IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN D. SHAW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50096

FILED

DEC 24 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count each of conspiracy to commit larceny, burglary, and attempted grand larceny. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. The district court sentenced appellant Kevin D. Shaw to serve a jail term of 12 months for conspiracy to commit larceny, a concurrent prison term of 18 to 72 months for burglary, and a consecutive prison term of 12 to 34 months for attempted grand larceny.

Shaw contends that he was denied a fair trial because a State's witness referred to prior bad acts. Specifically, the witness remarked that Shaw was on probation and that one of Shaw's codefendants had a prior conviction for a similar offense. Shaw asserts that these statements were inadmissible as evidence of prior bad acts and were prejudicial because they inferred that both he and one of his codefendants had prior felony convictions. Shaw contends that the district court abused its discretion in denying his motion for a mistrial. We conclude that Shaw's contention lacks merit.

08-32625

The decision to grant or deny a motion for a mistrial is within the district court's sound discretion and will not be disturbed on appeal absent a clear showing of an abuse of discretion.[1] Prior bad acts are generally inadmissible under NRS 48.045(2), which provides that evidence of other crimes, wrongs, or acts is inadmissible to prove a person's character in order to show that he or she acted in conformity therewith. Nevertheless, we have held that an improper reference to a defendant's criminal history may be harmless error in certain circumstances.[2] In particular, when determining whether an inadvertent reference to prior criminal activity is unduly prejudicial, the court may consider: "(1) whether the remark was solicited by the prosecution; (2) whether the district court immediately admonished the jury; (3) whether the statement was clearly and enduringly prejudicial; and (4) whether the evidence of guilt was convincing."[3]

The record reveals that police officer Truong Thai made two statements during the trial that referred to prior bad acts. First, in response to the prosecutor's question concerning Shaw's confession, Officer Thai remarked that Shaw was on probation as follows:

> Q: And he stated he wished to waive his rights and speak with you?
>
> A: Yes. He said that he was willing to talk to me.

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[1]Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996).

[2]Thomas v. State, 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998); Geiger, 112 Nev. at 942, 920 P.2d at 995-96.

[3]Geiger, 112 Nev. at 942, 920 P.2d at 995-96 (citing Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1983)).

Q: What did the defendant tell you?

. . .

THE WITNESS: Initially he told me that he was on probation, that he didn't want to go to jail.

THE COURT: Well, that comment will be stricken.

MS. ALBRITTON: Thank you, Your Honor.

THE COURT: You may continue Ms. Albritton.

Q (By Ms. Albritton): Did you ask the defendant anything about the incident on May 9th?

In the second instance, Officer Thai testified in response to defense counsel's questioning that two of Shaw's codefendants had been in the Target store before, and one had a prior conviction for a similar incident. The following colloquy occurred on cross-examination by defense counsel, where defense counsel challenged the officer's memory of Shaw's confession:

Q: Anything distinctive about this that would cause you to remember it?

A: No. It wasn't just a property – I mean, it wasn't just the property theft. Due to the fact that all three of them participated together, and that security also mentioned to me that two of them were actually in the business before, and one of them has a prior for a similar incident.

Q: So you remember this because –

A: Because that's pretty distinguished to me.

Q: Okay.

A: It wasn't just another petty larceny or anything like that, sir.

Mr. Tanner: That's all, Judge.

Defense counsel did not object to this statement concerning the codefendants, and the district court did not strike the statement or admonish the jury.

In the jury's absence, defense counsel moved for a mistrial based on these two statements. The district court denied the motion because the first statement was timely stricken and was unsolicited by the prosecutor. The court further found that the second statement would have weighed against Shaw's codefendants, if anyone. The district court concluded, "the store clerks have all been pretty specific that they've never seen Mr. Shaw before, but they had had prior incidents with the other two. So if that's got to weigh against anybody, it can weigh against the other two."

We conclude that the district court did not abuse its discretion in denying Shaw's motion for a mistrial. First, the comments were not deliberately solicited by the prosecutor. In fact, the second remark was made in response to defense counsel's questioning. Second, the remarks were not clearly and enduringly prejudicial. The statement about Shaw being on probation was immediately stricken, and the jury was advised in jury instruction number 18 to disregard any evidence ordered stricken by the court. While the second statement was not stricken, the district court properly found that the statement pertained to the codefendants and not Shaw.

Moreover, the evidence of Shaw's guilt was convincing. In particular, the State presented evidence that two Target employees observed one of Shaw's codefendants enter a Target store, load a shopping cart with valuable electronic merchandise, leave the full shopping cart in an aisle, and exit the store. Shaw then entered the store and began

pushing the cart toward a fire exit. Shaw's other codefendant was observed waiting in a car outside of the fire exit. Shaw eventually abandoned the cart and left the store. Shaw was apprehended with a two-way radio tuned to the same channel as a similar radio found in his codefendants' car. After the police administered Miranda[4] warnings, Shaw admitted that he entered the Target store for the purpose of stealing merchandise, but left without the merchandise because he was being watched.

Based on the evidence presented at trial, Shaw has not demonstrated that the testimony referencing prior bad acts was so prejudicial that it deprived him of the right to a fair trial. Therefore, we conclude that the district court did not abuse its discretion in denying Shaw's motion for a mistrial. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Saitta

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

cc: Hon. Sally L. Loehrer, District Judge
Albright Stoddard Warnick & Albright
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk