IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARLINE LEE MOORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67281

ORDER OF AFFIRMANCE

This is an appeal from jury verdicts convicting appellant of buying, possessing, receiving or withholding a stolen firearm and owning or possessing a firearm by a prohibited person. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge.

I.

Nevada Parole and Probation officer Megan Lytle conducted a search on Carline Lee Moore's residence, as Moore's supervising probation officer. During the search, Officer Lytle found a stolen firearm in the pocket of one of Moore's jackets, which was hanging in his closet.

Officer Lytle *Mirandized*[1] Moore and questioned him regarding the firearm. Moore changed his story about how he came into possession of the firearm several times. First, he denied knowledge of the firearm. Moore then admitted he knew the firearm was in the residence, but thought it was in the kitchen, a common area. Finally, Moore admitted he obtained the firearm from a man, "Cody," and was planning on selling it and splitting the profits.

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

During transport to the jail, Moore repeatedly asked probation officers what he could do to "make the charge go away" and get out of custody. Moore's statements were never recorded in any probation report. The State disclosed these statements to the defense on the Friday before Moore's Monday trial. Moore filed a motion in limine to prevent the officers from testifying to the statements, arguing the State's late disclosure violated NRS 174.235. Moore never sought a continuance of the trial date. The district court denied the motion.

The court bifurcated Moore's two-day trial. The first day, the jury determined whether Moore was guilty of possession of a stolen firearm. The next day, the jury determined whether Moore was also guilty of possession of a firearm by a convicted felon. Moore did not testify.

During closing arguments in the first phase of the bifurcated trial, the defense urged the jury to disregard Moore's statements made in the patrol car, arguing the testimony was unreliable and that even if Moore did make those statements, they did not evince his guilt or "show anything about knowledge [of the firearm]."

In its rebuttal argument, the prosecutor argued Moore had knowledge of the firearm's provenance and was guilty. The prosecutor made the following argument regarding Moore's statements in the patrol car:

> And the statement that he made throughout this case to Officer Lytle in the presence of Officer Marty for some of them, in the presence of Officer Earl for some of them, are that he did have consciousness of guilt; that he knew that he had done something wrong; *not that he—he never said anything: Well, let me explain myself. There's no testimony of that. Let me tell you why I didn't do this. There's no testimony of that, either. . . .* What

> he said in the car was that he wanted to know how he could get out of this case, get out of this charge. That's a consciousness of guilt.

(Emphasis added).

The jury found Moore guilty of possession of a stolen firearm and, subsequently, for possession of a firearm by a prohibited person. The district court sentenced Moore to 24-60 months for possession of a stolen firearm, and a concurrent sentence of 24-60 months for ex-felon possession of a firearm.

Moore appeals, advancing two arguments: First, the prosecutor impermissibly commented on Moore's constitutional right not to testify, and second, the prosecution should have been barred from using Moore's statements made in the patrol car because the State failed to timely disclose those statements. For the reasons set forth below, we affirm.

II.

Moore argues the district court abused its discretion in failing to grant a mistrial because the prosecutor's statements in closing impermissibly commented on Moore's failure to testify.

We review the denial of a mistrial for abuse of discretion, and will not reverse absent a clear showing of abuse. *Rose v. State*, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007). A prosecutor's direct reference to a defendant's failure to testify is reversible error, and an indirect reference is likewise impermissible if it was intended to reference the defendant's failure to testify or if the jury would naturally and necessarily understand it as referring to that failure. *Sherriff v. Walsh*, 107 Nev. 842, 845, 822 P.2d 109, 110-11 (1991). We review indirect references for harmless error, *id.* at 845, 822 P.2d at 111, and "if the prosecution made only passing reference to the defendant's post-arrest silence or if there is overwhelming

evidence of guilt," we will not reverse the district court's decision. *Colon v. State*, 113 Nev. 484, 493, 938 P.2d 714, 720 (1997).

Counsel's tone and presentation can clarify the meaning of statements which may be confusing on a cold transcript. In determining the intent of a prosecutor's statements, therefore, we must take into account the surrounding context. *Bridges v. State*, 116 Nev. 752, 764, 6 P.3d 1000, 1009 (2000). Because the trial judge is in the advantageous position of listening to the tone and tenor of the arguments and observes the trial presentation firsthand, the trial judge is in the best position to assess the impact on the jury. We, therefore, give deference to the judge's decision regarding whether to grant a mistrial. *See Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 703, 220 P.3d 684, 693 (2009). Generally, where the defense opens the door by raising an issue, and the prosecutor's comment is made in response to that defense argument, we will not reverse. *Colon*, 113 Nev. at 493, 938 P.2d at 720; *Bridges*, 116 Nev. at 764, 6 P.3d at 1009.

Here, the trial was bifurcated. During the first phase of the trial, the State was in the difficult position of presenting its case without reference to Moore's felony probation status. During its rebuttal, the prosecutor, made inartful statements alluding to testimony of Moore's prior statement as relayed by the officers. Moore objected to the prosecutor's statements, arguing they implicated Moore's Fifth Amendment right not to testify at trial. The district court disagreed, finding the argument was made to rebut the defense's version of testimony adduced at trial within the patrol car; the argument was not made in reference, nor did the State comment on, Moore's decision not to testify at trial.

The record supports the district court's decision. In closing, Moore argued testimony regarding Moore's statements made in the patrol car to parole and probation officers was not credible. The context surrounding the prosecutor's statement reflects the prosecutor was merely rebutting the defendant's argument referring to testimony offered at trial regarding Moore's statements and highlighted the importance of those statements as they showed consciousness of guilt. The prosecutor's statements neither directly nor indirectly referenced Moore's decision not to testify at trial, nor does the record support the jury "naturally and necessarily" took those statements as referencing Moore's decision not to testify. *See Sheriff*, 107 Nev. at 845, 822 P.2d at 111. Accordingly, the district court did not abuse its discretion in denying the motion for a mistrial.

III.

Moore next argues the district court abused its discretion in allowing the State to present evidence of Moore's statements when the State failed to disclose those statements until the day before trial. Moore asserts he was entitled to the disclosure of these statements under NRS 174.235.

NRS 174.235(1)(a) requires the prosecution, at the defendant's request, to allow the defendant to inspect and copy:

> [w]ritten or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the State, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney[.]

Nothing in this statute requires the State to disclose oral, as opposed to "written or recorded," statements. *See also Thompson v. State*, 93 Nev. 342, 343, 565 P.2d 1011, 1012 (1977) (the State's failure to disclose oral inculpatory statements made by the defendant does not violate due process). Moore acknowledges the statements were not recorded. Because they were not recorded, they do not fall within the purview of NRS 174.235. We also note parole and probation revocation reports are often very short, and no facts suggest the failure to incorporate Moore's statements in the report here was unusual or underhanded.[2] Further, both sides were aware of the witnesses to be called at trial, and nothing prevented Moore from contacting the State's witnesses and obtaining additional detail regarding their testimonies. Finally, the defendant never requested the continuance based on the State's late disclosure of Moore's oral statements. Accordingly, the district court did not err in denying Moore's motion in limine to exclude this evidence under NRS 174.235. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

[2]We acknowledge it is within the district court's discretion to fashion remedies for discovery violations, and the district court does not abuse its discretion absent some showing the State acted in bad faith or the defendant suffered substantial prejudice that was not alleviated by a court order. *Evans v. State*, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001).

Tao, J.
Tao

Silver, J.
Silver

cc: Hon. Lidia Stiglich, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk