IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIUS CEASAR POLLARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47499

FILED

FEB 29 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon jury verdict, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

A jury found Julius Pollard guilty of second-degree murder with the use of a deadly weapon for shooting and killing James Hayes in 1995.[1] Pollard was sentenced to life in prison, with the possibility of parole after a minimum of 10 years, plus an equal and consecutive term for a deadly weapon enhancement. The parties are familiar with the facts and we do not recount them except as pertinent to our disposition.

Jury instructions

This court has determined that "'[t]he district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error.'"[2] This

[1]In May 1996, at Pollard's first jury trial, the jury found him guilty of first-degree murder with the use of a deadly weapon. However, this court reversed the district court's order denying Pollard's post-conviction petition for a writ of habeas corpus based on ineffective assistance of counsel and remanded the matter to the district court for a new trial.

[2]Rose v. State, 123 Nev. ____, ____, 163 P.3d 408, 415 (2007) (quoting Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005)).

court reviews whether a jury instruction is a correct statement of the law de novo.[3]

Pollard argues that the implied malice jury instruction given by the district court was erroneous because it used the definition of "implied malice" from NRS 200.020(2). Pollard argues that a proper instruction would state: "Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." The State responds that this court has never found the statutory definition or the use of the word "shall" in an implied malice instruction to be unconstitutional.

NRS 200.020(2) provides: "Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." In Cordova v. State, this court determined that although "the use of 'may' . . . is preferable because it eliminates the issue of a mandatory presumption," use of the statutory language is not erroneous where "the jury is properly instructed on the presumption of innocence and the State's burden to prove beyond a reasonable doubt every element of the crime charged."[4]

In this case, the district court instructed the jury on the presumption of Pollard's innocence and the State's burden to prove each element of the crime. The court also instructed the jury that the State had the burden to establish that the shooting was not the result of provocation or accident, and instructed the jury that an accidental shooting is not

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[3]Nay v. State, 123 Nev. ____, ____, 167 P.3d 430, 433 (2007).

[4]116 Nev. 664, 666, 6 P.3d 481, 483 (2000).

murder. Although the district court did not use the preferred term "may" when issuing the implied malice jury instruction, the instruction was not erroneous because the district court also instructed the jury on "the presumption of innocence and the State's burden to prove beyond a reasonable doubt every element of the crime charged."[5] We therefore determine that the district court did not err by using NRS 200.020(2)'s definition of "implied malice."

Rebuttal witness

Testimony of a rebuttal witness is appropriate to clarify or contradict evidence offered during the defense's case-in-chief.[6] This court reviews a district court's decision to admit rebuttal evidence for an abuse of discretion.[7] Even where the State could have appropriately admitted the evidence in its case-in-chief, the district court retains the discretion to determine the admissibility of the evidence on rebuttal.[8]

Pollard argues that the district court erred by allowing the State to call, as a rebuttal witness, Dr. John Paglini, an expert in assessing criminal responsibility originally hired by the defense. The State argues that Dr. Paglini's testimony was appropriate to rebut the testimony of Dr. Michael Levy, an expert in addictive medicine and the behavioral effects of drugs, who Pollard called to answer hypothetical questions regarding the effects of drinking on a typical fifteen year old.

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[5]Id.

[6]Lopez v. State, 105 Nev. 68, 81, 769 P.2d 1276, 1285 (1989).

[7]Id.

[8]Walker v. State, 89 Nev. 281, 283-84, 510 P.2d 1365, 1367 (1973).

We conclude that the district court did not abuse its discretion by allowing Dr. Paglini to testify in rebuttal. Either party could have called Dr. Paglini to testify in its case-in-chief. Although Dr. Paglini's testimony did not directly contradict or clarify Dr. Levy's testimony, it did contradict an inference that Dr. Levy's testimony could have allowed the jury to draw: that drugs and alcohol prevented Pollard from forming the requisite criminal intent. Because the State called Dr. Paglini to contradict Dr. Levy's testimony, it was within the district court's discretion to allow Dr. Paglini to testify.

Pollard also argues that the State committed prosecutorial misconduct by calling Dr. Paglini in an attempt to associate Pollard with an incredible defense to later attack the credibility of that defense, and by denigrating Dr. Paglini and his testimony in its closing argument.

In Roever v. State, this court stated that "'[t]he prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice.'"[9] The Roever court held that the district court erred by admitting negative evidence of the defendant's character based on the State's claim that the defendant had opened the door for such evidence by making positive statements about her character in a videotaped interview that the State introduced.[10] This court held that it was error to permit the State to credit the defendant with opening the door for character evidence when it was the State that

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[9]114 Nev. 867, 871, 963 P.2d 503, 505 (1998) (quoting McCormick on Evidence § 190, at 452 n.54 (Edward W. Cleary, 2d ed. 1972)).

[10]Id.

had introduced the defendant's videotaped statement containing the positive character evidence.[11]

In this case, Pollard clearly presented the defense theory of voluntary intoxication: that Pollard had been drinking alcohol and smoking marijuana and was therefore incapable of forming the requisite specific intent to commit murder. Thus, unlike in Roever, Pollard asserted the defense that the State then attempted to discredit. We therefore conclude that the State did not commit prosecutorial misconduct by calling Dr. Paglini as a witness. However, we must also address the State's comments in closing arguments regarding Dr. Paglini's credibility.

In Rowland v. State, this court set a new standard for determining when the prosecutor's characterization of the credibility of a witness amounts to misconduct.[12] This court determined that "[a] prosecutor's use of the words 'lying' or 'truth' should not automatically mean that prosecutorial misconduct has occurred. But condemning a defendant as a 'liar' should be considered prosecutorial misconduct."[13] For situations that fall somewhere between these extremes, a case-by-case analysis is required and "we must look to the attorney for the defendant to object and the district judge to make his or her ruling."[14]

In its closing argument, the State questioned Dr. Paglini's credibility by pointing out that he was hired by the defense and that he

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[11]Id.

[12]118 Nev. 31, 39-40, 39 P.3d 114, 119 (2002).

[13]Id. at 40, 39 P.3d at 119.

[14]Id.

and Dr. Levy spoke on the phone before Dr. Paglini's testimony. In his closing, Pollard argued that Dr. Paglini was credible and relied heavily on Dr. Paglini's testimony regarding Pollard's mental state at the time of the shooting. In its rebuttal argument, the State discussed how Pollard vouched only for Dr. Paglini, not his own witnesses, and said that Dr. Paglini "knew where his bread was buttered" and "want[ed] to be loyal to the side that hired him in the first place." Pollard did not object to any of those comments.

We conclude that the State did not commit prosecutorial misconduct when it commented on Dr. Paglini's testimony because the State did not explicitly claim that Dr. Paglini was a liar. By merely suggesting that Dr. Paglini's testimony might not have been unbiased, the State's comments were within the appropriate scope for argument adopted in Rowland.

Burden shifting

This court has held that a jury verdict should not "'be lightly overturned on the basis of a prosecutor's comments standing alone.'"[15] This court has also repeatedly stated that a prosecutor may not comment on the defense's failure to produce evidence because such comments shift the burden of proof to the defense.[16] In Evans v. State, however, this court

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[15]Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

[16]Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996). But see id. (Steffen, C.J., dissenting) ("I see it as a case of fair comment by a prosecutor after defense counsel attempted to demonstrate that the State failed to properly investigate the case . . . . [T]he prosecutor is fairly responding to defense counsel's comments, indicating that the reason the

continued on next page . . .

clarified that when a defendant offers an alternative explanation of the events, "as long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented."[17] In such instances, this court has determined that the State may properly comment on a defendant's failure to "substantiate [his or her] theory with supporting evidence."[18]

Pollard argues that the State committed prosecutorial misconduct and improperly shifted the burden of proof to the defense when it commented on Pollard's decision not to call certain witnesses during trial. The State responds that its comments were fair comment on the defense's failure to substantiate its theory of the case after Pollard, in his closing argument, had questioned the State's failure to call those witnesses.

Pollard presented testimony from Lamar Hearon's parents about the amount of alcohol Pollard and the other boys drank throughout the day of the shooting. In closing, Pollard argued that the State had not called any of the other boys as witnesses to the shooting because those boys would have testified about how intoxicated Pollard was at the time of

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. . . *continued*

state did not call other witnesses is because they had nothing to contribute to the evidence.").

[17]117 Nev. 609, 631, 28 P.3d 498, 513 (2001) (citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992)).

[18]Id.

the shooting. In its rebuttal argument, the State argued that Pollard had subpoena power and could have called those boys as witnesses. The prosecutor also said that Lamar's mother would have been better able to procure Lamar's testimony than the State.

We conclude that the State's comments in this instance were appropriate comment on Pollard's failure to substantiate his theory that he was drinking excessively on the day of the shooting. Furthermore, because the State's comments were responsive to a comment Pollard made during his closing, suggesting that the State had not called the boys as witnesses because they would have said Pollard was drinking, and because the State did not call into question the defendant's failure to testify, the State's comments were not prejudicial in this case. The State permissibly remarked on Pollard's failure to establish through eyewitness testimony that he was drinking on the day of the shooting.

Evidence of prior bad acts

A district court's decision to admit or exclude evidence of prior bad acts rests within its sound discretion and will not be reversed by this court on appeal absent manifest error.[19] "A presumption of inadmissibility attaches to all prior bad act evidence."[20] The principal concern with admitting such evidence is that the jury will be unduly influenced by the evidence and convict the defendant because he is a bad person.[21] Prior bad act evidence may only be admitted once the district court holds a

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[19]Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

[20]Rosky v. State, 121 Nev. 184, 195, 111 P.3d 690, 697 (2005).

[21]Braunstein, 118 Nev. at 73, 40 P.3d at 417.

Petrocelli[22] hearing, outside the presence of the jury, to determine whether: (1) the evidence is relevant, (2) the State proves that the prior act occurred by clear and convincing evidence, and (3) the probative value of the prior act is not substantially outweighed by the danger of unfair prejudice.[23] Failure to hold such a hearing does not constitute reversible error so long as (1) the record on appeal is sufficient to allow this court to determine whether the evidence satisfied the test set forth above or (2) the admission of the prior act evidence was not prejudicial to the defendant.[24]

Pollard argues that the district court erred by admitting evidence that approximately four months before the shooting, Lamar and a group of boys that did not include Pollard attacked Terrell John Otis (TJ). Pollard argues that evidence of the fight was evidence of a prior act offered to associate Pollard with a group of boys who had a history of violence and thereby to imply that Pollard and the boys were violent people who acted violently on the occasion in question. The State argues that the evidence regarding the fight was not character evidence at all, but was relevant evidence of another act or crime offered to reveal why TJ turned his back on Lamar just before the shooting and that its admission was necessary to give the jury the complete story of the charged crime.

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[22]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified in part on other grounds by Sonner v. State, 112 Nev. 1328, 1333-34, 930 P.2d 707, 711-12 (1996), and superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004).

[23]Braunstein, 118 Nev. at 72-73, 40 P.3d at 416-17.

[24]Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).

Thus, the State argues that the evidence was admissible under NRS 48.035(3).[25]

The district court found that it was not required to hold a Petrocelli hearing because the issue of whether the evidence was admissible was one of relevance. We do not address this issue because we determine that the district court did conduct a hearing, outside of the presence of the jury, to determine the relevance of the proffered evidence, and thereby satisfied the requirements of a Petrocelli hearing. TJ testified, outside of the presence of the jury, that he was attacked by Lamar and some of his friends, but not Pollard, prior to the night of the shooting. The district court found that evidence of the fight was relevant to explain why TJ would not shake Lamar's hand and that the jury needed to understand the reasons for the altercation. Pollard did not argue or submit any evidence that Lamar did not fight with TJ, thus there was no issue as to whether the State proved that the prior event happened. The district court also allowed Pollard to cross-examine TJ about the reasons for the prior fight. As a result, we conclude that it was not manifest error for the district court to admit testimony regarding the prior fight.

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[25]NRS 48.035(3) provides:

> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

Prior testimony

Prior testimony is admissible under NRS 171.198 and NRS 51.325 "if three preconditions exist: first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial."[26] A district court may, in its discretion, exclude evidence "if its probative value is substantially outweighed by considerations of . . . waste of time or needless presentation of cumulative evidence."[27]

Pollard argues that the district court erred when it allowed the State to introduce the prior testimony of Dion Jones,[28] over Pollard's objection, because the State did not move for the admission of the prior testimony fifteen days prior to trial, as required by NRS 174.125, and because the testimony was cumulative. Pollard argues that according to

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[26]Drummond v. State, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970). See Funches v. State, 113 Nev. 916, 922-23, 944 P.2d 775, 779 (1997) (rejecting a strict construction of NRS 171.198's list of conditions that create unavailability and expanding the definition of unavailability to include NRS 51.055 and other general provisions of the evidence code).

[27]NRS 48.035(2).

