IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY HUGHES WALKER, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 36252

FILED

SEP 10 2002

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. On October 4, 1997, Maureen McConaha's body was found just behind a residential area in Las Vegas. She had been shot in the head five times, and once in the hand. Appellant Johnny Walker and his cousin, Christian Walker, who was dating Maureen at the time, were last seen with Maureen before her death. Both were charged separately with Maureen's murder. Christian, in a separate jury trial was convicted of second-degree murder, while Johnny was convicted of first-degree murder with the use of a deadly weapon.

The district court sentenced Johnny to two consecutive terms of life in prison with the possibility of parole after twenty years. Johnny appeals his conviction, alleging that the district court committed several prejudicial errors during his trial. We conclude that each allegation lacks merit and, therefore, affirm his conviction.

The jailhouse informant

In early November 1997, the Las Vegas Metropolitan Police (LVMP) received a phone call from Clark County Detention Center inmate Mark Smith. Smith was sharing a jail cell with Johnny at the time. Smith told the police that Johnny initiated a conversation with him, and

told him that Johnny and his cousin, Christian, shot and killed Christian's ex-girlfriend, Maureen. Police detectives interviewed Smith, but testified at trial that they did not promise him any special treatment in exchange for the information. The police did not ask Smith to seek any further information from Johnny. After Smith returned to his cell Johnny again initiated a conversation with him, which Smith characterized as a rehash of what Johnny had told him before. On appeal, Johnny argues that the district court, for several reasons, should not have admitted Smith's testimony. We disagree.

Johnny alleges that the district court should have excluded Smith's testimony because he was a jailhouse informant whose testimony was unreliable. Whether or not Smith was a credible witness was a question for the jury, not the court, to determine.[1] The proper avenue for impeaching the credibility of a witness is cross-examination, not exclusion of the witness's testimony.[2] The district court did not, therefore, err by admitting Smith's testimony at trial.

Likewise, the district court did not err, as Johnny alleges, by refusing to grant him access to Smith's jailhouse records. The State is only required to disclose material evidence that is favorable to the defense, including evidence that might impeach the credibility of the State's witnesses.[3] Contrary to Johnny's characterization of Smith's jailhouse

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[1]Lisle v. State, 113 Nev. 540, 555, 937 P.2d 473, 482 (1997); Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994); Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972).

[2]See NRS 50.115(2) (stating that "[c]ross-examination is limited to . . . matters affecting the credibility of the witness").

[3]Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000).

records, they do not contain any evidence that would have discredited Smith's testimony. Disclosure of the records was, therefore, not mandated by Brady.[4]

The district court was also not required, as Johnny avers, to give the verbatim jury instruction he requested regarding Smith's status as a jailhouse informer and a heroin addict, especially when the district court otherwise cautioned the jury to consider the credibility of jailhouse informer and drug user testimony.[5] Similarly, the district court did not violate Johnny's rights against self-incrimination by admitting Smith's testimony. Although we have held that police solicitation of an inmate to serve as an informer in exchange for reduced sentencing is the functional equivalent of express police questioning and violates the accused's privilege against self-incrimination,[6] there is no such violation when the informer acts on his own initiative,[7] as the record indicates Smith did here.

Johnny also argues that the State committed misconduct during its questioning of Smith by making brief reference to Johnny's imprisonment at the time of trial. Although reference to a defendant's custodial status is generally prejudicial,[8] the prosecutor's comment in this

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[4]Brady v. Maryland, 373 U.S. 83 (1963).

[5]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (recognizing that the district court has broad discretion to settle jury instructions).

[6]Holyfield v. State, 101 Nev. 793, 800, 711 P.2d 834, 838 (1985).

[7]Thompson v. State, 105 Nev. 151, 156, 771 P.2d 592, 596 (1989).

[8]Haywood v. State, 107 Nev. 285, 287, 809 P.2d 1272, 1273 (1991).

case was just a mere slip of the tongue, and, because the jury already knew Johnny was in jail, the comment was not prejudicial.[9]

Dana Eichar's testimony

On the night of her murder, Maureen attended a party with Johnny and Christian that was hosted by Dana Eichar. Dana Eichar testified at trial that at some point during the night she asked Christian where Maureen was and he said that he had taken her home. The district court allowed this testimony over Johnny's objection that it was inadmissible hearsay.[10] Eichar's testimony was not, however, offered to show that Maureen made it home; it is clear from the record that, in fact, Maureen never made it home. Because the testimony was not offered for the truth of the matter asserted, it was not hearsay and the district court did not err by allowing the testimony.[11]

Dana Eichar also testified that she was present as a witness during Johnny's preliminary hearing and that Johnny looked at her, stuck his finger to his head, and called her a snitch. Johnny argues that this was improper prior bad act testimony and that the district court erred by failing to hold a Petrocelli[12] hearing prior to admitting it. Johnny also

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[9]See Cunningham v. State, 113 Nev. 897, 908, 944 P.2d 261, 268 (1997).

[10]On appeal, Johnny suggests that the district court should have also excluded the testimony because it was overly prejudicial. Johnny, however, failed to object on these grounds below and has, therefore, not preserved this objection for appeal. Greene v. State, 113 Nev. 157, 175-76, 931 P.2d 54, 65 (1997); McCullough v. State, 99 Nev. 72, 73, 657 P.2d 1157, 1158 (1983).

[11]See NRS 51.035.

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

argues that he was not given prior notice of the substance of Eichar's testimony, such that the testimony should have been excluded or at least a continuance granted so that he could locate rebuttal witnesses. Both contentions lack merit.

Eichar did not testify to a prior bad act; rather, as the district court found, she merely testified to her own observations and impressions of Johnny's ill will, and the testimony was properly admissible as evidence of consciousness of guilt. The district court was, therefore, not required to hold a Petrocelli hearing prior to admitting Eichar's testimony. The district court was also not required to grant Johnny a continuance so that he could locate rebuttal witnesses. The decision whether or not to grant a continuance is within the sound discretion of the district court.[13] Although Johnny did not know exactly what Eichar would testify to at trial, he was aware that she would testify. The State was under no obligation to disclose the precise nature of Eichar's testimony[14] and the district court did not, therefore, abuse its discretion by failing to grant Johnny a continuance.

Testimony and evidence regarding Christian Walker's prior bad acts

The district court allowed Maureen's mother, Deborah Kloek, to testify regarding a phone conversation she had with Maureen on

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[13]Lord v. State, 107 Nev. 28, 42, 806 P.2d 548, 556 (1991).

[14]See NRS 174.234 (requiring the prosecutor to disclose who his witnesses will be, but not what the witness will testify to at trial); NRS 174.235 (requiring the disclosure of written or recorded statements made by a witness who the prosecutor intends to call during trial); see also Lord, 107 Nev. at 42, 806 P.2d at 556 (recognizing that the prosecution is under no general duty to disclose inculpatory evidence to the defendant).

August 27, 1997. Deborah testified that Maureen called her from school crying, upset, and scared. During the conversation, Deborah further testified, Maureen told her that she had a fight with Christian and that she had a big knot on her head as a result. Johnny's attorney objected to the testimony as inadmissible hearsay, but the court allowed it as an excited utterance.

NRS 51.095 provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule." Because Deborah testified that the phone conversation occurred within five to ten minutes of the fight, when Maureen was still scared and crying, the testimony was properly admitted as an excited utterance.[15] Geographic proximity between where the precipitating event occurred and where the out of court declarant is at the time the hearsay statement is made, is not necessary to satisfy the excited utterance exception.[16]

Deborah also testified that following that fight, Maureen obtained a Temporary Protective Order (TPO) against Christian. The

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[15]We have held hearsay statements to be admissible under the excited utterance exception even where the statements were made up to an hour and a half after the precipitating event allegedly occurred. See Browne v. State, 113 Nev. 305, 313, 933 P.2d 187, 192 (1997); Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987); Dearing v. State, 100 Nev. 590, 592, 691 P.2d 419, 421 (1984).

[16]See Lopez v. State, 105 Nev. 68, 80, 769 P.2d 1276, 1284 (1989) (although location was a factor in determining whether or not the excited utterance exception was satisfied, it was not determinative, nor was it put forth as a requirement).

district court allowed the testimony and later admitted the TPO into evidence. Johnny challenges the district court's admission of the TPO because he argues it was inadmissible hearsay, violated his rights under the Confrontation Clause to confront adverse witnesses, and constituted improper prior bad acts testimony. We conclude that the district court did not err by admitting the TPO.

Although hearsay, the TPO was signed under oath by both Maureen and her mother and was, therefore, admissible under the general reliability exception of NRS 51.315(1).[17] Hearsay statements that are firmly rooted in a hearsay exception or are "supported by '"a showing of particularized guarantees of trustworthiness"'" are considered to be sufficiently reliable and admissible even if they deprive a defendant of his rights under the Confrontation Clause[18] to confront opposing witnesses.[19]

Johnny argues that although the district court considered admissibility of the TPO at the Petrocelli hearing as to his later severed co-defendant Christian, it did not address admissibility of the TPO as to Johnny. The district court was not, however, required to consider admissibility of the TPO as to Johnny at the Petrocelli hearing because it

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[17]NRS 51.315(1) provides that "[a] statement is not excluded by the hearsay rule if: (a) Its nature and the special circumstances under which it was made offer strong assurances of accuracy."

[18]U.S. Const. amend. VI.

[19]Franco v. State, 109 Nev. 1229, 1239, 866 P.2d 247, 253-54 (1993) (quoting Idaho v. Wright, 497 U.S. 805, 815 (1989) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980))).

was evidence of Christian's, not Johnny's, prior bad act.[20] Because the TPO was relevant to show Johnny's motive of protecting his brother's interests, and because the prior bad act was not Johnny's, we conclude that the district court did not err by admitting the evidence at trial.

Detective Tremel's testimony

Detective Tremel of the LVMP testified at trial that he went to Christian's home to ask him questions regarding Maureen's murder. Tremel testified that when he arrived, Christian appeared to be crying. Tremel testified that Christian did not look at him, nor talk to him. At trial, Johnny objected to the testimony on relevancy grounds and now, relying on Murray v. State,[21] alleges that admission of the statements violated his constitutional rights.[22]

This court will consider constitutional questions raised for the first time on appeal.[23] In Murray, this court held that the "prosecution is forbidden at trial to comment upon a defendant's election to remain silent

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[20]See Salgado v. State, 114 Nev. 1039, 1042, 968 P.2d 324, 326 (1998).

[21]113 Nev. 11, 17, 930 P.2d 121, 124 (1997)

[22]Johnny also alleges on appeal that the statements were inadmissible hearsay. However, "[w]here evidence is admitted over a defendant's objection at trial, new grounds for objection may not be raised on appeal." Geer v. State, 92 Nev. 221, 224, 548 P.2d 946, 947 (1976). Even if, as Johnny alleges, he raised the hearsay objection off the record, "[f]ailure to make a proper objection on the record will generally preclude appellate consideration." Id. at 224, 548 P.2d at 948 (emphasis added).

[23]Greene, 113 Nev. at 176, 931 P.2d at 65; McCullough, 99 Nev. at 73, 657 P.2d at 1158.

following his arrest and after being advised of his rights."[24] Murray is inapplicable here because: (1) the prosecution did not comment on Johnny's election to remain silent; and (2) the extent to which the prosecution commented on Christian's election to remain silent involved his election to do so pre-arrest. Murray does not apply to a defendant's pre-arrest invocation of silence.[25] The district court's admission of Detective Tremel's testimony did not, therefore, violate Johnny's constitutional rights.[26]

Coroner's testimony

The coroner who performed Maureen's autopsy and testified at the preliminary hearing was retired by the time Johnny's trial was held. The State, on the day trial began, notified Johnny that it intended to call a substitute coroner. Johnny argues that the district court should not have allowed the substitute coroner to testify because his testimony was different than the original coroner's testimony. The record indicates, however, that there was no significant variation between the coroners' testimonies.

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[24]113 Nev. at 17, 930 P.2d at 124 (quoting Neal v. State, 106 Nev. 23, 25, 787 P.2d 764, 765 (1990)).

[25]Id. at 17 n.1, 930 P.2d at 124 n.1 (citing Jenkins v. Anderson, 447 U.S. 231, 240 (1980)).

[26]In his reply brief, Johnny also argues that the prosecution's admission of Christian's silence and crying violated his rights under the Confrontation Clause. This court is not required to consider matters raised for the first time in an appellant's reply brief. See NRAP 28(c); Leonard v. State, 114 Nev. 639, 662, 958 P.2d 1220, 1237 (1998); Ducksworth v. State, 113 Nev. 780, 792, 942 P.2d 157, 165 (1997).

Johnny also argues that if the original coroner was truly unavailable at trial, the State should have used the preliminary hearing testimony, rather than a substitute coroner. Although it would have been permissible for the district court to use the coroner's preliminary hearing testimony, it was not required to do so.[27] An expert witness need not have first-hand knowledge of the facts upon which he bases his opinion, so long as his opinion is based on data reasonably relied upon by other experts in the field.[28] The district court did not, therefore, abuse its discretion by allowing a substitute coroner to testify at trial.[29]

Johnny's prior conviction

Prior to Maureen's murder, Johnny and Christian were charged with the attempted murder and battery of David Dimas. Christian was convicted of the attempted murder, whereas Johnny was acquitted of the attempted murder, but convicted of battery with the use of a deadly weapon. The district court held a Petrocelli hearing prior to trial and decided to admit the prior battery as evidence of identity and common plan. Johnny now challenges that decision on appeal.

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[27]See Hogan v. State, 103 Nev. 21, 23-24, 732 P.2d 422, 423 (1987); see also Emmons v. State, 107 Nev. 53, 56, 807 P.2d 718, 720 (1991) ("[d]ecisions regarding the admissibility of expert testimony lie within the discretion of the trial court").

[28]NRS 50.285.

[29]On appeal, Johnny also argues that the district court should not have allowed the substitute coroner to testify because he did not receive adequate notice as provided by NRS 174.232. Johnny did not, however, object to the coroner's testimony on these grounds below. We will not consider a non-constitutional argument raised for the first time on appeal. McCullough, 99 Nev. at 73, 657 P.2d at 1158; Greene, 113 Nev. at 176, 931 P.2d at 65.

NRS 48.045(2) prohibits the admission of prior bad act evidence to show character, but permits it to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Because "similarities can be shown between many acts," the question on appeal is "whether significant similarities remain after the acts are considered in some detail" to render the prior bad act relevant[30] Here, the record shows that there are countless similarities between the David Dimas battery and Maureen's murder. The most significant similarity is that in both cases Christian had a prior conflict with the victims, whereas Johnny did not appear to have any conflict with the victims, yet Johnny shot them both. Johnny's conviction for the prior battery was relevant to show a motive or common plan. Johnny repeatedly was protecting his brother's interests which was his motive for both shootings. Otherwise, there would have been no reason for Johnny to shoot Maureen. The district court did not, therefore, err by admitting evidence of the prior battery.

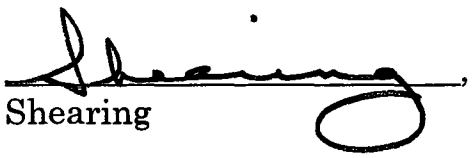
Jury instructions

Johnny requested that the district court instruct the jury that it could not convict him of first-degree murder if it believed that he was responsible only for aiding and abetting Christian in Maureen's murder because Christian had been convicted in a separate trial of only second-degree murder. The district court denied Johnny's request. We agree. A co-defendant's conviction does not bar the defendant's subsequent

[30]Meek v. State, 112 Nev. 1288, 1294, 930 P.2d 1104, 1108 (1996).

conviction of a greater offense via a separate trial.[31] The requested instruction was, therefore, erroneous, and properly denied by the district court.

Based on the foregoing, we find that Johnny's appeal lacks merit and ORDER the judgment of conviction AFFIRMED.



Shearing, J.

cc: Hon. Donald M. Mosley, District Judge
Special Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

[31]See Larsen v. State, 93 Nev. 397, 400 n.2, 566 P.2d 413, 414 n.2 (1977); see also Standefer v. United States, 447 U.S. 10, 25 (1980) (holding that an aider and abettor may be convicted of an offense, even if the perpetrator was acquitted of the same offense in a different prosecution); People v. Palmer, 15 P.3d 234, 239 (Cal. 2001) (holding that inconsistent verdicts for an aider and abettor and a perpetrator are acceptable).

BECKER, J., concurring:

I concur with the majority disposition. I write separately to address the issue of the admission of the Dimas battery. In the case involving Christian Walker, I concluded, based upon the briefs and arguments, that the Dimas incident was not properly admitted. Based upon the arguments made in this case, I now conclude that the Dimas act is admissible to prove motive and identity, although I still maintain it is not part of a common scheme or plan and is not admissible for that purpose.

Becker, J.
Becker

ROSE, J., dissenting:

The district court severed Johnny Walker's case from Christian Walker's, but then erroneously admitted evidence of several prior bad acts involving Johnny and Christian that effectively defeated the very reason for the severance - to prevent undue prejudice to either defendant. I dissent because Johnny was convicted in large part on the erroneous admission of prior-bad-act evidence.

The case against Johnny was weak, the State even admitting that its case was slight or marginal without the jailhouse snitch testimony. To bolster its case, the State was permitted at trial to introduce three prior bad acts; Johnny's battery against David Dimas, the temporary restraining order ("TRO") that the victim Maureen McConaha secured against Christian, and the threat Johnny made against Dana Eichar in open court. Individually, each would probably require reversal, but when considered together, reversal is mandated.

First, the shooting of Dimas by Johnny two weeks earlier does have some similarities, but also some distinct differences from the shooting of Maureen. The district court admitted it to show identity or a common plan. Prior violent acts usually have some similarities - a weapon and wounds, and the commission of the crime in a secluded location in the evening. But we have held that such general similar circumstances are not sufficient to admit prior bad acts to show a common plan or identity.[1] For instance, in Mitchell v. State,[2] we determined that a prior rape

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[1]See Meek v. State, 112 Nev. 1288, 1294, 930 P.2d 1104, 1108 (1996).

[2]105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).

incident allegedly involving the accused was erroneously admitted as a prior bad act against the accused who was charged with, among other thing, sexual assault, even though the two incidents occurred outside the same bar, occurred forty-five days apart, and were committed in approximately the same manner. We have noted: "[s]tated broadly enough, similarities remain after the acts are considered in some detail."[3]

I submit that there are as many dissimilar facts as there are general similarities. The Dimas shooting occurred at his house, while Maureen was shot in an isolated area. Johnny was alleged to have shot Dimas while Christian was the alleged shooter of Maureen. Dimas was a male unknown to Johnny prior to the shooting, but Maureen was a female who Johnny knew. The weapons used were different, and Dimas was shot once in the neck, while Maureen was shot six times in the head. I conclude, as we did in Meek, "[i]n view of the differences between these acts, the similarities between them are insufficient to make the prior act relevant to the charged crime."[4] Therefore, I conclude the Dimas shooting was inadmissible to show either identity or a common plan.

The district court also permitted a copy of the TRO Maureen secured against Christian to be admitted into evidence. This included the affidavits of Maureen and her mother setting forth the reasons why they believed Christian was violent and that they needed protection. The district court initially indicated in a pre-trial hearing that the TRO was not relevant as to Johnny and that, in all fairness, it should not apply to him. However during trial, the judge changed his mind and admitted the

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[3]Meek, 112 Nev. at 1294, 930 P.2d at 1108.

[4]Id. at 1294.

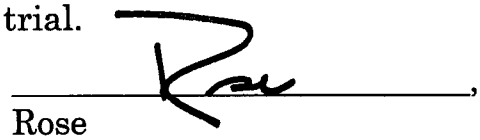
TRO into evidence. This was a prior bad act that did not even involve Johnny, was not relevant as the district court initially ruled, and any probative value clearly did not outweigh its prejudicial impact.

Dana Eichar testified that she was present as a witness during Johnny's preliminary hearing and that he looked at her, stuck his finger to his head, and called her a snitch. The defense was caught entirely by surprise by Eichar's testimony at trial, and asked for a continuance to investigate and secure rebuttal witnesses. The request was denied. This was prior bad conduct for which a Petrocelli hearing should have been held.

The State attempts to characterize Eichler's testimony simply as further direct evidence to show that Johnny believes he is in control and "a bad ass," and not a subsequent threat. First, I cannot see how this evidence can be viewed as anything but a threatening gesture toward Eichar. And second, the prosecutor stated in her remarks that NRS 48.045(2) is designed to prevent defendants from being convicted because they are a bad person, and yet she argued that the evidence of threats was admissible to show that Johnny was just that, a "bad ass guy." At a Petrocelli hearing, it is questionable whether the district court could have determined that the threat gesture was established by clear and convincing evidence, because no one else was in the courtroom to witness Johnny doing this. Without a Petrocelli hearing, this evidence of a prior bad act was clearly not admissible.

The State had the testimony of a jailhouse snitch and a very weak circumstantial evidence case against Johnny, but was permitted to bolster it with inadmissible prior-bad-act evidence. This evidence clearly

made a major difference at trial and, therefore, I would reverse the convictions and remand for a new trial.



_____, J.
Rose