

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELDER ZACARIAS-LOPEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40116

FILED

MAY 11 2004

ORDER OF AFFIRMANCE

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

Elder Zacarias-Lopez appeals from his judgment of conviction, pursuant to a guilty verdict, of first-degree murder with use of a deadly weapon.

On July 8, 2001, Moris Morataya was shot and killed at a house located at 1504 Teardrop in Las Vegas, Nevada. On September 27, 2001, Lopez was charged with one count of open murder with use of a deadly weapon.

At trial, Lopez testified that he did not shoot Moris. Instead, Lopez claimed that a man named Javier, wearing red pants and a blue shirt and having curly black hair, came by the house while he was talking to Moris. According to Lopez, Javier started walking towards the front door to go inside the house when Lopez heard gunshots and turned around to see Moris lying on the ground. Lopez testified that Javier threatened Lopez, saying that he would kill his family if he told anyone that he had shot Moris, and then ran away. Lopez claimed that he was frightened so he drove away in his red truck. Lopez testified that as he was driving, he looked down on the floor of the truck and saw a gun and bullets, which he claimed did not belong to him. He grabbed the bullets with his right hand and put them in his left pants pocket. He then saw a police car, grabbed

the gun, and threw it out the truck window because he was scared. Lopez then slowed down and stopped on his own.

However, the investigators who testified connected Lopez to the shooting—gunshot residue was collected from Lopez's hands; the gun that Lopez threw out the truck window was the same one used to shoot Moris; the unfired cartridges found on Lopez's person appeared to be made in the same manufacturing lot as those fired and/or recovered at the scene of the shooting; and the blood on Lopez's pants matched Moris' DNA.

Several witnesses testified that prior to the shooting they saw Lopez get something out of his truck and return to the house, and then shortly thereafter, they heard gunshots. Witnesses testified that Lopez and Moris were talking outside of the Teardrop residence prior to the shooting, and that after the shooting they saw Lopez driving quickly away in a red truck. Many of the witnesses had previously been shown a photo lineup, and had identified Lopez as the man who got into the red truck.

At the conclusion of the trial, the jury returned a unanimous verdict of guilty of one count of first-degree murder with use of a deadly weapon. Thereafter, the penalty phase commenced, and Lopez was sentenced to two consecutive terms of life imprisonment with the possibility of parole beginning when a minimum of twenty years has been served.

On appeal, Lopez argues that his conviction should be reversed because the district court committed prejudicial error by improperly excluding evidence of identification, admitting non-relevant evidence of the cooperative attitudes of the individuals detained at the scene of the shooting, excluding evidence of Lopez's limited mental capacity, and denying Lopez's motion for a new penalty hearing.

The decision to admit or exclude relevant evidence, after balancing the prejudicial effect against the probative value, is within the sound discretion of the district court, and the court's determination will not be overturned absent manifest error or abuse of discretion.¹

When cross-examining Detective Robert Wilson, Lopez's counsel asked about information gathered regarding the statements of the children who were in the neighborhood at the time the shooting occurred. Lopez's counsel then inquired as to what the children indicated when shown the photo lineup. The State objected to this line of questioning as irrelevant and as hearsay. The district court sustained the State's objection. Later, Lopez's counsel made an offer of proof that the excluded evidence would show that the police did not follow up on the children's statements that the man they saw get into the red truck had on blue jeans and had curly black hair. Lopez's counsel claimed that this fact was important because Lopez was wearing light-colored pants and did not have curly hair. The district court informed Lopez's counsel that she could have asked Detective Wilson whether he received information from any witnesses that they saw someone wearing blue jeans or having curly black hair, and then if he said yes, she could have asked what he did about verifying that information. The district court advised counsel that she could not ask about what the witnesses told the detective because that would be inadmissible hearsay.

We conclude that the district court did not err in preventing Lopez's counsel from questioning Detective Wilson about what each child

¹See NRS 48.035; see also K-Mart Corporation v. Washington, 109 Nev. 1180, 1186, 866 P.2d 274, 278 (1993).

said because such evidence was hearsay under NRS 51.035. Although Lopez argues that he wanted to offer the evidence for non-hearsay purposes—to show that the police did not follow up on the statements, Lopez was also offering the evidence for hearsay purposes—to prove the gunman wore a red shirt and blue jeans and that he had curly black hair. Despite the fact that the district court did not permit Detective Wilson to testify about what the kids said, the jury was still informed of the descriptions they gave when the children testified at trial. The children testified that they could not remember what the man who they saw get into the red truck was wearing, but they conceded that they had previously told the police that the man was wearing blue jeans and had curly black hair.

The State, over objection from Lopez, was allowed to question witnesses regarding the cooperative attitude of the men detained at 1504 Teardrop. Lopez argues that such evidence was not relevant and was more prejudicial than probative, in that it allowed the jury to infer that Lopez was not cooperative.

NRS 48.015 allows for the admission of evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” The cooperative attitude of the men who remained at the residence was relevant insofar as it demonstrated the likelihood that none of them participated in the shooting. Moreover, much testimony was elicited regarding the cooperative attitude of Lopez once he came into contact with the police. Hence, we conclude that evidence of the cooperative attitude of the men who remained at 1504 Teardrop was not prejudicial, as evidence of Lopez’s cooperation was also presented.

Prior to trial, Lopez gave notice of an expert witness, Thomas Kinsora, a neuropsychologist who planned to testify that Lopez has an IQ of 59. The district court did not permit Dr. Kinsora to testify, concluding that evidence of Lopez's IQ, by itself, was not relevant to any fact at issue. The district court also questioned the reliability of the IQ test. Lopez argues that the district court erred in so ruling because his theory of the case was that leaving the scene, scooping bullets into his pocket, and throwing the gun away were not indicia of guilt, but rather, reactions to just having witnessed someone being shot, to being scared, and to simply making a series of bad decisions, in part due to a relatively low mental capacity.

We conclude that the evidence was properly rejected because Dr. Kinsora's testimony was not needed to "assist the trier of fact to understand the evidence or determine a fact in issue."² Indeed, the jury was able to assess the mental capacity of Lopez first-hand when he testified. In addition, it appears that there were questions regarding the reliability of the IQ test; therefore, the evidence may have lacked relevancy inasmuch as it would not have tended to make the existence of a fact of consequence more or less probable.³

Finally, Lopez argues that the district court erred in denying his motion for a new penalty hearing because the court should have informed the parties that the jury asked three questions during deliberation.

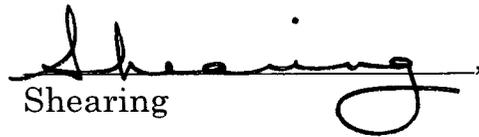
²NRS 50.275.

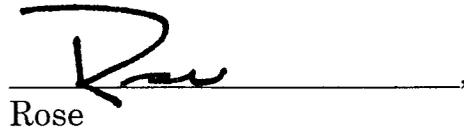
³See NRS 48.015.

Although the district court should not have answered the jury's questions as it did, by referring the jury back to the instructions already given without first informing counsel,⁴ we conclude that such error was harmless error since the jury instruction relating to the jury's questions was correct and adequately answered their questions.⁵ Accordingly, we conclude that the district court properly denied Lopez's motion for a new penalty hearing.

Having considered Lopez's arguments on appeal and concluding they lack merit, we

ORDER the judgment of the district court AFFIRMED.

 _____, C.J.
Shearing

 _____, J.
Rose

 _____, J.
Maupin

⁴Cavanaugh v. State, 102 Nev. 478, 484, 729 P.2d 481, 485 (1986) (noting that it was error for the district court to respond to a jury question without contacting counsel).

⁵Id. at 484, 729 P.2d at 484-85 (concluding that it was harmless error for the district court, without contacting counsel, to respond to a question during deliberations by referring the jury to an already-given instruction because the instruction was correct).

cc: Hon. Kathy A. Hardcastle, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk