IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY JONES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45250

FILED

JUN 12 2006

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of assault with a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge. The district court sentenced appellant Jimmy Jones to serve a prison term of 16-60 months.

First, Jones contends that the district court erred by rejecting his objection under Batson v. Kentucky[1] to the prosecutor using three of five peremptory challenges to strike minority venirepersons from the jury panel. Jones argues that the State's explanations for the exercise of the peremptory strikes were pretextual and proved purposeful discrimination. We disagree.

"The very purpose of peremptory strikes is to allow parties to remove potential jurors whom they suspect, but cannot prove, may exhibit a particular bias."[2] In the instant case, the State's race-neutral

[1]476 U.S. 79 (1986); see also Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004) ("a defendant need not belong to the same group as the prospective jurors in order to challenge their exclusion on grounds of discrimination").

[2]Miller-El v. Dretke, 545 U.S. ___, ___, 125 S. Ct. 2317, 2355 (2005) (Thomas, J., dissenting).

explanations for striking the potential jurors were made at a side-bar conference not recorded by the court reporter. The district court, however, with the parties' approval, recounted their conversation for the record. Potential jurors nos. 123 and 143, both Hispanic, informed the district court during voir dire about their respective, negative encounters with law enforcement personnel. Potential juror no. 114, an African-American, informed the court that she was employed as a substance abuse counselor. Another potential juror, whose dismissal was not challenged by Jones, was also struck by the State for working in a similar occupation. The district court noted that it was "common practice" to excuse potential jurors working in such fields "because of the perception that it will be more difficult for them to be more judgmental or to pass judgment on another or to perhaps be more forgiving in nature." The district court judge also commented, regarding the entire pool of potential jurors, that she has "never seen as many minorities in a courtroom as [she] saw in this case." The district court subsequently ruled that the State's peremptory strikes were proper. We conclude that Jones failed to prove that the explanations were a pretext for purposeful discrimination, and therefore, the district court did not err in rejecting his objections to the strikes.[3]

Second, Jones contends that the district court erred by refusing to allow the defense, through third-party witness testimony, to present evidence of his relationship with the victim. Specifically, Jones argues that he should have been allowed to extrinsically contradict the victim's trial testimony, denying that she engaged in an altercation with

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[3]See Purkett v. Elem, 514 U.S. 765, 767-68 (1995); Batson, 476 U.S. at 96-98; see also Foster v. State, 121 Nev. ___, ___, 111 P.3d 1083, 1088 (2005).

Jones several days before the assault, in order to prove bias against the defendant and motive to provide false testimony. Such evidence, Jones claims, would support the defense theory that the victim lacked credibility and fabricated the incident. The State argues that allowing extrinsic evidence to rebut the victim's testimony would have run afoul of NRS 50.085(3).[4] We agree with Jones that the district court erred,[5] however, we conclude that the error was harmless beyond a reasonable doubt.[6]

Other evidence admitted at trial served the same purpose – supporting the defense theory – as the improperly disallowed extrinsic evidence. On cross-examination, the victim admitted to having an earlier altercation with Jones on the day of the assault. The victim testified that

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[4]NRS 50.085(3) provides –

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090.

[5]See Lobato v. State, 120 Nev. 512, 519 & n.11, 96 P.3d 765, 770 & n.11 (2004) ("extrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias, interest, corruption or prejudice, is never collateral to the controversy and not subject to the limitations contained in NRS 50.085(3)").

[6]See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

Jones threatened to beat up her husband, and the two yelled at each other. Therefore, evidence of another altercation occurring several days earlier would have added little to the defense's case. Further, Jones was able to attack the victim's credibility with the testimony of two witnesses, Fay Smith and Mindy Allen, who both testified that, in their respective opinions, the victim was an untruthful person. As a result, we conclude that the district court's error was harmless.

Third, Jones contends that the district court erred by refusing to allow him to impeach the victim with evidence of her prior convictions. Jones argued below that the victim's three Minnesota convictions were felonies, and thus, were admissible for impeachment purposes pursuant to NRS 50.095(1).[7] The State concedes that the victim was initially convicted of felonies; however, documentation provided to the district court indicated that all three of the convictions were later reduced to misdemeanors after the victim successfully completed a period of probation. The district court stated that it was "satisfied" that the convictions were misdemeanors and barred their admission. We conclude that the district court properly excluded evidence of the victim's prior convictions because, by definition,

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[7] NRS 50.095(1) provides –

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which he was convicted.

the victim's convictions fall outside the category of crimes NRS 50.095(1) permits for impeachment purposes.[8]

Fourth, Jones contends that the district court erred by refusing to allow him to impeach the victim with evidence of her past history of drug use. Jones argued below that he wished to cross-examine the victim about her history of drug use in order to expose bias.[9] The district court prohibited Jones from pursuing this line of questioning, but allowed Jones to ask the victim whether she was under the influence of drugs on the day of the assault. As a result, Jones claims that the district court violated his confrontation and due process rights.[10] We disagree.

This court has stated that "[t]he decision to admit or exclude evidence rests within the trial court's discretion, and this court will not overturn that decision absent manifest error."[11] In this case, Jones cannot demonstrate that the victim's alleged history of drug use reflected a bias,

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[8]For the first time on appeal, Jones contends that the convictions, even treated as non-felonies, were admissible because the crimes reflected untruthfulness. This court has consistently held that an appellant "cannot change [his] theory underlying an assignment of error on appeal." Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). As a result, Jones' argument is not properly raised and we decline to address it. See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

[9]On appeal, Jones once again presents additional theories regarding error not raised below or addressed by the district court. We decline to address these arguments. See Ford, 111 Nev. at 884, 901 P.2d at 130; Davis, 107 Nev. at 606, 817 P.2d at 1173.

[10]See generally U.S. Const. amend. VI; Nev. Const. art. 1, § 8.

[11]Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000).

prejudiced her testimony, or was relevant to the proceedings.[12] Therefore, we conclude that the district court was not manifestly wrong in limiting the scope of Jones' cross-examination of the victim.

Fifth, Jones contends that the district court erred by admitting evidence of an uncharged bad act at trial – specifically, that he threatened the victim's husband – without conducting a Petrocelli hearing[13] and without giving a limiting oral and written instruction to the jury.[14] During the victim's direct examination by the State, the following exchange took place:

> Q. And did you and he ever have any words between you?
>
> A. I had gone over there to their house one day and when he came home he looked and said, "That bitch gotta go."
>
> . . . .
>
> Q. What was your response?
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> A. I just said, "Why?" And he said, "Because you talk too much shit." Then he said, "If I hear you talk any more shit, I'm whooping your husband's ass."

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[12]See NRS 48.015 (relevant evidence is "evidence having 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"); NRS 48.025(2) ("Evidence which is not relevant is not admissible.").

[13]See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

[14]See Tavares v. State, 117 Nev. 725, 733, 30 P.3d. 1128, 1133 (2001).

The district court overruled defense counsel's objection, and on cross-examination, the victim repeated the alleged threat. Outside the presence of the jury, the district court found that Jones' statement, as testified to by the victim, was admissible to show "intent, absence of mistake or accident." On appeal, Jones argues that the statement's admission, and the absence of a limiting instruction, deprived him of a fair trial and should have resulted in a mistrial. We disagree.[15]

Evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question.[16] NRS 48.045(2), however, states that evidence of other bad acts may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In the absence of a hearing and specific findings by the district court, a conviction will not be reversed "on appeal if '(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence . . . ; or, where the result would have been the same if the trial court had not admitted the evidence.'"[17]

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[15]Jones also claims that the district court admitted the victim's statement pursuant to NRS 48.035(3), the complete story of the crime doctrine. This contention is belied by the record. See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[16]NRS 48.045(1).

[17]Ledbetter v. State, 122 Nev. ___, ___, 129 P.3d 671, 677 (2006) (quoting Rhymes v. State, 121 Nev. ___, ___, 107 P.3d 1278, 1281 (2005)) (internal quotation omitted).

We conclude that the district court did not commit manifest error in overruling Jones' objection to the victim's statement about his threat to her husband,[18] and therefore, did not abuse its discretion in denying his motion for a mistrial.[19] Our review of the record reveals that the evidence satisfies the requirements of Tinch v. State.[20] Jones knew that the victim told his girlfriend about his alleged unfaithfulness. The threat was relevant and provided both context and motive for Jones' assault, supporting the theory that the attack was not random. Next, Jones neither challenged the veracity of the victim's testimony, nor disputed the fact that he made the threatening statement. The victim testified that Jones' girlfriend was present at the time of the threat, yet Jones did not attempt to refute the victim by presenting contradictory testimony. And finally, Jones cannot demonstrate that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

We also conclude, however, that the district court erred in failing to give a limiting instruction to the jury. Nevertheless, this court has stated that "under Tavares we consider the failure to give such a limiting instruction to be harmless if the error did not have a substantial and injurious effect or influence the jury's verdict."[21] Because of the

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[18]See Collman, 116 Nev. at 702, 7 P.3d at 436.

[19]See McKenna v. State, 114 Nev. 1044, 1055, 968 P.2d 739, 746 (1998) (holding that the "[d]enial of a motion for a mistrial is within the sound discretion of the district court, and that ruling will not be reversed absent a clear showing of abuse of discretion").

[20]113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[21]Rhymes, 121 Nev. at ___, 107 P.3d at 1282.

substantial evidence of Jones' guilt, including the victim's and a third-party witness' damaging testimony, we conclude that the failure of the district court to provide a limiting instruction did not influence the jury's verdict, and therefore, was harmless error.[22]

Sixth, Jones contends that the district court improperly allowed the State to present evidence of his pre-arrest silence in violation of the state and federal constitutions.[23] While the prosecutor was questioning Detective Timothy Barker of the Las Vegas Metropolitan Police Department about his investigation, the following exchange took place:

> Q. Did you make any attempt to locate [the defendant]?
>
> A. Yes, I did. I made several attempts to contact him at his girlfriend's residence. We left phone messages. We left business cards.
>
> DEFENSE COUNSEL: Your Honor, I'm going to object to this, [NRS] 48.045.
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> . . . .
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> THE COURT: All right. The objection at this point is overruled.
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> . . . .
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> Q. Detective, were you ever able to make contact with the defendant?
>
> A. No.

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[22]See NRS 178.598.

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

Jones argues that this evidence violated his right against self-incrimination.[24] We disagree.

Once again, we note that Jones has changed his theory of district court error on appeal, and therefore, we need not address it.[25] In the district court, Jones moved for a mistrial, arguing that the colloquy above was prejudicial evidence of flight. The State argued that because part of the defense theory was to attack the alleged inadequacy of the police investigation, the challenged line of questioning merely sought information regarding the investigating officer's actions. The district court refused to strike the testimony and denied the motion for a mistrial. Before resuming the trial, the district court instructed the jury:

> Before we recessed for lunch you heard testimony regarding the detective's attempts to make contacts with the defendant. There was no evidence that the defendant was ever made aware of those attempts, and therefore you are not to consider that as evidence of guilt. It may, however, be considered by you in light of all of the other facts relating to the [detective's] investigation.

The district court repeated the instruction immediately prior to the jury's deliberations. This court "presume[s] that the jury followed the district

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[24]But see Angle v. State, 113 Nev. 757, 763 n.2, 942 P.2d 177, 181 n.2 (1997) (prosecutor's remark regarding defendant's pre-arrest silence was proper); Murray v. State, 113 Nev. 11, 17 n.1, 930 P.2d 121, 125 n.1 (1997) (prosecutor's comment on defendant's pre-arrest silence was not improper).

[25]See Ford, 111 Nev. at 884, 901 P.2d at 130; Davis, 107 Nev. at 606, 817 P.2d at 1173.

court's orders and instructions."[26] Further, we conclude that Jones cannot demonstrate that he was prejudiced in any way by the challenged exchange. Therefore, we conclude that the district court did not err by refusing to strike the testimony or denying the motion for a mistrial.

Seventh, Jones contends that Detective Barker impermissibly vouched for the credibility of the victim. While cross-examining Detective Barker, Jones attempted to discredit the police investigation. On redirect, the State sought to rehabilitate Detective Barker:

> Q. You also indicated that you didn't feel it relevant or necessary to verify that the victim urinated on herself?
>
> A. That's correct.
>
> Q. Why do you feel that way?
>
> A. I have no reason to disbelieve the comment that she urinated on herself. She indicated through the whole experience that it was traumatic. I didn't need to put her through any more insult. I didn't feel it was necessary. I believed what she was telling me. I had independent witness testimony. I didn't think it was necessary to have to prove that one part of the case, that she urinated on herself, by submitting the clothing.

Jones did not object to the detective's statement, but later filed a motion for a new trial, alleging that counsel was ineffective for failing to object. The district court denied the motion for a new trial. On appeal, Jones claims that the detective's statement "invaded the province of the jury" and amounted to plain error. We disagree.

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[26]Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

This court has stated that "it is improper for one witness to vouch for the testimony of another."[27] Such error, however, is subject to a harmless error analysis.[28] In the instant case, outside the presence of the jury, the district court stated that it was concerned about the detective's "inappropriate" vouching for the victim's credibility and Jones' failure to object. The district court noted that defense counsel even revisited the testimony on recross-examination. The district court stated, "[N]ormally, I wouldn't have allowed that testimony and I wouldn't have had it elicited twice." The district court allowed the questioning to proceed "because that's part of the whole defense strategy kind of thing, to show [Detective Barker] just kind of did a summary investigation." Defense counsel conceded that he, "minimally," opened the door for the State's line of questioning, and informed the district court that it was a strategic decision not to object. The district court responded:

> THE COURT: Well, I have this jury coming in, and if it was not part of the defense strategy to incorporate those statements into argument and the theory of the defense's case, then I would instruct the jury right now to disregard the testimony about who this detective believed or didn't believe because it's not relevant and it was inappropriate.
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> DEFENSE COUNSEL: I appreciate that offer, Your Honor. And based upon the defense strategy, I would ask the Court not to do that.

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[27]Marvelle v. State, 114 Nev. 921, 931, 966 P.2d 151, 157 (1998), overruled on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000).

[28]See Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987).

Based on the above, we conclude that the error was harmless beyond a reasonable doubt, especially in light of defense counsel's express refusal to object.[29]

Eighth, Jones contends that the prosecutor committed misconduct during closing arguments by improperly commenting on the veracity and reliability of defense witnesses. Jones challenges the following statement by the prosecutor:

> As to the two witnesses who testified to their opinion, only one of them mentioned the rumor, that she heard the rumor. And, remember, she's good friends with the defendant. She was a subject of that rumor. She says or claims that it didn't bother her in the least. And, again, her opinion as to the truthfulness of the victim, there's really [no] indication as to how she formed that opinion. You can probably assume it's because a rumor was supposedly spread by [the victim].

Defense counsel objected, and the district court sustained the objection, stating, "I'm going to . . . instruct the jury to disregard the last argument of counsel regarding assuming anything, which would be inappropriate for you to do." Based on the above, Jones claims that the prosecutor improperly asked the jury to reject the defense witnesses' testimony and the district court's limiting instruction was insufficient. We disagree.

Initially, we note that Jones mischaracterizes the prosecutor's statement. The prosecutor did not ask the jury to reject the testimony of

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[29]See generally Marvelle, 114 Nev. at 935, 966 P.2d at 160 (Shearing, J., dissenting) (harmless error where "[t]he jury had to know already that the police detective believed the victim since implicit in the police detective's decision to submit the case for prosecution is his belief in the truth of the testimony of the victim").

the defense witnesses, therefore, this contention is belied by the record.[30] Further, to the extent that the prosecutor inappropriately asked the jury to make an assumption, any error was harmless beyond a reasonable doubt. The district court immediately instructed the jury to disregard the prosecutor's statement, and again, prior to deliberations, "to disregard any evidence to which an objection was sustained by the court." Moreover, Jones cannot demonstrate that the prosecutor's statement affected the outcome of the trial. Therefore, Jones has failed to demonstrate that he was prejudiced by the prosecutor's misconduct.[31]

Having considered Jones' contentions and concluded that they are without merit, we affirm the judgment of conviction. Our review of the judgment of conviction, however, reveals a clerical error. The judgment of conviction incorrectly states that Jones was convicted pursuant to a guilty plea. The judgment of conviction should have stated that Jones was convicted pursuant to a jury verdict. We therefore conclude that this matter should be remanded to the district court for the correction of the judgment of conviction.[32] Accordingly, we

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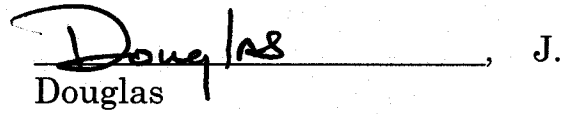
[30]See Hargrove, 100 Nev. 498, 686 P.2d 222.

[31]See Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1998) (holding that the testimony was not so prejudicial that it could not be neutralized by an admonition to the jury); see also Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) ("To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process.").

[32]See Ledbetter, 122 Nev. at ___, 129 P.3d at 681.

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.[33]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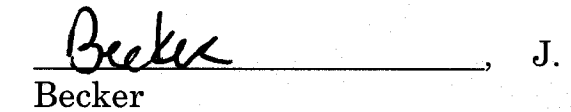
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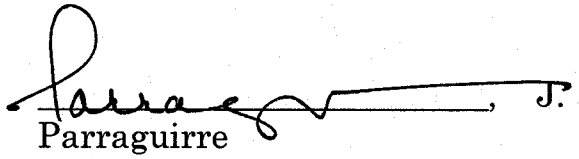
Parraguirre, J.

cc: Hon. Jennifer Togliatti, 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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[33]We also reject Jones' claim that cumulative error denied him his right to a fair trial. See generally Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (noting that factors relevant to a claim of cumulative error "include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged'") (internal citation omitted).