IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK WELLINGTON ROSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43557

FILED

MAY 19 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary while in the possession of a deadly weapon (counts I and IV), robbery with the use of a deadly weapon, victim 65 years of age or older (count II), and robbery with the use of a deadly weapon (counts III and V).[1] Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced appellant Patrick Wellington Ross to serve a prison term of 24-84 months for count I, a concurrent prison term of 24-84 months with an equal and consecutive prison term for the use of a deadly weapon for count II, a concurrent prison term of 24-84 months with an equal and consecutive prison term for the use of a deadly weapon for count III, a concurrent prison term of 24-84 months for count IV, and a consecutive prison term of 24-84 months with an equal and consecutive prison term for the use of a deadly weapon for count V.

[1]The conviction stems from two separate robberies committed by the appellant; the robbery of two different Albertson's on June 20 and June 23, 2003 (district court case nos. C194021 and C193699).

Ross contends that the State violated his right to a fair trial and due process based on several instances of prosecutorial misconduct. First, Ross argues that the prosecutor commented on defense's failure to produce evidence, which impermissibly shifted the burden of proof. More specifically, Ross claims that during the cross-examination of his alibi witness, and again during the State's rebuttal closing argument, the prosecutor impermissibly shifted the burden of proof by commenting on the alibi witness' inability to corroborate her allegedly exculpatory testimony. We disagree with Ross' contention.

This court has repeatedly stated that it is improper for a prosecutor to comment on the defense's failure to produce evidence because such comments shift the burden of proof to the defense.[2] In Evans v. State, however, this court cited approvingly to the proposition that "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."[3] In other words, "in some instances, the prosecutor may comment on a defendant's failure to substantiate a claim."[4]

Initially, we note that although defense counsel objected during the State's cross-examination of the alibi witness, and thus,

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[2]Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996).

[3]117 Nev. 609, 631, 28 P.3d 498, 513 (2001) (citing U.S. v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992)).

[4]Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001).

preserved the issue for review on appeal, defense counsel did not object during the State's rebuttal closing argument. The failure to raise an objection with the district court generally precludes appellate consideration of an issue.[5] This court may nevertheless address an alleged error if it was plain and affected the appellant's substantial rights.[6]

We conclude that the objected-to line of questioning amounted to an attack on the alibi witness' credibility and did not impermissibly shift the burden of proof onto Ross. The alibi witness claimed she was with Ross at the time of the robberies, and the prosecutor permissibly challenged her story and her failure to corroborate her account. The prosecutor also questioned the alibi witness, Ross' fiancé and his child's mother, about her failure to inform either the prosecutor or law enforcement personnel about Ross' alleged alibi prior to Ross' filing in the district court of a notice of his intention to claim an alibi.[7] During the rebuttal closing argument, the prosecutor merely referred to the alibi witness' testimony. Finally, we note that the jury was instructed prior to deliberations that it was the State's burden to prove guilt beyond a

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[5]See Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993) (holding that the failure to object to prosecutorial misconduct generally precludes appellate consideration).

[6]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Pray v. State, 114 Nev. 455, 459, 959 P.2d 530, 532 (1998).

[7]See NRS 174.233(1) ("a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall . . . file and serve upon the prosecuting attorney a written notice of his intention to claim the alibi").

reasonable doubt and that Ross was "under no obligation to present any evidence or testify himself." Therefore, we conclude that no plain error occurred and that the State did not commit prosecutorial misconduct in this regard.

Second, Ross contends that the State committed prosecutorial misconduct during closing arguments by characterizing his sole witness, his fiancé, as a liar. Ross argues that the prosecutor's statements led the jury to believe that it was the State's opinion that the witness was a liar. We disagree with Ross' contention.

This court has had a long-standing rule that prohibits a prosecutor from calling a defendant's witnesses or the defendant a "liar."[8] In Rowland v. State,[9] we relaxed this prohibition and set a new standard for determining when the prosecutor's characterization of the credibility of a witness amounts to misconduct. We explained that "[a] prosecutor's use of the words 'lying' or 'truth' should not automatically mean that prosecutorial misconduct has occurred. But condemning a defendant as a 'liar' should be considered prosecutorial misconduct."[10] For situations that fall somewhere between these extremes, a case-by-case analysis is

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[8]See Ross v. State, 106 Nev. 924, 927-28, 803 P.2d 1104, 1106 (1990) see also Rowland v. State, 118 Nev. 31, 39 n.6, 39 P.3d 114, 119 n.6 (2002).

[9]118 Nev. at 39-40, 39 P.3d at 119.

[10]Id. at 40, 39 P.3d at 119.

required and "we must look to the attorney for the defendant to object and the district judge to make his or her ruling."[11]

Once again, we note that Ross did not object to the prosecutor's allegedly improper comments, and therefore, we will only review the argument for plain error.[12] We conclude that no plain error occurred. The prosecutor never called the witness a liar, and instead merely discussed her motives for lying, including the fact that she was Ross' fiancé. Further, Ross' accomplice testified on behalf of the State, and during closing arguments, the State also discussed the accomplice's motive for lying and compared the two opposing witnesses' motives. The State implied that accomplice's testimony was more credible. Such an argument is permissible under our case law and did not amount to misconduct.[13]

Third, Ross contends that the prosecutor committed misconduct by disparaging defense counsel during rebuttal closing arguments. Ross challenges the following statement by the prosecutor:

> Defense counsel – and there's a saying in the law, Defense counsel gets up here, when the facts are against you, you bang on the law, and when the law is against you, you bang on the facts. And when they're both against you, you bang on the

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[11]Id.

[12]See NRS 178.602; Parker, 109 Nev. at 391, 849 P.2d at 1067.

[13]See, e.g., Ross, 106 Nev. at 927, 803 P.2d at 1106 ("A prosecutor may demonstrate to a jury through inferences from the record that a defense witness's testimony is palpably untrue.").

> bar in front of you. And that's what you just saw [defense counsel] do, right?

Ross argues that the prosecutor's comments suggest that "all defense counsel, in particular [Ross' counsel], are sneaky, cunning, or deceptive." We disagree.

This court has stated that "it is . . . inappropriate for a prosecutor to make disparaging remarks pertaining to defense counsel's ability to carry out the required functions of an attorney."[14] Once again, we note that Ross did not object to the prosecutor's statement. Further, we cannot conclude that the remarks above prejudiced Ross in any way amounting to reversible plain error. Even if the remarks were inappropriate, we conclude that the State presented overwhelming evidence of Ross' guilt, and "where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error."[15]

Fourth, Ross contends that the State committed prosecutorial misconduct during its rebuttal closing argument by "invok[ing] the power of the State" and "usurp[ing] the jury's function as the proper arbiter of truth." Ross argues that the comments made by the prosecutor led the jury to believe "that the State and the entire criminal justice system has already concluded [that Ross] is guilty." Again, Ross did not object during the State's argument and therefore the assignment of error is subject to a review for plain error. The argument challenged by Ross was part of the

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[14]Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991).

[15]King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).

prosecutor's summary of the case against him. We further note that the jury was properly instructed only to consider as evidence the testimony of witnesses, exhibits, and facts admitted or agreed to by counsel; the jury was also instructed that the statements, arguments, and opinions of counsel were to be considered as evidence. Therefore, we conclude that no plain error occurred.[16]

Fifth, Ross contends that his conviction on the two counts of robbery with the use of a deadly weapon (counts III and V) violates his right to be protected against double jeopardy. In a related argument, Ross also contends that the multiple counts of robbery were impermissibly redundant and duplicative. More specifically, Ross argues that the June 23, 2003, robbery of Albertson's, as charged in counts III and V, "can only be one robbery since there was only one taking of $7,000 though multiple victims were present when they provided the robber money as a 'team.'" Once again, we note that Ross failed to object to or challenge the sufficiency of the criminal information in the district court, and as we have repeatedly stated, failure to raise an objection with the district court generally precludes appellate consideration of an issue.[17] Nevertheless, our review of the issue reveals that no plain error occurred and that Ross' contention is without merit.

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[16]See Klein v. State, 105 Nev. 880, 884, 784 P.2d 970, 973 (1989) (it is permissible for prosecutor to argue evidence before the jurors and suggest reasonable inferences that might be drawn from it).

[17]See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.[18] Thus, the Double Jeopardy Clause protects against both multiple prosecutions and multiple punishments for the "same offense." The instant case clearly involves only a single prosecution; therefore, the only double jeopardy protection possibly implicated is the prohibition against multiple punishments. We conclude that none of these abuses occurred.

The two counts of robbery with the use of a deadly weapon were not impermissibly redundant. On appeal, Ross concedes that there were two victims. We further note that during the robbery on June 23, 2003, there were two separate takings, one from a cash register drawer and another from a safe in the manager's office. The first taking was in the presence of two victims, including a store manager, and the second involved only the same store manager. This court has affirmed such convictions in the past, holding that evidence of the unlawful taking of an employer's property, by use of force or fear directed at two employees, both of whom were in joint possession and control of the property taken,

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[18]See U.S. Const. amend. V; State v. Lomas, 114 Nev. 313, 315, 955 P.2d 678, 679 (1998) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

supports a conviction for two separate counts of robbery.[19] As such, multiple robberies may be charged where there are multiple victims involved in a single event. In such circumstances, multiple robbery convictions in a single trial do not violate the Double Jeopardy Clause and are not impermissibly redundant.[20] Therefore, we conclude that Ross' contention is without merit.

Sixth, Ross contends that the district court erred in granting the State's motion to consolidate the two cases for trial. Ross filed an opposition to the State's motion in the district court. Ross argues that the joinder of two robberies was improper because "the similarities are greatly outweighed by their dissimilarities."[21] We disagree with Ross' contention.

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[19]See Klein, 105 Nev. at 885, 784 P.2d at 973-74; see also NRS 200.380(1) (defining "robbery"); NRS 193.165 (deadly weapon enhancement statute).

[20]See, e.g., Commonwealth v. Levia, 431 N.E.2d 928, 929-31 (Mass. 1982) (upholding multiple robbery convictions where defendant entered convenience store and forcibly obtained money from cash register operated by one employee and gas pump receipts collected by another employee); People v. Wakeford, 341 N.W.2d 68, 75 (Mich. 1983) (upholding multiple robbery convictions where defendant entered grocery store armed with sawed-off shotgun and took money belonging to store from two employees), called into doubt on other grounds by People v. Baskin, 378 N.W.2d 535 (Mich. Ct. App. 1985); Commonwealth v. Rozplochi, 561 A.2d 25, 28-30 (Pa. Super. Ct. 1989) (upholding multiple robbery convictions where defendant threatened two employees at financial institution and obtained money from safe).

[21]See NRS 173.115; NRS 174.155; NRS 174.165.

NRS 173.115(2) states that multiple offenses may be joined and charged in a consolidated information if the offenses are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." "'The test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever.'"[22] Moreover, "[i]f . . . evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed."[23] The joinder of charges is reversible only if the simultaneous trial of the offenses has a "'substantial and injurious effect or influence in determining the jury's verdict.'"[24] In reviewing the issue of joinder on appeal, this court will consider the quantity and quality of the

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[22]Honeycutt v. State, 118 Nev. 660, 667, 56 P.3d 362, 367 (2002) (quoting United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976)).

[23]Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).

[24]Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 564 (1990) (quoting United States v. Lane, 474 U.S. 438, 450 (1985)).

evidence supporting the individual convictions.[25] "[J]oinder decisions are within the sound discretion of the trial court."[26]

We conclude that the district court did not abuse its discretion in granting the State's motion to consolidate the two cases for trial. The district court conducted a hearing, heard the arguments of counsel, and determined "that this should be done all together." We note that evidence from one robbery would have been admissible in a trial for the other robbery to establish identity and a common scheme or plan. The robberies occurred within days of each other, both places robbed were Albertson's grocery stores, and Ross was similarly described by witnesses in both cases. Further evidence regarding the amount of cash and the black handgun and sunglasses found in Ross' possession would be admissible in both trials. Finally, the joinder of the cases did not substantially and injuriously effect or influence the jury's verdict because the State presented sufficient evidence of the two robberies. Accordingly, we conclude that in the interest of judicial economy the cases were properly joined.

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[25]See, e.g., Brown v. State, 114 Nev. 1118, 1124-25, 967 P.2d 1126, 1130-31 (1998) (overwhelming evidence of guilt, along with other factors, supported joinder); Middleton v. State, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998) (no error in joining charges where sufficient evidence supported convictions); Mitchell, 105 Nev. at 739, 782 P.2d at 1343 (joinder did not have substantial and injurious effect where convincing evidence supported each conviction).

[26]Robins, 106 Nev. at 619, 798 P.2d at 563; Shannon v. State, 105 Nev. 782, 786, 783 P.2d 942, 944 (1989).

Seventh, Ross contends that the district court erred in allowing the State to improperly impeach his alibi witness, his fiancé. More specifically, Ross argues that the State's cross-examination of the witness regarding her writing of bad checks and inability to hold a checking account was improper because the matter should have been the subject of a pretrial hearing and motion to admit prior bad acts pursuant to NRS 48.045. Additionally, Ross claims that the district court had a duty to limit the State's cross-examination because this evidence was "marginally relevant and highly prejudicial." Ross also argues that the State improperly impeached the witness by failing to prove her prior conviction.[27] Ross preserved this issue for review on appeal by objecting during the cross-examination. We conclude that Ross' contention is without merit.

This court has stated that the decision to admit or exclude evidence rests within the discretion of the trial court.[28] Furthermore, "this court will respect the trial court's determination as long as it is not manifestly wrong."[29] "NRS 50.085(3) permits impeaching a witness on cross-examination with questions about specific acts as long as the

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[27]See NRS 50.095 ("impeachment by evidence of conviction of crime"); NRS 176.105 (detailing what a judgment of conviction must set forth).

