IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY DENNIS EDLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43422

FILED

MAY 17 2005

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

ORDER OF AFFIRMANCE

This is a direct appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellant Jeffrey Edler was convicted, after a two-day trial and pursuant to a jury verdict, of burglary, home invasion, and robbery of a victim 65 years old or older.[1] On May 7, 2004, the district court sentenced Edler to serve the following prison terms: 12 to 60 months for the burglary; 24 to 108 months for the home invasion; and 24 to 108 months, plus a consecutive term of 24 to 108 months as an enhancement, for the robbery of a victim 65 years old or older. Edler's sentences were imposed to run concurrently. He now appeals.

Edler first contends that trespass is a lesser-included offense of burglary and that the district court erred by refusing to give the jury a

[1]The jury also found Edler guilty of one count of battery with the intent to commit a crime. However, the district court stated in the judgment of conviction that the battery charge was "consumed with the robbery charge," and Edler neither was adjudged guilty of battery by the district court nor received any sentence based upon it. Although Edler challenges the sufficiency of the evidence supporting the battery, we conclude that this issue is moot.

trespass instruction. This court recently addressed this issue in Smith v. State and held that "trespass is not a lesser-included offense of burglary."[2] Although Edler acknowledges Smith, he nonetheless disregards its clear holding and cites to Block v. State to support his argument.[3] Smith expressly overruled Block on this issue.[4] Edler's argument is without merit, and the district court did not err by refusing his proposed instruction on trespass.

Edler next contends that the district court erred by refusing to instruct the jury that he may have acted in self-defense. This court has held that "[a] defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it."[5]

Here, evidence admitted at trial showed that the victim, 68-year-old Simon Reinstein, lived in a small apartment in downtown Las Vegas. He was asleep at about 9:30 p.m. on the night of April 8, 2003. Edler broke down the apartment door, entered Reinstein's apartment, jumped on him, and struggled with Reinstein who was afraid for his life. Reinstein reached for a loaded handgun that he kept by his pillow and fired a single shot into the apartment ceiling in an attempt to defend himself against Edler's attack. Reinstein testified that during the struggle

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[2]120 Nev. ___, ___, 102 P.3d 569, 571 (2004).

[3]95 Nev. 933, 936, 604 P.2d 338, 341 (1979), overruled by Smith, 120 Nev. at ___, 102 P.3d at 571.

[4]See Smith, 120 Nev. at ___ & n.7, 102 P.3d at 571 & n.7.

[5]Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983).

an unidentified man accompanying Edler took his wallet, which contained about $200.00 in cash and various pieces of identification. Edler and the other man fled with both Reinstein's wallet and handgun.

The evidence showed that it was Edler who unlawfully entered Reinstein's apartment and who was the initial aggressor. It was thus Reinstein, and not Edler, who was justifiably acting in self-defense. That Edler may have become afraid for his life after he initiated the attack and fled Reinstein's apartment provided no basis for a self-defense instruction.[6] The district court properly refused this proposed instruction.

Edler finally contends that the State engaged in three separate instances of prosecutorial misconduct during the closing of his trial. When the remarks of a prosecutor are alleged to have constituted misconduct, this court reviews the trial record to determine whether the alleged remarks were improper and, if so, whether they "'so infected the proceedings with unfairness as to make the results a denial of due process.'"[7] However, this court will not lightly overturn a defendant's criminal convictions on the basis of improper remarks by a prosecutor standing alone, and the remarks must always be read in context.[8]

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[6]See Mirin v. State, 93 Nev. 57, 59, 560 P.2d 145, 146 (1977) (providing that a defendant was not entitled to a jury instruction on self-defense where the defendant was the initial aggressor in the conflict); cf. Runion v. State, 116 Nev. 1041, 1046-47, 13 P.3d 52, 55-56 (2000).

[7]See Butler v. State, 120 Nev. ___, ___, 102 P.3d 71, 83 (2004) (quoting Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004)).

[8]Id.

Edler first contends that misconduct occurred when the prosecutor made the following remarks about Reinstein's apartment door to the jury during closing:

> Well, the defense might argue, well, how do you know when this damage was done. It could have been like that for any amount of time. It is an old apartment. That's true. However, who in their right mind would live on 316 North Ninth Street without a door that would close let alone lock.

(Emphasis added.) Edler's counsel objected to the prosecutor's remarks on the grounds that they were speculative and based on facts not admitted into evidence. The district court disagreed and overruled the objection.

It is well settled that it is improper for a prosecutor to "'argue facts or inferences not supported by the evidence.'"[9] It is permissible, however, for a prosecutor "to comment on testimony, to express . . . views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence."[10]

Here, Reinstein testified that he had lived in his apartment for 18 years. Reinstein described his neighborhood as a "war zone" and testified that he locked his door before he went to sleep on April 8—the night he was attacked by Edler. The prosecutor asked the jurors to draw a reasonable inference based upon the evidence. We conclude that no misconduct occurred by these remarks.

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[9]Thomas, 120 Nev. at 48, 83 P.3d at 825 (quoting Williams v. State, 103 Nev. 106, 110, 734 P.3d 700, 703 (1987)).

[10]Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001).

Edler contends second that the prosecutor committed misconduct during closing with the following remarks about the nature of Reinstein's injuries:

> Mr. Reinstein only has a small bruise. Even if we were going to believe this to be true, the small bruise, that's still a battery. If you go back and look at the battery instructions, a small bruise would suffice.
>
> But I would go a step further and point your attention to Renee Schwartz, the sister's testimony, when she saw him a day or so later after this occurred. She said his face looked like it had just been pummeled, and I don't think it takes a medical expert to be able to explain the fact that immediately after an incident like this occurs, you're going to have the fresh looking, the rosy red as the witnesses described injuries on your face . . .
>
> . . . .
>
> They take a couple of days to develop, and then that's when you get the real coloration, and that's what Renee was testifying to.

Edler's counsel objected to the remarks on the basis that they were not based upon any facts or medical testimony admitted into evidence. The district court noted the objection, but did not sustain it.

Here, it appears that the prosecutor incorrectly described the testimony of Renee Schwartz during these closing remarks. Our review of the record reveals that Schwartz testified that she observed her brother's injuries on the night of the attack and stated that "[h]e looked like he had been pummeled, his face." Yet Schwartz did not testify about seeing her brother's injuries in the days after the attack. Rather, it was Reinstein's longtime friend, Jacqueline Dalton, who testified that she saw him a few days after the attack and observed that "the whole side of his face was

purple." Thus, it appears that the prosecutor confused the testimony of Schwartz with that of Dalton.

In addition to the testimony of Schwartz and Dalton, other evidence was admitted regarding the nature of Reinstein's injuries. Reinstein himself testified that during the attack Edler jumped on top of him, struggled with him, grabbed his wrist, and injured his face. Las Vegas Metropolitan Police Department Crime Scene Analyst Yolanda McClary, who arrived at the crime scene on the night of the attack, observed an abrasion on Reinstein's face. LVMPD Patrol Officer Shawn Romprey, who was also at the crime scene that night, observed what he described as fresh "red and swollen" marks on the side of Reinstein's face. Pictures of Reinstein's injuries from that night were also admitted into evidence.

Evidence was thus admitted that showed that Reinstein's injuries were red in color on the night of the attack and had changed to a purplish color a few days later. That much of this evidence was based upon lay witness testimony, instead of the testimony of a medical expert, does not render the prosecutor's remarks improper.[11] The prosecutor's confusion about Schwartz's and Dalton's testimony appears to have been inadvertent and done without prejudice to the overall fairness of Edler's trial. We conclude that Edler is not entitled to relief on this issue.

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[11]See NRS 50.265 (providing that a lay witness may testify about inferences rationally based upon things he or she perceived and are helpful to an understanding of his or her testimony or a determination of a fact in issue).

Edler finally contends that the prosecutor committed misconduct during closing when he remarked to the jury the following:

> Mr. Reinstein after this happened ran outside. He's a proud man. He's not going to just stay in his apartment. For whatever reason you believe, he went outside. He saw the neighbor. He said call the police. That neighbor went right back inside. There are no other 911 calls logged other than what Mr. Reinstein had called in himself.
>
> I'm asking you, ladies and gentlemen, don't be like that neighbor. That neighbor—Mr. Reinstein even said, you know, I live in a war zone. I live in an area where people don't want to get involved.
>
> I am asking you, ladies and gentlemen, to return a verdict of guilty on all four counts and get involved. Thank you very much.

(Emphasis added.) Soon after the prosecutor made these remarks, Edler's counsel moved for a mistrial. The district court denied the motion.

Edler contends that the prosecutor's remarks asking the jurors to "get involved" were improper. Edler primarily relies upon this court's holding in Haberstroh v. State for support.[12] The prosecutor in Haberstroh referred to the jurors as "the conscience of the community" during the penalty phase of the defendant's first-degree murder trial.[13] This court held that to the extent that such remarks were even improper,

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[12]See 105 Nev. 739, 742, 782 P.2d 1343, 1345 (1989); see also Snow v. State, 101 Nev. 439, 447, 705 P.2d 632, 638 (1985).

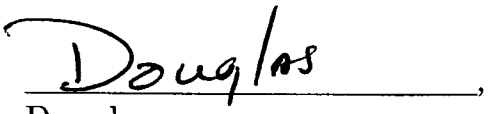
[13]See Haberstroh, 105 Nev. at 742, 782 P.2d at 1345.

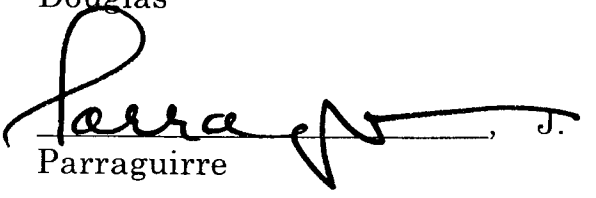
no reversible error occurred because the district court admonished the jurors regarding the remarks and cured any possible unfair prejudice.[14]

The prosecutor's remarks in this case asking the jurors to "get involved" were not inflammatory and did not invoke improper community pressure. We perceive no misconduct in the remarks, let alone the degree of unfair prejudice that would demand reversing Edler's convictions and granting him a new trial. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


, J.
Maupin


, J.
Douglas


, J.
Parraguirre

cc: Hon. Sally L. Loehrer, 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

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[14]Id.