IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL DEAN ADKISSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44581

FILED

MAY 17 2006

JANETTE M. BLOOM
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury trial, of one count of second degree murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

Appellant Michael Dean Adkisson was convicted of second degree murder with use of a deadly weapon for shooting and killing Steven Borgens. In the weeks before the shooting, Adkisson made hostile telephone calls to Borgens' girlfriend, Amy Beach, regarding her relationship with Borgens and stereo speakers that had been removed from Adkisson's apartment. Beach helped Adkisson's girlfriend, Patricia Colacino, remove the stereo speakers after Colacino had a fight with Adkisson. Colacino then loaned the speakers to Stephanie Roundtree. Adkisson then made a disparaging telephone call to Roundtree, which resulted in Roundtree taking the stereo speakers to Borgens' and Beach's residence, where Colacino had been staying during her fight with Adkisson.

Adkisson and Colacino subsequently reunited, after which they drove to Borgens' and Beach's residence to retrieve the stereo speakers. After arriving at the residence, Adkisson shot and killed Borgens. Adkisson and Colacino immediately left the scene. A short

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distance from the shooting, Adkisson engaged in a standoff with the police, during which he threatened to take his own life as well as the lives of the officers.

At trial, Beach and Roundtree were permitted to testify regarding the telephone calls made by Adkisson, as well as to their observations of his apartment while they were removing the stereo speakers. Additionally, evidence was admitted concerning the manner in which Adkisson left the scene and his subsequent standoff with the police. During its closing argument, the State commented on certain witnesses' testimony and the law of self-defense.

Adkisson raises five arguments on appeal: (1) that the testimony of Beach and Roundtree constituted impermissible character evidence; (2) that the district court erred in denying his motion in limine; (3) that the jury was improperly given a flight instruction; (4) that the State's comments during closing arguments constituted prosecutorial misconduct; and (5) that he was deprived of a fair trial due to the cumulative effect of the alleged errors. We disagree.

Character evidence – prior bad acts

Adkisson made several menacing telephone calls to Beach during which he called her derogatory names, ridiculed her for dating an ex-felon, and demanded that the stereo speakers be returned. During one of these telephone calls, Borgens and Adkisson exchanged threats. Adkisson also made an intimidating telephone call to Roundtree after learning that she possessed the stereo speakers. At trial, both Beach and Roundtree testified as to those telephone calls. Adkisson argues that this evidence was improper character evidence.

Absent manifest error, this court will give great deference to a trial court's decision to admit evidence of prior bad acts.[1] Pursuant to NRS 48.045(1), "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." "However, evidence of other wrongs may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident."[2]

Adkisson failed to object to both Beach's and Roundtree's testimony concerning the telephone calls they received from Adkisson.[3] Regardless, such evidence does not constitute plain error because both Beach's and Roundtree's testimony concerning the telephone calls was admissible pursuant to NRS 48.045(2). The telephone calls demonstrated Adkisson's motive and intent; both of which are admissible prior bad acts. On the night Adkisson went to retrieve the speakers, Adkisson claims he shot and killed Borgens out of self-defense. Beach's and Roundtree's testimony served to negate Adkisson's claim by showing that Adkisson disliked Beach and her relationship with Borgens, and was both angry and aggressive about getting the speakers back. Thus, the admission of such

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[1]Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

[2]Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998) (citing NRS 48.045(2)).

[3]Allred v. State, 120 Nev. 410, 418, 92 P.3d 1246, 1252 (2004) ("Failure to object to an issue at trial will generally preclude appellate review of that issue unless there is plain error.").

testimony did not result in plain error and did not prejudice Adkisson's substantial rights.[4]

Motion in limine

Next, Adkisson contends that the district court erred in denying his motion in limine to exclude evidence of him leaving the scene of the shooting and his interactions with the police thereafter. Adkisson argues that this evidence was irrelevant to the issue of self-defense since it occurred after the shooting.

"A district court's ruling on a motion in limine is reviewed for an abuse of discretion."[5] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."[6] "Conduct occurring after a crime may be relevant to proving the commission of the crime."[7] "The conduct of an accused which shows consciousness of guilt is admissible, even though it may in itself be criminal."[8]

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[4]We have considered Adkisson's arguments that Beach's and Roundtree's testimony concerning the condition of his apartment was improper character evidence and relieved the State of its burden of proof, and find them to be without merit.

[5]Whisler v. State, 121 Nev. ___, ___, 116 P.3d 59, 62-63 (2005).

[6]NRS 48.015.

[7]Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000) (overruled on separate grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002)).

[8]Reese v. State, 95 Nev. 419, 423, 596 P.2d 212, 215 (1979).

We conclude that the evidence concerning Adkisson immediately leaving the scene of the shooting and subsequently engaging in a standoff with police was relevant because it demonstrated Adkisson's consciousness of guilt. Such conduct makes it less probable that Adkisson shot Borgens out of self-defense since, generally, someone would not flee the scene and then threaten their own life as well as the lives of law enforcement if they had just shot someone in self-defense. As a result, we conclude that the district court did not abuse its discretion in denying Adkisson's motion in limine.[9]

Flight instruction

Jury instruction no. 31 permitted the jury to consider the evidence that Adkisson ran back to his car and drove off after shooting Borgens, as evidence of consciousness of guilt. Adkisson argues that this instruction was improper because there was inadequate evidence of flight.

A district court has broad discretion in settling jury instructions which will not be disturbed on appeal absent an abuse of discretion or judicial error.[10] Flight instructions are proper where evidence of flight has been presented.[11] Leaving the scene of a crime does not, in and of itself, constitute flight.[12] Rather, flight "embodies the idea of

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[9]We have also considered Adkisson's arguments that such evidence was improper res gestae evidence and/or improper character evidence. We conclude that both of these arguments similarly lack merit.

[10]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

[11]Potter v. State, 96 Nev. 875, 875-76, 619 P.2d 1222, 1222 (1980).

[12]Id. at 876, 619 P.2d at 1222.

going away with a consciousness of guilt and for the purpose of avoiding arrest."[13]

We conclude that the jury instruction on flight was not an abuse of discretion because evidence of flight was presented which indicated a consciousness of guilt and a desire to avoid apprehension. Testimony at trial established that, after shooting a shirtless Borgens, Adkisson and Beach ran back to their car and sped off. Before they were able to drive out of the gated community, a police officer pulled Adkisson over. Adkisson then refused to exit his vehicle and, as more officers arrived on the scene, revved his engine while yelling that he was going to "start running over officers." Adkisson also threatened to take his own life. Thus, the evidence demonstrated more than Adkisson merely leaving the scene; it embodied a consciousness of guilt and a desire to avoid arrest. As such, it was within the district court's discretion to issue a jury instruction on flight.

Prosecutorial misconduct

During its closing argument, the State argued that the fact that tests were not performed on the additional shell casings found at the scene were "red herrings." The State commented that the additional shell casings were there for the defense to test as well. The State also made a comment that in order for the jury to believe Colacino's testimony, it would have to believe that all of the other witnesses were "just pure lairs." Finally, the State commented on the law of self-defense stating that "a bare fear of death or great bodily injury is not sufficient to justify the use of deadly weapon against another." Adkisson did not object to any of these

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[13]Id.

portions of the State's closing argument save the comment that the shell casings were there for the defense to test as well. The district court sustained this objection, and the jury was admonished to disregard the comment.[14]

Adkisson argues that the above portions of the State's closing argument constitute prosecutorial misconduct and improperly shifted the burden of proof to the defense by misstating the law.

"As this court has stated, '[i]n order to preserve the issue of prosecutorial misconduct for appeal, the defendant must raise timely objections and seek corrective instructions.'"[15] "[F]ailure to object precludes appellate review of the matter unless it rises to the level of plain error."[16] "Prosecutorial misconduct can and will result in the reversal of convictions when it denies defendants their right to a fair trial."[17]

We conclude that the State's comments that the additional shell casings found were "red herrings," and that in order to believe Colacino the jury would have to believe that all of the other witnesses were "just pure lairs," did not constitute plain error. Colacino's testimony

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[14]Consequently, we decline to address the State's comment that the defense could have tested the additional shell casings as well. See Owens v. State, 96 Nev. 880, 885, 620 P.2d 1236, 1240 (1980) (where an objection is sustained and the jury admonished, this court presumes the admonition was followed by the jury).

[15]Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (alterations in the original) (quoting Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993), cert. denied, 510 U.S. 1000 (1993)).

[16]Anderson v. State, 121 Nev. ___, ___, 118 P.3d 184, 187 (2005).

[17]Jones v. State, 101 Nev. 573, 577, 707 P.2d 1128, 1131 (1985).

was inconsistent with that of the other testifying witnesses and therefore, the State's comment, in and of itself, did not constitute misconduct.[18] Moreover, the evidence of guilt was overwhelming and therefore the comment did not affect Adkisson's substantial rights.[19]

Likewise, we conclude that the State's comments on the law of self-defense did not constitute plain error. Specifically, the State's comment that "a bare fear of death or great bodily injury is not sufficient to justify the use of deadly weapon against another," was read directly from jury instruction no. 30. Jury instruction no. 30 was taken, almost verbatim, from this court's sample instruction recited in Runion v. State.[20] Accordingly, the State's comments were proper.[21]

Cumulative error

Finally, Adkisson argues that the cumulative effect of the alleged errors deprived him of a fair trial. We disagree.

To preserve the issue of cumulative errors for review, "objections must be made to the challenged remarks at the time, and the court must be requested to rule upon the objection, to admonish counsel,

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[18]Rowland v. State, 118 Nev. 31, 40, 39 P.3d 114, 119 (2002) ("A prosecutor's use of the words 'lying' or 'truth' should not automatically mean that prosecutorial misconduct has occurred.").

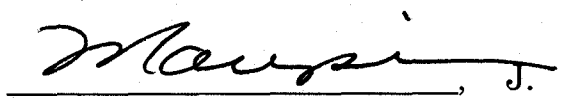
[19]Id. at 38, 39 P.3d at 118 (stating that in a plain error setting, the stronger the State's case is the less likely a prosecutor's misconduct will be considered prejudicial thereby affecting the defendant's substantial rights).

[20]116 Nev. 1041, 1050-51, 13 P.3d 52, 58-59 (2000).

[21]We have considered Adkisson's other arguments surrounding the alleged prosecutorial misconduct and find them to be without merit.

and instruct the jury."[22] The majority of Adkisson's assignments of error on appeal were not objected to during trial. Moreover, we have concluded that Adkisson's assignments of error on appeal lack merit. Accordingly, we conclude that Adkisson's cumulative effect argument is likewise without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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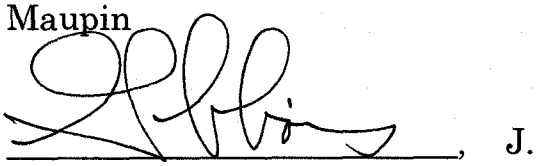

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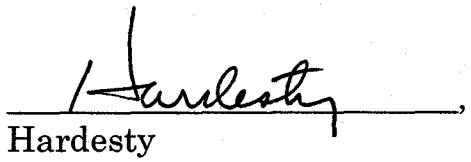

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cc: Hon. Nancy M. Saitta, District Judge
Robert L. Langford & Associates
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[22]Kelso v. State, 95 Nev. 37, 44, 588 P.2d 1035, 1040 (1979).