IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRIS TREMEL TAYLOR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 32179

FILED

FEB 04 2003

CLERK OF SUPREME COURT
J. Richards

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, burglary while in possession of a firearm, and robbery with the use of a deadly weapon. The district court sentenced appellant Darris Tremel Taylor, as a habitual criminal, to three consecutive terms of life imprisonment with the possibility of parole after ten years for each term.

On February 3, 1996, Taylor and Don Price attended a party at Alanna Franklin's apartment. Alanna testified that she had never met Taylor before the party and did not speak directly to him at the party. Alanna testified that Price kept following her and bugging her during the party, that she was really irritated with the fact that he was all over her, and that she didn't mean to be rude, but in retrospect she believes she may have been rude to him.

According to Taylor, in a tape-recorded interview admitted into evidence, Price was supposed to hook up with Alanna at the party, but she evidently rejected Price. According to Taylor's tape-recorded interview, Price told Taylor at the party, "Well I will come back and rob this bitch [Alanna]." During the tape-recorded interview, Taylor repeated multiple variations of what Price told him, including, "Well me and [Alanna] wasn't gettin' along, so I'm a show her whose the boss."

Akilah City testified that Taylor called her that same night and told her that he knew a girl who supposedly had a lot of money to rob. Akilah testified that Taylor arranged to pick her up and rob Alanna the following day. Akilah testified that Taylor set up the entire incident, providing the gun and telling her to hit Alanna with the gun. She testified that Taylor and Price picked her up the following day in Price's car. Prior to Taylor's trial, Akilah entered a plea agreement where she pleaded guilty to robbery with the use of a deadly weapon.

Akilah also testified that, at the time of the incident, she had known Taylor for a couple of years and was pregnant by him, although she was unaware of it. She stated that Taylor acknowledged that the baby is his.

Reiko Moss, Alanna's roommate at the time of the incident, testified that the day after the party, she opened her front door and found Taylor there looking slightly lost. She testified that Taylor wanted to know if he had left his pager inside the apartment. She testified that she checked with Alanna, who was taking a nap, and then told him "no." She testified that, after the incident, several items were missing from the apartment.

Alanna testified that later that afternoon she answered her front door and discovered Akilah, whom she did not know. She testified that Akilah claimed she had left her pager in the apartment. She testified that she allowed Akilah to search for her pager, that she asked her three times who she came to the party with, and that there was a knock at the front door. She testified that, when she answered the door, Taylor attempted to barge in past her. She testified that she asked Akilah if she came with Taylor to the party and that she observed Price behind a

mailbox and then said, "[Akilah] must have come with you guys." She testified that she asked Taylor to wait outside, and she locked the door.

She testified that, while she turned to get a tissue, she felt a gun at her waist and heard Akilah exclaim, "Bitch, get down." She testified that Akilah duct taped her hands, feet, mouth, and eyes while declaring "that the two guys outside were not associated with her." She testified that Akilah placed the gun at her temple and that she saw three flashes of light and fell backwards. She testified that, during the incident, she heard three distinct voices, including Akilah's, Price's, and another unrecognizable male voice, and that she heard them discussing what they should take.

In his tape-recorded interview, Taylor indicated that the day of the incident was his second time meeting Akilah and that she was Price's friend, more than his friend. In his opening statement, he stated that he didn't know who lived at the apartment where the incident occurred, that he thought he was moving Akilah out of her apartment, and that he didn't know Price or Akilah very well.

At trial, Taylor and the State indicated that they had no objection to the proposed jury instructions, and they did not object to the jury instructions when they were read.

Taylor first contends that the district court erred in admitting evidence of two photographs of the victim. "'Admission of evidence is within the [district] court's sound discretion; this court will respect the [district] court's determination as long as it is not manifestly wrong.'"[1]

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[1]Byford v. State, 116 Nev. 215, 231, 994 P.2d 700, 711 (2000) (quoting Colon v. State, 113 Nev. 484, 491, 938 P.2d 714, 719 (1997)).

Gruesome photographs are admissible if they aid in ascertaining the truth.[2] "'Despite gruesomeness, photographic evidence has been held admissible when it accurately shows the scene of the crime or when utilized to show the cause of death and when it reflects the severity of wounds and the manner of their infliction.'"[3]

Having reviewed the record, we conclude that the district court did not err in admitting the photographs. We further conclude that, even if the district court did err in admitting the photographs, the error was harmless because overwhelming evidence was adduced to support Taylor's convictions.

Second, Taylor argues that the district court erred by allowing double hearsay testimony of Taylor's tape-recorded statement where he repeated multiple variations of what Price told him, including, "Well I will come back and rob this bitch." Taylor argues that, when the statement was made, there was no evidence indicating that any conspiracy existed, and it was merely a spontaneous statement.

The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong.[4] Before an out-of-court statement by an alleged co-conspirator may be admitted into evidence against a defendant, the existence of a conspiracy must be established by

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[2]Id.

[3]Id. (quoting Theriault v. State, 92 Nev. 185, 193, 547 P.2d 668, 674 (1976) (citations omitted), overruled on other grounds by Alford v. State, 111 Nev. 1409, 1415 n. 4, 906 P.2d 714, 717 n. 4 (1995).

[4]Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

independent evidence, and the statement must have been made during the course of and in furtherance of the conspiracy.[5] A prima facie showing of the conspiracy is sufficient.[6]

The statement was admitted to demonstrate that Taylor had notice of Price's intention to rob Alanna when they returned to the apartment the following day. Because the statement was offered for a non-hearsay purpose, we conclude that the district court did not abuse its discretion.

However, even if this statement had been admitted to prove the truth of the matter asserted, we conclude that a conspiracy was established by the following slight evidence. Taylor and Price attended Alanna's party at her apartment the night before the incident. According to Reiko and Alanna's testimony, Taylor returned to the apartment two times prior to the incident. When Taylor returned to the apartment with Price, he had notice of Price's intention of robbing her. Alanna testified that she identified Price and Taylor outside her apartment immediately prior to the incident. Finally, Alanna testified that she recognized Price's voice during the incident. Accordingly, we conclude that there is sufficient evidence to support the conclusion that the statement was made during the course of and in furtherance of a conspiracy, and the district court did not abuse its discretion.

Next, Taylor argues that the district court erred by allowing Akilah to testify she was pregnant by Taylor, although she was unaware of it at the time of the incident.

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[5]Carr v. State, 96 Nev. 238, 239, 607 P.2d 114, 116 (1980).

[6]See Goldsmith v. Sheriff, 85 Nev. 295, 305, 454 P.2d 86, 92 (1969).

As referenced above, the determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong.[7] NRS 48.025(1) provides that all relevant evidence is admissible. NRS 48.015 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

In Taylor's tape-recorded statement, he indicated that the day of the incident was his second time meeting Akilah and that she was Price's friend, more than his friend. In his opening statement, he stated that he didn't know who lived at the apartment, that he thought he was moving Akilah out of her apartment, and that he didn't know Price or Akilah very well. We conclude that the evidence that Akilah was pregnant by Taylor tends to show that Akilah was more than a casual acquaintance to him, contrary to his position in his opening statement and tape-recorded interview. Accordingly, we conclude that the district court did not abuse its discretion in admitting this evidence.

Next, Taylor argues that the prosecutor committed misconduct during closing argument warranting reversal of Taylor's convictions. Specifically, Taylor argues that the State made an improper analogy of the rape scene in a movie to explain the legal concept of accomplice liability during closing argument, that the State improperly urged the jury to convict Taylor to remedy societal wrongs during rebuttal closing argument, and that the State improperly vouched for Akilah's credibility during rebuttal closing argument.

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[7]Petrocelli, 101 Nev. at 52, 692 P.2d at 508 (1985).

"[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."[8] If the issue of guilt or innocence is close, and if the State's case is not strong, prosecutorial misconduct will probably be considered prejudicial.[9] We conclude that the first comment, taken in context, does not amount to prosecutorial misconduct.

It is improper for a prosecutor to argue that the jury has a civic duty to convict the defendant.[10] We conclude that, although the second comment does rise to the level of prosecutorial misconduct, it is harmless and does not warrant reversal.

SCR 173(5) states, in pertinent part, that a lawyer shall not state a personal opinion as to the credibility of a witness. In order to preserve a prosecutorial misconduct issue for appeal, a defendant must make a timely objection and seek corrective instructions.[11] This court will only review a prosecutorial misconduct issue where the party failed to make a timely objection if the misconduct would be considered plain error or patently prejudicial.[12] Because Taylor failed to object or request a

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[8]United States v. Young, 470 U.S. 1, 11 (1985).

[9]Garner v. State, 78 Nev. 366, 373, 374 P.2d 525, 530 (1962).

[10]See, e.g., Haberstroh v. State, 105 Nev. 739, 742, 782 P.2d 1343, 1345 (1989) (finding prosecutor committed misconduct by referring to the jury as "the conscience of the community").

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

[12]See id.

limiting instruction, we conclude the third comment does not amount to plain error, nor has Taylor demonstrated prejudice. Therefore, we conclude that there was no misconduct warranting reversal.

Taylor also argues that the district court erred in allowing jury instructions regarding reasonable doubt and equal and exact justice. When a defendant has not only failed to object to jury instructions, but has agreed to them, the failure to object or to request special instructions precludes appellate review, except for plain error.[13] Taylor not only failed to object to the jury instructions, he agreed to them. Accordingly, we review the jury instructions for plain error.

NRS 175.211(1) provides the only permissible definition of reasonable doubt that may be provided to juries in criminal actions. At trial, the statutory reasonable doubt instruction was provided without any minor deviation. This court has consistently upheld the constitutionality of the statutory reasonable doubt instruction.[14] In Leonard v. State, this court upheld a jury instruction, requiring the jury to do "equal and exact justice between the Defendant and the State of Nevada."[15] Accordingly, we conclude that no plain error exists.

Next, Taylor argues the evidence adduced at trial was insufficient to support his convictions of conspiracy to commit robbery,

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[13]Bonacci v. State, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980).

[14]See Holmes v. State, 114 Nev. 1357, 1366, 972 P.2d 337, 343 (1998); see also Meek v. State, 112 Nev. 1288, 1297, 930 P.2d 1104, 1110 (1996) (holding that minor deviations from the statutorily prescribed reasonable doubt instruction constituted harmless error where there was overwhelming evidence of guilt and no other trial error).

[15]114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998).

burglary while in possession of a firearm, and robbery with the use of a deadly weapon.

"[W]hen the sufficiency of the evidence is challenged on appeal in a criminal case, '[t]he relevant inquiry for this Court is '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[s] beyond a reasonable doubt.'"[16] Moreover, it is for the jury to determine what weight, credibility and credence to give to witness testimony and other trial evidence.[17] Finally, circumstantial evidence alone may sustain a conviction.[18]

We conclude sufficient evidence was adduced from which the jury, acting reasonably and rationally, could have found the elements of conspiracy to commit robbery, burglary while in possession of a firearm, and robbery with the use of a deadly weapon beyond a reasonable doubt. Accordingly, we conclude that Taylor's convictions were supported by substantial evidence.

Finally, Taylor argues that the district court abused its discretion in sentencing Taylor as a habitual criminal. A district court has wide discretion in imposing a sentence, and this court will not disturb that sentence absent a showing of an abuse of discretion.[19] NRS 207.010

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[16]Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979).

[17]See id., at 107, 867 P.2d at 1139.

[18]McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992).

[19]Deveroux v. State, 96 Nev. 388, 390, 610 P.2d 722, 723 (1980).

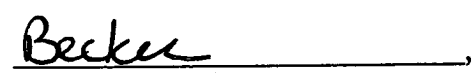
provides that a district court may impose a sentence of life with the possibility of parole, beginning when a minimum of ten years has been served, for anyone who has been convicted of three or more felonies.

We conclude that the district court did not abuse its discretion in sentencing Taylor as a habitual criminal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt



_____, J.
Becker

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