09CA0572 Peo v. Martinez 09-06-2012

COLORADO COURT OF APPEALS

Court of Appeals No. 09CA0572
Pueblo County District Court No. 05CR1125
Honorable Jill S. Mattoon, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Joe Anthony Martinez,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division III
Opinion by JUDGE ROY
Dailey and Richman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced September 6, 2012

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Douglas K. Wilson, Colorado State Public Defender, Shann Jeffery, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

Joe Anthony Martinez, defendant, appeals from the judgment of conviction entered upon a jury verdict finding him guilty of after deliberation first degree murder. We affirm.

I. Background

In the early morning hours, and after numerous calls to his former girlfriend's (mother) home, the victim woke his sixteen-year-old son and told him that they needed to gather guns and ammunition and "go take care of something." The son persuaded the victim to leave the guns and other weapons behind and the two drove to mother's home. Upon arrival, the victim told his son to go inside the home and talk to his mother. While he was talking to his mother, the son heard gunshots, and after ensuring that the other occupants of the home were safe, he ran outside and found the victim lying dead in the street. The victim had been shot six times. The first five shots disabled him; he was then dragged into the street where the final and fatal shot was administered to the back of his head.

A neighbor who lived across the street testified that he heard arguing and then heard popping sounds. After calling the police, he

observed, with the aid of high-power binoculars, a man lying in the street with two men standing over him. One man was wearing a shirt and standing near the victim's head, while the other man was shirtless with visible tattoos and standing near his feet. The neighbor testified that the shirtless man cursed at the victim and then shot him in the head. He then saw both men flee in a white Ford Taurus.

Another neighbor testified to hearing sounds like fireworks and then people swearing. When he looked out the window he saw two men standing over a body. He also testified that he heard one of the men swear at the victim and then fire a final shot. Five other neighbors also testified consistently with the first two; all indicated that they heard arguing and gunshots.

Police officers stopped a white Ford Taurus not far from the scene; defendant, who was wearing a blue racing jersey, was driving. The passenger, Gabriel Tapia, was not wearing a shirt and had obvious tattoos. The first neighbor identified Tapia as the man who administered the fatal shot to the head. He identified defendant as the other man standing near the victim's body.

A six-shot revolver was found under the passenger side of the white Taurus and forensic testing linked the gun to the shooting. Defendant had three bullets for the gun in his pocket. However, defendant told the police that he was unaware of the shooting and that he had been instructed by mother, who was his current live-in girlfriend, to pick up Tapia and give him a ride. Defendant and Tapia were charged with after deliberation first degree murder and, after separate jury trials, both were convicted.

II. Victim's Character for Violence

Defendant contends that the trial court erred when it excluded evidence of the victim's character for violence and when it refused to instruct the jury that it could consider the victim's character for violence when determining whether the victim was the initial aggressor. We are not persuaded by either argument.

A. Evidence

We first address defendant's contention that the trial court committed reversible error when it prevented him from presenting evidence of the victim's character for violence. We conclude that this issue has not been preserved.

Prior to trial, defendant filed a motion to dismiss pursuant to section 18-1-704.5, C.R.S. 2011, otherwise known as the "Colorado make-my-day" law. At a hearing on the motion, mother testified concerning abuse that the victim had inflicted upon her, but also stated that she had not discussed the specifics with defendant. Defendant's motion to dismiss was denied, but the pretrial court also stated that defendant could argue self-defense as an affirmative defense at trial.

After several continuances, the case was reassigned to a new trial judge, and another pretrial hearing was conducted. At that hearing, defendant argued for, and the trial court rejected, evidence of the victim's involvement in drug dealing to impeach the testimony of his son. Then, in response to a discussion about whether defendant could present evidence that the victim had gone to mother's home on prior occasions, the court concluded that it would have to defer the question for decision at trial after evidence had been heard. Ultimately, the trial court stated:

> It will be the order of the Court that there will be no testimony elicited regarding any drug use by the victim and the defense will not mention any character traits of the victim

> during voir dire and opening. *However, depending on the evidence presented at trial I am somewhat persuaded that there should be some testimony regarding the prior actions of the parties. Just hearing a preview of what the evidence might be I think it probably will become relevant to – it will be necessary to hear some testimony about previous actions between the parties* but defense is not to mention it during voir dire and opening statement because [the prosecution] is telling me that they're not going to introduce that kind of evidence. I have a feeling that that kind of evidence might come out.

(Emphasis added.)

On the first day of trial, immediately prior to voir dire, the trial court and counsel discussed whether defendant could mention the victim's prior acts of domestic violence against mother. In response to the prosecution's suggestion that such evidence would not be relevant to the question of whether there was premeditation, the trial court stated:

> I think it could [be relevant]. *If the evidence comes out that way, then I might allow that type of evidence*, but, you know, we're doing a lot of if's here. If evidence comes out, if the evidence comes out. I think [as to] the jury questionnaires we've gone about as far as we should on highlighting domestic violence. I'm ordering the parties not to highlight that unless something specific comes up that requires it in those questionnaires.

(Emphasis added.)

It is clear, from our review of these pretrial proceedings, that the trial court did not, as defendant suggests, preclude him from presenting evidence of the victim's prior acts of violence. The court's order only stated that defendant was not to discuss such actions during voir dire or opening statement, but that the trial court was open to admitting the evidence during the course of the trial. Indeed, the court acknowledged that such evidence might be relevant, but it would need to wait and see how the evidence unfolded.

Defendant has not cited any place in the record where he unsuccessfully attempted to admit the evidence. Rather, he directs our attention to the pretrial hearings and pre-voir dire conversations related to the matter. When parties do not direct an appellate court to where an issue was raised and resolved, it places the burden upon this court to search the record; we are under no obligation to undertake such a burden and have not done so here. *See Valentine v. Mountain States Mut. Cas. Co.*, 252 P.3d 1182, 1186 (Colo. App. 2011).

Consequently, we limit our review to the portions of the transcript cited in the opening brief and conclude that defendant did not preserve the evidentiary issue he argues on appeal. *See People v. Lesney*, 855 P.2d 1364, 1366 (Colo. 1993) ("An issue is not properly preserved for appellate review if, as here, it is not presented to the trial court and is raised for the first time on appeal.").

B. Jury Instruction

In a related argument, defendant contends that the trial court erred in rejecting his tendered instruction stating: "You may consider evidence of the victim's character for violence when determining whether the victim would be likely to be the initial aggressor." Defendant argues the jury should have been permitted to consider such evidence in the context of the affirmative defense of self-defense.

"However, an instruction on a matter is only required where there is evidence to support it." *People v. Brionez*, 39 Colo. App. 396, 399, 570 P.2d 1296, 1299 (1977) (citing *People v. Medina*, 185 Colo. 183, 522 P.2d 1233 (1974)). Defendant has not cited any

place in the record at which evidence supporting this instruction was admitted. Upon our own review, it appears that during the discussion of the jury instructions, defense counsel argued that the instruction was supported by the evidence that the victim was not allowed in mother's house or yard. However, these statements standing alone do not indicate that the victim had a character for violence. Because the evidence was insufficient to warrant the submission of the instruction, it was properly rejected by the trial court.

III. "Make-My-Day" Affirmative Defense

We next consider defendant's contention that the trial court erroneously prevented him from presenting the affirmative "make-my-day" defense at trial. We again conclude that this issue was not preserved for appellate review.

In his discussion of preservation, defendant argues that in denying his immunity motion to dismiss pursuant to section 18-1-704.5, the pretrial court stated that defendant would be allowed to present the parallel affirmative defense at trial. Defendant argues that the trial court then prevented him from doing so by

suppressing evidence of the victim's character for violence, which made the parallel affirmative defense impracticable to litigate. In making this argument, defendant cites to the same locations in the record where he has unsuccessfully argued that he preserved the trial court's alleged error in refusing evidence of the victim's character for violence.

As we have already concluded, the trial court did not prohibit defendant from presenting evidence of the victim's character for violence. The trial court merely instructed that defendant was not to mention these traits during voir dire and opening statements. He has not cited to any other place in the record at which he attempted to admit evidence relevant to the "make-my-day" affirmative defense. Thus, any instruction regarding that affirmative defense is unsupported by the evidence. *See Brionez*, 39 Colo. App. at 399, 570 P.2d at 1299; *see also People v. Zukowski*, 260 P.3d 339, 343 (Colo. App. 2010) (discussing the elements of the "make-may-day" affirmative defense).

Defendant further asserts that the trial court considered giving the "make-my-day" defense instruction, but instead decided to

instruct the jury pursuant to section 18-1-704, C.R.S. 2011, which states that a person is justified in using physical force in defending himself from unlawful physical force of another person. However, we have reviewed that portion of the record and, although the trial court did mention section 18-1-704.5, it was not then considering a "make-my-day" instruction. Instead, the trial court mentioned section 18-1-704.5, in passing, during a discussion with the prosecution about section 18-1-704(4), C.R.S. 2011.

Further, although defendant offered several instructions related to self-defense, he did not offer a "make-may-day" instruction. Consequently, we conclude that this issue was not properly presented to the trial court and is not properly before us on appeal. *See People v. Lee*, 30 P.3d 686, 689 (Colo. App. 2000) ("The jury need be instructed as to an affirmative defense . . . only if some evidence presented at trial supports *and the defendant requests it.*") (emphasis added).

IV. Excited Utterance

Defendant contends that the trial court erred in concluding that mother's excited utterance would open the door to mother's

other statements to the responding officer. We conclude that defendant's contention is not ripe for our review.

During the testimony of a responding police officer, defense counsel stated, in a bench conference, that she intended to elicit through the officer an excited utterance made by mother. According to defense counsel, the officer would testify that when he arrived, mother was hysterical and told him that the victim had threatened to come over and kill the whole family.[1]

Defense counsel argued the statement would be admissible pursuant to CRE 803(2), the excited utterance exception to the hearsay rule. The prosecution responded that if the statement was admitted it would seek to admit other statements that mother made to the officer, as well as statements that would contradict her excited utterance. The trial court originally indicated that if mother's excited utterance was admitted, everything else that she said would be admissible. After further discussion, defense counsel

[1] Mother's charges of first degree murder arising out of the same episode were pending, so she was not available to testify.

stated that the matter could await resolution and the officer could be recalled during defendant's presentation of evidence.

When discussion of the matter resumed several days later, the prosecution listed several of mother's statements that it believed directly contradicted her excited utterance. Following argument from both parties, the trial court refined its previous conclusion and held that pursuant to CRE 806, mother's excited utterance could be impeached, but only with her statements related directly to the content of that utterance. Following the trial court's ruling, defendant did not seek to admit the excited utterance.

An appellate court may exercise jurisdiction only when there is an actual case and controversy that is sufficiently real to warrant adjudication; accordingly, we will not entertain questions that are based upon speculative, hypothetical, or contingent facts. *See Metal Mgmt. W., Inc. v. State*, 251 P.3d 1164, 1174 (Colo. App. 2010) (quoting *Jessee v. Farmers Ins. Exch.*, 147 P.3d 56, 59 (Colo. 2006)).

Here, the trial court indicated that it would allow the prosecution to impeach mother's excited utterance only with her statements contradicting the excited utterance. Although the trial

court would likely have adhered to its determination that the statement was impeachable, "*in limine* rulings are not binding on the trial judge, and the judge may always change his [or her] mind during the course of a trial." *Ohler v. United States*, 529 U.S. 753, 758, 120 S. Ct. 1851, 1854 n.3 (2000) (citing *Luce v. United States,* 469 U.S. 38, 41-42, 105 S.Ct. 460, 463 (1984)).

The trial court would ultimately have to determine which impeaching statements it would permit. Further, the trial court's initial ruling would be subject to change as the trial unfolded, particularly if the statements offered by the prosecution differed from its initial proffer. *See Luce*, 469 U.S. at 41, 105 S.Ct. at 463.

If the excited utterance had been admitted into evidence and impeached by the prosecution, the trial court's decision to admit that impeachment evidence would be reviewable. Here, however, the precise nature of what evidence would have been admitted is unknowable and we are, therefore, "handicapped in any effort to rule on subtle evidentiary questions outside of a factual context." *Id.* Consequently, we conclude that any possible harm flowing from the trial court's in limine ruling that mother's statements would be

impeachable with her inconsistent statements is wholly speculative and not ripe for our review.

V. "After Deliberation" Jury Instruction

Defendant next contends that the trial court impermissibly lowered the prosecution's burden when it gave the jury an erroneous instruction concerning the interval necessary for "after deliberation." We perceive no reversible error.

At trial, the jury was instructed that:

> "AFTER DELIBERATION" means not only intentionally but also that the decision to commit the act has been made after the exercise of reflection and judgment concerning the act. And act committed after deliberation is never one which has been committed in a hasty or impulsive manner.

In addition, the jury was instructed that:

> The only time requirement for deliberation and premeditation is an interval sufficient for one thought to follow another. The length of time required for deliberation need not be long.

On appeal, defendant only contests the propriety of the second instruction, arguing that under *Key v. People*, 715 P.2d 319, 322-23 (Colo. 1986), it erroneously instructed the jury on the time interval for deliberation and lowered the prosecution's burden of proving

"after deliberation" as an element of first degree murder. The prosecution responds arguing that defendant did not preserve this argument and, therefore, urges us to review for plain error.

A. Preservation

During a conference on jury instructions, defendant objected to the second instruction on the basis it was not appropriate to give another instruction that further defines deliberation. The prosecution then provided the trial court with authority supporting its position that the latter instruction was appropriate. Defense counsel then stated, "Clearly the law is now and has been recently that deliberation requires enough time for one thought to follow another. That's what those cases say."

At a subsequent conference on the instructions, defense counsel again indicated that she understood the authorities relied upon by the prosecution, but objected to the instruction on the grounds that it unnecessarily and unduly highlighted the time period. Because defense counsel conceded, albeit incorrectly, that the second instruction was a correct statement of the law, we conclude that defendant did not object in the trial court on the

same basis he now asserts on appeal. Thus, we review only for plain error. *People v. Miller*, 113 P.3d 743, 748-49 (Colo. 2005); *see also People v. Malloy*, 178 P.3d 1283, 1288 (Colo. App. 2008) (where defendant did not object at trial on the grounds asserted on appeal, reversal is not warranted in the absence of plain error).

An error is plain when it is obvious and substantial, and so undermines the fundamental fairness of the trial so as to cast doubt upon the reliability of the judgment of conviction. *Miller*, 113 P.3d at 750 (quoting *People v. Sepulveda*, 65 P.3d 1002, 1006 (Colo. 2003). In the context of jury instructions, plain error occurs when the entire record demonstrates a reasonable possibility that the improper instruction contributed to the defendant's conviction. *People v. Sweeney*, 78 P.3d 1133 (Colo. App. 2003). A trial court must correctly instruct the jury regarding the applicable law. *People v. Rivas*, 77 P.3d 882 (Colo. App. 2003).

B. Analysis

In *Key*, and previously in *Sneed*, our supreme court specifically disapproved of the second instruction. *Key*, 715 P.2d at 322 (concluding that "the [sufficient for one thought to follow

another] instruction is incompatible with the legislatively mandated definition of 'after deliberation'"). The second instruction was constitutionally deficient and "referenced a legal standard that has not been in effect since 1973." *People v. Grant*, 174 P.3d 798, 810 (Colo. App. 2007) (citing *People v. Sneed*, 183 Colo. 96, 100, 514 P.2d 776, 778 (1973) and *Key*, 715 P.2d at 322). Therefore, the jury should not have been so instructed; the error in giving the instruction was obvious and should have not been countenanced by the trial court.

Having so concluded, we must now determine whether, considering the record as a whole, there is a reasonable possibility that the instruction contributed to the defendant's conviction. We conclude that there is not.

First, considering the instructions as a whole, we conclude that they did not permit the jury to return a verdict without finding beyond a reasonable doubt that defendant acted "after deliberation," as the term is defined in section 18-3-101(3), C.R.S. 2011. As quoted above, the first instruction, defining "after deliberation," was identical to the statutory language in section 18-

3-101(3). In addition, the prosecution did not make any reference, or draw attention to, the clearly erroneous second instruction during closing arguments. *See Key*, 715 P.2d at 323 (where other jury instructions stated the proper definition, the erroneous language "did not so distort the definition of 'after deliberation' . . . that the prosecution was relieved of its burden of proving the mental culpability requirement of first-degree murder beyond a reasonable doubt").

Second, in our view there was ample evidence in this case that the victim was shot after deliberation of an appreciable length of time. Here, the evidence established that the victim was shot several times while in the yard, fracturing his right leg, rendering his right arm useless, and causing him to fall to the ground. The victim was then dragged from the yard into the street where defendant and Tapia stood over the victim and yelled obscenities at him. At that point, Tapia shot the victim in the head. Even assuming, though highly unlikely, that the shots fired at the victim in the yard were inadvertent, there is certainly evidence of an appreciable length of time between the first shots and the fatal shot.

That is, sufficient for several neighbors in the early morning hours to be alerted by the first shots and get to a position to hear the shouts of profanity from both defendant and Tapia and to observe the firing of the fatal shot.

Consequently, we conclude that the error here in giving the latter instruction did not raise a reasonable possibility that it contributed to the guilty verdict as to after deliberation first degree murder.

VI. Sufficiency of the Evidence

Finally, we disagree with defendant's contention that the evidence was insufficient to convict him of after deliberation first degree murder as either a principal or complicitor.

We review a challenge to the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the prosecution and giving it the benefit of every reasonable inference that might be drawn from the evidence. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). Resolution of the weight and credibility of evidence is the province of the jury and we "will not set aside a verdict merely because [we] might have drawn a different conclusion

from the same evidence." *People v. Whittiker*, 181 P.3d 264, 277 (Colo. App. 2006).

As relevant here, "[a] person commits the crime of murder in the first degree if . . . [a]fter deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person." § 18-3-102(1)(a), C.R.S. 2011. The complicity statute, section 18-1-603, C.R.S. 2011, states: "[a] person is legally accountable as principal for the behavior of another constituting a criminal offense if, with the intent to promote or facilitate the commission of the offense, he or she aids, advises, or encourages the other person in planning or committing the offense."

Therefore, to convict a defendant of first degree murder as a complicitor, the prosecution must show that defendant had the culpable mental state required for after deliberation first degree murder and that the defendant assisted or encouraged the principal with the intent that his conduct promote or facilitate the commission of the murder by the principal. *People v. Candelaria*, 107 P.3d 1080, 1090-91 (Colo. App. 2004), *rev'd on other grounds*,

148 P.3d 178 (Colo. 2006). However, merely being present or being associated with the principal is insufficient to support a determination of complicity. *People v. Duran*, ___ P.3d ___, ___ (Colo. App. No. 06CA1850, Apr. 28, 2011) (prosecution did not present any evidence of defendant's actions during the set of gunshots that ultimately killed the victim to support a determination that the defendant aided, abetted, advised, or encouraged the principal).

Here, the prosecution's evidence, when viewed in the most favorable light to the prosecution, established the following: (1) the victim was shot five times while he was in the yard; (2) the initial five shots were not fatal, but they would have rendered the victim helpless; (3) the victim weighed approximately 180 pounds; (4) it would have been difficult to drag the victim by the legs because of the fracture injury to his right leg; (5) the victim was still alive when he was dragged from the yard to the street; (6) both defendant and Tapia yelled obscenities at the victim before the latter shot him fatally in the head; (7) defendant lived, and was in a romantic relationship, with mother, the former wife of the victim; (8) the gun

used to kill the victim belonged to mother and was a six-shot revolver; (9) in addition to the five shots to the victim, another bullet hole was discovered on the front porch, leading to a reasonable inference that the gun was reloaded before the victim was shot in the head; (10) bullets capable of being fired from the gun were found in defendant's pants pockets; (11) defendant was identified by one witness as the man standing near the victim's head; (12) another witness testified that the man standing near the victim's head said to the victim, prior to the final shot, "see what happens when you mess with my house"; (13) the victim drove Tapia from the scene of the crime; and (14) when questioned by the police, defendant denied any knowledge of the shooting.

Based on the foregoing, we conclude that — while not the strongest circumstantial case — viewed in the light most favorable to the prosecution, the evidence was sufficient to permit a reasonable juror to conclude, beyond a reasonable doubt, that defendant was guilty as a complicitor of after deliberation first degree murder in the slaying of the victim. *People v. McIntier*, 134 P.3d 467, 471-72 (Colo. App. 2005) ("An appellate court is not

permitted to act as a thirteenth juror and set aside a verdict because it might have drawn a different conclusion had it been the trier of fact.").

The judgment is affirmed.

JUDGE DAILEY and JUDGE RICHMAN concur.