[28]Pollard mentions in a footnote that the State failed to give timely notice of its motion to admit the prior testimony of three witnesses: Dion Jones, Robert Bucklin, and Richard Good. We decline to address the propriety of admitting the prior testimony of any witness other than Jones because Pollard fails to make a cogent legal or factual argument on appeal regarding the other two witnesses. See State v. Haberstroh, 119 Nev. 173, 187, 69 P.3d 676, 685-86 (2003) ("Contentions unsupported by specific argument or authority should be summarily rejected on appeal.").

this court's decision in Grant v. State,[29] the State's failure to comply with NRS 174.125 warrants reversal. In Grant, this court linked the procedural requirements of NRS 174.125 to the State's burden of proving that it diligently attempted to procure the witness's attendance to prove unavailability.[30] This court did not, however, conclude that the State's failure to comply with NRS 174.125 required reversal.[31] Rather, this court concluded that the error was harmless, because the evidence was duplicative and therefore the conviction did not rest on the erroneously admitted prior testimony.[32]

In this case, the State discovered prior to calendar call that Dion Jones was dead. Although the State could have discovered that information prior to the deadline for filing a pretrial motion under NRS 174.125, its earlier discovery would not have changed the ultimate result—Jones was unavailable. Therefore, we conclude that the State's failure to notify Pollard of Jones's unavailability prior to the deadline under NRS 174.125 did not prejudice Pollard and the district court did not abuse its discretion in admitting the evidence despite the State's failure to comply with NRS 174.125.

Pollard also argues that the district court erred by admitting Jones's testimony because it was cumulative. Jones was the fifth person to testify regarding the shooting as it was perceived from within Hayes's

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[29]117 Nev. 427, 24 P.3d 761 (2001).

[30]Id. at 432, 24 P.3d at 764.

[31]Id.

[32]Id. at 433, 24 P.3d at 765.

home. Although four other people testified, the district court found that Jones's testimony added to the jurors' understanding of the events. We conclude that the district court did not abuse its discretion by admitting Jones's testimony.

Brady violations

Determining whether the State adequately disclosed information under Brady v. Maryland[33] involves both questions of fact and law, therefore this court will conduct a de novo review.[34] A Brady violation has three components: "the evidence at issue is favorable to the accused; the evidence was withheld by the [S]tate, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material."[35] The State's reason for withholding evidence is immaterial, and the prosecutor is charged with constructive knowledge of evidence that other state agents withhold.[36] If a defendant made no request or only a general request for information, the evidence is material if a reasonable probability exists that the result would have been different had it been disclosed.[37] However, if the request was specific, the evidence is material if there is a reasonable possibility of a different result had there been disclosure.[38] This court has determined that "[a] reasonable probability is

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[33]373 U.S. 83 (1963).

[34]State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 7-8 (2003).

[35]Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000).

[36]Jimenez v. State, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996).

[37]See Mazzan, 116 Nev. at 66, 993 P.2d at 36.

[38]See id.

shown when the nondisclosure undermines confidence in the outcome of the trial."[39] However, "Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense."[40]

Pollard contends that the State violated Brady when it failed to disclose a handwritten notation in a detective's notebook, which indicated that Lamar told the detective about consuming alcohol on the day of the shooting. Pollard discovered the notation while cross-examining Detective Michael Higgins. The district court permitted Pollard to admit the note and to use it to impeach the detective during trial. Although the State failed to disclose the note, Pollard did not demonstrate a reasonable probability or possibility that the result would have been different if the State had disclosed it. Pollard presented evidence that he had been drinking on the day of the shooting, and the State's failure to disclose the note did not prevent Pollard from investigating, obtaining, and presenting evidence of his intoxication. The jury was apprised of the information in the note and heard other testimony that Pollard had been intoxicated, yet the jury still returned a guilty verdict. Because Pollard has not demonstrated prejudice, we conclude that his Brady claim lacks merit.

For the foregoing reasons, we

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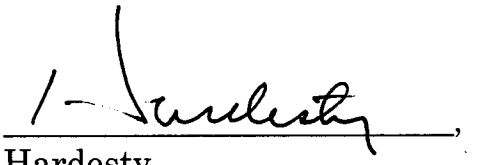
[39]Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000).

[40]Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

ORDER the judgment of conviction AFFIRMED.



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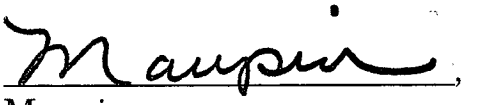

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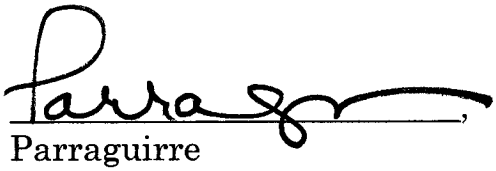

_____, J.
Parraguirre

cc: Eighth Judicial District Court Dept. 17, District Judge
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