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Barlow v. State of Nevada 138 Nev. Adv. Op. 25 (April 14, 2022)

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Clarification on Aggravating and Mitigating Circumstances:

The Court clarified the district court's reasoning that if the jury failed to reach a unanimous decision as to the weighing of aggravating and mitigating circumstances the result is a hung jury.

Summary

Kenneth Barlow was found guilty of multiple charges by a jury and sentenced to death for murdering two people. During the guilt phase of the trial, the State provided overwhelming evidence that Barlow had broken into the victims' apartment and shot each of them multiple times. Barlow was prohibited by the district court from arguing during the penalty phase that if a single juror determines that there are mitigating circumstances sufficient to outweigh the aggravating circumstance that the death penalty is no longer an option and the jury must then consider imposing a sentence other than death. The Court clarified that when a jury cannot reach a unanimous decision as to the weighing of the aggravating and mitigating circumstances, the jury cannot impose a death sentence but must consider other sentencing options. The Court concluded that the district court abused its discretion by prohibiting Barlow's argument. The Court concluded that Barlow was deprived of a fair penalty hearing for this error and others described within the case. No relief was warranted based on Barlow's claims in the guilt phase. The Court affirmed the judgment of conviction in part, reversed it in part, and remanded for a new penalty hearing.

Facts and Procedural History

Keith Barlow had a stormy romantic relationship with Danielle Woods. Woods was also in a relationship with Donnie Cobb. On February 1, 2013, Barlow ran into Woods' niece, Tamara Herron. Barlow asked if she knew where Danielle Woods was at the time. Herron stated that Barlow appeared angry, told her he was tired of the pair's "games" and knew Danielle Woods was with Donnie Cobb. Several days later he encountered the pair at a convenience store. After an altercation at the store in which Barlow threatened Cobb with a firearm, Barlow threatened that he would "be back." Two hours later, Barlow shot Cobbs and Woods to death at Cobb's apartment. Barlow was charged with home invasion while in possession of a firearm, burglary while in possession of a firearm, assault with the use of a deadly weapon, and two counts of first-degree murder with the use of a deadly weapon. The state filed a notice of intent to seek the death penalty for both murders. This appeal followed after the jury sentenced Barlow to death.

¹ By Anne-Greyson Long.

Discussion

Penalty phase claims

The primary issues addressed in this opinion concern the penalty phase of the trial. The issues were limitations placed on Barlow's penalty phase argument, prosecutorial misconduct, the great-risk-of-death aggravating circumstance, and cumulative error. The Court focused first on trial phase and then on the guilt-phase claims.

Limitation of Barlow's penalty-phase argument

Barlow relied on *Evans* and argued that the district court erred in prohibiting from making an argument based on a portion of the capital instruction and that if at least one juror decides that there are mitigating circumstances sufficient to outweigh the aggravating circumstances, he could not be sentenced to death and the jury must consider another punishment.² The state argues that despite *Evans* instruction saying the same thing, the district court correctly prohibited the argument citing that a disagreement as to the weighing of aggravating and mitigating circumstances would result in a hung jury such that the jury could not consider any other punishment. If at least one juror finds the mitigating circumstances to outweigh the aggravating circumstances, the jury cannot impose the death penalty and must look to other sentences. The Court therefore concluded that the district court abused its discretion in not allowing Barlow to make that argument to the jury. *Evans* provides guidance not only on the jury's consideration of evidence during deliberations but also provides instruction to the jury of steps that must be followed before imposing a sentence.³

Should the jurors all agree and determine that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, they can impose a death sentence (but they are not obligated to do so.) Conversely, if the jurors do not all agree that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, they cannot impose a death sentence. A hung jury only occurs when a jury cannot unanimously agree on the sentences to be imposed. The district court therefore abused its discretion by not allowing Barlow to make this argument regarding the weighing of determination. Further, the district court did correctly instruct the jury before deliberations began and the jury unanimously found that the aggravating circumstances outweighed the mitigating circumstances. While this error was considered harmless it did contribute to the cumulative error during the penalty hearing.

Prosecutorial misconduct

Barlow argues that prosecutorial misconduct during the penalty phase warrants reversal. At issue are remarks made by the prosecutor during trial and whether those remarks are harmless. The context of those remarks is also reviewed. At issue is the sentence imposed for the

² *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015).

³ *Id.*

killing of two victims with the reasoning being that had Barlow killed only Woods a life sentence would have been appropriate but if that is the decision, "...what justice does Donnie Cobb get?" The Court concluded that the prosecutor's comments improperly "suggest that justice requires a death sentence because the defendant killed more than one person." The prosecutor further told the jury that the State would respect whatever verdict they rendered. The Court concluded that the error was harmless after considering the remark in context.

Great-risk-of-death-to-more-than-one-person aggravating circumstance

Barlow argues the above is invalid for two reasons: the State did not provide sufficient notice and insufficient evidence supports it.

Inadequate notice of the State's alternative theory

Stated plainly, "a defendant should not have to gather facts to deduce the State's theory for an aggravating circumstance, the supporting facts must be stated directly in the notice itself."⁴ The State's notice of intent to seek the death penalty alleged that Barlow knowingly created a risk to more than one person based on the proximity of the victims to each other when he shot them. Further, a greater risk occurred because a bullet went through a wall and out a window in an adjoining apartment, and into a public area. The State never alleged that the path of the bullet to prove aggravating circumstances.⁵, made no mention of the bullet entering a public area or that other persons were in that area. The State improperly argued those facts in support of the great-risk-of-death aggravating circumstance. The State alleged six aggravating circumstances and only mentioned the public-area theory briefly when describing the evidence in aggravation. The remarks wherefore were harmless beyond a reasonable doubt. They did, however, contribute to the cumulative error.⁶

Sufficiency of the evidence

NRS 200.033(3) provides that first-degree murder is aggravated if it "was committed by a person who knowingly created a great risk of death to more than one person by means of weapon, device or course of action which would normally be hazardous to the lives of more than one person." The Court has also determined that the greater-risk-of-death aggravating circumstance also includes a "course of action" consisting of two intentional shootings closely related in time and place." The Legislature's adoption of the multiple-murder aggravating circumstance in 1993 modified the application. Such that for murders occurring committed after October 1, 1993, the aggravator set forth in NRS 200.033(12) rather than the one in NRS 200.033(3) be applied to cases such as this one where the defendant's course of action created a great risk of death only to the murder victims. Aggravating circumstances should not have been applied to this case. The Court concluded that the error in presenting the invalid aggravating

⁴ *Nunnery v. State*, 127 Nev. 749, 779, 263 P.3d 235, 255 (2011).

⁵ *Id.*

⁶ *Id.*

circumstance was harmless beyond a reasonable doubt. The State proved five other aggravating circumstances. The Court concluded beyond a reasonable doubt that, absent the invalid aggravating circumstance, the jury would still have found that the mitigating circumstances would be insufficient to outweigh the aggravating circumstances.

Cumulative error in the penalty phase

Barlow argues that the while the errors may be harmless individually, their cumulative impact during the penalty phase warrants relief. Generally, the nature and number of errors is assessed along with the evidence presented, and the gravity of the consequences a defendant faces.⁷ The Court determined that in light of the district court mistakenly prohibiting Barlow from making a legally valid argument that appealed to the jurors' ability to bestow mercy and in conjunction with the prosecutor's improper argument, that the likelihood exists that Barlow was prejudiced. The Court reversed the judgment of conviction as to the death sentences and remanded a new penalty hearing.

Guilt phase claims

Jury selection

Barlow argues that the jury selection process was unconstitutional based on the district court limiting his questioning, denying his objection the State's use of its peremptory challenges, and denying his for-cause challenge. The Court noted no errors made by the district court after reviewing the jury selection process.

Expert Testimony

Barlow argues that the district court erred by allowing an unqualified expert to testify about firearms and toolmark identification. NRS 50.275 states that the witness must be qualified to give specialized testimony, the testimony must be limited to the scope of the expert's knowledge and must help the jury.⁸ Further, whether the testimony of the expert witness is admitted is within the district court's discretion. The Court will not disturb that decision unless there is a clear need to do so.⁹ The Court concluded that the district court did not abuse its discretion in admitting expert testimony in this case.

Prosecutorial misconduct

Barlow contends that the prosecutor improperly argued that Barlow saved the final bullet for the headshot to Woods because no evidence supported this. The Court agreed but found the error harmless. The Court found that the State presented overwhelming evidence of Barlow's guilt including Barlow's testimony, the discovery of the handgun in Barlow's vehicle with his fingerprint and DNA, and the expert testimony linking shell casings found at the scene with

⁷ See Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (discussing cumulative error).

⁸ Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008).

⁹ Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

Barlow's handgun. The Court concluded that the comment did not have a substantial effect on the guilt phase verdict.¹⁰ Barlow also took issue with a comment made by the prosecutor at the end of the closing arguments noting that the prosecutor improperly commented on Barlow's right to remain silent.¹¹ The Court concluded that Barlow has not shown plain error.¹²

Jury Instructions

Barlow argues that the district court erroneously instructed the jury on several matters. First, Barlow contends that the burglarious-intent instruction unconstitutionally shifted the burden of proof allowing a finding of guilt without the State proving intent beyond a reasonable doubt. The Court disagreed because the instructions accurately reflect NRS 205.065. Second, Barlow contends that the state-of-mind and intent-to-kill instructions misled the jury. The State is not required to present direct evidence of state-of-mind and the jury may infer Barlow's state of mind to include use of a deadly weapon. The Court discerned no error.¹³

Cumulative error in the guilt phase

Barlow argues that cumulative error during the guilt phase warrants relief. The Court discerned only one error and found nothing to cumulate.¹⁴

Conclusion

The Court considered all of Barlow's guilt claims and concluded that no relief is warranted as to the guilt phase. The Court affirmed the judgment of conviction in part. Because of the error during the penalty phase of trial, the Court reversed the judgement of conviction as to the death sentences for first-degree murder with the use of a deadly weapon and remanded for a new penalty hearing.

¹⁰ See *King v. State*, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (noting that prosecutorial misconduct may be harmless where there is overwhelming evidence of guilt).

¹¹ See generally *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005); *Morris v. State*, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996); and *Taylor v. State*, 132 Nev. 309, 325-26, 371 P.3d 1036, 1047 (2016).

¹² See *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018), and *Coleman v. State*, 111 Nev. 657, 665, 895 P.2d 653, 658 (1995).

¹³ See *Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001).

¹⁴ See *Lipsitz v. State*, 135 Nev. 131, 140 n.2, 442 P.3d 138, 145 n.2 (2019).