IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMIAH J. SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51618

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery constituting domestic violence. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge. Appellant Jeremiah Smith challenges his conviction based on certain spontaneous references to past abuse and various instances of alleged prosecutorial misconduct. For the following reasons, we conclude that these arguments fail and affirm the district court's judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Motion for mistrial—spontaneous references to past abuse

Smith contends that the district court abused its discretion in denying his motion for a mistrial based on certain spontaneous references to prior instances of domestic abuse. See Ledbetter v. State, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006). We disagree.

Despite the parties' efforts to exclude any references to Smith's prior domestic violence convictions, when asked why she had pushed Smith away, the complaining witness, Jerrie Phelps, answered: "[b]ecause it wasn't the first time that he'd hit me." In response, the district court instructed the jury to disregard the reference, then

immediately held a bench conference, after which it instructed the jury a second time to disregard the reference in more explicit terms.

Notwithstanding these instructions, during the bench conference, a juror submitted a note to the district court inquiring whether Smith had "a history of violence." Although it did not read the note until after the bench conference, the district court disclosed the note during a later recess. Thereafter, Smith renewed his motion for a mistrial, which the district court denied on grounds that its curative instructions were "adequate" to cure any prejudice.[1] We agree.

Here, the jury was twice instructed to disregard the reference—first, immediately after the reference was made, then at greater length after the bench conference. See id. at 264-65, 129 P.3d at 680 (spontaneous or inadvertent references to inadmissible material can be cured by an immediate admonishment directing the jury to disregard the statement). Moreover, given the State's cooperation in screening the jury from Smith's prior convictions, the nature of the prosecutor's line of questioning, the prosecutor's apparent surprise at Phelps' response, and Phelps' voluntary and immediate apology for her comment, we are satisfied that the reference was unsolicited.

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[1]Although Smith characterizes the admission of this spontaneous reference as a violation of Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), because the reference occurred without notice, and the State did not seek its admission, Petrocelli's requirements are not at issue, but rather whether the district court's instructions were an effective cure under the circumstances. See Ledbetter, 122 Nev. at 264-65, 129 P.3d at 680; see also Rose v. State, 123 Nev. 194, 207, 163 P.3d 408, 417 (2007); Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005).

Additionally, since the juror's note was submitted contemporaneously with the district court's second curative instruction, we disagree that the timing of the note indicated that the jury had irretrievably absorbed the reference, and that any resulting prejudice was, by that point, incapable of mitigation. To the contrary, we conclude that the district court's instructions were sufficient to cure any prejudice resulting from Phelps' spontaneous reference and that the district court did not abuse its discretion in denying a motion for a mistrial based on that reference.[2]

Instances of alleged prosecutorial misconduct

Although these comments passed without objection, Smith claims that his conviction should be reversed because the prosecutor injected his personal opinion, improperly vouched for the credibility of the complaining witness, appealed to juror passions, and implied Smith's guilt in another crime. We disagree.

During closing arguments, the prosecutor stated in rebuttal, "[a]s far as I can remember I don't see any inconsistencies between what the police said and what the victim said" regarding Phelps' foot injury, and took issue with the defense's characterization of the injury as a black bruise, stating "I don't believe that's accurate."

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[2]On appeal, Smith also challenges the unobjected-to testimony of arresting officers that a "brief struggle" ensued during Smith's arrest in which Smith "drew back," causing the officers to "escort[Smith] down onto the ground and then plac[e] him in handcuffs." Although Smith contends that this testimony portrayed him as "a violent and combative individual," because the connection between the circumstances of his arrest and his violent propensities toward Phelps is tenuous, Smith fails to demonstrate that he was actually prejudiced by this testimony.

Contrary to Smith's assertions, neither statement amounts to misconduct, as the latter statement highlights a legitimate conflict in the evidence as opposed to expressing a personal opinion,[3] while—instead of vouching for Phelps' credibility—the former merely attempts to reconcile the officers' reference to Phelps' injury as an "abrasion" with Phelps' description of her injury as a bruise. See Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001) ("The State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence.").

Moreover, given the overwhelming evidence of guilt in this case, we disagree that reversal is required based on the prosecutor's statement that domestic violence is a "particularly dangerous" crime and "an erosion to society," and his reference during opening statements that the jury would hear Phelps' sister mention that there had been a robbery during her 911 phone call.

Here, in addition to Phelps' testimony that Smith had beaten her about her feet, legs, and arms as she lay curled in a ball, Phelps' mother, sister, and the two responding officers testified that Phelps' foot had been injured, while two of these four witnesses testified that Phelps had scratches on her arms. Later, as Phelps' mother testified, five to six

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[3]Based on our review of the record, conflicting evidence exists to suggest that Phelps' bruise had not yet fully blackened when her family and police arrived on the scene, but was still beginning to surface. Thus, while the prosecutor's assertion that Phelps' injury was "becoming a bruise" and "reddening" did not represent the testimony of Phelps' sister (who agreed with defense counsel that the bruise was dark black), neither did it mischaracterize the trial record to such a degree as to be considered plain error meriting reversal.

other bruises surfaced on her daughter's legs days after the incident, further corroborating the beating.

Additionally, following the altercation, which she claimed to have overheard taking place inside Phelps' trailer, Phelps' sister confronted Smith, whom she testified angrily screamed obscenities at her before telling her that "all of us Phelps[ ] girls needed to be smacked." Accordingly, in light of the victim's testimony,[4] as well as the corroborating testimony of these four witnesses, we conclude that the prosecutor's comments regarding the social effects of domestic violence and his robbery allusion do not warrant reversal.[5] See Rowland v. State,

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[4]We further disagree with Smith's assertion that the State's unopposed use of the term "victim" improperly minimized its burden of proof, and therefore amounted to reversible error.

[5]For the same reasons, we conclude that sufficient evidence supports Smith's guilt in this case of battery constituting domestic violence, and therefore reject Smith's sufficiency of the evidence challenge. See Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006); see also Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) (circumstantial evidence alone may support a conviction).

118 Nev. 31, 38, 40, 39 P.3d 114, 118, 120 (2002).

Based on the above, we conclude that each of Smith's arguments fails. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Elissa F. Cadish, 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