IN THE SUPREME COURT OF THE STATE OF NEVADA

DESHAWN LAMONT THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56419

FILED

SEP 19 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit kidnapping, first-degree kidnapping, battery, battery with intent to commit a crime, conspiracy to commit robbery, and robbery. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

Appellant Deshawn Thomas, with the help of a codefendant, lured NFL football player, Javon Walker, into a vehicle. Thereafter, Thomas stole Walker's personal property, beat Walker in the face, and left him unconscious in an abandoned parking lot. A jury convicted Thomas on all counts and the district court sentenced him to life in prison without parole, pursuant to the Nevada habitual criminal statute.

On appeal, Thomas raises nine arguments: (1) the district court violated Thomas's Sixth Amendment rights by restricting cross-examination of an important witness; (2) the district court violated Thomas's right to compulsory process by refusing to allow defense counsel to recall a witness during Thomas's case-in-chief; (3) the district court abused its discretion by refusing to issue a Sanborn instruction; (4) the district court improperly refused to admit extrinsic evidence; (5) the district court erroneously allowed evidence of Thomas's prior bad acts

without a Petrocelli hearing; (6) the State engaged in prosecutorial misconduct; (7) the district court improperly failed to control the State's misconduct; (8) the State did not provide Thomas reasonable notice of grand jury proceedings; and (9) the district court abused its discretion by allowing numerous leading questions. We conclude that Thomas's arguments lack merit and affirm.

Confrontation Clause

Whether a defendant's Confrontation Clause rights were violated is a question of law that this court reviews de novo. Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009). In essence, this court will consider whether the defendant had a full and fair opportunity for effective cross-examination. Pantano v. State, 122 Nev. 782, 790, 138 P.3d 477, 482 (2006).

Thomas argues that the district court violated his Sixth Amendment right to confront witnesses because the court prohibited him from asking Walker about a champagne-spraying incident that occurred a year earlier in a Denver, Colorado nightclub. Specifically, Thomas reasons that the events that occurred in Denver led to the death of one of Walker's close friends and show that people who engage in champagne spraying invite violence in return. Because Walker sprayed champagne in a Las Vegas nightclub before being victimized, Thomas reasons that once again the champagne spraying may have led to violence and thus, was an alternative explanation for Walker's injuries.

The district court concluded that the questioning was irrelevant to the underlying case, and so do we. Although the right to confront witnesses is of great importance, the Confrontation Clause does not prohibit trial judges from imposing reasonable limits on cross-examination. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). Thus,

trial courts retain wide latitude to limit cross-examination that causes harassment, prejudice, confusion of issues, a threat to the witness's safety, or otherwise involves matters that are repetitive or marginally relevant. Id.

Here, Thomas had the opportunity to cross-examine Walker about a variety of issues and indeed, Thomas carefully questioned Walker about his testimony in order to test his perception and memory. Thus, because Thomas successfully confronted his accuser and had an opportunity for effective cross-examination, we conclude that the district court did not violate Thomas's Sixth Amendment rights.

Recalling a witness

We will not overturn a district court's decision to issue or deny a certificate of summoning for an out-of-state witness absent an abuse of discretion. NRS 174.425; Bell v. State, 110 Nev. 1210, 1213-14, 885 P.2d 1311, 1313-14 (1994). Particularly where an accused has already had an opportunity to examine a witness, it is well within the trial court's discretion whether to subpoena a witness for the purpose of recross-examination. Collins v. State, 88 Nev. 9, 13-14, 492 P.2d 991, 993 (1972).

Thomas claims that the district court violated his right to compulsory process by refusing to allow him to re-subpoena and re-call Walker as a witness. Although Thomas cross-examined Walker extensively, he claims that he needed to recall Walker after the close of the State's case-in-chief.

We disagree. On no less than five occasions, the district court warned Thomas that Walker was leaving town after testifying and would not be available. After Thomas speculated that he would not know what to ask of Walker until hearing other testimony, the court allowed defendant's counsel to ask "all the questions you want" of Walker and

allowed substantial leeway during cross-examination to insure Thomas had the opportunity to thoroughly examine the witness. Additionally, the district court told Thomas that he could recall Walker if necessary. However, if Thomas needed to recall Walker for articulable reasons that only came to light after Walker was released, he did not make a record of those reasons in the district court. Instead, Thomas merely speculated on multiple occasions that he "may" need to recall Walker but never actually attempted to re-call Walker. Thus, the district court did not abuse its discretion by releasing Walker from subpoena.

Sanborn instruction

District courts have broad discretion to settle jury instructions, Cortinas v. State, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008), and this court will not overturn a district court's decision not to issue a Sanborn instruction[1] absent abuse of discretion or judicial error. Rose v. State, 123 Nev. 194, 204-05, 163 P.3d 408, 415 (2007).

Thomas argues that the State erred in failing to gather video evidence from surveillance cameras at Bill's Gambling Hall. Thomas maintains that the footage was material because it would have shown a witness, Lindsey Herman, talking on the phone with Walker at approximately the same time that witnesses saw Thomas at a Timbers bar across town. Because this video footage was not preserved, Thomas

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[1]A Sanborn instruction may be appropriate where the state loses evidence, if the defendant is prejudiced by the loss. The instruction specifically informs the jury that it should presume that the lost evidence would have been unfavorable to the State. Sanborn v. State, 107 Nev. 399, 408, 812 P.2d 1279, 1286 (1991).

argues that he was entitled to a presumption that the evidence would have been unfavorable to the State.

Sanctions, such as an adverse jury instruction, are appropriate where the disputed evidence is material and the State's failure to gather evidence resulted from gross negligence or bad faith. Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998).

In this case, the video footage was not material because it would not have changed the result of the proceedings. During trial, the State presented phone records that showed that Herman had a brief conversation with Walker at 6:04 a.m., roughly an hour before the time when Thomas ordered a drink at Timbers. However, the phone records revealed that Herman did not talk to Walker thereafter. Even assuming that the video showed Herman attempting to call Walker around 7:00 a.m., this footage contained no sound and would not have provided any information that conflicted with the witness's phone records. Therefore, the district court did not err in refusing to issue a Sanborn instruction.

Extrinsic evidence

We will not overturn a district court's decision to admit or exclude evidence absent an abuse of discretion. Johnson v. State, 118 Nev. 787, 795, 59 P.3d 450, 456 (2002); Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004).

Here, the district court refused to admit audio recordings of three phone calls Thomas's codefendant made while in jail.[2] Thomas

[2]In one of these calls, codefendant discussed his anger toward prosecutors and the cost of his bail; in the other two he expounded on his desperation to get out of jail.

argues that these recordings were permissible extrinsic evidence because they showed the codefendant's biases and motives for testifying. During a bench conference, the district court decided that the phone call regarding bail was irrelevant, but the other two phone calls could be used later as prior inconsistent statements during cross-examination of the codefendant. Oddly, after the bench conference Thomas made no further effort to use the audio recordings or to lay a foundation for their use. Therefore, because the district court did not bar Thomas from using the audio recordings for impeachment purposes, we hold that the district court did not abuse its discretion.

Bad acts

"A district court's decision to admit or exclude [prior bad act] evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error." Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

In this case, the State moved to admit evidence of other acts, specifically photographs from March 2008 of Thomas and the codefendant gambling and staging a fight. Thomas initially objected to admission of the photographs. However, Thomas stipulated to their admission after the State clarified "I'm not going to ask anything about it, other than to show that they are together to establish identity."

Later, the State discussed the photograph of the staged fight in its closing argument. Specifically, the State said, "[t]here were some exhibits introduced during this trial to show Arfat Fadel [the codefendant] and Deshawn Thomas together. They were in a casino. And at some point, while Deshawn Thomas and Arfat Fadel were in a casino prior to June of 2008 . . . ." Thomas then objected because the State was attempting to "marry[]" the photographs from March 2008 with the events

that happened to Walker in June 2008. After a brief bench conference and warning the State to "be careful," the court overruled Thomas's objection. Thereafter, the State continued,

> At some point, the photographic evidence will tell you that things didn't go too well between those two people. Because there, in one of the photographs, and State's Exhibit 71 memorialized, frozen in time, and in evidence for you to consider, is a person who throws a punch with his left hand.
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> In that photograph you see Deshawn Thomas clearly throwing the punch, and he's clearly throwing the punch with the left hand.

Thomas maintains that the State's emphasis on the punch improperly showed his bad character and prior uncharged bad acts. While Thomas admits that he stipulated to the photograph for the purpose of identification, he reasons that the State's commentary converted the photograph into evidence of a prior bad act.

We agree with Thomas that Nevada law prohibits "[e]vidence of other crimes, wrongs or acts" that are used "to prove the character of a person in order to show that the person acted in conformity therewith." NRS 48.045(2). However, such character evidence may be admissible when used for other purposes, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Id. Ordinarily, the district court must conduct a Petrocelli hearing before admitting prior bad act evidence.[3]

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[3]During a Petrocelli hearing, the court considers whether the prior incident is relevant to the crime charged; whether the act is proven by clear and convincing evidence, and whether the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

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We conclude that a Petrocelli hearing was not necessary when the State used the photograph for identification purposes, as both parties stipulated to its admission for such use. However, we hold that the district court should have conducted a Petrocelli hearing outside the presence of the jury before allowing the State to use the photograph for non-identification purposes because unfair prejudice may occur when evidence is actually used for a purpose other than the permissible limited purpose for which it was admitted. See Rosky v. State, 121 Nev. 184, 197–98, 111 P.3d 690, 698-99 (2005).

Nevertheless, we hold that the district court's error was harmless. See, e.g. Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998) ("we have routinely treated the erroneous admission of evidence of other bad acts as subject to review for harmless or prejudicial error.") After examining the photograph in question, we conclude that the photograph had little probative value to the State due to its poor quality. Relatedly, the State's comment, although inappropriate, was insignificant in light of the ample proof that Thomas kidnapped, robbed, and beat Walker.

Prosecutorial misconduct

When considering claims of prosecutorial misconduct, this court engages in a two-step analysis. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). First, we determine whether the

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Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985), superseded by statute on other grounds as stated in Thomas v. State, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

prosecutor's conduct was improper. Id. Second, if the conduct was improper, we must determine whether the conduct warrants reversal. Id.

Thomas claims that the State improperly disparaged defense counsel and her tactics.[4] Specifically, Thomas discusses four instances where the State made personal attacks and used unnecessarily sarcastic language.

We agree with Thomas that rude, sarcastic, or otherwise unprofessional comments have no place in the justice system. See McGuire v. State, 100 Nev. 153, 158-59, 677 P.2d 1060, 1064 (1984). However, in this case we conclude that the State's comments do not warrant reversal because they were made before the district court judge, outside the presence of the jury. Thus, reversal is not warranted, because Thomas did not suffer any prejudice because of the State's behavior.

Notice of grand jury proceedings

Thomas next complains that the State did not provide him with reasonable notice of grand jury proceedings. Even accepting Thomas's complaint as accurate for purposes of argument (the State disputes the relevant facts), Thomas still must show actual and substantial prejudice, Sheriff v. Keeney, 106 Nev. 213, 216-17, 791 P.2d 55, 57 (1990); irregularities that occur during grand jury proceedings are harmless if the defendant is tried and found guilty under the higher criminal burden of proof. Echavarria v. State, 108 Nev. 734, 745, 839 P.2d

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[4]Thomas also claims that the State referred to facts not in evidence and improperly inferred that Thomas had a prior criminal history. Similarly, Thomas argues that the district court erred by failing to control prosecutorial misconduct. These arguments have no merit.

589, 596-97 (1992); Dettloff v. State, 120 Nev. 588, 595-96, 97 P.3d 586, 591 (2004); Lisle v. State, 114 Nev. 221, 224-25, 954 P.2d 744, 746-47 (1998) (all citing United States v. Mechanik, 475 U.S. 66, 70, 71-73 (1986)).

Because Thomas was proven guilty beyond a reasonable doubt, his challenge to the adequacy of the notice he received of the grand jury proceedings fails.

Leading questions

District courts have substantial discretion as to whether to allow leading questions. Barcus v. State, 92 Nev. 289, 291, 550 P.2d 411, 412 (1976). Unless the leading questions cause extreme prejudice, their allowance is not ordinarily a ground for reversal. Leonard v. State, 117 Nev. 53, 70, 17 P.3d 397, 408 (2001); Anderson v. Berrum, 36 Nev. 463, 470-71, 136 P. 973, 976 (1913).

Thomas argues that the district court improperly allowed the State to ask witnesses leading questions during direct examination. After careful review of the record, we hold that these questions did not cause Thomas any prejudice or undermine the fairness of his trial. In light of the foregoing, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.

Cherry

Gibbons, J.

Gibbons

Pickering, J.

Pickering

cc: Hon. Doug Smith, District Judge
Law Office of Betsy Allen
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk