

IN THE SUPREME COURT OF THE STATE OF NEVADA

JORGE ROMERO A/K/A PUPPET,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42084

FILED

JUL 11 2005

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 by jury verdict for first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant Jorge Romero was convicted of the murder of Juan Rene Barragan-Betencourt and the attempted murder of Luis Hernandez-Hernandez, both with the use of a deadly weapon. Romero was sentenced to life imprisonment with the possibility of parole after twenty years for Betencourt's death, along with an identical consecutive life term for use of a deadly weapon; and sentenced to a consecutive 60-240 month term for the attempt on Hernandez's life, with an identical consecutive term for use of a deadly weapon.

Romero raises two issues on appeal. First, Romero contends the district court erred when it ruled a nine-millimeter semiautomatic weapon inadmissible. Second, Romero argues a limiting instruction should have been given to the jury regarding evidence of his gang activity.

Admission of the nine-millimeter gun

Romero argues that the trial court committed reversible error by precluding his introduction of a nine-millimeter semi-automatic weapon into evidence. Romero sought to introduce the weapon in order to bolster his testimony that although he had a weapon with him on the night in question, it was not the .357 caliber murder weapon. Romero further contends that the court should have granted a continuance instead of suppressing the evidence, based on Taylor v. Illinois¹ and the Sixth Amendment right to present witnesses at trial.²

When discovery disclosure requirements³ and time limits⁴ have been violated by a party seeking to admit evidence, NRS 174.295(2) allows the trial court to “permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.” “A trial court is vested with broad discretion in fashioning a remedy when, during the course of the proceedings, a party is made aware that another party has

¹484 U.S. 400, 413 (1988).

²U.S. Const. amend. VI.

³NRS 174.245(1)(c) (defense must permit prosecutor to inspect any “tangible objects that the defendant intends to introduce in evidence”); NRS 174.295(1) (party discovering additional material “shall promptly notify the other party” of the material).

⁴NRS 174.285(1) (disclosure requests must be made “within 30 days after arraignment or at such reasonable later time as the court may permit. A subsequent request may be made only upon a showing of cause why the request would be in the interest of justice.”).

failed to comply fully with a discovery order,”⁵ and “such a decision will not be overturned absent manifest error.”⁶

Romero knew for over a year the location of the gun but apparently made a conscious effort to keep that information from his defense counsel. Romero knew the importance of the gun to his defense, yet waited until the eleventh hour to reveal this evidence and corresponding defense. Additionally, the district court did allow testimony about the gun, excluding only admittance of the gun itself.

While the exclusion sanction may be severe,⁷ “[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system . . .”⁸ We agree with the State that where the violation of a discovery order is willful, as here, suppression of the proposed evidence is entirely consistent with purposes of the Sixth Amendment. We conclude the district court did not err in denying Romero’s request to admit the nine-millimeter gun under the circumstances.

⁵Jones v. State, 113 Nev. 454, 471, 937 P.2d 55, 66 (1997) (quoting Langford v. State, 95 Nev. 631, 635, 600 P.2d 231, 234 (1979)).

⁶Id. at 467, 937 P.2d at 63.

⁷Taylor, 484 U.S. at 413.

⁸Id. at 412-13 (quoting United States v. Nobles, 422 U.S. 225, 241 (1975)).

Limiting jury instructions

Romero next argues that the trial court committed reversible error in failing to give a limiting instruction to the jury regarding the evidence of Romero's gang membership.

Tavares v. State⁹ calls for a limiting instruction when such prejudicial testimony is permitted. An instruction limiting use of such uncharged misconduct is intended to minimize the prejudicial effect of knowledge of the misconduct. That is, the jury is specifically instructed not to allow the testimony to influence them to believe that a person necessarily acted in accordance with such prior misconduct. However, the defense may decline such an instruction for strategic purposes, since the defendant "is the intended beneficiary of the instruction and is in the best position to evaluate its consequence."¹⁰ Here, although Romero's counsel did not explicitly refuse a limiting instruction, there are circumstances that lead us to conclude that such an instruction was impliedly waived by the defense, for sound strategic reasons.

First, Romero did not request such a limiting instruction, and defense counsel openly agreed with the prosecution that testimony about gang activity was so intertwined with the facts of the case as to be unavoidable.¹¹

Second, Romero's counsel, in his closing argument, specifically used the gang membership of several witnesses to suggest that those witnesses might have been responsible for the crime. Although a limiting

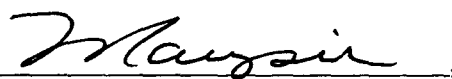
⁹Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001).


¹⁰Id. at 731, 30 P.3d at 1132.

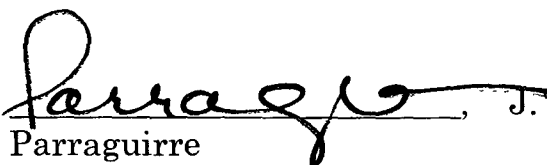
¹¹NRS 48.035(3)

instruction might have been beneficial to the jury's view of Romero, it would have significantly undermined the defense's use of the gang evidence to cast suspicion on the other gang members present during the crime, which was an important piece of Romero's defense. We conclude, therefore, that since Romero chose to use gang evidence to cast suspicion on the conduct of others, he cannot now object that similar suspicions may have been prejudicial to him, as his affirmative use of the evidence constitutes a waiver of a limiting instruction. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.
Maupin

 J.
Douglas

 J.
Parraguirre

cc: Hon. Jerome Polaha, District Judge
Richard F. Cornell
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk