IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY RAY BOWMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61801

FILED

MAR 1 2 2014

TRACIE K. LINDEMAN
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ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon and carrying a concealed firearm or other deadly weapon. Eighth Judicial District Court, Clark County; Douglas Smith, Judge. Appellant Anthony Bowman raises three errors on appeal. We address two of his claims, both of which are dispositive.[1]

Expert testimony

Bowman contends that the district court committed reversible error by refusing to ask Bowman's expert witness a juror-initiated question. The juror wanted the expert witness to offer his opinion about whether the photo lineups provided to the victim were biased. The expert had previously explained that a biased lineup is one where a witness has a "greater chance of choosing the . . . suspect than their chance of choosing anybody else in the lineup." Bowman argued that it was permissible for the expert to answer this question under NRS 50.285 and NRS 50.295.

[1]Because we are reversing and remanding for a new trial based on both errors, we need not address Bowman's other claim of cumulative error.

Over Bowman's objection, the district court refused to ask this question because the expert's opinion "would be a violation of the jury's responsibility to make that determination."

"The practice of jury-questioning is firmly rooted in both the common law and American jurisprudence," and is "a matter committed to the sound discretion of the trial court." *Flores v. State*, 114 Nev. 910, 912-13, 965 P.2d 901, 902 (1998). The decision to admit expert testimony also rests within the sound discretion of the district court and will not be disturbed absent a clear showing of abuse. *Mulder v. State*, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000). Therefore, the question before this court is whether the district court abused its discretion by refusing to ask this juror-initiated question and excluding expert testimony concerning the reliability of the photo lineup used by the detective in this case. We have previously held that similar expert testimony is relevant and may be helpful to the jury. *See Echavarria v. State*, 108 Nev. 734, 746-477, 839 P.2d 589, 597-98 (1992).

The district court's only stated reason for excluding the expert's testimony was that it invaded the province of the jury. In Nevada, experts may testify as to ultimate issues of fact, even though such testimony traditionally invaded the province of the jury so long as the testimony is "otherwise admissible." *See* NRS 50.295; *see also* Fed. R. Evid. 704 advisory committee's note (explaining that the purported purpose of the former rule, "to prevent the witness from 'usurping the province of the jury,' is aptly characterized as 'empty rhetoric'" (quoting 7 Wigmore, *Evidence* § 1920, at 17 (3d ed. 1940))). Although Bowman argued that the expert should be permitted to answer the juror-initiated question and directed the district court to NRS 50.295 on two separate

occasions, the district court responded by telling his counsel, "[y]ou can put it on the record, but I'm not going to let him." It failed to offer any explanation as to why the expert's opinion on this subject was otherwise inadmissible.

In its answering brief, the State attempts to supply the explanation that the district court failed to provide. It argues that the juror-initiated question sought the expert's direct opinion concerning the victim's credibility or veracity and amounted to improper vouching. We disagree. The question concerned the reliability of the photo lineup and did not seek the expert's opinion on whether the victim was telling the truth. *Cf. Perez v. State*, 129 Nev. ___, ___, 313 P.3d 862, 870 (2013). The State's claim that the expert's response would have amounted to a legal conclusion and invaded the province of the district court also lacks merit. In the absence of an adequate explanation as to why the expert was properly precluded from offering his opinion as to the reliability of the photo lineup used by a detective in this case, and in light of our previous approval of similar expert testimony, we conclude that the district court abused its discretion.

Because this error is not of a constitutional dimension, we will reverse only if the error substantially affected the jury's verdict. *Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008); *see also Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (explaining that we must determine "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict'" (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))), *holding modified on other grounds by Mclellan v. State*, 124 Nev. 263, 270 182 P.3d 106, 111 (2008). Here, Bowman testified that he drove several men to a location in North Las

Vegas so that they could confront the victim. He admitted that he exited the vehicle with a second man before approaching the victim. He also admitted that the victim was shot several times shortly after he exited the vehicle. The only dispute at trial was whether Bowman or the second man brandished a weapon and shot the victim. The victim claimed that he was sure Bowman shot him. Bowman testified that the second man shot the victim.

Bowman's theory of the case was that the victim incorporated post-event information based on a biased photo lineup to form a false memory that Bowman was the shooter rather than a bystander. During Bowman's case in chief he presented the testimony of Dr. Geoffrey Loftus, an expert on memory and identification. Dr. Loftus testified about how psychological experiments have demonstrated that post-event information can lead to a false memory about the original event and discussed the effect that poor lighting, inattention, stress, and unconscious transference can have on the memory. Dr. Loftus also testified about several ways that a photo lineup can be biased. As discussed above, however, the district court prohibited Dr. Loftus from offering his opinion as to whether the photo lineups used in Bowman's case exhibited any signs of bias. Thus, the district court prevented Dr. Loftus from applying his expertise to the facts of Bowman's case. Dr. Loftus' testimony could have explained from a scientific and professional perspective, based on his forty-five years of experience, whether and why the photo lineup used in this case was less reliable than a photo lineup that did not exhibit any signs of bias. Instead, the jurors were left to rely on the limited information they had gleaned from Dr. Loftus' expert testimony to decide for themselves whether Bowman's photo lineup exhibited any signs of bias. Based on the

juror-initiated question at issue here, it does not appear that all of the jurors were confident in their ability to carry out this task without the assistance of an expert. Our inquiry, however, does not end here. We must still decide whether the issue of identification was close enough that the expert's response to this question would have substantially affected the jury's verdict.

A witness testified that he was with the victim between 9:30 and 10:00 p.m. when the shooting occurred. The street lights were on but the witness "could barely see." Two men approached them on foot. One man was shorter than the other and wore a black hoodie which obscured his face. The shorter man walked to within four feet of the victim while the taller man stood about eight feet away. The victim was talking on the phone and not paying attention when the shorter man asked him if his name was Derrick. The victim did not respond. When the shorter man asked the victim a second time if his name was Derrick, the victim put his phone away and answered, "Yeah, why?" The shorter man then brandished a gun. The victim froze, looked shocked, and stared intently at the gun. When the victim tried to run, the shorter man grabbed him by the shirt, spun him around, and shot him three times. The taller man did not move.

After the victim woke up from surgery, a detective spoke with him in the intensive care unit of the hospital and showed him a photo lineup. The victim had taken his pain medicine just before the detective started asking him questions. In the photo lineup, the detective used a driver's license photo for Bowman and inmate photos for the other five filler photos. During trial, several juror-initiated questions asked the detective about the photo lineup, including why "four of the five pictures

appear to be obscure or under-exposed," and whether he could explain why the defendant's photo appeared to be the "clearest or brightest . . . of . . . the photos." The detective answered, "that's just technology" and "I'm not a photographer." Approximately fifteen seconds after being shown the photo lineup at the hospital, the victim identified the picture of Bowman as the shooter and told the detective that he was one-hundred percent sure that Bowman was the man who shot him. Sometime later, Bowman was arrested.

One week after the shooting, as a result of an interview with Bowman, the detective went to the victim's home and showed him a second photo lineup which included Desean Sheppard, Bowman's friend since childhood, and five filler pictures. The victim identified Sheppard as someone he remembered seeing in the neighborhood the day before the shooting but told detectives that he was not involved in the shooting. At trial, the victim made an in-court identification of Bowman and testified that he was one-hundred percent certain he was the shooter. Bowman testified that Sheppard was the second man who exited the vehicle and shot the victim. Evidence was presented that Sheppard was shorter than Bowman.

Having considered the nature of the district court's error, the content of the juror-initiated questions, the description of the photo lineup used to identify Bowman, and other evidence presented at trial, we "'cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" *Tavares*, 117 Nev. at 733 n.17, 30 P.3d at 1133 n.17 (quoting *Kotteakos*, 328 U.S. at 764-65).

Juror misconduct

Bowman also contends that the district court erred by denying his motion for a new trial based on juror misconduct because it failed to hold a hearing or make any reliable findings of fact and there is a reasonable probability that third-party intimidation affected the verdict. Juror misconduct includes attempts by third parties to influence the jury process through improper contact with jurors, threats, or bribery. *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003). "Before a defendant can prevail on a motion for a new trial based on juror misconduct, the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial." *Meyer*, 119 Nev. at 563-64, 80 P.3d at 455. "Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict." *Id.* at 564, 80 P.3d at 455. "A hearing before the trial court is the proper procedure to determine whether a communication is or is not prejudicial." *Isbell v. State*, 97 Nev. 222, 226, 626 P.2d 1274, 1277 (1981); *see also Smith v. Phillips*, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."). Although its factual inquiry is limited, the district court is responsible for "determining the extent to which jurors were exposed to the extrinsic or intrinsic evidence." *Meyer*, 119 Nev. at 566, 80 P.3d at 456.

Because the district court refused Bowman's request to hold an evidentiary hearing during trial so that the district court could question the jurors and the marshal who spoke with the jurors about the

alleged misconduct, the record before this court is limited. In its brief discussion outside the presence of the jury about the circumstances surrounding the alleged misconduct the district court described the facts as follows:

> Yesterday at a break with the jury using the restroom, the females, there were two females in here that have been watching, sitting on the defendant's side, I don't know their names, they got up and they followed the jury out. They walked in the ladies restroom and they stood by the wall, which intimidated the jury.

Bowman requested a mistrial based on prejudice arising from the jury intimidation because the jurors would believe that his supporters were responsible for the jury intimidation. In reality, the female spectators were attending in support of the victim. The district court denied the motion for a mistrial because it banned the women from the courthouse, had marshals walk the jurors to their cars, and admonished the jury to disregard anything that occurred in the restroom and instructed it "not to hold that against the defendant."

After the conclusion of trial, Bowman filed a motion for a new trial based on the same alleged juror misconduct. Bowman included a sworn affidavit from defense counsel detailing her post-verdict discussion with two jurors who were in the restroom during the incident. The sworn affidavit details additional facts about what occurred in the restroom and describes the women's behavior as "menacing." In its opposition to Bowman's motion, the State urged the district court to disregard the facts contained in the affidavit or in the alternative to consider the unsworn statement contained in its opposition indicating that a deputy district attorney overheard the jurors tell counsel that the restroom incident did not influence their deliberations or verdict. In a hearing on Bowman's

motion, the district court concluded that, "[i]n fact, the jury said they weren't intimidated by it." This finding is markedly different from the district court's description of the facts during trial where the district court told both parties that the conduct of the two females in the restroom "intimidated the jury," and leads us to the conclusion that the district court based its new finding on the unsworn statement contained in the State's motion which reflected the jurors' mental processes and deliberations.

The district court's decision on juror misconduct "must be based on objective facts and not the state of mind or deliberative process of the jury." *Meyer*, 119 Nev. at 563, 80 P.3d at 454; *see also* NRS 50.065(2) (explaining that an affidavit or evidence of any statement by a juror concerning the juror's mental processes with respect to the verdict is "inadmissible for any purpose"). Furthermore, the district court must apply an "objective test" in evaluating the impact of the restroom incident on the verdict. *Meyer*, 119 Nev. at 566, 80 P.3d at 456. "That is, the district court must determine whether the average, hypothetical juror would be influenced by the juror misconduct." *Id.* We are not confident that such an objective test was performed by the district court in this case or that we can rely on the district court's limited findings of fact during the hearing on Bowman's motion for a new trial. And because the district court improperly denied Bowman's request to question the jurors and marshal about the restroom incident during trial, we are left with a limited record upon which to decide whether this incident amounted to prejudicial juror misconduct. Based on the limited record developed by the district court we cannot say that the average hypothetical juror would not be influenced by the intimidating behavior of the two females who were

seated behind Bowman during the first day of trial, and we conclude that there is reasonable probability or likelihood that this incident affected the verdict.

Because we conclude that both of these errors prejudiced Bowman, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Douglas Smith, District Judge
Legal Resource Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk