

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMAAL JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42291

FILED

JUL 11 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, entered upon jury verdicts, of one count of burglary while in possession of a firearm, one count of conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, and two counts of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

During the late evening of September 26, 2001, three individuals entered an apartment in Las Vegas, Nevada, pursuant to a plan to rob the occupants of drugs and money. During the course of the robbery, the intruders shot and killed two of the intended victims. Based upon information received from the Secret Witness hotline and other sources, and after booking Johnson on an unrelated charge, police questioned Johnson regarding the robbery and homicides. Following the administration of Miranda¹ warnings, Johnson confessed to his participation in the robbery and murders in a taped statement.

The State charged Johnson with the above-mentioned charges. At trial, the State presented evidence establishing the corpus delicti of the murders, testimony from a co-offender describing Johnson's role in the

¹Miranda v. Arizona, 384 U.S. 436 (1966).

offenses, testimony from an acquaintance to tacit admissions of involvement by Johnson, and the audiotape of Johnson's confession. The investigating detective described the course of the investigation and how Johnson became a suspect. Johnson himself testified in his own defense and denied any complicity, claiming that all of his knowledge of the offenses came "from the street."

On the last day of trial, the members of the jury were exposed to print and live media coverage discussing the murders at issue. The newspaper coverage mentioned names of the victims and co-offenders, and discussed a federal indictment of 21 members of Johnson's street gang, but did not mention Johnson or the fact that he was then currently on trial. According to the parties, the live media coverage mentioned Johnson and the trial.²

The jury found Johnson guilty of one count of conspiracy, one count of burglary with possession of a firearm, two counts of robbery with the use of a deadly weapon, and two counts of first-degree murder with the use of a deadly weapon. The district court sentenced Johnson to the following terms of imprisonment: Count I, burglary while in possession of a firearm, 72 to 180 months; Count II, conspiracy to commit robbery, 24 to 72 months; Count III, robbery with the use of a deadly weapon, 72 to 180 months plus an equal and consecutive term for use of a deadly weapon; Count IV, 72 to 180 months plus an equal and consecutive term for use of a deadly weapon; Count V, murder with the use of a deadly weapon, life without the possibility of parole plus an equal and consecutive sentence of

²The live media reports are not in the record. The parties fail to mention whether the live media story included a discussion of the federal indictment.

life without the possibility of parole for use of a deadly weapon; Count VI, life without the possibility of parole plus an equal and consecutive sentence of life without the possibility of parole for use of a deadly weapon. The district court ordered concurrent imposition of the sentences under Counts I, II and III. It imposed all other sentences consecutively. Johnson appeals.

DISCUSSION

Admissibility of custodial statement

Johnson argues that his audiotaped statement to police was involuntary because the interrogating officer, Detective Hardy, misrepresented the offenses to which the Miranda waiver was to apply, that Johnson did not understand that he was waiving his rights with respect to the murder charges, and that Hardy conducted a coercive, unrecorded and un-Mirandized pre-interview before the recorded interview during which Johnson confessed. Johnson also claims that the officer obtained the confession based upon false assurances that Johnson would not be arrested for the murders on the evening of the interview. These claims were litigated below during a pretrial suppression hearing. The district court ruled against Johnson on these issues and admitted the audiotaped statement into evidence.

A district court's factual findings relating to the "scene- and action-setting" circumstances surrounding an interrogation are entitled to deference and will be reviewed for clear error.³ However, we review a district court's ultimate determination regarding the voluntariness of a

³Rosky v. State, 121 Nev. ___, ___, 111 P.3d 690, 694 (2005).

confession de novo.⁴ Factors relevant to the voluntariness determination are as follows: (1) youth of the accused, (2) lack of education or low intelligence of the accused, (3) lack of any advice regarding constitutional rights, (4) length of detention, (5) repeated and prolonged nature of questioning, and (6) infliction of physical punishment, including deprivation of food or sleep.⁵ A suspect's prior experience with law enforcement is also a relevant consideration.⁶ The prosecution has the burden of proving by a preponderance of the evidence that the statement was voluntary.⁷

Aside from the transcript of Johnson's statement, the primary evidence introduced during the suppression hearing consisted of Detective Hardy's testimony. The district court was entitled to assess his credibility, weigh the evidence, and render its decision accordingly. Although the district court did not specifically state its opinion regarding whether or not a coercive un-Mirandized pre-interview transpired, its decision on the issue of voluntariness implies that it found against Johnson on this issue.

A balance of factors leads us to conclude that the district court did not err in its determination that Johnson's confession was voluntary. Although Johnson was 19 at the time and was momentarily confused as to whether the interview concerned the murder case or the separate matter for which he was originally taken into custody, a transcript of the

⁴Id.

⁵Alward v. State, 112 Nev. 141, 155, 912 P.2d 243, 252 (1996).

⁶Rosky, 121 Nev. at ___, 111 P.3d at 696.

⁷See Rosky, 121 Nev. at ___, 111 P.3d at 695.

interview reflects that Detective Hardy cleared up that confusion. The transcript further reveals that Johnson understood the basic nature of his rights. This was further supported by the fact that police had administered Miranda warnings to Johnson in connection with previous unrelated incidents.

Going further, the recorded statement clearly demonstrates Johnson's knowledge that the police were investigating the two murders, and that the Miranda warnings applied to any statements made concerning them. Also, while Johnson claims that Officer Hardy pre-played some scenarios prior to the interview, there is no indication from either Hardy or Johnson that Hardy elicited the recorded statement following an initial un-Mirandized confession.⁸ Finally, any assurances concerning when and if Hardy would arrest Johnson are irrelevant to our review of the admissibility of the recorded statement.

Hearsay

Johnson argues that the State committed prosecutorial misconduct by eliciting hearsay testimony from Detective Hardy regarding information he obtained through sources such as the Secret Witness hotline. He also asserts that this testimony amounted to impermissible vouching in that the information gathered from these sources served to corroborate the State's case. NRS 51.035 generally defines hearsay as a statement offered in evidence to prove the truth of the matter asserted.

We reject Johnson's assignment of error concerning admission of this testimony. All but three of the references now attacked by Johnson were made without objection. We therefore conclude that Johnson has

⁸See Missouri v. Seibert, 124 S. Ct. 2601, 2608-11 (2004).

failed to preserve the issue as to the unchallenged responses. We also conclude that plain error analysis is unwarranted because most of the allusions to information received from informants did not restate “statements” made by them, but merely served to generally demonstrate how the investigation focused upon Johnson.⁹ Also, the district court sustained Johnson’s objections to at least two of Hardy’s descriptions as to how Johnson became a suspect.

We note, however, the State’s argument that “[w]ithout Detective Hardy’s testimony regarding the course of his investigation, there would have been no basis for the jury to understand why [the] defendant was ultimately arrested.” While this argument tacitly concedes that the probative value of Hardy’s descriptions was that informant information implicating Johnson was true, thus implicating the hearsay rule, a clear error analysis is still unwarranted. First, the State clearly proved the corpus delicti of the murders. Second, other witnesses unequivocally implicated Johnson in the robberies and the murders. Third, his own admissions concerning his participation render any hearsay error harmless beyond a reasonable doubt.¹⁰

Jury selection

Johnson challenges the manner in which the district court engaged in unrecorded, ex parte bench conferences with jurors that allegedly caused prejudicial irregularities. We conclude that Johnson’s

⁹See U.S. v. Running Horse, 175 F.3d 635, 638 (8th Cir. 1999) (describing as permissible the admission of testimony based on out-of-court statements giving background information regarding the origin of an investigation).

¹⁰See Chapman v. California, 386 U.S. 18, 24 (1967).

argument lacks merit. Although the district court judge stated that she did not record the substance of these interviews, the record clearly reflects the district court's reasons for excusing the prospective jurors in question.

Juror exposure to news coverage

Johnson argues that the district court erred in denying him the right to conduct an evidentiary hearing regarding juror exposure to news sources, and that the exposure requires reversal. He also asserts that the extensive nature of the federal indictment revealed in this media coverage prejudiced his case because (1) it implicated him in a criminal operation larger than the one at issue, and (2) the jury could view the coverage as corroborative of the State's case.

"The determination of whether . . . prejudice has resulted from jurors' consideration of inadmissible evidence in a given case 'is a fact question to be determined by the trial court, and its determination will not be disturbed on appeal in the absence of a showing of an abuse of discretion.'"¹¹ In Winiarz v. State, this court stated that the following factors are relevant in this consideration: (1) "whether the issue of innocence or guilt is close, [(2)] the quantity and character of the error, and [(3)] the gravity of the crime charged."¹² In Winiarz, this court concluded it was reversible error for the jury to have access to the transcript of the defendant's prior trial.¹³

¹¹Winiarz v. State, 107 Nev. 812, 814, 820 P.2d 1317, 1318 (1991) (quoting Rowbottom v. State, 105 Nev. 472, 486, 779 P.2d 934, 942-43 (1989)).

¹²Id. (quoting Rowbottom, 105 Nev. at 486, 779 P.2d at 943) (quoting Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985))).

¹³Id.

We conclude that the district court did not abuse its discretion in refusing to conduct an evidentiary hearing and in denying Johnson's claims of prejudice.¹⁴ First, the issue of guilt was not close in light of Johnson's detailed statement regarding his participation in the planning and execution of the robbery and his presence during the homicides. Second, other testimony implicated his participation in this incident. Third, while the offenses in this case are most serious, the quantity and character of the error appears slight. These conclusions are explained more particularly below.

The newspaper article

The newspaper article made no mention of Johnson. Also, although the article specifically stated the names of Johnson's codefendants, the charges against them, and the victims' names, the jury had previously heard admissible trial evidence on all of this information. Finally, while the article mentioned the gang affiliation of the participants, Johnson himself testified in passing to his gang involvement. Thus, despite the possibility that the jury may have perceived the article as corroborative of the State's case, or as suggestive that Johnson was part of a larger criminal conspiracy, we conclude that the possibility of such speculations were not so prejudicial as to warrant reversal under Winiarz.

¹⁴It was not an abuse of discretion to refuse Johnson's request for an evidentiary hearing. As discussed below, the media exposure described by the parties in the record did not require a new trial and does not compel reversal of Johnson's convictions. See People v. Hedgecock, 795 P.2d 1260, 1274 (Cal. 1990).

Live media coverage

Both parties concede that the live news coverage discussed Johnson's case and identified him specifically. However, the jurors were already aware that Johnson faced charges in state court due to his presence at trial. Accordingly, the balance of the Winiarz factors with regard to the TV coverage also lead us to conclude that the exposure, while improper, does not compel reversal.

Deadly weapon enhancements

Johnson argues that the district court erroneously applied deadly weapon enhancements to the robbery and murder sentences because these offenses grew out of a conspiracy. Johnson supports this claim based upon our decision in Moore v. State, in which we held that the crime of conspiracy may not be enhanced for the ultimate use of a deadly weapon.¹⁵ We note, however, that Moore affirmed deadly weapon enhancements imposed in connection with robbery and first-degree murder convictions committed in furtherance of the underlying conspiracy.¹⁶ In the present case, the deadly weapon enhancements only applied to Johnson's robbery and murder convictions, and not his conviction for conspiracy. We therefore conclude that the district court did not abuse its discretion in its imposition of the deadly weapon enhancements of the robbery and murder sentences.¹⁷

¹⁵117 Nev. 659, 663, 27 P.3d 447, 450 (2001).

¹⁶See id.

¹⁷This reasoning applies with equal force to Johnson's conviction for burglary while in possession of a firearm.

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Sentence

Johnson argues that the district court erroneously sentenced him beyond the minimum statutory term in violation of Blakely v. Washington.¹⁸ In Blakely, the trial court imposed a sentence, under a separate enhancement provision, that exceeded the basic statutory maximum by three years.¹⁹ The United States Supreme Court concluded that this sentence was unconstitutional because the facts supporting the exceptional sentence were neither admitted by the petitioner nor found by a jury.²⁰ Blakely is inapposite to Johnson's case because Blakely concerned imposition of a sentence beyond the basic statutory maximum, not minimum.²¹ In the present case, the court sentenced Johnson pursuant to jury verdicts and to terms within the prescribed statutory ranges for each offense;²² therefore, we reject this argument.

... continued

Johnson further argues that the district court erred in not giving a limiting instruction regarding the deadly weapon enhancement. We find no request for such an instruction in the record. Regardless, we conclude that Johnson was not entitled to an instruction based on his interpretation of Moore, as explained above.

¹⁸542 U.S. ___, 124 S. Ct. 2531 (2004).

¹⁹Id. at ___, 124 S. Ct. at 2535.

²⁰Id. at ___, 124 S. Ct. at 2537.

²¹See id.


²²See NRS 200.380(2) (robbery: 2 to 15 years); NRS 205.060(4) (burglary with possession of a deadly weapon: 2 to 15 years); NRS 199.480(1)(a) (conspiracy to commit robbery: 1 to 6 years); NRS 200.030(4)(b) (first-degree murder: 20 years to life without possibility of parole); NRS 193.165(1) (allowing for additional equal and consecutive penalty for use of a deadly weapon in commission of a crime).

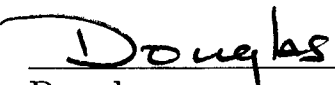
Johnson also argues that he cannot be sentenced to more than 50 years for first-degree murder without a finding of aggravating circumstances. We similarly reject this argument because NRS 200.030(4)(b) specifically provides that a court need not find aggravating circumstances to impose a life sentence without the possibility of parole for first-degree murder.

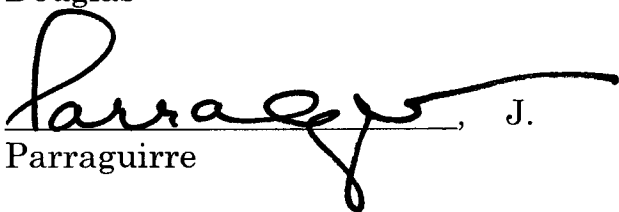
CONCLUSION

We conclude that Johnson received a fair trial, and that the errors alleged by him are either non-existent or harmless beyond a reasonable doubt. Further, we discern no cumulative error in this case. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Honorable Jackie Glass, District Judge
Dixon, Truman & Fisher
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk