IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN PERRY A/K/A STEVEN ALEXANDER PERRY, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44599

FILED

SEP 27 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon jury verdict, of one count of murder with the use of a deadly weapon, and one count of attempted robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

In this order, we consider whether Steven Perry was entitled to suppression of his statements to police because police failed to notify Perry's parent or guardian of Perry's in-custody status. We also consider Perry's claims of prosecutorial misconduct, and that the district court erroneously admitted prejudicial testimony and deprived him of the right to present a meaningful defense. For the reasons stated below, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 8, 2003, Steven Perry, Tyrone Williams and Julius Bradford physically attacked Benito Zambrano-Lopez on a sidewalk in a Las Vegas residential neighborhood. When Zambrano-Lopez tried to escape, Williams pulled out a gun and shot Zambrano-Lopez four times. According to an eye witness, Perry and Bradford ran away, but Williams momentarily stayed behind to "pat down" their victim before running as

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well. Despite the "pat down," police found a wallet containing $123, a watch, and a set of keys in Zambrano-Lopez's pants pockets. Paramedics transported him to a local hospital where he died the next day.

Later on the day of the attack, the trio met together with other friends, at which time Williams said "he had just laid a Mexican man down," and that the three had just tried to rob the Mexican man. Neither Bradford nor Perry said anything to contradict these statements at the gathering. However, Perry did say that, after being shot, the man "curled up and said aye, aye, aye."

The next day, based on eyewitness descriptions, police apprehended Williams and Perry near the area of the attack. The arrest concerned the prior day's shooting, as well as Williams' and Perry's attempts to evade police, their possession of a stolen vehicle, and their commission of a strong-arm robbery to procure the vehicle. Perry was 17 at the time of these incidents.

Police took two statements from Perry on the day of his arrest—one alone and one with Williams present. Police read Perry his Miranda[1] rights before the first interview and obtained Perry's signature on a "rights of persons arrested" card.[2] During both interrogations, Perry denied being present during the shooting incident. While police questioned Perry and Williams together, Williams admitted to shooting Zambrano-Lopez for gang recognition. Perry then told Williams not to cooperate. Police eventually separated the two and, as the police separated them, Perry began "throwing" gang signs. Due to Perry's lack of

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[1]Miranda v. Arizona, 384 U.S. 436 (1966).

[2]At the time, Perry claimed that he was an adult.

cooperation, one of the detectives physically pushed Perry into his seat and handcuffed him to a pole in another interview room.

In a third interview held the following week at juvenile hall, the investigating officer informed Perry of his juvenile rights.[3] In this, the officer verbally and in writing informed Perry that he had the right to have a parent present. Perry stated that he understood his rights, and signed the accompanying "rights" card. He then admitted to being present at the assault and that he and his friends needed money. He also indicated that Zambrano-Lopez swung at Williams first when Williams approached him. Perry further claimed that he told Williams to leave the victim alone, but Williams would not listen. Perry denied harming Zambrano-Lopez in any way.

The State charged Perry with first-degree murder and attempted robbery, both with the use of a deadly weapon. The criminal information included the following theories in support of the murder count: premeditation, felony murder, aiding and abetting and conspiracy. The district court presided over a five-day jury trial, after which the jury found Perry guilty on both counts. The district court sentenced Perry to matching consecutive terms of 20 years to life in prison on the murder conviction, and matching consecutive terms of 24 to 120 months for the attempted robbery conviction. The district court ordered concurrent service of the attempted robbery and murder sentences and awarded Perry 535 days credit for time served in local custody. Perry appeals.

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[3]By this time, police confirmed that Perry was 17 years of age.

DISCUSSION

Parental notification

Perry argues that the district court erroneously admitted his statements to police because they failed to contact his parents as required under NRS 62C.010(2)(a).[4] This statute provides that, if an officer takes a child into custody, the officer shall attempt to notify the child's parent or guardian, if known, without undue delay. The State responds that NRS 62B.330(3)(a)[5] obviated the need to notify Perry's parents or guardian in this instance. NRS 62B.330(3)(a) states that a juvenile charged with the commission of murder, attempted murder or any other offenses arising from either is removed from the jurisdiction of the juvenile court. Perry claims that NRS 62B.330(3) does not apply because he was not formally charged with murder or attempted murder at the time of his statements.

In our recent decision, Ford v. State,[6] this court clarified the parameters of parental notification under NRS 62C.010(2)(a). In Ford, this court held that "the objectives of parental notification do not prevent juvenile interrogations in the absence of parental notification,"[7] and that NRS 62C.010 does not require law enforcement to notify a juvenile suspect's parents to obtain a voluntary statement from the juvenile, irrespective of the crime investigated.[8] We further explained that the

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[4]The substance of NRS 62C.010(2) was formerly codified in NRS 62.170(1).

[5]The substance of NRS 62B.330(3) was formerly codified as NRS 62.040.

[6]122 Nev. ___, ___ P.3d ___ (Adv. Op. No. 69, July 20, 2006).

[7]Id. at ___, ___ P.3d at ____.

[8]Id.

objective of NRS 62C.010 is to notify parents when their child is in police custody; that this statute provides no remedy when police fail in this regard;[9] that, under Shaw v. State[10] and Elvik v. State,[11] absence of parental notification is only a factor to be considered in determining voluntariness; and that NRS 62C.010 "has no bearing on law enforcement decisions to interview juvenile suspects and only limited bearing on whether a juvenile's statement is voluntary."[12] In short, we held that this parental notification statute does not operate as a procedural bar to the admissibility of an otherwise voluntary statement elicited from a juvenile.

Based on this court's statements in Ford, we conclude that the district court correctly determined that the lack of parental notification in Perry's case failed to justify suppression of his statements to police.[13]

Prosecutorial misconduct

Perry claims the prosecution committed misconduct during its opening statement by creating the impression that Perry confessed to physically attacking Zambrano-Lopez with the intent to commit robbery.

The prosecution's statements with which Perry takes issue include the following:

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[9]Id.

[10]104 Nev. 100, 753 P.2d 888 (1988).

[11]114 Nev. 883, 965 P.2d 281 (1998).

[12]Ford, 122 Nev. at ___, ___ P.3d at ___.

[13]While trial counsel argued that the physical confrontation between the officers and Perry rendered his statements involuntary, appellate counsel has not raised the issue. Having reviewed the record, we cannot discern any error in the admission of Perry's statements into evidence.

> That day, everybody's pockets was just hurting, June the 8th, 2003. The day these events happened, the words, straight from the defendant's mouth, in regards to what happened out there, these are the words that go right to the intent.
>
> That day, everybody's pockets was just hurting. And because everybody's pockets were hurting, Benito Zambrano-Lopez was killed.
>
> Because of the hurt in the defendant's pocket, the fact that he didn't have money, this man was punched, kicked, and then shot brutally because the defendant, Steven Perry, also known as Little Mizz, that's a nickname that you will hear, together with Tyrone Williams, also known as T-Mizz, and Julius Bradford, also known as TTLoc. Because all of their pockets were hurting, they approached the victim with the intent to get his money so that their pockets would no longer be hurting. They intended to commit an attempted robbery.

To determine if prosecutorial misconduct was prejudicial, this court examines whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process.[14] This court is to consider the context of such statements, and "'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[15] The State may outline its theory of the case and propose those facts it intends to prove.[16] However, the prosecution

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[14]Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004).

[15]Id. (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

[16]Garner v. State, 78 Nev. 366, 371, 374 P.2d 525, 528 (1962).

must refrain from stating facts in its opening statement that cannot be proven at trial.[17]

We conclude that the prosecutor committed no misconduct in delivering the aforementioned statements. Nothing in the quoted passage intimates that Perry himself physically attacked this victim. Also, the district court admitted Perry's third statement to police, in which Perry denied harming Zambrano-Lopez, but stated that "everybody's pockets was hurting" and "[n]obody had that much money" when the three men passed Zambrano-Lopez on the street. Based on Perry's statements concerning financial need, we conclude the prosecution had a good-faith basis to argue that the suspects assaulted and killed Zambrano-Lopez for his money.

Victim-impact testimony

Perry contends that the district court abused its discretion when it permitted the prosecution to elicit victim-impact testimony in the guilt phase of a non-capital case. He specifically takes issue with testimony by the victim's son, Roberto Zambrano-Lopez, regarding (1) the victim's undocumented immigrant status, (2) his practice of working six days a week and sending money to his family in Mexico, (3) his good health before the incident, and (4) his lack of problems with the neighborhood.

Victim-impact testimony includes testimony regarding a victim's personal characteristics and the emotional impact of the victim's death on others.[18] Such testimony is permitted in capital penalty

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[17]Riley v. State, 107 Nev. 205, 212, 808 P.2d 551, 555 (1991).

[18]See Kaczmarek v. State, 120 Nev. 314, 340, 91 P.3d 16, 34 (2004).

proceedings, "but it must be excluded if it renders the proceeding fundamentally unfair."[19]

Evidence is relevant and generally admissible if it has any tendency to render the existence of any fact of consequence more or less probable than without the evidence.[20] "[R]elevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice, if it confuses the issues, or if it amounts to the needless presentation of cumulative evidence."[21] District courts have considerable discretion in determining the relevance and admissibility of evidence.[22]

We conclude that the son's testimony clearly included information that otherwise would constitute victim-impact testimony. However, the testimony regarding Zambrano-Lopez's undocumented immigrant status and his hard work to earn money was marginally relevant to draw an inference that he was carrying money on his person. Also, the testimony regarding Zambrano-Lopez's good health and lack of problems with the neighborhood was relevant because it demonstrated that he did not have certain injuries prior to the incident, and that he was not one to provoke others. In any event, given the admissions of Williams' and Perry's statements to police, the admission of this evidence was harmless beyond a reasonable doubt.[23]

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[19]Floyd v. State, 118 Nev. 156, 174, 42 P.3d 249, 261 (2002) (citing NRS 175.552(3)).

[20]Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107 (1998) (citing NRS 48.015).

[21]Id. (citing NRS 48.025; NRS 48.035).

[22]Id. at 277, 956 P.2d 107-08.

[23]See Chapman v. California, 386 U.S. 18, 24 (1967).

Conditioned admissibility of evidence

Perry claims that the district court violated his constitutional right to present a meaningful defense by placing conditions upon the admissibility of certain evidence: first, the introduction of Williams' admission that he shot Zambrano-Lopez "for the stripes"; and second, evidence indicating that Detective McGrath became physical with Perry after the second interview. Perry argues that the trial court effectively excluded such evidence by ruling that if Perry presented evidence on these issues, the State could explore gang-related aspects of the case.

We conclude that the district court did not abuse its discretion in conditioning the introduction of evidence of Williams' admission and police physicality with Perry. The district court did not outright exclude this evidence; it merely permitted each side to present facts favoring the respective cases on each issue.[24] For instance, if Perry raised the issue of Williams' admission that he shot Zambrano-Lopez "for the stripes," or to earn prominence within Perry and Williams' gang, it would not be unreasonable for the district court to then permit the State to question Perry regarding the gang-related aspect of Williams' admission. All of this evidence was relevant to the State's felony murder, premeditation and aiding and abetting theories in support of the murder charge. Similarly, if Perry raised the issue of the police use of force in connection with Perry's statements, it would not be unreasonable for the district court to then extend to the State an opportunity to explain why Perry was restrained, i.e., that he began "throwing" gang signs to intimidate Williams. Perry's

[24]Any decisions made by the defense to present or forego presentation of evidence in the wake of these rulings were purely tactical. That these decisions proved unwise or unsuccessful does not compel reversal.

argument on appeal that this marginalized his ability to address the State's felony-murder theory does not in any way vitiate the probative value of the follow-up evidence that the district court would have allowed as a condition of admission of the evidence Perry wanted to introduce.

Prejudicial testimony and mistrial

Perry contends that Detective Long's testimony opining, from a legal standpoint, that a robbery had occurred based on what others told him, prejudiced Perry's case to such an extent as to deprive him of a fair trial. Perry also claims error with the district court's failure to admonish Detective Long, and the prosecution's attempts to elicit such testimony from Detective Long. Perry also claims that Detective Long's statements were so prejudicial as to require a mistrial.

This court will not reverse a lower court's decision regarding a mistrial absent an abuse of discretion.[25]

The following factors enunciated in Geiger v. State are relevant in reviewing a denial of a motion for a mistrial:

> (1) whether the remark was solicited by the prosecution; (2) whether the district court immediately admonished the jury; (3) whether the statement was clearly and enduringly prejudicial; and (4) whether the evidence of guilt was convincing.[26]

We conclude that despite the erroneous nature of these statements, they did not merit a mistrial and do not warrant reversal.

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[25]Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996).

[26]Id. at 942, 920 P.2d at 995-96. Although the court in Geiger utilized this framework to determine whether an inadvertent reference to a defendant's prior criminal history warranted a mistrial, we conclude that this framework is applicable to cases such as Perry's, in which the motion for mistrial concerned allegedly prejudicial testimony. See id.

Although it appears that the prosecution solicited several of the statements at issue, the defense interjected numerous objections to these statements below, which the district court sustained. Further, the district court later stated in the presence of the jury that regardless of Detective Long's opinion, the determination of whether a robbery had occurred ultimately belonged to the jury.

Further, these statements did not unduly prejudice Perry, and constitute harmless error.[27] We regard the evidence of Perry's guilt to be convincing, given (1) the conflicting nature of his statements to police, and (2) testimony adduced from acquaintances privy to a conversation with Perry and the other suspects suggesting Perry's participation in the assault.

Cumulative error

Perry asserts that cumulative error deprived him of a fair trial, thereby warranting reversal.[28] We disagree. The only errors we discern on appeal concern the admission of borderline victim impact testimony and Detective Long's testimony that a robbery had occurred. We conclude that this testimony constituted harmless error.

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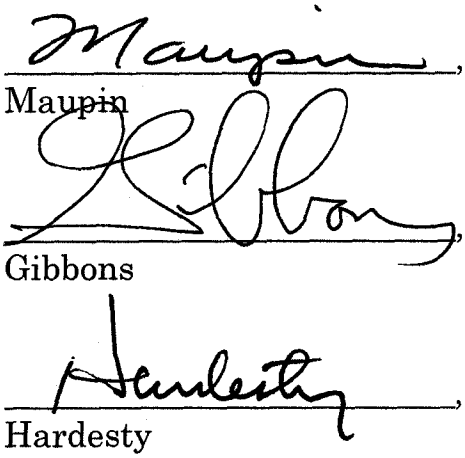
[27]See Chapman, 386 U.S. at 24.

[28]See Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994).

CONCLUSION

We conclude that Perry received a fair trial. Therefore, we ORDER the judgment of the district court AFFIRMED.



_____, J.
Maupin

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Michelle Leavitt, District Judge
Special Public Defender David M. Schieck
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk