IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER PAUL JERNIGAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41081

FILED

DEC 21 2004

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Appeal from a judgment of conviction for first-degree murder of a person sixty-five years or older, with the use of a deadly weapon. Fifth Judicial District Court, Mineral County; John P. Davis, Judge.

Appellant Christopher Paul Jernigan was tried by a jury and convicted of first-degree murder of a person over sixty-five years of age with the use of a deadly weapon, for killing Frank Knight in Mina, Nevada.

Jernigan now appeals. We affirm Jernigan's conviction, however, we reverse the sentence and remand for a new sentencing hearing.

Ineffective assistance of counsel

In this direct appeal, Jernigan asks us to consider his claim that he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. Jernigan argues that the issue of his counsel's ineffectiveness is inseparable from the other issues on direct appeal, and so it is impossible to raise the other issues without also presenting the ineffective assistance claim.

Although we may entertain claims of ineffective assistance of counsel on direct appeal, where an evidentiary hearing has been held on

the claims or where such a hearing would be unnecessary,[1] ineffective assistance of counsel claims are "generally not appropriate for review on direct appeal."[2]

After considering Jernigan's request that we review his ineffectiveness claim within the context of this direct appeal, we are compelled to deny his request because no evidentiary hearing has been held. Without a record exploring the following issues, we cannot fairly ascertain counsel's trial strategies, if any, and therefore what inspired counsel's decisions concerning how to handle the presentation of witnesses and evidence, what investigations were performed, what discussions with Jernigan occurred and what decisions were mutually agreed upon, what tactical decisions counsel made independently and the reasonableness of such decisions.[3] In short, without an adequate record in this case, we are unable to determine whether trial counsel's performance was deficient and, if so, whether Jernigan's right to a fair trial was thereby prejudiced. Jernigan's ineffective assistance claims are premature. We elect not to consider them in the context of this direct appeal.

Denial of continuance

Shortly before this matter was to proceed to trial, Jernigan's counsel asked for a continuance, claiming that he was not adequately prepared. We are asked to decide if the district court abused its discretion

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[1]Pellegrini v. State, 117 Nev. 860, 883, 34 P.3d 519, 534 (2001).

[2]Evans v. State, 117 Nev. 609, 622, 28 P.3d 498, 507 (2001).

[3]See Strickland v. Washington, 466 U.S. 668, 691 (1984) (stating that "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions").

by denying Jernigan a trial continuance under this circumstance. Absent an abuse of discretion, we will not disturb a district court's decision to deny a trial continuance.[4]

Mindful that a defendant is entitled to a fair trial, not a perfect trial, we conclude that the district court did not abuse its discretion in ordering the trial to proceed.[5] At the time of the hearing on the motion for a continuance, defense counsel conceded that he was under-prepared, but he did not indicate that prejudice to Jernigan's right to a fair trial would result. Jernigan has not identified any witnesses that his defense counsel allegedly had not interviewed and what their testimony would include, and therefore he has failed to show prejudice. While it is true that Jernigan's defense counsel did not make a motion to suppress Jernigan's statement to investigators, the statement that might have been suppressed was exculpatory in nature. In addition to Jernigan's failure to establish prejudice from the denial of his motion for a trial continuance, the trial had earlier been continued twice at Jernigan's request, and the State had informed the district court that one of its witnesses had a terminal illness and that there existed the grave possibility that the witness would not survive to an extended trial date. Under these circumstances, Jernigan cannot demonstrate that the motion should have been granted. Accordingly, Jernigan's argument on appeal lacks merit.

Jury instruction regarding malice

Because Jernigan was charged with murder, the jury was instructed on the element of malice. Jernigan argues that, of the three jury instructions on malice, Instruction No. 18 was ambiguous and

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[4]Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996).

[5]Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

impermissibly reduced the definition of malice to a negligence standard. Jernigan contends that the instruction incorrectly described what the State was required to prove on this element, consequently violating Jernigan's Fifth and Sixth Amendment rights under the United States Constitution.

