

IN THE SUPREME COURT OF THE STATE OF NEVADA

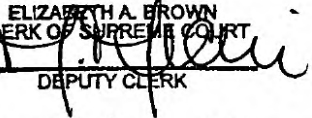
EARNEST JEWELL BATES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 83456

**FILED**

OCT 30 2023

ORDER OF AFFIRMANCE

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

This is an appeal from an amended judgment of conviction, pursuant to a jury verdict, of voluntary manslaughter with use of a deadly weapon. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Appellant Earnest Bates fatally shot Arlandus Jones in 2018 in Las Vegas. After fleeing the jurisdiction, Bates was arrested and brought into custody in Clark County. The State pursued a charge of first-degree murder with a deadly weapon under an open murder framework. Bates argued a theory of self-defense to the jury and testified in his own defense. The State called multiple eyewitnesses to the shooting, including Bates's ex-girlfriend, Angelica Ward. After the jury deadlocked and an alternate replaced a seated juror, the jury reached a verdict of voluntary manslaughter with the use of a deadly weapon. The district court sentenced Bates to an aggregate term of 8 to 20 years in prison.

Bates appeals, arguing (1) the jury's consideration of first-degree murder violated Bates's right to due process and a fair trial, (2) the district court abused its discretion by issuing a coercive *Allen* instruction, (3) the district court abused its discretion by permitting Ward to testify, (4) the district court abused its discretion by admitting evidence of Bates's prior conviction for attempted robbery, (5) the district court abused its discretion

by denying Bates's motion for a court-supervised audit of attorney-client communications allegedly intercepted by the Clark County Detention Center, and (6) that cumulative error warrants reversal.

*Bates's constitutional rights were not violated by the jury's consideration of the open murder charge*

Bates argues that Nevada's open murder charging scheme is unconstitutional because it provides no legal mechanism to prevent the jury from considering first-degree murder when the State has not presented any evidence of first-degree murder. While Nevada provides mechanisms for challenging an unwarranted verdict post-trial, Bates argues that Nevada must adopt a means of challenging an unsupported charge before the jury deliberates.

The Fourteenth Amendment's Due Process Clause "guarantees the right to a fair trial before a fair tribunal." *Ivey v. Eighth Judicial Dist. Court*, 129 Nev. 154, 159, 299 P.3d 354, 357 (2013); U.S. Const. amend. XIV, § 1; *see also* Nev. Const. art. 1, § 8. The Sixth Amendment also guarantees the right to a trial by an impartial jury. U.S. Const. amend. VI; *see also* Nev. Const. art. 1, § 3. To establish a violation of these rights, Bates argues that the allegedly baseless first-degree murder charge pressured the jury into rendering a voluntary manslaughter verdict, when the jury would otherwise have acquitted based on self-defense. As evidence, Bates points to the fact that the jury was deadlocked before the district court issued an *Allen* instruction.

We conclude that Bates has failed to show how his right to a fair trial was violated in this case. First, Bates's argument assumes the State presented no evidence at trial supporting a first-degree murder charge. The record belies this. The State presented a theory of first-degree murder where Bates shot Jones with no provocation. Multiple bystanders

and responding officers denied seeing Jones with a gun. Bates was the only witness who claimed Jones had a gun whereas two witnesses expressed that Jones appeared happy and conciliatory on his birthday, contradicting Bates. Second, while Bates argues the jury was pressured by the inclusion of a first-degree murder charge, this assertion speculates beyond the record. The jury did reach a deadlock; however, the reason is unknown. Further, following the deadlock, the jury restarted deliberations soon after with a substitute juror. Bates has failed to establish any facts sufficient to demonstrate Nevada's open murder scheme deprived him of a right to a fair trial.

*The Allen instruction did not coerce the jury*

Bates argues the district court improperly gave an *Allen* instruction, over defense's objection, coercing the jury into returning a guilty verdict. As evidence, Bates points to the speed with which the jury reached their verdict after receiving the *Allen* instruction. Bates asserts the case was a close call and the instruction's timing made it more likely to be coercive: the instruction was given on a Thursday afternoon after the time the jury had been told the trial would conclude.

We conclude that the *Allen* instruction in Bates's case was not unduly coercive. In *Allen v. United States*, the United States Supreme Court upheld an instruction telling jurors to give proper regard and deference to the opinions of other jurors, while maintaining that the verdict must reflect the opinion of each individual juror. 164 U.S. 492, 501-02 (1896). This court

has reluctantly approved the *Allen* charge if it clearly informs the jury that each member has a duty to adhere conscientiously to his or her own honest opinion, and if it avoids creating the impression that there is anything improper,

questionable or contrary to good conscience for a juror to create a mistrial.

*Wilkins v. State*, 96 Nev. 367, 373, 609 P.2d 309, 312 (1980). The “concern in regard to *Allen* charges is that they not coerce jurors into reaching a verdict.” *Staude v. State*, 112 Nev. 1, 6, 908 P.2d 1373, 1376-77 (1996), holding modified on other grounds by *Richmond v. State*, 118 Nev. 924, 59 P.3d 1249 (2002).

In *Wilkins*, this court cautiously upheld an *Allen* instruction when the jury had deliberated for fifteen hours without a verdict because it deliberated for six more hours after the instruction. 96 Nev. at 373, 609 P.2d at 312-13. This court in *Wilkins* appended an approved *Allen* instruction as a footnote “for the future guidance of our district courts.” *Id.* at 373 & n.2, 609 P.2d at 313 & n.2.

The district court’s *Allen* instruction mirrors the approved instruction that appears in *Wilkins*:

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.



You are not partisans. You are judges—  
judges of the facts. Your sole interest is to ascertain  
the truth from the evidence in the case.

*Id.* (internal quotation marks omitted).

In addition to giving the approved instruction, the district court also properly determined that the jurors had not deliberated long enough to warrant a mistrial based on the deadlock. In comparison to the six-days of hearing evidence during the guilt-phase at trial, the two partial afternoons of deliberations with hour-long lunch breaks did not constitute an overly lengthy deliberation or justify a mistrial. *See Hudson v. State*, 92 Nev. 84, 88, 545 P.2d 1163, 1166 (1976) (describing five- to six-hour deliberations with a meal break as “relatively short” and supporting an *Allen* instruction rather than declaring a mistrial).

Additionally, the jury was instructed to restart deliberations soon after receiving the *Allen* instruction. An alternate juror was empaneled on the third day of deliberations after a seated juror was excused due to a time conflict. The addition of the alternate juror after the *Allen* instruction makes the effect of the *Allen* instruction unclear at best. The dynamics of the jury changed independently of the *Allen* instruction. In sum, the model *Allen* instruction, given after two half-days of deliberations and before a restart in deliberations, was not unduly coercive.

*The district court did not abuse its discretion by admitting Angelica Ward’s testimony*

Bates argues that the district court’s decision to admit Ward’s testimony over the defense objection violated Bates’s right to a fair trial under the Sixth and Fourteenth Amendments. Particularly, Bates argues that because Ward’s statements to police were not recorded, Bates was ambushed by Ward’s testimony.

We conclude that the district court did not abuse its discretion by admitting Ward as a rebuttal witness because the State did not withhold the contents of Ward's testimony from Bates. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Rimer v. State*, 131 Nev. 307, 328, 351 P.3d 697, 712 (2015) (internal quotation marks omitted). "Trial by ambush traditionally occurs where a party withholds discoverable information and then later presents this information at trial, effectively ambushing the opposing party through gaining an advantage by the surprise attack." *Turner v. State*, 136 Nev. 545, 553, 473 P.3d 438, 447 (2020) (internal quotation marks omitted).

Bates fails to explain how the lack of a written or recorded interview between Ward and the police constituted a surprise attack at trial. The district court ruled early in the case that Ward's oral proffer to the State need not be disclosed. Bates does not challenge that ruling on appeal. The district court instructed Bates's counsel to interview Ward at a pretrial hearing and to contact Ward's attorney multiple times, but Bates's counsel never followed-up. When the State represented to the district court that it had communicated with Bates's attorney about Ward's proffer to the State, Bates's counsel again maintained he needed a written or recorded statement. Somehow, when the State moved to admit Ward's testimony regarding Bates's gang affiliation, Bates still maintained that he had no idea what Ward would testify about. Bates's counsel provided no specific examples regarding how Ward's testimony caused surprise.

Additionally, Detective Boucher testified his interview with Ward was accurately recounted in his investigative report. The district court questioned the State about the specifics of Ward's testimony during trial after Bates's counsel brought up the issue for the third time. Bates

never interviewed Ward prior to trial. While Bates argues he was surprised by Ward's testimony, the record shows multiple avenues that Bates's attorney either had or could have taken to investigate. Further, Bates never demonstrated any surprising testimony. Therefore, we conclude that the district court did not abuse its discretion by admitting Ward's testimony to impeach Bates.

*The district court did not abuse its discretion by admitting evidence of Bates's prior conviction for attempted robbery*

Bates argues the district court should have suppressed evidence of Bates's prior conviction for attempted robbery because the conviction was substantially more prejudicial than probative under NRS 48.035(1) and argues admission of the prior bad act was impermissible character evidence, serving only to paint Bates as a person of bad character. Bates asserts the probative value was low because Bates was seventeen years old when he pleaded guilty to attempted robbery.

The district court applied the appropriate test and determined the prior conviction was admissible for impeachment purposes. "[T]he decision whether to admit a prior conviction for impeachment purposes rests within the sound discretion of the trial court, and will not be reversed absent a clear showing of abuse." *Pineda v. State*, 120 Nev. 204, 210, 88 P.3d 827, 832 (2004) (internal quotation marks omitted). NRS 50.095(1) provides that "[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which the witness was convicted." NRS 50.095(2) prohibits evidence of a conviction if more than ten years has passed since the release of the person from confinement or the expiration of parole, probation, or sentence. Here, in 2013, Bates was certified as an adult at

seventeen. Bates received a prison sentence of 16 to 72 months and was paroled in 2016. Under NRS 50.095, the attempted robbery conviction was admissible and relevant for credibility purposes.

Nonetheless, NRS 48.035(1) requires the exclusion of otherwise relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” Further, “our legislation contemplates a balancing process to determine whether the evidentiary usefulness of the proposed impeachment by prior felony convictions, is substantially outweighed by the danger of unfair prejudice.” *Yates v. State*, 95 Nev. 446, 449-50, 596 P.2d 239, 241-42 (1979).

Here, the district court found the risk of Bates’s attempted robbery conviction being used to demonstrate propensity was low because the mention of robbery without any factual context was not similar to the incident at trial. The court also found Bates’s credibility was relevant because Bates was the only person who could give testimony about the reasonableness of his fear. *Pineda*, 120 Nev. at 210, 88 P.3d at 832 (finding that by testifying in his own defense, the defendant “placed his credibility squarely in issue”); *Yates*, 95 Nev at 450, 596 P.2d at 242 (“[S]ince robbery and larceny involve dishonesty, convictions for such offenses are often held admissible for purposes of impeachment.”). We conclude that the district court did not abuse its discretion by allowing the State to ask Bates about the prior attempted robbery conviction.

*Bates’s constitutional rights were not violated by the district court’s denial of his motion for a court-supervised audit of intercepted attorney-client communications*

Bates brought to the court’s attention that the Clark County Detention Center had maintained video of an attorney client visit between Bates and defense counsel. Bates moved for an audit of the detention center



video archives. Bates argues the district court's refusal to audit the video violated his right to the assistance of counsel under the Sixth Amendment and as articulated in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Bates argues the recorded video amounted to deliberate governmental interference in his relationship with defense counsel. Bates claims this intrusion caused Bates paranoia, which impeded counsel's ability to effectively prepare for trial.

Bates's argument has shifted on appeal. On appeal, Bates claims the district court was asked "to conduct a supervised audit of the recorded attorney/client video conference." By contrast, Bates's motion before the district court requested "an audit of any remaining undisclosed intercepted attorney/client communications." The district court denied this broad request as not feasible, stating, "I just don't have the ability to supervise everything Metro is putting into evidence.com. They are putting thousands of bodycam videos in there every day. I have no means of being able to supervise that." The district court also based its denial on the affidavit provided by the prosecutor in Bates's case, in which the prosecutor swore that no person from the prosecution had viewed the contents of the video of Bates meeting with defense counsel. The district court reviewed the State-provided audit trail for the video, which confirmed the prosecutor's affidavit.

The attorney-client relationship is sacrosanct and "subject to the closest scrutiny by the courts." *Williams v. Waldman*, 108 Nev. 466, 472, 836 P.2d 614, 618 (1992). Government interception of attorney-client communications is a threat to effective assistance of counsel. *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977). *Weatherford*, holding the presence of an undercover government agent during attorney-client conversations


did not violate Defendant's constitutional rights, emphasized the fact that Weatherford, the undercover agent, "revealed nothing said or done at the meetings . . . he attended. None of the Government's evidence was obtained as a consequence of Weatherford's participation in those meetings." *Id.* at 555. Further, the Court notes "this is not a situation where the State's purpose was to learn what it could about the defendant's defense plans." *Id.* at 557. Likewise, the district court, here, was satisfied there was no improper use of the video by the prosecution. No bad faith intent to intrude into the attorney-client relationship existed. Finally, Bates does not explain how the district court's viewing of this video would have prevented or remedied any improper government interference. As such, we cannot conclude the district court abused its discretion in denying Bates's motion, nor find any violation to Bates's Sixth Amendment rights.

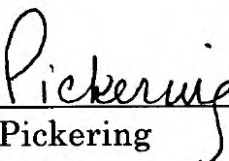
*There are no errors to cumulate*

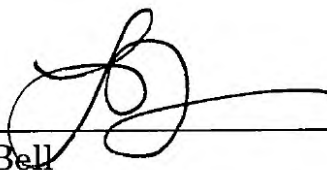
Last, Bates argues cumulative error warrants reversal. This court finds no errors to cumulate and therefore Bates's argument is without merit. *See Chaparro v. State*, 137 Nev. 665, 673-74, 497 P.3d 1187, 1195 (2021) ("Because we have rejected Chaparro's assignments of error, we conclude that his allegation of cumulative error lacks merit.").

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Cadish

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Bell

cc: Hon. Tierra Danielle Jones, District Judge  
Law Office of Rachael E. Stewart  
Attorney General/Carson City  
Clark County District Attorney  
Eighth Judicial District Court Clerk