IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR PEREZ-MARQUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42561

FILED

SEP 0 8 2005

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, upon a jury verdict, of first-degree murder with the use of a deadly weapon, first-degree kidnapping, battery with intent to commit a crime, and first-degree arson. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

FACTS AND PROCEDURAL HISTORY

The State charged appellant Oscar Perez-Marquez (Perez) with first-degree murder, first-degree kidnapping, battery with intent to commit a crime, and first-degree arson related to the death of Alfredo "Enrique" Reina. While the State originally proceeded on the theory that Perez killed Reina over a stolen nail gun, evidence at trial suggested that a dispute arose between the two men over drugs. Although the record in this regard is somewhat fragmented, the defense attempted to draw inferences that Reina's drug use led to a pattern of bizarre behavior shortly before his death; that the State's primary witness, Ricardo Cuellar, had provided drugs to Reina; and that Cuellar killed Reina for failure of payment. In this, over the State's objection, the defense elicited testimony that Reina died with high blood levels of methamphetamine. The State then pursued a theory that Reina owed drug money to Perez, and that Perez, not Cuellar, killed Reina over the drug dispute. In aid of that theory, the district court allowed the State to elicit prior bad-act testimony

to the effect that Perez had, over time, engaged in drug trafficking with individuals other than Reina. The district court apparently admitted this evidence to show Perez's intent, plan and motive to enforce his preeminence as a drug trafficker and to "show the complete story of the crime."[1]

Cuellar was the State's sole eyewitness to the events surrounding Reina's demise. Cuellar testified that he had been a guest at Perez's property in the Pahrump area of Nye County for several weeks before Reina's murder; that, on June 18, 2002, Reina appeared at Perez's residence during a party celebrating Perez's return from a two-week trip to Mexico; and that, upon Reina's arrival, Perez and three associates from Mexico immediately attacked Reina, severely injuring him. According to Cuellar, the four men and Cuellar then took Reina to a remote desert location, two of the other men placed Reina in the driver seat of his pick-up truck, Perez poured gasoline on Reina, and one of the men from Mexico lit Reina on fire. Although Cuellar admitted to being present at these events, admitted to cleaning up the scene after the attack, and admitted using money taken from Reina's person to buy beer for the group, he denied any direct participation in the fatal assault. In this, Cuellar claimed that his limited participation in these events was based upon his fear of Perez, who Cuellar also claimed was a major drug dealer in the area. This was underscored by Cuellar's concession that, prior to Reina's arrival, Cuellar had been involved in an intense discussion concerning money Cuellar owed Perez for drugs Perez left with Cuellar to sell while

---

[1]See infra note 26.

Perez was away in Mexico. The defense categorically denied Cuellar's version of events, claiming that Cuellar was the primary instigator.

Pursuant to verdicts of guilty on all charges, the district court sentenced Perez to the following terms of imprisonment: Count I, first-degree murder with the use of a deadly weapon, consecutive terms of life without the possibility of parole; Count II, first-degree kidnapping, life without the possibility of parole; Count III, battery with intent to commit a crime, 8 to 20 years; Count IV, first-degree arson, 4 to 10 years. The district court ordered consecutive service of the sentences imposed in connection with Counts I, II and III. It further ordered that the sentence on Count IV be served concurrently with that imposed on Count I. Perez received credit for 446 days time served.

On appeal, Perez seeks reversal based upon: (1) improper admission of prior bad-act testimony; (2) denial of Perez's proffered instruction on accomplice testimony; (3) refusal to allow Perez to impeach Cuellar with extrinsic evidence; (4) unconstitutionality of Nevada's statutory definition of a deadly weapon and the related jury instruction; (5) unconstitutionality of the Nevada express and implied malice jury instruction; (6) improper admission of gruesome autopsy photos; (7) improper admission of testimony that a witness was afraid for his family; and (8) cumulative error.

Because we conclude that the district court erred in refusing Perez's proffered accomplice instruction, we reverse and remand for a new trial.

DISCUSSION

Perez argues that the district court erred in refusing to give his proffered jury instruction on accomplice testimony.

This court evaluates claims concerning jury instructions using a harmless error standard of review.[2] However, "'the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be.'"[3] Thus, a district court may only refuse a jury instruction on the defendant's theory of the case if it is substantially covered by other instructions or misstates the law.[4]

Perez's proffered instruction on accomplice testimony tracked NRS 175.291,[5] and provided:

> A conviction shall not be had on the testimony of an accomplice unless corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.
>
> An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

The district court's reasoning for rejecting this instruction is not apparent from the record.

---

[2]Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003).

[3]Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002) (quoting Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991)).

[4]Id. at 372, 46 P.3d at 77.

[5]The Nevada statute concerning accomplice testimony.

"In enacting NRS 175.291, the legislature intended that 'one who has participated criminally in a given criminal venture shall be deemed to have such character, and such motives, that his testimony alone shall not rise to the dignity of proof beyond a reasonable doubt.'"[6] Thus, "[i]n order for a defendant to be convicted on the testimony of an accomplice, the state must present other, independent evidence that tends to connect the defendant with the crime."[7] Notably, this court has "long recognized not only that the uncorroborated testimony of an accomplice has doubtful worth, but that his incrimination of another is not corroborated simply because he accurately describes the crime or the circumstances thereof."[8] The question of whether a witness is an accomplice is typically a question of fact for the jury to decide.[9] However, the district court should instruct the jury that a witness is an accomplice

---

[6]Ramirez-Garza v. State, 108 Nev. 376, 378, 832 P.2d 392, 392-93 (1992) (quoting Austin v. State, 87 Nev. 578, 588, 491 P.2d 724, 731 (1971)).

[7]Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803 (1995) (also holding that such "corroborative evidence" can be direct or circumstantial and "'need not in itself be sufficient to establish [the accomplice's] guilt'" (quoting Cheatham v. State, 104 Nev. 500, 504-05, 761 P.2d 419, 422 (1988))); see also Globensky v. State, 96 Nev. 113, 117, 605 P.2d 215, 218 (1980) (stating "the requirement of corroboration of accomplice testimony is a creature of statute and is not of constitutional dimension").

[8]Austin, 87 Nev. at 584, 431 P.2d at 728.

[9]Rowland v. State, 118 Nev. 31, 41, 39 P.3d 114, 120 (2002); see also Globensky, 96 Nev. at 117, 605 P.2d at 218.

as a matter of law "when the witness's own testimony leaves no doubt that the witness was an accomplice."[10]

Not every eyewitness is an accomplice. However, an aider or abettor, as defined in NRS 195.020, qualifies as an "accomplice" under NRS 175.291.[11] This is true because "every person concerned in the commission of a crime, whether he directly commits the act constituting the offense or aids or abets in its commission is guilty as a principal."[12] Thus, Perez was entitled to an accomplice instruction if the evidence presented to the jury, even if "weak or incredible," revealed that the State could have prosecuted Cuellar for Reina's murder under an aiding and abetting theory or as a direct principal.[13] As further discussed below, we conclude that Cuellar testified in such a way as to allow a clear inference that he was an accomplice to Reina's murder.[14]

Rowland v. State[15] is instructive on this point. Like the accomplice in Rowland, it is clear that Cuellar was present at all times during the commission of the crimes alleged. Further, Cuellar admitted at trial to burying evidence and cleaning up the crime scene. This clearly

---

[10]Rowland, 118 Nev. at 41, 39 P.3d at 120.

[11]See id. at 41, 39 P.3d at 120-21.

[12]Sharma v. State, 118 Nev. 648, 652, 56 P.3d 868, 870 (2002); see also NRS 195.020.

[13]See Rowland, 118 Nev. at 41-42, 39 P.3d at 120-21 (citing Austin, 87 Nev. at 588-89, 431 P.2d at 730-31); cf. Sharma, 118 Nev. at 655, 56 P.3d at 872.

[14]Rowland, 118 Nev. at 41, 39 P.3d at 120.

[15]Id. at 40-42, 39 P.3d at 120-21.

implicates Cuellar as an accessory after the fact.[16] While Cuellar testified that he did not participate in Reina's murder and only participated in the cleanup out of fear of Perez, given the totality of his testimony, we conclude that the jury could have reasonably drawn an inference that Cuellar was more "culpably implicated in" the murder than his self-serving testimony indicates.[17] While the State argues with great force that Cuellar was credible, as discussed below, the State's view as to his credibility does not undermine Cuellar's potential status as an accomplice in connection with Reina's demise.

The State's reliance on State v. McKay[18] is misplaced. First, McKay only supports the proposition that an accomplice instruction is unnecessary if the evidence presented at trial establishes the eyewitness's "innocence as to any complicity whatever in the criminal acts of the [defendant]."[19] This is not the situation in the instant matter because the jury could have reasonably concluded that Cuellar's involvement was far less than completely innocent. Second, McKay predates the Legislature's enactment and our subsequent applications of NRS 175.291.[20]

---

[16]See NRS 195.030(1).

[17]Cf. Rowland, 118 Nev. at 40-42, 39 P.3d at 120-21 (finding a witness's conduct after the alleged crime to support the district court's instruction that the witness was an accomplice as a matter of law).

[18]63 Nev. 118, 165 P.2d 389 (1946).

[19]Id. at 175, 165 P.2d at 414 (also stating that a conviction based on eyewitness testimony was proper because "no evidence in the record [justifies] even an inference that [the eyewitness] was an accomplice").

[20]See Austin, 87 Nev. at 588-89, 431 P.2d at 730-31 (noting that our Legislature has declared accomplice testimony inherently suspect).

Reversal is mandated unless it can be said that the district court's failure to properly instruct the jury on the use of accomplice testimony did not affect Perez's substantial rights.[21] The error affects Perez's substantial rights if the State failed to present sufficient independent corroborative evidence establishing Perez's guilt.[22] As noted above, evidence merely supporting Cuellar's testimony and showing that he accurately described the crime and circumstances thereof is not sufficiently corroborative.[23]

Based on our review of the record, the only potentially independent and probative corroborative evidence the State presented at trial is Perez's letter to Rosa Sanchez and Ruben Ortega, and evidence of Perez's prearrest evasion of Officer Carmody.[24] However, we conclude that this evidence does not provide a level of corroboration sufficient to render harmless the district court's failure to give the proposed statutory accomplice instruction. In short, "[e]vidence to corroborate accomplice testimony does not suffice if it merely casts grave suspicion on the

---

[21]See Barnier, 119 Nev. at 132, 67 P.3d at 322.

[22]See Heglemeier, 111 Nev. at 1250, 903 P.2d at 803.

[23]Austin, 87 Nev. at 588-89, 431 P.2d at 730-31.

[24]We note that the district court properly instructed the jury on the use of flight evidence. See Walker v. State, 113 Nev. 853, 870-71 n.4, 944 P.2d 762, 773 n.4 (1997) (approving an instruction which stated, in part, "The flight of a person after the commission of a crime is not sufficient in itself to establish guilt; however, if flight is proved, it is circumstantial evidence in determining guilt or innocence.").

defendant."[25] While the State clearly established that the crime of murder had been committed, the letters did not contain admissions of guilt and the case had to stand or fall upon the testimony of Cuellar. Although the State provided a degree of circumstantial proofs beyond Cuellar's testimony, the corroboration is not so strong as to justify rejection of a valid statutory accomplice instruction. Accordingly, we conclude that the district court's failure to give Perez's proffered accomplice instruction is reversible error, entitling Perez to a new trial.[26]

---

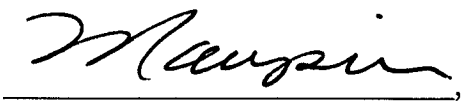
[25]Eckert v. State, 91 Nev. 183, 186, 533 P.2d 468, 471 (1975); see also Heglemeier, 111 Nev. at 1250-51, 903 P.2d at 803-04.

[26]We conclude that Perez's other contentions in this appeal, in and of themselves, do not compel reversal. That said, we provide the following instructions for the trial on remand. First, Perez should be allowed to confront Cuellar with any bad-act evidence for which there is a good-faith basis, subject to rules concerning the admission of extrinsic evidence under Lobato v. State, 120 Nev. ___, 96 P.3d 765 (2004). Second, testimony concerning actions taken by witnesses based upon fear of retribution by any of the participants is relevant to their motive for testifying one way or another. Third, evidence of threats to witnesses may be admitted as competent circumstantial evidence of guilt. Fourth, the district court may properly admit toxicology evidence concerning the victim's methamphetamine blood levels. Fifth, the district court must reexamine the admission of Perez's prior drug involvement solely under NRS 48.045(2). Given Cuellar's testimony concerning Perez's trafficking activities, the district court should determine the relevance/probative value of the evidence, whether it improperly places Perez's character in issue, and whether the probative value urged by the State is substantially outweighed by considerations of undue prejudice. See Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001); Tinch v. State, 113 Nev. 1170, 946 P.2d 1061 (1997); Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985). In this, the district court must forego any consideration of the "complete story of the crime" doctrine under NRS 48.035(3).

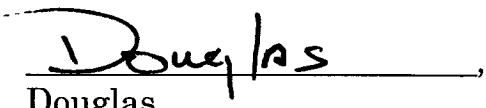
CONCLUSION

We conclude that the district court committed reversible error in refusing to give Perez's proffered accomplice instruction. Therefore, we

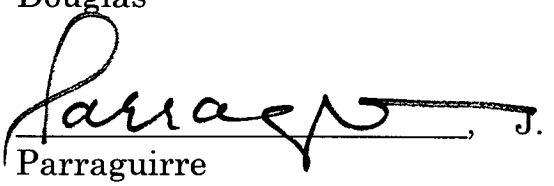
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Maupin



_____, J.
Douglas



_____, J.
Parraguirre

cc: Hon. John P. Davis, District Judge
David M. Schieck
Attorney General Brian Sandoval/Carson City
Nye County District Attorney/Tonopah
Nye County Clerk