

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHESTER BARELA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46286

FILED

MAY 31 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a conviction, upon a jury verdict, of three counts of sale of a controlled substance. Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge.

In April 2004, appellant Chester Barela sold marijuana and methamphetamine to Shawn Gallegos, a confidential informant working with local police. A jury convicted Barela of three counts of sale of a controlled substance. Barela argues he is entitled to a new trial, alleging evidentiary and instructional errors. All of Barela's assignments of error are without merit, but several warrant detailed discussion.¹ The parties

¹Barela also advances the following arguments on appeal: (1) the district court erred in failing to grant a mistrial when a member of the venire stated at voir dire that she had been on another trial with the defendant; (2) the district court erroneously admitted Detective Hibbs' trial testimony regarding the use of confidential informants and Gallegos' reliability in prior cases; (3) the district court erred in permitting Gallegos to testify about drug use in Barela's house at the time of the sale; (4) the district court failed to adopt Barela's proposed jury instruction regarding the State's presentation of witnesses; (5) the jury's verdict is not supported by substantial evidence; (6) the district court improperly punished Barela at sentencing for exercising his constitutional right to a trial by jury; and (7) the district court erroneously failed to grant a new trial based upon

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are familiar with the facts, and we do not recount them here except as necessary to our discussion.

Admission of edited digital recordings

Barela argues that the district court erroneously admitted into evidence edited and enhanced digital recordings of the drug transactions at issue. First, Barela asserts that the State failed to provide a proper foundation for these enhanced recordings. Second, he alleges that the district court erred procedurally by permitting the State to disclose this evidence on the eve of trial and by failing to inform the jury that the recordings had been altered. The decision to admit or exclude evidence is within the district court’s discretion and will not be reversed upon appeal unless it is manifestly wrong.²

Foundation

Barela first contends that the district court abused its discretion in admitting the recordings because the State failed to provide an adequate foundation for the evidence. We disagree.

Demonstrative evidence, including sound recordings, must be authenticated before it can be admitted. Pursuant to NRS 52.015, the requirement of authentication “is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims.” “The most important criterion for admission is that

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juror misconduct. We have considered these arguments and conclude that they lack merit.

²Archanian v. State, 122 Nev. __, __, 145 P.3d 1008, 1016 (2006).

the tapes accurately reflect the conversation which they purport to record. This evidence may be circumstantial or direct, real or testimonial, and need not conform to any particular mode.”³

In this case, the State sought to admit digital recordings that had been enhanced and edited. Such recordings are generally admissible, provided the proponent of the evidence can demonstrate that the recording is accurate, that no relevant or exculpatory information was deleted from it, and that the modifications made to it did not adversely affect or obscure the content.⁴

The State first called Gallegos, who testified that the enhanced recordings were an accurate record of the conversations he had with Barela during the drug transactions. Two police detectives then testified as to the reliability of the digital recording device and established chain of custody for the compact discs containing the digital recordings. The detectives also testified that they were present when the district attorney used digital editing software to enhance the volume of conversations on the tape and reduce background noise. Finally, the district court independently determined that the enhanced recordings were authentic after listening to and comparing the originals and the enhanced recordings.

³United States v. Traficant, 558 F.Supp. 996, 1002 (N.D. Ohio 1983) (citations omitted).

⁴Archanian, 145 P.3d at 1015-16. See also Cook v. State, 728 So.2d 117, 121 (Ct. App. Ms. 1998) (inquiry in determining whether to admit an enhanced or edited recording is whether “there has been any significant change so as to distort either the words uttered therein or their apparent meaning”).

This testimony sufficiently authenticated the enhanced recordings, and Barela has revealed nothing that throws into question the authenticity of the original recordings. Therefore, we conclude that the district court did not abuse its discretion in admitting these enhanced recordings.

Procedural issues

Barela also assigns error to the admission of the recordings on procedural grounds. He argues that the district court should not have admitted the edited tapes because copies were first provided to the defense shortly before the pretrial conference on August 22, 2005, the day before trial. Barela also contends that the district court erred when it failed to inform the jury that the tapes had been edited.

However, Barela never raised an objection to either the late proffer of the tapes nor requested such an instruction at trial. The failure to object at trial precludes appellate review, except where errors are patently prejudicial and inevitably inflame or excite the passions of the jurors against the accused.⁵ Other than conclusory statements in the briefs and at oral argument, Barela has failed to indicate how these alleged procedural errors caused actual prejudice to his defense at trial. Barela's procedural arguments are therefore waived.

Because the State was able to properly authenticate the recordings at issue, we conclude that the district court did not abuse its discretion in admitting the edited, enhanced digital recordings at trial.

⁵Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 234-35 (1986).

Exclusion of document evidencing Gallegos' prior conviction

During the cross-examination of Shawn Gallegos, Barela sought to introduce into evidence an uncertified copy of Gallegos' 1998 conviction in Utah for possession of marijuana. The district court, after noting that Gallegos had testified in detail about the circumstances of the conviction, excluded the Utah document on the grounds that the evidence was cumulative. Barela contends that this was an abuse of discretion. We disagree.

Under NRS 48.035(2), the district court may exclude relevant evidence if its probative value is substantially outweighed by "considerations of undue delay, waste of time or needless presentation of cumulative evidence." On direct, Gallegos discussed the circumstances of the Utah conviction, testifying that he was arrested for marijuana possession during a DEA sting and that he agreed to cooperate with federal authorities in return for a reduction in his sentence. The introduction of the Utah document would have added nothing to this testimony; therefore, we conclude that the district court did not abuse its discretion in determining that the copy of conviction was cumulative and therefore inadmissible.⁶

Prosecutorial misconduct

Barela also alleges that he is entitled to a new trial based upon the district attorney's misconduct during closing arguments. During

⁶If Gallegos had denied the existence of the conviction at trial, the defense certainly would have been entitled to introduce this evidence in the form of a certified record of conviction. Corbin v. State, 111 Nev. 378, 383-84, 892 P.2d 580, 583 (1995); NRS 50.095.

his closing, the district attorney made a number of comments that arguably vouched for Gallegos's character and reliability.⁷

A prosecutor may not vouch for the credibility of a witness or accuse a witness of lying.⁸ However, such comments will be deemed harmless if there is overwhelming evidence of guilt.⁹ Here, although the district attorney should not have been permitted to vouch for Gallegos' credibility, we conclude that Barela's fundamental rights were not affected due to the overwhelming testimonial, demonstrative, and physical evidence of Barela's guilt.¹⁰

⁷Specifically, the district attorney stated that Gallegos was "honest" and told the truth, and that Gallegos "didn't do it for money," but rather participated in the investigation "because it was the right thing to do."

⁸Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997) (stating that it is improper to vouch for the credibility of a government witness); Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990) (holding that it is improper argument to characterize a witness as a liar).

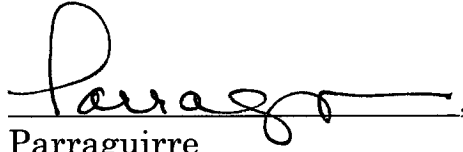
⁹Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187-88 (2005).


¹⁰This court previously admonished Mr. Sears for similar misconduct in Anderson, 121 Nev. at 517, 118 P.3d at 187. Although that opinion was not issued prior to the trial in this case, we again caution Mr. Sears that further conduct of this nature will be met with serious sanctions by this court.

Conclusion

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre, J.


Hardesty, J.


Douglas, J.

cc: Hon. Dan L. Papez, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General Catherine Cortez Masto/Carson City
White Pine County District Attorney
White Pine County Clerk