IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT COTA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48317

FILED

JUL 24 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Appellant Albert Cota argues that the district court erred in denying his motion to suppress evidence, which was based on a purported Miranda[1] violation. Cota further argues that he is entitled to a new trial because a police officer's testimony improperly commented on Cota's silence and because prior bad acts and character evidence were improperly introduced into evidence. Cota additionally argues that he is entitled to a new trial because the State elicited improper vouching testimony from a police officer. We conclude that these arguments lack merit.

Motion to suppress evidence

Cota generally argues that the district court erred in denying his motion to suppress evidence based on a purported Miranda violation,

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

as to evidence that should have been suppressed under the fruit of the poisonous tree doctrine under Wong Sun v. United States.[2]

We conclude that there was no Miranda violation because Cota was not subject to a custodial interrogation when he voluntarily inquired whether his wife had been in an accident and responded to an officer's follow-up question. In particular, Cota had not "been taken into custody or otherwise deprived of his freedom of action in any significant way"[3] at the time of his pre-Miranda statements. As a result, we further conclude that Cota's subsequent statements after being advised of his Miranda rights were not tainted by any alleged prior Miranda violation.[4] For these reasons, we conclude that the district court did not err in denying Cota's motion to suppress evidence.

Comments on Cota's silence

Cota argues that he is entitled to a new trial because a police officer's testimony at trial improperly commented on Cota's silence. We disagree.

This court has recognized that a "direct reference to a defendant's decision not to testify is always a violation of the fifth

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[2]371 U.S. 471, 484-85 (1963) (holding that evidence seized during a lawful search and seizure cannot constitute proof against the victim of a search and that the exclusionary prohibition extends to indirect as well as direct products of such invasions); see also United States v. Patane, 542 U.S. 630, 637-38 (2004) (holding that the failure to give a suspect Miranda warnings does not require suppression of physical fruits of a suspect's unwarned but voluntary statements).

[3]See 384 U.S. at 478.

[4]See Patane, 542 U.S. at 637-38.

amendment."[5] Similarly, the State may not comment on or elicit testimony that comments on a defendant's post-arrest silence.[6]

Here, the challenged testimony occurred during defense counsel's cross-examination of a police officer. The officer remarked that he did not know the answer to defense counsel's question because Cota would not talk to police. Thereafter, defense counsel declined the district court's offer to give the jury a curative instruction. We conclude that the officer indirectly referred to Cota's post-arrest silence but the comment was harmless beyond a reasonable doubt because it was a single, passing reference.[7]

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[5]Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991).

[6]Murray v. State, 113 Nev. 11, 17, 930 P.2d 121, 124 (1997) (holding that the prosecution is forbidden to comment at trial upon a defendant's election to remain silent following his arrest and after being advised of his rights as required under Miranda); Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267-68 (1996) (explaining that prosecutorial comments during impeachment on post-arrest silence are improper and holding that same rule extends to comments made during the prosecution's case in chief).

[7]Morris, 112 Nev. at 264, 913 P.2d at 1267-68 (holding that "[c]omments on the defendant's post-arrest silence will be harmless beyond a reasonable doubt if (1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence, or (2) there was overwhelming evidence of guilt" (citations omitted)); see also Sampson v. State, 121 Nev. 820, 830-31, 122 P.3d 1255, 1261-62 (2005) (holding that the constitutional error in the State's eliciting of a police officer's testimony that the defendant refused to consent to a warrantless search was harmless error because the testimony was no more than a passing reference to the defendant's invocation of his Fourth Amendment rights and because the State's questioning was not aimed at discussing the defendant's refusal to consent).

Prior bad acts and character evidence

Cota additionally argues that he is entitled to a new trial because allegations of his prior bad acts had been improperly introduced into evidence. He contends that under NRS 48.045(2), the evidence relating to the discrepancies in his tax returns and multiple social security numbers should not have been introduced into evidence. Cota further argues that the district court erred in admitting evidence that the victim's credit cards had been found in the possession of Cota's ex-wife, which the State impermissibly used to suggest that Cota took the credit cards and gave them to his ex-wife. Additionally, Cota argues that the district court abused its discretion by admitting testimony regarding his propensity for violence.

Evidence of character traits is not admissible to prove that a defendant acted in conformity with those traits on a particular occasion.[8] Similarly, evidence of prior bad acts is not admissible to prove character.[9] But these types of evidence are admissible in certain circumstances. In particular, evidence of a witness's character is admissible when offered to attack that witness's credibility, so long as the evidence is not excluded by NRS 50.090 and meets the limitations of NRS 50.085.[10] And evidence of prior bad acts may be admitted for purposes other than showing character, "such as proof of motive, opportunity, intent preparation, plan, knowledge,

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[8]NRS 48.045(1).

[9]NRS 48.045(2).

[10]NRS 48.045(1)(c).

identity, or absence of mistake or accident."[11] When evidence of prior bad acts is offered for a permissible purpose, the district court must conduct a hearing outside the jury's presence to determine whether: "(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 substantially outweighed by the danger of unfair prejudice."[12] Additionally, in very limited circumstances, evidence of another crime or act may be admissible if it "is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime."[13]

We conclude that the district court did not abuse its discretion in admitting the evidence at issue.[14] First, while the State's cross-examination of Cota regarding taxes and multiple social security numbers may have been outside the scope of defense counsel's direct examination wherein defense counsel asked Cota about his finances, it was not an abuse of discretion for the district court to allow the State to ask Cota these questions, which properly challenged Cota's credibility and

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[11]NRS 48.045(2).

[12]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[13]NRS 48.035(3); see also Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, ___ (2005) (observing that "complete story of the crime" doctrine, as codified in NRS 48.035(3), "must be construed narrowly").

[14]See Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008).

truthfulness.[15] Second, the district court did not abuse its discretion in admitting the credit card evidence because it was necessary in presenting a complete story of the crime under NRS 48.035(3). But even if the district court abused its discretion, admission of the credit card evidence was not unduly prejudicial because defense counsel was able to refute any inference that Cota stole the victim's credit cards, as defense counsel presented evidence that Cota's ex-wife was helping Cota and the victim with their finances. Finally, it was not plain error for the district court to allow testimony regarding Cota's violent propensities. This testimony had been elicited by defense counsel;[16] thus, the district court was not required to conduct a Petrocelli[17] hearing or make a Tinch[18] determination. Therefore, Cota is not entitled to a new trial as a result of the district court's admission of the aforementioned evidence.

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[15]See NRS 50.085(3); see also Jezdik v. State, 121 Nev. 129, 135-40, 110 P.3d 1058, 1062-65 (2005).

[16]See Taylor v. State, 109 Nev. 849, 857 n.1, 858 P.2d 843, 848 n.1 (1993) (stating that the invited error doctrine, which is also known as the doctrine of curative admissibility, provides "'that when one party introduces inadmissible evidence, with or without objection, the trial court may allow an adverse party to offer otherwise inadmissible evidence on the same subject if it is responsive to the evidence in question'" (quoting Lala v. People's Bank & Trust Co. of Cedar Rapids, 420 N.W.2d 804, 807-08 (Iowa 1988))).

[17]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 1334, 930 P.2d 707, 711-12 (1996), and superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004).

[18]113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

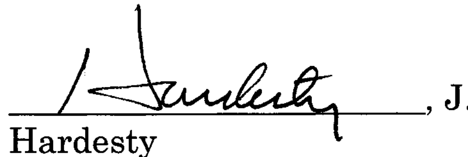
Vouching testimony

Cota further argues that he is entitled to a new trial because the State elicited improper vouching testimony from a police officer. He takes issue with the police officer's testimony as to whether another witness's explanation of the events was reasonable.

Cota did not object to this testimony, and therefore we review for plain error.[19] Having reviewed the parties' arguments and record on appeal, we conclude that Cota's substantial rights were not prejudiced with the introduction of this testimony.[20] Therefore, Cota is not entitled to a new trial as a result of the testimony at issue.

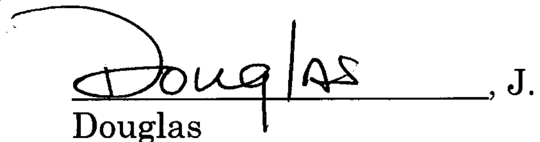
Consequently, we conclude that Cota's arguments on appeal lack merit.[21] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_______________, J.
Hardesty

_______________, J.
Parraguirre



_______________, J.
Douglas

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[19]See Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 109 (2008).

[20]See Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 159 (2008).

[21]We conclude that Cota's argument as to police/prosecutorial misconduct is without merit; Cota's due process rights to a fair trial were not violated. See Steese v. State, 114 Nev. 479, 490, 960 P.2d 321, 328 (1998) (holding that witness intimidation by a prosecutor warrants a new trial if it results in a denial of the defendant's due process rights to a fair trial).

cc: Hon. Stewart L. Bell, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk