IN THE SUPREME COURT OF THE STATE OF NEVADA

THEODIS WHITE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45117

FILED

FEB 17 2006

JANETTE M. BLOOM
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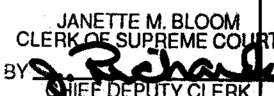

ORDER OF AFFIRMANCE AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of failure to stop on the signal of a police officer. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge. The district court sentenced appellant Theodis White to a prison term of 28 to 72 months but then suspended execution of the sentence and placed White on probation for a time period not to exceed 3 years.

White first contends that the district court abused its discretion by denying his request for a continuance. Specifically, White contends that the district court's refusal to grant him a continuance deprived him of a fair trial because he needed additional time to obtain essential medical records establishing his defense that he failed to stop for police officers because of an epileptic seizure. We conclude that White's contention lacks merit.

This court has held that the granting of a continuance is addressed to the discretion of the district court.[1] The denial of a motion for a reasonable continuance may be an abuse of discretion "where the

[1] Zessman v. State, 94 Nev. 28, 31, 573 P. 2d 1174, 1177 (1978).

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purpose of the motion is to procure important witnesses and the delay is not the particular fault of counsel or the parties."[2]

In this case, the record indicates that the district court gave White sufficient time to obtain medical records in preparation for trial. White was arraigned on May 8, 2003, and his trial did not begin until approximately eighteen months later on December 6, 2004. The district court had twice previously granted White's request for a continuance to enable him to obtain medical records supporting his claim that he suffered from epilepsy. Further, the record indicates that White failed to inform his counsel that additional medical records could be located in California until the day scheduled for trial. Accordingly, we conclude that the district court did not abuse its discretion in denying the motion for a continuance.

Second, White contends that the prosecutor committed misconduct in his cross-examination of White by commenting on White's failure to present corroborating evidence in support of his testimony that he had a history of epileptic seizures. At trial, the following colloquy occurred:

> Prosecutor: Now this Dilantin you say you take 5 milligrams a day.
>
> White: Yes sir.
>
> Prosecutor: Do you have that on you?
>
> White: No, sir.
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> Prosecutor: Do you have a prescription bottle with you?
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> White: No, Sir.
>
> Prosecutor: Obviously, you have with you today some of the medical records from either an ER or

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[2]Lord v. State, 107 Nev. 28, 42, 806 P.2d 548, 557 (1991).

> an urgent care where you were treated for seizures, correct?
>
> White: No.

Preliminarily, we note that at trial White did not object to the prosecutor's question. The failure to object to prosecutorial misconduct precludes appellate review absent plain error affecting a defendant's substantial rights.[3] Generally, a defendant must show that he was prejudiced by a particular error in order to prove that it affected substantial rights.[4] We conclude that White was not prejudiced by the alleged misconduct. The prosecutor's line-of-questioning amounted to an attack on White's credibility as a witness and did not impermissibly shift the burden of proof onto White.[5] Accordingly, any error involving the prosecutor's line-of-questioning was harmless beyond a reasonable doubt.

In a related argument, White contends that the prosecutor committed misconduct in rebuttal closing arguments by stating --

> And, if take a step back and you focus on the evidence, you'll realize there's nothing at all to support this notion that he had a seizure. I'm reminded of the famous Wendy's commercials of the '80's maybe, late '80's early '90's, with the little old lady that says, where's the beef, where's the beef? And I guess that's what I say to the defendant, where's the beef? Where is the evidence to support what you're trying to make this jury to believe that you had a seizure? Where's the medical evidence? Where's the expert

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[3]See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

[4]Id.

[5]See Evans v. State, 117 Nev. 609, 630-31, 28 P.3d 498, 513 (2001) (it is permissible for the prosecutor to comment on a defendant's failure to present evidence substantiating a defense theory provided the remarks do not call attention to the defendant's failure to testify).

testimony on how seizures affect driving. Where is something as simple as --

Defense counsel interrupted the prosecutor and objected, stating "That's placing the burden on Mr. White, which is absolutely incorrect." The district court sustained the objection and advised the prosecutor, "I'm going to ask you to confine your rebuttal statements to what you believe the evidence has shown and how the law applies to it." Citing to Mahar v. State,[6] White argues that the prosecutor's argument deprived him of a fair trial because it shifted the burden of proof and diluted the presumption of innocence. We disagree.

Even assuming that the prosecutor's argument was improper,[7] we note that the district court took appropriate curative measures immediately after the statement was made, sustaining the objection and admonishing the prosecutor. Further, the jury instructions stated that White was presumed innocent and the State had the burden to prove the material elements of the crime beyond a reasonable doubt. We must presume that the jurors followed the district court's instructions.[8] Additionally, the alleged instances of prosecutorial misconduct were isolated and not so prejudicial that they could not have been neutralized

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[6]102 Nev. 488, 728 P.2d 439 (1986) (remanding for new trial because the prosecutor's comment on defendant's post-arrest silence, during cross-examination, violated defendant's constitutional right to a fair trial).

[7]See Evans, 117 Nev. at 630-31, 28 P.3d at 513 (concluding that prosecutor's comment, "where's the evidence?," was not improper because it is permissible for a prosecutor to argue that the defense failed to substantiate its theory with evidence).

[8]See Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) ("There is a presumption that jurors follow jury instructions."), clarified on other grounds, 114 Nev. 221, 954 P.2d 744 (1998).

by the admonition to the jury.[9] Accordingly, reversal of White's conviction is not warranted on the basis of prosecutorial misconduct.

Citing to Martinez v. State,[10] White next contends that the district court erred in ordering that restitution be paid to insurance companies because they were not statutory victims as defined under NRS 176.033(1)(c). We disagree.

Our holding in Martinez, which involved a restitution award imposed pursuant to NRS 176.033(1)(c),[11] is inapplicable to this case because, here, the district court ordered restitution as a condition of probation pursuant to NRS 176A.430. In construing NRS 176A.430, this court has recognized that "the legislature chose to accord broad authority to the district court judge to order restitution not only to 'victims,' but to any 'person or persons named in the order.'"[12] Accordingly, we conclude that the district court did not abuse its discretion in ordering that restitution imposed pursuant to NRS 176A.430 be paid to insurance companies.

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[9]See Greene v. State, 113 Nev. 157, 169, 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).

[10]115 Nev. 9, 974 P.2d 133 (1999) (holding that an insurance company is not a victim pursuant to NRS 176.033(1)(c) and NRS 176.015(5) because the loss incurred is sustained as part of a contractual obligation and is neither unexpected nor involuntary).

[11]Id. at 11, 974 P.2d at 134.

[12]Igbinovia v. State, 111 Nev. 699, 709, 895 P.2d 1304, 1310 (1995) (emphasis added).

Nonetheless, we further conclude that the district court did err with respect to the restitution by failing to name the particular insurance companies and individuals to whom restitution was to be paid. This court had recognized that the district court may not award restitution in uncertain terms.[13] In this case, the judgment of conviction states "[p]ay $2,500.00 restitution which includes $1,000 for each insurance company and $500 deductible for one individual; and deft. to pay the deductible to the remaining individual once it is determined." Because the district court failed to identify with particularity the entities or individuals who should receive restitution, we remand this case to the district court with instructions to amend the judgment of conviction to identify the entitities or individuals who should receive restitution.

It is so ORDERED.

Maupin, J.

Gibbons, J.

Hardesty, J.

cc: Hon. Nancy M. Saitta, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[13] See Botts v. State, 109 Nev. 567, 569, 854 P.2d 856, 857 (1993).