IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD DEE MARTIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51244

FILED

SEP 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of conspiracy to commit robbery, burglary while in possession of a firearm, first-degree kidnapping with the use of a deadly weapon, battery with intent to commit a crime, robbery with the use of a deadly weapon, and possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge. The district court sentenced appellant Donald Dee Martin to serve two consecutive terms of life in prison with the possibility of parole for kidnapping and multiple definite terms for the remaining offenses.

On appeal, Martin contends that (1) the State improperly vouched for the victim's testimony during the testimony of another witness and its rebuttal argument, (2) the district court abused its discretion in denying Martin's motion to dismiss the first-degree kidnapping count, (3) there was insufficient evidence to support his first-degree kidnapping conviction, (4) the district court abused its discretion in

denying Martin's motion for a mistrial based on the State's failure to provide discovery in a timely manner, and (5) the district court abused its discretion in denying Martin's motion in limine to preclude the introduction of his criminal record.

Vouching

Martin argues that a police officer repeatedly vouched for the credibility of the victim at trial. This court has stated that "it is improper for one witness to vouch for the testimony of another." Leonard v. State, 117 Nev. 53, 74 n.14, 17 P.3d 397, 410 n.14 (2001). Such error is subject to a harmless error analysis. See Townsend v. State, 103 Nev. 113, 119, 734 P.2d 705, 709 (1987). However, where the defendant fails to object to the comment below, we review for plain error. See Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005); Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 57-58 (2005).

During the cross-examination of Officer Alley, the following occurred:

> Q: Okay. So your investigation and your search was based simply on [Michael Vogt's] story and his account?
>
> A: He's the victim, yeah. And there's –
>
> Q: You have a good point.

Martin did not object to this statement. Later, during redirect testimony, the State asked the officer "did you analyze the credibility of those involved?" Before Officer Alley answered, Martin objected, the objection

was sustained, and the district court instructed the jury to disregard the question.

We conclude that Martin failed to demonstrate that the first remark amounted to plain error or that the second remark prejudiced him in any way amounting to reversible error. Officer Alley's first statement did not improperly vouch for Vogt's testimony, but rather it merely explained the course of the police investigation. As the comment was not improper, it did not amount to plain error. Regarding the second statement, Martin's objection was sustained and the district court instructed the jury to disregard the question. "[T]his court generally presumes that juries follow district court orders and instructions." Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006). Further, the jury was properly instructed that the statements, arguments, and opinions of counsel were not to be considered evidence.

Martin also argues that the State improperly vouched for the victim's credibility during its rebuttal argument.

"It is improper for the prosecution to vouch for the credibility of a government witness." See 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). Additionally, "[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.3d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

Here, the challenged statements concern the State's response to the defense's suggestion that whatever occurred on the day of the alleged crime was the result of drug use by the parties involved and was not a robbery. Specifically, the prosecutor stated, "[o]n the opposite side, the State sees [Vogt] quite differently. We don't see him as an individual that's running any show." Martin objected, and the district court instructed the State to rephrase the argument. The prosecutor then stated, "State submits to you that Mr. Vogt is not an individual running any show. He is an individual that is very addicted to drugs. However, he was very candid, and I believe that—." Martin again objected, and the prosecutor rephrased the argument.

We conclude that Martin failed to demonstrate that the remarks prejudiced him in any way amounting to reversible error. Martin's objection was sustained, and the district court instructed the State to rephrase its argument. The prosecutor rephrased the offending portion of the previous statement into a proper argument. While the prosecutor then began a later statement with his personal belief, the defense's objection prevented him from completing the thought. Further, the jury was properly instructed that the statements, arguments, and

opinions of counsel were not to be considered evidence. See Summers, 122 Nev. at 1333-34, 148 P.3d at 783-84.

Denial of motion to dismiss

Martin argues that the district court erred in denying his motion to dismiss the kidnapping count because the movement of the victim was incidental to the robbery and did not substantially increase the risk of harm to the victim beyond that risk inherent in the robbery.

The trial court is the appropriate forum for determining whether probable cause exists. Sheriff v. Shade, 109 Nev. 826, 828, 858 P.2d 840, 841 (1993). "The finding of probable cause may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused." Id. We review a district court's decision to deny a motion to dismiss an information for an abuse of discretion. See Hill v. State, 124 Nev. ___, ___, 188 P.3d 51, 54 (2008).

Dual convictions for kidnapping and an associated offense are appropriate "where the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense" and "where the movement, seizure or restraint stands alone with independent significance from the underlying charge." Mendoza v. State, 122 Nev. 267, 274-75, 130 P.3d 176, 180-81 (2006). "[T]he questions of whether the movement of the victim was incidental to the associated offense and whether the movement increased the risk of harm to the victim are questions of fact to be determined by the

jury in all but the clearest cases." Langford v. State, 95 Nev. 631, 638-39, 600 P.2d 231, 236-37 (1979).

We conclude that this argument lacks merit. There was sufficient evidence produced at the preliminary hearing upon which to conclude that there was probable cause to bind Martin over for both kidnapping and robbery. While the asportation and detention of the victims appeared merely necessary to accomplish the robbery, some evidence, such as the fact that Martin struck Vogt during the detention, suggested that the movement increased the risk of harm. Therefore, as facts produced at the preliminary hearing did not show that this was the clearest of cases, the district court did not abuse its discretion in denying Martin's motion to dismiss the information.

Sufficiency of the evidence

Martin argues that there was insufficient evidence adduced at trial to sustain his first-degree kidnapping conviction. He argues that any movement of the victim was incidental to the robbery.

The standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). "[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

As noted above, dual convictions for kidnapping and an associated offense are appropriate "where the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense" and "where the movement, seizure or restraint stands alone with independent significance from the underlying charge." Mendoza, 122 Nev. at 274-75, 130 P.3d at 180-81.

In the instant case, Martin and another individual met Vogt at the door to his townhouse. Vogt reluctantly invited them inside where Martin brandished a shotgun and ordered Vogt upstairs. Martin pressed the gun against the back of Vogt's head and neck as he walked up the stairs. While he was walking, Vogt called out to Jason Kenney, a houseguest, to come out. Martin and his compatriot ordered the two men to sit in Vogt's office. Martin asked Vogt where his drugs were and ordered him to call his supplier. Martin then attempted to speak to Vogt's supplier but was unsuccessful. Martin also rifled through Vogt's belongings and pulled a computer monitor off the wall. During the time in the office, Martin told Vogt that Vogt "knew too much about him." Vogt tried to calm Martin, but Martin responded by punching Vogt in the chin. Martin and the other man gathered Vogt's property and left.

We conclude that the jury could reasonably infer from this evidence that Martin seized and detained Vogt for the purpose of robbing him. See NRS 200.310(1). Considering Martin's attempt to contact Vogt's drug supplier, his statements concerning what Vogt knew about him, and

his striking Vogt, the movement and restraint of Vogt substantially exceeded that required to complete the robbery and stood alone with independent significance from the robbery. Mendoza, 122 Nev. at 274-75, 130 P.3d at 180-81. Therefore, we conclude that Martin's dual convictions for first-degree kidnapping with the use of a deadly weapon and robbery with the use of a deadly weapon were proper.

Denial of motion for a mistrial

Martin argues that the district court abused its discretion in denying his motion for a mistrial based on the failure of the State to timely provide discovery related to an incident involving Martin and Vogt at Vogt's residence the day after the alleged robbery.

Whether to deny a motion for mistrial rests within the district court's discretion and will not be reversed on appeal "absent a clear showing of abuse." Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001). "If . . . 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(1). NRS 174.295(2) also sets forth the remedy for violation of a discovery order under NRS 174.234. Specifically, where a discovery order has been violated, 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 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, Vogt testified that he called the police because Martin returned to his home the day after the alleged robbery. Martin moved for a mistrial based on the State's failure to provide discovery related to Vogt's 911 call and related police reports concerning this event. The State asserted that they only learned of the second visit when they prepared Vogt for trial, within several days of his testimony. Further, the State contended that it did not have a copy of the 911 call.

Based on the above, we conclude that the district court did not abuse its discretion in denying Martin's motion for a mistrial. There is no evidence that the State acted in bad faith in failing to produce records of the 911 call or other police reports concerning the contact the following day. The prosecution had only learned of the event within days of offering Vogt's testimony. Martin was provided with a full opportunity to cross-examine Vogt after he revealed the visit on direct examination. Therefore, we conclude that Martin failed to demonstrate that the nondisclosure caused substantial prejudice.

Denial of motion in limine

Martin argues that the district court abused its discretion in denying his motion in limine to preclude the reference to Martin's criminal record.

As a general rule, "proof of a distinct independent offense is inadmissible" during a criminal trial. Nester v. State, 75 Nev. 41, 46, 334 P.2d 524, 526 (1959). To overcome this rule, "the State bears the burden of requesting the admission of the [prior bad acts] evidence and establishing its admissibility" under NRS 48.045(2). Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005). Under NRS 48.045(2) evidence of other crimes or bad acts is admissible to show, among other things, the defendant's intent, plan, or absence of mistake.

In Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), this court concluded that prior bad act evidence is admissible under NRS 48.045(2) only if "the trial court . . . determine[s], outside the presence of the jury, 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." If the district court admits the prior bad acts evidence, it must give a limiting instruction prior to the admission of the evidence and in a final charge to the jury. Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001).

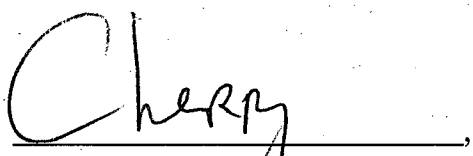
In the instant case, Vogt testified that Martin had come to his home on an evening prior to the alleged robbery. Martin asked Vogt to look up Martin's criminal history at the Clark County website.

We conclude that the district court did not abuse its discretion when it allowed Vogt to testify about his prior interaction with Martin. The district court determined that the testimony was relevant to "the state

of mind of the victim, and/or any force, fear or intimidation that may or may not have been used." Further, we note that Vogt could not have described the robbery without referring to the prior visit to explain Martin's comments about Vogt knowing too much about Martin, which were made during the robbery. See State v. Shade, 111 Nev. 887, 893-94, 900 P.2d 327, 330-31 (1995). Moreover, the district court only permitted reference to Martin's request for Vogt to research his criminal history, not a discussion of the contents of that research or any specific criminal acts, and the district court provided a limiting instruction to the jury when the testimony was admitted.

Having considered Martin's contentions and concluding that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
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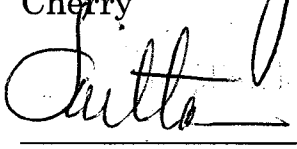

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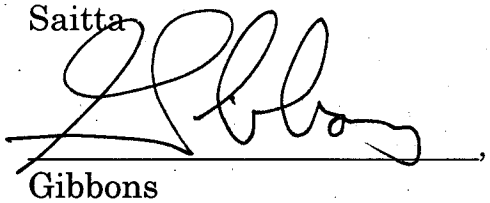

_____, J.
Gibbons

cc: Hon. Jennifer Togliatti, District Judge
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Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk