

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMIE DEPEDRO WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42962

FILED

JUL 11 2005

ORDER OF AFFIRMANCE

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY *J. Rinaldi*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, upon jury verdict, of one count of robbery with use of a deadly weapon, and one count of burglary while in possession of a firearm. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

FACTS AND PROCEDURAL HISTORY

Appellant Tommie Depedro Wilson (Wilson) was convicted of robbery and burglary incident to a theft of approximately \$51,000 from Bally's Casino during the early morning hours of December 23, 2002. For count one, robbery with use of a deadly weapon, the district court sentenced Wilson to a maximum term of one hundred twenty months with a minimum term of forty-eight months for robbery plus an equal and consecutive term for use of a deadly weapon. For count two, burglary while in possession of a firearm, the court sentenced Wilson to a maximum term of one-hundred twenty months with a minimum term of thirty-six months to run consecutive to count one. In addition to the \$25.00 administrative assessment fee, the court ordered Wilson to submit to DNA testing and pay the \$150.00 DNA analysis fee. Furthermore, the court ordered Wilson to pay \$51,529.39 in restitution.

On appeal, Wilson argues that the following issues warrant a reversal of his convictions: (1) the district court erred by denying his

motion to compel discovery of eight videotapes taken from the casino's ceiling camera surveillance; (2) that the State used its peremptory challenges to exclude African-American members of the jury venire; (3) that the State shifted the burden of proof to Wilson; (4) that at sentencing the State argued facts outside of the pre-sentence report which resulted in a harsher sentence; and (5) that there was insufficient evidence presented at trial to prove he committed burglary. We conclude that Wilson's contentions lack merit.

DISCUSSION

Motion to compel discovery

Wilson argues that the district court erred by denying his motion to compel discovery of eight video surveillance tapes from the casino used to create one compilation tape that was eventually admitted into evidence. Wilson also implies that the State violated Brady v. Maryland by withholding the tapes because they could have provided evidence favorable to his defense.¹

The State counters that it did not violate Brady because it did not withhold the videotapes. Additionally, Wilson had ample opportunity to request the tapes throughout Wilson's first trial and instead waited until the day the second trial began, after seating a jury, to bring his motion. The State suggests that had the court granted Wilson's request, the trial would have been postponed indefinitely because the eight tapes contained almost one hundred hours of footage. Finally, the State argues that Wilson failed to establish that any footage from the original eight videotapes would have been material to his defense.

¹373 U.S. 83 (1963).

“[R]esolution of discovery issues are normally within the trial court’s discretion.”² However, “[d]etermining whether the State adequately disclosed information under Brady v. Maryland involves both factual and legal questions and requires de novo review by this court.”³ “Brady and its progeny require a prosecutor to disclose evidence favorable to the defense if the evidence is material either to guilt or to punishment.”⁴ “Evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed.”⁵

The district court denied Wilson’s motion to compel, in part, because it was not timely filed.⁶ The court found that Wilson knew of the existence of the original eight tapes and yet failed to request them at any time prior to the first day of his second trial. Moreover, Wilson was provided a copy of an edited compilation tape made pursuant to NRS

²Lisle v. State, 113 Nev. 679, 695, 941 P.2d 459, 470 (1997) (citing People v. District Court of El Paso County, 790 P.2d 332, 336 (Colo.1990)).

³Lay v. State, 116 Nev. 1185, 1193, 14 P.3d 1256, 1262 (2000) (internal citation omitted); see also Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

⁴Id. at 1194, 14 P.3d at 1262; see Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996).

⁵Id.

⁶See NRS 174.125(1), which states in pertinent part, “all other motions which by their nature, if granted, delay or postpone the time of trial must be made before trial, unless an opportunity to make such a motion before trial did not exist or the moving party was not aware of the grounds for the motion before trial.”

52.275(1).⁷ The court carefully scrutinized the compilation, and Wilson did not object to its admissibility or assert that the compilation excluded favorable evidence. The record also supports the district court's determination that the motion to compel would have delayed the trial. Therefore, we conclude that denial of Wilson's discovery motion was not an abuse of discretion.

With respect to his Brady contention, Wilson has not offered any evidence that the State failed to disclose favorable evidence. In contrast, during Wilson's first trial, numerous witnesses testified that the compilation tape accurately depicted all relevant events that occurred on the night of the crime. This testimony belies Wilson's claim that images favorable to him were excluded from the compilation.⁸

Moreover, Wilson fails to demonstrate that there is a reasonable probability that his trial would have resulted differently had

⁷NRS 52.275(1) states "[t]he contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation." The eight tapes consisted of several hours of footage. The compilation was created to condense multiple camera footage into one seamless version of the events that occurred immediately before, during, and after the incident.

⁸Wilson additionally argues that the eight tapes might have demonstrated an inadequate foundation, with respect to a magazine left at the scene of the crime containing his fingerprints, due to a lack of chain of custody. However, the State presented every witness in the magazine's chain of custody to establish it was unaltered. If the tape actually depicted a flaw in the chain of custody it would have been material to Wilson's defense. Nevertheless, Wilson cannot prove the State either intentionally or negligently withheld the eight tapes and therefore cannot demonstrate a Brady violation.

the tapes been produced. Wilson merely speculates that the tapes would have demonstrated that the robbery was an “inside job” without arguing what images on the tapes would support this argument. In light of his failure to demonstrate that the State withheld favorable evidence or that the tapes would have been material, we conclude that Wilson’s Brady argument is without merit.

Peremptory challenges

Wilson argues that the State excluded potential jurors based on race in violation of Batson v. Kentucky.⁹ Under the United States Constitution, it is impermissible to use a peremptory challenge to exclude a potential juror based on race.¹⁰ When determining whether peremptory challenges have been used in a discriminatory manner, the opponent of the challenge must make a prima facie showing of intentional discrimination.¹¹ Then the burden shifts to the party making the challenge to express a race-neutral explanation for the challenge.¹² Finally, the court determines whether the explanation is merely a pretext.¹³ “The trial court’s decision on the ultimate question of

⁹476 U.S. 79 (1986).

¹⁰Id. at 89 (“[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.”).

¹¹Id. at 96.

¹²Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (citing Batson, 476 U.S. at 97-98).

¹³Id. at 359.

discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.”¹⁴

Specifically, Wilson claims that the State’s explanation, that it challenged three African-American veniremen because each had family members involved in the criminal justice system, was pretextual. Wilson asserts that the State intentionally discriminated against these jurors, arguing that because African-Americans are disproportionately represented in the prison system, any potential African-American juror could have family members in prison, which would then potentially exclude him or her from serving on a jury. Wilson requests that this court reconsider its decision in Doyle v. State, where this court held “[a]ssociation with the criminal justice system is a facially neutral reason to challenge veniremen.”¹⁵ We decline the request.

Wilson made a prima facie showing that the State intentionally discriminated against African-American veniremen by challenging three of the four African-Americans on the venire. However, the State offered race-neutral explanations for each challenge. Because the district court’s ultimate factual determination is accorded significant deference on review, we do not believe the court erred by concluding that the State’s challenges were not pretextual.

¹⁴Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997) (citing Hernandez, 500 U.S. at 364).

¹⁵112 Nev. 879, 889, 921 P.2d 901, 908 (1996) (overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004) (quoting Clem v. State, 104 Nev. 351, 355, 760 P.2d 103, 106 (1988))).

Burden of proof

Wilson contends that the State impermissibly shifted the burden of proof when it argued to the jury that to accept his theory of defense, Wilson needed to demonstrate that the real perpetrator of the crime failed to leave fingerprint evidence. Additionally, Wilson contends it was prosecutorial misconduct and an impermissible shift of the burden of proof when the State argued that his expert should have tested latent fingerprint evidence to prove it belonged to a different suspect.

“Generally, prosecutorial comment on the failure of the defense to present witnesses or evidence impermissibly shifts the burden of proof.”¹⁶ However, “as long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented.”¹⁷

Here, the State did not call attention to Wilson's decision not to testify. Rather, the prosecutor's comments on the fingerprint evidence merely related to Wilson's theory of the case. Therefore, the prosecutor's statements did not impermissibly shift the burden of proof.

Sentencing

Wilson argues that his sentence is improper because the State argued matters outside the pre-sentence report and the court sentenced him more harshly because he maintained his innocence at his sentencing hearing. The State counters that the district court is entitled to wide

¹⁶Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001) (citing Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996)).

¹⁷Id. (citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir.1992)).

discretion in sentencing and is free to consider information extraneous to the pre-sentence report.

This court affords the district court “wide discretion when sentencing a defendant”¹⁸ and “will not disturb the sentence absent a showing of abuse of such discretion.”¹⁹ Additionally, this court “will refrain from interfering with the sentence imposed so long as the record does not demonstrate prejudice resulting from consideration of information founded on facts supported only by impalpable or highly suspect evidence.”²⁰

At sentencing, “courts are generally free to consider information extraneous to the pre-sentence report.”²¹ “A recommendation of the Department of Prisons or the Department of Parole and Probation has no binding effect on the courts.”²² Where a sentence imposed is within statutory limits, and there is no showing that the district court judge relied on “impalpable or highly suspect evidence,” there is no abuse of

¹⁸Parrish v. State, 116 Nev. 982, 988, 12 P.3d 953, 957 (2000); see also Randell v. State, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993); Etcheverry v. State, 107 Nev. 782, 786, 821 P.2d 350, 352 (1991).

¹⁹Tanksley v. State, 113 Nev. 844, 848, 944 P.2d 240, 242 (1997) (citing Glegola v. State, 110 Nev. 344, 349, 871 P.2d 950, 953 (1994)).

²⁰Allred v. State, 120 Nev. 410, ___, 92 P.3d 1246, 1253 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)).

²¹Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996); see also Collins v. State, 88 Nev. 168, 171, 494 P.2d 956, 957 (1972) (“A trial court does not abuse its discretion by imposing a sentence in excess of that suggested by the Department.”).

²²Etcheverry, 107 Nev. at 786, 821 P.2d at 352 (citing Lloyd v. State, 94 Nev. 167, 170, 576 P.2d 740, 742 (1978)).

discretion.²³ However, a court's reliance on the defendant's refusal to admit guilt would be an abuse of discretion.²⁴

Contrary to Wilson's contention, the record confirms that the court did not consider information outside the pre-sentence report, even though it could have. The State argued for the maximum sentence based in part on Wilson's juvenile record. However, upon objection by Wilson's counsel, the court advised the State to only argue based upon the pre-sentence report. Additionally, nothing in the record indicates the court sentenced Wilson more harshly due to his denial of guilt. Therefore, we conclude there was no abuse of discretion by the district court in sentencing Wilson.

Insufficient evidence of burglary

Wilson argues that his burglary conviction must be reversed because "there is absolutely no evidence that [he] committed the burglary." The State counters that the jury's verdict was based upon substantial evidence.

"The standard of review regarding sufficiency of the evidence is whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt."²⁵ When reviewing a

²³Id. at 786, 821 P.2d at 352.

²⁴See Thomas v. State, 99 Nev. 757, 758, 670 P.2d 111, 112 (1983).

²⁵DePasquale v. State, 106 Nev. 843, 848, 803 P.2d 218, 221 (1990) (citing Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980)); see also Buff v. State, 114 Nev. 1237, 1242, 970 P.2d 564, 567 (1998) (citing Domingues v. State, 112 Nev. 683, 693, 917 P.2d 1364, 1371 (1996) ("A reviewing court will not disturb a verdict on appeal if it is supported by sufficient evidence.")).

claim of insufficient evidence, this court views “the facts in the light most favorable to the State.”²⁶

The State presented substantial evidence that Wilson committed burglary. Although Wilson questions the strength of the State’s evidence throughout his opening brief, this court has upheld a burglary conviction where the State introduced evidence that the defendant fit the general description of a suspect seen running from the scene, was apprehended near the scene, and his fingerprints were found on several items at the crime scene.²⁷ Similarly, here, a rational trier of fact could have found all the elements of burglary beyond a reasonable doubt based upon Wilson’s entry into the casino facility and his actions thereafter. Therefore, this court will not disturb the verdict.

CONCLUSION


We conclude that Wilson’s assignments of error lack merit. Wilson failed to demonstrate that the State withheld the eight surveillance videotapes and that the information on these tapes would have been material. Additionally, the district court did not abuse its discretion by denying his motion to compel discovery due to the potential for significant delay. Moreover, the district court did not err in denying Wilson’s Batson challenge and in sentencing him to the statutory maximum for each charge. Finally, the State presented sufficient evidence to support the jury’s verdict with respect to the burglary charge,

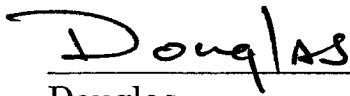
²⁶Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) (citing Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)).

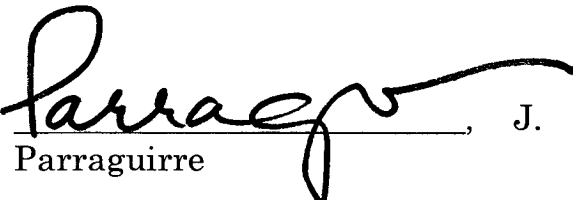
²⁷See Matthews v. State, 94 Nev. 179, 576 P.2d 1125 (1978).

and the prosecutor's statements regarding the fingerprint evidence did not impermissibly shift the burden of proof. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Honorable Jackie Glass, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk