

IN THE SUPREME COURT OF THE STATE OF NEVADA

TONY SMITH,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34617

FILED

JAN 24 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction following a jury trial. Appellant Tony Martin Smith was convicted of first-degree murder, burglary, and conspiracy to commit robbery. Smith alleges on appeal that the district court committed several errors. We disagree with all of Smith's contentions and affirm his conviction.

First, Smith argues that the district court committed plain error by failing to cure instances of prosecutor misconduct.¹ Specifically, Smith directs this court to two instances, when the prosecutor allegedly misstated Smith's alibi evidence by eliciting testimony that created a "false impression" about turnarounds and also when the prosecutor stated in her closing argument that only some of the units were conducting turnarounds. This court may consider sua sponte plain error which affects the defendant's substantial rights, if the error either: "(1) had a prejudicial

¹See Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 235 (1986) (noting that this court may review errors that are "patently prejudicial," regardless of counsel's failure to object).

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.”² We conclude that the prosecutor did not elicit confusing testimony to create a deliberate misimpression about turnarounds. Further, the prosecutor’s turnaround statement during closing was not improper because her argument drew inferences from the documentary evidence. Thus, we conclude that there is no plain error in these instances.

Additionally, Smith asserts that several of the prosecutor’s arguments were so improper and prejudicial that they constitute reversible plain error, including witness vouching, personal opinion, pressuring the jury to convict, and dilution of the reasonable doubt standard.³ We disagree. While giving her personal opinion in argument and vouching for a witness’s credibility were improper, we conclude that the prosecutor’s actions did not have a prejudicial impact on the verdict because there were a number of witnesses directly connecting Smith to the crime.⁴

Smith also contends that the district court erred in denying his motion to dismiss based on the State’s failure to preserve certain

²Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996); see also NRS 178.602.

³See Oade v. State, 114 Nev. 619, 622, 960 P.2d 336, 338 (1998) (reviewing unobjected-to prosecutorial misconduct under the plain error doctrine).

⁴See Libby, 109 Nev. at 911, 859 P.2d at 1054.

evidence,⁵ including, the Holmes fan, the blood-stained items found in Steven Bruce Silva's cell, and the piece of paper that matched the threatening note. In establishing a violation of due process resulting from the State's failure to preserve evidence, the defendant must demonstrate either: (1) the State acted in bad faith; or (2) the defendant was prejudiced and the evidence possessed an exculpatory value that was apparent.⁶ We conclude that the State did not act in bad faith because at the time the fan and the piece of paper were retrieved they had no evidentiary value. Further, the State did not act in bad faith regarding the blood-stained items because there was no evidence that anyone's blood other than Silva's was present in the cell. We also conclude that Smith has failed to demonstrate that the Holmes fan, the blood-stained items, or the piece of paper have apparent exculpatory value.

Next, Smith contends that the district court erred in admitting evidence of prior bad acts, specifically evidence of: (1) gang membership; (2) prison yard threats after the crime; (3) evidence of racism; and (4) Robert Rowland's rape of Juan LaPeire. We conclude that the district court did not abuse its discretion in admitting prior-bad-act evidence against Smith because this evidence was relevant to prove identity,

⁵See Mortensen v. State, 115 Nev. 273, 283-84, 986 P.2d 1105, 1111-12 (1999); Sheriff v. Warner, 112 Nev. 1234, 1242, 926 P.2d 775, 779-80 (1996) (reviewing de novo due-process-violation claims resulting from the State's failure to preserve evidence).

⁶Mortensen, 115 Nev. at 283, 986 P.2d at 1111-12.

conspiracy, motive, and intent to cover up the crime;⁷ the acts were proven by clear and convincing evidence; and any prejudice did not substantially outweigh the probative value of the evidence.⁸

Smith claims that the State's discovery delays and nondisclosures violated the Brady standard.⁹ Brady v. Maryland¹⁰ requires a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or punishment. There are three components to showing a successful Brady violation: (1) the evidence at issue must be favorable to the accused; (2) the evidence must be withheld by the state, either intentionally or inadvertently; and (3) prejudice must ensue.¹¹ We conclude that because Smith has failed to establish that the discovery and disclosures were exculpatory, withheld, or material, his Brady arguments lack merit.¹²

⁷See NRS 48.05(2) (noting that admission of prior bad acts may be appropriate when used as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.)

⁸See Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998) (noting that trial court's decision to admit evidence of prior bad acts is given great deference and will not be reversed absent manifest error).

⁹See Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000) (reviewing the district court's determination of whether the State committed a Brady violation de novo).

¹⁰373 U.S. 83, 87 (1963).

¹¹Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

¹²See Mazzan, 116 Nev. at 66, 993 P.2d at 36 (noting that a Brady violation is material "if there is a reasonable possibility that the omitted evidence would have affected the outcome.").

Smith contends that the district court abused its discretion in denying his motion to sever his case from Rowland's.¹³ We disagree and conclude that Smith has failed to demonstrate that evidence against Rowland prejudicially "spilled over" to Smith's case; rather, Smith has only established a "guilt by association" theory, which is insufficient.¹⁴

Smith next makes several other arguments: the district court erred in denying his motion to admit Jason Jones's polygraph examination; the district court erred in its felony murder instruction; and the district court showed improper bias against Smith. After a thorough review of the record, we conclude that each of these arguments lacks merit.


Finally, Smith alleges that these cumulative errors denied him the right to a fair trial. We conclude that the issue of innocence or guilt does not appear to be particularly close in light of several State witnesses attesting to Smith's participation. Balancing this factor against the prejudicial effect of any errors, we conclude that the cumulative effect of any trial errors did not violate Smith's right to a fair trial.¹⁵ Accordingly, we

¹³See Buff v. State, 114 Nev. 1237, 1245, 970 P.2d 564, 549 (1998) (reviewing the district court's decision to sever a joint trial under an abuse of discretion standard).

¹⁴See Lisle v. State, 113 Nev. 679, 689-90, 941 P.2d 459, 466 (1997) (noting that severance will not be granted if based on "guilt by association" alone because merely having a better chance at acquittal in a severed trial is not sufficient to establish prejudice).

¹⁵See Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985) (establishing the criteria that is relevant in a cumulative error analysis).

ORDER the judgment of the district court AFFIRMED.


Shearing, J.


Rose, J.


Becker, J.

cc: Hon. Michael R. Griffin, District Judge
Attorney General/Carson City
Carson City District Attorney
Allison W. Joffe
Carson City Clerk