IN THE SUPREME COURT OF THE STATE OF NEVADA

LEE MURRAY SYKES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47524

FILED

SEP 21 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree kidnapping with the use of a deadly weapon, burglary, possession of a firearm by an ex-felon, and three counts of attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced appellant Lee Murray Sykes to serve concurrent and consecutive terms totaling 18 years to life in prison.

Sykes argues that the district court erred by denying his motion to dismiss the charges due to a violation of Brady v. Maryland[1] and by refusing to give proposed jury instructions relating to the State's alleged loss of evidence. Sykes contends that the State failed to preserve records relating to calls from the jail where Sykes was housed to the

[1]373 U.S. 83 (1963); see Daniels v. State, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998).

07-20924

victim's telephone number and failed to preserve Sykes' vehicle, resulting in the loss of potential blood and firearms evidence.

We have previously held that

> [t]he State's loss or destruction of evidence constitutes a due process violation only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed. . . . The defendant must show that it could be reasonably anticipated that the evidence sought would be exculpatory and material to [the] defense. It is not sufficient to show merely a hoped-for conclusion or that examination of the evidence would be helpful in preparing [a] defense.[2]

Here, Sykes does not contend that the State acted in bad faith. He argues that preservation of the vehicle could have led to evidence that would buttress his theory that the victim was the initial aggressor and his actions were in self-defense. He also argues that preservation of the jail telephone records would have enabled him to impeach the victim based on her testimony that she only spoke with Sykes a few times after the incident.

---

[2]Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001) (internal quotations and citations omitted).

We conclude that Sykes failed to make the required showing. Witness testimony and video surveillance tapes admitted at trial established that Sykes beat the victim with his fist, attempted to shoot two witnesses who interceded in the altercation, chased the fleeing victim to a convenience store, and shot at her while she ran inside. There was no indication that Sykes had been injured or shot at. In light of these facts, there was no apparent exculpatory value to the vehicle or the recordings; nor was Sykes unduly prejudiced by their loss given the evidence described above.

Further, Sykes failed to establish that the State was grossly negligent. The investigating detective testified that she saw no further evidentiary value to the vehicle and that release of the vehicle was normal under that circumstance. The jail records custodian testified that telephone records are normally destroyed after one year. Thus, Sykes was not entitled to a presumption that such evidence would have been unfavorable to the State.[3] Accordingly, we conclude the district court did not err in this regard.

Sykes next argues that the district court erred by denying his motion for a new trial based on the district court's not delaying the trial to allow the victim to testify in Sykes' case in chief. We conclude the district court did not err. Sykes concedes that he did not seek a continuance and

---

[3]See Daniels, 114 Nev. at 267-68, 956 P.2d at 115.

in fact decided not to call the victim. We therefore conclude the district court did not err in this regard.

Sykes also argues that the district court erred by disallowing testimony by defense witness John Lucero on hearsay grounds. Sykes contends that Lucero would have testified that the victim told him Sykes never kidnapped her. Sykes appears to contend that this testimony was admissible as a present sense impression,[4] but he fails to provide any argument to support this contention. We therefore decline to address its merits.[5] Sykes could have attempted to admit the statement as a prior inconsistent statement, but he elected not to recall the victim in his case in chief.

Sykes next argues that the district court erred by denying his motion for a new trial based on judicial and juror misconduct. Sykes contends that a statement made by the district court during jury voir dire suggesting counsel expedite his questioning of the panel pitted jurors against the defense and trivialized the proceedings. We are not persuaded that this single exchange between the district court and defense counsel

---

[4]See NRS 51.085.

[5]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

prejudiced Sykes.[6] Nor does the exchange rise to level of misconduct we found warranted reversal and remand in Parodi v. Washoe Med. Ctr.[7]

As to juror misconduct, Sykes argues that throughout the trial, "several jurors displayed visible reactions to the testimony and evidence, made audible comments about the case, and implied they had formed opinions during the trial about the case." Sykes concedes he made no contemporaneous objections to the jurors' alleged conduct, but he contends the district court was obligated to conduct a hearing pursuant to Viray v. State[8] to determine if the jurors had violated the district court's admonishment to them. Viray is distinguishable, because in Viray one of the jurors sent a note to the judge expressing reservations about his duties as a juror.[9] Over defense objection, the district court interviewed the juror, who stated under oath that he had discussed the case with another juror.[10] Here, there is no indication that a juror or a party raised this issue to the district court. Viray does not stand for the proposition that the district court must conduct a hearing under these circumstances. We therefore conclude the district court did not err in this regard.

---

[6]See Kinna v. State, 84 Nev. 642, 647, 447 P.2d 32, 35 (1968).

[7]111 Nev. 365, 892 P.2d 588 (1995).

[8]121 Nev. 159, 111 P.3d 1079 (2005).

[9]Id. at 161, 111 P.3d at 1081.

[10]Id.

Sykes also argues that the district court should have questioned or dismissed juror 13 after receiving a note from that juror asking to be released because the juror did not like to speak in front of people and sometimes had trouble explaining his feelings in English. Sykes concedes that he failed to object to the district court's refusal to question or dismiss the juror, but he argues that the matter should be reviewed for plain error.[11] After receiving the note, the district court stated that the note was written "pretty well." Our review of the record indicates this finding was not plainly erroneous. We therefore conclude the district court did not err in this regard.

Sykes next argues that the district court erred by denying his challenge to the jury panel as not constituting a fair cross-section of the community and by overruling his Batson v. Kentucky[12] objection to the State's dismissal of an African-American panel member. Although there were only four African-American members in a panel of 60, Sykes presents no facts to show that systematic exclusion of African-Americans occurs in Clark County's juror selection process.[13] As to the Batson challenge, the State explained that it challenged the juror because it feared he harbored

---

[11]See NRS 178.602.

[12]476 U.S. 79 (1986); see also King v. State, 116 Nev. 349, 353-54, 998 P.2d 1172, 1174-75 (2000).

[13]See Williams v. State, 121 Nev. 934, 941, 125 P.3d 627, 631-32 (2005).

ill will toward the police due to his being pulled over at gunpoint and ordered out of his car after a shooting in his neighborhood. This was a sufficiently race-neutral explanation for the challenge, and Sykes points to no indication in the record that panel members with similar experiences were not challenged.[14] We therefore conclude the district court did not err in this regard.

Sykes next argues that there was insufficient evidence to support his conviction of first-degree kidnapping with the use of a deadly weapon. "The relevant inquiry for this court is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[15] We conclude a rational jury could have found the elements of this charge based on the evidence adduced at trial, including that Sykes told the victim he would take her to get money, he had a gun in his vehicle, once leaving the victim's home Sykes told the victim they were going to talk, he drove to a remote location at night, he accused her of seeing another man, he threatened to beat and kill her, he used a gun to

---

[14]See King, 116 Nev. at 354, 998 P.2d at 1175.

[15]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original).

continue his detention of her,[16] and he beat and shot her. Accordingly, we conclude that the district court did not err in this regard.

Sykes also argues that the district court erred by refusing to give a proposed instruction on coercion as a lesser related offense. However, we have held that a defendant is not entitled to an instruction on a lesser related offense.[17] Thus, the district court did not err in this regard.

Sykes next argues that the district court erred by allowing an emergency room physician to give unduly prejudicial evidence about the victim's injuries. He contends that the testimony was improper because, immediately before the witness took the stand, he offered to stipulate that the victim's injuries constituted substantial bodily harm. We note that Sykes failed to object to the physician's testimony. We therefore review this issue for plain error.[18] We perceive no plain error. Although the victim had already testified about her injuries and medical treatment, testimony from a medical expert was probative on the extent of those

---

[16]See NRS 200.310(1); Larson v. State, 102 Nev. 448, 725 P.2d 1214 (1986).

[17]Peck v. State, 116 Nev. 840, 844-45, 7 P.3d 470, 473 (2000) overruled in part on other grounds by Rosas v. State, 122 Nev. ___, 147 P.3d 1101 (2006).

[18]See NRS 178.602.

injuries, and we are not persuaded that the probative value was substantially outweighed by the danger of unfair prejudice.[19]

Sykes also argues that the district court erred by denying his pretrial motion to suppress statements he made over the telephone to Officer Guedry. Sykes contends that Guedry had no pre-existing familiarity with Sykes' voice, and it therefore could not be established that Sykes actually made the statements. A telephone conversation is admissible if the identity of the caller can be established; such identification can be based on circumstantial evidence.[20]

We agree with Sykes that a proper foundation was not laid for this testimony. Guedry testified that he was not familiar with Sykes' voice. He believed he obtained the telephone number from another officer but he did not know how that officer obtained it. He testified that the man who called him told him things only Sykes would know, but the record does not reflect what those things were. And while the man who called him identified himself as Sykes, this alone is generally not sufficient to

---

[19]Compare NRS 48.035 with Edwards v. State, 122 Nev. 378, 132 P.3d 581 (2006) (holding that in a trial for ex-felon in possession of a firearm it was reversible error to admit records of defendant's four prior felony convictions where defendant offered before trial to stipulate that he was an ex-felon).

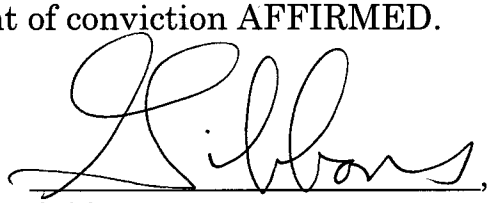
[20]Longley v. Heers Bros., Inc., 86 Nev. 599, 602-03, 472 P.2d 350, 352 (1970) (citing King v. State, 80 Nev. 269, 392 P.2d 310 (1964), and State v. Billings, 84 Nev. 55, 436 P.2d 212 (1968)).

establish an identification.[21] However, we conclude that the error was harmless in light of the overwhelming evidence of Sykes' guilt.

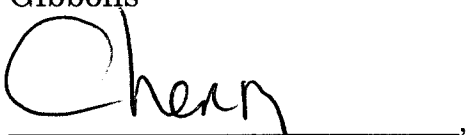
Sykes also argues that the suggestion that he failed to adequately respond to Guedry and other officers who tried to contact him constitutes an impermissible reference to his pre-arrest silence. Our review of the record reveals that Guedry testified that he placed or received about 13 calls to and from the telephone number he believed to be Sykes'. Guedry's testimony did not imply that Sykes failed to adequately respond to him.

Finally, Sykes argues that cumulative error warrants reversal and remand for a new trial. Having found only one error and concluded it was harmless, we disagree. Accordingly, we

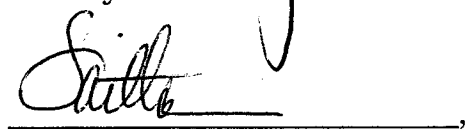
ORDER the judgment of conviction AFFIRMED.



_____, J.
Gibbons



_____, J.
Cherry



_____, J.
Saitta

---

[21]See, e.g., People v. Caffey, 792 N.E.2d 1163, 1191 (Ill. 2001).

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