Because Jernigan failed to object to Instruction No. 18, we will review the instruction for plain or constitutional error.[6] We will not reverse a judgment of conviction based on a jury instruction erroneously setting forth an element of the crime if the error was harmless beyond a reasonable doubt.[7] Jury Instruction No. 18 provided:

> The definition of "malice" and "maliciously" is to import an evil intent, wish or design to vex, annoy or injure another person.
>
> Malice may be inferred from an act done in willful disregard of the rights of another or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

Instruction No. 18 defines "malice" and "maliciously" as set forth in NRS 193.0175, which is part of Nevada Revised Statutes' Title 15, governing Crimes and Punishments. NRS Chapter 193 contains only general provisions governing crimes and punishments. NRS Chapter 200, also contained within Title 15, governs Crimes against the Person. Homicide and murder are dealt with specifically in Chapter 200. NRS 200.010 specifically defines murder and includes as an essential element of the crime of murder, "killing . . . with malice aforethought, either express or implied." NRS 200.020 defines express and implied malice as

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[6]Bridges v. State, 116 Nev. 752, 761, 6 P.3d 1000, 1007 (2000).

[7]Collman v. State, 116 Nev. 687, 722, 7 P.3d 426, 449 (2000).

applies to murder.[8] Express malice, according to the statute, involves an unlawful deliberate intention to kill; implied malice is implied when the state proves no considerable provocation for the killing or when the circumstances of the killing show an "abandoned and malignant heart."

The judge also gave the jury Instruction No. 17 which was taken from NRS 200.020 and which supplied the jury with the correct statutory definition of express and implied malice.[9]

Instruction No. 18 erroneously described the malice element. The definition of malice contained in this instruction does not pertain to murder. We are at a loss to understand why the district court approved this instruction. It conflicts with and sets forth a different standard than is contained in Instruction No. 17, the correct and proper instruction regarding the element of malice, express or implied, as pertains to the crime of murder.

Instruction No. 17 is the only instruction defining malice the jury should have received. However, we conclude that the district court's error in giving Instruction No. 18 was harmless beyond a reasonable doubt

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[8]NRS 200.020 provides: "1. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. 2. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart."

[9]Jury Instruction No. 17 states: Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." Jury Instruction No. 17 quotes NRS 200.020 exactly except that the instruction states: "Malice may be implied . . . ." (Emphasis added.) We have held that "may" is preferable to "shall" in an implied malice instruction. Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 483 (2000).

for several reasons. First, the jury also received Instruction No. 17 which was referred to by the State in closing argument by its contents, though not its instruction number. It is clear from the record that the State's theory of the case was that Jernigan had committed first-degree murder, a killing that was committed willfully, deliberately and with malice aforethought. The jury was informed by the State itself, in closing argument, that, in effect, the State accepted its burden to prove malice, by characterizing the killing as deliberate, premeditated, and the product of an "abandoned and malignant heart." Second, Instruction No. 17, as mentioned, properly guided the jury in making its decision.[10] Had the jury sensed the conflict in the two instructions at issue in this appeal, we would reasonably expect them to send a question to the district court asking how to resolve the conflict during their deliberations. This they did not do. Third, the State did not rely upon Instruction No. 18 or refer at all to its improper definition of malice during closing arguments.[11] Fourth, overwhelming evidence of Jernigan's guilt is found in the record. Therefore, while we disapprove of the district court's choice to give

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[10]Collman, 116 Nev. at 723, 7 P.3d at 449. In Jerningan's case, Instruction No. 17 correctly defined express and implied malice, taking the definition directly from NRS 200.020.

[11]During closing arguments, the State asked the jury to consider whether Instruction No. 17A, which defines first-degree murder as a "willful, deliberate and premeditated killing," applied in this case. The State mentioned deliberation and premeditation several times and argued that Jernigan had an abandoned and malignant heart, but never alluded to Instruction No. 18 nor to any definition of malice. Instruction No. 16 states: "Murder is the unlawful killing of a human being, with malice aforethought, either express or implied." Jernigan argues only that Instruction No. 18 was given in error; he does not challenge the other jury instructions.

differing and confusing instructions on the essential element of malice, we perceive no plain or constitutional error in giving Instruction No. 18. We emphasize, however, that the prosecutor should not have offered Instruction No. 18 and the judge should not have given it. After considering all arguments of counsel in this appeal, we conclude that the error is harmless beyond a reasonable doubt.

Evidence of prior uncharged misconduct

Jernigan argues that the district court erred when it admitted evidence of Jernigan's prior uncharged misconduct without first holding a Petrocelli[12] hearing to determine its admissibility. "The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference."[13] We will not reverse the district court's decision to admit prior bad act evidence absent manifest error.[14]

We discourage the use of prior bad act evidence to convict a defendant because "bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges."[15] The admission of prior bad act evidence also creates a risk that the jury will convict the defendant for being a "bad person" rather than basing its

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[12]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified in part on other grounds by Sonner v. State, 112 Nev. 1328, 1333-34, 930 P.2d 707, 711-12 (1996) and superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004).

[13]Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

[14]Id.

[15]Tavares v. State, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001).

verdict on evidence indicating that the defendant committed the crime.[16] Nonetheless, prior bad act evidence may be admissible "for limited purposes other than showing a defendant's bad character," such as for motive, opportunity and intent.[17] Before such evidence may properly be presented to the jury, the State must, at a hearing outside the presence of the jury, prove that: (1) the prior bad act is relevant to the crime charged; (2) clear and convincing evidence demonstrates the act occurred; and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence.[18] Furthermore, if the district court admits such evidence, the State has the burden of requesting a contemporaneous limiting instruction.[19] If the State fails to request a limiting instruction, the district court must so instruct sua sponte.[20]

As a threshold issue, the record reveals that Jernigan failed to object to the introduction of several instances of prior bad act testimony. Hence, two standards of review apply: an abuse of discretion standard regarding the objected-to evidence and a plain error standard regarding the evidence to which Jernigan did not object.[21]

We first note that the State failed to request, and the district court failed to hold, a Petrocelli hearing on the proposed testimony

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[16]Id.

[17]Id.; NRS 48.045(2).

[18]Tavares, 117 Nev. at 731, 30 P.3d at 1131.

[19]Id. at 731, 30 P.3d at 1132.

[20]Id.

[21]Dzul v. State, 118 Nev. 681, 688, 56 P.3d 875, 880 (2002) (noting that, where a defendant failed to object, "this court may address plain error and constitutional error sua sponte").

concerning any of Jernigan's prior acts. Moreover, we conclude that the bad act evidence was irrelevant to the crime charged, and the district court erred in admitting the evidence. Testimony about Jernigan consuming methamphetamine with his friend several days after Knight's death was irrelevant. Testimony that the State elicited from Jernigan that he was a drug dealer, while arguably relevant, had low probative value and a highly unfair prejudicial effect. Similarly, although not exactly bad act evidence, testimony that Jernigan had swastika tattoos was irrelevant, and evidence that Jernigan's mother was supporting and raising his child with the State's financial assistance was irrelevant and served only to show that Jernigan was an irresponsible person and a danger and burden to society. Along with the irrelevance or marginal relevance of the above evidence, we conclude that the risk of unfair prejudice substantially outweighed any probative value it may arguably have had.

In addition to the Petrocelli violation, the State failed to request a contemporaneous limiting instruction, nor did the district court independently instruct the jury as to the limited purposes for which the evidence could be considered.

While we emphasize that the State and the district court handled the admission of this evidence poorly, we also recognize that a Petrocelli violation is, on appeal, subject to harmless error analysis. The failure to conduct a Petrocelli hearing may not constitute reversible error if the result would remain unchanged had the evidence not been admitted.[22] Moreover, we review the failure to give a contemporaneous limiting instruction under NRS 178.598, which requires this court to

[22]King v. State, 116 Nev. 349, 354, 998 P.2d 1172, 1175 (2000).

disregard any error not affecting substantial rights.[23] "The test . . . is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'"[24] Because "of the potentially highly prejudicial nature of uncharged bad act evidence, . . . it is likely that cases involving the absence of a limiting instruction on the use of uncharged bad act evidence will not constitute harmless error."[25]

Here, the State wrongly introduced evidence of Jernigan's drug use and drug dealing, his swastika tattoos and his inability to support his daughter. However, overwhelming evidence supports the verdict, and these items of evidence are relatively innocuous in comparison to the strong, direct evidence concerning Jernigan's commission of the crime itself. Therefore, we conclude that the admission of this evidence constitutes harmless error, and is not error of a constitutional dimension. The record reveals strong, ample and non-circumstantial evidence against Jernigan. Sylvia Brown testified that, the night of the murder, when Jernigan learned Knight was in town, he told Brown that he should beat up that "old man" and then steered Brown toward Knight's motel room. Brown testified that she fled the motel room when Jernigan started punching Knight. She testified that, ten minutes after she returned home that night, Jernigan arrived and told her that he

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[23]Tavares, 117 Nev. at 731-32, 30 P.3d at 1132.

[24]Id. at 732, 30 P.3d at 1132 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

[25]Id. at 732-33, 30 P.3d at 1133; see also Kotteakos, 328 U.S. at 765 ("The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.").

slit Knight's throat with a machete and instructed her to say that he had walked her home. Dawn Marie Ahart, a clerk at the Gas Store and an old acquaintance of Jernigan's, testified that Jernigan told her that he had killed Knight. Jernigan's sister testified that, when she came home on the evening Jernigan had gone to Knight's room, Jernigan was in his boxer shorts, the dryer was running and Jernigan said that he had washed his jeans because he was going to Fallon the next day. Forensic evidence revealed blood on Jernigan's boots. The DNA matched Knight's DNA.

Prosecutorial misconduct

Finally, we are asked to reverse Jernigan's conviction because of instances of prosecutorial misconduct. Jernigan urges that the State's actions described above, as well as other actions by the State at trial, amounted to reversible error as prosecutorial misconduct. Specifically, Jernigan points to the following actions by the State: eliciting prior bad act testimony, eliciting testimony about the swastika tattoo, eliciting testimony regarding Jernigan's unemployment and his mother raising his child, eliciting testimony that Jernigan invoked his right to remain silent upon his arrest and the State's mentioning in closing arguments that when the killing occurred, Jernigan had just been released from prison. Jernigan argues that all the above actions demonstrate the State's aim to prejudice the jury and, therefore, amount to impermissible prosecutorial misconduct.

In arguing that the State engaged in prosecutorial misconduct, Jernigan relies on the Fifth Amendment, which prohibits the State from commenting on the accused's silence, and the statutes governing the admissibility of character evidence and other bad acts.

We remind the State that "'[i]t is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful

conviction as it is to use every legitimate means to bring about a just one.'"[26] At the same time, we will not lightly overturn a criminal conviction based on prosecutorial misconduct.[27] After viewing the State's comments or conduct in the context of the entire trial, we must determine whether such conduct affected the defendant's right to a fair trial.[28] "If the issue of guilt or innocence is close, and if the State's case is not strong, prosecutorial misconduct will probably be considered prejudicial. However, where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error."[29]

In this case, while we find the sloppy prosecution inexcusable, we conclude that the State's actions do not rise to the level of reversible error as prosecutorial misconduct. We note that the question of guilt was not close and the State presented a strong case. As discussed earlier in this decision, the State's errors were harmless and did not result in prejudice to Jernigan given the overwhelming evidence of guilt.

New sentencing hearing

NRS 175.552(1)(a) states that, when a defendant has had a jury trial, "the separate penalty hearing must be conducted . . . before the trial jury." Here, Jernigan was sentenced by the judge rather than the jury.[30] The evidence in the record suggests, and the State concedes, that

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[26]Tavares, 117 Nev. at 731, 30 P.3d at 113 (alterations in original) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

[27]King, 116 Nev. at 356, 998 P.2d at 1176.

[28]Id.

[29] Id. (citations omitted).

[30]Cf. Ring v. Arizona, 536 U.S. 584, 589 (2002); Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

Jernigan did not waive his right to be sentenced by a jury. Therefore, we reverse and remand for a new sentencing hearing to be held before a jury.

Accordingly, we

ORDER the judgment of conviction of the district court AFFIRMED IN PART, REVERSED IN PART AND REMAND this matter to the district court for a new sentencing hearing by a jury.

Becker _____, J.
Becker

_____, J.
Agosti

_____, J.
Gibbons

cc: Hon. John P. Davis, District Judge
Lewis S. Taitel
Attorney General Brian Sandoval/Carson City
Mineral County District Attorney
Mineral County Clerk