IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MICHAEL BIELA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56720

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction in a death penalty case. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

In the early morning hours of January 21, 2008, 19-year-old Brianna Denison was sleeping on her friend's couch in a residence near the University of Nevada, Reno (UNR) campus. Appellant James Biela entered the residence through an unlocked door, pressed a pillow to Brianna's face, and removed her from the house. Biela then sexually assaulted and murdered her with the strap of a pair of thong underwear. Weeks later, Brianna's naked body was discovered in a ravine in south Reno.

During the investigation into Brianna's murder, Biela was linked to the prior sexual assaults of two other college-aged women that had also occurred in the vicinity of the university. Months before Brianna's abduction and murder, UNR student Amanda C. was returning to her vehicle after an evening class when she was grabbed from behind, dragged between two parked vehicles, and sexually assaulted at gunpoint. Amanda did not initially report her assault to police. A few weeks later,

Emma C., an exchange student at UNR, was attacked and kidnapped. Emma's assailant drove her to a secluded spot in his truck, sexually assaulted her, and returned her to her home where she called 911.

After viewing the significant media coverage Brianna's abduction attracted, Amanda was finally convinced to report her assault and provided police with a sketch of her assailant. Many months later, detectives were led to Biela by an anonymous tip. After DNA evidence linked Biela to the crimes, he was arrested and ultimately charged with sexual assault with the use of a deadly weapon for the attack on Amanda; sexual assault and first-degree kidnapping for the attack on Emma; and the premeditated murder and sexual assault of Brianna Denison. The State elected to seek the death penalty.

At the guilt phase of the trial, both of the surviving victims testified, and Amanda identified Biela as her assailant. A male DNA profile obtained from Emma after her assault, while not precise enough to point to Biela as the source, was consistent with Biela or any of his male relatives. Finally, among other evidence recovered linking Biela to Brianna's murder, a forensic examiner testified that Biela was the source of the DNA obtained from sperm fragments recovered from Brianna's vaginal area, DNA recovered from the underwear that was used to strangle her, and DNA obtained from the exterior door handle of the residence from which Brianna was taken.

The State also presented extensive evidence of Biela's activities which confirmed his interest in women's thong underwear and of his cell phone records that demonstrated that he was in the area just before each crime. The defense called as its only witness an expert in DNA analysis who attacked the State's procedures in evaluating the DNA

evidence in the case. After deliberating for less than two hours, the jury returned a verdict of guilty on all counts.

At the penalty hearing, the State alleged four aggravating circumstances, which were the felonies of which Biela was convicted in the guilt phase. In mitigation, Biela presented evidence that he had a rough upbringing, had no criminal record of note before the instant crimes were committed, was a loving and responsible father, and was a good provider for his family. The jury found all four alleged aggravating circumstances and one or more jurors found 23 mitigating circumstances. The jury concluded that the mitigating circumstances did not outweigh the aggravating circumstances and sentenced Biela to death. Thereafter, the district court sentenced Biela for the sexual assaults and kidnapping and entered a judgment of conviction. This appeal followed.

Biela raises several claims related to severance, sufficiency of the evidence, guilt-phase jury instructions, the alleged prejudicial impact of juror-initiated questions, and penalty-phase weighing of aggravating and mitigating circumstances. For the reasons explained below, we reject his claims and affirm the judgment of conviction.

Severance

Biela claims that the district court erred in denying his pretrial motion to sever the counts related to each victim, contending that, under NRS 173.115, the three criminal instances were neither connected together nor did they constitute a common scheme or plan and that a joint trial prejudiced him. We disagree. NRS 173.115(2) provides that "[t]wo or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged . . . are . . . [b]ased

on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

First, Biela claims that the district court erred in concluding that the crimes were evidence of a common scheme or plan. Determining whether such a scheme or plan existed under NRS 173.115(2) entails a "fact-specific analysis." Weber v. State, 121 Nev. 554, 572, 119 P.3d 107, 119 (2005). Biela claims that because the crimes were committed in different places, at different times, and against different victims in different ways, there is no evidence of purposeful design. The district court noted that the crimes were committed against college-aged women within a mile of the UNR campus. Not only were the crimes committed near the UNR campus, but they were committed within 400 yards of each other,[1] late at night or in the early morning. Each involved a sexual assault achieved with the use of violence and threat of future violence; each involved the taking of women's underwear. Biela also contends that the "differences" in the crimes are evidenced by the fact that Amanda was only sexually assaulted at gunpoint, while Emma was kidnapped and then sexually assaulted, and Brianna was kidnapped, sexually assaulted, and murdered. The district court agreed with the State that these facts were not evidence of "differences," but rather evidence of escalation and thus of purposeful design. The district court did not err.

Second, Biela argues that the crimes are not connected together. The test for connectedness under NRS 173.115(2) provides that

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[1]Of course, it is unclear exactly where Biela strangled and sexually assaulted Brianna, but the residence she was abducted from is within that 400-yard radius.

other offenses may be joined if they are proven by clear and convincing evidence and shown to be relevant to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2); Weber, 121 Nev. at 573, 119 P.3d at 120. The district court concluded that the commonalities in the facts recited above were relevant to prove identity, motive, opportunity, preparation and plan and that the offenses are therefore connected together. We agree and conclude that Biela has failed to carry his "heavy burden" in showing that the district court abused its discretion in denying his motion to sever. Weber, 121 Nev. at 570, 119 P.3d at 119.[2]

Violation of district court order

Biela argues that the State committed reversible plain error by repeatedly violating the district court's order prohibiting the parties from characterizing certain evidence as pornographic. Following a motion in limine regarding the State's offer of evidence relevant to show Biela's interest in thong underwear, the district court forbade witnesses from characterizing any of the evidence as "pornography." Biela claims that the State violated this order on three occasions, but he failed to object at trial and we are accordingly unable to review whether these occasions constituted a violation of the district court's order. Nor can we discern

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[2]We also reject Biela's contention that even if joinder was appropriate, it was unfairly prejudicial because the DNA evidence presented at trial confused the jury. Our review of the record shows that the DNA evidence presented at trial was carefully and exhaustively delivered. In addition, the jury was instructed that it must consider the evidence on each count separately, and we presume it followed this instruction. See Richardson v. Marsh, 481 U.S. 200, 211 (1987).

plain error where Biela fails to convincingly articulate how these putative violations prejudiced him and thus how his substantial rights were violated.[3] See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

Juror-initiated questions

Biela claims that the district court committed reversible error when it permitted the jury to ask questions. Even if the district court did not err in permitting jury questions, Biela further contends, the district court erred when it failed to weigh the risks of permitting such questions on the record, to restrain their number, or to instruct the jury that it should not put undue weight on these questions. Biela admits that while he "acquiesced" to the allowance of jury questions and to the procedure by which they were asked and objected to, the errors were nevertheless plain and affected his substantial rights. See Vega v. State, 126 Nev. ___, ___, 236 P.3d 632, 637 (2010) ("To amount to plain error, the error must be so unmistakable that it is apparent from a casual inspection of the record." (internal quotations omitted)). Additionally, he raises a claim of error as to the one jury question to which he did object.

Permitting jury questions

Biela argues that, considering the high-profile nature of this case, the district court plainly erred in allowing jury questions. This court has recognized that allowing juror-initiated questions poses certain

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[3]Biela did object on one additional occasion following the testimony of a detective repeating verbatim the anonymous tip that led investigators to identify Biela as a suspect. The district court did not err in concluding that this was not "characterization" of the evidence in violation of its order but a recitation of a statement.

dangers but may also "significantly enhance the truth-seeking function of the trial process" and has therefore left the decision on whether to allow such questions to the "sound discretion of the trial court." Flores v. State, 114 Nev. 910, 913, 965 P.2d 901, 902 (1998). Beyond the bare and conclusory contention that the community's interest in the case posed the danger of an over-inquisitive jury, Biela does not point to any specific way in which his substantial rights were violated. Further, Biela can hardly complain of a procedure to which he acquiesced. See U.S. v. Sutton, 970 F.2d 1001, 1006 (1st Cir. 1992).

For similar reasons, the district court committed no error in failing to sua sponte restrain the number of jury questions. Biela tallies the number of questions at 99 and asserts this "excessive" number constitutes evidence of a jury that had thoroughly abandoned its role as a neutral fact-finder. Biela never objected to the number or alleged excessiveness of the jury questions and the district court did not err in failing to object in his stead.

Jury-question procedure

Biela contends that the district court erred in failing to state on the record that it had weighed the risks of asking jury questions against the benefits and then stating its reasoning for allowing the practice in this case. Biela relies on Knipes v. State, 124 Nev. 927, 192 P.3d 1178 (2008), in support of his proposition that such an on-the-record determination is required. Knipes, however, only requires on-the-record hearings when they pertain to the admissibility of jury questions, 124 Nev. at 931, 192 P.3d at 1180-81, and we therefore discern no plain error. We also decline his invitation to adopt the disapproving stance of the federal courts on the practice of asking jury questions. Compare U.S. v. Ajmal, 67

F.3d 12, 14 (2d Cir. 1995) (requiring "extraordinary or compelling circumstances as to justify juror questioning of witnesses" (internal citations omitted)), with Flores, 114 Nev. at 912-13, 960 P.2d at 902-03 (condoning the practice and incorporating procedural safeguards to guard against any risks posed by the practice).

Biela further contends that the district court erred in failing to promptly instruct the jury that they should not put undue weight on the responses to juror-submitted questions. The district court gave this instruction on the fifth day of trial and at the close of evidence. Accordingly there was no error, as the district court twice gave the undue-weight admonition and nothing in Flores requires that the admonition be given at some specific point before the jury deliberates. Cf. Allred v. State, 120 Nev. 410, 418, 92 P.3d 1246, 1252 (2004) (concluding that failure to give undue-weight admonition was harmless error).

Jury question MM

Biela claims that district court erred when it denied his motion for a mistrial because jury question MM presupposed that he was guilty of sexual assault with the use of a deadly weapon. We disagree. During the testimony of one of the lead detectives, the State played a video that captured a conversation between Biela and his girlfriend that occurred in a police interview room on the afternoon of his arrest. In the video, Biela mentions that he had attempted to purchase a gun the previous week. A juror then submitted a question that was marked as MM and to which neither party objected. Defense counsel asked MM of the detective: "Do you have any thoughts on why he would try to buy a gun, if he already had one (as used with Amanda C.)?" The next day, Biela moved for a mistrial, stating that "upon further reflection, we are

concerned the question presupposes guilt" as to the sexual assault of Amanda (count I).

Following Chavez v. State, 125 Nev. 328, 213 P.3d 476 (2009), the district court held a hearing at which it asked the juror who authored the question whether it indicated that she had prematurely decided Biela's guilt as to count I. The juror stated that it did not indicate that, and the parties declined to ask any follow-up questions. A fair reading of the juror's question supports the district court's determination that the juror was simply requesting factual information and not revealing a premature opinion. See Flores, 114 Nev. at 913, 965 P.2d at 903 ("A proper question does not imply that a juror formed any opinion any more than it does when a judge asks a question."). We therefore conclude that the district court did not abuse its discretion in determining that neither removal of the juror nor a mistrial was necessary. See Chavez, 125 Nev. at 347, 213 P.3d at 489.

Sufficiency of the evidence

Biela argues that reversal is required on count I—the sexual assault of Amanda—because her identification of Biela as her assailant occurred only after media reports named Biela as a suspect and she saw his photo on a newspaper's website, rendering her testimony "suspect." Biela frames this issue as a sufficiency-of-the-evidence claim. Amanda, however, testified at trial, identified Biela as her attacker, and, despite extensive cross-examination that tested the accuracy of her recollection, maintained that Biela's face was the face of "the man who haunts my dreams"; such testimony, standing alone, is sufficient to support his conviction on this count. See LaPierre v. State, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992). Likewise, we reject his claim that certain facets of

Amanda's testimony rendered it incredible as a matter of law. See Rembert v. State, 104 Nev. 680, 682, 766 P.2d 890, 891 (1988) ("The foregoing were matters for the jury's deliberation in assessing the weight of the evidence and the credibility of the witnesses."); cf. State v. Diamond, 50 Nev. 433, 437, 264 P. 697, 698-99 (1928) (observing that "circumstances in evidence might, as a matter of law, be enough to destroy the credibility of the complaining witness").

Jury instructions

Biela raises several contentions related to the jury instructions given in the guilt and penalty phases of his trial.

Guilt-phase instructions

First, Biela claims that the district court erred when it declined to give the federal pattern jury instruction on reasonable doubt and gave Nevada's statutory instruction instead.[4] Biela claims that the "more weighty affairs of life" language in the statutory instruction renders the instruction unconstitutionally defective. This court has repeatedly held that the instruction codified in NRS 175.211 is constitutional and that it will defer to the legislature for changes to that instruction. See

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[4]Jury instructions 7B and 29 defined reasonable doubt in a manner identical to NRS 175.211 and read:

> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

Garcia v. State, 121 Nev. 327, 339-40, 113 P.3d 836, 844 (2005); Noonan v. State, 115 Nev. 184, 189-90, 980 P.2d 637, 640 (1999); Bolin v. State, 114 Nev. 503, 530, 960 P.2d 784, 801 (1998), abrogated on other grounds by Richmond v. State, 118 Nev. 924, 934, 59 P.3d 1249, 1256 (2002). Therefore, the district court did not err in giving the statutory reasonable doubt instruction.

Second, Biela argues that the district court committed reversible error when it gave an instruction explaining that the trial would occur in two phases and that, if the jury found Biela guilty of murder, it would then be called upon, in the second phase, "to decide whether or not to impose the death penalty." He contends that this instruction was erroneous because it exceeded what is required by Valdez v. State, 124 Nev. 1172, 196 P.3d 465 (2008), and invited the jury to convict Biela of first-degree murder so that it could then get to the penalty phase. The instruction conforms to the requirements of Valdez. See id. at 1184, 196 P.3d at 473 (finding an abuse of discretion where district court did not give jury bifurcation instruction informing it that it must leave considerations of a penalty for a possible second phase). Moreover, Biela affirmatively assented to this instruction at trial, and the failure to object to an instruction or offer alternatives precludes this court's consideration of his claim on appeal. Etcheverry v. State, 107 Nev. 782, 784-85, 821 P.2d 350, 351 (1991).

Penalty-phase instruction

Biela asserts that a new penalty hearing is required because the penalty-phase instructions erroneously informed the jury that it was required to find that the mitigating circumstances outweighed the aggravating circumstances beyond a reasonable doubt. The jurors in this

case were provided with penalty-phase jury instructions that frequently, but not uniformly, stated that in order for a juror to find Biela ineligible for the death penalty, the mitigating circumstances must have outweighed the aggravating circumstances beyond a reasonable doubt. The beyond-a-reasonable-doubt standard was inserted into two weighing instructions at the behest of the State, with Biela's acquiescence.

While the instructions in this case correctly informed the jury that in order to find Biela death eligible, it must first find beyond a reasonable doubt that at least one aggravating circumstance exists, NRS 175.554(2), (4), the relevant statutes only require that the jury must also find that any mitigating circumstances did not outweigh those in aggravation, NRS 175.554(3). No Nevada statute mentions a burden of proof as it pertains to the weighing determination, see McConnell, 125 Nev. at 254, 212 P.3d at 314-15, and this court has long rejected claims that the weighing of the mitigating and aggravating factors in a death penalty case was subject to the beyond-a-reasonable-doubt standard, see DePasquale v. State, 106 Nev. 843, 852, 803 P.2d 218, 223 (1990). In Nunnery v. State, 127 Nev. ___, 263 P.3d 235 (2011), this court elaborated on this latter point and held that because the weighing determination is a moral decision and not a fact-finding exercise, it is not susceptible to a standard of proof. As a result, "[w]hile the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, the relative weight is not." Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983) (citations omitted); see Nunnery, 127 Nev. at ___, 263 P.3d at 235 ("The weighing determination does not involve the finding of any facts; instead, weighing asks the sentencing body to balance facts that have already been found

(aggravating and mitigating circumstances) in order to reach a conclusion or judgment."). The two instructions given in this case thus misstate the law and similar instructions should not be used in the future.

Biela did not object to these instructions and fails to demonstrate that the beyond-a-reasonable-doubt language prejudiced him. See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001), abrogated on other grounds by Nunnery, 127 Nev. at ___, 263 P.3d at 235. Biela claims that the language the district court inserted into these two instructions "shifted the burden to the defendant in a death penalty case to prove beyond a reasonable doubt that the mitigating evidence outweighs the alleged aggravating circumstances" and thus compels this court to grant him a new penalty hearing or to set aside his death sentence and impose a sentence of life without the possibility of parole. He asserts that "[t]hese instances of instructional error on a very pivotal factual determination undermine the reliability of the jury's verdict." However, as the foregoing discussion details, the weighing determination is not factual. Essentially, Biela claims that the district court impermissibly shifted the burden of proof where no burden can be applied. But because Biela cannot demonstrate that the verdict was affected by the inaccurate language, or that he was otherwise prejudiced, any error in the two instructions does not rise to the level of plain error that would warrant reversal.

Cumulative error

Biela argues that the cumulative effect of the errors committed during his trial warrant reversal of his conviction and sentence. Having found only one error that was not itself prejudicial, we conclude that Biela's claim of cumulative error lacks merit. See

Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002); see also U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

Mandatory review

NRS 177.055(2) requires that this court review every death sentence and consider whether (1) sufficient evidence supports the aggravating circumstances found, (2) the verdict was rendered under the influence of passion, prejudice or any arbitrary factor, and (3) the death sentence is excessive.

First, the four aggravating circumstances found by the jury were based on the four felonies of which Biela was convicted in the guilt phase. Sufficient evidence existed to support these convictions, including the surviving victims' testimony, the evidence corroborating that testimony, and the extensive DNA and other forensic evidence presented.

Second, there is nothing in the record demonstrating that the jury's verdict was the result of passion, prejudice, or any other arbitrary factor. Biela claims that the extensive media attention this case received polluted the jury pool with fear that a violent sexual predator was on the prowl for months and that the evidence that the police released to the media further served to inflame members of this community. To the contrary, the jury's finding of 23 mitigating circumstances and the 99 questions it asked during trial provide ample evidence that it was attentive, thoughtful, and did not rush to judgment in the determination of either guilt or penalty.

Finally, the death penalty is not excessive in this case. Despite his evidence in mitigation, the evidence presented quite

persuasively showed that Biela entered someone else's home early in the morning, pressed a pillow to a sleeping woman's face until she choked, and abducted her. He then raped her, strangled her with the strap of her best friend's thong underwear, and left her body in a field. This crime followed his stalking and sexual assault of two other young women. These crimes and this defendant are "of the class or kind that warrants the imposition of death." Dennis v. State, 116 Nev. 1075, 1085, 13 P.3d 434, 440 (2000).

Having considered Biela's contentions and conducted the review required by NRS 177.055(2), we conclude that no relief is warranted. We therefore

ORDER the judgment of conviction AFFIRMED.

Cherry, C.J.

Douglas, J.

Saitta, J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

cc: Hon. Scott N. Freeman, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk