

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER A. HERNANDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41790

FILED

MAR 17 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of voluntary manslaughter with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

FACTS

In October 2002, appellant Christopher Hernandez and his companion, David Lopez, drove to a Las Vegas 7-Eleven store. In the 7-Eleven parking lot, Gabriel Alspaugh approached the two men. Soon after, a fight broke out between Lopez and Alspaugh. Hernandez briefly joined the altercation, and then went inside the store to get help. Thomas Rogers, the 7-Eleven clerk, immediately went outside to attempt to break up the fight. While Rogers was attempting to keep Alspaugh away from Lopez, Lopez yelled for Hernandez to get his gun. Rogers stated he told the men "no guns here" and asked them to leave. Hernandez returned to the car and got in the driver's seat. Believing the fight to be over, Rogers released Alspaugh, who then ran to the car and began hitting Hernandez through the open driver's side window. Rogers immediately ran to the car to push Alspaugh away from the car. In the meantime, Hernandez retrieved a gun, got out of the car, and fired a shot toward Alspaugh. A bullet hit Alspaugh in the back. Alspaugh died as a result of the gunshot wound.

During trial, Hernandez did not contest that he fired the shot; however, he alleged Alspaugh was turning around to continue fighting when he was killed. The State argued Hernandez shot Alspaugh in the back while Rogers had him restrained.

Following the shooting, Hernandez ran to Sonja Bucher's apartment. Hernandez left Las Vegas and was later arrested by the FBI in Chicago. After being brought to the Chicago Police Department, Hernandez was read his Miranda rights and offered to speak to FBI Agent Pablo Araya. Hernandez gave an unrecorded statement to Araya.

Hernandez was returned to Clark County and charged by information with murder with the use of a deadly weapon. The case was tried to a jury. During trial, Hernandez attempted to introduce photographs of Alspaugh's body and business records from an auto mechanic who worked on Hernandez's car; however, the district court refused to admit the evidence. Hernandez also filed a motion for mistrial due to prosecutorial misconduct or, in the alternative, for curative instructions because of allegedly improper statements made by the State during closing argument. The district court denied this motion.

The jury returned a verdict against Hernandez for voluntary manslaughter with the use of a deadly weapon. Hernandez was sentenced, and this appeal follows.

DISCUSSION

Sixth Amendment Violation

Hernandez claims the district court violated his Sixth Amendment right to confront and cross-examine witnesses against him. Specifically, Hernandez argues the court erroneously restricted cross-examination of Las Vegas Police Detective Robert Wilson and FBI Agent

Pablo Araya. Hernandez wanted to question Detective Wilson about Alspaugh's history of violence and the statement Hernandez made to Bucher after the shooting. He also wanted to question Agent Araya about significant words and statements left out of Araya's testimony about his prior unrecorded conversation with Hernandez.

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to confront the witnesses against him including the opportunity to cross-examine such witnesses.¹ The right is subject to the discretion of the district court, and the district court can limit the scope of cross-examination if it has satisfied the requirements of the Sixth Amendment.² The district court has less discretion when the purpose of cross-examination is to "expose bias," and this court has held that "counsel must be permitted to elicit any facts which might color a witness's testimony."³ The standard of review to be applied is abuse of discretion; but if the cross-examination is dealing with witness bias, the district court's discretion is more limited.⁴

Detective Wilson

Hernandez sought to cross-examine Detective Wilson, after Wilson testified he thought Alspaugh was murdered rather than shot in self-defense. Hernandez wanted to elicit whether Wilson had investigated the background of the victim before he made this conclusion. Furthermore,

¹Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986).

²Crew v. State, 100 Nev. 38, 45, 675 P.2d 986, 990 (1984).

³Id., at 45, 675 P.2d at 991.

⁴Bridges v. State, 116 Nev. 752, 761, 6 P.3d 1000, 1007 (2000).

Hernandez wanted to cross-examine Wilson as to Bucher's statement that Hernandez told her he shot the victim in self-defense. The court disallowed both forms of cross-examination.

An accused that presents a self-defense claim is permitted to present evidence of the victim's propensity for violence.⁵ An accused, when claiming self-defense, has the right to cross-examine witnesses who testify to the reputation of the victim regarding specific acts of violence committed by the victim to test the witnesses' credibility and trustworthiness.⁶

NRS 51.035 defines hearsay as a "statement offered in evidence to prove the truth of the matter asserted." Hearsay is generally inadmissible, but if the statement is offered merely to show the effect the statement has on the listener, it is admissible as non-hearsay.⁷

We conclude that the district court erred in limiting Hernandez's cross-examination. Hernandez presented a self-defense argument and was entitled to elicit all the facts that would color Wilson's testimony, including whether he investigated the victim's history. Furthermore, Hernandez should have been able to cross-examine Wilson to determine why he ignored possible exculpatory statements made to Bucher. The statement to Bucher was not offered to prove the truth of the matter asserted, but rather to show Wilson heard possible exculpatory evidence and ignored it when determining Hernandez murdered Alspaugh.

⁵Petty v. State, 116 Nev. 321, 326, 997 P.2d 800, 803 (2000).

⁶State v. Sella, 41 Nev. 113, 138-39, 168 P. 278, 286 (1917).

⁷Wallach v. State, 106 Nev. 470, 473, 796 P.2d 224, 227 (1990).

However, we further conclude that the error in restricting cross-examination of Hernandez was harmless beyond a reasonable doubt. “[W]here the evidence of guilt is great . . . error [in admitting evidence] will be deemed harmless.”⁸ An error is harmless when it is clear beyond a reasonable doubt that a jury would have concluded the defendant is guilty absent the error.⁹ Based on our review of the other evidence in the record supporting the jury’s finding of guilt, we conclude that the erroneous restriction of cross-examination could not have influenced the jury’s determination of guilt.¹⁰

Agent Araya

Hernandez also argues he should have been allowed to continue cross-examination of Araya to show possible flaws and bias in the agent’s testimony. The district court allowed defense counsel to cross-examine Araya about why the interview with Hernandez was unrecorded, about how certain statements from the interview were not included in the final report, and about possible problems that could result from such a situation. However, the court then stopped cross-examination, believing an inference was being made to the jury that Araya had clandestine or inappropriate reasons for not recording the interview.

We conclude that the district court erred in limiting Hernandez’s cross-examination. The interview was unrecorded, and

⁸Kelly v. State, 108 Nev. 545, 552, 837 P.2d 416, 420 (1992) (quoting McMichael v. State, 98 Nev. 1, 4, 638 P.2d 402, 403 (1998)).

⁹Wegner v. State, 116 Nev. 1149, 1156, 14 P.3d 25, 30 (2000).

¹⁰See Ramsey v. State, 100 Nev. 277, 280, 680 P.2d 596, 597-98 (1994).

Araya's notes admittedly left statements out; therefore, Araya's testimony was significant. Hernandez had the right to further cross-examine Araya regarding omitted statements and other possible flaws in the agent's testimony. However, consistent with the analysis above, we also conclude the district court error is harmless error beyond a reasonable doubt.

Reliance on impalpable or highly suspect evidence

Hernandez claims the district court relied on impalpable or highly suspect information when it sentenced him for the crime of voluntary manslaughter.

The district court "has wide discretion in imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion."¹¹ This court will refrain from interfering with a sentence imposed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence."¹² During sentencing, "all factors bearing on a defendant's sentence must have a basis in the record."¹³

The district court sentenced Hernandez to two consecutive terms of 120 months for the crime of voluntary manslaughter with the use of a deadly weapon. The court stated it did not feel the shooting occurred as a result of self-defense, but that Hernandez "executed" Alspaugh because he was mad.

¹¹Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996).

¹²Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

¹³Norwood, 112 Nev. at 440 n.2, 915 P.2d at 279 n.2.

We conclude the district court did not abuse its discretion in sentencing Hernandez because it did not base its decision on impalpable or highly suspect evidence. Before sentencing, the court noted all relevant evidence had been heard. Furthermore, there was overwhelming evidence in the record that the shooting was not done in self-defense. The 7-Eleven clerk testified Alspaugh was shot in the back after the clerk had pushed him away from Hernandez and Lopez. Another witness corroborated the clerk's testimony with a similar rendition of the facts. In addition, the medical examiner stated the cause of death was a gunshot wound to the back. Because overwhelming evidence in the record clearly establishes that Hernandez did not shoot Alspaugh in self-defense, the district court did not base its sentencing decision on impalpable or highly suspect evidence.

Motion for Mistrial

Hernandez argues the district court erred in denying the motion for mistrial or, in the alternative, for a curative instruction. He argues the State engaged in prosecutorial misconduct when it used the word "fib" to describe statements made by the defense and when it stated Hernandez had an "evolving defense."

As an initial matter, with regard to the "evolving defense" language used, the State argues Hernandez failed to properly object to preserve the issue for appeal. "In order to preserve the issue of prosecutorial misconduct for appeal, the defendant must raise timely objections and seek corrective instructions."¹⁴ Even if remarks made by the prosecution were improper, they must be objected to in order to raise

¹⁴Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993).

the issue on appeal.¹⁵ We conclude Hernandez failed to properly preserve this issue on appeal.

Hernandez filed a motion for mistrial or curative instruction after the State's closing argument; however, he did not object to the statement about an "evolving defense" during the State's closing argument. Hernandez stated he did not object because he did not want to get "admonished in front of the jury." We have held that the issue of prosecutorial misconduct was precluded from review where the defendant failed to object to the allegedly improper statements made "during the closing arguments."¹⁶

Therefore, because Hernandez did not object to the phrase "evolving defense" during the State's closing argument, Hernandez is precluded from raising that issue on appeal.¹⁷

The standard of review for denial of a motion for mistrial is abuse of discretion.¹⁸

When looking at prosecutorial misconduct, this court has held "the important question is whether such error is to be found prejudicial and reversible or merely harmless."¹⁹ In determining whether misconduct

¹⁵Porter v. State, 94 Nev. 142, 149, 576 P.2d 275, 279 (1978).

¹⁶Parker, 109 Nev. at 391, 849 P.2d at 1067.

¹⁷We further conclude that Hernandez has failed to demonstrate that plain error affecting his substantial rights occurred in this respect. See, e.g. Green v. State, 119 Nev. 542 80 P.3d 93 (2000).

¹⁸Mortensen v. State, 115 Nev. 273, 281, 986 P.2d 1105, 1111 (1999).

¹⁹Garner v. State, 78 Nev. 366, 374, 374 P.2d 525, 530 (1962).

is prejudicial or harmless, the court looks to see whether the issue of guilt or innocence is close or if the evidence of guilt is great.²⁰

During its closing argument, the State stated that defense counsel had made “multiple fibs” during his closing argument. Hernandez objected, claiming this was a personal attack on defense counsel. The State responded that it was merely using the same word defense counsel used in closing argument. We conclude this comment alone does not justify a reversal of Hernandez’s conviction.

Even if prosecutorial misconduct is substantial, it does not require a reversal if there is overwhelming evidence of guilt.²¹ We conclude overwhelming evidence supports the jury’s verdict; therefore, we conclude these statements do not warrant reversal.

Photographs

Hernandez argues that the district court erred in refusing to admit into evidence photographs of Alspaugh’s body. He contended the photographs were relevant to show the victim did not suffer significant injuries from the fight, to show where the bullet wound entered his back, and to show white supremacist tattoos on his body.

“The admissibility of photographs is within the sound discretion of the trial court, whose decision will not be disturbed in the absence of a clear abuse of that discretion.”²² This discretion includes the

²⁰Id.

²¹Barron v. State, 105 Nev. 767, 782, 783 P.2d 444, 451 (1989).

²²Greene v. State, 113 Nev. 157, 167, 931 P.2d 54, 60 (1997); overruled on other grounds by Byford v. State, 116 Nev. 214, 235 994 P.2d 700, 713 (2000).

ability to exclude photographs when their prejudicial effect substantially outweighs their probative value.

The district court held the photographs were irrelevant, finding there was no evidence of a racial motive in the altercation. The court also believed Hernandez was trying to introduce the photographs to besmirch the victim. In addition, the court found the information Hernandez sought to obtain from the photographs could be obtained from other sources whose probative value would not be outweighed by the prejudice.

We agree and conclude the district court did not err in holding the prejudicial effect of the photographs substantially outweighed their probative value.

Business Records

Hernandez's final argument is that the district court erred in refusing to admit into evidence records from a mechanic about work that was done on the car Hernandez left at the 7-Eleven store when he took off on foot after the shooting.

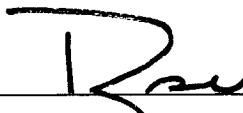
The district court has "considerable discretion in determining the relevance and admissibility of evidence."²³

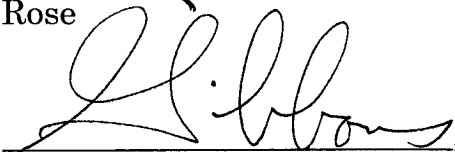
The district court did not admit the records for various reasons, including that they were illegible and would likely confuse the jury. Furthermore, the court stated it would be "patently unfair" to admit this type of evidence without allowing the State to cross-examine or expand upon what the mechanic meant.

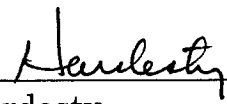
²³Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998).

The records the defense wanted to introduce were from repairs made to the car three months after the shooting. Their relevance is minimal without further investigation as to what occurred with the car in the interim between the shooting and the repair work. Finally, the handwriting on the documents is difficult to read, and the language provides little guidance to a jury untrained in automotive maintenance. We conclude the district court did not abuse its discretion in excluding these records.

Accordingly, we ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

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