

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNEST CHARLES GIBBS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58026

FILED

OCT 01 2012

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *Angela*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of assault, assault with a deadly weapon, burglary, resisting a public officer, and carrying a concealed weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Ernest Gibbs was criminally charged based on two incidents in August 2009 at the Kensington Trailer Park in Las Vegas, Nevada. On August 4, 2009, after being accused of theft by a neighbor, Gibbs reached through the back window of a neighbor's car and swung either his fist or a foot-long knife towards the neighbors' head. Then, on August 14, 2009, Gibbs, after being told to lower himself to the ground by a Las Vegas Metropolitan Police Department (LVMPD) Sergeant Detective, drew and pointed his knife at the Sergeant Detective, who thought it was a large gun and shot Gibbs. Gibbs was charged with two counts of felony assault with a deadly weapon, felony burglary, felony resisting a public officer, and felony carrying a concealed weapon. Gibbs pleaded not guilty.

Subsequently, Gibbs was found guilty on all counts¹ and the district court adjudicated him as a habitual criminal.

On appeal, Gibbs argues that the district court erred by: (1) denying his motion to sever, (2) granting the State's motion in limine to exclude evidence of the Sergeant Detective's previous shootings, (3) determining that the Sergeant Detective's file contained no discoverable information, (4) allowing the State to interfere with his right to counsel, (5) excluding an investigator's report, (6) admitting his prior convictions for impeachment purposes, (7) allowing a witness to testify as to his reputation, (8) admitting evidence that was not disclosed to the defense prior to trial and was irrelevant and confusing, and (9) prohibiting the defense from referring to other recent police shootings during closing argument. Gibbs also contends that (10) his convictions are not supported by substantial evidence and (11) cumulative error warrants reversal. We conclude that all of Gibbs' contentions on appeal lack merit.

Denial of severance

Gibbs argues that the district court erred in denying his motion to sever. NRS 173.115(2) allows joinder when the offenses are "[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." "[F]or two charged crimes to be 'connected together' under NRS 173.115(2), a court must determine that evidence of either crime would be admissible in a separate trial regarding the other crime." Weber v. State, 121 Nev. 554, 573, 119 P.3d 107, 120 (2005). We conclude that the offenses against Gibbs were

¹Gibbs was convicted of felony assault without the use of a deadly weapon for the August 4, 2009, incident.

connected together because evidence of each would have been relevant and admissible at separate trials of the other crimes. NRS 173.115(2); see Fields v. State, 125 Nev. 776, 782, 220 P.3d 724, 728 (2009) (laying out the considerations for overcoming the presumption of inadmissibility that attaches to all prior bad act evidence). The August 4th incident and the August 14th incident are cross-admissible to prove intent with regard to Gibbs' behavior concerning use of the distinctive knife and to demonstrate identity and opportunity. See NRS 48.045(2). Accordingly, we conclude that joinder was permissible.

However, even if joinder is permissible under NRS 173.115, the district court should sever the offenses if the joinder is unfairly prejudicial. Tabish v. State, 119 Nev. 293, 304, 72 P.3d 584, 591 (2003). To assess the potential prejudice caused by joinder, the test is whether the prejudice manifestly outweighs the central concern of judicial economy. Id. We conclude that joinder in this case was not prejudicial when both incidents were supported by substantial evidence. Moreover, the fact that the jury convicted Gibbs of assault without the use of a deadly weapon for the August 4th incident indicates a lack of prejudice by the presentation of evidence from the other incident involving the same knife. Thus, the district court did not err when it denied Gibbs' motion to sever when Gibbs has failed to demonstrate how joinder prejudiced him.

Discoverability of the Sergeant Detective's file

Gibbs argues that his rights to equal protection and confrontation were violated when the district court granted the State's motion in limine seeking to preclude references to the Sergeant Detective's previous officer-related shootings. Gibbs contends that he had not received the motion in limine or been given notice of the hearing and was not allowed to respond. Contrary to Gibbs' argument, once the district

court was made aware that there may have been communication problems, the court scheduled a date to hear a defense motion to reconsider. After the LVMPD submitted the file to the district court for an in camera review, the district court determined that there was no discoverable information. As Gibbs was afforded the opportunity to argue his opposition and the State's motion in limine was ultimately granted on the merits, we conclude that Gibbs' claim fails. See Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006) ("District courts are vested with considerable discretion in determining the relevance and admissibility of evidence.").

Concerning Gibbs's confrontation claim, we conclude that whether the Sergeant Detective previously shot someone in the line of duty is not relevant to whether he would lie about Gibbs raising and pointing a knife at him. See Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) (stating that "trial judges retain wide latitude . . . to impose reasonable limits . . . based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant"); Chavez v. State, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (reviewing Confrontation Clause issues de novo). Thus, limiting his testimony was permissible.

In a related argument, Gibbs contends that the district court erred in concluding that the Sergeant Detective's file contained no discoverable information when the file is pertinent to the Sergeant Detective's bias in the instant matter. We conclude that the district court was correct in refusing to allow discovery or discussion of this evidence. Because extrinsic or bad act evidence is not admissible to attack

credibility, district courts have wide discretion to control cross-examination that attacks a witness's general credibility. Lobato v. State, 120 Nev. 512, 520, 96 P.3d 765, 771 (2004). While an examiner must be permitted to elicit facts relating to bias which might color a witness's testimony, "those inquiries which are repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness" should be restricted. Id. (quoting Bushnell v. State, 95 Nev. 570, 573, 599 P.2d 1038, 1040 (1979)). Although Gibbs argues that this evidence would tend to show bias concerning the Sergeant Detective's motivation to protect himself and the LVMPD, we conclude that this was merely an attempt to attack the Sergeant Detective's credibility. Thus, the district court did not err.

Interference with Gibbs' right to counsel

Gibbs contends that the State's interference with his right to counsel had a substantial and injurious effect on the jury verdict. We conclude that because Gibbs failed to provide any support in the record or any proof for his contention that the State improperly interfered with his right to counsel, this argument fails. Under NRAP 28(a)(9)(A), the argument contained in an appellant's brief must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." If an appellant fails to provide this court with sufficient citations to authority to support its contentions, then that argument cannot prevail. See State, Dep't of Mtr. Vehicles v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991); Smith v. Timm, 96 Nev. 197, 201, 606 P.2d 530, 532 (1980).

Exclusion of an investigator's report

Gibbs next argues that the district court erred in ruling that the investigator's report, which contained a statement by the neighbor that he lied to the police about Gibbs having had a knife in his hand during the August 4th incident, was not admissible. Gibbs contends that the exclusion of this crucial evidence resulted in prejudice. We conclude that the district court properly ruled that the report was inadmissible based on lack of authentication. See NRS 52.015(1). The report was a summary made by the investigator based on her impressions and, because the investigator was unavailable to testify, the report was inadmissible. While the neighbor agreed that he read and signed the report on the top of the page, he did not authenticate the entire report, specifically, the section that defense counsel was attempting to use for impeachment. The neighbor further denied ever having made this statement. We conclude that without proper authentication, the report was inadmissible.

Admission of Gibbs' prior convictions

Gibbs argues that the district court erred in concluding that his prior criminal convictions were admissible as impeachment evidence when he did not testify at trial. Gibbs claims that, in light of the prejudice caused to him, the district court should have sua sponte required a Petrocelli hearing.

Instead of testifying and opening himself up to cross-examination and admission of his prior convictions under NRS 50.095(1), Gibbs strategically introduced his own hearsay statement. NRS 51.069(1) allows for an attack on the credibility of the declarant of a hearsay statement. It provides that "[w]hen a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked or supported by any evidence which would be admissible for those purposes if

the declarant had testified as a witness.” NRS 51.069(1). Thus, by introducing his hearsay statement, Gibbs put his credibility at issue.² Based upon the plain language of NRS 51.069(1), Gibbs’ prior convictions were then admissible for impeachment purposes. Gibbs essentially functioned as a witness on his behalf and, in effect, made the hearsay statements without being subject to cross-examination. Accordingly, we conclude that the evidence which would have been admissible to impeach Gibbs if he had testified was admissible for impeachment under the circumstances of this case, including prior felony convictions.³

However, Gibbs takes issue with NRS 51.069(1)’s interaction with Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). In Byford, we determined that “the legislature did not intend NRS 51.069(1) as a basis for admitting evidence of a criminal defendant’s prior convictions any time another party introduces a hearsay statement made by the defendant.” Id. at 227, 994 P.2d at 709. As pointed out by the State, our decision in Byford is limited to circumstances in which the hearsay statement was not

²Gibbs contends that his prior convictions had no bearing on his credibility because the statement was ruled an excited utterance and, therefore, deemed credible due to the fact that it was made under the stress of the startling event. However, Gibbs misconstrues the admission of a hearsay statement under an exception as being indicative of declarant credibility—the fact that the statement is reliable enough to be admitted into evidence has nothing to do with the credibility of the declarant.

³Other jurisdictions with statutes analogous to NRS 51.069(1) have handed down similar rulings. See U.S. v. Greenidge, 495 F.3d 85, 96-98 (3d Cir. 2007); United States v. Lawson, 608 F.2d 1129, 1130 (6th Cir. 1979); People v. Jacobs, 93 Cal. Rptr. 2d 783, 787-90 (Ct. App. 2000); People v. Dore, 997 P.2d 1214, 1218-19 (Colo. App. 1999); Fisher v. State, 924 So. 2d 914, 916-17 (Fla. Dist. Ct. App. 2006).

offered by the declarant. As such, it does not control whether Gibbs' credibility may be attacked when he introduced the statement in lieu of taking the witness stand. Accordingly, we conclude that it was not an abuse of discretion to admit Gibbs' prior felony convictions for impeachment under NRS 51.069(1) after Gibbs introduced his hearsay statement. See Pineda v. State, 120 Nev. 204, 210, 88 P.3d 827, 832 (2004) (“[T]he decision whether to admit a prior conviction for impeachment purposes rest within the sound discretion of the trial court.” (internal quotations omitted)); see also Ramet v. State, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009) (reviewing a district court's decision to admit or exclude evidence for an abuse of discretion).

We further conclude that the district court did not err when it did not conduct a Petrocelli hearing to determine the probative versus prejudicial value of the admissions of Gibbs' prior convictions. Here, the rebuttal evidence was not admitted pursuant to NRS 48.045(2), but was admitted pursuant to NRS 50.095(1). We have indicated that when the evidence is not admitted pursuant to NRS 48.045(2), a Petrocelli hearing is unnecessary. See Blake v. State, 121 Nev. 779, 789-90, 121 P.3d 567, 574 (2005); Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 766-67 (1998). In accordance with this caselaw, the district court was not required to conduct a Petrocelli hearing. Moreover, while Gibbs also argues that his convictions were unduly prejudicial, he did not raise this concern with the district court when it was considering the admission of the evidence, and he has failed to demonstrate any prejudice on appeal. See Dieudonne v. State, 127 Nev. ___, ___, 245 P.3d 1202, 1205 (2011) (stating that a defendant's failure to object during trial results in plain error review on appeal). While the district court did not explicitly weigh

the probative value over the prejudicial effect on the record, it discussed the judgments in depth before admitting them, and presumably considered the balancing test in its reasoned decision. Because undue prejudice has not been demonstrated, Gibbs' claim fails.

Testimony as to Gibbs' reputation

Gibbs also argues that the district court erred in allowing testimony about his reputation as being dangerous that irreparably tainted the jury. However, we have held that “[a] witness’s spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement.” Rose v. State, 123 Nev. 194, 207, 163 P.3d 408, 417 (2007) (alteration in original) (quoting Ledbetter v. State, 122 Nev. 252, 264-65, 129 P.3d 671, 680 (2006)). We conclude that any prejudicial impact was cured by the swift objection, immediate admonishment, and subsequent explanation that took place after the statement.

Admission of undisclosed evidence

Gibbs contends that, pursuant to NRS 174.295(2), the district court erred in allowing the State to admit confusing radio-traffic evidence that had not been presented to the defense prior to trial. We conclude that the district court did not abuse its discretion. See Chavez v. State, 125 Nev. 328, 344, 213 P.3d 476, 487 (2009) (reviewing a district court’s decision to admit or exclude evidence for abuse of discretion). NRS 174.295(2) mandates that if a party fails to comply with its continuing duty to supplement discoverable materials, the court may order the discovery or prohibit the discovering party from introducing the evidence at trial, grant a continuance, or “enter such other order as it deems just under the circumstances.” Because it has been afforded “broad discretion

in fashioning a remedy under [NRS 174.295]; [the district court] does not abuse its discretion absent a showing that the State acted in bad faith or that the nondisclosure caused substantial prejudice to the defendant.” Evans v. State, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001). Because Gibbs never suggests that the State failed to disclose these recordings in bad faith or indicates how he was substantially prejudiced, we conclude that the district court acted within its discretion.

References to other recent police shootings

Gibbs argues that the district court erred in prohibiting defense counsel from referencing the instances of LVMPD shootings in the year preceding trial during closing argument. We disagree. While “[c]ounsel is allowed to argue any reasonable inferences from the evidence the parties have presented at trial,” Jain v. McFarland, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993), it is fundamental that neither the prosecution nor the defense may “premise arguments on evidence which has not been admitted.” Glover v. Dist. Ct., 125 Nev. 691, 705, 220 P.3d 684, 694 (2009) (quoting Johnson v. United States, 347 F.2d 803, 805 (D.C. Cir. 1965)). As these facts had not been admitted, we conclude that the district court did not abuse its discretion in sustaining the State’s objection to this impermissible argument. See id. at 704, 220 P.3d at 693 (utilizing the abuse of discretion standard to review a district court’s rulings respecting the latitude allowed counsel in closing argument).

Sufficiency of the evidence

Gibbs argues that his due process rights were violated because the evidence at trial did not support the verdict. We conclude that sufficient evidence was presented for a rational juror to find beyond a reasonable doubt that Gibbs was guilty of both incidents. See Moore v. State, 122 Nev. 27, 35, 126 P.3d 508, 513 (2006) (this court will not reverse

a jury verdict that is supported by substantial evidence). First, concerning the convictions for the August 4th incident, both occupants of the vehicle testified that Gibbs reached into the car and attempted to hit the neighbor in the head. While Gibbs points out that no physical evidence was presented, circumstantial evidence can be sufficient to sustain a jury verdict. Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003). Second, regarding the convictions for the August 14th incident, the Sergeant Detective testified that after he asked Gibbs to stop and get down, Gibbs drew his foot-long knife and pointed it at him. The Sergeant Detective also stated that Gibbs threw his weapon over the fence and a knife identified as belonging to Gibbs was found nearby. In addition, Gibbs made a statement that he pulled a knife on an officer and was injured. Therefore, there was sufficient evidence to support the verdict.


Cumulative error

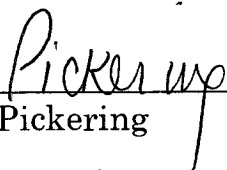
Gibbs argues that cumulative error so infected the trial as to warrant reversal. Cumulative error may deny a defendant a fair trial even if the errors, standing alone, would be harmless. Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). “When evaluating a claim of cumulative error, we consider the following factors: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.” Id. (quoting Mulder v. State, 116 Nev. 1, 17,

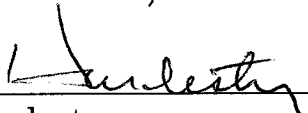
992 P.2d 845, 854-55 (2000)). We conclude that cumulative error does not warrant reversal in this instance as Gibbs raises no meritorious issues.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Saitta


_____, J.
Pickering


_____, J.
Hardesty

cc: Hon. Michael Villani, District Judge
Jonathan E. MacArthur
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk