IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD LEO SJOLSETH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41468

FILED

APR 21 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict finding Appellant, Donald Sjolseth, guilty of one count of murder with the use of a deadly weapon committed against a victim sixty-five years of age or older. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

The trial jury convicted Sjolseth of killing his roommate Harley Peters. The district court sentenced Sjolseth to a term of life without the possibility of parole, plus an additional consecutive term of life without the possibility of parole for use of a deadly weapon upon a victim sixty-five years of age or older.

Sjolseth raises five issues on appeal. First, he argues the confession he made to police while in custody was inadmissible because it was obtained by police coercion. In this, Sjolseth further argues his constitutional rights were violated when his requests to remain silent and to obtain legal counsel were ignored. Second, Sjolseth contends the trial court failed to properly instruct the jury on the limited purpose of the prior bad act evidence. Third, Sjolseth claims the court erred when it granted the prosecutor's request for a flight instruction. Fourth, Sjolseth argues the prosecutor improperly argued his personal knowledge and opinion during the sentencing phase of the trial, resulting in improper

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enhancement of the sentence. Fifth, Sjolseth argues that repeated instances of misconduct and improper rulings throughout the trial, in combination with improperly received evidence and prosecutorial misconduct, prejudiced his right to a fair trial. Accordingly, he seeks reversal of the judgment entered upon the conviction below.

DISCUSSION

Confession

Sjolseth argues the police violated his Fifth and Sixth Amendment right, when they continued to question him about Peters' death after taking him into custody.

The State contends Sjolseth did not properly invoke his rights because his statements to the police were ambiguous and equivocal.

In Davis v. State[1] the United States Supreme Court held that, when interrogating a defendant, the police need only respond to unequivocal invocations of one's right to counsel or to remain silent. The transcript of the interview reveals Sjolseth was a talkative suspect who never unequivocally or emphatically exercised his right to remain silent or his right to counsel. During the interview, Sjolseth twice mentioned he did not want to answer any questions, but immediately thereafter continued to talk about the death of his roommate. He twice mentioned his desire to contact an attorney, but after making these requests he continued to discuss the case with the detectives. With each ambiguous assertion of the right to remain silent, Sjolseth continued to discuss the

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[1]Davis v. State, 512 U.S. 452, 459-60, 114 S. Ct. 2350, 2355-56, (1994).

death of his roommate and voluntarily attempted to explain away discrepancies in his story. The trial court viewed the videotape of the interview and found that Sjolseth's requests for counsel were equivocal.

We reject Sjolseth's arguments that his Fifth and Sixth Amendment rights were violated. Sufficient evidence supports the trial court's finding that Sjolseth was equivocal throughout the taped video session, did not emphatically exercise his right to remain silent or to have an attorney present, and continued to talk voluntarily to detectives.

Police Coercion

Sjolseth argues that while in the interrogation room, the detectives used coercive tactics and violated his rights per Miranda v. State,[2] by refusing his requests for counsel. The State argues that investigators placed Sjolseth in a room at the police station and orally administered a complete Miranda warning. When asked to sign a card acknowledging he was given the Miranda warning, Sjolseth refused.

The trial court viewed the videotape of the interview and found it void of police coercion. This court's review of the interview transcript confirms the administration of Miranda warnings, and reveals Sjolseth's voluntary statement that the detectives behaved like gentlemen. There was no indication in either that the police detectives bullied, forced, intimidated or coerced Sjolseth into confessing to the crime. We therefore reject Soljeth's argument as being without merit.

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[2]Miranda v. Arizona, 384 U.S. 436 (1966).

Limited Scope of Prior Bad Acts

Sjolseth argues the court and the prosecutor erred in not instructing the jury on the limited use of the prior bad act evidence. Sjolseth cites Tavares v. State,[3] in which this court held that, when the prosecutor fails to request an instruction limiting the effect of prior bad act evidence, the district court should sua sponte raise the issue. Sjolseth argues the jury was tainted by the graphic testimony of the police officer and crime scene analyst. Sjolseth claims admission of this evidence without a limiting instruction inflamed the jury to believe the defendant was a bad person, thus guilty of the death of Peters.

The State argues that the jury was properly instructed on the admission of evidence pursuant to NRS 48.045(2), which states that evidence of other crimes is not admissible to prove a person's character. Evidence may be admissible to prove motive, intent, opportunity, plan, or scheme.

Jury instruction number 22 read as follows:

> Evidence that the defendant committed offenses other than that for which he is on trial, if believed, was not received and may not be considered by you to prove that he is a person of bad character or to prove that he has a disposition to commit crimes, such evidence was received and may be considered by you only for the limited purpose of proving the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. You must weigh this evidence in the same manner as you do all other evidence in the case.

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[3]Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001).

The State's argument is partially correct as to jury instruction in light of Tavares. In Tavares we instructed "that a limiting instruction should be given both at the time of evidence of the uncharged bad act is admitted and in the trial court's final charge to the jury."[4] In this case no jury instruction was given at the time of the evidence admittance by the district court and no contemporaneous objection was made as to said error. In this case, in the absence of one limiting instruction, we consider whether the error "had substantial and injurious effect or influence in determining the jury verdict."[5] In this case the error did not have a substantial or injurious effect on the jury in light of the evidence.

We conclude, however, that this error was harmless. As such, we find Sjolseth's argument is without merit.

Flight Instruction

Sjolseth argues the flight instruction was unwarranted because he did not flee the scene after the crime and had no intent to flee. Sjolseth contends the court erred when it granted the prosecutor's request for a flight instruction.

The State argues that there was no reason initially for Sjolseth to flee since the police were unaware of Peters' death. However, once he had informed others of Peters' death, he began to hide from the authorities. In this, neighbor, Charles Schulte, testified that he overheard Sjolseth tell another neighbor that he "was on the run." Sjolseth also called Thomas Smith, to tell him of Peters' suicide. When Smith asked Sjolseth if he reported the death to the police, Sjolseth stated he could not

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[4]Id. at 733.

[5]Id. at 732.

do so right now, as he had other things to do. Finally, Sjolseth fled police officers who were summoned when Sjolseth returned to the scene to collect his belongings.

Pursuant to Jackson v. State,[6] evidence that a defendant fled the crime scene demonstrates evidence of consciousness of guilt. In the case at bar, the district court concluded that trial testimony and evidence demonstrated Sjolseth's intent to avoid arrest.

We conclude there was no abuse of discretion and that sufficient evidence was adduced at trial to support the flight instruction.

Prosecutor's Opinion

Solseth argues that the prosecutor improperly injected his personal opinion in the proceedings at sentencing.

During the sentencing hearing, in response to an inquiry by the district court as to life with the possibility after twenty years consecutive enhancement for a fifty-two year old, the prosecutor argued for the maximum penalty, adding his comments involved his personal feelings based on the recent actions of the Pardons and Parole Board as to the commutation process regarding life without the possibility of parole, opposed to life with the possibility of parole.

The court asked the defense to address why leniency was appropriate. The defense encouraged leniency by the court because of Sjolseth's age and the belief that he was involved in a mercy killing. Counsel for the defense reminded the court that the defendant cried during the interview with the detectives and that Peters was no angel, but rather a "shyster." After considering the arguments of both counsel, the

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[6]Jackson v. State, 117 Nev. 116, 122, 17 P.3d 998, 1001 (2001).

court systematically recounted the evidence that was presented at trial to indicate Sjolseth's physical and mental brutalization of his victim.

We conclude the prosecutor's arguments did not constitute plain error,[7] and that the district court did not rely on the prosecutor's personal opinion when determining the sentence. The district court relied on the testimony and evidence, which revealed the brutality of the crime and the existence of an abusive relationship. Therefore, we conclude the appellant's argument is without merit.

Cumulative Errors Warrant a New Trial

Sjolseth argues the cumulative errors committed during the trial warrant a new trial. We conclude, having reviewed the record on appeal, that this contention is without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin

_____, J.
Douglas

_____, J.
Parraguirre

[7]Floyd v. State, 118 Nev. 156, 173-74, 42 P.3d 249, 261 (2002).

cc: Hon. Donald M. Mosley, District Judge
Special Public Defender David M. Schieck
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk