

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONNIE MONEY COLEMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54617

FILED

FEB 28 2011

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a deadly weapon and assault with the use of a deadly weapon, and from a district court order denying a motion for judgment of acquittal or for a new trial. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

FACTUAL BACKGROUND

Appellant Ronnie Money Coleman and his girlfriend, Rosie Davis, were in Reno, Nevada on the evening of Saturday July 7, 2007. They were gambling at Diamonds Casino when Davis met Salvador Murillo. Davis and Murillo discussed having sex for money. The two left the casino in Murillo's truck, visited Murillo's bank, and then parked near the north end of Sutro Street and sat on the tail gate. About two minutes later, Coleman, wearing a black winter coat and a beanie, approached with a handgun. Davis left upon seeing Coleman, who tasered Murillo in the face and took his money and debit card. Coleman also made Murillo take off his belt and boots before attempting to bind him with the belt. When Coleman attempted to bind Murillo, Murillo ran off and found help in a nearby residential neighborhood.

Reno Police Officer Allan Weaver arrived in the area around 11:35 p.m. Shortly after, he observed Coleman, in a black winter coat,

walking from behind a closed business. Weaver told another officer he had a possible burglary suspect. Weaver followed Coleman in his patrol car and attempted to speak to Coleman, who replied he did nothing wrong and then walked toward Weaver with his hands in his pockets. Weaver repeatedly requested and then ordered Coleman to remove his hands from his pockets. Eventually, Weaver drew his gun. Coleman fled and Weaver pursued him. Upon reaching the corner of a building, Weaver observed Coleman turn around with a handgun. Weaver fired seven shots. Two shots hit Coleman in the leg and produced non-life threatening injuries. Reno police subsequently arrived and searched Coleman and the area. They found a stun gun, a beanie, gloves, seventy-two dollars in currency, and Murillo's debit card.

Coleman was charged with robbery with a deadly weapon, assault with a deadly weapon, resisting arrest and obstructing justice with a dangerous weapon, ex-felon possession of a firearm, and ex-felon possession of a taser. Charges related to his ex-felon possession of a firearm and the taser were severed. An attempted murder charge was subsequently added but dropped before trial. A jury convicted Coleman of the robbery and assault with a deadly weapon (ADW) charges, but acquitted Coleman of the obstruction of justice charge. The state dismissed the charges related to ex-felon possession of a firearm and taser. Coleman filed a timely motion for acquittal or a new trial, but was denied.

Coleman now appeals his conviction arising out of his robbery with the use of a deadly weapon on Murillo and his assault with the use of a deadly weapon on Officer Weaver. He argues that (1) the district court abused its discretion by refusing to sever the robbery and assault charges; (2) the district court failed to properly instruct the jury on the assault

proof requirements and accomplice witness testimony; (3) the district court improperly precluded proof that Officer Weaver acted inconsistently with Reno Police Department practice and protocols; (4) the district court improperly precluded cross-examination of Murillo and Davis; (5) the district court improperly refused to issue a certificate of materiality; (6) the district court erred by not suppressing physical evidence obtained after the shooting as fruit of an illegal search, in which there was no reasonable suspicion to stop Coleman, the attempted stop amounted to illegal detention, and officer Weaver used excessive force; (7) the district court erroneously admitted Murillo's debit card into evidence; (9) the grand jury proceedings resulting in the indictment were not statutorily authorized and it was prosecutorial vindictiveness for the prosecutor to use the grand jury to add an attempted murder charge to the indictment and (10) the district court erred by denying Coleman's post-trial motion for a new trial or acquittal.

The parties are familiar with the remaining facts and procedural history of this case; therefore, we do not recount them in this order except as is necessary for our disposition.¹

¹Coleman's argument that the district court abused its discretion by admitting evidence of the debit card is without merit. The district court did not commit manifest error because the detective's testimony was sufficient to establish foundation and chain of custody for the evidence. See Nolan v. State, 122 Nev. 363, 370-73, 132 P.3d 564, 568-70 (2006) (stating that a decision to admit evidence is within the sound discretion of the district court and will not be reversed unless it is manifestly wrong). Coleman's arguments that the grand jury indictment was improper and that the prosecutor vindictively added an attempted murder charge are also without merit. NRS 172.175 empowers the grand jury with a general duty to inquire into all matters affecting morals, health, and general

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I. Joinder was not an abuse of discretion

Coleman argues that he was denied due process because there was no statutory basis for joinder of his robbery-with-a-deadly-weapon and assault-with-a-deadly-weapon charges. We disagree.

A decision not to sever is reviewed for an abuse of discretion. Weber v. State, 121 Nev. 554, 575, 119 P.3d 107, 121 (2005). NRS 173.115 provides that multiple offenses may be charged if the charges are “[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan.” Offenses are “connected together” if evidence of either offense is cross-admissible to prove the other offense. Weber, 121 Nev. at 573, 119 P.3d at 120. Such evidence is admissible if it is relevant, proven by clear and convincing evidence, and has probative value that substantially outweighs the risk of unfair prejudice. Id. Severance is mandated if joinder is unfairly prejudicial. Weber, 121 Nev. at 574, 119 P.3d at 121. Unfair prejudice exists if joinder is so prejudicial that it outweighs “judicial economy and compels the exercise of the court’s discretion to sever.” Tabish v. State, 119 Nev. 293, 304, 72 P.3d 584, 591 (2003) (internal citations omitted).

... continued

welfare, including Coleman’s criminal actions; and the State is permitted to add charges after a defendant declines a plea bargain and Coleman does not address the State’s explanation. See Schmidt v. State, 94 Nev. 665, 666-67, 584 P.2d 695, 696-97 (1978) (concluding that a prosecutor’s intention to amend a criminal information to include a charge of habitual criminality in the event the case proceeded to trial was not a violation of due process).

The district court considered the Murillo robbery and Weaver assault as two acts. It found that they were connected because the assault was relevant to prove Coleman's identity in the robbery and the robbery was relevant to explain Coleman's conduct in the assault. It also agreed with the State that cross-admissibility existed as evidence of flight, as consciousness of guilt, and as corroboration of the victim's testimony. The district court reasoned that the state would need to explain Coleman's actions. Finally, the district court concluded that the counts were properly joined because the acts that constituted each crime were almost a continuing action, and therefore, the evidence demonstrating each charge was cross-admissible to prove the other charge. We conclude that the district court did not abuse its discretion in finding that evidence of the crimes were connected together.

Coleman also argues that unfair prejudice required severance. At trial, the State identified Coleman by tying the robbery evidence to Coleman's clothing, which was seized by the police after Coleman was arrested for assaulting Officer Weaver. The State also explained that Coleman committed the assault because he had committed the robbery. This is not an impermissible use of propensity evidence. See Fields v. State, 125 Nev. ___, ___ 220 P.3d 709, 713 (2009). Further, Coleman originally stipulated to the joinder and points to nothing in the record that demonstrates joinder was so prejudicial as to outweigh judicial economy. Nevada caselaw has consistently upheld joinder involving more heinous acts. See, e.g., Floyd v. State, 118 Nev. 156, 162-65, 42 P.3d 249, 253-55 (2002) (upholding the joinder of kidnapping and four counts of sexual assault with a deadly weapon against one victim, with four counts of first degree murder with a deadly weapon against four other victims),

abrogated on other grounds by Grey v. State, 124 Nev. 110, 113-119, 178 P.3d 154, 160-61 (2008). We conclude that the district court did not abuse its discretion by failing to sever the robbery and assault.²

II. The district court did not abuse its discretion in setting jury instructions for the assault and accomplice-witness testimony

A. The assault instruction was proper

Coleman argues that the jury should have been instructed that a conviction for assault with a deadly weapon required a finding that he pointed a gun at Weaver. He contends that allowing the jury to convict him of the assault charge based upon evidence that he displayed a weapon constituted a fatal variance between the indictment and jury instruction. We disagree.

“[F]ailure to clearly object . . . to a jury instruction [generally] precludes appellate review.” Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Yet discretion exists to address an error that is plain and affects the defendant’s substantial rights. Id. An accused must be clearly informed as to the charges set forth in the indictment so that there is an opportunity to adequately prepare for trial and not be surprised by evidence. Id. at 74, 605 P.2d at 204. Reversible error based on a variance

²Coleman also argues that the district court erred by failing to give a contemporaneous limiting instruction. Notably, the district court gave an instruction at the close of trial that instructed the jury to decide each offense separately. This instruction was sufficient for purposes of joinder and Coleman offers “no reason to abandon the customary presumption” that the jury followed this instruction. See Weber, 121 Nev. at 575, 119 P.3d at 121 (concluding that the general instruction at the close of trial was sufficient to inform the jury of its duty to decide each offense separately).

between an indictment and a jury instruction exists only if the variance affects substantial rights of the accused. State v. Jones, 96 Nev. 71, 73-74, 605 P.2d 202, 204 (1980).

Coleman points to the charging document, which alleged that Coleman committed the assault because he aimed a firearm at Weaver while attempting to elude the officer, and argues that the jury should have been instructed to determine whether Coleman pointed his weapon at Weaver. We disagree.

Instead, we conclude that Coleman was sufficiently informed of the nature of the assault charge. Moreover, the State consistently argued that Coleman pulled a handgun on Weaver, the instruction adequately set forth the elements of assault with a deadly weapon, and the instruction was inconsequential to Coleman's defense that he did not have a gun. Coleman may be correct that a jury would have acquitted him of the assault charge if the instruction included aiming or pointing, but assault-with-a-deadly weapon does not require such a finding and the jury could have found Coleman guilty without finding he aimed or pointed his weapon at Weaver. See NRS 200.471. We therefore conclude that Coleman failed to demonstrate that his substantial rights were affected. As a result, the district court did not abuse its discretion in giving the assault instruction and no reversible error exists based on any variance between the indictment and the instruction.

B. The accomplice-witness instruction was proper

Coleman also argues that the district court abused its discretion by refusing to give Coleman's cautionary instruction regarding accomplice testimony. Coleman proposed the following instruction: "[y]ou should view with distrust the testimony of any witness whom you find to

be an accomplice.” We disagree and conclude that the district court appropriately instructed the jury regarding accomplice testimony.

The district court gave the following jury instruction:

You are hereby advised that Rosie Davis was charged with crimes arising from this case and has testified in this case. Her negotiations are set forth in an Exhibit, which has been provided to you, wherein she must testify truthfully and the State will recommend she be placed on a term of probation for the crime of Conspiracy to Commit Robbery with a Firearm. She has not been sentenced and the State has not indicated if they believe she has testified truthfully. You may view her testimony and regard it in light of the possible pressure to which she is subject, her desire to assist the State in obtaining a conviction, and her desire to receive probation and avoid incarceration

This instruction is tailored to the case and is not categorical but rather an instruction to weigh Davis’ testimony in light of her plea agreement and pending sentencing. See Crowe v. State, 84 Nev. 358, 368, 441 P.2d 90, 96 (1968) (noting that “it is desirable that jury instructions have meaning in the particular circumstances of each case,” with discretion left to the trial court and counsel to fashion the instructions). We conclude that the district court did not abuse its discretion in refusing to give Coleman’s accomplice instruction.

III. The district court did not err or otherwise abuse its discretion in refusing to allow the use of Reno Police Department protocols

Coleman argues that the district court denied him due process and his confrontation rights when it precluded proof that Weaver acted inconsistently with Reno Police Department practices and procedures during his encounter with Coleman. We disagree.

A decision to admit evidence is within the sound discretion of the district court and will not be reversed unless it is manifestly wrong and not a harmless error. Nolan v. State, 122 Nev. 363, 370-73, 132 P.3d 564, 568-69 (2006). A potential violation of the Confrontation Clause is a question of law reviewed de novo. Chavez v. State, 125 Nev. ___, ___, 213 P.3d 476, 484 (2009). The district court allowed Coleman to ask Weaver about statements Weaver made during an officer-involved-shooting protocol, but it disallowed Coleman from referencing that the statements were related to the routine protocol because it was not relevant and would potentially confuse and mislead the jury.

Coleman cites Cosio v. State, 106 Nev. 327, 330, 793 P.2d 836, 838 (1990), for the proposition that a defendant must be allowed “to introduce into evidence any testimony or documentation which would tend to prove the defendant’s theory of the case.” (quoting Vipperman v. State, 96 Nev. 592, 596, 614 P.2d 532, 534 (1980)). Yet nowhere does Coleman demonstrate that the district court prevented him from offering evidence or questioning Weaver regarding any police protocol that Weaver allegedly violated. We conclude that there was no error or abuse of discretion in precluding reference to the routine officer-involved-shooting protocol.

IV. The district court did not abuse its discretion in limiting cross-examination of Davis or Murillo

Coleman argues that the district court abused its discretion by limiting his cross-examination of Murillo and Davis. We disagree.

A district court’s evidentiary decisions are generally reviewed for an abuse of discretion, but a potential violation of the Confrontation Clause is a question of law reviewed de novo. Chavez, 125 Nev. at ___, 213 P.3d at 484. During cross-examination, the district court limited Coleman from questioning Murillo about condoms, his marital status and

his wife's knowledge of the robbery. Coleman argued that Murillo's thinking about a condom prior to the robbery was relevant to his claim that a man jumped out of the dark with a gun. Coleman also argued that Murillo had a motive to fabricate the robbery and Coleman sought to ask Murillo whether he was still married, whether he had to explain the robbery to his wife, or whether she knew he was with a prostitute. The district court found the questions irrelevant. The condom question is irrelevant and the marital questions are marginally relevant at best.

Coleman also attempted to probe Davis about her confidence in her attorney. The district court allowed Coleman to ask whether Davis was satisfied with her counsel, but not about specific conversations with her counsel because such communications were privileged. Coleman was also precluded from asking whether Davis' attorney was appointed and whether her attorney raised any substantive or procedural issues on her behalf after the State objected based on relevancy. Finally, Coleman was precluded from asking Davis about whether she knew the police and prosecution's theory of the robbery, but an objection was sustained as to speculation. In sum, nothing in the trial transcripts cited by Coleman establish that he was erroneously limited from probing whether Davis perceived her attorney as incompetent, that she felt helpless, or that she knew the state expected her to testify something other than the truth. We conclude that the district court did not abuse its discretion in limiting the cross-examination of Davis or Murillo.

V. The district court did not abuse its discretion in refusing to issue a certificate of materiality to obtain evidence to impeach Davis

Coleman argues that the district court erroneously precluded him from obtaining Davis' bank records by subpoena duces tecum in order

to prove that Davis had a financial need to engage in prostitution rather than serve as Coleman's robbery accomplice. We disagree.

A district court may issue a subpoena duces tecum accompanied by an ancillary request for the appearance of an out-of-state witness. Wyman v. State, 125 Nev. ___, ___, 217 P.3d 572, 577 (2009). A moving party must "demonstrate that the witness is material and that the moving party would be prejudiced absent the court's issuance of the certificate." Id. at 580. Refusal to issue the subpoena is reviewed for an abuse of discretion. Id. In reviewing such a refusal, we ask whether (1) "substantial evidence supports the district court's findings that the moving party failed to demonstrate that the evidence is material to the defendant's case" and (2) "substantial evidence supports the district court's findings that the moving party failed to demonstrate that the absence of the evidence prejudiced the defense." Id. at 581. Material evidence is that which is "logically connected with the facts of consequence or the issues in the case." Id. at 583.

At trial, Coleman made an unsworn claim that Davis was lying about her bank account balance in which Coleman stated that Davis did not have the account balance that she represented during her testimony. The defense counsel sought a certificate of materiality to impeach Davis but the district court denied the request based on materiality because Davis was not the only witness to identify Coleman and the bank account was only weakly connected to Davis' allegations that Coleman committed the robbery. We agree. Davis' bank account balance would not prove that she was a prostitute nor would it establish that she was not an accomplice to the robbery. Because substantial evidence with respect to materiality and prejudice supported the district court's decision

to refuse to issue a subpoena mid-trial, we conclude that the district court did not abuse its discretion by refusing to issue a subpoena to obtain Davis' bank records.

VI. The district court did not err by refusing to suppress physical evidence obtained from Coleman following the shooting

Coleman argues that the evidence seized from the shooting should have been suppressed because it was the fruit of an illegal search, as there was no reasonable suspicion to stop Coleman, his arrest was illegal, and Weaver used excessive force. We disagree.

Suppression decisions involve mixed questions of law and fact, whereby legal conclusions are reviewed de novo and factual determinations are reviewed for sufficient evidence. Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002). We give deference to the district court's findings of fact during a suppression hearing. See McMorran v. State, 118 Nev. 379, 383, 46 P.3d 81, 84 (2002).

The district court concluded that the State had a reasonable suspicion to detain Coleman, that Officer Weaver did not use excessive force, and that all of the evidence obtained was incident to a lawful arrest after Coleman pulled a gun on Weaver.

A. There was reasonable suspicion to stop Coleman and investigate

Under Fourth Amendment search and seizure analysis, an officer may briefly stop someone in order to investigate criminal activity if the officer has a reasonable suspicion that criminal activity is afoot. Terry v. Ohio, 392 U.S. 1, 30-31 (1968). NRS 171.123 allows law enforcement to "detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime." Coleman was observed at night, wearing a

heavy black coat in warm weather, with his hands in his pockets, coming from around a closed industrial building, and avoiding looking at the police car in an otherwise empty parking lot. He also failed to respond when Weaver initially attempted to speak with him.

Weaver testified that he was a three-year veteran who consistently worked this area as part of his graveyard shift and that Coleman was in an unusual place, at an unusual time, wearing unusual clothes, and acting in an unusual manner. We determine that these facts, taken with rational inferences, under the totality of circumstances, were sufficient to give Weaver reasonable suspicion to stop Coleman to investigate. See Terry, 392 U.S. at 22. We conclude that the district court did not err in determining Weaver had reasonable suspicion to stop Coleman.

B. There was no illegal detention and Weaver had probable cause to arrest Coleman

Coleman also argues that the attempted stop by Weaver amounted to an illegal detention of Coleman. We disagree.

A “seizure” under the Fourth Amendment occurs when a suspect yields to authority. California v. Hodari D., 499 U.S. 621, 626 (1991). Nevada law treats flight from detention as ending any seizure or initial detention. State v. Lisenbee, 116 Nev. 1124, 1130, 13 P.3d 947, 951 (2000). Coleman fled after Weaver initiated the Terry stop so his argument regarding seizure based on the Terry stop is without merit. Moreover, Weaver subsequently had probable cause to arrest Coleman after Coleman pulled his weapon. Thus, the search of Coleman’s clothes and belongings was justified. See Illinois v. Lafayette, 462 U.S. 640, 645 (1983) (stating that a lawful arrest establishes police authority to conduct a full search of a person because it is both an exception to the warrant

requirement and reasonable under the Fourth Amendment) (citing United State v. Robinson, 414 U.S. 218, 235 (1973)). We conclude that the district court did not err in determining that probable cause existed to arrest and search Coleman.

C. Coleman did not demonstrate that Weaver used excessive force

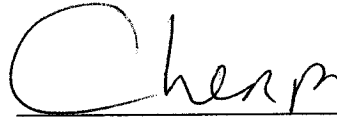
Coleman argues that because his expert witness testified that he was probably on the ground when he was shot, Weaver illegally used excessive force to seize him and all of the seized evidence should have been suppressed. We disagree.

Deadly force may be used if a suspect threatens an officer with a weapon. Tennessee v. Garner, 471 U.S. 1, 11 (1985). In its decision regarding Coleman's suppression motion, the district court found that Coleman pulled a gun on Weaver and Weaver responded by firing his own gun at Coleman. We conclude that the district court did not err in refusing to suppress the evidence obtained incident to a lawful arrest based on Coleman's excessive force claim.³

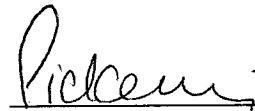
Therefore, we affirm the judgment of conviction and the order

³We decline to separately address Coleman's arguments for acquittal based on error or new trial because they are without merit based on the foregoing analysis. We do note that sufficient evidence supports the verdict because a rational juror could find the essential elements of both crimes. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

of the district court denying a motion for judgment of acquittal or for a new trial.


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

cc: Hon. Jerome Polaha, District Judge
Dennis E. Widdis
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Washoe District Court Clerk