IN THE SUPREME COURT OF THE STATE OF NEVADA

DEREK ALVIN MCCALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 35172

FILED

JUL 10 2002

JANETTE M. BLOOM
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 three counts of burglary, one count of attempted burglary, one count of robbery with the use of a deadly weapon, and one count of first-degree kidnaping with the use of a deadly weapon, and an appeal from a denial of a motion for a new trial. These convictions resulted from crimes committed against four victims at four separate crime scenes. The district court found McCall to be an habitual criminal, and sentenced him to serve six consecutive life sentences in prison without the possibility of parole. We affirm the judgment of conviction.

Sufficiency of the evidence

McCall contends that the evidence presented at trial was insufficient to support his convictions. When sufficiency of the evidence is challenged on appeal, this court inquires as to "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[1] If, after viewing the evidence in the light most

[1]Jackson v. Virginia, 443 U.S. 307, 319 (1979), quoted in Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994).

02-11727

favorable to the prosecution, there is substantial evidence in the record to support the verdict, this court will not disturb the verdict on appeal.[2]

Joanne Ranieri testified that an intruder entered her boyfriend's apartment where she was sleeping alone. The intruder approached Ranieri's bed, told her he had a gun and that he would shoot her if she moved. The intruder then fondled Ranieri's breasts and commented that she had a nice body. He took the rings Ranieri wore on her fingers.

The intruder then grabbed Ranieri by her hair and forced her over to the bedroom closet. While she was on all fours with the intruder's knee in her back, the intruder made Ranieri empty mugs of coins and personal items into a pillowcase. During this time, he also touched her breasts and buttocks. The intruder then grabbed Ranieri's hair, pulled her up, and pushed her into the living room to get her money from her purse. Her purse was outside the front door, and the intruder forced her to go outside and retrieve it. He warned her that he had a gun and would shoot her if she ran away. The intruder took her money, looked at her identification, and told her if she called the police he would come back and kill her. The intruder then grabbed her hair and pushed her back into the bedroom, where he made her lie on the bed. At that point, he touched and rubbed Ranieri's breasts and buttocks again. Ranieri also testified that she felt something in her rectum, and when she later went to the bathroom, she had a bloody discharge.

At trial, the district court admitted photographs taken later in the day that showed bruises on Ranieri's breasts. Although Ranieri could

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[2]Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992).

not identify McCall as the intruder, a fingerprint expert identified a fingerprint lifted from Ranieri's window screen as McCall's fingerprint. Ranieri's testimony, in conjunction with this fingerprint evidence, constitutes sufficient evidence for a rational trier of fact to convict McCall of burglary, robbery with the use of a deadly weapon, and first-degree kidnaping with the use of a deadly weapon.

On the charge of attempted burglary, Caesar Igayac testified that he heard a noise, woke up, and saw a man trying to pry open the screen on his window. When he opened his front door, the man ran away. Igayac identified the man as a black male. Although Igayac could not identify McCall as the man who pried open his window screen, a fingerprint expert identified a fingerprint lifted from Igayac's window screen as McCall's fingerprint. Igayac's testimony, in conjunction with this fingerprint evidence, constitutes sufficient evidence for a rational trier of fact to convict McCall of attempted burglary.

Preliminary hearing testimony

McCall argues that the district court erred in admitting Delgado's preliminary hearing testimony at trial. During the preliminary hearing, Jaime Delgado testified that a man carrying a flashlight broke into his apartment and stole a baseball cap from him. He pretended to be asleep, but he saw the intruder out of the corner of his eye. On direct examination, Delgado identified McCall, who was sitting in front of him at the hearing, as the man who broke into his apartment. McCall cross-examined Delgado about his employment, the layout of his apartment, and the intruder's physical characteristics and what he was wearing at the time of the burglary.

A few days before the trial started, the State informed the district court that several months before trial, it discovered that Delgado was out of the state and would not be back before the trial, if at all. At that time, the State filed a motion of intent to use Delgado's preliminary hearing testimony. In a sworn affidavit filed with this motion, the prosecutor indicated that he learned from Delgado's apartment manager that Delgado had left the jurisdiction to work on a Florida-based cruise ship. The prosecutor stated that he had called a contact number Delgado left with his apartment manager, but it was out of service. Delgado also left a forwarding address in Phoenix, Arizona, and at the time the prosecutor signed the affidavit, the State was investigating to determine who lived at this address.

When asked by the district court during calendar call, the prosecutor indicated that he did not know the name of the cruise ship. The prosecutor told the district court that he had contacted the Phoenix, Arizona Police Department. The State claimed that it had no way to serve Delgado with process. Based on the evidence presented, the district court ruled that Delgado's preliminary hearing testimony was admissible. We agree.

NRS 171.198(6) allows a district court to admit preliminary hearing testimony at trial when the witness is "out of the state . . . or when his personal attendance cannot be had in court." This court has held that there are three preconditions to using preliminary hearing testimony of a material witness at trial: "(1) the defendant was represented by counsel; (2) defendant's counsel had an opportunity to cross-examine the

witness; and (3) the witness is shown to be unavailable."[3] During the preliminary hearing, McCall was represented by counsel. McCall's counsel had an opportunity to cross-examine Delgado. Based on the State's affidavit and its explanation to the district court, substantial evidence supports the district court's finding that Delgado was unavailable for trial. Therefore, the district court did not err in admitting Delgado's preliminary hearing testimony.

Brady violation

McCall contends that the State violated Brady v. Maryland by failing to disclose that Delgado was an illegal alien who might not appear for trial.[4] McCall argues that because the State willfully suppressed its knowledge of Delgado's illegal alien status, he was unable to discover until days before trial that Delgado also used a stolen social security number, used the social security number to fraudulently obtain a credit card under another name, and, therefore, might himself have been a criminal. McCall argues that his inability to cross-examine Delgado on this evidence prejudiced him.

A true Brady violation has three prongs: (1) material exculpatory or impeaching evidence; (2) that the State either willfully or inadvertently suppressed; (3) which thereby caused prejudice to the defendant.[5] Evidence is material in determining whether a Brady violation occurred "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would

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[3]Anderson v. State, 109 Nev. 1150, 1152, 865 P.2d 331, 333 (1993).

[4]373 U.S. 83 (1963).

[5]See Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

have been different."[6] There is no reason to believe that the outcome on the Delgado burglary charge at trial would have been different if McCall could have impeached Delgado with the evidence of the stolen social security number and fraudulent credit card at trial.[7] The subject of Delgado's testimony was in no way related to his false identity cards. Because the outcome at trial would have been the same even if McCall had been able to impeach Delgado with this evidence at trial, there was no Brady violation.

911 tape

After Delgado was burgled, he called 911. When Delgado realized that someone had also attempted to burgle Igayac's apartment, they both spoke to the 911 operator. McCall agreed that the State could play a portion of the 911 tape at trial. The State played the 911 tape during Igayac's trial testimony. The State's purpose in playing the tape was for Igayac to identify Delgado's voice. After the State played the tape, McCall objected and argued that the State used the tape to support Igayac's testimony and not just for identification purposes.

The district court found that even though the State had played more of the tape than agreed, this "over play" did not prejudice McCall. We agree. Igayac was on the stand, and McCall had an opportunity to cross-examine Igayac as to any representations that were made on the tape, whether or not they were his representations or representations

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[6]United States v. Bagley, 473 U.S. 667, 682 (1985); see also Jiminez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996).

[7]See Strickler, 527 U.S. at 280 (holding that a Brady violation results only where there is a reasonable probability that the suppressed evidence would have produced a different verdict).

fashioned after discussion with Delgado. The district court did not abuse its discretion by admitting the tape of the 911 call.

Prosecutorial misconduct

McCall argues that the prosecutor committed misconduct during closing argument that warrants reversal of his convictions. This court has held that "[a] criminal conviction is not lightly overturned on the basis of a prosecutor's comments standing alone."[8] Rather, the inquiry is whether the prosecutor's misconduct so infected the trial with unfairness as to deprive the defendant of his due process right to a fair trial.[9] This court balances the degree of misconduct against the evidence of guilt; even if the prosecutor uses condemnable tactics and "foul blows," a conviction supported by overwhelming evidence will not be overturned.[10]

McCall argues that the prosecutor committed misconduct in remarking during closing argument that fingerprinting is "a science that can be verified and checked and double-checked, much like DNA has become in recent years." McCall did not object to this comment at trial. Where a defendant does not object to a prosecutor's statements at trial, this court reviews for plain error.[11]

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[8]Runion v. State, 116 Nev. 1041, 1053, 13 P.3d 52, 60 (2000).

[9]See Steese v. State, 114 Nev. 479, 490, 960 P.2d 321, 328 (1998); see also Darden v. Wainright, 477 U.S. 168, 181 (1986).

[10]Yates v. State, 103 Nev. 200, 205, 734 P.2d 1252, 1255 (1987).

[11]Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995).

Prosecutors may profess deductions or conclusions from admitted evidence.[12] Here, the prosecutor did not say that fingerprinting is as reliable as DNA evidence, only that fingerprint analysis, like DNA analysis, is subject to peer review and verification. This statement is consistent with the evidence produced at trial, and therefore, there was no misconduct and, therefore, no plain error.

McCall also argues that the prosecutor committed misconduct when he commented that McCall's leg injury was not serious and that McCall could have run away from Igayac. The prosecutor compared McCall to a disabled iron man competitor, speculated that McCall might be able to run a 100-yard dash in 15 seconds, and stated that he saw no infirmity in McCall's leg. McCall did not object to these comments at trial. The statements were not plain error.

During closing argument, attorneys enjoy wide latitude in drawing inferences from the evidence.[13] Although prosecutors generally may not assert a personal belief,[14] they may submit an opinion as to a deduction from the evidence presented.[15] The district court allowed McCall to show his leg injury to the jury. The prosecutor also saw McCall's leg injury and movement in court. Based on the evidence in this

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[12]Domingues v. State, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (1996).

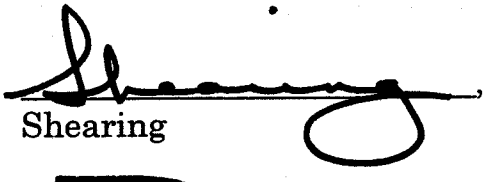
[13]Greene v. State, 113 Nev. 157, 177, 931 P.2d 54, 67 (1997).

[14]Parker v. State, 109 Nev. 383, 392, 849 P.2d 1062, 1068 (1993) (citing Collier v. State, 101 Nev. 473, 480, 705 P.2d 1126, 1130 (1985)).

[15]Id. (citing Collins v. State, 87 Nev. 436, 439, 488 P.2d 544, 545 (1971)).

case, any prosecutorial misconduct that may have occurred does not warrant reversal of McCall's convictions. Accordingly, we

ORDER the judgment of conviction AFFIRMED.



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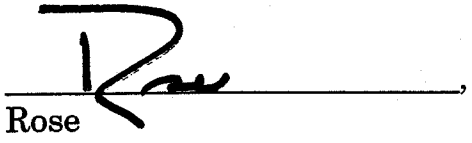

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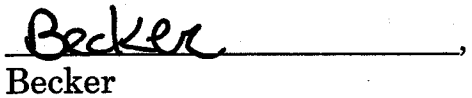

_____, J.
Becker

cc: Hon. Michael L. Douglas, District Judge
Gary E. Gowen
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk