

IN THE SUPREME COURT OF THE STATE OF NEVADA


LUIS FERMIN HERRERA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52909

**FILED**

MAY 03 2010

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, robbery with the use of a deadly weapon, and attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

A jury convicted appellant Luis Fermin Herrera of burglary, robbery with the use of a deadly weapon, battery with the use of a deadly weapon, and attempted murder with the use of a deadly weapon. Herrera was sentenced to a prison term of 48 to 120 months for burglary, 72 to 180 months for robbery, plus a consecutive term of 12 to 180 months for the deadly weapon enhancement, and 120 months to life for attempted murder, with all counts to run concurrently.

On appeal, Herrera argues that the district court erred by :  
(1) allowing the State to call a rebuttal expert witness in the absence of appropriate notification to the defense; (2) allowing a detective to testify about Herrera's state of mind during interrogation, and thereby comment on Herrera's veracity; (3) refusing to dismiss the instant charges or give a jury instruction based on the State's failure to conduct

a blood-alcohol analysis; and (4) in adjudicating him as a habitual offender. We conclude that all of these claims lack merit.<sup>1</sup>

First, the decision to allow the State's rebuttal expert witness to testify was within the discretion afforded to the trial court. A party in a criminal case is required to provide notice of intent to present expert rebuttal witnesses. Grey v. State, 124 Nev. 110, 119-20, 178 P.3d 154, 161 (2008). The decision of whether notice was untimely, and any remedy, is left to the discretion of the trial court. Id. The rebuttal expert's testimony was short, simple, and consisted solely of her opinion that a toxicologist could not realistically estimate blood-

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<sup>1</sup>Herrera also argues that: (1) the district court's refusal to excuse a group of biased jury panelists for cause deprived him of his right to a fair and impartial jury, (2) the State's exclusion of the only minority jury panelist in the absence of a race-neutral explanation violated his constitutional rights, (3) the district court's admission of his statement to the police violated his constitutional rights, (4) the district court erred by admitting gruesome photos of the victim that were cumulative and prejudicial, (5) the district court erred by admitting irrelevant and highly prejudicial threat evidence, (6) the district court erred by refusing multiple defense-proposed negatively phrased jury instructions, (7) the district court incorrectly instructed the jury on the crime of burglary, (8) the district court erred by instructing the jury that Herrera was presumed innocent "until" the contrary was proven, (9) the district court's transition jury instruction minimized the State's burden of proof, (10) the district court erred by refusing to declare a mistrial after the State repeatedly committed prosecutorial misconduct in closing argument, (11) his convictions for attempted murder and robbery violate double jeopardy and redundancy principles, (12) the State failed to present sufficient evidence to sustain his convictions, and (13) cumulative error warrants reversal of his convictions. After considering these issues, we conclude that all of Herrera's arguments are without merit.

alcohol levels from observing a person and reading reports. The district court required the rebuttal expert to provide a written report, which she did, and defense counsel had time to review the report before the rebuttal expert testified. The decision to allow the State's rebuttal expert witness to testify was within the discretion afforded to the trial court.

Second, the record shows that the detective never testified about Herrera's state of mind and he did not comment on Herrera's veracity. During his testimony, the detective testified about admissions that Herrera made during his interrogation and explained what he thought the theory of minimizing was. This court has concluded that "it is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony." Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994). Accordingly, a lay witness may not give his or her opinion as to the veracity of the statement of another. DeChant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000). The detective never voiced his personal opinion on whether Herrera was telling the truth. Instead, the detective limited his comments to common evasive techniques that suspects generally use when interrogated. A review of the record demonstrates that the detective never testified about Herrera's state of mind and did not comment on Herrera's veracity. The district court did not err in allowing the detective's testimony.

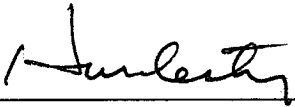
Third, the district court did not err in refusing to dismiss the case or give a jury instruction based on the failure to draw Herrera's blood. "In a criminal investigation, police officers generally have no duty to collect all potential evidence." Randolph v. State, 117

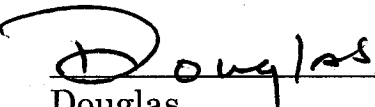
Nev. 970, 987, 36 P.3d 424, 435 (2001) (citing Daniels v. State, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998)). In some cases, a failure to gather evidence may warrant sanctions against the State. Gordon v. State, 121 Nev. 504, 509, 117 P.3d 214, 218 (2005). To warrant sanctions, the defense must show that the evidence was material, *i.e.*, that there is a reasonable probability that the result of the proceedings would have been different if the evidence had been available and that the State was negligent, grossly negligent, or acted in bad faith in failing to collect the evidence. *Id.* at 509-10, 117 P.3d at 218. Herrera has failed to show that the evidence was material because the testimony of the witnesses who were in contact with Herrera at the time the crimes were committed did not suggest he was intoxicated, and thus there was not a reasonable probability that the result would have been different if a blood-alcohol analysis was completed. Further, because there was no indication that Herrera was intoxicated during the crimes, the officer did not have a duty to take a blood sample and he was not negligent nor acting in bad faith by not taking one. The district court's determination that the absence of a blood-alcohol sample was not material was within its discretion.

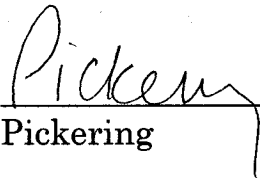
Fourth, Herrera qualified for punishment pursuant to NRS 207.010 and was sentenced accordingly as a habitual offender. Herrera had five prior felony convictions, which is more than sufficient for the district court to sentence Herrera to 10 years to life under NRS 207.010(1)(b)(2). The State admitted documentation in support of all five convictions, and Herrera did not contest the validity of the convictions below. The record establishes that there were sufficient felony convictions for the district court to sentence Herrera under NRS

207.010, and the sentence given was permitted under the statute. Therefore, the district court did not err in adjudicating Herrera as a habitual offender. Accordingly we,

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Pickering

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