[28]See Greene v. State, 113 Nev. 157, 166, 931 P.2d 54, 60 (1997), overruled on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

[29]See Colon v. State, 113 Nev. 484, 491, 938 P.2d 714, 719 (1997).

impeachment pertains to truthfulness or untruthfulness and no extrinsic evidence is used."[30]

We conclude that the district court did not err in overruling Ross' objection to State's line of questioning. A review of the trial transcript reveals that nothing during the cross-examination was elicited that indicated that the witness was ever convicted of a crime, and the State never sought to impeach the witness by introducing extrinsic evidence of a prior judgment of conviction. Specific instances of conduct relevant to truthfulness may be inquired into on cross-examination, and writing bad checks is conduct relevant to a witness' truthfulness.[31] Therefore, we conclude that the evidence was properly admitted.

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[30]Collman v. State, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000). NRS 50.085(3) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090.

[31]Cf. Butler v. State, 120 Nev. ___, ___, 102 P.3d 71, 79-80 (2004) ("Attempted forgery is a crime involving dishonesty and conduct that goes to [the witness'] truthfulness as a witness.").

Eighth, Ross contends that the district court erred in denying his motion to suppress evidence seized as a result of an invalid search warrant. Ross argues that probable cause did not exist to support the issuing of the telephonic search warrant because it was based on the uncorroborated statements of his accomplice. We disagree.[32]

A search warrant may issue only upon facts sufficient to satisfy a magistrate that probable cause exists to believe that seizable items will be found if the search is conducted.[33] This court has stated that "[w]hether probable cause is present to support a search warrant is determined by a totality of circumstances."[34] "A deficiency in either an informant's veracity and reliability or his basis of knowledge 'may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability.'"[35] This court will not conduct a de novo review of a probable cause determination, but instead will determine "whether the evidence viewed as a whole provided a substantial basis for the magistrate's finding of probable

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[32]Ross also states, "Arguments contained in defense's motion to suppress search warrant are incorporated by reference." An appellant, however, is not allowed to incorporate by reference documents filed in the district court. See NRAP 28(e).

[33]See NRS 179.045(1).

[34]Doyle v. State, 116 Nev. 148, 158, 995 P.2d 465, 471 (2000) (citing Illinois v. Gates, 462 U.S. 213, 238 (1983); Keesee v. State, 110 Nev. 997, 1002, 879 P.2d 63, 67 (1994)).

[35]Doyle, 116 Nev. at 158, 995 P.2d at 471 (quoting Gates, 462 U.S. at 233).

cause."[36] And finally, this court will give great deference to the issuing judge's determination of probable cause.[37]

We conclude that the district court did not err in denying Ross' motion to suppress. At a pretrial hearing, the district court stated that "there was sufficient probable cause to support the issuance of the search warrant." In particular, we note that a witness spotted a black male adult running between houses in the area of the robbery, and eventually get into what was later discovered to be the accomplice's car. The witness wrote down the license plate number of the getaway car. After being located, the accomplice admitted to being the driver of the car seen fleeing from the scene of the robbery committed on June 20, 2003. The investigating officers discovered at his residence $500.00 in brown wrappers hidden underneath his mattress; the accomplice stated that was what he got paid for his part in the robbery. The accomplice then accurately described Ross as a black male adult, explained that Ross was the perpetrator of the robbery, and gave the officers information about where to locate him and his girlfriend. He further informed the officers that Ross had a black .45 automatic handgun in his possession, similar to that described by the victims of the robbery. The search warrant sought by the investigating officers was for the location where Ross and his girlfriend were later found; and when executed, the black handgun, clothes described by the

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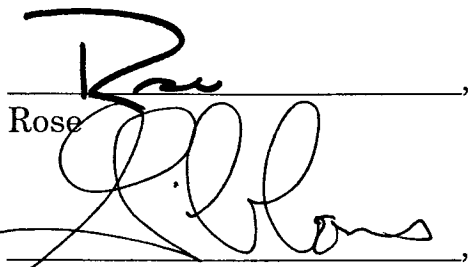
[36]Keesee, 110 Nev. at 1002, 879 P.2d at 67 (citing Massachusetts v. Upton, 466 U.S. 727 (1984)).

[37]See Gates, 462 U.S. at 236; Doyle, 116 Nev. at 158, 995 P.2d at 471.

witnesses, and close to $6,000.00 were discovered. Based on all of the above, we conclude that the totality of the circumstances reveals a substantial basis for the issuance of the search warrant.[38]

Therefore, having considered Ross' contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

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

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[38]Ross also contends that cumulative error "usurped his right to a fair trial and due process of law." Because we have rejected Ross' assignments of error, we conclude that his contention is without merit. See U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors").