IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT NADON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47542

FILED

APR 06 2007

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, one count each of level-one trafficking in a controlled substance and level-three trafficking in a controlled substance. First Judicial District Court, Carson City; William A. Maddox, Judge. The district court sentenced appellant Robert Nadon to serve concurrent prison terms of 13-60 months and 10 years to life, to run consecutively to the sentence imposed in district court case no. 05-00472C.

First, Nadon contends that the district court erred by denying his motion to sever the two counts. Specifically, Nadon claims that joinder of the two counts was improper because "they were not based on the same act or transaction, and they were not part of a common scheme or plan."[1] We disagree.

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[1]NRS 173.115 provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
>
> 1. Based on the same act or transaction; or

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The district court retains the discretion to decide severance motions and will not be reversed on appeal absent an abuse of that discretion.[2] "Error resulting from misjoinder of charges is harmless unless the improperly joined charges had a substantial and injurious effect on the jury's verdict."[3] Even when joinder is proper under NRS 173.115, a district court should sever charges when joinder would unfairly prejudice the defendant.[4] In reviewing the issue of joinder on appeal, this court will consider the quantity and quality of the evidence supporting the individual convictions.[5]

In the instant case, district court conducted a hearing, heard the arguments of counsel, determined that a common scheme or plan existed between the facts alleged in the two counts, and denied Nadon's motion. Both counts involved controlled drug buys of methamphetamine using the

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. . . continued

> 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

[2]See Tabish v. State, 119 Nev. 293, 302, 72 P.3d 584, 589-90 (2003); Honeycutt v. State, 118 Nev. 660, 667, 56 P.3d 362, 367 (2002), overruled on other grounds by Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005).

[3]Weber v. State, 121 Nev. 554, 570-71, 119 P.3d 107, 119 (2005).

[4]Id. at 571, 119 P.3d at 119.

[5]See, e.g., Brown v. State, 114 Nev. 1118, 1124-25, 967 P.2d 1126, 1130-31 (1998) (overwhelming evidence of guilt, along with other factors, supported joinder); Middleton v. State, 114 Nev. 1089, 1108, 968 P.2d 296, 309 (1998) (no error in joining charges where sufficient evidence supported convictions).

same confidential informant and supervised by the same Tri-Net police officers, therefore requiring the same witnesses at trial, and the buys occurred at the same location in the same vehicle within a day of each other. Moreover, the evidence suggests that the second controlled drug buy was merely a continuation of the first. Additionally, our review of record reveals that the State presented more than sufficient evidence in support of each individual count. Therefore, we conclude that the counts were properly joined and that the district court did not abuse its discretion in denying Nadon's motion.[6]

Second, Nadon contends that the prosecutor committed misconduct during closing arguments by (1) impugning his character and comparing him to a bottom-feeding catfish, and (2) vouching for the credibility of the State's witnesses. Nadon concedes that there was no objection to the prosecutor's comments, but argues that the misconduct amounted to reversible plain error.[7] We disagree.

The prosecutor began his closing argument by offering an analogy, comparing the use of confidential informants in controlled drug buys to catfishing. The prosecutor stated that, in catfishing, "the bait you use is the foulest, smelliest, stinkiest stuff that you can use." In making this analogy, the prosecutor was referring to his own witness, Rudy Gage, in trying to explain to the jury the difficulties in using confidential

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[6]See Honeycutt, 118 Nev. at 667, 56 P.3d at 367 (quoting United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976)).

[7]See NRS 178.602; Young v. State, 120 Nev. 963, 971-72, 102 P.3d 572, 578 (2004) (the failure to object to alleged prosecutorial misconduct precludes appellate consideration absent plain error).

informants in drug transactions, and acknowledging the obvious shortcomings of Gage as a witness, being a methamphetamine user and convicted felon. The prosecutor concluded his story by remarking that "[t]he good thing about this case is the State is not asking you [the jury] to rely solely upon the word of Rudy Gage to convict in this case." The prosecutor then proceeded to review the corroborating evidence. Therefore, because the State was referring to its own witness, Nadon's claim that the prosecutor was impermissibly impugning his character is belied by the record and without merit.[8]

Nadon also contends that the prosecutor committed misconduct by vouching for two of the State witnesses – Rudy Gage, the confidential informant, and Detective Daniel Johnson. We disagree.

It is improper for a prosecutor to vouch for the credibility of a government witness.[9] "To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process."[10] Additionally, "[a] prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[11]

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[8]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[9]See United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980).

[10]Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

[11]Knight v. State, 116 Nev. 140, 144-45, 993 P.3d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

In referring to Gage's work as a confidential informant, the prosecutor stated, "He may not be doing it right when Tri-NET is not watching, but he did it right when they were. That would be consistent with my sense of who Rudy Gage is." Considered in context, the prosecutor's statement was an attempt to convince the jury that Gage's testimony was trustworthy because he was being watched and listened to by the detectives at all times while working as a confidential informant. Nevertheless, even assuming, without deciding, that the prosecutor erred by offering his "sense" of Gage, Nadon cannot demonstrate that the statement affected his substantial rights and amounted to reversible plain error.[12]

During the State's rebuttal closing argument, the prosecutor commented, referring to the testimony of Detective Johnson, that "[h]e testified to what he saw, credibly and honestly." The prosecutor's statement was made in direct response to defense counsel's allegation, made during Nadon's codefendant's closing argument, that Detective Johnson was not physically in a position to see the movements taking place inside the vehicle where the controlled buy occurred, and therefore, his testimony about witnessing movements consistent with the exchange of money and drugs was not credible. Once again, even assuming, without deciding, that the prosecutor's comment was inappropriate, Nadon cannot

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[12]See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (stating that when conducting a review for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice").

demonstrate that the statement affected his substantial rights and amounted to reversible plain error.[13]

Finally, Nadon contends that the district court erred by refusing to give his requested jury instruction on "mere presence." Nadon requested the following instruction:

> If you believe the Defendant, Robert Mitchell Nadon, was merely present during the transaction on October 26, 2005, and was not the seller, and did not have actual or constructive possession of the 42.05 grams of methamphetamine, you must find him not guilty of trafficking.

The district court denied Nadon's request, stating that "mere presence" was "contained in other instructions and you can argue that."

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error."[14] The district court may refuse to give a proposed jury instruction if the content is substantially covered by other jury instructions.[15] In this case, the instruction proposed by Nadon was substantially covered by other jury instructions. The district court provided the jury with two instructions related to the defense of "mere presence." Instruction no. 17 stated:

> A person aids and abets the commission of a crime if he aids, promotes, encourages or

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[13]See id.

[14]Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005); see also Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (holding that "[a]n abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason").

[15]See Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002).

> instigates, by act or advice, the commission of such crime with the intention that the crime be committed.
>
> Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.
>
> Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.

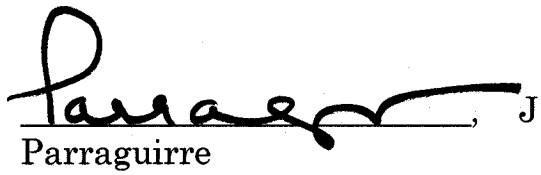
(Emphasis added.) Instruction no. 23 stated:

> Mere presence at the scene of a crime alone cannot support an inference that one is a party to an offense, however; presence, companionship and conduct before, during and after the crime are circumstances from which participation in a criminal act can be inferred.

Therefore, based on the above, we conclude that the district court did not abuse its discretion in rejecting Nadon's proposed instruction. We also note that Nadon did not object below to the instructions given, and on appeal, does not assign error to them.

Accordingly, having considered Nadon's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



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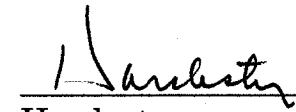

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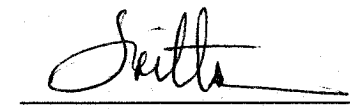

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cc: Hon. William A. Maddox, District Judge
Kay Ellen Armstrong
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
Carson City Clerk