IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES BREDE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47568

FILED

JAN 23 2008

TRACIE K. LINDEMAN
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 one count of possession of a cheating device. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced James Brede to 12 to 32 months imprisonment. The district court then placed him on probation for an indeterminate period not to exceed two years.

The parties are familiar with the facts of this case; thus, we recount them only as necessary to explain our decision.

The prosecution introduced sufficient evidence to sustain a guilty verdict beyond a reasonable doubt

Brede argues that the State did not introduce sufficient evidence to sustain a guilty verdict beyond a reasonable doubt because the prosecution admitted that more than one key was required to open the slot machines. We disagree.

When determining whether a jury verdict was based on sufficient evidence to meet due process requirements, this court will inquire "'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.'"[1] "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."[2]

After viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have found Brede guilty beyond a reasonable doubt on all the elements of NRS 465.080 and NRS 465.088 because (1) witnesses testified that Brede was trespassing and not authorized to possess a slot key inside Larry's Villa, (2) a witness testified that he was wearing a disguise, and (3) police discovered a slot key in one of Brede's pockets. We further conclude that NRS 465.080 only required the State to show that Brede possessed a cheating device and did not require the State to prove that his slot key could have overcome all of the security measures to open the slot box.

The prosecutor's statements were not seriously prejudicial and did not infect the proceeding with unfairness under plain error review

Brede contends that the prosecutor's closing argument statements about his pre-arrest silence violated his Fifth Amendment due process right to a fair trial because the statements flagrantly misstated the evidence and infected the proceedings with unfairness. We disagree.

In order to receive appellate consideration, accusations of prosecutorial misconduct must be properly preserved through objection.[3]

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

[2]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[3]Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002).

If a party fails to properly object, "this court has the discretion to address an error if it was plain and affected the defendant's substantial rights."[4] The defendant's substantial rights are affected if the "prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process."[5] A defendant's due process rights are not violated when the State impeaches the defendant with his or her pre-arrest silence.[6]

In closing argument, "'[t]he prosecutor may argue all reasonable inferences from evidence in the record. [However,] [i]t is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.'"[7]

We review the prosecutor's statements during closing argument for plain error because Brede did not object to the statements at trial. Under plain error review, we conclude that the prosecutor's closing remarks were not prejudicial and did not infect the proceedings with unfairness because the State could properly impeach Brede with his pre-arrest silence. We further conclude that the prosecutor did not misstate

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[4]Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

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

[6]Dettloff v. State, 120 Nev. 588, 599, 97 P.3d 586, 593 (2004); see also Jenkins v. Anderson, 447 U.S. 231, 238 (1980) ("conclud[ing] that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility").

[7]United States v. Young, 470 U.S. 1, 8 n.5 (1985) (quoting ABA Standards for Criminal Justice 3-5.8(a) (2d ed. 1980)).

the evidence because the record supported his inference that Brede knew he possessed an unauthorized slot key when he was apprehended, and thereafter, did not respond to an employee's accusation. Accordingly, we reject this contention.

The district court did not abuse its discretion when it allowed the State to introduce Brede's statements to police officers shortly after he was apprehended

Brede argues that the district court abused its discretion when it denied his motion to suppress his statement to police about how he obtained the slot key because police elicited that statement through custodial interrogation, without the benefit of a Miranda warning, shortly after he was apprehended. We disagree.

This court reviews a district court's denial of a motion to suppress for abuse of discretion.[8] "The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning."[9] In State v. Taylor, this court developed two per se rules in determining whether custody exists under Miranda.[10] First, "an individual is deemed 'in custody' where there has been a formal arrest, or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would

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[8]State v. Smith, 105 Nev. 293, 297, 774 P.2d 1037, 1040 (1989).

[9]State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998).

[10]Id. at 1082, 968 P.2d at 323.

not feel free to leave."[11] Second, an individual is deemed not in custody if "police officers only question an individual on-scene regarding the facts and circumstances of a crime or ask other questions during the fact-finding process."[12]

We conclude that the district court did not abuse its discretion when it allowed Brede's statement to police into evidence because Brede was not in custody under Miranda for two reasons. First, officers had not placed him under formal arrest or restrained his freedom of movement when they questioned him about how he obtained the slot key. Second, officers questioned him on-scene at Larry's Villa about the facts and circumstances of his possession of the slot key.

The district court did not abuse its discretion when it allowed one of the State's witnesses to testify about Brede's previous trespass violation

Brede contends that the district court abused its discretion when it denied his motion in limine and allowed a witness to testify at trial about his previous trespass violation into Larry's Hideaway. The State argues that the district court properly allowed the testimony under Tinch v. State,[13] after the State filed a motion to admit the prior bad acts evidence. We conclude that Brede's argument lacks merit.

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[11]Id.

[12]Id.

[13]113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

As a general rule, "proof of a distinct independent offense is inadmissible" during a criminal trial.[14] To overcome this rule, "the State bears the burden of requesting the admission of the [prior bad acts] evidence and establishing its admissibility" under NRS 48.045(2).[15] Under NRS 48.045(2) evidence of other crimes or bad acts is admissible to show, among other things, the defendant's intent, plan, or absence of mistake.

In Tinch, this court concluded that prior bad act evidence is admissible under NRS 48.045(2) only if "the trial court . . . determine[s], outside the presence of the jury, that: (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."[16] If the district court admits the prior bad acts evidence, it must give a limiting instruction prior to the admission of the evidence and in a final charge to the jury.[17] If the district court fails to give a limiting instruction, then this court will determine whether the district court's failure affected the defendant's substantial rights or whether the failure was harmless because it did not substantially influence the jury's verdict.[18]

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[14]Nester v. State of Nevada, 75 Nev. 41, 46, 334 P.2d 524, 526 (1959).

[15]Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005).

[16]113 Nev. at 1176, 946 P.2d at 1064-65.

[17]Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001).

[18]Rhymes, 121 Nev. at 24, 107 P.3d at 1282.

We conclude that the district court did not abuse its discretion when it allowed a witness to testify about Brede's prior trespass into Larry's Hideaway while wearing a disguise because the State satisfied its burden to show that the prior bad act was admissible under NRS 48.045(2). The witness' testimony about Brede's prior trespass into Larry's Hideaway while wearing a disguise was probative of Brede's intent for the present charge because it was relevant to show that Brede intentionally possessed the slot key when he entered Larry's Villa and did not mistakenly bring it from home. Second, the witness' testimony was also relevant to show a common plan because the two trespasses were: (1) at similar locations because Brede worked for both Larry's Villa and Larry's Hideaway, (2) at similar times because only a few months separated the entries, and (3) under similar pretexts because Brede wore a disguise during both entries. Lastly, we conclude that the probative value of the witness' testimony was not substantially outweighed by the danger of unfair prejudice.

While the district court did not abuse its discretion when it admitted the prior bad acts evidence, we conclude that it erred when it failed to give limiting instructions to the jury. We further conclude that its error was harmless because the State presented overwhelming evidence of Brede's guilt; thus, the error could not have substantially influenced the jury's verdict.

The district court did not abuse its discretion when it allowed the prosecutor to read Brede's preliminary hearing testimony into the trial record

Brede argues that the district court abused its discretion when, over his objection, it allowed the prosecutor to read Brede's preliminary hearing testimony into the trial record because (1) it was

inadmissible hearsay, (2) it violated his Fifth Amendment rights, and (3) Judge Bixler did not expressly inform Brede that he had a right not to testify. We disagree.

This court reviews a district court's admittance of preliminary hearing testimony for abuse of discretion.[19]

"A defendant's Fifth Amendment privilege is not per se violated by the introduction of testimony from a trial or hearing on the same offense."[20] While a defendant's prior testimony is generally inadmissible hearsay, this court has ruled "that it is proper to admit an exculpatory statement as an admission if it tends to establish guilt."[21] This court has further concluded that "a party's admission is relevant, and admissible, if at trial, it is inconsistent with the contention of the party who made the statement."[22]

Under NRS 51.035, a statement is hearsay if it is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." However, under NRS 51.035(3)(a), a statement is not hearsay if it is offered against a party and it is his own statement.

We conclude that Brede's Fifth Amendment privilege was not violated for three reasons. First, the preliminary hearing testimony concerned the same offense, possession of a cheating device, a violation of

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[19]Dawson v. State, 108 Nev. 112, 120, 825 P.2d 593, 598 (1992).

[20]Turner v. State, 98 Nev. 103, 105, 641 P.2d 1062, 1063 (1982).

[21]Id. at 107, 641 P.2d at 1064.

[22]Id. at 106, 641 P.2d at 1064.

NRS 465.080. Second, Brede's statement at his preliminary hearing concerning how he acquired the slot key tended to establish his guilt because the statement conflicted with the testimony by the owner of Larry's Villa, and the jury could have concluded that Brede's explanation was untruthful. Third, Brede's preliminary hearing statements were inconsistent with his claim at trial that he did not knowingly possess a cheating device when he entered Larry's Villa with a slot key concealed inside a box in his pocket.

We further conclude that the district court did not abuse its discretion when it allowed the prosecutor to read Brede's preliminary hearing testimony into the record. During the preliminary hearing, Brede testified that the general manager of Larry's Villa sold him some slot machines and the key to open them. At trial, the owner of Larry's Villa testified that the general manager of Larry's Villa did not sell Brede any slot keys or slot machines. Thus, we conclude that Brede's preliminary hearing testimony was not hearsay under NRS 51.035(3)(a) because the State offered Brede's statement against him and it was his own statement.

The court was not required to inform Brede of his right not to testify at the preliminary hearing

In Phillips v. State, this court adopted the federal position and concluded that reversal of a criminal conviction is not warranted solely because the district court did not advise the defendant on the record that he has a Fifth Amendment right to testify on his own behalf.[23]

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[23]105 Nev. 631, 633, 782 P.2d 381, 382 (1989); see, e.g., Brown v. Artuz, 124 F.3d 73, 78-79 (2d Cir. 1997); U.S. v. Martinez, 883 F.2d 750,

continued on next page . . .

We conclude that former Justice of the Peace James Bixler was not obligated to advise Brede on the record that he had a Fifth Amendment right to testify on his own behalf. Analogously, we also conclude that Judge Bixler was not obligated to advise Brede on the record that he had a Fifth Amendment right not to testify on his own behalf. At Brede's preliminary hearing, he was represented by counsel, and Judge Bixler informed him of his right to testify on his own behalf. Pursuant to this court's holding in Phillips, we conclude that Judge Bixler did not violate Brede's Fifth Amendment right when he did not inform him of his right not to testify.

Accordingly, we conclude that the district court did not abuse its discretion when it allowed the prosecution to read Brede's preliminary hearing testimony into the record.

NRS 465.080 is not unconstitutionally ambiguous, vague, or overbroad

Brede argues that the State violated his due process rights when it charged him under NRS 465.080 because the statute is unconstitutionally ambiguous, vague, and overbroad. We disagree.

A statute's constitutionality is a question of law, which this court reviews de novo.[24] This court presumes that a statute is valid, and

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. . . continued

760 (9th Cir. 1989), opinion vacated on other grounds, 928 F.2d 1470, 1471 (9th Cir. 1991).

[24]Silvar v. Dist. Ct., 122 Nev. 289, 292, 129 P.3d 682, 684 (2006).

the challenger bears the burden of overcoming that presumption by clearly showing that the statute is invalid.[25]

At the time Brede was charged, NRS 465.080(4) provided as follows:

> It is unlawful for any person, not a duly authorized employee of a licensee acting in furtherance of his employment within an establishment, to have on his person or in his possession on or off the premises of any licensed gaming establishment any key or device known to have been designed for the purpose of and suitable for opening, entering or affecting the operation of any gambling game, cashless wagering system or drop box, or any electronic or mechanical device connected thereto, or for removing money or other contents therefrom.[26]

NRS 465.080 is not unconstitutionally ambiguous

A statute is ambiguous if it is "capable of being understood in two or more senses by reasonably well-informed persons."[27] "Although the principle of definiteness is given strict application in penal statutes, it does not require impossible standards of specificity."[28]

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[25]Id.

[26]NRS 465.080(4) (1995), amended by 2007 Nev. Stat., ch. 295, § 24, at 1120.

[27]Thompson v. District Court, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984).

[28]Sheriff v. Luqman, 101 Nev. 149, 155, 697 P.2d 107, 111 (1985) (citation omitted).

This court presumes that NRS 465.080 is valid, and Brede bore the burden of proving that the statute was unconstitutionally ambiguous. We conclude that Brede did not overcome this burden because he failed to show that two reasonably well-informed persons could understand the statute in two or more senses.

Accordingly, we conclude that NRS 465.080 is not unconstitutionally ambiguous.

NRS 465.080 is not unconstitutionally vague

"[T]he Due Process Clause of the Fourteenth Amendment prohibits the states from holding an individual 'criminally responsible for conduct which he could not reasonably understand to be proscribed.'"[29] "'A statute is unconstitutionally vague and subject to facial attack if it (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement.'"[30] This court permits a party to challenge a penal statute under the vagueness doctrine even when the First Amendment is not implicated.[31]

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[29]Sheriff v. Martin, 99 Nev. 336, 339, 662 P.2d 634, 636 (1983) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

[30]Gallegos v. State, 123 Nev. ___, ___, 163 P.3d 456, 458 (2007) (quoting Silvar v. Dist. Ct., 122 Nev. 289, 293, 129 P.3d 682, 685 (2006)).

[31]City of Las Vegas v. Dist. Ct., 118 Nev. 859, 863, 59 P.3d 477, 480 (2002).

This court presumes that NRS 465.080 is valid, and Brede bears the burden of proving that the statute is unconstitutionally vague. We conclude that Brede did not meet this burden and NRS 465.080 satisfies both prongs of the vagueness test. First, the statute's terms are sufficiently definite to enable a person of ordinary intelligence to understand that possessing an unauthorized cheating device on the premises of a gaming establishment is prohibited. In particular, this court concluded in Laney v. State that the term "cheating device" is sufficiently definite.[32] Moreover, NRS 465.080(4)'s requirement that the cheating device be "designed for the purpose of and suitable for opening, entering or affecting the operation of any gambling game" is also sufficiently definite and would not encompass benign items such as mirrors and paperclips, because these objects are not designed for the purpose of affecting the operation of gambling games. Second, NRS 465.080 provides law enforcement with sufficiently specific standards to prevent discriminatory enforcement. We therefore conclude that Brede's vagueness challenge lacks merit.

NRS 465.080 is not unconstitutionally overbroad

If a challenger seeks to invalidate a statute on First Amendment grounds, then his or her claim must be based on the overbreadth doctrine, not the void for vagueness doctrine.[33] "The overbreadth doctrine provides that a law is void on its face if it 'sweeps

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[32]86 Nev. 173, 177, 466 P.2d 666, 669 (1970).

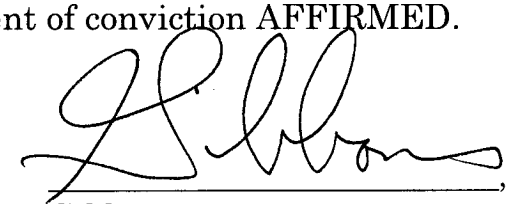
[33]City of Las Vegas v. Dist. Ct., 118 Nev. 859, 863 n.14, 59 P.3d 477, 480 n.14 (2002); see Chicago v. Morales, 527 U.S. 41, 52-53 (1999).

within its ambit other activities that in ordinary circumstances constitute an exercise of protective First Amendment rights, such as the right to free expression or association."[34]

We conclude that the overbreadth doctrine is not implicated in this case because Brede does not contend that NRS 465.080 violated or implicated his First Amendment rights. We therefore conclude that Brede's overbreadth challenge lacks merit.

Having considered Brede's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.



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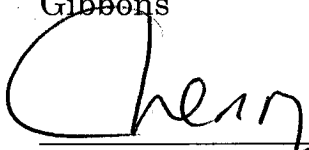
Gibbons



_____, J.
Cherry

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Saitta

[34]City of Las Vegas, 118 Nev. at 863 n.14, 59 P.3d at 480 n.14 (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940)).

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