IN THE SUPREME COURT OF THE STATE OF NEVADA

BRENDAN JAMES NASBY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35319

FILED

FEB 07 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of murder with the use of a deadly weapon and conspiracy to commit murder.

The district court sentenced appellant Brendan James Nasby to two consecutive terms of life with the possibility of parole on the charge of murder with use of a deadly weapon and a consecutive term of forty-eight to one hundred twenty months in prison on the conspiracy to commit murder charge. This appeal followed.

First, Nasby asserts that he was denied a fair and impartial trial in that the State used coerced testimony to obtain his conviction. Nasby argues that his co-defendants were under strong compulsion to testify in a particular fashion. We disagree.

In Sheriff v. Acuna, 107 Nev. 664, 669, 819 P.2d 197, 200 (1991), the appellant challenged the testimony of a witness on the grounds that the witness was under compulsion to testify against him. In Acuna, this court held that:

> any consideration promised by the State in exchange for a witness's testimony affects only the weight accorded the testimony, and not its admissibility. Second, we also hold that the State may not bargain for testimony so particularized that it amounts to following a script, or require that the testimony produce a specific result. Finally, the terms of the quid pro quo must be fully disclosed to the

> jury, the defendant or his counsel must be allowed to fully cross-examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction.

Id. at 669, 819 P.2d at 200.

This court, in Acuna, recognized that "withholding the benefit of the bargain until after the promisee testifies" is a permissible method for the State to use to ensure that the witness does not commit perjury or conveniently forget about his previous statements once he has received the benefit of the bargain. Id. at 668, 819 P.2d at 199. Thus, providing the benefit before the witness testifies may result in an "uncooperative or 'forgetful' witness." Id.

Nasby has failed to show how the State contravened the accepted practice of plea bargaining with co-defendants to secure testimony against a defendant on trial. No evidence suggests that the State bargained for particularized testimony or that the State required that the testimony produce a specific result. The terms of each accomplice's plea bargain were elicited through testimony, disclosed to the jury, and defense counsel was given the full opportunity of cross-examination. Therefore, the accomplice testimony in the case at hand was admissible and did not deny Nasby of his right to a fair and impartial trial.

Next, Nasby argues that insufficient corroborating evidence was produced at trial and that his convictions resulted from uncorroborated accomplice testimony. We disagree.

In a criminal case, the standard of review in determining whether there was sufficient evidence upon appeal is "whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt." Doyle v. State, 112 Nev. 879, 891, 921 P.2d 901, 910 (1996).

Corroborating evidence must independently connect the defendant with the offense. See Evans v. State, 113 Nev. 885, 891, 944 P.2d 253, 257 (1997). Corroboration evidence does not have to be '"in itself . . . sufficient to establish guilt"-"it will satisfy the statute if it merely tends to connect the accused to the offense."' Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803 (1995) (citing Cheatham v. State, 104 Nev. 500, 504-05, 761 P.2d 419, 422 (1988)).

The record contains sufficient independent evidence to corroborate the accomplices' testimony that Nasby committed murder. Among other things, two witnesses testified that Nasby admitted to them that he killed Michael and there was expert testimony that the weapon found at Nasby's residence was the murder weapon. We therefore conclude that a reasonable jury could have been convinced of Nasby's guilt of murder beyond a reasonable doubt based on the corroborative evidence that connects Nasby to the murder.

Nasby also asserts that the only evidence of a conspiracy to commit murder came from accomplice Jeremiah Deskin's uncorroborated testimony. We disagree.

"[T]o sustain a conviction of conspiracy there must be independent proof of an agreement among two or more persons." Myatt v. State, 101 Nev. 761, 763, 710 P.2d 720, 722 (1985). It is difficult to find direct evidence of a conspiracy. Therefore, it often must be established "by inference from the conduct of the parties." Doyle, 112 Nev. at 894, 921 P.2d at 911. Furthermore, a conspiracy conviction may be proved by "'a coordinated series of acts,' in furtherance of the underlying offense, 'sufficient to infer the existence of an agreement.'" Id. (quoting Gaitor v. State, 106 Nev. 785, 790 n. 1, 801 P.2d 1372, 1376 n. 1 (1990)).

There was sufficient testimony to corroborate Deskin's testimony that there was an agreement. Specifically, a witness testified that Nasby told her that he and three other people took Michael to the desert to shoot a new gun and Nasby shot Michael twice in their presence. The witness further testified that Nasby told her that, as they got in the car to leave, someone said to get out and get the shells; however, Nasby got out and shot Michael a third time before they left. We therefore conclude that a jury could be convinced of Nasby's guilt of a conspiracy to murder beyond a reasonable doubt based on the corroborative evidence together with Deskin's testimony.

Next, Nasby contends that the standard credibility instruction that was given to the jury was insufficient. Nasby argues that the jury must be given a cautionary instruction when the State uses accomplice testimony in its case in chief.

Failure to make a timely objection during trial waives the appellant's right to raise the issue on appeal. See Pray v. State, 114 Nev. 455, 959 P.2d 530 (1998). However, this court "may address plain error and constitutional error sua sponte." Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992). Appellant Nasby waived this issue by failing to make a timely objection before the trial court. We conclude that it was not plain or constitutional error for the trial court to fail to give a cautionary instruction and therefore reject Nasby's argument regarding this issue.

In his next argument, Nasby asserts that the State's reference during opening statements to a letter that was later ruled inadmissible was an improper reference to criminal history and a violation of due process. Nasby asserts that

the court should not have allowed the State to refer to the letter in its opening statement without first having ruled on the admissibility of the letter.

Opening statements are to acquaint the jury and court with the nature of the case. See Garner v. State, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962) (citing State v. Olivieri, 49 Nev. 75, 236 P. 1100 (1925)). During opening statements, it is appropriate for the prosecutor to present his theory of the case and propose facts he plans to prove. Id. It is counsel's duty to state the facts fairly and refrain from stating facts that he cannot, or will not, be able to prove. See State v. Olivieri, 49 Nev. 75, 236 P. 1100 (1925) (citing People v. Stoll, 143 Cal. 689, 77 P. 818 (1904)). Furthermore, an appellate court reviewing statements "will not usually predicate error on a statement to the jury that certain proof, which is later rejected, will be offered if the question of its admissibility is a close one, thus indicating that the prosecutor acted in good faith in making the statements." Garner, 78 Nev. at 371, 374 P.2d at 528 (citing State v. Lyskoski, 47 Wash.2d 102, 287 P.2d 114 (1955)); State v. Albert, 159 Or. 667, 82 P.2d 689 (1938)). See also State v. Fisher, 680 P.2d 35 (Utah, 1984) (where a witness whose testimony was outlined during opening statement was never produced, the court analyzed the good faith or lack thereof of counsel and the likelihood that the opening statement was unfairly prejudicial to the defendant.)

Prosecutorial misconduct "must be prejudicial and not merely harmless," to constitute reversible error. Sherman v. State, 114 Nev. 998, 1010, 965 P.2d 903, 912 (1998) (citing Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990)). Harmless error occurs if the verdict would have been the same

absent the error. Id. (citing Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1156 (1988)).

We conclude that the prosecutor in the case at hand presented, in good faith, facts to the jury that he thought he could prove, which included the evidence of the letter. Although the admissibility of the letter later became questionable, there is no evidence of bad faith on the part of the prosecutor at the time of his opening statement. Therefore, we cannot conclude that the prosecutor's reference to the letter during opening statements constitutes prosecutorial misconduct.

Furthermore, there was no other reference to the letter (in the presence of the jury) during the trial and the jury was instructed that counsel's arguments are not evidence. We therefore see no likelihood that the reference to the letter during opening statement was unfairly prejudicial. Even if the prosecutor's sole reference to the letter was error, we hold that such reference was harmless error and the jury verdict would have been the same absent the error.[1]

Finally, Nasby asserts that the trial court erroneously used instructions similar to those used in Kazalyn v. State, 108 Nev. 67, 75-76, 825 P.2d 578, 583-84 (1992), rather than the instruction adopted by this court in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

This court, in Byford, considered the Kazalyn instruction and set forth more preferable instructions for future cases. In Bridges v. State, 116 Nev. ___, 6 P.3d 1000 (2000), this court held that, because Bridges was tried prior

[1]We note that when proposed evidence is the subject of a pending objection or motion in limine, a better practice would be for the district court to instruct the parties not to refer to the evidence until a ruling is made upon the motion or objection.

to the Byford decision, additional instruction pursuant to Byford was not required. Furthermore, in Garner v. State, 116 Nev. ___, 6 P.3d 1013 (2000), this court held that "with convictions predating Byford, neither the use of the Kazalyn instruction nor the failure to give instructions equivalent to those set forth in Byford provides grounds for relief." 116 Nev. at ___, 6. P.3d at 1025.

Nasby's argument is without merit. Nasby was tried prior to the decision in Byford. As such, the Byford instructions were not required and the instructions that were given were sufficient.

Having fully reviewed the briefs and the record, we conclude that Nasby's contentions lack merit. Accordingly, we affirm the judgment of conviction.

It is so ORDERED.

Maupin, C.J.
Maupin

Rose, J.
Rose

Becker, J.
Becker

cc: Hon. Mark W. Gibbons, District Judge
Clark County District Attorney
Attorney General
Frederick A. Sanatcroce, Esq.
Clark County Clerk