

IN THE SUPREME COURT OF THE STATE OF NEVADA

TAIWAN ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42847

FILED

APR 20 2005

ORDER OF AFFIRMANCE

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

This is a direct appeal from a judgment of conviction, upon a jury verdict, of one count of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

A jury convicted appellant Taiwan Allen of shooting Yashoma Clemons, his live-in girlfriend, in their Las Vegas home. Allen alleges he was also shot during the altercation with Clemons. Following the shooting, Allen fled to Wisconsin and left Clemons' four children alone with the corpse for five days. The jury sentenced Allen to life imprisonment without the possibility of parole.

Allen raises seven issues on appeal: (1) the district court abused its discretion by admitting evidence that the children were left alone with the corpse; (2) the district court abused its discretion by finding S.B. competent to testify; (3) insufficient evidence was presented at trial to support a conviction for first-degree murder; (4) it was prosecutorial misconduct for David Roger to replace David Stanton at sentencing; (5) evidence of Allen's post-verdict attack of David Stanton should have been excluded at sentencing; (6) the district court abused its discretion by denying his post-verdict motion for a competency evaluation; and (7) cumulative error below requires a new trial.

The district court did not abuse its discretion by admitting evidence that the victim's children were left alone with the corpse for five days

NRS 48.035(1) states that relevant evidence “is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice.” “The decision to admit or exclude evidence is within the sound discretion of the trial court and this court will not overturn the trial court’s determination absent manifest error.”¹

Not only do we defer to the decision of the trial court, we have held that the statute generally favors admission. “By requiring the prejudicial effect of evidence to “substantially outweigh” its probative value, NRS 48.035 [strongly favors] admissibility.”² Accordingly, evidence does not warrant exclusion unless it “appeal[s] to the emotional and sympathetic tendencies of a jury, rather than the jury’s intellectual ability to evaluate evidence.”³

The district court concluded that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The district court reached this conclusion, in part, because the State bore the burden of proving that Allen did not kill Clemons in self-defense. The court held that the flight evidence demonstrated consciousness of guilt and was relevant to that burden.

We conclude that the district court did not abuse its discretion. “An abuse of discretion occurs if the district court’s decision is arbitrary or

¹Walker v. State, 113 Nev. 853, 862, 944 P.2d 762, 768 (1997).

²Krause Inc. v. Little, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001) (quoting Schlotfeldt v. Charter Hosp. of Las Vegas, 112 Nev. 42, 46, 910 P.2d 271, 273 (1996)).

³Id.

capricious or if it exceeds the bounds of law or reason.”⁴ The decision below was not arbitrary or capricious; the district court determined that the evidence’s probative value for disproving self-defense outweighed any prejudicial effect. Allen has not shown that the district court’s decision resulted in a verdict based on juror emotion or sympathy as opposed to an intellectual review of the evidence as a whole.⁵

The district court did not abuse its discretion by declaring S.B. competent to testify

S.B. is the minor child of Yashoma Clemons. “A child is competent to testify if he or she is able to receive just impressions and relate them truthfully.”⁶ A child’s competency must be determined on a case-by-case basis, but we have enumerated six considerations that are relevant to that determination:

“(1) the child’s ability to receive and communicate information; (2) the spontaneity of the child’s statements; (3) indications of ‘coaching’ and ‘rehearsing’; (4) the child’s ability to remember; (5) the child’s ability to distinguish between truth and falsehood; and (6) the likelihood that the child will give inherently improbable or incoherent testimony.”⁷

The district court held a competency hearing outside the presence of the jury. The State questioned S.B. and defense counsel had an opportunity to cross-examine her. S.B. testified that she knew the

⁴Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

⁵Krause, 117 Nev. at 935, 34 P.3d at 570.

⁶Evans v. State, 117 Nev. 609, 624, 28 P.3d 498, 509 (2001).

⁷Id. (quoting Felix v. State, 109 Nev. 151, 173, 849 P.2d 220, 235 (1993)).

difference between the truth and a lie and that she remembered the night of the shooting. Based on this hearing, the district court ruled that S.B. was competent to testify.

“This court will not disturb a finding of competency absent a clear abuse of discretion.”⁸ “Inconsistencies in testimony go to the weight to be given the evidence by the jury rather than to the question of competence.”⁹ Allen was allowed to cross-examine S.B. regarding alleged inconsistencies in her testimony. The jury was free to consider the inconsistency and give S.B.’s testimony whatever weight it chose.¹⁰ The district court did not abuse its discretion.

The State presented sufficient evidence at trial to support a first-degree murder conviction

“The determination of the degree of crime is almost invariably left to the discretion of the jury.”¹¹ “The critical question . . . is whether, upon a review of the evidence most favorably in support of the judgment, a reasonable interpretation indicates a sufficiency of evidence to establish that the homicide was murder of the first degree, as distinguished from murder in the second degree.”¹² “[D]eliberation and premeditation . . . are the truly distinguishing elements of first-degree murder.”¹³ We strictly

⁸Id.

⁹Wilson v. State, 96 Nev. 422, 423-24, 610 P.2d 184, 185 (1980).

¹⁰Jacobson v. Best Brands, Inc., 97 Nev. 390, 392, 632 P.2d 1150, 1152 (1981).

¹¹Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981).

¹²Id. at 531, 635 P.2d at 280.

¹³Byford v. State, 116 Nev. 215, 234, 994 P.2d 700, 713 (2000).

construe this distinction and have refused to adopt “the modern tendency to muddle the line between first- and second-degree murder.”¹⁴

Deliberation requires proof that the defendant decided to kill his victim after considering his perceived justifications and the potential consequences. Deliberation need not be long, but the decision to kill is not deliberate if formed in the heat of passion.¹⁵ Premeditation is the “determination to kill, distinctly formed in the mind by the time of the killing.”¹⁶ “Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind.”¹⁷

S.B. testified that on the afternoon of April 14, 2003, Allen and Clemons returned to the home together after running an errand. When they entered the home, they were talking and “[k]ind of mad at each other and kind of happy.” S.B. stated that as the evening progressed, Clemons and Allen continued their discussion in the master bedroom. S.B. stated that the disagreement escalated when Clemons told Allen that she intended to leave him and reconcile a former relationship. S.B. stated that Allen and Clemons then started yelling at each other and she could see their shadows from her bedroom door. S.B. testified that Allen began choking Clemons and that she could hear Clemons yelling for help. S.B. then heard Allen loading his gun, followed by a series of “booms.” She

¹⁴Id. (quoting State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992)).

¹⁵Id. at 235, 994 P.2d at 714.

¹⁶Id. at 237, 994 P.2d at 714.

¹⁷Id.

then heard Allen say to Clemons, "That's what you get for messing with me."

S.B. further testified that early the next morning, Allen looked in on the children, all of whom spent the night in S.B.'s room. Allen then went back to the master bedroom, locked the bedroom door, and left the house in Clemons' car. On April 16, 2003, S.B. was able to pick the lock on the master bedroom door. She found her mother lying on the floor covered in blood. On April 19, 2003, Olayo went to the house because she had not heard from Allen or Clemons in several days. Olayo discovered that the children had been left alone with the corpse for five days and called 911 emergency services.

Allen's theory of the case was that he acted in self-defense. In support of that theory, Robert Irwin, a firearms instructor at the police academy, testified that the directionality of the bullet holes indicated that there were two shooters firing at each other in different directions. Dr. Steven Holper testified that he examined Allen at the Clark County Detention Center before trial. Dr. Holper testified that Allen had suffered what appeared to be several gunshot wounds. Dr. Holper testified that the most serious of those wounds was on Allen's head, where a bullet was still lodged between Allen's scalp and skull. Surgery was later performed to relieve pressure caused by blood pooling. Dr. Holper did not perform the surgery and could not testify as to whether the bullet was still in Allen's head at the time of trial.

This evidence, standing alone, may have been sufficient to raise a reasonable doubt as to whether the killing was done in self-defense. However, Dr. Holper did not examine Allen until May 29, 2003, and could not testify that Allen's wounds were suffered on the day

Clemons was killed. Detective Robert Wilson of LVMPD testified that the wound to Allen's head was not present on May 4, 2003.

Further, James Krylo, a firearms examiner for LVMPD, testified that microscopic examination of the bullets and bullet fragments recovered from the scene showed that all the bullets were fired from a single weapon. Krylo also testified that based on the bullet strikes found at the scene, a minimum of six to eight bullets were fired. Krylo testified that the average .38 caliber revolver holds either five or six rounds. Thus, Allen may have reloaded his revolver during the shooting.

Dr. Roxene Worrell, medical examiner for the Clark County Coroner's Office, conducted Clemons' autopsy and testified that Clemons suffered four gunshot wounds. The first wound was a through-and-through wound to Clemons' forearm. The bullet entered the back of the forearm and exited the front of the forearm. Dr. Worrell testified that this wound was defensive, meaning that Clemons was likely raising her arms to protect herself when she was shot. The second wound entered Clemons' left chest and passed through her heart, diaphragm, and kidney before lodging in her lower back. Dr. Worrell testified that this wound caused massive blood loss and would have been fatal, but was not instantaneously incapacitating.

Dr. Worrell further testified that Clemons was also shot twice in the back of the head. The first of these gunshots entered the back of Clemons' skull where the bullet's lead core separated from the copper jacket. Both the lead core and copper jacket were recovered from Clemons' brain. This wound was independently fatal and would have incapacitated Clemons immediately. The second wound to Clemons' head entered the

scalp and lodged between the scalp and skull. This wound was not fatal and caused no serious damage.

Based on the evidence presented, we conclude that a reasonable jury could have convicted Allen of first-degree murder. The evidence showed that Allen and Clemons argued for several hours on the day of the murder. When Clemons told Allen that she intended to leave him and reconcile a former relationship, Allen loaded his revolver and shot Clemons four times, including twice in the back of the head. The ballistics evidence showed that all the bullets were fired from a single weapon and that Allen may have stopped to reload his revolver during the shooting.

Furthermore, the self-defense theory was not strong. Robert Irwin's "two shooter" testimony was inconsistent with the ballistics evidence, and Dr. Holper could not testify that Allen was wounded on the night of the shooting. Accordingly, a reasonable jury could have determined that Allen shot Clemons with premeditation and deliberation. Under these circumstances, Allen was guilty of first-degree murder.

It was not prosecutorial misconduct for David Roger to replace David Stanton

David Roger is the duly elected district attorney of Clark County, Nevada. Deputy district attorneys David Stanton and Vicki Monroe work for Mr. Roger's office and were assigned to prosecute this case.

"The matter of the prosecution of any criminal case is within the entire control of the district attorney."¹⁸ We will not order a new trial on the grounds of prosecutorial misconduct unless the misconduct is

¹⁸Cairns v. Sheriff, 89 Nev. 113, 115, 508 P.2d 1015, 1017 (1973).

“clearly demonstrated to be substantial and prejudicial.”¹⁹ This incident began following the jury’s verdict. After the verdict was read, the jury was excused, and the judge had left the courtroom, prosecutors Stanton and Monroe remained in the courtroom discussing the case. Stanton had his back to the defense table. Allen then stood, approached the prosecution table, and launched himself at Stanton.

Allen struck Stanton in the back of the head, causing Stanton to fall onto the prosecution table. Allen then punched Stanton multiple times before he was pulled away and subdued by corrections officers. As a result of the attack, Stanton suffered multiple injuries including a concussion and a torn rotator cuff. Stanton was hospitalized and was unable to participate in sentencing.

Roger stepped in to assist Monroe at sentencing. This participation was entirely within the district attorney’s discretion.²⁰ Given his vast experience in trying murder cases, we agree with the State that Roger was uniquely able to join a murder prosecution in progress and meaningfully assist a fellow prosecutor. Roger’s participation included the direct examination of two witnesses, redirect examination of one witness, and delivering the State’s rebuttal closing argument.

The fact that Roger is a well-known and successful prosecutor does not transform his participation into prosecutorial misconduct. The Supreme Court of Indiana has held that it is not prosecutorial misconduct for a well-known, popularly-elected district attorney to enter the

¹⁹Sheriff v. Fullerton, 112 Nev. 1084, 1098, 924 P.2d 702, 711 (1996).

²⁰Cairns, 89 Nev. at 115, 508 P.2d at 1017.

courtroom at various times during the trial to watch the proceedings.²¹ The Indiana court specifically found that the district attorney's presence during specific testimony did not indicate to the jury that the testimony was especially important simply because the district attorney was present to hear it.²² We agree with this reasoning and conclude that the State's argument at sentencing did not become more believable to the jury simply because Roger, and not Stanton, delivered it.

The substitution of counsel in this case by the district attorney's office is proper. Both Allen and his counsel were present when Allen attacked Stanton. We do not believe that Allen, who procured Stanton's unavailability, has any grounds to complain that the State replaced Stanton with another prosecutor. The severity of Stanton's injuries put both Allen and his counsel on notice that Stanton could not proceed and that Roger was at least a possible replacement. Thus, the district attorney was free to substitute prosecutors.

The district court did not abuse its discretion by admitting evidence of Allen's attack of Stanton at sentencing

During a sentencing hearing, "evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible."²³ "The decision to admit particular evidence during the

²¹Games v. State, 535 N.E.2d 530, 539-40 (Ind. 1989).

²²Id. at 540.

²³NRS 175.552(3).

penalty phase is within the sound discretion of the district court and will not be disturbed absent an abuse of that discretion.”²⁴

The district court conducted an evidentiary hearing outside the presence of the jury to consider the admission of this evidence. Based on that hearing, the district court ruled that the evidence was admissible because it was relevant as an aggravator and its probative value outweighed the prejudice to Allen.

We conclude that the evidence was admissible under NRS 175.552(3). We have previously held that evidence of a defendant’s prior violent acts are relevant at sentencing to determine whether the defendant poses a future threat to society.²⁵ Accordingly, the district court’s ruling did not constitute an abuse of discretion.

The district court did not abuse its discretion by denying Allen’s motion for a competency hearing

NRS 178.405 requires the district court to suspend trial and conduct a competency hearing if, at any time before trial or upon conviction, a doubt arises as to the defendant’s competence to stand trial. A competency hearing is required only if a reasonable doubt exists as to the defendant’s competence. The district court has discretion to determine whether such a reasonable doubt exists,²⁶ and “[a] bare allegation of incompetence is not sufficient to raise a reasonable doubt.”²⁷

²⁴McKenna v. State, 114 Nev. 1044, 1051, 968 P.2d 739, 744 (1998).

²⁵Haberstroh v. State, 105 Nev. 739, 741, 782 P.2d 1343, 1344 (1989).

²⁶Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983).

²⁷Martin v. State, 96 Nev. 324, 325, 608 P.2d 502, 503 (1980).

The district court heard oral argument on whether a competency hearing should be granted based on Allen's attack of Stanton. Based on that hearing, the district court ruled that the attack was simply an angry outburst and there had been no evidence that Allen was incompetent. The district court specifically stated, "I don't see an indicia of a mental defect or incompetency of any kind." Accordingly, defense counsel's motion was denied.

The district court did not abuse its discretion. The district court is vested with the authority to determine whether a reasonable doubt exists as to defendant's competency.²⁸ Absent such a finding, the district court is not obligated to conduct a competency evaluation.²⁹ Here, the district court found no reasonable doubt as to Allen's competence. Thus, no evaluation was required.

There was no cumulative error

Cumulative error below may justify the order of a new trial, even if the errors are harmless standing alone.³⁰ However, the district court committed no errors below. Thus, Allen is not entitled to a new trial under the cumulative error doctrine.

CONCLUSION

We conclude that the district court did not abuse its discretion by admitting evidence that the children were left alone with the corpse or by finding S.B. competent to testify. Sufficient evidence was presented


²⁸Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113.


²⁹Jones v. State, 107 Nev. 632, 638, 817 P.2d 1179, 1182 (1991).

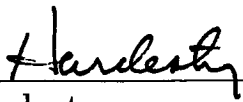
³⁰See, e.g., Byford v. State, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000); Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986).

below to sustain a first degree murder conviction. It was not prosecutorial misconduct for David Roger to replace David Stanton. The district court did not abuse its discretion in admitting evidence of Allen's attack of Stanton or by denying Allen's motion for a competency evaluation. Allen is not entitled to a new trial under the cumulative error doctrine because the district court made no errors below. Accordingly we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Donald M. Mosley, District Judge
Longabaugh Law Offices
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk