IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARENCE H. ELLIOT,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 33630

FILED

FEB 8 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Clarence H. Elliot was convicted by a jury of first-degree murder with the use of a deadly weapon. The district court sentenced Elliot to one term of life imprisonment with the possibility of parole for the first-degree murder conviction, and a consecutive term of life imprisonment with the possibility of parole for the deadly weapon enhancement. Elliot now appeals his judgment of conviction, raising numerous issues. After reviewing the record on appeal, we conclude that none of Elliot's arguments have merit; accordingly, we affirm the judgment of conviction.

First, Elliot argues that insufficient evidence was adduced at trial to support his conviction. Elliot contends that there were no facts adduced at trial showing that he acted with malice, a necessary element of first-degree murder. We disagree.

On appeal, this court will not disturb a verdict which is supported by sufficient evidence.[1] And to decide whether sufficient

[1]Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

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evidence exists, this court will determine "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[2] Furthermore, when conflicting evidence is presented at trial, the jury, and not this court, determines what weight and credibility to give to the evidence.[3]

In regard to malice, the presence or absence of malice should be determined by the fact-finder during a full trial on the merits.[4] We have stated that malice "is not a question to be determined by the trial judge at a hearing upon a petition for a writ of habeas corpus, nor by this court, on appeal, but by the trier of fact at the trial of the case."[5]

We conclude that sufficient evidence exists to support Elliot's conviction. NRS 200.010 defines murder as the "unlawful killing of a human being, with malice aforethought, either express or implied." Although the case against Elliot was circumstantial, evidence was adduced at trial showing Elliot exhibited either express or implied malice.[6] Evidence was presented to the jury showing that the victim was shot four times and linking Elliot to the killing. Such evidence supports the

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[2]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980) (determining that sufficient evidence is evidence that establishes guilt beyond a reasonable doubt as determined by a rational trier of fact).

[3]Bolden, 97 Nev. at 71, 624 P.2d at 20.

[4]Thedford v. Sheriff, 86 Nev. 741, 744, 476 P.2d 25, 27 (1970).

[5]Sheriff v. Hodes, 96 Nev. 184, 187, 606 P.2d 178, 180 (1980).

[6]See NRS 200.020.

conclusion that sufficient evidence was adduced at trial regarding malice. Elliot's contention regarding sufficiency of the evidence is without merit.

Next, Elliot argues that his conviction should be reversed because the police did not preserve two items of evidence. According to Elliot, these items of evidence were exculpatory, and therefore Elliot's right to due process of law was violated. This argument is without merit.

Although Elliot styles his argument as a failure to preserve evidence claim, Elliot's argument is more properly framed as a failure to gather evidence claim.[7] As such, in order to demonstrate that the State violated his due process rights, Elliot must show: (1) that the State failed to gather evidence that is constitutionally material, i.e., that raises a reasonable probability of a different result if it had been available to the defense; and (2) that the failure to gather the evidence was the result of gross negligence or a bad faith attempt to prejudice the defendant's case.[8]

In this case, detectives investigating Elliot's involvement in this crime viewed the items of evidence that Elliot now claims are material. The detectives, however, found nothing in the evidence that was exculpatory to Elliot. He has failed to show that the evidence was constitutionally material. Elliot's argument, therefore, is without merit.

Elliot next argues that the district court erred by allowing inadmissible hearsay statements into evidence. Elliot objects to seven separate instances where the district court admitted testimony into evidence. Elliot contends that reversal is warranted. We disagree.

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[7]See Steese v. State, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998); Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998).

[8]See Steese, 114 Nev. at 491, 960 P.2d at 329 (citing Daniels, 114 Nev. at 267, 956 P.2d at 115; State v. Ware, 881 P.2d 679, 685 (N.M. 1994)).

Initially, we note that several statements of which Elliot now complains were not objected to at trial. Generally, failure to object at trial will preclude appellate review of an issue.[9] And although we have discretion to address plain error or issues of constitutional dimension sua sponte,[10] the statements complained of do not constitute such error. Therefore, we need not address these statements.

As to the other statements, hearsay errors are subject to harmless error analysis.[11] Generally, any error which does not affect the defendant's substantial rights shall be disregarded.[12] The statements of which Elliot complains clearly did not affect his substantial rights. Therefore, any error that occurred at trial was harmless.[13]

Elliot next argues that at trial the prosecutor impermissibly commented on his election not to testify. Elliot's argument is without merit.

The Fifth Amendment to the United States Constitution states that a defendant shall not "be compelled in any criminal case to be a witness against himself."[14] Part of the Fifth Amendment's right against compelled testimony also prohibits a prosecutor from commenting to the

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[9]Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482 (2000).

[10]Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991); McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

[11]Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993).

[12]NRS 178.598.

[13]We note that one statement of which Elliot now complains was objected to at trial, and that the objection was sustained by the district court. Clearly, no error occurred regarding this statement.

[14]U.S. Const. amend. V; see also Nev. Const. art. 1, § 8.

jury on the defendant's decision not to testify.[15] In determining whether the Fifth Amendment's prohibition against commenting on an accused's silence has been violated, this court has distinguished direct references to a defendant's decision not to testify from indirect references.[16] Direct references always violate the Fifth Amendment.[17] Indirect references, however, are only impermissible if "the language used was 'manifestly intended to be' or was of such a character that the jury would 'naturally and necessarily' take it to be a comment on the accused's failure to testify."[18] Even when a prosecutor's comments meet this test, and are therefore considered impermissible and a violation of the Fifth Amendment, a prosecutor's comments will only constitute reversible error if such comments are not deemed to be harmless beyond a reasonable doubt.[19]

The statements of which Elliot complains were not direct references to his Fifth Amendment right not to testify. Furthermore, the statements were not "manifestly intended to be" or of "such a character that the jury would 'naturally and necessarily' take it to be a comment on

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[15]Griffin v. California, 380 U.S. 609, 614 (1965).

[16]See Sheriff v. Walsh, 107 Nev. 842, 845, 822 P.2d 109, 110-11 (1991); Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991).

[17]Harkness, 107 Nev. at 803, 820 P.2d at 761; Walsh, 107 Nev. at 845, 822 P.2d at 110-111.

[18]Walsh, 107 Nev. at 845, 822 P.2d at 110-111 (quoting Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989)).

[19]Walsh, 107 Nev. at 845, 822 P.2d at 110-111; Coleman v. State, 111 Nev. 657, 664, 895 P.2d 653, 657 (1995) (citing Chapman v. California, 386 U.S. 18, 24 (1967)).

the accused's failure to testify." Therefore, the comments did not impinge upon Elliot's Fifth Amendment right.

Elliot next argues that several instances of prosecutorial misconduct warrant reversal of his conviction. We disagree.

First, Elliot argues that the prosecutor impermissibly quantified reasonable doubt. According to Elliot, the prosecutor's comments, along with a typographical error contained in the written instruction given to the jury, require reversal of his conviction. We disagree.

We have defined reasonable doubt as "a subjective state of near certitude."[20] But we have cautioned that "[w]hen a prosecutor begins to rephrase the reasonable doubt standard, he or she is often venturing into troubled water."[21] We emphasized this point when we commented that "[p]arties to a criminal case should assiduously avoid such attempts to quantify the concept of reasonable doubt."[22] We have also found that some attempts made by prosecutors to quantify reasonable doubt are merely harmless error.[23]

Although some of the prosecutor's comments improperly compared things like choosing a college and buying a car to finding an accused guilty of a serious crime, this court's prior pronouncements on this

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[20]Wesley v. State, 112 Nev. 503, 514, 916 P.2d 793, 801 (1996) (citing McCullough v. State, 99 Nev. 72, 75, 657 P.2d 1157, 1158 (1983)).

[21]Howard v. State, 106 Nev. 713, 721, 800 P.2d 175, 180 (1990).

[22]Lord v. State, 107 Nev. 28, 35, 806 P.2d 548, 552 (1991).

[23]Quillen v. State, 112 Nev. 1369, 1383, 929 P.2d 893, 902 (1996).

issue make clear that such arguments do not constitute reversible error.[24] Therefore, although we take this opportunity to caution the prosecutor to refrain from making improper arguments in the future, we conclude that any error that occurred was harmless.

In regard to the typographical error, this court has held that although the mandate of NRS 175.211 is clear that no other reasonable doubt instruction may be given, minor deviations from the statutorily prescribed reasonable doubt instruction constitute harmless error where there was overwhelming evidence of guilt and no other trial error occurred.[25] Although the evidence against Elliot was circumstantial, it was strong enough to overcome the typographical error in the instruction given. Therefore, the typographical error was merely harmless error.

Next, Elliot argues that the prosecutor made an improper "Golden Rule" argument during closing argument. This contention is without merit.

Although we have repeatedly stated that it is improper for the prosecutor to ask the jury to place themselves in the shoes of a party or the victim,[26] we have also held that it does not constitute misconduct for the prosecutor to ask the jury to step into the shoes of the defendant when the defendant's state of mind is at issue.[27] This is just what occurred in this case. Therefore, Elliot's argument is without merit.

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[24]Id.; Lord, 107 Nev. at 35, 806 P.2d at 552; Howard, 106 Nev. at 720, 800 P.2d at 179.

[25]Holmes v. State, 114 Nev. 1357, 1365, 972 P.2d 337, 342 (1998).

[26]Howard, 106 Nev. at 718, 800 P.2d at 178.

[27]See Rice v. State, 113 Nev. 1300, 1313, 949 P.2d 262, 270-71 (1997).

Elliot also argues that the prosecutor committed misconduct by characterizing Elliot as a "liar." This argument is without merit.

We have distinguished situations where the prosecutor demonstrates to the jury through inferences that the testimony of a witness may be untrue, from situations where the prosecutor states as a fact that a witness is a "liar."[28] While demonstrating that a witness is lying by referring to the record is permissible, this court has stated that the cumulative effect of a prosecutor remarking that a witness is a liar,[29] or characterizing testimony as a lie,[30] may constitute reversible error.

In this case, the prosecutor, although specifically stating the Elliot "lied," did not commit misconduct. Instead, the prosecutor demonstrated to the jury that Elliot's version of events simply could not be true, and that in order to mislead police, Elliot had lied. Such comments differ from statements made by a prosecutor that the defendant is a "liar." Accordingly, Elliot's argument is without merit.

Finally, in regard to prosecutorial misconduct, Elliot argues that the prosecutor improperly referred to Elliot's previous service in the military. This argument is without merit.

In Felder v. State,[31] we concluded that although caution must be taken, when referring to a defendant's prior military service, the prosecutor's comments only constituted harmless error. The comments made by the prosecutor in the instant case were likewise harmless.

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[28]See Ross v. State, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990).

[29]Id.

[30]Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1998).

[31]107 Nev. 237, 810 P.2d 755 (1991).

Last, Elliot argues that the jury was improperly instructed regarding premeditation and deliberation. This is so, according to Elliot, because the instructions given to the jury did not properly distinguish between premeditation and deliberation. We disagree.

We have already addressed and rejected this argument in Garner v. State[32] and Byford v. State.[33] Furthermore, we have repeatedly stated that the mere use of the instruction utilized in Elliot's trial does not constitute reversible error.[34] Therefore, Elliot's argument is without merit.

Having reviewed the record on appeal, we conclude that none of Elliot's arguments have merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

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[32]116 Nev. 770, 6 P.3d 1013 (2000).

[33]116 Nev. 215, 994 P.2d 700 (2000).

[34]Leonard v. State, 117 Nev. __, __, 17 P.3d 379, 411 (2001); Garner, 116 Nev. at 788, 6 P.3d at 1025.

cc: Hon. Jeffrey D. Sobel, District Judge
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