

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM GILMORE LACEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36230

FILED

JUL 10 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of fraudulent use of a credit card. Appellant William Lacey worked as a mechanic for the victim, Kim Stewart. Stewart's company, which markets and transports agricultural products, maintains a number of credit cards to purchase diesel fuel for company trucks. The company also maintains a miscellaneous credit card, which is coded to pump unleaded fuel for other vehicles used for company business. In June 1998, the credit card-issuing company informed Stewart that there was unusual activity on one of the credit cards. Stewart asked Lacey about the credit card and the fuel charged to it. Lacey told Stewart that he had used the credit card to put unleaded fuel in his personal vehicle, and he offered to repay Stewart. Stewart contacted the police, and Deputy Sheriff Sherlock called Lacey down to the Sheriff's Department for questioning. Lacey admitted to Sherlock that he used the miscellaneous credit card for his personal use and offered to repay Stewart.

After the jury convicted Lacey on two counts of fraudulent use of a credit card, the district court sentenced Lacey to serve two consecutive prison terms of twelve to thirty-eight months. The district court then suspended the sentence and placed Lacey on probation for a period not to exceed five years. Lacey now raises a number of issues on appeal.

Because we conclude each claim lacks merit, we affirm the judgment of conviction.

Information by affidavit

Lacey argues that the district court erred by permitting the State to file an information by affidavit. At the conclusion of the preliminary hearing, the justice court bound Lacey over on two of ten counts charged. The justice court did not explain why it declined to bind Lacey over on the other charges. The State then moved the district court to file an information by affidavit to include the remaining charges. The district court found that the justice court committed “egregious error” and granted the State’s motion in part, binding over five of the eight additional charges.

NRS 178.562 and NRS 173.035(2) permit the State to file an information by affidavit in cases where the justice court did not bind the defendant over at the preliminary hearing. This court has held that NRS 173.035(2) “is ‘a safeguard against egregious error by a magistrate in determining probable cause.’”¹ In this case the district court reviewed evidence adduced at the preliminary hearing, and concluded that the justice court committed egregious error in not binding Lacey over on five of the additional eight charges. We defer to the conclusion of the district court that the justice court committed egregious error and, therefore, the district court did not err by permitting the State to file an information by affidavit.

¹State of Nevada v. District Court, 114 Nev. 739, 741-42, 964 P.2d 48, 49 (quoting Cranford v. Smart, 92 Nev. 89, 91, 545 P.2d 1162, 1163 (1976)).

Admissibility of statements

Lacey contends that the district court erred by refusing to suppress his statements to the police. Deputy Sheriff Sherlock asked Lacey to come to the Sheriff's Department for questioning about Stewart's allegations against him. Lacey went voluntarily. Sherlock took Lacey into an interview room inside the Sheriff's Department and questioned him for approximately five minutes before arresting him, at which point the questioning stopped. Sherlock was the only police officer that questioned Lacey at that time. Lacey makes no assertions that Sherlock strong-armed him during questioning. Sherlock did not remember if she told Lacey that he was free to leave, but he was not behind any locked doors during questioning. Sherlock did not advise Lacey of his Miranda rights at any point during their five-minute conversation.²

This court reviews the district court's findings of fact at a suppression hearing under a deferential standard of review and will not disturb such findings of fact on appeal if they are supported by substantial evidence.³ An individual is deemed to be "in custody" for Miranda purposes where there has been a formal arrest, or where there has been a restraint on freedom of movement to the degree associated with a formal arrest, such that a reasonable person would not feel free to leave.⁴ An individual is not in custody simply because a police officer questions the individual as the focus of an investigation.⁵ The record contains

²Miranda v. Arizona, 384 U.S. 436 (1966).

³See State v. Johnson, 116 Nev. 78, 80-81, 993 P.2d 44, 45-46 (2000).

⁴State v. Taylor, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998).

⁵Id.

substantial evidence that the conversation between Lacey and Deputy Sheriff Sherlock was not a custodial interrogation for Miranda purposes. Therefore, although Lacey was not advised of his Miranda rights, the district court did not err when it refused to suppress Lacey's statements to the police.

Corpus delicti

Lacey argues that the district court improperly allowed the State to admit his incriminating statements to Deputy Sheriff Sherlock into evidence before it established the corpus of the crime. Prior to Sherlock's testimony, the State called three witnesses. These three witnesses established that Lacey received possession of the credit card at issue in this case, that unleaded fuel was charged to the card, and that Stewart, the owner of the card, never received the card from Lacey and did not recognize the charges on it. The State properly established the corpus delicti in this case, and the district court did not err.

Sufficiency of evidence

Additionally, Lacey contends that his convictions were not supported by substantial evidence. When sufficiency of the evidence is challenged on appeal, this court inquires "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 beyond a reasonable doubt."⁶ It is the jury's function to assess the weight of the evidence and the credibility of witnesses.⁷ If, after viewing the evidence in

⁶Jackson v. Virginia, 443 U.S. 307, 319 (1979), quoted in Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994).

⁷Furbay v. State, 116 Nev. 481, 486, 998 P.2d 553, 556 (2000).

the light most favorable to the prosecution, there is substantial evidence in the record to support the jury's verdict, this court will not disturb the verdict on appeal.⁸

Under NRS 205.760, the elements of fraudulent use are an intent to defraud and use of the credit card to obtain anything of value. The State presented the following evidence for the jury to assess. Lacey accepted delivery of a group of thirteen Stewart company credit cards, which included the card at issue in this case. Stewart, Lacey's employer and the victim in this case, testified that he never received the card at issue, which was coded to allow the purchase of unleaded fuel for other vehicles used for company business. Stewart learned from his credit card company that there was unusual activity on the card, which was inconsistent with his past fuel purchases.

When Stewart asked Lacey about the credit card, Lacey told Stewart that he had it in his wallet. Lacey admitted to Stewart that he used the credit card, apologized, and told Stewart he would pay him back. Additionally, another Stewart employee testified that he knew Lacey had the credit card, and Deputy Sheriff Sherlock testified that Lacey admitted to her that he had used the credit card for his personal use and that he was willing to pay Stewart back. Based on the foregoing, there was sufficient evidence before the jury to support Lacey's convictions.

Investigator at county expense

Lacey argues that the district court erred when it denied his request to provide him an investigator at the county's expense. At that time, private counsel represented Lacey, and Lacey had employed an

⁸Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992).

investigator at his own expense. Lacey asserted to the district court that he required an additional \$3,000.00 to \$4,000.00 in further investigative services, and he did not have any savings or other assets that he could use to pay for any further investigation of the criminal charges against him. Lacey claims that the district court's denial of his request precluded him from securing necessary witnesses for trial.

In Widdis v. District Court, this court held that "a criminal defendant who has retained private counsel is nonetheless entitled to reasonable defense services at public expense based on the defendant's showing of indigence and need for services."⁹ The record does not establish that Lacey carried his burden of proof and established his indigence or the necessity of his request. Therefore, the district court did not err in denying his request.

Fifth Amendment

Prior to trial, the State filed a motion to suppress testimony based upon alleged discovery violations by Lacey. In order to determine whether the State was prejudiced, such that the testimony of any witnesses should be precluded, the district court required Lacey to make offers of proof as to what the witnesses would testify. Lacey argues that the district court violated his Fifth Amendment right against self-incrimination and right to a fair trial by compelling him to present his case strategy prior to the presentation of the State's case-in-chief.

⁹114 Nev. 1224, 1229, 986 P.2d 1165, 1168 (1998).

This court has already noted in its order dismissing an interlocutory appeal in State v. Lacey,¹⁰ that the district court's finding of discovery violations was erroneous, but Lacey's argument here still lacks merit. In Williams v. Florida, the United States Supreme Court held that "[n]othing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense."¹¹ The effect of Lacey's offers of proof was to compel Lacey to accelerate the timing of disclosures that he intended to divulge at trial, which does not violate the Fifth Amendment.¹² Therefore, the district court did not violate Lacey's Fifth Amendment rights when it required him to make offers of proof.

Brady violations

Lacey contends that, prior to trial, the State failed to provide him with information about two witnesses and withheld portions of credit card billing statements. Lacey generally alleges that this evidence was material, exculpatory, or impeaching, and, therefore, the State violated Brady v. Maryland by failing to disclose it to him.¹³ The test for a Brady violation has three prongs: (1) "[t]he evidence at issue must be favorable

¹⁰State v. Lacey, Docket No. 35475 (Order Dismissing Appeal, February 17, 2000).

¹¹399 U.S. 78, 85 (1970), quoted in Binegar v. District Court, 112 Nev. 554, 551, 915 P.2d 889, 894 (1996).

¹²See Binegar, 112 Nev. at 550-51, 915 P.2d at 894.

¹³373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

to the accused, either because it is exculpatory, or because it is impeaching;" (2) the State must have suppressed that evidence, "either willfully or inadvertently;" and (3) "prejudice must have ensued."¹⁴ The record shows that Lacey did not satisfy any element of this test.

Jury selection

After impaneling of the jury, but before any testimony, a juror requested that the district court discharge her for work hardship and the district court discharged her after notifying counsel. Lacey and counsel replied that "even though it sounds like Ms. Bohman has compelling reasons to be excused from jury duty, I do not think excusing her is a good idea." Lacey argues that the district court abused its discretion and violated his due process rights by failing to conduct a hearing where both parties could argue their objections and by excusing the juror prior to the start of trial. We disagree. The district court did not abuse its discretion when it dismissed this juror.

On the morning of trial, Lacey sought to remove one of the jurors, arguing that she was no longer impartial. The district court questioned this juror and determined that she could render a fair and impartial verdict. Lacey argues that the district court only asked the juror general questions and did not allow him to question the juror about any potential bias against him. After questioning the juror, and in the juror's presence, the district court denied Lacey's request to discharge her. Lacey now argues that the district court's refusal to dismiss this juror and its subsequent comment in open court violated his fundamental right to a fair trial and constituted prejudicial error.

¹⁴Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

This court gives considerable deference to the district court with respect to the scope of voir dire of jurors.¹⁵ The critical concern is “to discover whether a juror ‘will consider and decide the facts impartially and conscientiously apply the law as charged by the court.’”¹⁶ The parties had already conducted voir dire of this juror. In response to Lacey’s new assertion of bias, the district court satisfied the “critical concern” when it asked the juror just prior to the start of trial whether she could render a fair and impartial verdict and the juror answered that she could. The district court did not abuse its discretion by refusing to discharge this juror.

Character of the victim

During trial, Lacey attempted to present evidence of Stewart’s vindictive character, via direct examination testimony as to specific acts. The district court determined that the evidence was not relevant, and even if it were relevant, it would be not be proper impeachment evidence. Lacey contends that the district court abused its discretion by precluding him from presenting evidence of the victim’s vindictive character.

The general rule of NRS 48.045(1) is that “[e]vidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.” Pursuant to NRS 48.055(1), character may be proved by “testimony as to reputation or in the form of an opinion,” or on cross-examination, “inquiry may be made into specific instances of conduct.” The record shows that Lacey intended to call witnesses in his defense, and

¹⁵See Witter v. State, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996).

¹⁶Id. (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

on direct examination, ask them about specific instances when Stewart acted vindictively against them. This inquiry into specific acts on direct examination would have violated NRS 48.055(1). Therefore, the district court did not abuse its discretion by precluding Lacey from presenting this testimonial evidence of the victim's vindictive character.

Prior bad acts evidence

On direct examination, Lacey testified that when he started working for Stewart, it was as part of a work-release program; he was in jail for driving under the influence and driving on a revoked license. On cross-examination, the prosecutor asked Lacey, "[i]sn't it true that you were actually in jail for driving under the influence and for resisting arrest?" Lacey now argues that the State's reference to another bad act was impermissible and violated the requirements set forth in Petrocelli v. State.¹⁷

Lacey testified as to why he was in jail and consequently opened the door to evidence challenging the truthfulness of his testimony.¹⁸ The district court did not abuse its discretion by allowing the prosecutor's question.

Prosecutorial misconduct

During trial, Lacey objected on several occasions that the prosecutor was arguing facts not in evidence, including statements regarding double billing of the credit card at issue in this case and

¹⁷101 Nev. 46, 692 P.2d 503 (1985).

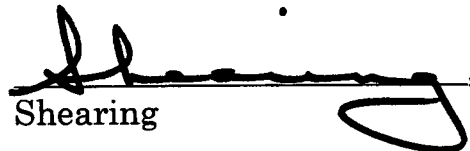
¹⁸See NRS 50.085(3).

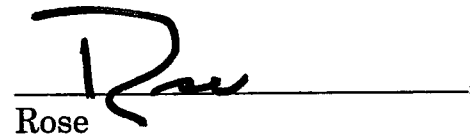
misstating facts in the record. We disagree. The prosecutor's comments must be viewed in context.¹⁹ We do not find any prosecutorial misconduct.

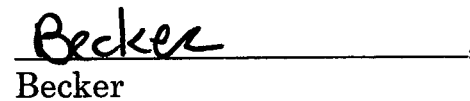
Cumulative error

Since we conclude that the district court did not err, Lacey's argument that this court should reverse his convictions under the theory of cumulative error is without merit. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

 _____, J.
Shearing

 _____, J.
Rose

 _____, J.
Becker

cc: Hon. David A. Huff, District Judge
Williams & Emm
Attorney General/Carson City
Lyon County District Attorney
Lyon County Clerk

¹⁹See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000).