

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH ANTONETTI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43221

FILED

DEC 20 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction for attempted murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Joseph Antonetti was charged with one count of attempted murder with the use of a deadly weapon, in relation to the November shooting of his roommate, Susan Smith. The jury found Antonetti guilty of attempted murder with use of a deadly weapon, and he was sentenced to 96 to 240 months in prison, plus an equal and consecutive sentence for the deadly weapon enhancement.

Antonetti claims that the following errors committed below warrant reversal of his conviction: (1) the district court erroneously allowed the admission of a photograph of his tattoos to identify him as the shooter, (2) the State committed prosecutorial misconduct when it failed to disclose a motion to exclude the tattoo photograph from Antonetti's unrelated December shooting case, (3) the district court erroneously disallowed impeachment testimony, and (4) the district court erroneously admitted evidence of the unrelated December shooting.

We conclude that the district court did not err in its rulings and affirm the conviction and corresponding sentence.

Tattoo photograph

Antonetti argues that a photograph introduced into evidence at trial, that displayed his Nazi themed tattoos, was irrelevant to the issue of identity. Additionally, the photograph was the subject of a motion to exclude at Antonetti's earlier trial for an unrelated December shooting (December shooting). During the first trial, the district court never made a ruling on the admissibility of the photograph. Antonetti contends that the State committed prosecutorial misconduct by introducing the photograph without first advising the defense that it was the subject of a motion to exclude filed in the earlier trial.

Pursuant to NRS 47.040, "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and: (a) in case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection." Absent a timely objection to preserve the issue, this court will not grant an appellant relief absent plain error affecting an appellant's substantial rights.¹

After properly authenticating the photograph at trial, the State moved for its admission. The court specifically asked the defense if there was any objection, and counsel stated "no objection, your honor."²

It is not disputed that the identity of the shooter was at issue. Stewart positively identified his assailant from comparing the tattoos he

¹See Bridges v. State, 116 Nev. 752, 761, 6 P.3d 1000, 1007 (2000).

²Because Antonetti failed to object to the admission of the photographs at trial, this court need not consider this issue on appeal. However, we review the record to determine if Antonetti's substantial rights were affected.

noticed on Antonetti's arms to the tattoos in the photograph. Because the same gun was used in both shootings, the photograph tended to show that the December shooter, whom Stewart identified, was also the November shooter. Therefore, we conclude the photographic evidence was relevant and its probative value outweighed the danger of unfair prejudice pursuant to NRS 48.035. Without a showing of unfair prejudice, Antonetti's contentions fail under the clear error standard.

In light of Antonetti's failure to object to the admission of the photographs at trial and the fact that Antonetti fails to demonstrate how the photograph affected his substantial rights, we conclude the district court did not err in admitting the photographs.

Prosecutorial misconduct

Antonetti asserts that it was prosecutorial misconduct for the deputy district attorney not to disclose to the defense, or the district court, that the photograph displaying Antonetti's Nazi themed tattoos was subject to a motion to exclude before the November shooting charge was severed from the December shooting charges. The same deputy district attorney prosecuted both trials.

First, Antonetti failed to object to the asserted instance of prosecutorial misconduct at trial. Therefore, he waived the issue on appeal.³ Furthermore, we conclude his argument lacks merit.

Antonetti cites State v. Lotter,⁴ a Nebraska case, to support his prosecutorial misconduct argument. We conclude that Lotter is inapplicable, and his reliance on this case is misplaced.

³See Pray v. State, 114 Nev. 455, 459, 959 P.2d 530, 532 (1998).

⁴586 N.W.2d 591 (Neb. 1998).

Insofar as Antonetti argues that the prosecution failed to disclose the fact that his tattoos were the subject of an earlier motion in a different case, he is claiming the State violated its obligation pursuant to Brady v. Maryland.⁵ “Brady v. Maryland held that suppression of material evidence justifies a new trial ‘irrespective of the good faith or bad faith of the prosecution.’”⁶ “Evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed.”⁷

Before his trial for the December shooting, Antonetti filed a motion in limine to preclude prejudicial evidence. Antonetti argued that his tattoos involving Nazi themes were not relevant and any probative value was substantially outweighed by potential prejudice. Antonetti requested that the court exclude all photographic depictions of him with visible tattoos in an effort to avoid potential prejudice should the jury see the images of the swastika and Adolph Hitler. The district court never ruled on the motion and it appears the State did not introduce the photographs.

Although “[f]ailure to supply [a] transcript or continue the trial until it [is] furnished is prejudicial error[.]”⁸ Antonetti has failed to demonstrate that the State withheld the record of the previous hearing and thereby violated its duty to disclose material evidence. Furthermore,

⁵373 U.S. 83 (1964).

⁶Giglio v. United States, 405 U.S. 150, 153 (1972) (quoting Brady, 373 U.S. at 87).

⁷Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000).

⁸Beasley v. State, 81 Nev. 431, 435, 404 P.2d 911, 913 (1965).

Antonetti fails to offer any argument that there is a reasonable likelihood that the result of his trial would be different had his counsel been aware of the earlier motion.

Impeachment testimony

During his investigation of the November shooting, Detective Kniffen interviewed a witness named Kroftsman. Kroftsman told Kniffen that he was not present during the shooting and Kniffen recorded the statement in a police report. While Kniffen was cross-examined, the defense asked him what Kroftsman said at the scene. The State objected, claiming the statement was hearsay. Antonetti's counsel responded that the statement contradicted Smith's testimony. The district court sustained the objection.

Antonetti claims that the district court committed reversible error by excluding impeachment evidence under hearsay grounds. He asserts that the statement was not hearsay because it was offered to impeach the testimony of an earlier witness and was not offered for its truth because Smith had testified that Kroftsman was present during the shooting.

As a preliminary matter, Antonetti did not make an offer of proof at trial regarding the substance of Kroftsman's statement. Therefore, this court need not consider the issue on appeal.⁹

Nonetheless, hearsay is defined in pertinent part as "a statement offered in evidence to prove the truth of the matter asserted."¹⁰

⁹See Burgeon v. State, 102 Nev. 43, 47, 714 P.2d 576, 579 (1986).

¹⁰NRS 51.035.

The district court's decision regarding the admissibility of an alleged hearsay statement is subject to a harmless error standard of review.¹¹

Kroftsman's statement was offered to prove that Kroftsman was not present at the scene of the crime, or to impeach Smith's testimony that Kroftsman was present during the shooting. If the statement was offered to prove that Kroftsman was not present during the shooting, it was hearsay pursuant to NRS 51.035, because Kroftsman never testified at trial; he was called as a witness in the previous trial for the December shooting, but he invoked his privilege against self-incrimination. Therefore, the statement was properly excluded if offered to prove the truth of the matter asserted.

Assuming the statement was not offered to prove that Kroftsman was not present at the scene, but was instead offered to impeach Smith, the court could have independently sustained the objection because the statement was not proper impeachment testimony pursuant to NRS 50.075 through NRS 50.105. In Summers v. State, this court held that the district court erred in admitting a suicide note offered into evidence to impeach the testimony of another witness.¹² Specifically, because the person who committed suicide had not testified at trial and therefore was not subject to cross-examination, the exception to the hearsay rule was not satisfied.¹³

¹¹See generally Deutscher v. State, 95 Nev. 669, 685, 601 P.2d 407, 417-18 (1979).

¹²102 Nev. 195, 201, 718 P.2d 676, 680 (1986).

¹³Id.

Here, Antonetti did not attempt to impeach Smith with Kroftman's testimony. Antonetti attempted to impeach Smith with Kniffen's recollection of Kroftsman's statement. Kroftsman was not subject to cross-examination when he made the statement, because he made the statement to a police officer. Therefore, the statement did not fall within any hearsay exception, and was therefore properly excluded.¹⁴

Finally, even if the district court erred, the error was harmless because another investigating officer testified that Kroftsman told her he was not at the scene when Smith was shot. During Officer Hagar's cross-examination the district court allowed her to testify that Kroftsman said he was not present during the shooting even though the State interposed four separate objections to the statement on the grounds that it was hearsay. Therefore, Antonetti's argument lacks merit because the jury had already heard the desired statement.

Evidence of unrelated murder case

The district court conducted a Petrocelli hearing outside the presence of the jury. At the conclusion of the hearing the district court decided to allow evidence of the December shooting to be used during trial. The court found that because Antonetti had been convicted of the December shooting, it had been proven by clear and convincing evidence. Further, the district court noted that because the same gun was used in both shootings, the December evidence would be admissible "for the

¹⁴Antonetti cites Collins v. State, 113 Nev. 1177, 1183, 946 P.2d 1055, 1060 (1997), for the general proposition that impeachment testimony is admissible over hearsay objections. However, the facts of Collins are inapposite to this case, and Collins does not apply.

limited purpose of establishing identity.” Finally, the district court found the probative value outweighed the prejudice to Antonetti.

Antonetti argues that because the two shootings were not part of a common scheme or plan, evidence of the December shooting should not have been admitted in his trial for the November shooting. Furthermore, even if the evidence was relevant, it was more prejudicial than probative. Antonetti also advises that he offered to stipulate to the fact that he was convicted of the December shooting and that a .25 caliber gun was used.

NRS 48.045(2) prohibits the introduction of evidence of other crimes, wrongs, or acts as proof of a person's character, but allows such evidence to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. However, while this evidence is admissible for these 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.”¹⁵

Before the district court admits other crimes evidence, “the State must demonstrate, at a hearing outside the presence of the jury, that: (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

¹⁵Rhymes v. State, 121 Nev. ___, ___, 107 P.3d 1278, 1280 (2005).

prejudice.”¹⁶ If the district court decides to admit the evidence, it has a duty to ensure that proper limiting instructions are given to the jury.¹⁷

Finally, “[t]he trial court's determination of whether to admit or exclude [prior bad acts] evidence will not be disturbed on appeal absent manifest error.”¹⁸

Neither party disputes that the State proved the December shooting by clear and convincing evidence. The December shooting was primarily used to show the identity of the shooter. This was clearly relevant to Antonetti's defense in chief; that he was not present at the time the shooting occurred. Additionally, Smith's credibility was in issue because she had been using methamphetamine the day of the shooting and the defense aggressively cross-examined her on this subject in an attempt to impeach her. Under these circumstances, the probative value of the December shooting outweighed the danger of unfair prejudice. Therefore, we conclude that the district court did not err in admitting evidence of the December shooting.

CONCLUSION

The defense did not object to the introduction of the photograph showing Antonetti's Nazi themed tattoos, and it was not prosecutorial misconduct to fail to inform Antonetti's new trial counsel of a motion filed in the previous case regarding the photograph. Additionally,

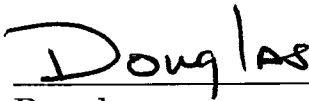
¹⁶Id. at ___, 107 P.2d at 1281 (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).

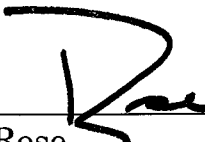
¹⁷See Meek v. State, 112 Nev. 1288, 1295, 930 P.2d 1104, 1108-09 (1996).

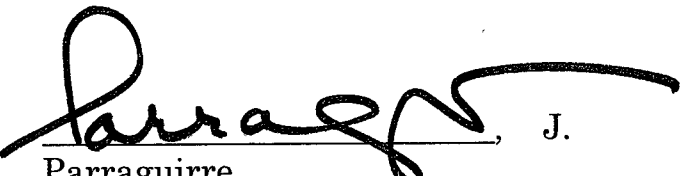
¹⁸Walker v. State, 116 Nev. 442, 446, 997 P.2d 803, 806 (2000).

the district court properly sustained the State's objection to the impeachment evidence on the grounds of hearsay. Finally, evidence of the December shooting was relevant to the issue of the identity of the November shooter and the probative value of the evidence outweighed its prejudicial effect. Accordingly we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Rose


_____, J.
Parraguirre

cc: Hon. Stewart L. Bell, District Judge
Amesbury & Schutt
Attorney General
Clark County District Attorney David J. Roger
Clark County Clerk