IN THE SUPREME COURT OF THE STATE OF NEVADA

DOYLE CHASE BARNETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55204

FILED

MAY 27 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 burglary. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

In December 2008, appellant Doyle Chase Barnett exited a Raley's grocery store in Reno, Nevada, with approximately $150 worth of deli meat and alcohol without payment. Barnett was apprehended outside of the grocery store by Joey Robles, a Raley's loss prevention employee. Prior to entering the store, Barnett had given his friend, Thomas Button, his backpack, which contained Barnett's wallet. Once outside the grocery store, Button pulled Barnett's wallet from the backpack and gave it to Robles to pay for the items. Thereafter, Robles escorted Barnett back into the grocery store and searched his wallet, which contained his identification, a credit card, and no cash.

One week after Barnett's arrest, Detective Reed Thomas of the Reno Police Department contacted Barnett's credit card company, without first obtaining a search warrant or subpoena, to inquire about the credit card Barnett had in his possession during the arrest. Detective Thomas learned that the credit card was over the limit and had been suspended.

Barnett was charged by criminal information with one count of burglary, and the State alleged that Barnett was a habitual criminal. A

jury found Barnett guilty of the charge of burglary. Thereafter, the district court adjudicated Barnett a habitual criminal pursuant to NRS 207.010 and sentenced him to 25 years in the Nevada State Prison with parole eligibility after a minimum of 10 years.[1]

On appeal, Barnett argues that: (1) the district court erred in admitting his credit card information, (2) the jury's function was usurped through the testimony of Detective Thomas, and (3) the district court judge abused his discretion when he refused to recuse himself based on an allegation of actual bias.

We conclude that while the district court erred in admitting Barnett's credit card information because law enforcement is required to comply with NRS 239A.180, the overwhelming evidence presented against Barnett renders this error harmless. We further conclude that although Detective Thomas implicated the ultimate question of guilt or innocence by testifying on several occasions that a crime occurred, this error did not rise to the level of plain error and did not affect Barnett's substantial rights. Moreover, we conclude that it was harmless error for Judge Flanagan to hear his own motion to recuse. Barnett's remaining arguments are without merit.[2] Therefore, we affirm Barnett's judgment of conviction.

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[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

[2]Barnett also argues that: (1) the district court abused its discretion in admitting an uncharged prior bad act allegation that he had previously attempted to steal a comforter, (2) the district court erred in refusing to give his requested jury instruction regarding petit larceny, and (3) district

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Financial information

Barnett contends that the district court erred in refusing to follow the mandates of NRS 239A.180, which require suppression of financial institution information illegally obtained by law enforcement officers. Barnett also argues that the information obtained during Detective Thomas's telephone call in search of his financial records was illegally obtained and, therefore, all evidence flowing from that conversation must be excluded as fruit of the poisonous tree.

"NRS Chapter 239A prohibits governmental agencies from requesting and financial institutions from releasing financial records unless authorized by the customer or pursuant to a subpoena or search warrant." Atlantic Commercial v. Boyles, 103 Nev. 35, 38, 732 P.2d 1360, 1362-63 (1987), abrogated on other grounds by Executive Mgmt. v. Ticor Title Ins. Co., 118 Nev. 46, 50, 38 P.3d 872, 874-75 (2002).

This issue is specifically governed by NRS 239A.080(1) and 239A.180. NRS 239A.080(1), which addresses disclosure of financial records to governmental agencies, states in pertinent part, that:

> 1. An officer, employee or agent of a governmental agency shall not request or receive the financial records of any customer from a financial institution unless:
>
> (a) The request relates to a lawful investigation of the customer;

. . . continued

court abused its discretion in adjudicating him a habitual criminal. We have reviewed these arguments and conclude that they lack merit.

> (b) The financial records are described in the request with particularity and are consistent with the scope and requirements of the investigation; and
>
> (c) The officer, employee, or agent furnishes the financial institution with a customer authorization, subpoena or search warrant authorizing examination or disclosure of such records as provided in this chapter.

"Evidence obtained in violation of [NRS 239A.080] is inadmissible in any proceeding." NRS 239A.180.

It is clear that NRS 239A.080(1) and 239A.180 create a statutory exclusionary rule. See Orion Portfolio Servs. 2 v. Clark County, 126 Nev. ___, ___, 245 P.3d 527, 531 (2010) (providing that "[w]hen a statute is clear and unambiguous, this court gives effect to the plain and ordinary meaning of the words and does not resort to the rules of construction."). As such, Detective Thomas's telephone call to Barnett's bank was in violation of NRS 239A.080(1) and 239A.180 as he did not obtain a search warrant or subpoena prior to obtaining this information. Thus, this evidence should have been suppressed. Therefore, we conclude that the district court erred in admitting Barnett's credit card information.

However, we further conclude that that the error in not suppressing Barnett's credit card information was harmless because the evidence of Barnett's guilt was overwhelming—including the properly admitted prior bad act evidence, the fact that he had no money in his wallet, and that he gave his backpack to Button upon entering the grocery store and exited the store without payment. See Cortinas v. State, 124 Nev. 1013, 1027, 195 P.3d 315, 324 (2008) (stating that under a harmless-error review, the appropriate standard is "'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the

verdict obtained.'") (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

Testimony of Detective Thomas

"District courts are vested with considerable discretion in determining the relevance and admissibility of evidence." Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998). Specifically, "[t]he admissibility and competency of opinion testimony, either expert or non-expert, is largely discretionary with the trial court." Watson v. State, 94 Nev. 261, 264, 578 P.2d 753, 756 (1978). Moreover, when an appellant fails to object to a decision of a district court, "this court may review plain error . . . despite a party's failure to raise an issue below." Murray v. State, 113 Nev. 11, 17, 930 P.2d 121, 124 (1997). Plain error occurs when "the error either: (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously effects the integrity or public reputation of the judicial proceedings." See Gaxiola v. State, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005).

Barnett contends that Detective Thomas usurped the jury's function by testifying more than once as to his belief that Barnett was guilty of burglary. Barnett argues that a lay witness usurps the province of the jury trying the case when he or she testifies to the precise issue submitted for trial.

According to NRS 50.265,

> [i]f the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
>
> 1. Rationally based on the perception of the witness; and

> 2. Helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

At trial, Detective Thomas testified that he investigated a crime, specifically, a burglary, which occurred at the Raley's in Reno. Detective Thomas opined that the incident was a preplanned event and that Barnett had no means of paying for the goods. We conclude that this testimony is admissible under NRS 50.265, as Detective Thomas's opinions were rationally based on his perception and were helpful to the jury in determining whether Barnett committed the burglary. See Paul v. Imperial Palace, Inc., 111 Nev. 1544, 1550, 908 P.2d 226, 230 (1995).

However, during his testimony, Detective Thomas mentioned that a "crime" occurred on several occasions. Barnett's attorney did not object to any of these statements. We have recognized that it is impermissible for a law enforcement officer to give an opinion on the ultimate issue of guilt or innocence because "jurors 'may be improperly swayed by the opinion of a witness who is presented as an experienced criminal investigator.'" Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000) (quoting Sakeagak v. State, 952 P.2d 278, 282 (Alaska Ct. App. 1998)). Similar to the case at bar, the defendant in Cordova contended that the detective improperly testified on his guilt under Nevada law and the defense did not object to the testimony of the detective. Id. at 668-69, 6 P.3d at 484-85. This court concluded that "the detective's opinion . . . implicate[d] the ultimate question of guilt or innocence." Id. at 669, 6 P.3d at 485. However, this court concluded "that if any error occurred [ ], [then] it was not plain error and did not affect [the defendant's] substantial rights." Id. at 670, 6 P.3d at 485.

We conclude that Detective Thomas usurped the jury's function because while he did not directly testify that Barnett was guilty of burglary, his statements concluding that a crime was committed, in relation to Barnett, were, in essence, improper opinion about Barnett's guilt. Nevertheless, we conclude that this error does not rise to the level of plain error that affected Barnett's substantial rights, as Barnett has not demonstrated actual prejudice because the record contains overwhelming evidence supporting the jury's verdict and, therefore, "[t]he jury's determination . . . did not hinge solely upon the challenged testimony of [Detective Thomas]." Cureton v. State, 169 P.3d 549, 552 (Wyo. 2007). Thus, we conclude that Detective Thomas's testimony neither had a prejudicial impact on the verdict when viewed in context of the trial as a whole nor did it seriously effect the integrity or public reputation of the judicial proceedings.

Motion to recuse

Barnett contends that the district court judge, Judge Flanagan, abused his discretion when he refused to recuse himself for actual bias. Barnett argues that criminal defendants expect a neutral and impartial judge, as outlined in the Nevada Code of Judicial Conduct, and that Judge Flanagan's decisions and language throughout this case demonstrate that he had an actual bias against defense counsel. Barnett also argues that Judge Flanagan's blatant refusal to follow the law regarding his motion to suppress expresses his bias. Furthermore, Barnett argues that his conviction must be reversed and remanded for new proceedings before a neutral and impartial judge.

Pursuant to NRS 1.230(1), a judge cannot preside over an action or proceeding if he or she is biased or prejudiced against one of the

parties to the action. "This rule promotes public confidence in the judiciary and encourages efficiency and finality in litigation." Hogan v. Warden, 112 Nev. 553, 560, 916 P.2d 805, 809 (1996). "A judge is presumed to be unbiased, and 'the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification.'" Rivero v. Rivero, 125 Nev. ___, ___, 216 P.3d 213, 233 (2009) (quoting Goldman v. Bryan, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988), abrogated on other grounds by Halverson v. Hardcastle, 123 Nev. 245, 266, 163 P.3d 428, 443 (2007)). "'[W]here the challenge fails to allege legally cognizable grounds supporting a reasonable inference of bias or prejudice,' a court should summarily dismiss a motion to disqualify a judge." Id. at ___, 216 P.3d at 233 (quoting In re Petition to Recall Dunleavy, 104 Nev. 784, 789, 769 P.2d 1271, 1274 (1988)). "This court gives substantial weight to a judge's decision not to recuse herself and will not overturn such a decision absent a clear abuse of discretion." Id. at ___, 216 P.3d at 233

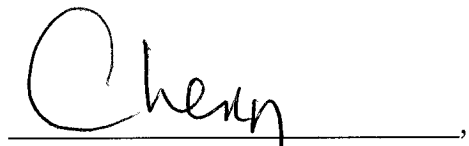
Barnett filed a motion to recuse Judge Flanagan based on Judge Flangan's prior professional relationship with defense counsel and for actual bias based on the language used in his initial order denying Barnett's motion to suppress. Judge Flanagan heard arguments on the motion to recuse and denied the motion, determining that recusal was not required. Judge Flanagan later acknowledged that the language used in his initial order was inappropriate and apologized to Barnett's counsel.

Subsequently, Barnett filed a renewed motion to recuse Judge Flanagan. Judge Steinheimer heard arguments on the renewed motion and denied the motion, after concluding that Judge Flanagan should not have heard a motion regarding his own bias.

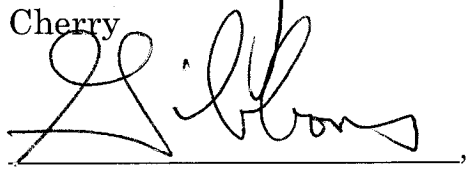
We agree with Judge Steinheimer. We conclude that Judge Steinheimer did not abuse her discretion in denying Barnett's renewed motion to recuse. While we conclude Judge Flanagan erred in hearing his own motion to recuse we nevertheless determine that this error was harmless. In so concluding, we are persuaded by Judge Flanagan's acknowledgment that he used inappropriate language in his order denying the motion to suppress, his apology to Barnett's counsel, and the fact that he amended his order removing the offending language.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry



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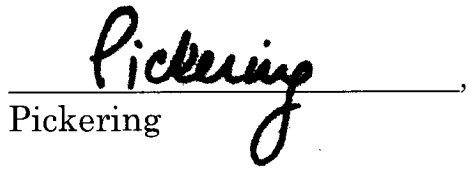

_____, J.
Pickering

cc: Hon. Patrick Flanagan, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk