IN THE SUPREME COURT OF THE STATE OF NEVADA

VITALY ZAKOUTO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41709

FILED

MAR 03 2005

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Appeal from a judgment of conviction entered upon jury verdicts finding appellant Vitaly Zakouto guilty of first-degree murder with use of a deadly weapon, burglary while in possession of a deadly weapon, home invasion while in possession of a deadly weapon, aggravated stalking, and stalking. Eighth Judicial District Court, Clark County; Joseph S. Pavlikowski, Judge.

Zakouto asserts on appeal that various errors warrant a new trial, including the admission of videotape testimony from a prior separate proceeding, failure to sever the stalking charges, use of lay witness opinion testimony and failure to suppress his statements to police. Zakouto also claims entitlement to a new trial based upon cumulative error and failure of the State to produce sufficient evidence to sustain the convictions. We conclude that the district court committed no error in any of these respects, but find plain error with regard to redundant convictions for both burglary and home invasion. We therefore affirm the district court judgment in part, and remand for vacation of the home invasion conviction.

## FACTUAL AND PROCEDURAL HISTORY

Zakouto and his wife, the victim Marina Cannon, became estranged during the year 2000. The couple separated on June 22, 2000, at Cannon's insistence. During the ensuing months, Cannon and several members of her family frequently notified the police regarding Zakouto's threats to Cannon, his return and forcible re-entry into the marital residence, and his commission of multiple acts of vandalism. After obtaining a protective order, Cannon, her family, and neighbors reported numerous subsequent disturbances and vandalism involving Zakouto. Cannon testified during a contempt hearing in family court that Zakouto had violated the restraining order several times and threatened to harm her. Based upon these complaints, the State filed various criminal charges against Zakouto, including aggravated stalking.

On December 23, 2000, Cannon was murdered. Police detective David Mesinar suspected Zakouto and requested via dispatch that Zakouto be stopped and detained. Traffic officers eventually located Zakouto, effected a traffic stop, and detained him for questioning by Mesinar. While the officers did not formally place Zakouto under arrest, he was not free to leave. When Detective Mesinar arrived and informed Zakouto of Cannon's murder, Zakouto spontaneously stated that he did not know where she lived. Zakouto then agreed to give a formal statement but, shortly thereafter, terminated the interview so he could consult with his attorney. At that point, the detective told Zakouto he was free to go, but impounded his vehicle. Zakouto became irate and stated he wanted to remove some property from his vehicle. In response to the denial of this request, Zakouto spontaneously informed Mesinar that he saw Cannon at a Wal-Mart on December 22.

On December 26, 2000, based upon further investigation, Mesinar arrested Zakouto, at which time Zakouto indicated that his attorney advised him to speak with them. Zakouto went on to ask about the evidence against him, to which Mesinar responded that neighbors had seen Zakouto's car near Cannon's residence during the days preceding her death. At that point, Zakouto voluntarily confirmed that he was the only person who drove his vehicle. The record reflects no further out-of-court statements by Zakouto to investigators.

The State charged Zakouto with murder with use of a deadly weapon, burglary while in possession of a deadly weapon, home invasion while in possession of a deadly weapon, aggravated stalking, and stalking. Prior to trial, Zakouto filed various motions that sought suppression of his statements to police, exclusion of lay witness opinion testimony identifying him as the intruder depicted on a videotape taken via surveillance camera at Cannon's residence on the night of her death, and severance of the stalking charges from the remaining charges. The district court denied these motions and the case proceeded to trial.

At trial, the State elicited evidence from numerous witnesses recounting the violent interactions between Zakouto and Cannon, his acts of stalking and vandalism, her attempts at evading him by changing residences, his location of her new residence and his obsession with her. The State also published her videotaped testimony from the prior proceeding. Finally, Cannon's sons identified Zakouto as the person depicted in surveillance movies.

As noted, the trial jury found Zakouto guilty on all counts. The district court sentenced Zakouto to consecutive terms of life imprisonment without the possibility of parole for murder with use of a

deadly weapon; 36 to 120 months for burglary; 36 to 120 months for home invasion; 36 to 120 months for aggravated stalking, and one year in the Clark County Detention Center for stalking, a gross misdemeanor. All sentences were imposed concurrently except the deadly weapon enhancement imposed in connection with the murder conviction. The district court awarded Zakouto credit for 493 days time served in local custody, imposed a $25 administrative assessment and a $150 DNA analysis fee, and ordered genetic marker testing. Zakouto appeals.

## DISCUSSION

Admission of videotape testimony[1]

Zakouto argues that the admission at trial of Cannon's videotaped testimony from the family court proceeding violated his right to confront witnesses under the Sixth Amendment as construed in Crawford v. Washington.[2]

The United States Supreme Court held in Crawford that, in considering the admissibility of hearsay statements, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[3]

---

[1]Zakouto argues that the State failed to provide him with notice under NRS 174.234 of its intention to introduce the videotape. This argument lacks merit, given Zakouto's objection to the videotape testimony at the preliminary hearing over two years before trial.

[2]541 U.S. 36, 124 S. Ct. 1354 (2004).

[3]Id. at ___, 124 S. Ct. at 1374 (emphasis added).

NRS 51.325 states the "former testimony" hearsay exception. To admit testimony under this exception, (1) the declarant must be unavailable, (2) "[i]f the proceeding was different, the party against whom the former testimony is offered [must have been] a party [to the prior proceeding] . . . or is in privity with one of the former parties," and (3) the issues litigated in both proceedings must be substantially the same.

Neither party contests that Cannon was unavailable to testify at trial or that Zakouto was a party to the prior proceeding. Therefore, the only remaining dispute under NRS 51.325 is whether the issues in both proceedings were substantially similar. The issue in the family court contempt hearing was whether Zakouto threatened Cannon, caused damage to her home, and whether he violated Cannon's restraining order against him. In the murder trial, issues arose as to whether Zakouto threatened and stalked Cannon, and whether he had motive and opportunity to commit murder. We conclude that both proceedings were substantially similar within the meaning of NRS 51.325.

Because we conclude that Zakouto had the opportunity to confront Cannon in a prior proceeding regarding issues substantially similar to those at the trial below, we reject Zakouto's argument that admission of Cannon's videotape testimony violated his confrontation rights.

We reject the State's argument that Zakouto forfeited his confrontation rights when he murdered Cannon. The State requests that we endorse a practice at the trial level in which the district court would conduct a preliminary assessment, based on the preponderance of the evidence, of whether Zakouto wrongfully procured Cannon's unavailability. We decline to do so because such a pre-assessment of guilt

would deprive a defendant of constitutional protections such as the right to a jury trial and the presumption of innocence until proven guilty beyond a reasonable doubt.

Severance

Zakouto asserts that the district court should have severed the stalking charges because they were too remote in time and otherwise because of unfair prejudice.

The decision to sever charges is left to the sound discretion of the trial court, and an appellant has the "heavy burden" of showing that the court abused that discretion.[4] "Misjoinder requires reversal only if the error has a substantial and injurious effect on the jury's verdict."[5] "'The test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever.'"[6] Further, "[t]he simultaneous trial of the offenses must render the trial fundamentally unfair, and hence, result in a violation of due process."[7]

"Cross-admissibility of evidence . . . is one of the key factors in determining whether joinder is appropriate."[8] "'If . . . evidence of one charge would be cross-admissible in evidence at a separate trial on

---

[4]Middleton v. State, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998).

[5]Id.

[6]Honeycutt v. State, 118 Nev. 660, 667, 56 P.3d 362, 367 (2002) (quoting United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976)).

[7]Id. at 668, 56 P.3d at 367.

[8]Id.

another charge, then both charges may be tried together and need not be severed.'"[9]

Substantial evidence demonstrated Zakouto's violent despondence over his separation from Cannon, and that he repeatedly threatened her, stalked her and invaded her home. While evidence of collateral offenses is inadmissible to prove that a defendant held a propensity to commit the crime charged,[10] such evidence may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[11] We conclude that the stalking evidence established Zakouto's motive and intent for killing Cannon, thus satisfying the test for cross-admissibility between the stalking and the other charges. Also, because the stalking offenses occurred from June 2000 until Cannon's death on December 23, 2000, the acts underlying the stalking charges were not remote in time from those associated with Cannon's murder. We therefore reject Zakouto's claims of prejudice from the joinder.

Accordingly, we conclude that the district court did not abuse its discretion in denying Zakouto's motion to sever the stalking counts.

Lay witness opinion testimony

Zakouto argues that the district court improperly permitted Jason Jaeger, a chiropractor by profession, to testify as a lay witness that Zakouto was the man depicted in the surveillance videotape taken at

---

[9]Middleton, 114 Nev. at 1108, 968 P.2d at 309 (quoting Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989)).

[10]Id. at 1108, 968 P.2d at 309.

[11]NRS 48.045(2).

Cannon's residence on December 23, 2000, the night she was killed. He asserts that the State improperly presented Jaeger as an expert witness based upon his heightened faculties of perception gained from his experience as a chiropractor.

A district court's decision to admit or exclude evidence will not be disturbed on appeal unless it is "manifestly wrong."[12] NRS 50.265 governs the admissibility of lay witness opinion testimony, which is admissible if rationally based upon the witness's perception and is either helpful to a clear understanding of the witness's testimony or the determination of a fact at issue.

In Rossana v. State, this court considered whether a lay witness could properly identify the defendant from a surveillance videotape.[13] This court noted that the testimony of lay witnesses may be "particularly appropriate" when the witness was familiar with the defendant's appearance.[14]

The State presented Jaeger's testimony only as that of a lay witness and, prior to his direct examination, the district court admonished the jury that Jaeger would testify as such. Jaeger testified that he believed the man in the surveillance video was Zakouto because he had seen Zakouto on many occasions and knew his distinctive gait and posture. Jaeger's testimony was based on his own perception and it was helpful to the jury in determining whether Zakouto was the intruder on December 23, 2000. While Jason's chiropractic training may have

---

[12]State v. Butner, 67 Nev. 436, 441, 220 P.2d 631, 633 (1950).

[13]113 Nev. 375, 380, 934 P.2d 1045, 1048 (1997).

[14]Id. at 381, 934 P.2d at 1048.

heightened his abilities of perception, his identification did not require the skill or knowledge of an expert witness, nor does the identification evidence border upon improper expert testimony.[15] Therefore, we conclude that the district court did not abuse its discretion in denying Zakouto's motion to exclude this testimony.

Admission of pre- and post-arrest statements to police

Zakouto claims that the district court erred when it failed to suppress his pre- and post-arrest statements to police, which he asserts were obtained in violation of his Fifth and Sixth Amendment rights to counsel.

Pre-arrest statements under the Fifth Amendment

Zakouto argues that the district court should have suppressed his December 23 statements because Detective Mesinar obtained the information during a custodial interrogation without Miranda[16] warnings.

"The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning."[17] "'Custody' means 'a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'"[18] When a defendant is not under formal arrest at the time of questioning, the inquiry concerning whether statements were given in a custodial setting

---

[15]Cf. Beattie v. Thomas, 99 Nev. 579, 586, 668 P.2d 268, 273 (1983).

[16]See Miranda v. Arizona, 384 U.S. 436 (1966).

[17]State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998).

[18]Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)).

becomes "'how a reasonable man in the suspect's position would have understood his situation.'"[19] This involves consideration of the totality of circumstances.[20] We will not overturn a district court's determination of whether a defendant was in custody where substantial evidence supports that determination.[21]

When police stopped Zakouto on December 23, 2000, they did not handcuff him, pat him down, or search him for weapons. When the detective arrived, he informed Zakouto that Cannon had been murdered, to which Zakouto responded that he had no knowledge of where Cannon lived. Zakouto agreed to give a formal statement, and followed the detective in a patrol car for a taped interview. Shortly thereafter, Zakouto stated that he would say no more and requested an attorney, upon which the detective terminated the interview.[22] The detective then told Zakouto he was free to leave, but that Mesinar was impounding his car. Only at this point did Zakouto state that he had recently seen Cannon at a Wal-Mart store. Under the totality of the circumstances, we cannot conclude that the district court erred in its determination that Zakouto was not in custody for Miranda purposes when he made incriminating statements

---

[19]Id. (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).

[20]See id.

[21]Id.

[22]Zakouto argues that police detained him in excess of sixty minutes in violation of NRS 171.123, from the time police stopped him until the time police impounded his vehicle. The record, however, suggests that less than one hour elapsed from the time police stopped Zakouto until the time the interview terminated, at which time the detective told Zakouto he was free to leave.

after his temporary detention by traffic officers on December 23, 2000. Accordingly, we cannot further conclude that the district court erred in its denial of Zakouto's motion to suppress these pre-arrest statements.

Post-arrest statements under the Fifth Amendment

As noted, Miranda only applies to custodial interrogation. In the context of Miranda, the Supreme Court has defined "interrogation" as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[23] Further, the Court in Miranda expressly permits the admission of statements that do not stem from custodial police interrogation and which are voluntarily given by the defendant.[24]

Mesinar did not administer Miranda warnings to Zakouto upon making the arrest on December 26, 2000, because he had no intention of conducting an interview at that point. The circumstances indicate that Zakouto voluntarily and spontaneously made his post-arrest statements, and not in response to any interrogation by Mesinar. As noted, Detective Mesinar testified that, after he arrested Zakouto, Zakouto informed Mesinar that he had just spoken with his attorney, who advised him to speak with police, after which Zakouto asked the detective what evidence the police had against him. The detective responded that people had seen Zakouto's car near Cannon's house in the days preceding her death. It was then that Zakouto responded in turn that no one used his car but him. The voluntary nature of Zakouto's statements and the fact that the statements did not stem from an interrogation lead us to conclude

---

[23]Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[24]Miranda, 384 U.S. at 478.

that the district court properly denied Zakouto's motion to suppress his post-arrest statements.

Sixth Amendment rights to counsel

"The Sixth Amendment right to counsel attaches when 'judicial proceedings have been initiated' against the defendant."[25] Formal charges, a preliminary hearing, indictment, criminal information or arraignment initiate those proceedings.[26] "[T]he offense-specific Sixth Amendment right does not require suppression of statements deliberately elicited during a criminal investigation merely because the right has attached and been invoked in an unrelated case."[27]

We find no Sixth Amendment violation. Although stalking charges were pending against Zakouto when he spoke with police on December 23 and later on December 26, the purpose of requesting Zakouto's formal statement on those dates related to the investigation for murder. As of either date, the State had yet to initiate proceedings in connection with that charge.

Because Zakouto has demonstrated no violation of his rights to counsel, we find no error in the admission of his pre- and post-arrest statements.[28]

---

[25]Coleman v. State, 109 Nev. 1, 4, 846 P.2d 276, 278 (1993) (quoting Brewer v. Williams, 430 U.S. 387, 398 (1977)).

[26]Kaczmarek v. State, 120 Nev. ___, 91 P.3d 16, 25 (2004).

[27]Id. at ___, 91 P.2d at 25.

[28]Even if the district court erred in its suppression rulings, or insofar as the ruling related to the stalking charges, we conclude that any such error was harmless. See Chapman v. California, 386 U.S. 18 (1967).

Sufficiency of the evidence

Zakouto asserts that the State failed to present sufficient evidence at trial to support the murder, burglary and home invasion charges.

"In reviewing evidence supporting a jury's verdict, this court must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by . . . competent evidence."[29] More particularly, after viewing the evidence in the light most favorable to the prosecution, this court questions whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[30] Where there is conflicting testimony, the jury determines its weight and credibility.[31] "Circumstantial evidence alone may support a judgment of conviction."[32] We conclude that substantial evidence supports Zakouto's convictions on all counts.

First, the State adduced evidence of a lengthy course of violent conduct involving Zakouto, including repeated invasions of Cannon's home by force, acts of vandalism, disruption of her telephone communications, and threats of bodily harm.

Second, Damon and Jason Jaeger credibly identified Zakouto as the disguised intruder on the December 23, 2000, surveillance videotape.

---

[29]Braunstein v. State, 118 Nev. 68, 79, 40 P.3d 413, 421 (2002).

[30]Id. at 79-80, 40 P.3d at 421.

[31]Id. at 79, 40 P.3d at 421.

[32]Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000).

Third, the State introduced compelling evidence of motive. The evidence at trial showed that Zakouto was violently despondent over his breakup with Cannon and threatened to kill both himself and her. Further, the State also introduced evidence that Zakouto was desperate to obtain a motor vehicle insurance settlement and was angry with Cannon for not signing off on the vehicle title so he could recover the insurance proceeds.

Fourth, Cannon was beaten, repeatedly stabbed and shot twice, all of which support the murder charge in this instance.

Fifth, although Cannon attempted to move without revealing her new residence to Zakouto, several neighbors observed Zakouto's vehicle in her new neighborhood days before her murder. Their observations, when linked with Zakouto's statement to Detective Mesinar that he was the only person who drove his vehicle, provided corroborative proof of a pre-conceived plan to kill his wife.

Redundant convictions

Although not raised by either party on appeal, we conclude that it was plain error[33] to convict Zakouto of both home invasion and burglary for the same conduct. In assessing whether convictions are redundant, we must determine if a "material or significant part of each charge is the same."[34] Convictions for two separate offenses are

---

[33]See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) (stating that this court may address an error if plain and affected defendant's substantial rights); NRS 178.602.

[34]Salazar v. State, 119 Nev. 224, 227-28, 70 P.3d 749, 751 (2003) (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).

redundant if they punish the same illegal act.[35] We conclude that Zakouto's convictions for burglary and home invasion are duplicative because they both punish Zakouto's unlawful entry into Cannon's home.

Cumulative error

Zakouto argues that the cumulative prejudice of the errors at trial warrants a new trial. The only error we ascertain is that involving the redundant convictions, which we find insufficient to overturn any portion of the judgment of conviction entered upon the remaining jury verdicts.

## CONCLUSION

We uphold the rulings concerning admissibility of videotape and lay witness identification testimony, the denial of Zakouto's severance motions, and the admission of his pre- and post-arrest statements. We also find that sufficient evidence supports the jury's verdicts. However, we conclude that it was plain error to convict Zakouto of both burglary and home invasion. We therefore

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART, and remand this matter for vacation of Zakouto's conviction for home invasion.

Maupin, J.
Maupin

Douglas, J.
Douglas

Parraguirre, J.
Parraguirre

[35]Id. at 228, 70 P.3d at 751.

cc: Hon. Joseph S. Pavlikowski, Senior Judge
William B. Terry, Chartered
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk