

IN THE SUPREME COURT OF THE STATE OF NEVADA

LEON MCCOY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44583

FILED

APR 07 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced appellant Leon McCoy to serve two consecutive prison terms of life with parole eligibility in 20 years.

McCoy was charged with one count each of murder with the use of a deadly weapon, burglary, robbery with the use of a deadly weapon, and possession of a firearm by an ex-felon for the shooting death of a male individual who purportedly drove into McCoy's neighborhood looking to purchase marijuana. At trial, two eyewitnesses testified that they observed McCoy, who they had known for many years, enter the victim's vehicle and engage in a struggle. The eyewitnesses described hearing gunshots and seeing McCoy exit the victim's vehicle; the vehicle then crashed into a brick wall. The cause of the victim's death was determined to be a gunshot wound to the chest. In addition to the eyewitness testimony, McCoy's ex-girlfriend testified at trial that she overheard McCoy saying that he "smoked" a guy and the guy went

through a brick wall. After a four-day trial, the jury convicted McCoy of first-degree murder with the use of a deadly weapon.

McCoy first contends that his constitutional rights to due process and equal protection were violated when one of the State's eyewitnesses to the murder called McCoy a "known criminal." At trial, the following colloquy occurred:

Prosecutor: Having seen what you saw [the shooting at issue], did you feel it was important to go and [tell police] --

Eyewitness: I felt like it was important, but didn't want to jeopardize my family.

Prosecutor: What do you mean by that?

Eyewitness: Because he's a known criminal.

Defense Counsel: I'm going to object to that, Your Honor. Move to strike and --

Eyewitness: He's violent.

Defense counsel: -- may we approach now, Judge?

Eyewitness: We've had problems --

District Court: Excuse me, ma'am, you need to stop for just a sec.

Outside the presence of the jury, defense counsel moved for a mistrial. The prosecutor informed the district court that he did not intentionally solicit the information and, before trial, had instructed the witness not to talk about other bad acts of the defendant. The district court denied the motion for the mistrial, noting that the statement was not intentionally solicited by the prosecutor. The district court also admonished the jury to disregard the witness's last statement and ordered that it be stricken from the record.

Relying on legal authority from other jurisdictions, McCoy argues that the testimony was so prejudicial that it could not be overcome by a curative statement. We disagree and conclude that the error was harmless beyond a reasonable doubt. The witness statement was inadvertent, the isolated reference to criminal activity was indirect, and the district court immediately gave a curative instruction.¹ Therefore, we conclude that the isolated remark did not affect the reliability of the verdict.²

McCoy next contends that reversal of his conviction is warranted because a State's witness had improper communications with the jurors. Specifically, the bailiff informed the judge that two jurors had told him that they overheard a State's witness "yelling about [defense counsel] trying to put words in her mouth." The district court noted that the witness's comments did not involve anything substantive, and asked defense counsel if he wanted to question the witness about her comments outside of the courtroom. Defense counsel declined the district court's invitation to question the witness but moved for a mistrial. The district court denied the motion. McCoy alleges that the district court erred in denying his motion because the State failed to overcome the presumption of prejudice that arises when a third party comes into contact with the jurors. We disagree.

¹See Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 281-82 (1992).

²See Thomas v. State, 114 Nev. 1127, 1141-42, 967 P.2d 1111, 1121 (1998).

The district court's determination of whether a defendant was prejudiced by witness communication with a juror will not be overturned absent a manifest abuse of discretion.³ In this case, we conclude that the district court did not abuse its discretion in denying the motion for mistrial because the witness communication did not involve a substantive matter before the jury.⁴

Finally, McCoy contends that the prosecutor committed misconduct in closing argument by referring to the dead victim as a "white man." Specifically, McCoy contends that there was no permissible reason for the prosecutor to refer to the ethnicity of the dead victim during closing argument and the injection of race into the trial was constitutionally infirm. The State correctly points out that McCoy has failed to provide this court with the transcript of the closing argument for review. An appellant has the burden to provide a proper appellate record.⁵ This court can only rule on matters contained within the record.⁶ Therefore, from the

³Roever v. State, 111 Nev. 1052, 1055, 901 P.2d 145, 146 (1995).

⁴Reese v. State, 95 Nev. 419, 424, 596 P.2d 212, 217 (1979) (mistrial not warranted where the communication between the jurors and the witness involves a subject unrelated to the criminal case before the jury).

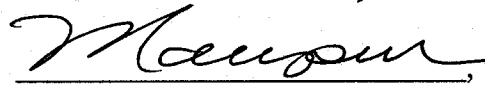
⁵Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); see also NRAP 28(e) (requiring references in briefs to matters in the record be supported by citation to appendix or transcript and stating that briefs); NRAP 30(b) (requiring inclusion in appellant's appendix of matters essential to the decision of issues presented on appeal).

⁶Phillips v. State, 105 Nev. 631, 634, 782 P.2d 381, 383 (1989).

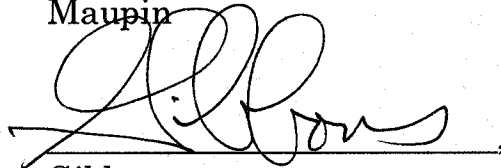
record before us, we cannot conclude that the prosecutor committed misconduct.

Having considered McCoy's arguments and concluded that they lack merit, we

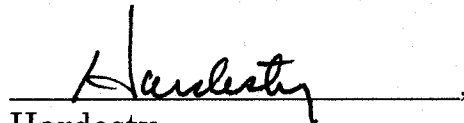
ORDER the judgment of conviction AFFIRMED.

 J.

Maupin

 J.

Gibbons

 J.
Hardesty

cc: Honorable Jackie Glass, District Judge
Gregory L. Denué
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk