IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY ROSS WILLIAMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53614



ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of obtaining and/or using the personal identification information of another and conspiracy to commit obtaining and/or using the personal identification information of another. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Bad acts evidence

Appellant Anthony Ross Williams claims the district court abused its discretion by admitting evidence of an alleged prior bad act because it was not established by clear and convincing evidence and was more prejudicial than probative. The decision to admit or exclude evidence of bad acts under NRS 48.045(2) is within the sound discretion of the district court and will not be reversed on appeal absent a showing of manifest error. See Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006). The district court did not make the requisite finding regarding clear and convincing evidence, and we conclude that the district court erred by admitting evidence of the alleged prior bad act because it was not proven by clear and convincing evidence. See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (establishing three-part test for admission of prior bad act evidence); see generally, In re Drakulich, 111

Nev. 1556, 1566-1567, 908 P.2d 709, 715 (1995) (defining clear and convincing evidence). Nevertheless, we conclude that the error is harmless and no relief is warranted because the jury would have convicted Williams of both charges even if the prior bad act evidence had not been admitted. See NRS 178.598 (defining harmless error); see also Ledbetter, 122 Nev. at 259, 129 P.3d at 677.

Comment on post-arrest silence

Williams claims that the prosecution committed misconduct by eliciting testimony regarding Williams' post-arrest silence. As Williams failed to object to the prosecution's conduct below, we review for plain error. See NRS 178.602; Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 477 (2008). Even assuming the detective's rebuttal testimony that Williams did not mention two alibi witnesses, terminated the interview, and did not want to talk anymore was an improper comment on Williams' post-arrest silence, Williams has failed to demonstrate actual prejudice resulting from the passing reference and therefore we conclude that no relief is warranted. See Diomampo v. State, 124 Nev. 414, 430, 185 P.3d 1031, 1041 (2008); Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267-68 (1996) (holding that a passing reference to defendant's post-arrest, pre-Miranda silence is harmless).

State's peremptory challenge

Williams claims that the State improperly exercised a peremptory challenge against an African-American potential juror in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Williams failed to preserve this claim for review by raising a Batson objection in the district court. See Rhyne v. State, 118 Nev. 1, 11, 38 P.3d 163, 169-70 (2002). However, we may address plain or constitutional error sua sponte. See Gray v. State, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008). We conclude that Williams has failed to demonstrate any error under Batson because

the prosecutor explained that a member of the juror's family had recently been convicted of a similar offense and there is nothing in the record to suggest that the challenge was anything but race-neutral. See Batson, 476 U.S. at 96-98 (establishing three-part test for determining whether State purposefully discriminated in exercise of peremptory challenge). Therefore, we conclude that no relief is warranted.

Remaining claims

Finally, Williams claims that the district court abused its discretion by (1) admitting a witness's pretrial photographic identification of Williams, (2) permitting the State to impeach Williams with the details of his prior felony robbery conviction, and (3) allowing two State witnesses who may have received favorable treatment in exchange for their testimony pursuant to undisclosed plea bargains to testify and for failing to instruct the jury on bargained-for testimony. Because Williams failed to preserve these issues for appellate review, we review for plain error. See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003). After examining the record and considering Williams' arguments, we conclude that the district court did not err in connection with any of the above claims. See id. (explaining that first step in plain error review is determining whether there was error).

Having considered Williams' claims and concluded that they lack merit or do not warrant relief, we

ORDER the judgment of conviction AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Jerome Polaha, District Judge
Law Office of Thomas L. Qualls, Ltd.
Mary Lou Wilson
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk