IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE HERMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50952

FILED

JUN 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction, pursuant to a jury verdict, of one count of first-degree murder. Second Judicial District Court, Washoe County; Robert H. Perry, Judge. The district court originally sentenced appellant Willie Herman to a prison term of life without the possibility of parole. This court affirmed in part, reversed in part, and remanded with instructions to conduct a new penalty phase. Herman v. State, 122 Nev. 199, 128 P.3d 469 (2006). Following a new penalty phase before a jury, the district court again sentenced Herman to a prison term of life without the possibility of parole.

Herman contends that three errors in his penalty phase resulted in violations of his constitutional rights: (1) the district court erred in admitting evidence of a prior criminal charge in which he was acquitted; (2) the prosecutor committed misconduct; (3) and cumulative error.

Prior criminal charge

First, Herman contends that the district court erred in admitting evidence at the penalty hearing of a prior charge for which he had been acquitted.

During a penalty hearing, evidence may be presented on "any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible." NRS 175.552(3). A sentencing court may "take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted." United States v. Donelson, 695 F.2d 583, 590 (D.C. Cir. 1982). "'[The acquittal did] not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.'" Dowling v. United States, 493 U.S. 342, 349 (1990) (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361-62 (1984); see also United States v. Sweig, 454 F.2d 181 (1972) (concluding that "the judge could properly refer to the evidence introduced with respect to crimes of which defendant was acquitted" because '[a]cquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant").

Herman had been charged with a robbery prior to being charged in the present case. He submitted a blood sample in an effort to exonerate himself from the crime, and the jury acquitted Herman of that charge. However, the DNA results were entered into a criminal database, which resulted in a match for the current crime of first-degree murder.

At the second penalty phase for the instant case, the State produced witnesses who discussed Herman's activities in relation to the original robbery, including the victim of the robbery and a police officer, Detective David Jenkins, who testified that Herman was questioned after the crime and was found to be in possession of blood-stained currency and the victim's identification. Jenkins also testified to the facts surrounding that case and explained that the jury had acquitted Herman because the

State had failed to conduct DNA testing in that case. Herman's earlier acquittal did not prove that Herman was innocent of that charge, only that there was reasonable doubt. Further, the evidence was relevant to demonstrate that Herman had the propensity to commit violent offenses. Thus, the district court did not err in admitting the evidence of the earlier charges of which Herman had been acquitted.

Prosecutorial misconduct

Next, Herman contends that six instances of prosecutorial misconduct resulted in violations of his constitutional rights: he contends that the prosecutor committed misconduct by (1) violating a court order to exclude reference of the victim's docile nature; (2) impermissibly shifting the burden of proof; (3) referencing evidence not admitted at trial; (4) repeatedly misstating the evidence; (5) commenting on the possibility of parole law changing; and (6) telling the jury that justice requires a sentence of life without parole.

When deciding whether prosecutorial misconduct is prejudicial, "the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). We examine the context of the statements, and we will not overturn a conviction solely because of the comments "unless the misconduct is 'clearly demonstrated to be substantial and prejudicial.'" Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (quoting Sheriff v. Fullerton, 112 Nev. 1084, 1098, 924 P.2d 702, 711 (1996)).

Generally, the failure to object to prosecutorial misconduct precludes appellate review. Gaxiola v. State, 121 Nev. 638, 653-54, 119 P.3d 1225, 1236 (2005). However, we will consider prosecutorial

misconduct, under plain error review, "'if the error either: (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings.'" Id. at 654, 119 P.3d at 1236 (quoting Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118-19 (2002)).

The victim's docile nature

First, Herman contends that the prosecutor committed misconduct by violating a court order excluding information regarding the docile nature of the deceased. Herman did not object to any of these references at trial, and thus, we review for plain error. Id. at 653-54, 119 P.3d at 1236.

Herman had moved prior to trial to exclude mention of the "docile nature" of the victim. The district court agreed that such evidence was irrelevant and inadmissible. In opening argument, the prosecutor described the victim as "nonviolent." On direct examination, a witness for the State described the victim as "never confrontational." Herman contends that these references violated the court's order excluding reference to the victim as "docile."

"Docile" is defined as easily taught or easily led or managed. Merriam Webster's Collegiate Dictionary 341 (10th ed. 1995). Whereas "nonviolent" is defined as abstaining or free from violence. Id. at 792. "Confrontational" is defined as a face-to-face meeting or a clashing of forces or ideas. Id. at 243. One can certainly be nonviolent or non-confrontational and not be docile. Because the prosecutor did not refer to the victim as "docile," the prosecutor did not commit misconduct and there is no plain error.

Shifting the burden of proof

Second, Herman contends that the prosecutor committed misconduct by impermissibly shifting the burden of proof. Specifically, Herman contends that the prosecutor impermissibly questioned a State witness, Sergeant Rafaqat, regarding Herman's inability to explain how the victim's blood got on his clothing. Herman contends that this statement constituted a comment on his right to remain silent and suggested to the jury that it was the defendant's burden to produce proof by explaining the absence of evidence.

"[W]e have stated that 'as long as a prosecutor's remarks do not call attention to a defendant's failure to testify, it is permissible to comment on the failure of the defense to counter or explain evidence presented.'" Allred v. State, 120 Nev. 410, 418, 92 P.3d 1246, 1252 (2004) (quoting Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001)). "The tactic of stating that the defendant can produce certain evidence or testify on his or her own behalf is an attempt to shift the burden of proof and is improper." Barron v. State, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989). Further, "'[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.'" Allred, 120 Nev. at 418, 92 P.3d at 1252 (internal quotations omitted) (quoting Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000)).

Taken in context, the witness merely described the taking of Herman's statement and commented on his inability to explain how his blood was present at the crime scene and the victim's blood was present on his clothing. The comment did not relate to Herman's choice to not testify

or shift the burden of proof.[1] Thus, the prosecutor did not commit misconduct in this instance.

Referencing evidence not admitted at trial

Third, Herman contends that the prosecutor committed misconduct by disregarding the district court's order and referencing evidence improperly introduced at trial. Specifically, Herman contends that the prosecutor elicited testimony from Rafaqat regarding hearsay statements made by Timothy Dalton, a fellow inmate of Herman's. Because Dalton did not testify during the guilt phase, Herman argues that reference to his statements during the guilt phase violated the Confrontation Clause pursuant to Crawford v. Washington, 541 U.S. 36 (2004), and thus, the improper comments should not have been referenced during the second penalty phase.[2]

Hearsay evidence is generally admissible during penalty hearings. NRS 175.552(3). We have also held that the Confrontation Clause does not apply to evidence admitted at a capital penalty hearing. Summers v. State, 122 Nev. 1326, 1332-33, 148 P.3d 778, 783 (2006). Although Herman filed a motion to exclude reference of Dalton's assertion

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[1]It should be noted that Herman testified during the guilt phase of his original trial. Herman, 122 Nev. at 203, 128 P.3d at 471. The statement made by Rafaqat was made in summary of what was presented to the jury in the guilt phase of the original trial. Thus, the prosecutor could not shift the burden of proof at this later penalty hearing as to Herman's guilt, which had already been proven beyond a reasonable doubt.

[2]Herman did not provide the testimony from the guilt phase of his trial in which Dalton was referenced. This information is based on the briefs on appeal and the district court's order.

prior to his second penalty phase, and the district court ordered the exclusion, Herman did not object below when Rafaqat referenced Dalton, and thus, we review for plain error. See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); NRS 178.602.

The prosecutor specifically asked Rafaqat whether he had located individuals with whom Herman had discussed the murder. Because the prosecutor specifically elicited testimony that was ordered excluded, the prosecutor committed misconduct in this instance. However, Herman cannot demonstrate that he was prejudiced by the comment because guilt had already been established. Further, the comment was brief and nonspecific. Rafaqat merely testified that Dalton had been one of the people with whom Herman had made admissions. See Sampson v. State, 121 Nev. 820, 830, 122 P.3d 1255, 1261 (2005) (holding that a passing reference to inadmissible evidence may be harmless error).

Misstating the evidence

Fourth, Herman contends that the prosecutor committed misconduct by eliciting testimony which repeatedly misstated the evidence. Herman did not object below, so we review for plain error. See Green, 119 Nev. at 545, 80 P.3d at 95; NRS 178.602.

Herman contends that Officer Troy Shipley falsely testified that Herman had previously been charged with attempted armed robbery. Another State witness, Detective John Topoian, testified that following a robbery, Herman had been found with the victim's wallet and identification in his possession, even though Herman had only been in possession of the victim's identification.

Herman cites to Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988), and yet Flanagan does not address a witness's testimony where the

witness is mistaken on the facts. Further, defense counsel corrected the mistaken testimony during cross-examination and the prosecutor correctly characterized the testimony in final summation. Thus, the prosecutor did not commit misconduct in this instance.

Changing of parole law

Fifth, Herman contends that the prosecutor committed misconduct during closing argument by stating that the law regarding parole often changed. Herman did not object below when the prosecutor discussed parole, and thus, we review for plain error. See Green, 119 Nev. at 545, 80 P.3d at 95; NRS 178.602.

In response to defense counsel's comments during closing argument regarding an inmate's need for hope of eventual release, the prosecutor responded:

> I don't talk about in terms of hope and redemption. I'm a criminal prosecutor. I talk about what we need to do to address crime in this community and what we need to do to protect people in this community. And we can talk about parole, and all that is the subject of a whole other body of laws that sometimes change, sometimes don't.

Citing to Sonner v. State, 114 Nev. 321, 955 P.2d 673 (1998), Herman claims that this language suggested to the jury that unless it sentenced him to a term of life without parole, he could "get out at any time."

However, in Sonner, the jury was instructed that even though the State Pardons Commissioners had the power to modify sentences, that it should not speculate as to whether the sentence imposed may or may not change at a later date. Id. at 324-25, 955 P.2d at 675-76. The defendant in that case claimed that the instruction convinced the jury to

impose death because it was misled into believing that unless it imposed death, Sonner would be released.

Sonner does not apply to the present case because the "jury was not presented with a false choice between a death sentence or a limited term of incarceration." Id. at 326, 955 P.2d at 676. Herman cites to no other law in support of his claim. Therefore, we decline to address this claim. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (holding that "[i]t is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court").

Commenting that justice required life without

Sixth, Herman contends that the prosecutor committed misconduct by telling the jury during closing argument that justice requires a sentence of life without the possibility of parole. Herman did not object below, and thus, we review for plain error. See Green, 119 Nev. at 545, 80 P.3d at 95 (2003); NRS 178.602.

We have held that a prosecutor may "ask the jury, through its verdict, to set a standard or make a statement to the community." Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997) (citing Mazzan v. State, 105 Nev. 745, 750, 783 P.2d 430, 433 (1989)), overruled on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000); see also Sonner v. State, 112 Nev. 1328, 1342, 930 P.2d 707, 717 (1996) (asserting that a "prosecutor's plea for justice in accordance with what the criminal justice system requires under the circumstances" is proper argument).

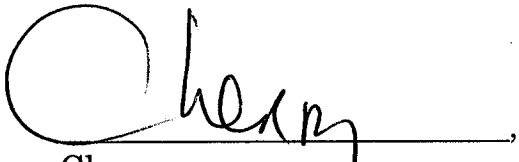
The prosecutor's argument in the present case was proper, and thus, Herman failed to demonstrate that this claim merits relief.

Cumulative error

Herman contends that the cumulative effect of errors resulted in a violation of his constitutional rights. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). If the defendant's fair trial rights are violated because of the cumulative effect of errors, this court will reverse the conviction. DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000). Because the only error was one instance of a State witness briefly commenting on inadmissible evidence, we conclude that there is no cumulative error.

Having considered Herman's contentions and determined that they are without merit, we

ORDER the amended judgment of conviction AFFIRMED.



_____, J.
Cherry

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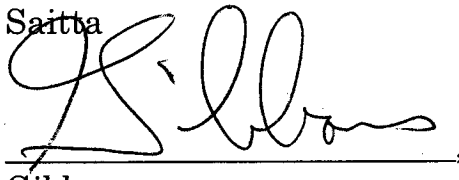

_____, J.
Gibbons

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