

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRANCE L. HART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51059

FILED

APR 15 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery (count I), robbery with the use of a deadly weapon (counts II-III), burglary while in the possession of a firearm (count IV), and grand larceny auto (count V). Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge. The district court sentenced appellant Terrance L. Hart to serve a prison term of 12-48 months for count I, two consecutive prison terms of 60-180 months for count II, two consecutive prison terms of 60-180 months for count III, a prison term of 36-120 months for count IV, and a prison term of 24-72 months for count V. The prison terms were ordered to run concurrently.

Hart contends that the State violated his right to a fair trial and due process based on several instances of prosecutorial misconduct.¹

¹We note that the portion of the fast track statement submitted by counsel for Hart which alleges prosecutorial misconduct does not contain specific citations to the record. See NRAP 3C(e)(2) ("Every assertion in the fast track statement regarding matters in an appendix shall cite to the page of the appendix that supports that assertion."); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper
continued on next page . . .

First, Hart claims that the prosecutor committed misconduct during cross-examination of his alibi witness—his girlfriend, Iya Martin—and again during closing arguments. Specifically, Hart argues that by attacking the veracity of Martin, and by commenting about her failure to come forward sooner as an alibi witness, the prosecutor improperly violated his Fifth Amendment right to remain silent. See U.S. Const. amend. V. We disagree with Hart’s contention.

Initially, we note that Hart did not object to the challenged line of questioning and/or comments made by the prosecutor based on an alleged violation of his right to remain silent. The failure to raise an objection with the district court generally precludes appellate consideration of an issue. See Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993) (holding that the failure to object to prosecutorial misconduct generally precludes appellate consideration). This court may nevertheless address an alleged error if it was plain and affected the appellant’s substantial rights. See NRS 178.602 (“Plain errors or defects affecting substantial rights may be noticed although they were not

... continued

appellate record rests on appellant.”). We further note that the fast track statement is not an original document; instead, counsel submitted an exact duplicate of Hart’s unsuccessful motion for a new trial filed in the district court. At the time Hart filed the motion for a new trial, the trial transcripts had allegedly only been partially prepared, thus possibly explaining the absence of specific citations to the record in the motion. Nevertheless, this provides no excuse for the deficient filing in this court on appeal. We caution counsel that, in the future, such disregard for the rules of this court may result in the striking of the fast track statement or the imposition of sanctions. See NRAP 3C(n).

brought to the attention of the court.”); Pray v. State, 114 Nev. 455, 459, 959 P.2d 530, 532 (1998).

There is no indication in the record that the prosecutor made any reference to Hart’s invocation of the right to remain silent. See Doyle v. Ohio, 426 U.S. 610, 611 (1976) (holding that due process forbids the prosecution from commenting about a defendant’s invocation of the right to remain silent following arrest); Diomampo v. State, 124 Nev. ___, ___, 185 P.3d 1031, 1039-40 (2008). On cross-examination, the prosecutor asked Martin a series of questions related to why she waited approximately one year after Hart’s arrest to come forward as an alibi witness; Martin came forward only a week and a half before the start of trial. The prosecutor also referred to Martin’s testimony during closing arguments. We conclude that the prosecutor’s line of questioning amounted to an appropriate attack on the alibi witness’ credibility and did not impermissibly violate Hart’s right to remain silent. In fact, Hart has not provided any persuasive authority in support of his proposition that the prosecutor’s questioning of and comments about the alibi witness constituted a violation of his Fifth Amendment right. Therefore, we conclude that no plain error occurred and that the State did not commit prosecutorial misconduct in this regard.

Second, Hart contends that the prosecutor committed misconduct by asking the alibi witness, Martin, “baited” questions in order to improperly elicit excluded testimony regarding Hart’s criminal history. Hart claims that Martin was confused, did not know “which case” the prosecutor was questioning her about, and as a result, she “kept referring to the fact that there were ‘other’ charges.” Again we note that Hart has

failed to identify any specific instances in the trial transcript where the prosecutor may have committed misconduct.²

The test for determining whether a witness has referred to a defendant's "criminal history is whether 'a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity.'" Manning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) (quoting Commonwealth v. Allen, 292 A.2d 373, 375 (Pa. 1972)). In this case, we conclude that any error was harmless beyond a reasonable doubt because, even if the jury could infer that Hart had engaged in prior criminal activity, the spontaneous statements made by Martin were not solicited by the prosecutor and defense counsel did not request an admonition to the jury. See Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 282 (1992). This conclusion is bolstered by consideration of the convincing nature of the evidence of Hart's guilt, including, among other things, the victims' positively identifying Hart as one of the two perpetrators. See Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1983). Further, Hart has failed to demonstrate that the challenged testimony affected the outcome of the trial. See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Therefore, we conclude that the prosecutor did not commit misconduct in this regard.

Third, Hart contends that the prosecutor committed misconduct during closing arguments by vouching for the credibility of the State's witnesses and expressing personal opinions about their trial

²See supra n.1.

testimony. Hart claims that the prosecutor's statements improperly influenced the jury to rely upon his expertise rather than objectively weighing the evidence. We disagree with Hart's contention.³

"It is improper for a prosecutor to vouch for the credibility of a government witness." United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980). Also, "prosecutors must not inject their personal beliefs and opinions into their arguments to the jury." Aesoph v. State, 102 Nev. 316, 322, 721 P.2d 379, 383 (1986). "To determine if prejudicial prosecutorial misconduct occurred, 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). "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.'" Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

During closing argument, the prosecutor argued that "[t]he individuals who testified here have no dog in this race. They have no

³In a related argument, Hart contends that the prosecutor "made himself a witness in the case" by attacking the alibi witness, Martin, and pointing out discrepancies in her trial testimony and prior statements. Hart claims the prosecutor's attack on Martin's veracity, somehow, "is the clearest instance of vouching for a witness available to this Court." Hart has not provided any specific citation to the record, legal authority, or cogent argument in support of this allegation of prosecutorial misconduct. Therefore, we need not address it. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

reason or motivation to come in and finger this individual.” The district court sustained Hart’s objection to the prosecutor’s statement. During the rebuttal closing argument, the prosecutor stated, “And ladies and gentlemen, as far as corroborations of those victims, do you have any doubt of either their veracity or their memory, what do we have?” Hart did not object, but a discussion at the bench with counsel ensued.

We conclude that the prosecutor’s comments were permissible inferences drawn from the evidence presented and did not amount to improper vouching. See Klein v. State, 105 Nev. 880, 883-84, 784 P.2d 970, 973 (1989). This court in Klein found that argument about a witness’ motivation was permissible if it did not divert the jury’s attention away from focusing on the facts in evidence which reflected on the credibility of the witnesses. See id. Further, the prosecutor’s rebuttal closing argument appropriately addressed Hart’s challenge to the veracity of the State’s witnesses during defense counsel’s closing argument. The arguments challenged by Hart were part of the prosecutor’s summary of the case against him. We also note that the jury was properly instructed only to consider as evidence the testimony of witnesses, exhibits, and facts admitted or agreed to by counsel; and, the jury was instructed that the statements, arguments, and opinions of counsel were not to be considered as evidence. Therefore, we conclude that Hart has failed to demonstrate that the prosecutor committed misconduct resulting in a denial of due process.

Fourth, Hart contends that the prosecutor committed misconduct by failing to disclose information about victim Robert Dotson’s most recent felony conviction. Hart knew about Dotson’s earlier felony conviction due to a National Crime Information Center (NCIC) report

provided by the State pursuant to a district court order; however, the most recent felony conviction was not discovered until he was being cross-examined by defense counsel. Hart claims that the State's violation of NRS 174.295(1) rendered him "unable to properly prepare for an effective cross-examination" of Dotson. We disagree with Hart's contention.

NRS 174.295(1) provides in part that "[i]f . . . a party discovers additional material previously requested which is subject to discovery . . . , he shall promptly notify the other party . . . of the existence of the additional material." NRS 174.295(2) sets forth the remedy for discovery violations. Specifically, the district court "may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." NRS 174.295(2). The "resolution of discovery issues is normally within the district court's discretion." Floyd v. State, 118 Nev. 156, 167, 42 P.3d 249, 257 (2002), abrogated on other grounds by Grey v. State, 124 Nev. ___, 178 P.3d 154 (2008). The district court "does not abuse its discretion absent a showing that the State acted in bad faith or that the nondisclosure caused substantial prejudice to the defendant which was not alleviated by the court's order." Evans v. State, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001).

In this case, Dotson revealed that he had a second, more recent felony conviction when asked by defense counsel on cross-examination. The NCIC report provided by the State did not include the most recent conviction. At the close of Dotson's cross-examination, Hart moved for a mistrial based on the State's failure to provide the information. The prosecutor informed the district court that he was not

made aware of Dotson's most recent felony conviction until immediately before he took the stand. In fashioning a remedy, the district court allowed Hart to recall Dotson to fully explore the relevant circumstances surrounding his recent felony conviction and attempt to impeach him with the newly discovered information. During the second cross-examination, Dotson testified that he received probation after his recent felony conviction, but denied that he received leniency in exchange for his testimony against Hart.

Based on the above, we conclude that the district court did not abuse its discretion in fashioning a remedy for the State's discovery violation. Hart was provided with a full opportunity to cross-examine Dotson after he revealed that he had another, more recent felony conviction. Therefore, we conclude that Hart has failed to demonstrate that the nondisclosure caused substantial prejudice not cured by the district court's remedy. Accordingly, we further conclude that the prosecutor did not commit misconduct requiring the reversal of Hart's conviction.

Fifth, Hart contends that the district court erred by precluding him from using victim Curtis Boyd's preliminary hearing testimony for impeachment purposes. See NRS 50.135(2)(a); NRS 51.035(2)-(3); but see NRS 50.095. At the preliminary hearing, Boyd testified that he had a prior felony conviction. Prior to trial, the State provided Hart and the district court with information indicating that Boyd was mistaken—as a juvenile, he was only convicted of misdemeanor petit larceny. Additionally, the State pointed out that Boyd's juvenile history included “a charge for the possession or sale [of marijuana] but no conviction on NCIC.” The district court ruled that Hart could not attempt to impeach

Boyd on cross-examination with his erroneous prior statement. As a result, Hart claims he was denied his right to a fair trial and is entitled to a new trial. We disagree.

“[W]hen the defense is attempting to impeach a prosecution witness, a question concerning a prior felony conviction should be permitted if the defense has a reasonable belief that such prior conviction exists.” Corbin v. State, 111 Nev. 378, 383, 892 P.2d 580, 583 (1995). The district court, however, “may exercise discretion in determining whether the defense is asking about a prior conviction for the honest purpose of impeaching the witness or merely to arouse suspicion in the jurors’ minds.” Id. “It is within the district court’s sound discretion to admit or exclude evidence, and ‘this court will not overturn [the district court’s] decision absent manifest error.’” Means v. State, 120 Nev. 1001, 1008, 103 P.3d 25, 29 (2004) (quoting Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000)) (footnote omitted) (alteration in original).

As noted above, the State provided Hart and the district court with information indicating that Boyd mistakenly testified at the preliminary hearing that his criminal history included a felony conviction. In support of the State’s oral motion to preclude Hart from attempting to impeach Boyd with his erroneous preliminary hearing testimony, the State provided a copy of Boyd’s NCIC report. The district court reviewed the entirety of Boyd’s NCIC report and criminal history, which included no felony convictions, and found that it would be improper to allow Hart to ask Boyd, on cross-examination, if he had ever been convicted of a felony with the intended goal of tarnishing his reputation and impeaching him with the erroneous statement made at the preliminary hearing. We agree and conclude that the district court did not err in this regard.

Finally, Hart contends that the district court erred by granting in part the State's motion in limine to preclude Felesia Tejero from testifying as an alibi witness. Hart claims that he was deprived of a fair trial because, despite the untimely notice and noncompliance with NRS 174.233(1), the State "can not claim surprise or prejudice" and, in fact, spoke to Tejero before defense counsel had the opportunity. We disagree with Hart's contention.

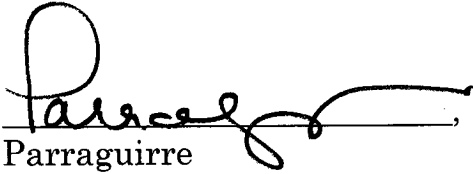
"NRS 174.233(1) requires written disclosure to the State of a defendant's intention to introduce alibi testimony at least ten days before trial, or at such other time required by the court. If a defendant fails to make timely disclosure, NRS 174.233(4) permits a court to exclude such alibi testimony." Morales v. State, 122 Nev. 966, 971, 143 P.3d 463, 466 (2006). The written disclosure must detail with specificity the "information as to the place at which the defendant claims to have been at the time of the alleged offense and . . . the names and last known addresses of the witnesses by whom he proposes to establish the alibi." NRS 174.233(1).

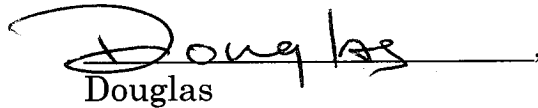
In the instant case, Hart did not file a notice of intent to call Tejero as an alibi witness until approximately six days prior to the start of the trial. Hart further violated NRS 174.233 by not providing either Tejero's correct address or "information as to the place at which the defendant claims to have been at the time of the alleged offense." In fact, Hart did not inform the State and district court about the alleged alibi location until the first day of trial. Additionally, Hart has failed to demonstrate that he was prejudiced by the decision to preclude Tejero because the district court allowed him to call another individual, Iya Martin, to testify as an alibi witness. Therefore, we conclude that the

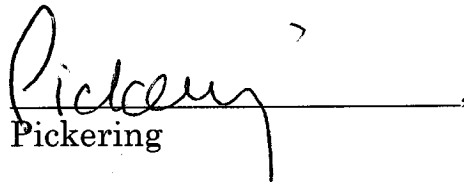
district court did not abuse its discretion by granting in part the State's motion to preclude Tejero from testifying.

Having considered Hart's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

 J.
Parraguirre

 J.
Douglas

 J.
Pickering

cc: Hon. Douglas W. Herndon, District Judge
Law Office of Betsy Allen
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk