IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM A. ROBINSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44940

FILED

JUL 10 2006

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, upon jury verdicts, of 5 counts of sexual assault of a minor under the age of 14, and 6 counts of sexual assault of a minor under the age of 16. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

In this appeal, we review the district court's decision to deny the defendant's request to represent himself following a canvass under Faretta v. California,[1] the prosecution's joinder of assaults committed upon two victims at different times, and various assertions of prosecutorial misconduct. For the reasons below, we reverse.

FACTS AND PROCEDURAL HISTORY

The State charged Robinson with multiple counts of sexual assault, lewdness, statutory seduction, and incest involving two of his daughters. Before trial, the district court heard Robinson's motion for self representation, during which it canvassed the defendant to determine his competency to waive counsel. The canvass reflected the following in-court exchange on the record:

[1]422 U.S. 806, 835 (1975).

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THE COURT: How old are you, sir?

THE DEFENDANT: Sixty.

THE COURT: How far did you go in school?

THE DEFENDANT: I have a BS/BA in marketing; I have an AA degree in business administration, and I'm 12 credits away from a BS in accounting.

THE COURT: What kind of work have you done in the past?

THE DEFENDANT: Here in Las Vegas -- I've only been here for 12 years. Prior to that, I was mostly in international marketing dealing mostly in Asia. Since I've been here, I've been going to school. I worked at MASH village for almost three-and-a-half years.

THE COURT: Doing what?

THE DEFENDANT: I was in charge of food services and purchasing. Basically, I was the beggar. I have to go out and beg for all the food. I worked for another organization for about two years that was dealing with Southern Nevada adult mental health patients and intertwining them back into the community in single family environments.

THE COURT: Where did you go to college?

THE DEFENDANT: UNLV.

THE COURT: That's where your degree is from?

THE DEFENDANT: Yes, sir. I'm waiving a flag about that.

THE COURT: What are you charged with?

THE DEFENDANT: A lot -- 24 counts, 23 counts.

THE COURT: Of what?

THE DEFENDANT: Sexual assault of a minor.

THE COURT: Do you know what the elements of the crimes are?

THE DEFENDANT: Yes, sir, I do.

THE COURT: What are they?

THE DEFENDANT: I just drew a blank. I should have wrote them down, but I was only given last night – I received notice last night, your Honor, at 11:30, okay, via the mail.

THE COURT: Notice of what?

THE DEFENDANT: To be here this morning.

THE COURT: I know, but if you're going to represent yourself on these charges, sir –

THE DEFENDANT: I'm sorry. I didn't write them down.

MS. HOFFMAN [Defense counsel]: If they go to trial, what do they have to prove?

THE DEFENDANT: That I did it.

MS. HOFFMAN: Did what?

THE DEFENDANT: That I assaulted the daughter.

THE COURT: Miss Hoffman, you can't ask him – instruct him.

MS. HOFFMAN: I'm not instructing him, Judge.

THE COURT: I'm over here canvassing him, and you're over there giving him instructions, so how am I supposed to know whether he can represent himself?

MS. HOFFMAN: Sorry, Judge.

THE COURT: What penalty can you suffer as a result of –

THE DEFENDANT: Twenty years to life.

> THE COURT: Do you know what "elements" mean?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: What?
>
> THE DEFENDANT: Well, time, which is not an element in this case. I'm sorry. I'm just drawing an absolute blank on this particular one.
>
> THE COURT: Sir, I'm going to deny your motion to represent yourself.
>
> THE DEFENDANT: Your Honor, please.
>
> THE COURT: No. You don't even know what the elements are. All right? No, you're not going to do it. If you're going to do it, you have to at least know what the elements of the crimes are.

Based on Robinson's alleged lack of knowledge of the elements of the crime of sexual assault, the district court denied his Faretta motion for self-representation.

The district court then presided over a four-day trial of the joined charges concerning both daughters. The State elicited direct testimony from the daughters concerning the allegations, and from Robinson's spouse concerning tacit admissions to the charges.

The jury convicted Robinson on all counts. To eliminate redundant convictions, the State later moved to dismiss all but the sexual assault charges (i.e., all but counts 1 through 5, and 12 through 17). The district court imposed a series of concurrent sentences ranging from 15 to 40 months imprisonment (counts 12 through 17), to life imprisonment with parole eligibility in 20 years (counts 1 through 5). The district court further ordered that Robinson submit to genetic marker testing, register as a sex offender, and submit to lifetime supervision upon release. It

further ordered payment of $150 for DNA analysis, $25 in administrative assessments and $720 in restitution. Robinson appeals.

DISCUSSION

Faretta canvas

Robinson asserts that the district court erroneously denied him his right to self-representation.

This court accords deference to a district court's decision to permit a defendant to represent himself.[2] The reason for such deference stems from a trial judge's ability, through face-to-face interaction, to discern whether a defendant understands what it means to waive the right to counsel.[3] In Faretta, the United States Supreme Court stated that, before a court can permit a defendant to waive counsel, the court must ensure that the defendant is competent, and that the waiver of counsel is knowing, voluntary, and intelligent.[4] The test for approval of self-representation is not whether the defendant can ably represent himself or herself; rather, the defendant must merely demonstrate that he knowingly and intelligently forgoes the benefits of counsel, and that he is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"[5]

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[2]Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996).

[3]Id.

[4]See Faretta v. California, 422 U.S. 806, 835 (1975).

[5]See id. (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)).

In accordance with the above, the trial court should conduct a Faretta canvas to inform the defendant of the risks inherent in self-representation, and of the nature of the charges.[6] In this, SCR 253(2) provides that the district court should inform the defendant of such risks, and lists certain warnings that the court should offer.[7] SCR 253(3) further states that the district court may question the defendant regarding the defendant's knowledge and understanding of the proceedings against him,[8] and SCR 253(4) requires the district court to make findings on the record regarding the defendant's competency to waive counsel and whether the waiver is voluntary and knowing.[9] Improper denial of the right to self-representation is per se reversible error.[10]

We conclude that the district court erred in denying Robinson's application for self-representation. His lack of memory of the elements of sexual assault at the time of the canvass did not compel the conclusion that he was incapable of understanding the significance of the waiver of counsel, or of waiving this right voluntarily, which is all that is required under Faretta. Further, Robinson's extensive educational background suggests that he was capable of a Faretta waiver.

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[6]Hymon v. State, 121 Nev. ___, ___, 111 P.3d 1092, 1101 (2005).

[7]Id.

[8]Id.

[9]Id.

[10]Hymon, 121 Nev. at ___, 111 P.3d at 1101.

Joinder

Robinson further asserts that the joinder of both daughters' allegations compels reversal. As a preliminary matter, we note that Robinson failed to object on these grounds below. Therefore, we undertake plain error analysis in assessing this claim.[11]

NRS 173.115 provides that two or more offenses may be joined if they are (1) "[b]ased on the same act or transaction; or [(2) b]ased on two or more acts or transactions connected together," or which constitute a common scheme or plan. NRS 174.165(1) provides in part that if a defendant or the State would be prejudiced by a joinder of offenses, the court may order separate trials or provide other relief that justice may require. We review joinder orders for an abuse of discretion.[12]

Joinder may be appropriate if evidence of one charge would be cross-admissible as evidence in separate trials of the multiple charges.[13] Evidence supporting an individual charge may be cross-admissible in separate trials on multiple charges as a prior bad act under NRS 48.045(2)[14] if

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[11]See Brown v. State, 114 Nev. 1118, 1125, 967 P.2d 1126, 1131 (1998).

[12]See Tabish v. State, 119 Nev. 293, 302, 72 P.3d 584, 589-90 (2003).

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

[14]NRS 48.045(2) provides the following:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

continued on next page . . .

> (1) the prior acts are relevant to the crime charged because they show motive, intent or another material element listed in NRS 48.045(2); (2) the prior acts are proved by clear and convincing evidence; and (3) the prior acts are more probative than prejudicial.[15]

We conclude that the joinder of these charges did not arise to the status of plain error. First, under our recent decision in Ledbetter v. State, the respective allegations of each daughter were relevant in relation to one another to demonstrate Robinson's intent and motive to manipulate sexual favors from his daughters.[16] Second, the relatively detailed nature of each daughter's testimony provided clear and convincing evidence of the allegations. Third, the testimony of each daughter was probative to the other's case due to their similarity in certain respects—namely, the lack of force utilized in the abuse, fellatio being the primary form of abuse, and the timing of the abuse, in that these acts occurred when the daughters sought permission to see friends. Thus, the probative value of the respective charges in their relation to each other outweighed any prejudice resulting from the joinder.

Assuming that Robinson had preserved this error for appeal, we can find no abuse of discretion in the joinder of the multiple charges below.

. . . *continued*

> opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[15]Mitchell, 105 Nev. at 738, 782 P.2d at 1342.

[16]122 Nev. ___, ___, 129 P.3d 671, 678 (2006) (affirming the admission of prior bad acts of sexual assault as proof of motivation through a mental aberration to sexually assault a minor child).

Prosecutorial misconduct

Robinson claims error with five instances of alleged prosecutorial misconduct. As a preliminary matter, we note that Robinson failed to object to any of these instances; therefore we review his claims for plain error.[17] Under a plain error analysis, the error must be plain and prejudicially affect the outcome of the trial.[18] We address this plain error issue to provide guidance for the trial court on remand.

To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process.[19] This court must 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.'"[20]

Comment implicating Robinson's decision to not testify

Robinson argues that the prosecutor improperly referenced Robinson's failure to testify during an objection to a question asked by the defense of its expert, Dr. Mark Chambers. The exchange leading up to and containing this objection went as follows:

> [Defense counsel]: Is it also part of your training and experience that you are able to identify high, medium- and low-risk offenders?

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

[18]See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

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

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

> [Dr. Chambers]: A large part of what I do in my forensic work is evaluating individuals for their risk to commit sexual offenses, yes.
>
> [Defense counsel]: During your interview with the defendant, did you note any factors pursuant to that end that would give you any indication as to whether he met a high, medium or low risk of being in that category?
>
> [Prosecutor]: I would object as it's calling for hearsay or assuming facts not in evidence and it's beyond the scope.
>
> [Defense counsel]: My response to that, your Honor, is that all doctors, whether psychological or medical, must rely on the representations of the patient interviewed in order to draw conclusions, and therefore, is not submitted necessarily for the truth of the matter asserted but in that it is information relied upon.
>
> THE COURT: What? That doesn't make any sense. You act like this is hearsay. Hearsay has nothing to do with this. A doctor can base his opinion on hearsay.
>
> What is your objection?
>
> [Prosecutor]: My objection is that witness is going to testify instead of the defendant about what's happened, and I don't think that's appropriate. I think he's testifying based on inappropriate material.

(Emphasis added.) The prosecutor eventually withdrew the objection.

The accused has the right to not testify against himself in a criminal case.[21] A direct reference to a defendant's decision to not testify

[21]U.S. Const. amend. V; Nev. Const. art. 1, § 8.

at trial violates the Fifth Amendment.[22] If the reference is indirect, it is constitutionally impermissible if "'the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify.'"[23]

We conclude that this alleged reference to Robinson's decision to not testify was indirect, at best. Further, it is not plain that the prosecutor manifestly intended to refer to Robinson's lack of testimony, or that the jury would naturally interpret this comment as such a reference. Therefore, we reject Robinson's assignment of error on this instance.

Prosecutor's communication with the jury during the reading of the verdict

Robinson claims error with the prosecutor's communication with the jury during the reading of the verdict by shaking his head and talking to them.[24] The district court noticed the prosecutor's conduct and admonished him.

We conclude that this conduct is certainly improper. However, we also regard it as harmless error because it occurred after the jury had reached a verdict and submitted it to the court clerk to be read. Further, nothing in the record suggests that this communication affected jurors during the clerk's subsequent polling regarding their individual verdicts.

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[22]Griffin v. California, 380 U.S. 609, 615 (1965); Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991).

[23]Harkness, 107 Nev. at 803, 820 P.2d at 761 (quoting United States v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968)).

[24]The record does not indicate what the prosecutor was saying at this time.

Elicitation of prejudicial expert testimony regarding Robinson's potential sentence

Robinson claims error with the prosecutor's cross-examination of Dr. Chambers regarding the effect of a favorable psychosexual examination on a defendant's sentence. The exchange at issue went as follows:

> [Prosecutor]: And the interview process is going to have ramifications on what sentence they get or whether they get probation or not?
>
> [Dr. Chambers]: It has some ramifications for that, yes. I don't determine that. I don't make recommendations about sentencing, but my evaluation could have some relevance to that, yes.
>
> [Prosecutor]: So, if they get a favorable psychosexual evaluation from you, there's a good chance they won't go to prison, they can duck the bullet?
>
> [Dr. Chambers]: Probably in most cases.

Because Dr. Chambers had testified during direct examination by the defense that Robinson was in a low-risk category to commit sexual assault, Robinson claims that the jury could have interpreted Dr. Chambers' testimony in response to the State's questions to mean that Robinson could receive probation even if he was convicted, thus leaving the jury with little reason to render verdicts of acquittal despite the presence of reasonable doubt. We agree that this line of questioning was clearly improper. However, given the lack of objection to this testimony and the particularity of the victims' testimony regarding the assaults, we cannot conclude that this testimony constituted prejudice under a plain error analysis. First, substantial evidence in the record suggests that Robinson tacitly admitted to the abuse of his daughters. Second, although the cross-examination improperly raised issues of possible sentencing ramifications,

the district court specifically instructed the jury to not discuss or consider the subject of punishment in its deliberations.

Elicitation of improper lay witness testimony

Robinson claims that the prosecutor improperly elicited testimony from Melody Robinson regarding the decline of the family's financial situation as a result of the allegations. Evidence tending to prove a witness's bias or motive to testify a certain way is admissible for impeachment purposes.[25] And, a party may impeach its own witness to preemptively neutralize the effect that the impeachment evidence would have on cross-examination. Here, immediately prior to eliciting this impeachment testimony, the prosecutor explicitly informed Melody that he would like to briefly discuss any bias, interest, or motive that she might have in the case.

It seems questionable that the prosecution was simply trying to pre-empt possible impeachment, it being highly unlikely that the defense would highlight the economic and familial devastation that followed in the wake of these events. We conclude that the probative value of this bias evidence was clearly outweighed by its prejudicial effect. That said, the evidence in this case was so overwhelming that the error was harmless beyond a reasonable doubt.[26]

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[25]Lobato v. State, 120 Nev. 512, 519, 96 P.3d 765, 770 (2004).

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

Improper rebuttal closing argument

Robinson assigns error to the following comment made by the prosecutor during rebuttal closing argument:

> The defendant very smugly remarked after he admitted to this because it's Melody's fault. She does not know her girls; she consented after all, and it's her fault because she's not having sex with him for how many years it was; "You'll never prove it." That's his smart ass remark to his wife as he goes out the door after having diddled her daughters. The State has proven it and you're going to prove otherwise. The guilty verdict.

(Emphasis added.) The district court then admonished the prosecutor to not call the defendant a "smart ass," and informed the jury to disregard the comment.

In light of the district court's immediate admonishment of the prosecutor, we conclude that this comment does not merit reversal. However, we caution the prosecution against use of such rhetoric in the future, as it is extremely unprofessional and, coming from the State, improperly injects the imprimatur of the prosecutor's personal views of the matter into the case.

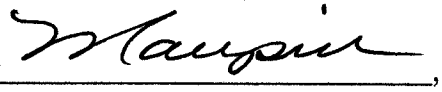
Cumulative error

Robinson asserts that the accumulation of errors in his case merits reversal. Beyond the Faretta issue, given his tacit admissions and the relatively detailed nature of the victim witness testimony against him, cumulative error would not merit reversal.

CONCLUSION

We conclude that the district court's denial of Robinson's request for self-representation requires reversal. We therefore,

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.



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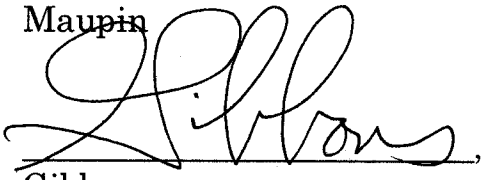

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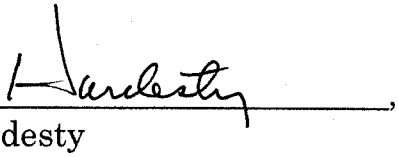

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cc: Hon. Lee A. Gates, District Judge
Christopher R. Oram
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
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