IN THE SUPREME COURT OF THE STATE OF NEVADA

GUSTAVO JELASCO PEREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52663

FILED

MAY 10 2011

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 one count each of conspiracy to commit robbery, burglary while in the possession of a firearm, first-degree kidnapping with the use of a deadly weapon, robbery with the use of a deadly weapon, and grand larceny auto. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Pretrial habeas petition/probable cause

Perez contends that the district court erred by denying his pretrial petition for a writ of habeas corpus. We disagree. We defer to the district court's determination of factual sufficiency when reviewing pretrial orders on appeal. See Sheriff v. Shade, 109 Nev. 826, 828, 858 P.2d 840, 841 (1993). The evidence presented at the preliminary hearing that the victim was left in an abandoned apartment with his face down on the floor and his hands bound behind his back was sufficient to support a reasonable inference that a kidnapping had been committed and Perez committed it. See NRS 171.206; NRS 200.310(1); Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (probable cause to support a criminal charge "may be based on slight, even 'marginal' evidence" (internal

citations omitted)); Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971). Perez's claim that the kidnapping charge should have been dismissed because it was incidental to the robbery went to the ultimate issue of guilt and was for the trier of fact to determine. See Ricci v. Sheriff, 88 Nev. 662, 663-64, 503 P.2d 1222, 1223 (1972). Therefore, we conclude that the district court did not err by denying Perez's pretrial petition for a writ of habeas corpus.

Batson challenge

Perez contends that the district court erred by denying his objection to the State's use of a peremptory challenge to remove juror 119 because the prosecutor's reason was "mere pretext" for racial discrimination. See U.S. Const. amends. VI, XIV § 1; Nev. Const. art. 1, §§ 3, 8; Batson v. Kentucky, 476 U.S. 79 (1986). We disagree.

When reviewing a Batson challenge, we give great deference to "'[t]he trial court's decision on the ultimate question of discriminatory intent.'" Diomampo v. State, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008) (quoting Walker v. State, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997)). The district court found that the prosecutor's removal of juror 119 because his son was a lawyer did not contain an inherent intent to discriminate and that Perez failed to prove purposeful discrimination. See Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004) ("'Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" (quoting Hernandez v. New York, 500 U.S. 352, 360 (1991))). Because the record supports the district court's determination, we conclude that the district court did not err by rejecting Perez's Batson challenge.

Brady violation

Perez contends that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by not providing the defense with information regarding the alleged extortion of the victim by a nontestifying witness. See Strickler v. Greene, 527 U.S. 263, 280 (1999) (Brady and its progeny require a prosecutor to disclose favorable exculpatory and impeachment evidence that is material to the defense). We disagree.

Determining whether the State adequately disclosed information pursuant to Brady involves both questions of fact and law which we review de novo. See State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 7-8 (2003). Our review of the record reveals that the information in question was not exculpatory or favorable to Perez's defense. See Strickler, 527 U.S. 281-82; Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). Moreover, Perez was not prejudiced by the admission of the evidence because he received information regarding the nontestifying witness' involvement with the victim prior to the start of the guilt phase of the trial and he could have cross-examined the witness regarding this information. See Wade v. State, 115 Nev. 290, 296, 986 P.2d 438, 441 (1999); see also United States v. Palmer, 536 F.2d 1278, 1280-81 (9th Cir. 1976). Finally, Perez has failed to demonstrate that a different verdict would have been reasonably possible if the evidence had been disclosed at an earlier date. See Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996). Therefore, we conclude that Perez is not entitled to relief.

Amended information

Perez contends that the district court erred by allowing the State to amend count II of the information "[a]t the conclusion of the trial," over his objection, to charge him with "burglary while in possession of a

deadly weapon" rather than "burglary with use of a deadly weapon." (Emphasis added.) This claim lacks merit because, as the district court found, the amended information did not charge Perez with an additional or different offense and Perez's substantial rights were not prejudiced. See NRS 173.095(1); Viray v. State, 121 Nev. 159, 162-63, 111 P.3d 1079, 1082 (2005) (prejudice depends on whether "the defendant had notice of the State's theory of prosecution").

Prosecutorial misconduct

Perez contends that the prosecutor committed misconduct during rebuttal closing argument by arguing that the defense should have produced certain evidence and thus impermissibly shifted the burden of proof. See Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996). We conclude that the prosecutor did not commit misconduct and the district court did not err by overruling Perez's objection because, when taken in context, the prosecutor was responding to a statement made during defense counsel's closing argument regarding the State's failure to preserve evidence and the response did not have the effect of shifting the burden of proof. See Lisle v. State, 113 Nev. 679, 706-07, 941 P.2d 459, 477 (1997).

Motion for a new trial

Perez contends that the district court erred by denying his motion for a new trial. See NRS 176.515(4). Perez claims that the State violated NRS 50.095 and improperly impeached his alibi witness by questioning him about a prior felony conviction.

The district court has broad discretion in ruling on a timely motion for a new trial. See Servin v. State, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001). In this case, the district court erred by allowing the

State to impeach the witness without providing a certified copy of his felony conviction. See Boley v. State, 85 Nev. 466, 470, 456 P.2d 447, 449 (1969) ("There can be only one irrefutable documentation of the conviction and that is from the exemplified copy of the judgment."). However, in light of the substantial evidence of Perez's guilt, including the victim's positive identification of Perez as the perpetrator, the error was harmless. See NRS 178.598; Boley, 85 Nev. at 470, 456 P.2d at 449. Therefore, we conclude that the district court did not abuse its discretion by denying Perez's motion for a new trial.

Cumulative error

Perez contends that cumulative error denied him his right to a fair trial. Balancing the relevant factors, we conclude that the cumulative effect of the alleged errors did not deny Perez a fair trial and no relief is warranted. Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d, 465, 481 (2008) (three factors are relevant to cumulative error: "'(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'" (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000))).

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

ORDER the judgment of conviction AFFIRMED.

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Kenneth C. Cory, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk