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Turner v. State, 136 Nev. Adv. Op. 62 (Oct. 1, 2020)

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CRIMINAL LAW: CONFRONTATION CLAUSE, EXPERT TESTIMONY,
PROSECUTORIAL MISCONDUCT

Summary

The Court affirmed Defendant's conviction, holding that Defendant waived his *Bruton* challenge, and that any other errors were harmless and did not warrant reversal.

Defendant was convicted of conspiracy to commit burglary, attempted burglary while in possession of a firearm or deadly weapon, two counts of attempted murder with use of a deadly weapon, and battery with use of a deadly weapon resulting in substantial bodily harm. On appeal, Defendant argued that, under *Bruton*, his Confrontation Clause rights were violated when the district court admitted a codefendant's statements. The Court affirmed, holding (1) the that Defendant waived his *Bruton* argument; (2) although the district court abused its discretion by admitting certain testimony, the error did not warrant reversal; and (3) although there were multiple instances of prosecutorial misconduct, the cumulative errors did not warrant reversal.

Background

Eric Clarkson and Willoughby Potter de Grimaldi heard noises outside their bedroom window at around 3:30 a.m. They were able to make out the figure of a man on the patio, who was wearing a cap and holding a shotgun, but could not see the intruder's face. Clarkson called 9-1-1, and as someone began to beat the door, Grimaldi noticed a second and third intruder running by the window and down the street.

Approximately five minutes later, Clarkson let in Officers Robertson and Grego-Smith. Leaving the lights off, the officers searched the home and then opened the back door. The intruders immediately opened fire. At least two shots flew into the home. One bullet hit Robertson in the upper thigh, severely damaging his femur, and the other exploded mid-air, sending shrapnel throughout the home.

After returning fire, Grego-Smith waited for additional officers and a K-9 unit to arrive. The officer entered the backyard and found Clemson Hudson injured with a shotgun laying between his legs. The officers opened a mile-wide perimeter, and then located Steven Turner after a resident reported a suspicious person in their backyard. Turner had an apparent bullet wound in his leg and told the officers he had been injured while jumping a fence. Turner was transported to UMC where doctors, including Dr. Amy Urban, examined him for a gunshot wound and found shrapnel and the presence of "stippling" in his leg.

Back at Clarkson's home, officers found a shotgun, rifle, and handgun in the patio area. They also found Hudson's vehicle parked outside the home with keys in the ignition. Inside the car were two phones, a gun magazine, a loose cartridge, and Turner's two dogs. One of the

¹ By Eli Bergida.

phones was later traced to Turner's residence, and recovered surveillance footage showed Turner traversing yards, parking lots, and fences immediately after the incident.

Although Hudson and Turner admitted to the police that they went to the home to steal marijuana, they each blamed the other for orchestrating the burglary and bringing the guns. Turner claimed that after the shooting broke out, he hopped the fence and set out for a friend's house. He claimed Hudson held the rifle and shotgun and denied ever holding a gun or firing a weapon at the scene. He also claimed that the rifle was previously stolen from his uncle and that there was no third person working with them. Hudson claimed that they both fired weapons at the officers.

Both Hudson and Turner were indicted and tried jointly, and the State charged them under three alternate theories: directly committing the crimes, aiding or abetting, and conspiracy. Turner conceded to conspiracy and attempted burglary but contested the remaining charges. At trial, he maintained that he stayed at the back of the yard and ran when the shooting broke out. He also argued that because he did not fit the description of three intruders, the State had failed to connect him to the crimes.

Hudson and Turner filed a pretrial motion to sever. They argued that because their statements inculpated each other, a joint trial would violate the Confrontation Clause. The district court denied the motion and the State redacted statements, to the extent possible, that referenced the other defendant. During a status check, Turner agreed with the State's redactions, proffered additional redactions, and stated that he would not renew if severing was not an option. However, at a later status check, Turner stated that he may bring another *Bruton* challenge to the admission of Hudson's statements.

Turner did not renew a motion to sever and Hudson's statements were admitted into evidence. However, per Turner's request, the district court instructed the jury to use Hudson's statements as evidence against only Hudson.

Although state witnesses were able to link Hudson's DNA to evidence recovered from the scene, they could not link Turner's. However, Anya Lester, a firearms expert, testified that the shotgun had definitely been fired, and although not conclusive, the rifle was likely fired as well. Additionally, both guns would have required two hands to fire. Lester and Dr. Urban also addressed the skin stippling in Turner's leg. The State used the stippling evidence to argue that Turner was not at the back of the yard during the shooting. They also used both defendants' statements to argue that only two people committed the crime.

The jury convicted Turner and Hudson on all counts, and Turner moved for a new trial. He argued that the district court should have severed after the *Bruton* challenge. The court denied the motion and Turner appealed.

Discussion

The Court addressed each of Turner's three arguments.

Whether Turner waived his Bruton argument

The Court first considered whether Turner's action waived or forfeited his *Bruton* argument. *Bruton* provides that the admission of a non-testifying codefendant's inculpatory statements that expressly implicates the defendant violates the Confrontation Clause.² The State argued the because Turner agreed to the redactions before trial and then failed to object to the statements' admission during trial, Turner waived his *Bruton* challenge. Turner argued that because he filed a motion to sever, reserved the right to re-raise the argument later, and then moved for a new trial, he preserved the *Bruton* challenge.

The Court noted that the Tenth Circuit addressed a similar situation. Three defendants were jointly tried, and when one moved for severance under *Bruton*, the court denied the motion.³ The defendant agreed to cooperate but clarified, on the record, that his cooperation did not waive his objection to the joint trial.⁴ The Tenth Circuit concluded that because the defendant's pretrial position was clear, he did not waive the issue before trial, and although the defendant did not object at trial, the position was "sufficiently preserved."⁵

The Court then cited a Ninth Circuit case where the defendant unsuccessfully moved to sever the trial but did not object to the admission of the codefendant's redacted statements into evidence.⁶ The court concluded that the defendant's pretrial actions sufficiently preserved the argument for appeal.⁷

From these two cases, the Court concluded that when the defendant makes his intent to preserve the argument clear, cooperating with efforts to redact and then failing to object at trial does not waive a *Bruton* challenge per se. However, if the record does not show the defendant intended to preserve the argument, the challenge is forfeited or waived.

The Court then considered a 2018 case to offer additional guidance and address relevant policy concerns. There, a defendant argued that the district court's decision to exclude his family members from the courtroom during a voir dire prejudiced him.⁸ However, the Court concluded that because the defendant did not object during trial, his failure to do so was "intentional."⁹ The Court warned against correcting matters on appeal where doing so would encourage defendants, who were aware their rights were being violated, to stay silent and then raise the issue to obtain a new trial if they are convicted.¹⁰

² *Bruton v. United States*, 391 U.S. 123, 135–36, 88 S. Ct. 1620, 1627–28 (1968).

³ *United States v. Sarracino*, 340 F.3d 1148, 1158 (10th Cir. 2003).

⁴ *Id.* at 1159.

⁵ *Id.*

⁶ *People v. Archer*, 82 Cal. App. 4th 1380, 1386, 99 Cal. Rptr. 2d 230, 233 (2000).

⁷ *Id.*

⁸ *Jeremias v. State*, 134 Nev. 46, 49, 412 P.3d 43, 47 (2018).

⁹ *Id.* at 52, 412 P.3d at 50.

¹⁰ *Id.*

Accordingly, the Court extracted the following rule: to clearly preserve a *Bruton* challenge for appellate review, the defendant must formally object, on the record, after the parties have agreed upon redactions and prior to the court's admission of a codefendant's statements.

Turning to the case at hand, the Court concluded that Turner waived his *Bruton* argument. Turner did not clarify, on the record, that he wished to preserve the argument for appeal before the admission of Hudson's statements.

Whether the district court erroneously admitted unnoticed expert testimony

The Court then addressed Turner's second argument that the court improperly admitted Anya Lester and Dr. Urban's expert testimonies because they were both unnoticed.

The Court cited prior case law which ruled that district courts must ensure witnesses are sufficiently qualified before permitting them to testify as experts.¹¹ Additionally, Nevada requires parties to disclose expert witnesses and provided a brief statement of the expected substance of the testimony at least twenty-one days before trial.¹² Furthermore, as soon as a party determines they intend to call an expert, they have a continuing duty to provide written notice.¹³ Lastly, although the law favors allowing late-disclosed witnesses to testify in criminal matters, courts should exclude such undisclosed witnesses if the State's failure to notice that witness constitutes bad faith.¹⁴ These rules level the playing field and prevent trial by ambush.¹⁵

Anya Lester's stippling testimony

The Court first analyzed Lester's testimony. Lester described stippling as both small abrasive marks on the skin from a gunshot wound and small bruises from gunpowder due to the close proximity of the firing weapon. However, Lester stated she had limited experience with stippling, and when the State asked her about her opinion regarding the distance one would need to be from a weapon to receive gunpowder stippling, Turner objected. Turner argued that that Lester was not noticed or qualified to talk about the causes of stippling.

Upon this objection, the district court conducted voir dire outside the jury's presence. There, it came to light that Lester's stippling training was not disclosed on her CV. In fact, Lester had limited experience with stippling, and the State asked her to look into stippling the day before she testified. However, the court did allow Lester to define and explain stippling.

The Court determined that because the State did not disclose the substance of the stippling testimony, they violated the NRS's expert witness disclosure requirements. Although the State noticed Lester as a firearms expert, the CV did not mention that her training included stippling. Accordingly, the defense was not on notice that Lester would testify regarding any

¹¹ Hallmark v. Eldridge, 124 Nev. 492, 498–99, 189 P.3d 646, 650–51 (2008).

¹² NEV. REV. STAT. § 174.234 (1999).

¹³ *Id.*

¹⁴ *Id.*; Sampson v. State, 121 Nev. 820, 827, 122 P.3d 1255, 1260 (2005).

¹⁵ Land Baron Inv. Inc. v. Bonnie Springs Family LP, 131 Nev. 686, 701 n.14, 356 P.3d 511, 522 n.14 (2015); Sanders v. Sears-Page, 131 Nev. 500, 517, 354 P.3d 201, 212 (Ct. App. 2015).

type of stippling on human skin. Additionally, Lester was an unqualified expert in the area of stippling on human skin. Altogether, these conclusions result in a trial by ambush.

The Court concluded, however, that these errors did not warrant reversal. The Court reasoned that Turner's own statements placed him near the yard during the shooting, and the unobjected-to medical records established the presence of stippling. This, combined with Dr. Urban's testimony discussed below, independently suggested that Turner was at the scene when the shooting broke out.

Dr. Amy Urban's testimony

Next, the Court analyzed whether the district court abused its discretion by admitting Dr. Urban's testimony. However, because Turner did not object during trial, the Court only reviewed for plain error.

Dr. Urban testified that Turner's wound showed stippling, which she defined as little black dots from a gunshot wound. Additionally, Turner's medical records, which the parties stipulated to admit, noted the presence of stippling in Turner's leg.

The Court concluded that Turner failed to show plain error. The medical records were admitted before Dr. Urban testified and listed the doctor as Turner's treating physician. Because Dr. Urban testified to medical records that were already admitted into evidence, her testimony, conveying what was in the records, did not affect Turner's rights.

Whether prosecutorial misconduct warrants reversal

Lastly, the Court analyzed Turner's third argument that the numerous instances of alleged prosecutorial misconduct during closing arguments warranted reversal. In evaluating claims for prosecutorial misconduct, the Court first determines if the conduct was improper and then determines if the improper conduct warrants reversal.¹⁶ Even if the errors do not individually warrant reversal, the cumulative effect of the errors may.¹⁷ In evaluating a claim for cumulative error, the Court considers (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the charged crime.¹⁸

The Court noted there were multiple instances of misconduct. First, the prosecutor invited the jurors to feel "good" about convicting those who shoot police officers. Furthermore, the prosecutor invited the jury to consider issues not in evidence, and implied that the state could have charged Turner with additional crimes. Next, the prosecutor disparaged defense counsel regarding the argument that a third person was present at the crime scene. Although an eyewitness testified to the presence of a third intruder, the prosecutor stated the argument simply "came into [defense counsel's] head." Finally, although not supported by evidence, the prosecutor argued that Turner knew that Grimaldi and Clarkson were unarmed and therefore vulnerable.

¹⁶ Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

¹⁷ *Id.* at 1195, 196 P.3d at 481.

¹⁸ *Id.*

Despite the misconduct, the Court determined that the errors did not warrant reversal because substantial evidence implicated Turner. Turner admitted to going to the residence to steal marijuana and that guns were in the car. Turner's dogs and phone were found in the car. The victims' testimony indicated that two separate guns were fired simultaneously, and the guns would have each needed two hands to fire. Evidence linked Turner to the rifle. The police found Turner with shrapnel in his leg and a stippling wound. Lastly, Turner denied working with a third person, and his own statements placed him near the yard during the shooting.

Although there were several instances of misconduct, the collective evidence supports that Turner intentionally went to the crime scene with the rifle to commit a violent crime, was shot, and then dropped the gun to flee the scene. The court concluded that although the charges were grave, reversal was not warranted.

Conclusion

The Court affirmed the verdict. The Court ruled that Turner waived his *Bruton* challenge. The Court also ruled that although the district court improperly admitted Anya Lester's expert testimony regarding skin stippling, the error was ultimately harmless. Similarly, the Court ruled that although the prosecutor advanced several improper arguments, those statements did not rise to cumulative error to warrant reversal under the particular facts of the case.