IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM H. BICKOM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44016

FILED

JAN 11 2006

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 trafficking in a controlled substance (count I) and manufacturing in a controlled substance (count II). Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court sentenced appellant William H. Bickom to serve a prison term of 10 to 25 years for count I and a concurrent prison term of 3 to 15 years for count II.

Bickom first contends that the district court erred in admitting Sargeant Faulis' hearsay testimony that William Hodek, the owner of the Castleberry apartment searched, told him that Bickom and his co-defendant, Lisa Gill, lived in the apartment. Bickom contends that the admission of the hearsay testimony violated his right to confrontation and was prejudicial because it was the only evidence establishing that he was an actual resident of the apartment. In its appellate brief, the State concedes that the testimony was inadmissible, but argues that the error involving the admission of such testimony was harmless beyond a reasonable doubt. We conclude that the admission of the hearsay testimony does not warrant reversal of Bickom's conviction.

Our review of the record indicates that the error involving the admission of the hearsay testimony was harmless beyond a reasonable

doubt because there was sufficient independent evidence establishing that Bickom was a resident of the apartment. In particular, Sergeant Faulis testified that it appeared that a man lived in the apartment because there were both men's and women's clothing in the closet found during the course of the search, and in conducting surveillance on the apartment, he had previously observed Bickom enter and exit the apartment numerous times. Additionally, Bickom's fingerprint was found on a glass component of the methamphetamine lab and numerous pieces of paperwork bearing his name were found in a nightstand drawer. Finally, Bickom testified that he lived with his girlfriend and co-defendant Gill "forever," including in 1999, the year that the Castleberry apartment was searched, and there was testimony presented at trial that Gill admitted to residing in the apartment. In light of the overwhelming independent evidence that Bickom lived in the apartment, we conclude that any error in admitting the hearsay testimony was harmless beyond a reasonable doubt.[1]

Second, Bickom contends that the district court erred in denying his motion for a mistrial based on Bruton v. United States.[2] In particular, Bickom alleges that he was denied the right to cross-examine Gill, his non-testifying co-defendant, about an incriminating statement admitted into evidence at trial. Particularly, the following colloquy occurred at trial:

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[1]See Turner v. State, 98 Nev. 243, 246, 645 P.2d 971, 972 (1982) ("Where the independent evidence of guilt is overwhelming, the improperly admitted evidence is harmless error and the resulting conviction will not be reversed.").

[2]391 U.S. 123 (1968).

> DA: [D]efense counsel had gone through some of the car titles with you. Those were found -- where were those found?
>
> Sergeant Faulis: In Ms. Gill's purse.
>
> DA: Okay. Do you recall defendant Gill making any sort of statement regarding those titles?
>
> Sergeant Faulis: She stated that she was holding them for Billy.
>
> Counsel for Bickom: Objection. Outside the presence of the jury, judge.
>
> The Court: That will be stricken. The objection will be sustained.

We conclude that the district court did not err in denying the motion for a mistrial.

In Bruton, the United States Supreme Court held that the admission of a co-defendant's confession inculpating the other defendant in a joint trial constituted a violation of the confrontation clause, and this violation could not be overcome by an instruction to the jury to disregard the statement.[3]

In this case, we disagree with Bickom that Gill's statement offended Bruton's protective rule. Gill's statement is not a confession and not facially inculpatory because it does not expressly reference Bickom, only "Billy." Additionally, the criminal charges against Bickom did not directly involve the car titles, and only when linked with other evidence introduced at trial could the evidence be considered inculpatory.[4]

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[3]Id. at 135.

[4]See Richardson v. Marsh, 481 U.S. 200, 208 (1987) (recognizing that statement that is not facially incriminating but "became so only when

continued on next page . . .

Nonetheless, even assuming the statement about the car titles was facially inculpatory, we conclude that Bickom was not prejudiced by the alleged Bruton violation. The statement was not admitted into evidence; instead, the district court struck the testimony and ordered the jurors to disregard it.[5] Further, even assuming error, we conclude it would have been harmless.[6] As previously discussed, there was sufficient independent evidence proving that Bickom constructively possessed the methamphetamine and materials used to manufacture the same. Therefore, the testimony regarding the car titles did not unfairly prejudice Bickom.[7]

. . . *continued*
linked with evidence introduced later at trial" does not amount to Bruton violation).

[5]See Lisle v. State, 113 Nev. 679, 692-93, 941 P.2d 459, 468 (1997), limited on other grounds by Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998) (holding that Confrontation Clause is not violated by admission at joint trial of inculpatory hearsay statement where jury is given appropriate limiting instruction because there was not an overwhelming probability that the jurors would be unable to obey the instruction to disregard such evidence in assessing defendant's guilt); cf. Stevens v. State, 97 Nev. 443, 444-45, 634 P.2d 662, 663-64 (1981).

[6]See Harrington v. California, 395 U.S. 250, 251-54 (1969) (holding Bruton error may be harmless).

[7]See United States v. Vejar-Urias, 165 F.3d 337, 340 (5th Cir. 1999) (Bruton error may be harmless where, disregarding codefendant's statement, there is otherwise ample evidence against defendant);(quoting United States v. Hickman, 151 F.3d 446, 457 (5th Cir. 1998); see, e.g., Lisle, 113 Nev. at 693, 941 P.2d at 468 (recognizing that any error in admitting codefendant's statement would be harmless because other witnesses testified to hearing defendant confess).

Third, Bickom contends that the district court erred in failing to grant the motion to sever. Specifically, Bickom contends that the motion should have been granted because: (1) he and his co-defendant had antagonistic defenses; (2) his co-defendant made statements that incriminated him; and (3) his defense counsel had previously prosecuted his co-defendant in an unrelated case. We conclude that Bickom's contention lacks merit.

NRS 174.165(1) permits the trial court to sever a joint trial if it appears that the defendant is prejudiced by joinder of defendants for trial. However, "severance should only be granted when there is a 'serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'"[8] There are situations in which inconsistent defenses may support a motion for severance, i.e., where the defenses are mutually exclusive, but the doctrine is very limited, and "mutually antagonistic defenses are not prejudicial per se."[9] An appellant therefore has a "'heavy burden' to show that the district court abused its discretion in failing to sever the trial."[10]

In this case, Bickom has failed to show that the district court abused its discretion in denying his motion to sever. The record indicates that Bickom's and Gill's defenses were not mutually exclusive; both defense

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[8]Rodriguez v. State, 117 Nev. 800, 808-09, 32 P.3d 773, 779 (2001) (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

[9]Jones v. State, 111 Nev. 848, 854, 899 P.2d 544, 547 (1995); see also Marshall v. State, 118 Nev. 642, 645, 56 P.3d 376, 378 (2002).

[10]Rodriguez, 117 Nev. at 809, 32 P.3d at 779 (quoting Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990)).

theories were similar, namely, that the police were sloppy in collecting evidence and failed to gather enough evidence to prove that Bickom and Gill were in constructive possession of the drugs. Additionally, although the district court denied the motion to sever, it granted Bickom's motion to exclude Gill's statement to police that Bickom resided in the apartment thereby avoiding potential prejudice arising from the admission of Gill's statements at a joint trial. Finally, Bickom has failed to show how he was prejudiced by Gill's hostility towards Bickom's defense counsel. Accordingly, the district court did not err by refusing to sever the trial.

Fourth, Bickom contends that reversal of his conviction is warranted because the prosecutor engaged in misconduct during closing argument by commenting on Bickom's failure to present evidence. Specifically, the prosecutor stated:

> This is easy. They are trying to confuse you saying oh, he was beaten up by police and this and that although with regard to being beaten up by the police, there's no evidence of that. He brought no photos to show his injuries, he reported it to no one and today is the first time any of us have heard of this.
>
> Why would officers risk their careers to beat up this defendant? And if they were going to, wouldn't they do a better job than just barely cutting him with a knife to the fact that he didn't even know he had been cut. Why on earth would they do that. There is no logical reason.

As a preliminary matter, we note that Bickom failed to object to the alleged instance of prosecutorial misconduct. As a general rule, the failure to object to prosecutorial misconduct precludes appellate review

absent plain or constitutional error.[11] After considering the isolated comment in context, we conclude that the prosecutor's remarks did not rise to the level of improper argument that would justify overturning Bickom's conviction.[12]

Fifth, Bickom contends that reversal of his conviction is warranted because the district court allowed two police officers to testify as experts without qualifying them as expert witnesses pursuant to NRS 50.275 and Mulder v. State.[13] In particular, Bickom contends that the police officers were not qualified to give expert testimony about whether the apartment contained a methamphetamine lab because they had only worked in the narcotics division for eighteen months and three years, respectively. We conclude that Bickom's contention lacks merit.

NRS 50.275 provides that a qualified expert may testify to matters within his specialized scope of knowledge in order to aid the trier of fact. The admissibility of expert testimony is within the sound discretion of the district court.[14]

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[11]Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987).

[12]See Greene v. State, 113 Nev. 157, 169-70, 931 P.2d 54, 62 (1997), ("the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process"), modified prospectively on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

[13]116 Nev. 1, 14, 992 P.2d 845, 853 (2000) (holding that the district court should not permit a witness to testify as an expert when the court has concluded that the witness is not a qualified expert).

[14]Smith v. State, 100 Nev. 570, 572, 688 P.2d 326, 327 (1984).

Preliminarily, we note that, at trial, defense counsel failed to object on the grounds that the police officers lacked sufficient specialized training or experience to form an opinion on whether the apartment contained the components of a methamphetamine lab. Nonetheless, even assuming defense counsel had properly objected, we conclude that the district court did not abuse its discretion in allowing the police officers to testify because they were sufficiently qualified to provide expert testimony on the issue. During the prosecutor's voir dire, both officers indicated that they had taken specialized training courses on the production of methamphetamine and also had prior work experience with investigations involving methamphetamine manufacturing. Accordingly, the district court did not abuse its discretion in allowing the expert testimony of the police officers.

Sixth, Bickom contends that NRS 178.562[15] violates constitutional principles of fundamental fairness and due process of law because it allows the prosecution "two bites at the apple." As Bickom

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[15]The statute provides that:

> Dismissal or discharge as bar to another prosecution.
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> 1. Except as otherwise provided in NRS 174.085, an order for the dismissal of the action, as provided in NRS 178.554 and 178.556, is a bar to another prosecution for the same offense.
>
> 2. The discharge of a person accused upon preliminary examination is a bar to another complaint against him for the same offense, but does not bar the finding of an indictment or filing of an information.

recognizes, this court has upheld NRS 178.562 against similar constitutional challenges.[16] We decline to revisit this issue.

Seventh, Bickom contends that there was insufficient evidence to sustain his conviction for trafficking and manufacturing methamphetamine because the evidence established nothing more than his mere presence in the apartment. Our review of the record on appeal, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[17] The jury could reasonably infer from the evidence presented, including the testimony of the law enforcement officers and criminalists, that Bickom constructively possessed a trafficking quantity of methamphetamine and a majority of the materials required to manufacture methamphetamine.[18] It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[19]

Eighth, Bickom contends that reversal of his conviction is warranted because Judge Bell, who presided over his trial, was the Clark County District Attorney at the time Bickom was indicted and the

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[16]See State of Nevada v. District Court, 114 Nev. 739, 964 P.2d 48 (1998).

[17]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

[18]See NRS 453.3385(3); NRS 453.322.

[19]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

indictment was filed in Bell's name. Citing to NRS 1.230,[20] Bickom argues that recusal was mandatory because of the appearance of implied bias. We conclude that Bickom's contention lacks merit.

Preliminarily, we note that Bickom failed to preserve this issue for appeal by filing a motion to recuse Judge Bell in district court pursuant to NRS 1.235 or NCJC 3E.[21] Nonetheless, even assuming the issue was preserved for review, we conclude that recusal was not mandatory merely because the indictment was filed under Bell's name. There is no allegation here, or indication in the record, that Bell, while acting as Clark County District Attorney, signed a document filed with the court or made a court appearance as an attorney in the case and therefore NRS 1.230 and NCJC 3E are not implicated.[22] Although the indictment was filed under Bell's name, a deputy district attorney actually signed the indictment and made the pretrial court appearances in the case. Accordingly, we conclude that mandatory recusal was not warranted.

Ninth, Bickom contends that cumulative error denied him the ability to obtain a fair trial. Because we have rejected Bickom's

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[20]NRS 1.230(2)(c) provides that a judge shall not preside over a proceeding when implied bias exists, including "[w]hen he has been attorney or counsel for either of the parties in the particular action or proceeding before the court."

[21]See id.; see also PETA v. Bobby Berosini, Ltd., 111 Nev. 431, 894 P.2d 337 (1995), overruled by Towbin Dodge, LLC v. Dist. Ct., 121 Nev. ___, 112 P.3d 1063 (2005).

[22]Cf. Turner v. State, 114 Nev. 682, 686, 962 P.2d 1223, 1225 (1998) (mandatory recusal required where the trial judge had previously appeared on behalf of the district attorney's office, at one of appellant's prior sentencing hearings, as well as the initial arraignment of the case over which he was now presiding as judge).

assignments of error, we conclude that his allegation of cumulative error lacks merit and that he received a fair trial.[23]

Having considered Bickom's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Stewart L. Bell, District Judge
Karen A. Connolly
Mueller & Associates
Attorney General
Clark County District Attorney David J. Roger
Clark County Clerk

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[23]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").