IN THE SUPREME COURT OF THE STATE OF NEVADA

RAY ANTONIO AZCARATE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50616

FILED

MAY 05 2009

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 first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Appellant Ray Antonio Azcarate was sentenced to life without the possibility of parole for first-degree murder, plus an equal and consecutive term of life without the possibility of parole for use of a deadly weapon.

On appeal, Azcarate argues that: (1) the district court erred by admitting evidence of Azcarate's previous domestic violence conviction, (2) the State committed reversible error by failing to disclose to Azcarate photos of the victim's prior injuries, and (3) the State committed prosecutorial misconduct by eliciting testimony about Azcarate's prior drug use in violation of a stipulation. For the reasons set forth below, we conclude that Azcarate's contentions are without merit, and therefore, affirm the judgment of conviction.

The parties are familiar with the facts and we do not recount them except as necessary for our disposition.

Evidence of previous domestic violence

Azcarate argues that the district court erred by admitting evidence of his previous act of domestic violence without first conducting a Petrocelli[1] hearing. He also alleges that the district court's failure to issue a limiting instruction prior to admitting the evidence warrants reversal.

This court has held that "[t]he trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and . . . will not be reversed absent manifest error." Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). We conclude that the district court did not err in failing to hold a Petrocelli hearing because the prior bad act was sufficiently proven.

Under Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), in order to admit evidence of prior bad acts, the district court must conduct a hearing outside the presence of the jury and determine "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." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (citing Walker v. State, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996)). Failure to conduct a Petrocelli hearing is not reversible error when the record establishes that the evidence is

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[1]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified by Sonner v. State, 112 Nev. 1328, 133-34, 930 P.2d 707, 711-12 (1996), and superseded in part by statute as stated in Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004).

admissible under the above test, or that the result would have been the same had the evidence been excluded. Petrocelli, 101 Nev. at 52, 692 P.2d at 508.

In this case, the record established that Azcarate's prior domestic violence conviction was admissible under Petrocelli. The domestic violence incident was relevant to prove motive and intent with respect to the crime charged; the State's theory of the case was that Azcarate was mad at the victim for refusing to bail him out of jail after the domestic violence charge. The domestic violence incident was proven by clear and convincing evidence; Azcarate was convicted of the charge. Although Azcarate alleges that the domestic violence conviction was not sufficiently proven because of improper police testimony, he provides no evidence of this, nor does he provide a transcript of that proceeding. Finally, we agree with the district court that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Therefore, the evidence was admissible under the Petrocelli three-part test, and failure to conduct a Petrocelli hearing is not reversible error.

Azcarate also argues that the district court erred by failing to to give the jury a limiting instruction when the evidence of the prior domestic violence incident was presented to the jury. This court has held that "the trial court must give a limiting instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and a general instruction at the end of trial reminding the jurors that certain evidence may be used only for limited purposes." Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 111 (2008) (citing Tavares v. State, 117 Nev. 725, 733, 30

P.3d 1128, 1133 (2001)). We conclude that the failure to give a limiting instruction prior to admitting the evidence was harmless.

While a limiting instruction was not given immediately prior to the admission of this evidence, the district court gave a limiting instruction at the end of trial instructing the jurors that the evidence could only be used for limited purposes. Because the district court gave a limiting instruction before the case was submitted to the jury, any error was harmless since it had no "'substantial and injurious effect or influence in determining the jury's verdict.'" Tavares, 117 Nev. at 732, 30 P.3d at 1132 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). We are convinced that Azcarate suffered no prejudice as a result of the district court's failure to give the limiting instruction prior to admission of the evidence.

Photographs of the prior domestic violence

Azcarate argues it was error for the State not to disclose to the defense photographs of the injuries suffered by the victim as a result of the earlier domestic violence incident. We disagree. The photographs were neither exculpatory nor impeaching and Azcarate has failed to tell us how he was prejudiced.

The United States Supreme Court held in Brady v. Maryland that the Due Process Clause imposes upon the State a duty and obligation to disclose "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963).

Azcarate was not prejudiced by the State's failure to disclose to the defense photographs of the injuries suffered by the victim as a result of the earlier domestic violence incident. The photographs were neither exculpatory nor impeaching; it was not material to guilt or punishment. Thus, the State did not commit reversible error by failing to turn the photographs over to the defense.

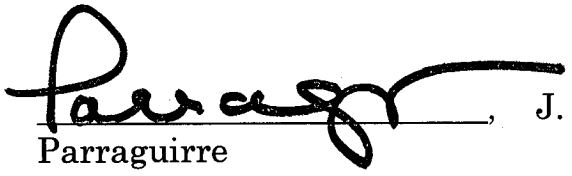
Testimony about Azcarate's prior drug use

Finally, Azcarate argues that the State committed prosecutorial misconduct by failing to honor a stipulation not to present evidence of his prior drug use. The stipulation provides that the State may introduce evidence about Azcarate's drug use on the day of the murder, but evidence of his prior drug use was to be excluded. The prosecutor questioned witnesses about Azcarate's prior drug use, in violation of the stipulation; however, Azcarate failed to object.

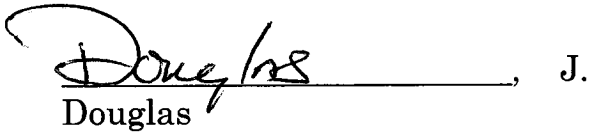
"Although failure to object at trial generally precludes appellate review, this court has the discretion to review constitutional or plain error." Somee v. State, 124 Nev. ___, ___, 187 P.3d 152, 159 (2008). Plain error review requires this court to consider whether an error exists; if so, whether it was clear; and finally, whether any error prejudiced the defendant's substantial rights. Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). Prosecutorial misconduct is prejudicial when it "so infect[s] the proceedings with unfairness as to result in a denial of due process." Id.

In light of Azcarate's admissions and the overwhelming evidence against him, admitting the evidence of his prior drug use was not plain error. Azcarate's substantial rights were not prejudiced by the admission of this evidence. Accordingly, we

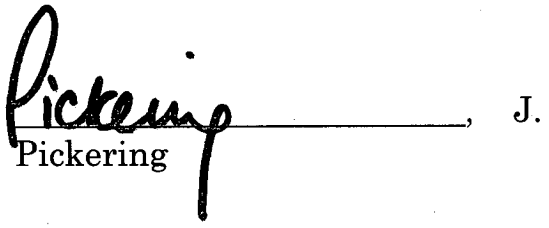
ORDER the judgment of the district court AFFIRMED.



_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Hon. Valorie Vega, District Judge
Amesbury & Schutt
John P. Parris
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk