IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ANTONETTI A/K/A JOSEPH GOZDZIEWICZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42917

FILED

DEC 20 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature] CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction for first-degree murder, attempted murder, and felon in possession of a firearm. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Antonetti was charged with one count of murder with use of a deadly weapon, one count of attempted murder with use of a deadly weapon, and one count of a felon in possession of a firearm for the December shooting and killing of Mary Amina and the shooting of Daniel Stewart.

After a five day trial Antonetti was convicted of all charges. For count one of first-degree murder, Antonetti was sentenced to life without the possibility of parole, along with an equal and consecutive sentence for the use of a deadly weapon. For attempted murder, Antonetti was sentenced to a maximum of 240 months and a minimum of 96 months with an equal and consecutive sentence for the use of a deadly weapon, to run consecutively to count one. Finally, for the charge of felon in possession of a handgun, Antonetti was sentenced to a maximum of 72 months and a minimum of 28 months, to run consecutively to counts one and two.

05-24776

Antonetti appeals asserting that: (1) the district court erred by admitting evidence of an unrelated November shooting, (2) a police officer improperly commented on Antonetti's prior criminal record, (3) the prosecutor improperly commented on Antonetti's failure to testify during closing argument, (4) the State did not provide proper notice for his grand jury indictment, (5) the State failed to disclose a deal it offered to a witness in exchange for the witness's testimony against Antonetti, (6) there was insufficient evidence to convict him of the crimes charged, and (7) cumulative error warrants reversal.

We conclude that the district court did not err in its rulings and we affirm the convictions and the corresponding sentences.

Evidence of prior bad acts

Antonetti argues that the district court erred by allowing the State to introduce evidence of the unrelated November shooting during trial. Antonetti urges that the two incidents were not part of a common scheme or plan, that the November shooting did not demonstrate motive, opportunity, or identity, and was more prejudicial than probative.

NRS 48.045(2) provides that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of the person in order to show that he acted in conformity therewith." However, evidence of other crimes or wrongs may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[1]

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[1]NRS 48.045(2).

Notwithstanding that prior bad acts evidence is admissible for limited purposes, "this court has often looked upon the admission of prior bad acts evidence with disfavor because the evidence is often irrelevant and prejudicial, and forces a defendant to defend against vague and unsubstantiated charges."[2] Therefore, the State bears the burden of establishing the evidence's admissibility at a hearing outside the presence of the jury by demonstrating: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[3] "[T]he decision to admit or exclude such evidence is within the discretion of the trial court and will not be overturned absent a showing that the decision is manifestly incorrect."[4]

Where questions are raised as to the credibility of witnesses' trial identification, the need for additional evidence to establish identity is enhanced.[5] If the identity of a perpetrator is in issue, evidence of prior crimes may be admitted in order to prove identity provided the prejudicial effect is outweighed by the evidence's probative value.[6] Additionally, the prior bad act must demonstrate "characteristics of conduct" unique and common to the defendant and the perpetrator whose identity is in issue.[7]

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[2]Rhymes v. State, 120 Nev. ___, ___, 107 P.3d 1278, 1280 (2005).

[3]Id. at ___, 107 P.3d at 1281 (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).

[4]Id.

[5]Reed v. State, 95 Nev. 190, 193, 591 P.2d 274, 276 (1979).

[6]See Mayes v. State, 95 Nev. 140, 142, 591 P.2d 250, 251 (1979).

[7]See generally Coty v. State, 97 Nev. 243, 627 P.2d 407 (1981).

The November shooting was primarily used to show the identity of the shooter. This was clearly relevant to Antonetti's defense that he was not present at the time the shooting occurred. Because identity was a key issue at trial, we conclude the probative value of the identity of the November shooter outweighed any prejudice to Antonetti.

Therefore, we conclude that the district court did not err in allowing the admission of evidence of the November shooting.

Police officer's testimony

Antonetti argues that the State elicited improper character and prior bad acts evidence when a police officer testified that while he investigated the November shooting he recognized Antonetti's name after the victim advised him that Antonetti had shot her.

"Because it affects the presumption of innocence, a reference to criminal history, absent special conditions of admissibility, is a violation of due process."[8] "The test for determining if a reference to a defendant's prior criminal history occurred 'is whether a juror could reasonably infer from the facts presented that the accused has engaged in prior criminal activity.'"[9] However, an unsolicited and inadvertent reference coupled with an appropriate limiting instruction by the court does not rise to the level of a reasonable inference regarding a defendant's prior criminal

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[8]Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 282 (1992).

[9]Cunningham v. State, 113 Nev. 897, 908, 944 P.2d 261, 268 (1997) (quoting Manning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983)).

history.[10] Additionally, the inference of criminal activity is harmless when the evidence of guilt is overwhelming.[11]

During direct examination Detective Kniffen was asked whether he had the name of a suspect when he was first assigned to investigate the November shooting. The detective testified that he did and that the name was Joseph Antonetti. The State then asked what Kniffen did with the name and Kniffen responded that he recognized Antonetti's name. Antonetti's counsel immediately objected and the court ordered the answer stricken and admonished the jury to disregard the answer.

We hold that although Kniffen's statement might permit the jury to reasonably infer that Antonetti engaged in prior criminal activity, the statement was unsolicited and inadvertent, and the district court immediately admonished the jury to disregard the answer. Further, given the eyewitness testimony to the December shooting, which is substantial evidence of guilt, we conclude that the reference was harmless.

Prosecutor's comment on Antonetti's failure to testify

During closing argument, the prosecutor referred to the fact that there were only four people in the apartment the night of the shootings, and that only four people could tell the jury who the shooter was. Antonetti's attorney immediately objected and the judge convened an off the record discussion at the bench. After the bench discussion, the State made no further comment on Antonetti's failure to testify.

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[10]Id. See also Rice, 108 Nev. at 44, 824 P.2d at 282.

[11]See Theriault v. State, 92 Nev. 185, 190, 547 P.2d 668, 671 (1976); overruled on other grounds by Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995).

Antonetti argues that his conviction should be overturned because the prosecution improperly commented on his failure to testify during closing argument. Specifically, the prosecutor's statement implied that Antonetti was one of four people who could have explained what happened in the apartment on the night of the shooting.

"Indirect references to a defendant's failure to testify are constitutionally impermissible if 'the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify.'"[12] "The context of the prosecutor's comment must be taken into account in determining whether a defendant should be afforded relief."[13] "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comment standing alone."[14]

We conclude that the prosecutor's statement, when viewed in context, was not an impermissible comment on Antonetti's refusal to testify.[15] The statement was merely a prelude to a summary of the testimony from witnesses the State had presented at trial.[16] Moreover, the statement was not "manifestly intended to be a comment" on Antonetti's failure to testify. Nor, was it "of such a character that the jury

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[12]Barron v. State, 105 Nev. 767, 779, 783 P.2d 444, 451-52 (1989).

[13]Bridges v. State, 116 Nev. 752, 764, 6 P.3d 1000, 1008 (2000).

[14]Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) (quoting U.S. v. Young, 470 U.S. 1, 11 (1985)).

[15]See Bean v. State, 81 Nev. 25, 36, 398 P.2d 251, 258 (1965).

[16]See Septer v. Warden, 91 Nev. 84, 87-88, 530 P.2d 1390, 1392 (1975).

would naturally and necessarily take it to be a comment" on Antonetti's failure to testify. We therefore hold that the statement did not amount to prosecutorial misconduct; nor did it infringe upon Antonetti's rights as a criminal defendant.

Notice of grand jury indictment

A defendant is entitled to reasonable notice before being indicted by a grand jury.[17] "The purpose of reasonable notice is to ensure that a defendant has an opportunity to exercise his right to testify at the grand jury hearing."[18] The notice is adequate if it "is given to the person, his attorney of record or an attorney who claims to represent the person and gives the person not less than five judicial days to submit his request to testify to the district attorney[.]"[19] Furthermore, the notice may be orally delivered[20] but "must include the time, place, and date of the grand jury proceeding."[21]

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[17]Sheriff v. Marcum, 105 Nev. 824, 827, 783 P.2d 1389, 1391 (1989).

[18]Solis-Ramirez v. District Court, 112 Nev. 344, 347, 913 P.2d 1293, 1295 (1996).

[19]NRS 172.241(2)(a).

[20]Daniels v. State, 114 Nev. 261, 270, 956 P.2d 111, 117 (1998).

[21]Id.

When "the facts relating to the notice provided are not in dispute, the adequacy of the notice is a question of law and, therefore, appropriate for de novo review."[22] However, when a district court's factual determination that the defendant received notice is in dispute, the "district court's determinations of fact will not be set aside unless they are clearly erroneous."[23] Additionally, "a conviction will not be reversed due to an irregularity in the grand jury proceedings absent a showing that the irregularity deprived the defendant of a fair trial or otherwise resulted in actual prejudice relating to the conviction."[24]

Here, the question of whether Antonetti actually received notice is a question of fact, which this court reviews under a clearly erroneous standard.

At his arraignment, Antonetti argued that neither the State nor any one of his previously appointed attorneys had informed him that he was subject to grand jury investigation. Notwithstanding this claim, Antonetti's counsel confirmed that he had received timely notice from the State before the superseding indictment. Additionally, the prosecutor advised the court that she had made Antonetti's previous counsel aware of the State's intentions and had kept defense counsel informed of what was going on.

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[22]Id.

[23]Lisle v. State, 113 Nev. 540, 549, 937 P.2d 473, 479 (1997).

[24]Id. at 551, 937 P.2d at 480 (quoting People v. Corona, 259 Cal. Rptr. 524, 528-29 (Ct. App. 1989)).

Antonetti's claim of lack of notice is belied by the record. Antonetti offers no credible evidence that the State did not provide either he or his counsel notice of the grand jury proceedings. The district court specifically determined that the State provided Antonetti's counsel with reasonable notice of all the grand jury proceedings. This factual determination was not clearly erroneous.

Bartoli's testimony

Antonetti argues that the State may have offered witness Fred Bartoli a plea bargain in return for his testimony against Antonetti. Antonetti suggests that the State had enough evidence against Bartoli to convict him of at least felony murder incident to the December shooting, yet the State failed to charge and prosecute him. Additionally, Antonetti surmises that because Bartoli was awaiting criminal prosecution on unrelated charges, when he testified it raised the presumption that he had been offered a deal. Antonetti highlights the fact that the same deputy district attorney who prosecuted him was also prosecuting Bartoli on the unrelated charges. Antonetti asserts that the State violated the district court's order to turn over any information relating to any promises or indictments Bartoli received. The State denies Bartoli was given any deal in return for his testimony.

"Brady v. Maryland held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.'"[25] "Evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed."[26] When the "'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule."[27] Further, "evidence of any understanding or agreement as to a future prosecution would be relevant to [a witness's] credibility;" therefore, the jury is entitled to know about it.[28] "Determining whether the State adequately disclosed information under Brady involves both factual and legal questions and requires de novo review by this court."[29]

In his opening brief Antonetti admits that he has no proof that Mr. Bartoli received any benefit from testifying against him. Meanwhile, the State steadfastly maintained that it had not offered Bartoli any deal in exchange for his testimony. Additionally, Bartoli testified during a thorough cross-examination by Antonetti's counsel that he was not offered a deal, he did not expect a deal, nor did he have any implied agreement with the prosecution.

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[25]Giglio v. United States, 405 U.S. 150, 153 (1972) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1964)).

[26]Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000).

[27]Giglio, at 154 (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).

[28]Id. at 154-55.

[29]Lay, 116 Nev. at 1193, 14 P.3d at 1262 (internal citation omitted).

The record contains substantial evidence demonstrating that Bartoli did not receive a deal in exchange for testimony against Antonetti. Additionally, by his own admission, Antonetti fails to demonstrate that there was a deal. As such, we conclude that Antonetti fails to demonstrate materiality; and therefore, his claim lacks merit.

Insufficient evidence

Antonetti argues that the State failed to present sufficient evidence to prove that he committed first-degree murder. He contends that the evidence merely demonstrated that the victims were shot in the heat of passion during an argument. Antonetti contends that the State failed to prove beyond a reasonable doubt that Antonetti killed with premeditation and deliberation.

Deliberation requires proof that the defendant decided to kill his victim after considering his perceived justifications and the potential consequences.[30] "A deliberate determination may be arrived at in a short period of time."[31] However, "the determination must not be formed in passion, or if formed in passion, it must be carried out after there has been time for the passion to subside and the deliberation to occur."[32]

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[30]Byford v. State, 116 Nev. 215, 236, 994 P.2d 700, 714 (2000).

[31]Id.

[32]Id.

Premeditation is the "determination to kill, distinctly formed in the mind by the time of the killing."[33] "Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind."[34]

"The determination of the degree of crime is almost invariably left to the discretion of the jury."[35] On claims of insufficient evidence "[t]he relevant inquiry for this Court is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[36] This court has held "[e]vidence of premeditation and deliberation is usually indirect, and circumstantial evidence may constitute sufficient evidence."[37]

Here, both Stewart and Bartoli testified that Antonetti made threats to Amina, shot her twice in the head, and then shot Stewart twice before fleeing the scene. Although there was an argument prior to the shooting, Stewart testified that the argument was between Bartoli, Amina, and himself. Stewart testified that during the argument Bartoli threatened that if he did not get his property Antonetti was going to get angry. Antonetti brought a loaded gun to the apartment. Furthermore, while Bartoli was arguing with Amina and Stewart, Antonetti approached

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[33]Id. at 237, 994 P.2d at 700.

[34]Id.

[35]Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981).

[36]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original).

[37]Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 854 (2000).

Amina, pulled the gun, pointed the gun at her stomach, and exchanged threats with her before firing two shots.

We conclude that a rational trier of fact could have found Antonetti guilty of first-degree murder beyond a reasonable doubt based upon this evidence.[38] Accordingly, Antonetti's claim of insufficient evidence lacks merit.

Cumulative error

Antonetti argues he is entitled to a new trial based upon the cumulative effect of the errors committed at trial. The State contends that no error was committed and therefore Antonetti should be denied relief on his cumulative error claim.

"[I]f the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction."[39] "Relevant factors to consider in deciding whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'"[40] A cumulative error argument lacks merit when the record is devoid of any error.[41]

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[38]See generally Peoples v. Warden, 87 Nev. 610, 491 P.2d 719 (1971).

[39]DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000).

[40]Id. (quoting Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

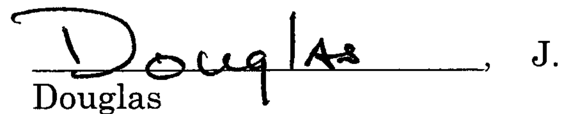
[41]Hughes v. State, 116 Nev. 975, 981 n.3, 12 P.3d 948, 952 n.3 (2000).

We conclude that if any errors were committed at trial, they were harmless in light of substantial evidence of guilt. Therefore, we hold that Antonetti's cumulative error argument lacks merit.

CONCLUSION

This court will not overturn a conviction based on the admission of prior bad acts evidence unless the district court's decision was "manifestly incorrect." Here, the district court's decision to admit the prior bad acts evidence was not manifestly incorrect. With respect to Antonetti's remaining claims, each lacks merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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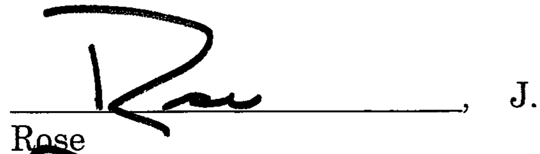

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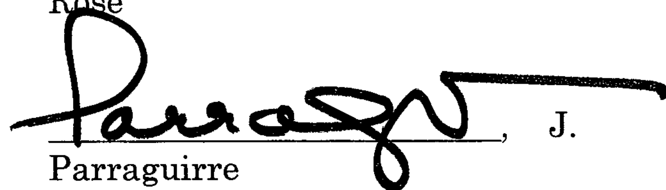

_______________, J.
Parraguirre

cc: Hon. Joseph T. Bonaventure, District Judge
Christopher R. Oram
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Clark County Clerk