

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIRSTIN BLAISE LOBATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49087

FILED

FEB 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of voluntary manslaughter with the use of a deadly weapon and sexual penetration of a dead human body. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

In 2002, a jury convicted appellant Kirstin Blaise Lobato of first-degree murder with the use of a deadly weapon and sexual penetration of a dead human body. On appeal, this court reversed and remanded for a new trial on all counts. Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004). Upon retrial, Lobato was convicted of voluntary manslaughter with the use of a deadly weapon, count one, and sexual penetration of a dead human body, count two. The district court sentenced Lobato on count one to a maximum of 120 months with minimum parole eligibility in 48 months, plus an equal and consecutive term for the deadly weapon enhancement; on count two to a maximum of 180 months with minimum parole eligibility in 60 months, to run consecutively with count one.

Lobato now makes multiple assignments of error regarding the second trial. On appeal, we address whether the district court abused its discretion by admitting evidence of positive initial tests for blood and if the admission of Detective Thomas Thowsen's testimony about reports of

other stabbings around the time of the murder was hearsay and violated Lobato's constitutional right to confrontation.¹ For the reasons set forth below, we conclude that Lobato's contentions fail and, therefore, affirm the judgment of conviction. The parties are familiar with the facts and we do not recount them except as necessary for our disposition.

The positive luminol tests

Lobato argues that the district court abused its discretion when it permitted the State to introduce evidence of positive luminol and phenolphthalein tests for blood when the subsequent confirmatory tests were negative. We disagree.

This court reviews a district court's decision to admit evidence for a manifest abuse of discretion. Tabish v. State, 119 Nev. 293, 310, 72 P.3d 584, 595 (2003). Pursuant to NRS 50.275, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge." That evidence must be relevant, which is defined as "evidence having any tendency to make the

¹Lobato also argues that: (1) there was insufficient evidence to support her conviction; (2) the detective's testimony was improper opinion testimony; (3) the district court violated her constitutional rights by refusing to allow witnesses to testify about her statements; (4) the district court violated her rights by admitting inflammatory evidence; (5) the district court abused its discretion in denying her motion to dismiss, based on the State's failure to collect potentially exculpatory evidence; (6) this court should reconsider its holding as to issues raised in her first appeal; and (7) the sentence imposed by the district court violates her double jeopardy rights. We have considered these issues and conclude that each of these additional challenges fails.

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.” NRS 48.015. However, relevant “evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice.” NRS 48.035(1).

The district court properly weighed the evidence and determined it was more probative than prejudicial. The experts’ specialized knowledge did assist the trier of fact to understand the evidence and determine a fact at issue. Both parties fully explored the meaning of the initial positive tests, as well as the reliability of luminol and phenolphthalein versus the confirmatory test, which were negative. Through direct and cross-examination of multiple experts the State and the defense adequately explained to the jury the significance of the initial positive results. Therefore, we conclude that it was not error for the court to allow the evidence of the initial positive tests for blood to be introduced.

Detective Thowsen’s testimony

Lobato argues that Detective Thowsen’s testimony regarding reports of other stabbings around the time of the murder was hearsay and violated her constitutional right to confrontation. We agree that the testimony was hearsay; however, we conclude that any error was harmless.

This court reviews a trial court’s decision to admit or exclude evidence for an abuse of discretion. Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996). Hearsay is an out-of-court statement that is offered to prove “the truth of the matter asserted” in the statement. NRS 51.035. Hearsay is generally inadmissible at trial, unless an exception to the hearsay rule applies. NRS 51.065.

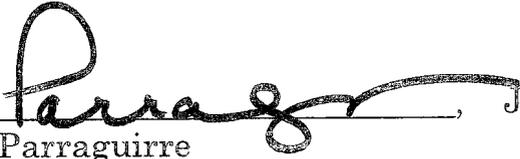
Detective Thowsen's testimony regarding the police records was hearsay. He testified that there were no reports of similar stabbings but he was not the individual who reviewed the police records. In fact, Detective Thowsen was testifying about what he had been told by his secretary and others to whom he had delegated the project. Detective Thowsen's testimony was clearly hearsay; he testified about an out-of-court statement made to him by another, and that statement was offered to prove that there were no other reports of similar stabbings. However, based on Lobato's admission, there was substantial evidence that she committed the murder. Therefore, we conclude that any error in admitting the hearsay testimony was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 21-24 (1967) (establishing that a court need not reverse a conviction if the alleged error is harmless beyond a reasonable doubt).

Additionally, Detective Thowsen's testimony regarding his conversations with urologists and medical providers was also hearsay. In this case, the hearsay was occasioned by defense counsel's questioning during cross-examination. Therefore, it was invited error and we will not reverse. See Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) ("The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit."); see also Taylor v. State, 109 Nev. 849, 856-57, 858 P.2d 843, 848 (1993) (Shearing, J., concurring in part and dissenting in part) (stating that the invited error doctrine establishes that ordinarily inadmissible evidence may be rendered admissible when the complaining party is the party who first broached the issue).

Finally, Lobato contends that because she was not able to confront and cross-examine the urologists and medical providers Detective Thowsen spoke to, her confrontation rights under Crawford v. Washington were violated. 541 U.S. 36, 53-59 (2004). Lobato never objected to the detective's testimony on Confrontation Clause grounds and while "[f]ailure to object below generally precludes review by this court; however, we may address plain error and constitutional error sua sponte." Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 161 (2008) (quoting Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992)). This testimony was occasioned by defense counsel's questioning during cross-examination and thus was invited error. Consequently, we conclude that the admission of the detective's testimony was not plain error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Valorie Vega, District Judge
Special Public Defender David M. Schieck
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk