IN THE SUPREME COURT OF THE STATE OF NEVADA

LEONARD SLACK, A/K/A LEONARD GREEN SLACK, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 45812
LEONARD SLACK A/K/A LEONARD GREEN SLACK, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 45998

FILED

JUL 28 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

These are consolidated appeals. Docket No. 45812 is an appeal from a district order denying appellant's motion for a new trial. Docket No. 45998 is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of robbery of a victim age 60 or older, battery with intent to commit a crime, and burglary. Eighth Judicial District Court, Clark County; Valerie Adair, Judge. The district court sentenced appellant Leonard Slack to serve two consecutive prison terms of 48 to 156 months for the robbery count, a consecutive prison term of 48 to 156 months for the battery count, and a consecutive prison term of 24 to 96 months for the burglary count.

First, Slack contends that the district court erred by admitting unauthenticated hearsay from the victim's cellular phone bill because the State failed to lay an adequate foundation by providing an affidavit from the custodian of records. The State concedes error, but argues that the error was harmless. Slack also argues that reversal of his conviction is

required because the prosecutor engaged in misconduct in rebuttal closing argument by giving a lengthy exposition labeling the defense theory a "red herring." The State notes that, in making the argument, the prosecutor did not personally malign the defendant and, again, argues that any error was harmless.

In this case, we conclude that the district court erred by admitting the victim's cellular telephone bill under the business records exception to the hearsay rule because it was not properly authenticated.[1] Additionally, we conclude that the prosecutor engaged in misconduct by labeling the defense theory of the case a "red herring."[2] However, we need not consider whether each error was harmless in isolation because we conclude that the cumulative effect of the two alleged errors deprived Slack of his right to a fair trial.[3]

This court has stated that factors relevant to a claim of cumulative error "include whether 'the issue of innocence or guilt is close,

---

[1]NRS 51.135; Thomas v. State, 114 Nev. 1127, 1147-48, 967 P.2d 1111, 1124-25 (1998).

[2]See Pickworth v. State, 95 Nev. 547, 550, 598 P.2d 626, 627-28 (1979) (stating that "[t]he prosecution should not disparage legitimate defense tactics" and concluding that characterizing the defense theory of drug intoxication as a "red herring" is "highly improper").

[3]We also do not address whether the district court erred in admitting testimony about the contents of police computer databases because, even assuming the evidence was hearsay, it was cumulative and, therefore, any error was harmless. See generally Batson v. State, 113 Nev. 669, 677-78, 941 P.2d 478, 484 (1997).

the quantity and character of the error, and the gravity of the crime charged.'"[4]

While we agree with the State that there was sufficient evidence to sustain the conviction,[5] the evidence presented at trial was far from overwhelming. There was no physical evidence linking Slack to the robbery. The only eyewitness who positively identified Slack as the robber was the victim, and her testimony was not free from doubt given the lapse of time between the robbery and the identification, and the fact that there were some discrepancies between the victim's police statement describing the robber and Slack's physical appearance. Even the district court who presided over the trial noted that the issue of guilt was close, commenting in a post-conviction proceeding that it would have acquitted the defendant had there been a bench trial because the defense "had created a reasonable doubt" and "there was some question created as to whether or not it could have been [Slack's] cousin."

We also cannot say the errors alleged were harmless beyond a reasonable doubt given the character of the error. The prejudicial nature of the erroneous admission of the hearsay evidence was significant

---

[4]Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (internal citations omitted).

[5]We reject Slack's contention that the evidence was insufficient to sustain the conviction. See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). To the extent that Slack argues that the pretrial identification violated his right to due process, we note that Slack failed to preserve this issue by filing a pretrial suppression motion or objecting to the admission of the evidence. Nonetheless, there is no indication that the pretrial identification was overly suggestive. See Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980).

because it provided the only corroboration of the victim's identification testimony. And, the prosecutor's disparaging remarks about the defense theory of the case were inappropriate and compounded the prejudice involving the hearsay evidence. In this case, Slack was charged with multiple, serious felony counts and, like every criminal defendant, had a constitutional right to a fair trial. Because the issue of innocence or guilt was close and the gravity of the errors was significant, we conclude that cumulative error warrants reversal of Slack's conviction. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for a new trial.[6]

Douglas, J.
Douglas

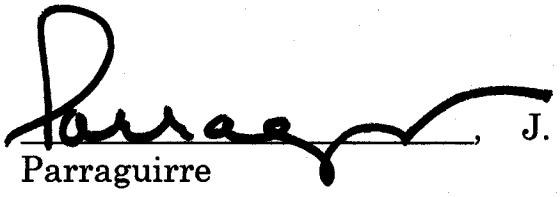
Becker, J.
Becker

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

[6]Because we remand for a new trial, we note that Slack's remaining contention that the district court erred by denying his motion for a new trial is moot.

Parraguirre, J., dissenting:

I conclude that the alleged instances of error were harmless beyond a reasonable doubt.[1] Accordingly, I would affirm the judgment of conviction and order denying appellant's motion for a new trial.



_____, J.
Parraguirre

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