IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ADAMS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35669

FILED

NOV 06 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of unlawful sale of a controlled substance. The district court sentenced appellant to serve 24 to 60 months in prison.

A paid confidential informant ("CI") purchased five rocks of cocaine from appellant at a Reno motel during a controlled buy set up by the Consolidated Narcotics Unit ("CNU"). The CI wore a wire during the buy and a detective assigned to the CNU testified regarding the transaction she heard over the wire. The CI and the detective listening to the wire testified that a male sold the drugs to the CI. The CI identified appellant as the individual who sold her five rocks of cocaine for $100.00 in prerecorded buy money provided by the CNU. Agent Jerry Craig of the Drug Enforcement Administration conducted surveillance of the motel and the buy. He testified that appellant was the only male who approached the room where the CI purchased the drugs. Additionally, Craig testified that he continued his surveillance of appellant and the motel while other officers obtained a search warrant for two rooms at the motel and, within two hours of the drug transaction, he participated in the arrest of appellant. In a search incident to the arrest, Craig located the prerecorded buy money in appellant's pocket.

Appellant raises the following contentions: (1) the district court abused its discretion in denying a defense motion for a mistrial; (2) the district court failed to adequately explain appellant's right to testify and right to remain silent; and (3) the prosecutor committed misconduct during closing argument. We conclude that each contention lacks merit.

First, appellant argues that the district court abused its discretion in denying a defense motion for a mistrial after the CI testified that in the weeks between the controlled buy and her grand jury testimony, she was jerked from her car and beaten. Appellant argues that the district court's admonishment to the jury was insufficient to cure any prejudice and that the court therefore should have granted the motion for a mistrial. We disagree.

"[I]t is within the sound discretion of the trial court to determine whether a mistrial is warranted. Absent a clear showing of abuse of discretion, the trial court's determination will not be disturbed on appeal." Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996) (citations omitted).

Based on our review of the record, we conclude that the district court did not abuse its discretion in denying the motion for a mistrial. After a hearing outside of the jury's presence, the district court determined that testimony regarding the CI's condition when she testified before the grand jury was relevant to an assessment of her credibility because the defense had repeatedly questioned her regarding inconsistencies between her grand jury testimony and a debriefing statement she made immediately after the controlled buy. However, expressing concern that the testimony could be prejudicial if the jury inferred that appellant was involved

in the attack on the CI when there was no evidence to support such an inference, the district court admonished the jury as to the limited use of the evidence. We must presume that the jury followed that instruction. See Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) ("There is a presumption that jurors follow jury instructions."), clarified on other grounds, 114 Nev. 221, 954 P.2d 744 (1998). Moreover, we conclude that the testimony was not so prejudicial that it could not be neutralized by an admonition to the jury. See Allen v. State, 99 Nev. 485, 490, 665 P.2d 238, 241 (1983).

Appellant next contends that the district court failed to provide appellant with adequate notice of his right to testify and "fell far short of imparting any useful knowledge to him concerning his right to testify at the trial." Appellant argues that "[i]t was incumbent upon the trial court to ascertain, at the very least, just what the Appellant's knowledge was regarding his constitutional right to testify or to refrain from doing so." We conclude that this contention lacks merit.

In Phillips v. State, 105 Nev. 631, 633, 782 P.2d 381, 382 (1989), this court refused to adopt a rule mandating "the reversal of any criminal conviction if the defendant has not been expressly advised by the court of his right to testify." Nonetheless, this court suggested that "every defendant should be advised on the record, but outside the presence of the jury, by the court of his right to testify at or near the end of the State's case-in-chief." Id. However, such an advisement "is not a sine qua non of a valid conviction in all cases." Id.

Here, the district court advised appellant as follows:

> Mr. Adams, let me advise you at this time that you do have the right to be a witness in this trial

> if you on [sic] so chose [sic]. You also have the right not to testify and a decision as to whether or not you testify is yours alone to make. You should make this important decision only after consulting with your counsel.

Appellant indicated that he understood.

The district court clearly and succinctly informed appellant that he had a right to testify or not to testify and that the decision was an important one that he should discuss with his attorney. Appellant does not specify what additional information the district court should have provided. We do not perceive any error on the part of the district court warranting reversal of appellant's conviction, particularly considering our statement in Phillips that a conviction is not invalid where there was no advisement.

Finally, appellant contends that the prosecutor committed misconduct during rebuttal closing argument and that the misconduct warrants reversal of appellant's conviction. In particular, appellant points to the following portion of the rebuttal closing argument:

> Most amusing part of the closing argument was the attempt to make this broad stroke towards Jerry Craig. First off, let's clear something up. Mr. Archuleta knows--he said that Mr. Craig did not make a report. That is not true. And Mr. Archuleta knows it. The question that was asked of Mr. Craig is did you make any notes while he was sitting there? That was Mr. Archuleta's question. He said no, but there was a report made by Jerry Craig and it was made at the time this case occurred. And Mr. Archuleta has it and he knows that he does. That's a fact. So that is not true and please don't for a second think that Jerry Craig was in here making it up or just guessing.[1]

As an initial matter, we note that appellant failed to object to the comments challenged on appeal. Generally,

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[1]We note that defense counsel did not specifically argue that Craig did not prepare a report. With respect to Craig, defense counsel stated: "[B]ut Detective Craig was tough. He's the federal government. He didn't leave a record that I could find contradictions on." Later, defense counsel argued: "The only thing that the defense has is the evidence that the police create. They write reports. They take audios. The give testimony. That's all we have."

such a failure precludes review by this court. See Garner v. State, 78 Nev. 366, 372-73, 374 P.2d 525, 529 (1962). However, we may review for plain errors affecting appellant's substantial rights. See NRS 178.602.

Disparaging remarks

Appellant contends that by indicating that defense counsel's closing argument was "amusing" and that defense counsel "knew better" than to make certain arguments, the prosecutor improperly disparaged defense counsel. See Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991). We conclude that to the extent the prosecutor improperly disparaged defense counsel, the error did not affect appellant's substantial rights because the State adduced overwhelming evidence to support the conviction. See United States v. Olano, 507 U.S. 725, 734 (1993) (explaining that "affec[t] substantial rights" language in federal version of NRS 178.602 "in most cases . . . means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings").

Vouching/Evidence Not Admitted

Appellant contends that the prosecutor vouched for the credibility of Jerry Craig, an agent with the Drug Enforcement Administration, by stating that Craig had prepared a report and imploring the jury not to think that Craig had made up his testimony. See Lisle, 113 Nev. at 553, 937 P.2d at 481. Appellant also contends that these comments were improper because a report prepared by Craig was not admitted into evidence. See Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992). While the testimony at trial indicates that Craig prepared a probable cause statement in support of appellant's arrest, nothing in the evidence adduced at trial indicates that Craig prepared a "report." It thus appears

that the prosecutor referred to evidence that was not admitted at trial and suggested that he had special knowledge of that evidence and that it supported Craig's testimony. We conclude that such argument is improper. However, we further conclude that the argument does not rise to the level of plain error because the error did not affect appellant's substantial rights as the State adduced overwhelming evidence of appellant's guilt. See Olano, 507 U.S. at 734.

Having considered appellant's contentions and concluded that they lack merit, we affirm the judgment of conviction.

It is so ORDERED.

Young, J.

Maupin, J.

Becker, J.

cc: Hon. Brent T. Adams, District Judge
Attorney General
Washoe County District Attorney
Walter B. Fey
Washoe County Clerk