

IN THE SUPREME COURT OF THE STATE OF NEVADA

KIMOTHY DEMOND WRIGHT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43042

FILED

JUN 13 2005

JANE TERRY BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon jury verdict, of possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

Appellant Kimothy Wright was standing in front of a convenience store with two other individuals. Officers in the area approached Wright after observing suspicious conduct and noting that he was loitering. Wright fled from the location, but was apprehended by police. An unidentified witness pointed the police to an area where they recovered marijuana and a firearm that Wright allegedly disposed of during the pursuit. Wright was a convicted felon at the time, making his possession of a firearm illegal. A jury returned a guilty verdict for possession of the firearm. Wright appeals claiming prosecutorial misconduct and improper admission of evidence.

Admissibility of weapon

A district court decision to admit evidence is reviewed for abuse of discretion.¹ NRS 171.123(1) permits a police officer to “detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is

¹Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998).

about to commit a crime.”² Officers may use objective facts combined with permissible deductions to form reasonable suspicion.³ While an individual’s presence in a high crime area by itself is not sufficient to support reasonable suspicion, it can be combined with other objective observations to determine whether further investigation is necessary.⁴ Unprovoked flight provides sufficient cause to justify an investigative stop, and absent hot pursuit, a chase and investigative pursuit are excluded from wholesale Fourth Amendment protection.⁵

The district court did not abuse its discretion in allowing the weapon to be entered into evidence. The officers were trained in detection of narcotics violations, had knowledge of the area, had viewed Wright’s loitering violation. They also felt Wright behaved suspiciously when he approached the vehicle at the parking lot and immediately halted when he noticed the police presence. Wright also grabbed his waistband when he was ordered to put his hands in the air. Finally, when asked to approach the police vehicle, Wright fled without provocation. Thus, Wright’s argument lacks merit and the officers had sufficient facts to form reasonable suspicion.

Admissibility of statements

Wright objects to two statements he made to officers during the investigation of the incident: (1) the statement relating to the possession of marijuana that he made to Officer Melissa James in the

²State v. Lisenbee, 116 Nev. 1124, 1128, 13 P.3d 947, 950 (2000).

³United States v. Cortez, 449 U.S. 411, 419 (1981).

⁴United States v. Sharpe, 470 U.S. 675, 682-83, n.3 (1985).

⁵State v. Stinnett, 104 Nev. 398, 401, 760 P.2d 124, 126 (1988).

police car, “if you found the package you got my fingerprints don’t you?”, and (2) the confession he made to Detective Tim Meamber.

No error occurred in the admission of Wright’s statement to Officer James. Most importantly, the statement was elicited by defense counsel. Further, as a general matter, a defendant must raise a contemporaneous objection at trial to preserve the issue for appellate review.⁶ Despite failing to object, “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.”⁷ Even if the district court failed to exclude the evidence sua sponte, errors in admitting evidence are harmless where there is overwhelming evidence of guilt.⁸ Because the issue was not raised below, and no plain error exists, we conclude Wright’s argument lacks merit.

We likewise conclude that no error occurred in the admission of the confession to Detective Meamber. A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement.⁹ “To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. The question in each case is whether the defendant’s will was overborne when he confessed.”¹⁰ Deception by a police officer is a relevant factor but not one

⁶McCullough v. State, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

⁷NRS 178.602.

⁸Kelly v. State, 108 Nev. 545, 552, 837 P.2d 416, 420 (1992).

⁹Franklin v. State, 96 Nev. 417, 421, 610 P.2d 732, 734-35 (1980).

¹⁰Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987).

that by itself is sufficient to make the confession involuntary.¹¹ “[C]onfessions obtained through the use of subterfuge are not vitiated so long as the methods used are not of a type reasonably likely to procure an untrue statement.”¹²

Wright testified that he spoke with Detective Meamber voluntarily, that he waived his rights, and that he understood the detective’s questions. The interview was not excessively long, took place mid-afternoon, and there was no evidence of any sort of deprivation. No error occurred in admitting the confession.

Hearsay

Wright argues that the State’s presentation of evidence of the unidentified man who told the police that he saw Wright drop certain items constituted hearsay improperly admitted. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.¹³ The traditional definition of “hearsay is an out-of-court statement offered to prove the truth of its contents, the probative value of which is dependent upon the credibility of a witness that cannot be cross-examined.”¹⁴

Failure to exclude evidence is harmless error where overwhelming evidence supports the conviction.¹⁵ Overwhelming evidence supports Wright’s conviction including his confession and statement to Officer James. Thus, we conclude that the error, if any, was harmless.

¹¹Sheriff v. Bessey, 112 Nev. 322, 325, 914 P.2d 618, 619 (1996).

¹²Id. at 325, 914 P.2d at 620.

¹³NRS 51.035.

¹⁴Crowley v. State, 120 Nev. 30, 36, 83 P.3d 282, 287 (2004) (Maupin, J., concurring).

¹⁵Richmond v State, 118 Nev. 924, 934, 59 P.3d 1249, 1252 (2002).

Burden shifting

Wright argues that the prosecutor, during summation, stated that Wright's testimony provided no explanation of how the gun came to be located where it was found. He argues that this conflicted with his own testimony, and that any such requirement equates to improper burden shifting.

Generally, prosecutorial comment on a defendant's failure to present evidence constitutes improper burden shifting.¹⁶ It is, however, proper for a prosecutor to comment on the failure of the defense to counter or explain evidence presented.¹⁷ Even if the comment made by the prosecution at trial was an attempt to call into question Wright's failure to present testimony or evidence, it was proper. Additionally, any taint as to burden shifting was removed by the district court's subsequent clarification.. Therefore, any error in this connection was harmless.¹⁸

Flight jury instruction

This court will not reverse a judgment by reason of an erroneous jury instruction unless the error "was prejudicial to the substantial rights of the appellant."¹⁹ This court reviews a district court instruction to a jury for abuse of discretion.²⁰ Where there is evidence to suggest that Wright fled with consciousness of guilt, such an instruction is

¹⁶Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001).

¹⁷Id.

¹⁸Chapman v. California, 386 U.S. 18, 24 (1967).

¹⁹Pfister v. Shelton, 69 Nev. 309, 310, 250 P.2d 239, 239 (1952).

²⁰Tavares v. State, 117 Nev. 725, 734, 30 P.3d 1128, 1133 (2001).

proper.²¹ We conclude that the instruction was a valid instruction given based on the uncontradicted evidence of Wright's flight.

Prosecutorial misconduct

Wright seeks reversal based upon the prosecutor's questioning of him during certain portions of the trial. Wright complains that after he denied that he slumped in the rear seat of the police car, the prosecutor then improperly asked Wright if Officer James was lying when she testified that he had slumped in the seat. Wright asserts that the prosecutor was improperly goading Wright into accusing the officer of lying.

A defendant must object to improper remarks at the time they are made, so that the district judge can cure the error by admonishment and instruction.²² This court may address an issue of plain error sua sponte if the error substantially affected the defendant's rights, including if the error, "(1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings."²³ Prosecutors are not entitled to state that a defendant is lying.²⁴ Although Wright failed to object at trial to the questioning and the questions were improper,

²¹Walker v. State, 113 Nev. 853, 870-71, 944 P.2d 762, 773 (1997).


²²Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002).

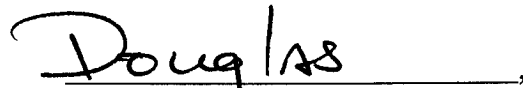
²³Id. (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds by Libby v Nevada, 516 U.S. 1037 (1996); see also NRS 178.602.

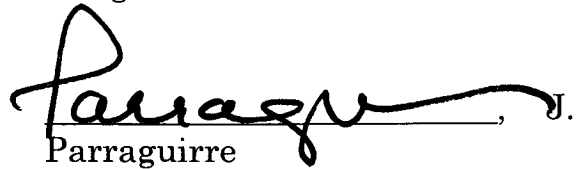
²⁴Ross v. State, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990)

therefore, the interchange had no effect upon the outcome of the trial.
Therefore, Wright's argument lacks merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. Joseph T. Bonaventure, 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