IN THE SUPREME COURT OF THE STATE OF NEVADA

ANGEL ARTURO PEREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55950

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, attempted robbery with the use of a deadly weapon, second-degree murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, assault with the use of a deadly weapon, and discharging a firearm out of a motor vehicle. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

This appeal arises out of an incident at an illegal street race. At the race, appellant Angel Perez and his codefendants attempted to rob a car belonging to another group of men and then started shooting at them, killing one person. Perez and his codefendants were apprehended shortly after the incident, and Perez made incriminating statements while being questioned by police detectives. At the subsequent joint trial of Perez and his codefendants, the jury was instructed on second-degree murder based on malice aforethought and second-degree felony murder based on the underlying crimes of aiding and abetting the commission of a crime, assault with a deadly weapon, battery with a deadly weapon, discharging a firearm from a vehicle, and conspiracy to commit a

dangerous felony such as robbery. Perez was convicted of various felonies, including second-degree murder, and sentenced to, inter alia, life with the possibility of parole.[1]

On appeal, we address two issues in depth. First, we address Perez's contention that the district court erred in denying his motion to suppress his statements to police on the ground that he did not knowingly and voluntarily waive his rights under Miranda. We agree that the admission of Perez's statements was in violation of Miranda and determine that this error was not harmless with respect to two of his convictions. Second, we consider whether the district court erred in instructing the jury on second-degree felony murder based on assaultive-type felonies. As this court has adopted the merger doctrine in the second-

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[1]Perez also argues that there is no statutory basis for second-degree felony murder with conspiracy to commit robbery as the predicate felony. There are no statutorily enumerated felonies with respect to second-degree felony murder. See Rose v. State, 127 Nev. ___, ___, 255 P.3d 291, 295 (2011). However, we have explained that a felony supporting second-degree felony murder must be "'inherently dangerous, where death or injury is a directly foreseeable consequence of the illegal act,'" and that there must be a direct causal relationship between the defendant's actions and the victim's death. Ramirez v. State, 126 Nev. ___, ___, 235 P.3d 619, 622 (2010) (quoting Labastida v. State, 115 Nev. 298, 307, 986 P.2d 443, 448-49 (1999)). When determining whether a felony is inherently dangerous for purposes of second-degree felony murder, this court looks at the facts, not abstract elements. Id. at ___ n.2, 235 P.2d at 622 n.2. We conclude that the very nature of the conspiracy Perez entered into and the acts in furtherance of the conspiracy were inherently dangerous and, thus, the theory of conspiracy was a sufficient basis for a second-degree felony murder instruction; however, as discussed below, we conclude that Perez's conspiracy-to-commit-robbery and second-degree-murder convictions should be reversed on other grounds.

degree murder context, we conclude that the jury was improperly instructed. Accordingly, we reverse Perez's convictions for conspiracy to commit robbery, attempted robbery with the use of a deadly weapon, and second-degree murder with the use of a deadly weapon.

Knowing and voluntary waiver of rights under Miranda

Perez argues that the district court erred in denying his motion to suppress his statements to the police because he did not voluntarily, knowingly, and intelligently waive his Miranda rights and his confession was made involuntarily. We agree and conclude that this error was not harmless with respect to the charges of conspiracy to commit robbery and attempted robbery with the use of a deadly weapon.[2]

We review a district court's determination as to whether a waiver was knowing and intelligent, which is a question of fact, for clear error; we review its finding of voluntariness, which is a mixed question of law and fact, de novo. Mendoza v. State, 122 Nev. 267, 276, 130 P.3d 176, 181 (2006).Perez first claims that he did not make a voluntary, knowing, and intelligent waiver of his Miranda rights. In Miranda v. Arizona, 384 U.S. 436, 471 (1966), the United States Supreme Court held that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." Before the State may introduce an incriminating statement made by a defendant, it must be proved by a preponderance of

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[2]Perez does not assert that any error in the admission of his statements affected his convictions for attempted murder with the use of a deadly weapon, assault with the use of a deadly weapon, and discharging a firearm out of a motor vehicle. Upon review of the record, we conclude that the error was harmless with respect to these other convictions.

the evidence that the accused made a voluntary, knowing, and intelligent waiver of his or her Miranda rights. Colorado v. Connelly, 479 U.S. 157, 168 (1986). "The waiver inquiry has two distinct dimensions: waiver must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) (quotations omitted).

Perez was advised of his constitutional rights twice—first, shortly after Perez and his codefendants were stopped, and then again at the police station. After the first reading of his Miranda rights, Perez did not answer whether he understood his rights. The police detective questioning Perez ascertained that Perez either did not want to answer the question or did not understand his rights, and thus discontinued questioning at that point. Following the second Miranda warning, Perez was only asked if he understood that he could have a parent present. His right to have a parent present was then explained at length. However, the detective never elicited a response from Perez as to whether he understood his other important rights to remain silent and to have counsel present during the interrogation. While a Miranda warning was given, and Perez made a statement, the State failed to make the additional requisite showing that Perez understood his Miranda rights that is necessary to support that the waiver was knowing and intelligent. See Berghuis, 130 S. Ct. at 2261-62. The record indicates Perez did not understand his rights at the time he made the statement when he was in the bottom two to five percent of the population with respect to intelligence and displayed difficulty understanding that he could have a parent present. Accordingly,

we conclude that the district court committed clear error in finding that that Perez voluntarily, knowingly, and intelligently waived his Miranda rights.

Perez also contends that his confession was made involuntarily. A totality-of-the-circumstances analysis is required to determine the voluntariness of a confession, taking into consideration "the youth of the defendant, his lack of education or low intelligence, the lack of advice of constitutional rights, the length of detention, repeated and prolonged questioning, and physical punishment such as deprivation of food or sleep." Floyd v. State, 118 Nev. 156, 171, 42 P.3d 249, 259-60 (2002), abrogated on other grounds by Grey v. State, 124 Nev. 110, 118, 178 P.3d 154, 160 (2008). We have also recognized that a parent's absence from a juvenile's interrogation is an additional factor for consideration. Ford v. State, 122 Nev. 796, 802-03, 138 P.3d 500, 504-05 (2006).

Perez was 16 years old at the time of the interview, was in the bottom two to five percent of the population with respect to intelligence,[3] and had been awake for approximately 24 hours. While Perez was only interviewed once, for less than two hours, was provided with water, and

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[3]The State points out that a voluntary confession may be found where a defendant with a low IQ "interacted normally and intelligently with the arresting agents and . . . was familiar with the criminal justice system." U.S. v. Glover, 431 F.3d 744, 748 (11th Cir. 2005), abrogated on other grounds as recognized in U.S. v. Joseph, 371 F. App'x 70, 73 (11th Cir. 2010). However, the record indicates that Perez did not interact in a normal and intelligent manner with the detectives when he had difficulty in understanding his rights, and while he was familiar with the criminal justice system, this is insufficient to establish a voluntary confession when taking into consideration the other relevant factors.

had a parent present, these considerations are not enough to counterbalance the other considerations that weigh against voluntariness. A full review of the record, taking into account the totality of the circumstances, indicates that the State failed to demonstrate that Perez's confession was voluntary.[4] Therefore, we conclude the admission of Perez's involuntary statement into evidence was in error.

We further conclude that it is unclear if Perez would have been convicted of conspiracy to commit robbery or attempted robbery with the use of a deadly weapon without his statements being admitted because his codefendants did not directly indicate that Perez was involved in the attempted robbery or in the conspiracy. Accordingly, the error in admitting testimony concerning this statement was not harmless. See Chapman v. California, 386 U.S. 18, 24 (1967) (an error is harmless if the court can determine "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). Therefore, we reverse Perez's convictions for conspiracy to commit robbery and attempted robbery with the use of a deadly weapon.

Jury instruction on second-degree felony murder based on assaultive-type felonies

Perez argues that his constitutional rights were violated when the district court instructed the jury on second-degree murder based on assaultive-type felonies. Perez argues that the underlying felonies of

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[4]Perez also argues that under the federal and Nevada Constitutions, the State should have the burden of proving the voluntariness of a confession a beyond a reasonable doubt, rather than the current preponderance-of-the-evidence standard. In light of the outcome of this issue, we decline to reach this contention.

assault and battery with a deadly weapon and discharging a firearm from a vehicle are assaultive in nature such that they merge with the homicide and cannot be used for purposes of a second-degree felony murder conviction.[5] We agree.

"The 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." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Because the instructional error alleged here involves a question of law, we review the instruction for judicial error. Rose v. State, 127 Nev. ___, ___, 255 P.3d 291, 295 (2011). When a jury has been given an erroneous jury instruction, we will not reverse the judgment of conviction if the error is harmless. Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004). "An error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Id. (quotation omitted). "Additionally, we presume that the jury followed the district court's orders and instructions." Id.

"The felony-murder rule makes a killing committed in the course of certain felonies murder, without requiring the State to present additional evidence as to the defendant's mental state." Rose, 127 Nev. at ___, 255 P.3d at 295. In Rose, we addressed the use of the merger doctrine as a tool to restrict the scope of the felony-murder rule in the second-

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[5]Perez, joined by his codefendants, objected to the second-degree murder instruction based on the merger doctrine. The district court allowed the instruction to be given without alteration. We note that Rose v. State, 127 Nev. ___, ___, 255 P.3d 291, 295 (2011), had not yet been issued when the district court made this decision.

degree murder context when the underlying felony is not a crime independent of the killing itself. Id. at ___, 255 P.3d at 296. We held "that assaultive-type felonies that involve a threat of immediate violent injury merge with a charged homicide for purposes of second-degree felony murder and therefore cannot be used as the basis for a second-degree felony-murder conviction." Id. at ___, 255 P.3d at 293. Because the determination of whether a felony may be assaultive is based on the manner in which the felony was committed, we held that courts must leave this inquiry to the jury. Id.

Pursuant to the indictment and the jury instructions, the possible predicate felonies that could be used to obtain a second-degree murder conviction against Perez under the felony-murder rule were: aiding and abetting the commission of a crime, assault with a deadly weapon, battery with a deadly weapon, discharging a firearm from a vehicle, and conspiracy to commit a dangerous felony such as robbery. Alternatively, the jury could find second-degree murder based on malice aforethought. Our adoption of the merger doctrine potentially removes three of the six bases for the conviction—assault with a deadly weapon, battery with a deadly weapon, and discharging a firearm from a vehicle—depending on whether the jury would find those crimes to be assaultive in nature based on the manner in which the felony was committed. See Rose, 127 Nev. at ___, 255 P.3d at 297-98 (stating that a felony is assaultive in nature if it "involves a threat of immediate violent injury"). Concerning the remaining bases for the second-degree murder conviction—aiding and abetting, conspiracy, and malice aforethought—there was conflicting evidence presented as to whether Perez was responding to a threat and was protecting himself as opposed to acting

with malice or with the intent that a codefendant commit murder. Perez indicated that he only discharged his firearm because a red car was following his group. While there is no doubt that Perez fired his weapon, conflicting evidence was presented as to whether Perez actually shot at anyone or if he was just shooting into the air. Moreover, Perez indicated that he and his codefendants had decided not to rob the car, arguably ending the conspiracy. With three of the six possible bases for second-degree murder potentially removed and conviction on the other grounds questionable, we cannot conclude beyond a reasonable doubt that a rational jury would have found Perez guilty absent the error. Allred, 120 Nev. at 415, 92 P.3d at 1250. Accordingly, we reverse Perez's conviction for second-degree murder.

Accordingly, we

ORDER the judgment of the district court AFFIRMED with respect to the convictions for attempted murder with the use of a deadly weapon, assault with the use of a deadly weapon, and discharging a firearm out of a motor vehicle, REVERSED with respect to the convictions for conspiracy to commit robbery, attempted robbery with the use of a deadly weapon, and second-degree murder with the use of a deadly weapon, AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry, C.J.

Gibbons, J.

Pickering, J.

cc: Hon. Jackie Glass, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk