IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACEY MORRELL WARREN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45497

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of one count of burglary and one count of robbery of a flower shop. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Tracy Warren was convicted of burglarizing and robbing the Las Vegas Bouquet, a flower shop, on the morning of August 28, 2002. Warren walked into the flower shop and ordered flowers from Malgorzata (Gosia) Biernacinski. Before the flowers were ready, Warren left, walked over to the University Medical Center (UMC) human resources office, asked for something to write on, and was given a Post-it note. Warren went back to the flower shop and, when the flowers were ready, handed Gosia the Post-it note that read "PleAse emPty The Drawer and do AS I SAY!! or There will be trouble!!! I do hAve A gun." Warren had his hand under his shirt pointing it at Gosia as if he had a gun. Gosia gave Warren the money from the register. Warren escorted Gosia to the bathroom and closed the door. Then he left the flower shop.

Hunter Borges witnessed Warren leaving the flower shop and, before Warren disappeared from view, saw Gosia run out of the flower shop shouting that she had just been robbed. Borges contacted the Las Vegas Metropolitan Police Department (LVMPD). The LVMPD detained Warren shortly thereafter, even though there was some confusion as to the

robber's description. Warren consented to the LVMPD's pat down and retrieval of a wad of money from his back pocket. Gosia identified Warren as the robber while he was standing with the LVMPD, and other witnesses identified Warren as the robber after he was arrested and in handcuffs.

The State charged Warren with burglary, first-degree kidnapping, and robbery. The State also alleged that Warren was a habitual criminal because Warren had a record of eight prior robberies and attempted robberies. The jury found Warren guilty of burglary and robbery, but not guilty of first-degree kidnapping.

Warren appeals the district court's (1) admission of money seized from his person, (2) admission of at-the-scene identifications, (3) order compelling Warren to give handwriting samples of the robbery note's text on ten Post-it notes, (4) admission of testimony of the State's handwriting expert, (5) exclusion of Warren's handwriting expert, and (6) admission of the prior attempted robbery conviction. Warren also (7) challenges the sufficiency of the evidence and (8) alleges cumulative error.

The search and seizure

Warren first argues that the district court abused its discretion when it admitted into evidence money found during the LVMPD's search of his person. While the Fourth Amendment of the United States Constitution does protect a defendant from unreasonable searches and seizures,[1] a search and seizure is rendered lawful if consent

[1]Zabeti v. State, 120 Nev. 530, 535, 96 P.3d 773, 776 (2004).

to a search is "freely and intelligently given."[2] In this case, LVMPD officers asked Warren's permission to both pat him down and take the money out of his pocket, and Warren gave his consent both times. Accordingly, we conclude that the district court did not abuse its discretion because substantial evidence supports the district court's finding that the search was consensual.

The at-the-scene identification

Next, Warren argues that the district court's admission of witnesses' identification of him at the crime scene denied him a fair trial. If an at-the-scene identification was unnecessarily suggestive, then it must be excluded from evidence unless the identification was reliable.[3] Indicia of reliability include "'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.'"[4]

In this case, Warren was identified shortly after the robbery—first by Gosia while he was being detained by two officers and second by Borges and the UMC employees while he was in handcuffs. The police presence may have rendered the circumstances unnecessarily suggestive, but even if so, the identifications were reliable.

---

[2]State v. Johnson, 116 Nev. 78, 81, 993 P.2d 44, 46 (2000).

[3]Canada v. State, 104 Nev. 288, 294, 756 P.2d 552, 555 (1988).

[4]Id. at 294, 756 P.2d at 555 (quoting Manson v. Brathwaite, 432 U.S. 98, 114 (1977)).

Gosia saw and conversed with Warren twice that morning, recognized him as a repeat customer, and was 100 percent certain that Warren was the man who robbed her. Borges saw Warren multiple times that morning walking in front of and around his car, and he was certain that Warren was the man he saw. The UMC personnel had the opportunity to observe Warren in the UMC human resources office. Therefore, we conclude that the district court did not abuse its discretion when it admitted the at-the-scene identifications into evidence.[5]

The compelled handwriting sample

Warren argues that forcing him to write the robbery note's text on ten Post-it notes was a violation of his Fifth Amendment right to avoid self-incrimination.[6] However, "[t]he Fifth Amendment does not bar the forced production of 'real' or 'physical' evidence, such as blood or breath samples."[7] The United States Supreme Court has determined that handwriting is physical evidence that does not implicate the Fifth Amendment.[8] Accordingly, we conclude that Warren's Fifth Amendment rights were not violated.[9]

---

[5]Even if the UMC personnel's at-the-scene identifications were not reliable, we conclude that admitting the identifications was harmless error in light of the other identifications and remaining evidence.

[6]In addition to the Post-it notes, Warren was also compelled to write out three pages of general handwriting exemplars.

[7]State v. Smith, 105 Nev. 293, 296, 774 P.2d 1037, 1039 (1989).

[8]United States v. Mara, 410 U.S. 19 (1973).

[9]Warren relies on United States v. Green, 282 F. Supp. 373, 374-75 (S.D. Ind. 1968), to support his case. However, the United States Supreme Court decided Mara in 1973, after Green.

Expert witnesses

Warren argues that the district court abused its discretion by admitting testimony from the State's expert witness and by excluding testimony from his proffered expert witness. The district court may admit an expert witness "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."[10] "Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and this court will not disturb that decision absent a clear abuse of discretion."[11]

Warren challenges whether forensic document examination is a valid science. Both the State and Warren address in their briefs the United States Supreme Court's Daubert v. Merrell Dow Pharmaceuticals[12] factors and the Ninth Circuit Court of Appeals application of the Daubert factors to forensic document examination in United States v. Prime.[13] However, Nevada does not follow Daubert. Expert testimony in Nevada is "admissible if the individual's 'specialized knowledge will assist the trier of

---

[10]NRS 50.275.

[11]Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

[12]509 U.S. 579, 593-94 (1993).

[13]431 F.3d 1147, 1151-54 (9th Cir. 2005). The district court relied on United States v. Prime, 363 F.3d 1028 (9th Cir. 2004), which was good law at the time but was later vacated by 543 U.S. 1101 (2005).

fact to understand the evidence or to determine a fact in issue.'"[14] In this case, the district court considered the Daubert and other factors and found that the State's expert's knowledge would assist the trier of fact. Based on our review of the record, the district court did not abuse its discretion.

Regarding the State's and Warren's expert witness's qualifications, the State provided evidence that its expert had attended numerous seminars and training on document examination, had testified as an expert in questioned documents over seventy-five times, was employed as a Questioned Documents Examiner with LVMPD, and was affiliated with numerous organizations. The State's expert also has published numerous articles regarding document examination and is certified by the American Board of Forensic Document Examiners. The district court determined that the State's expert was qualified to be an expert. On the other hand, Warren provided evidence that his expert was an expert in scientific methodology. The district court found that this had nothing to do with the actual science of forensic document examination and excluded Warren's expert. We agree with the district court and conclude that it did not abuse its discretion in admitting the State's expert witness and excluding Warren's expert witness.

Prior bad acts

Warren argues that his prior robbery conviction was inadmissible character evidence. Under NRS 48.045(2), evidence of other crimes "is not admissible to prove the character of a person in order to show that he acted in conformity therewith," but may be admissible as

---

[14]Rudin v. State, 120 Nev. 121, 135, 86 P.3d 572, 581 (2004) (quoting NRS 50.275).

proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." "Evidence of prior bad acts is only admissible when: (1) the incident is relevant to the crime charged, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[15] This court will not disturb a district court's admission of prior bad act evidence absent an abuse of discretion.[16]

The district court admitted Warren's 2003 conviction for attempted robbery as proof of identity and common plan or scheme.[17] First, the robbery involved a small business with one or two people present, Warren used a distinctive note, and Warren threatened the victim by holding his hand under his shirt as if he had a gun. These facts are almost identical to the instant facts. Second, the State provided a certified copy of the conviction. And third, admission of the prior attempted robbery was not substantially outweighed by the danger of unfair prejudice because of the factual similarities between the crimes. Therefore, we conclude that the district court did not abuse its discretion when it admitted Warren's prior attempted robbery conviction.

Sufficiency of the evidence

Warren argues that the evidence does not support his conviction. "'Where there is substantial evidence to support the jury's

---

[15]Phillips v. State, 121 Nev. 591, 600-601, 119 P.3d 711, 718 (2005) (footnotes omitted).

[16]See id.

[17]NRS 48.045(2).

verdict, it will not be disturbed on appeal.' 'The standard of review for sufficiency of evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant's guilt beyond a reasonable doubt.'"[18]

In this case, both Gosia and Borges provided strong identifications, the handwriting expert testified that the handwriting on the Post-it note was Warren's, and evidence of a common plan or scheme was presented. Based on this evidence, a reasonable jury could have been convinced of Warren's guilt. Accordingly, we conclude that substantial evidence supports Warren's conviction.

Cumulative error

Finally, Warren argues that he should receive a new trial because of cumulative error. As we found no error above, we conclude that there was no cumulative error.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Gibbons

_____, J.
Douglas

_____, J.
Cherry

[18]Smith v. State, 112 Nev. 1269, 1280, 927 P.2d 14, 20 (1996) (quoting Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992)).

cc: Hon. Douglas W. Herndon, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Clark District Court Clerk