

IN THE SUPREME COURT OF THE STATE OF NEVADA

JENTRICE HOPKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51308

FILED

JUL 31 2009

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

ORDER AFFIRMING IN PART, VACATING IN PART, REVERSING IN
PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of burglary and robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

We issued an order vacating in part, reversing in part, and remanding in this case on June 30, 2009. After granting the State's motion to clarify the order, we withdraw our June 20, 2009, order and issue this order in its place.

Appellant Jentrice Hopkins appeals from her conviction arising out of her taking of clothing from Ross Dress for Less without paying for the merchandise. She argues that (1) the district court erred by giving a flight jury instruction, (2) the district court erred by refusing to give her "mere presence" jury instruction, (3) the prosecutor misstated the burden of proof in his opening statement, (4) the district court erred by denying her motion to strike Robert Coleman as a witness and her motion for a continuance, (5) the district court erred by improperly admitting prior bad act evidence, and (6) insufficient evidence supports the conviction of robbery with the use of a deadly weapon.

We conclude that: (1) the district court properly gave a flight jury instruction, (2) the district court committed reversible error by

refusing Hopkins' mere presence jury instruction, (3) the prosecutor did not commit misconduct, (4) the district court acted within its discretion in denying Hopkins' motions to strike and for a continuance, (5) the district court's admission of bad act evidence was harmless, and (6) insufficient evidence supports the conviction of robbery with the use of a deadly weapon. We therefore affirm the burglary conviction, vacate the deadly weapon enhancement, and reverse the robbery conviction and remand to the district court for proceedings consistent with this order.

The parties are familiar with the facts and procedural history of this case; therefore, we do not recount them in this order except as is necessary for our disposition.

DISCUSSION

I. The district court properly gave a flight jury instruction

Hopkins argues that the district court's flight jury instruction created an unduly prejudicial emphasis on the facilitating-escape evidence, thereby depriving her of her Sixth Amendment right to a properly instructed jury and Fourteenth Amendment right to a fair trial. We disagree because sufficient evidence supported the jury instruction and it did not overemphasize the facilitating-escape evidence.

This court reviews a district court's decision to give a jury instruction for abuse of discretion. Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 163 (2008). A flight instruction is proper if the evidence supports it. Weber v. State, 121 Nev. 554, 581, 119 P.3d 107, 126 (2005). Flight signifies more than just leaving the scene; it suggests leaving for the purpose of avoiding arrest. Id. at 582, 119 P.3d at 126. "Because of the possibility of undue influence by such an instruction, this court carefully scrutinizes the record to determine if the evidence actually warranted the instruction." Id.

Here, Jury Instruction No. 28 stated:

The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation[.]

A. Sufficient evidence supported the flight instruction

The flight instruction is a proper statement of the law and did not create a mandatory presumption of guilt. Walker v. State, 113 Nev. 853, 871, 944 P.2d 762, 773 (1997); Weber, 121 Nev. at 582, 119 P.3d at 126. The evidence also supported the instruction. Nicholas Woten, the loss prevention officer, testified that Hopkins struggled to free herself from his grasp and then got into the car and left with Coleman. Coleman physically threatened Woten to let Hopkins go and said he would “cut” him if Woten followed them. Further, Coleman testified that the threats were to facilitate escape. The confrontation with Woten put Hopkins on notice that he suspected her of shoplifting. If she had no consciousness of guilt, she would likely have reentered the store with Woten voluntarily and stayed to clear her name. Thus, there was ample evidence in this case to support an inference of flight, and therefore the district court properly gave the instruction.

B. The flight instruction did not make the facilitating-escape evidence unfairly prejudicial

Hopkins also argues that the flight instruction overemphasized the facilitating-escape evidence because the State argued to the jury that it should consider the evidence as proof of the underlying

robbery and as evidence of guilt for completing the underlying robbery. We disagree.

Robbery is the unlawful taking of personal property of another, against his will, by force or threat of force if the force or threat of force is used to obtain or retain the property, overcome resistance to the taking, or to facilitate escape. NRS 200.380. In this case, the State argued a facilitating-escape theory of robbery to the jury. That the flight evidence was probative of both an element of the crime and demonstrated consciousness of guilt does not render the flight instruction prejudicial.

The California Supreme Court rejected a similar argument in People v. Navarette, 66 P.3d 1182, 1209 (Cal. 2003), and held that the jury need not find the defendant guilty of the crime before it can consider flight evidence for consciousness of guilt. “The purpose of presenting evidence of flight is to establish consciousness of guilt,” and to require a finding of guilt before considering the flight defeats the purpose of the flight evidence. Id. Also, flight evidence can be used to establish consciousness of guilt even if it is also evidence of an element of the crime. Id. Similarly, here, the flight evidence was evidence of both an element of the crime and consciousness of guilt. Coleman admitted threatening Woten so that he and Hopkins could leave the scene. Therefore, regardless of the flight instruction, the jury could have found Hopkins guilty of robbery before they actually left the scene.

Further, even without the flight instruction, the threats and the car were central to the State’s case and would have been critical to the jury’s verdict. Given the several testimonies regarding Coleman threatening Woten, Coleman and Hopkins leaving in the car, and how the car lead the police to Coleman and Hopkins, the flight instruction did not prejudicially overemphasize the facilitating-escape evidence. Therefore,

we conclude that the district court properly gave the flight jury instruction.

II. The district court's refusal of Hopkins' "mere presence" jury instruction requires reversal

Hopkins argues that the district court's refusal to instruct the jury on mere presence denied her the ability to present her defense regarding the robbery charge to the jury, thereby denying her right to a fair trial and due process. We agree because evidence supports her mere presence theory.

A defendant is entitled to a jury instruction on her theory of the case if any evidence supports the theory, however improbable it may be. Allen v. State, 97 Nev. 394, 398, 632 P.2d 1153, 1155 (1981). This court held in Brooks v. State, 103 Nev. 611, 613-14, 747 P.2d 893, 894-95 (1987), that it is reversible error for the district court to refuse to give defendant's proposed instruction when it is a proper statement of the law and explains a defense theory or position, even if the law is stated in other instructions. Further, even if a defense theory or position is implausible, if the jury could believe it, the district court commits reversible error in refusing the instruction. Id. at 613, 747 P.2d at 895.

In this case, Hopkins proposed a mere presence jury instruction that would go to the robbery charge, but the district court rejected the instruction because the evidence did not support it. Hopkins' proposed instruction is almost identical to the Brooks instruction, which this court has already concluded is a proper statement of law. Id. Hopkins argued to the jury that she was only guilty of petit larceny and did not have the knowledge or intent necessary to commit robbery with the use of a deadly weapon. Freeman testified that she did not hear Hopkins threaten Woten or instruct Coleman to harm him or use a weapon. Coleman testified that he never had a knife or a gun and that he

and Hopkins had not planned the use of weapons or escape. Freeman and Gooden never saw a knife or a gun. Thus, Hopkins presented sufficient evidence to support a mere presence instruction. Although the jury could infer the mere presence theory and law from the aiding and abetting instructions, this does not justify the district court's refusal of Hopkins' mere presence instruction. Margetts v. State, 107 Nev. 616, 620, 818 P.2d 392, 395 (1991). Hopkins presented some evidence supporting her mere presence instruction, it was a proper statement of law, and it stated her defense theory. Therefore, pursuant to Brooks, the district court committed reversible error in rejecting Hopkins' mere presence instruction. We therefore reverse the robbery conviction and remand to the district court for proceedings consistent with this order.

III. The prosecutor did not err by misstating the burden of proof in his opening statement

Hopkins argues that the prosecutor committed plain error by misstating the burden of proof in his opening statement, thereby depriving Hopkins of a fair trial, and that the district court should have sua sponte declared a mistrial. We disagree because the prosecutor's statements were not misconduct.

This court first analyzes prosecutorial conduct by determining if it was improper and, if so, whether it constitutes reversible error. Valdez v. State, 124 Nev. ___, ___, 196 P.3d. 465, 476 (2008). If the misconduct was constitutional, then this court will reverse unless the State proves beyond a reasonable doubt that the misconduct was harmless error. Id. If the error is non-constitutional, then this court will "reverse only if the error substantially affects the jury's verdict." Id. at ___, 196 P.3d at 476. However, because Hopkins failed to object to the State's opening statement, we review for plain error. Id. at ___, 196 P.3d at 477.

Plain error is plain from the record and requires reversal if it affects the defendant's substantial rights. Id.

A prosecutor has a duty not to make statements in his opening argument that he cannot prove at trial, but doing so is not misconduct unless he acts in bad faith. Johnson v. State, 122 Nev. 1344, 1357, 148 P.3d 767, 776 (2006). In this case, the prosecutor twice stated in his opening that the only "logical conclusion" in this case was to find Hopkins guilty. Hopkins argues that this opening left the jury with the impression that a guilty verdict could be based on a logical conclusion from the trial evidence, thereby misstating the burden of proof. We disagree.

Although the prosecutor improperly argued what conclusions the jury should make, rather than just stating the facts he would prove at trial, there is no evidence that he argued in bad faith. Further, the court properly instructed the jury on reasonable doubt, using verbatim the language from NRS 175.211. The district court also properly instructed the jury that arguments by counsel are not evidence. Thus, the prosecutor's statements were not in bad faith and did not affect Hopkins' substantial rights because the district court properly instructed the jury on the burden of proof. Therefore, the prosecutor's misconduct does not warrant reversal.

IV. The district court properly denied Hopkins' motion to strike Coleman as a witness and her motion for a continuance

Hopkins argues that the district court abused its discretion by denying her motion to strike Coleman as a State witness and her request for a continuance to prepare for Coleman's testimony. She contends that the State did not properly notice Coleman as a witness on the information or witness lists, thereby denying her a fair trial under the due process clause of the Fourteenth Amendment. We disagree because Hopkins had

notice that Coleman could testify against her and the district court acted within its discretion.

A. The information

Pursuant to NRS 173.045, the district attorney must endorse the information to include the names of all witnesses he reasonably expects to call at trial. Endorsement of witnesses on an information is within the district court's discretion and only constitutes reversible error when it causes the accused substantial injury. Jones v. State, 113 Nev. 454, 472, 937 P.2d 55, 66 (1997). This court presumes that if a prosecutor calls an unendorsed witness to testify, the prosecutor was not previously aware of the witness. Id. at 472, 937 P.2d at 67. The proper remedy in such a case is a continuance so that the defense has an opportunity to interview the witness and prepare a cross-examination. Dossey v. State, 114 Nev. 904, 908, 964 P.2d 782, 784 (1998).

In this case, the first information listed Coleman as a witness. The amended information did not have a witness list attached and appears only to have changed the caption and other relevant language to remove Coleman as a defendant. Because the State listed Coleman as a witness in the first information, Hopkins had notice that the State may call him as a witness. Also, the State was unaware it would call Coleman as a witness because on the morning of the first day of trial, Coleman pleaded and was no longer a defendant, thus changing his position from defendant to State's witness. Further, Hopkins has not demonstrated that Coleman's testimony caused her substantial injury. Therefore, Hopkins had sufficient notice that Coleman could testify against her, and we conclude that the district court acted within its discretion in denying her motion to strike and motion for continuance.

B. The witness list

At least five days before trial, or within the time the court directs, the prosecution must serve the defendant with written notice of witnesses the prosecution intends to call during the State's case in chief. NRS 174.234, declared unconstitutional on other grounds by Grey v. State, 124 Nev. ___, ___, 178 P.3d 154, 159, 161 (2008). This court reviews the district court's denial of a continuance for abuse of discretion. Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996). The district court does not abuse its discretion when it affirms an endorsement of witnesses one to four days before trial if the defense can anticipate the type of witnesses the State will add and the testimony the State will elicit. Id. Some of the circumstances this court considers in evaluating the State's failure to give the defense proper notice of witnesses are: (1) surprise and any prejudice to the defendant's investigation and cross-examination of witnesses, (2) the reasons the State did not give proper notice, (3) the value of the testimony, (4) the effect of admission or non-admission of the testimony on the State or the defense, and (5) the feasibility of postponement. Founts v. State, 87 Nev. 165, 170, 483 P.2d 654, 656 (1971).

In this case, the State issued two witness lists, both of which incorporated all the witnesses from the information and listed Coleman as a defendant. Because the State listed Coleman as a witness in the first information, he was incorporated by reference into the witness lists. Coleman pleaded out the morning of the first day of trial and, therefore, both the State and Hopkins had short notice that Coleman would be a State witness. Coleman's plea may not have been foreseeable to Hopkins because Coleman proceeded to trial as a codefendant until the first day of trial. Despite this surprise to Hopkins, she was on notice as to Coleman's knowledge and possible testimony. As such, Hopkins would have been

able to adequately prepare a cross-examination. Also, Coleman's testimony was very valuable to the State because he was involved in the incident in question and, therefore, could testify from personal knowledge regarding the events, Hopkins' intent, and the involvement of the other witnesses. Because Hopkins moved for a continuance on the first day of trial, granting the motion would have inconvenienced the court, the State, and the witnesses.

Hopkins argued that given a continuance, she would have researched Coleman's criminal history, requested jail records, interviewed his former cellmates, and conducted further investigation for impeachment evidence. The State gave Hopkins confirmation that Coleman had no criminal history. The State also told Hopkins that Coleman had been out of custody for a month, therefore it was unlikely that Hopkins would be able to track down his cellmates. Therefore, Coleman's testimony was foreseeable, and the denial of the continuance only minimally prejudiced Hopkins. Given all these considerations, the district court did not abuse its discretion in denying Hopkins' motions to strike Coleman as a witness and for a continuance.

V. The district court's admission of bad act evidence was harmless error

Hopkins argues that the district court erred by denying her motion in limine to exclude evidence that she was "kicked out" of the apartment where she had been living, thereby denying her a fair trial. Although we agree that the district court erred in admitting this evidence, we conclude that the error was harmless.

Evidence of prior crimes or wrongs is inadmissible to prove that the defendant acted in conformity with the alleged bad acts, but may be admissible for other purposes. NRS 48.045(2). To determine if bad acts are admissible, the court must hold a Petrocelli hearing. Salgado v. State,

114 Nev. 1039, 1043, 968 P.2d 324, 327 (1998) (citing Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985)). Pursuant to NRS 48.035(1), relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. Under the same statute, evidence shall not be excluded when it is so closely related to a crime charged that an ordinary witness cannot describe the crime without referring to the evidence in question. NRS 48.035(3). This court reviews the district court's decision whether to admit bad act evidence for abuse of discretion. Salgado, 114 Nev. at 1043, 968 P.2d at 327. Any defect that does not affect substantial rights is harmless error. NRS 178.598.

In its opening, the State explained that the police determined that the receipt found in Hopkins' purse was from Extended Stay America. Police went there to look for Hopkins, but the clerk at the front desk explained that Hopkins had been "kicked out" that day. Officer Jeffrey Swanbeck testified to the same series of events. When the State showed the receipt to the jury, it displayed a balance, suggesting that Hopkins had been kicked out for failure to pay for her room. This inference could have been unfairly prejudicial in this case since the crimes charged were theft crimes.

Further, we believe that the State could have adequately told the story without mentioning that Hopkins was "kicked out." The State could have simply said that the clerk indicated Hopkins had left that day because it was only using the fact as narrative to explain how the police found Hopkins and Coleman. Therefore, why Hopkins had left that hotel was irrelevant. Thus, Hopkins being "kicked out" was not so closely related to the crime in question that the State had to mention it to tell the story of the crime. NRS 48.035(3). As a result, the district court erred in finding that the evidence was not bad act evidence. The district court also

found that there were too many witnesses to assure that none of them would mention Hopkins being “kicked out.” However, a review of the record reveals that only Officer Swanbeck and the prosecution mentioned the phrase. Thus, it was feasible for the State and its witnesses not to mention Hopkins being “kicked out.”

Although we conclude that the district court abused its discretion in admitting the evidence, there is ample evidence of robbery and, therefore, the error is harmless. The evidence shows that Hopkins was in Ross cutting the tags off clothing and putting the clothing in her purse and pants, that Coleman verbally threatened and lunged towards Woten when he tried to stop them from leaving the store, and that Hopkins and Coleman left the store without paying for anything. Therefore, the evidence clearly showed that Coleman was using force or fear to keep the clothing Hopkins had taken or to facilitate their escape. Thus, the jury would have found Hopkins guilty of robbery or as a principal in aiding and abetting Coleman regardless of the erroneous admission of the evidence that Hopkins was kicked out of her hotel room. For these reasons, we conclude that the error was harmless.

VI. Insufficient evidence supports the conviction of robbery with use of a deadly weapon

Hopkins argues that although the evidence supports a conviction for petit larceny, it does not support a conviction of robbery with the use of a deadly weapon because the evidence shows that Hopkins did not know that Coleman had weapons, she did not encourage him to use threats or weapons, and she did not participate in his use of threats or weapons. Although we agree that the evidence does not support the deadly weapon enhancement, we conclude that it does support the robbery conviction.

Due process requires the State to prove every element of every crime charged beyond a reasonable doubt. Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007). To determine whether this burden has been met, this court will view the evidence in the light most favorable to the State and determine whether a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Id.

A. Robbery

“Robbery is the unlawful taking of personal property from . . . another, . . . by means of force or violence or fear of injury” NRS 200.380(1). “A taking is by means of force or fear if force is used to” retain possession of the property, overcome resistance to the taking, or facilitate escape. Id. A person who aids and abets a felony is liable as a principal for the offense. NRS 195.020.

Woten testified that he watched Hopkins take clothing from Ross, cut the security tags off, and put the clothes in her purse and pants. He then watched Hopkins leave the store without paying for the merchandise. Freeman testified that she could see the clothes in Hopkins’ pants. Thus, a rational juror could find that Hopkins unlawfully took clothes from Ross.

Woten also testified that Coleman repeatedly threatened to harm him if he did not let Hopkins go. Freeman also testified that Coleman was threatening Woten. Further, a video showed that Coleman had something in his hand and lunged towards Woten. Therefore, regardless of whether the jury thought that Coleman had a weapon, it could have found that Coleman was using force or fear to retain the clothes Hopkins had taken or to facilitate their escape. As a result, a rational juror could have found Hopkins independently guilty of robbery,

or guilty as a principal in her aiding and abetting Coleman. Therefore, sufficient evidence supports Hopkins' robbery conviction.

B. Use of a deadly weapon

The State must prove additional elements to subject an unarmed offender to a deadly weapon enhancement. In Anderson v. State, and several subsequent cases, this court held:

[T]he possession necessary to justify statutory enhancement may be actual or constructive; it may be exclusive or joint. Constructive or joint possession may occur only where the unarmed participant has knowledge of the other offender's being armed, and where the unarmed offender has . . . the ability to exercise control over the firearm.

95 Nev. 625, 630, 600 P.2d 241, 244 (1979) (emphasis added), abrogated by Brooks v. State, 124 Nev. ___, ___, 180 P.3d 657, 660-61 (2008).¹ The State offered no evidence that Hopkins knew that Coleman had a knife or a gun. Freeman testified that Hopkins never instructed Coleman to pull out a weapon or threaten anyone and that Hopkins never verbally or physically threatened anyone. Woten explained that Hopkins never threatened him or brandished a weapon. Freeman and Gooden also testified that they never saw Coleman with a weapon. Coleman testified that he did not

¹Brooks holds that a person is subject to a deadly weapon enhancement if he or she is a principal to the underlying crime, another principal uses a deadly weapon in the commission of the crime, and "the unarmed offender had knowledge of the use of the deadly weapon." 124 Nev. at ___, 180 P.3d at 661. Therefore, Brooks eliminated the requirement that the unarmed offender be able to exercise control over the weapon. Id. Although we decided Brooks after Hopkins' trial, Nevada law as of at least 2003 required knowledge of the other offender's being armed. 124 Nev. at ___, 180 P.3d at 659-60; see, e.g., Anderson, 95 Nev. at 630, 600 P.2d at 244.

have a knife at Ross and that he later put a knife in his pocket at home, and that this was the pocket knife the police found. He explained that at Ross, the only thing in his hand was a set of keys. Coleman also testified that he never had a gun. Therefore, the only evidence the State presented on the issue establishes either that Coleman never had a weapon or that if he did have a weapon, Hopkins had no knowledge of it. Thus, we conclude that insufficient evidence supports the deadly weapon enhancement. We therefore vacate the deadly weapon enhancement.

Accordingly, we ORDER the judgment of the district court AFFIRMED IN PART, VACATED IN PART, AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry, J.
Cherry
Saitta, J.
Saitta

cc: Hon. Jackie Glass, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

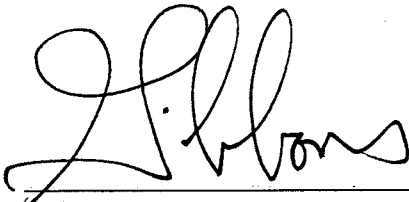
GIBBONS, J., dissenting:

Although I agree with my colleagues' analysis in every other respect, I conclude that the district court's error in refusing Hopkins' mere presence jury instruction was harmless, and therefore, would affirm the robbery conviction, after vacating the deadly weapon enhancement. The error is harmless in this case because the district court allowed Hopkins to argue to the jury that she was merely present when the robbery occurred.

"An error is harmless if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Santana v. State, 122 Nev. 1458, 1463, 148 P.3d 741, 745 (2006) (quoting Wegner v. State, 116 Nev. 1149, 1155, 14 P.3d 25, 30 (2000)). For example, the district court's refusal of a defendant's proposed theory-of-defense jury instruction is harmless when overwhelming evidence supports the conviction. Estes v. State, 122 Nev. 1123, 1138, 146 P.3d 1114, 1124 (2006).

In this case, the evidence established that Coleman aided and abetted Hopkins by facilitating her escape. Woten testified that he saw Hopkins take clothing from Ross, cut off the security tags, put the clothes down her pants and in her purse, and leave the store without paying. Freeman testified that she saw that Hopkins had clothing in her pants. Woten also testified that Coleman threatened to harm him if he did not let Hopkins go, and Freeman corroborated his testimony. The video showed that Coleman had something in his hands and that he lunged at Woten. Further, it is uncontroverted that Coleman and Hopkins left in a car, and Hopkins still had the clothes in her pants. Therefore, regardless of

whether Coleman had a weapon, the evidence was overwhelming that Coleman was using force or fear to keep the clothes Hopkins had taken. Thus, even if the district court gave the mere presence jury instruction, it is clear beyond a reasonable doubt that the jury would still have found Hopkins guilty of robbery or guilty as a principal in aiding and abetting Coleman. As such, I conclude the district court's refusal of Hopkins' proposed mere presence jury instruction was harmless error and would affirm the robbery conviction.


_____, J.
Gibbons