IN THE SUPREME COURT OF THE STATE OF NEVADA

BEAU E.Z. BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40062

FILED

JAN 0 8 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction pursuant to a jury verdict of murder with the use of a firearm, attempted robbery with the use of a firearm, and burglary. Appellant Beau E.Z. Brown was sentenced to consecutive terms of life imprisonment on the murder conviction, consecutive twenty-four to sixty month terms on the attempted robbery conviction, to be served concurrently with the murder conviction, and twenty-four to one hundred twenty months on the burglary conviction, to be served concurrently with the murder and attempted robbery convictions.

On June 24, 2000, police responded to a call of a robbery in progress at Bains Mini Market in Reno, Nevada. According to witnesses, Brown, together with two customers of the mini-mart, was performing CPR on Kuldip Bains, the owner of the market. Bains had been shot in the face. Brown was observed repeatedly stating, "You can't die, he can't die." When police arrived, they asked Brown for identification. Brown, accompanied by an officer, went to his car to retrieve identification.

Officer Rulla noticed a handgun in the back seat of Brown's car. He picked up the gun and questioned Brown as to its owner. A struggle ensued, and Rulla tossed the gun back into the car. Brown broke free, and Rulla shouted, "Gun!" Officers tackled Brown to the ground.

Brown's head hit the pavement, causing seizures and a momentary loss of consciousness. Emergency medical personnel took Brown to Washoe Medical Center for his injuries. Video surveillance from Bains Market captured most of this incident.

At the hospital, several officers had custody and control of the clothes emergency personnel cut from Brown's body. At trial, the State conceded several officers, some of whom did not sign the evidence logs as required, had handled the clothes. Upon release from the hospital, police took Brown to the Reno Police Department on charges of obstruction and resisting a police officer.

Police advised Brown of his Miranda rights. Brown, dressed only in a hospital gown, agreed to discuss his day, although he allegedly suffered amnesia from the altercation with police. Brown's blood alcohol level was .17, a fact known to the interviewing detective.

According to Brown, he went to Bains Market and purchased various items, including vodka. After making the purchases, Brown drove his car to pick up a friend named Travis. The car contained, among other things, a ten-millimeter Colt handgun and a .22 caliber handgun. Both handguns belonged to Brown's father.

Brown stated that he and Travis attempted to buy marijuana from a Carlos Hernandez. They drank vodka while waiting for Hernandez at a location near Bains Market. Brown testified that Hernandez mistrusted Travis, so Travis drove away in Brown's car. Fifteen minutes later, Travis allegedly returned and told Brown he shot Bains, the owner of Bains Market. Brown then drove to the market to assist Bains.

Detective Wes Myers obtained a telephonic warrant to search Brown's car and home. Police towed the car from the convenience store to the Washoe County Crime Lab. The search revealed a pair of Adidas jogging pants with a stripe on the side, white T-shirt, black shirt, dark colored backpack, Colt ten-millimeter handgun with a fully loaded magazine, gun holster, dark blue baseball cap, wallet, and two bottles of vodka.

The car remained in impound for several months. Prior to the release of the car, officers, in the presence of all counsel, searched the car again. This time, police recovered a box cutter, prescription drug bottles, a Guns & Ammo magazine, and film canisters with an aroma of marijuana. Brown filed a pre-trial motion to suppress the evidence obtained in the second search for lack of a warrant.

The district court denied Brown's motion, finding the search was done with consent of Brown, however, the district court ruled that some of the evidence was more prejudicial than probative. The district court excluded the box cutter in light of the events of September 11. Subsequent to the suppression ruling, police found a ski mask with eyeholes cut in it near the crime scene. The mask contained the DNA of Brown and an unidentified individual. Based upon the possibility that the box cutter could have been used to cut the eyeholes in the mask, the district court revised its earlier ruling and indicated the box cutter could be admitted.

After a seven-day trial, a jury convicted Brown of murder in the first degree with the use of a firearm, attempted robbery with a deadly weapon, and burglary with a deadly weapon. This appeal followed.

DISCUSSION

Suppression of evidence

Brown alleges five instances where the district court failed to suppress evidence. In each instance, the district court determined, after briefing and oral arguments, that the evidence was admissible. Brown contends the district court should have suppressed the evidence. Further, he claims there should be a new trial without the prejudicial evidence. We disagree.

"Suppression issues present mixed questions of law and fact. While this court reviews the legal questions de novo, it reviews the district court's factual determinations for sufficient evidence."[1] A district court's decision regarding suppression of evidence will be upheld "unless this court is 'left with the definite and firm conviction that a mistake has been committed.'"[2] Nevertheless, the lawfulness of a search is reviewed de novo.[3]

June 24, 2000, search warrant

Brown contends the warrant was invalid because it did not contain a statement of probable cause, and the probable cause affidavit was not attached pursuant to State v. Allen.[4]

We have held that NRS 179.045(5) requires affidavits to be attached to search warrants when an affidavit exists.[5] When, as here,

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[1]Johnson v. State, 118 Nev. ___, ___, 59 P.3d 450, 455 (2002).

[2]State v. McKellips, 118 Nev. ___, ___, 49 P.3d 655, 658 (2002) (quoting United States v. Gypsum Co., 333 U.S. 364, 395 (1948)).

[3]McMorran v. State, 118 Nev. 379, 383, 46 P.3d 81, 84 (2002).

[4]118 Nev. ___, ___, 60 P.3d 475, 478 (2002).

there is no affidavit because police obtained the warrant telephonically, the requirement is inapplicable.[6]

Brown also alleged that his vehicle was improperly searched at the scene prior to the police obtaining a warrant. The district court considered Brown's contention and concluded after a hearing that police did not search Brown's vehicle without a warrant. Videotaped surveillance from the store, asserted to be the most damning evidence against the police, supports the district court's decision. The videotape does not show police entering Brown's car while it was parked at the store. Police also testified that no officer entered the vehicle after medical personnel took Brown to the hospital. We conclude substantial evidence supports the district court's finding that the police did not search the vehicle without a warrant.

Based upon the record, we conclude the district court did not err in refusing to suppress evidence obtained from the June 24, 2000, search.[7]

Search on August 8, 2000

Brown contends the State illegally obtained evidence from his car on August 8, 2000. The search warrant issued on June 24, 2000, had expired. Although the car was in the police impound lot, Brown claims

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. . . *continued*

[5]Id.

[6]Id.

[7]Brown asserts, for the first time on appeal, other challenges to the validity of the warrant. We have considered these issues and find that they do not amount to plain error and are without merit. Richmond v. State, 118 Nev. ___, ___, 59 P.3d 1249, 1256 (2002).

that the police could not retain possession of the vehicle indefinitely, and the continued possession by the police amounted to an illegal seizure and search.

Brown argues the State lacked authority to hold the vehicle after the ten-day period set forth in NRS 179.075 to execute a warrant.[8] The State attempted to justify the search under NRS 179.075, however, NRS 179.075 is inapplicable. Police impounded Brown's vehicle pursuant to a search warrant and retained it in compliance with NRS 179.105.

NRS 179.105 requires an officer to retain "[a]ll property or things taken on a warrant . . . subject to the order of the court to which he is required to return the proceedings before him." Thus, the State must retain Brown's vehicle unless the court orders its return to Brown.

Further, while Brown argued the evidence seized was more prejudicial than probative, he waived the right to challenge the validity of the search when his attorney voluntarily participated in the search. Thus, the district court did not err in admitting the evidence obtained from Brown's vehicle on August 8, 2000.

Admission of box cutter and photograph

As stated above, a district court's decision regarding admissibility of evidence will be upheld "unless this court is 'left with the definite and firm conviction that a mistake has been committed.'"[9] A court

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[8]NRS 179.075(1) states that "[t]he warrant may be executed and returned only within 10 days after its date."

[9]McKellips, 118 Nev. at ___, 49 P.3d at 658 (quoting Gypsum Co., 333 U.S. at 395).

has the authority to modify its rulings during trial.[10] In Richmond v. State,[11] we concluded that a motion in limine preserves appellate review, however, that is not to suggest the district court cannot change its mind during trial.

Initially, the district court ruled the box cutter inadmissible as irrelevant and prejudicial in light of the September 11 terrorist attacks. The district court did, however, reserve the opportunity to admit the box cutter if the State could show relevancy at a later time.

The State offered relevancy in its motion for reconsideration, suggesting that Brown used the box cutter to cut eyeholes in a knit cap found near the murder scene. Because police found the box cutter inside the pants Brown allegedly wore when he shot Bains, the box cutter was relevant to show planning and preparation of the murder. The district court denied the motion for reconsideration. However, the district court did indicate that the State could inquire about the box cutter if Brown testified and had an opportunity to explain the purpose in possessing the box cutter so as to diffuse any terrorist implications associated with box cutters as a result of the events of September 11.

Consistent with the district court's ruling, the State did not introduce the box cutter during its case-in-chief. After Brown testified during the defense's case-in-chief, the State asked him about the box cutter. Brown explained he used box cutters at work, so he would not be

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[10]Staude v. State, 112 Nev. 1, 5, 908 P.2d 1373, 1376 (1996), modified on other grounds by Richmond, 118 Nev. at ___, 59 P.3d at 1254.

[11]118 Nev. at ___, 59 P.3d at 1254.

surprised if police found a box cutter in pants found under the driver's seat of his car.

Brown's concern regarding the box cutter related to potential prejudice because of the September 11 terrorist attacks. If the State attempted to admit the box cutter during its case-in-chief, it might have impermissibly shifted the burden of proof to Brown, forcing him to explain why police found a box cutter in his pants.[12] When Brown testified, this issue became moot. Therefore, the district court did not err in allowing the State to question Brown about the box cutter during cross-examination and admitting the evidence.

Prior to trial, the district court indicated it would exclude a photograph found in the search of Brown's residence depicting Brown holding the murder weapon. However, at trial, the district court reversed this ruling and admitted the photograph. Outside the presence of the jury, the district judge heard arguments regarding the photograph's probative value versus its prejudicial impact. The State argued the photograph shows Brown's familiarity with, and access to, the gun used to kill Bains. Brown's counsel argued the photograph was prejudicial and made Brown "look like he's a bad guy."

The district court did not find the photograph prejudicial because the photograph merely showed Brown target shooting, which does not indicate any bad act. Brown also raised issues regarding the gun's location and use during cross-examination of the State's witnesses. Thus, the district court found the photograph relevant as to whether Brown used the gun at issue.

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[12]See Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989).

As stated above, a district court has authority to modify its rulings during trial.[13] Moreover, the district court did not make a "definitive ruling." To the contrary, the district court reserved ruling on the matter until the State showed the relevancy of the photograph. The district court explained that the photograph would be relevant if the defense contested the identity of the gun or alleged mistake as to ownership of the gun. The district court admitted the photograph at trial because "the defense so far seems to be that the gun just disappeared from Mr. Brown, Sr.'s house. Nobody knows for sure if it's the same gun."

There is nothing in the record to leave this court "'with the definite and firm conviction that a mistake has been committed.'"[14] The district court determined the photograph was relevant. In addition, the district court found the photograph more probative than prejudicial. Thus, the district court did not err in admitting the photograph. Even if we concluded it was error to admit the photograph, the error is harmless.[15]

Evidence obtained at the hospital

Brown argues the district court erred in admitting evidence seized while he received treatment at Washoe Medical Center because of the improper chain of custody and control by police.

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[13]Staude, 112 Nev. at 5, 908 P.2d at 1376, modified on other grounds by Richmond, 118 Nev. at ___, 59 P.3d at 1254.

[14]McKellips, 118 Nev. at ___, 49 P.3d at 658 (quoting Gypsum Co., 333 U.S. at 395).

[15]Domingues v. State, 112 Nev. 683, 693, 917 P.2d 1364, 1372 (1996).

"It is not necessary to negate all possibilities of substitution or tampering with an exhibit[;] . . . it is sufficient to establish only that it is reasonably certain that no tampering or substitution took place, and the doubt, if any, goes to the weight of the evidence."[16] When there is a break in the chain of custody, the State must offer evidence indicating the evidence was in "'substantially the same condition as when the crime was committed.'"[17] Tampering accusations go to the weight of evidence, not admissibility.[18]

Police collected Brown's clothes at the hospital and placed them into bags. The items collected included Brown's shorts, T-shirt, socks and sandals. While different officers were in charge of the evidence throughout the time it was at the hospital, at least one officer controlled the evidence at all times. Moreover, Brown identified the items on cross-examination, thus diffusing any suggestion of tampering. Therefore, we conclude substantial evidence supports the district courts conclusion that that Brown's clothing was in "'substantially the same condition as when the crime was committed.'"[19] The district court did not err in admitting the evidence.

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[16]Sorce v. State, 88 Nev. 350, 352-53, 497 P.2d 902, 903 (1972).

[17]Collins v. State, 113 Nev. 1177, 1184, 946 P.2d 1055, 1060 (1997) (quoting U. S. v. Dickerson, 873 F.2d 1181, 1185 (9th Cir. 1988)).

[18]U.S. v. Brown, 136 F.3d 1176, 1182 (7th Cir. 1998).

[19]Collins, 113 Nev. at 1184, 946 P.2d at 1060 (quoting Dickerson, 873 F.2d at 1185).

Brown's statement to police

Brown contends the district court erred in admitting his entire statement to police because he did not unconditionally waive his right to counsel. Specifically, Brown argues he waived his right to counsel only as to the misdemeanor charges of obstructing and resisting, not a murder charge.

"This court examines the facts and circumstances of a case in order to determine whether a defendant has executed a valid waiver of his Fifth Amendment right against self-incrimination after receiving Miranda warnings."[20] A defendant who gives a confession must do so voluntarily, knowingly and intelligently.[21]

Reno Police Detective Whan began Brown's interview by informing him of his Miranda rights. Brown asked whether he needed a lawyer. Whan told Brown, "That's not my choice." Brown responded, "I don't know if I need one. I don't know, if I'm only being charged with O & R I don't need one." Whan then asked Brown, "Having these rights in mind, do you want to talk to me about what happened?" Moments later, Brown told Whan, "I don't remember anything about the store. I'll tell you about my day, and that's about it."

At the hospital, Brown's mother informed him of the events at the store that he allegedly could not remember. Thus, he knew Whan was investigating all the events of the day, not just the obstructing and resisting charges. Moreover, on cross-examination about the interview,

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[20]State v. Taylor, 114 Nev. 1071, 1083, 968 P.2d 315, 324 (1998).

[21]Id.

Brown said he spoke to Whan "freely, voluntarily and intelligently, having [his] rights in mind." We conclude the district court did not err in finding that Brown did not selectively waive his Miranda rights and Whan owed no duty to explain every crime he was investigating.[22]

Brown also contends his intoxication prevented him from voluntarily waiving his Miranda rights. However, the record reflects his answers during the interview appeared coherent and intelligible. In addition, Brown's testimony at trial failed to raise intoxication as the reason he waived his Miranda rights. While he indicated he "still felt the effects of alcohol," he admitted he "knew why [he] was there." We conclude the district court did not err in admitting Brown's statements to Whan because he knowingly, intelligently, and voluntarily waived his Miranda rights.

Second-degree murder jury instruction

Brown suggests his attempts to administer aid to Bains after the shooting prove a lack of premeditation and deliberation. He argues this lack of premeditation entitled him to a second-degree murder instruction. The State counters that the conduct tends to show Brown's innocence, not a lack of premeditation. The district court found the instruction inconsistent with Brown's defense. "It would call for jury nullification based upon the defense as presented."

Questions of law are reviewed de novo.[23] The court reviews a district court's decisions regarding non-statutory jury instructions for an

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[22]See U. S. v. Soliz, 129 F.3d 499, 503 (9th Cir. 1997), overruled on other grounds by U.S. v. Johnson, 256 F.3d 895 (9th Cir. 2001).

[23]State v. Friend, 118 Nev. 115, 120, 40 P.3d 436, 439 (2002).

abuse of discretion.[24] "'[T]he defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be.'"[25] Conversely, when the evidence points only to either first degree murder or innocence, a district court may properly refuse a second degree murder instruction.[26]

The district court properly refused the second-degree murder instruction. Brown's defense consistently suggested his unidentified friend committed the murder, not Brown. Brown testified he was not the murderer and was nowhere near the scene at the time of the murder. Similarly, the State's case relied solely on first-degree murder principles. Thus, either Brown was innocent because he did not murder Bains or he was guilty of first-degree murder. We conclude the district court did not err in refusing to give a second-degree murder instruction.

Cruel and unusual punishment

"A sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to

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[24]Castillo v. State, 114 Nev. 271, 282, 956 P.2d 103, 110 (1998).

[25]Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1032 (1995) (quoting Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991)).

[26]Graham v. State, 116 Nev. 23, 31, 992 P.2d 255, 258 (2000).

the offense as to shock the conscience.'"[27] Further, "'[a] jury is presumed to follow its instructions.'"[28]

NRS 200.030(4) provides that a person found guilty may be punished by death, life in prison without parole, life in prison with the possibility of parole, or for a definite term of fifty years. The jury determined life without the possibility of parole was the appropriate punishment.

Brown contends that his age, employment, education, and familial assistance, combined with his return to the murder scene to render aid, suggest the jury punished him excessively. The jury should have been lenient on Brown based upon these mitigating factors. Brown argues the jury's failure to exercise leniency could have come only as a result of their dislike for his counsel.

Brown walked into a convenience store and shot Bains in the head, killing him. A sentence of life in prison without the possibility of parole hardly shocks the conscience compared to his crime. Brown's cruel murder of an innocent victim deserves a proportionate punishment. Thus, we conclude Brown's sentence is not cruel and unusual.

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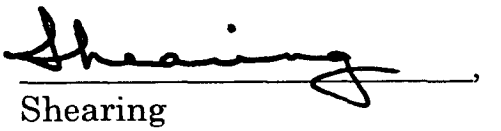
[27]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

[28]Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (quoting Weeks v. Angelone, 528 U.S. 225, 234 (2000)).

We conclude Brown's assignments of error are either without merit or constitute harmless error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[29]



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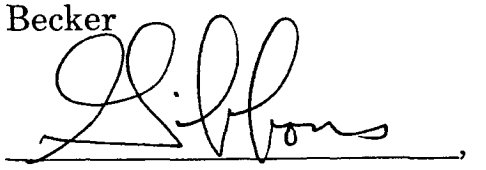

_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Karla K. Butko
Scott W. Edwards
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[29]Brown also asserts the following claims of error: (1) discovery violations alleging the State failed to inform him that several officers had control of evidence at the hospital and that the probable cause affidavit was completed by two officers; (2) substitution of an expert witness one month before trial; (3) admission of fingerprint testing evidence; (4) improper courtroom design; (5) prosecutorial misconduct; (6) refusal of proffered instructions on reasonable doubt, DNA evidence, burden shifting, and attempted robbery; and (7) cumulative error. We have considered these claims and conclude they are meritless.