called the felony-murder rule.

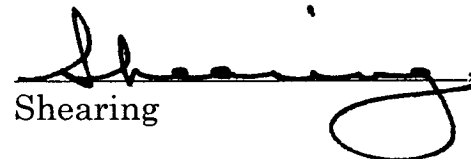
Too often the State will charge an offender with felony murder in addition to first-degree murder, when the crime can only be found to be a felony by the most technical construction and the activity does not increase the risk of harm. However, by charging an offender with felony murder, the State may be able to convince the jury that the homicide constitutes first-degree murder, bypassing the burden of proving the elements of willfulness, premeditation, and deliberation.

Most of the felony-murder cases at least have some technical justification for finding a felony. This case lacks even that. The crime in this case is not a burglary or a kidnapping. It is a homicide. Miller claimed that he only intended to commit suicide, not murder. The jury

¹NRS 200.030(1)(a).

²NRS 200.030(1)(b), (c), (d) and (e).

should have been allowed to decide if they believed Miller, and therefore, convict him of a lesser degree of homicide, rather than first-degree murder. There was ample evidence from which the jury could have determined that the killings constituted first-degree murder, but the State denied them this opportunity. The State should trust the jury to distinguish between the various degrees of homicide.

 C.J.
Shering