IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RONALD JOSEPH RUETTEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69061

ORDER OF AFFIRMANCE

Appellant Ronald Joseph Ruetten appeals from a second corrected judgment of conviction entered pursuant to a jury verdict of two counts of trafficking in a controlled substance and one count each of possession of a controlled substance for the purpose of sale, maintaining a place for the purpose of selling or using a controlled substance, and being a felon in possession of an electronic stun device. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Motion for mistrial

Ruetten claims the district court erred by denying his motion for a mistrial because a witness commented about his post-arrest silence. We review a district court's ruling on a motion for a mistrial for an abuse of discretion. *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006).

The record reveals Detective Sean Jones testified on direct examination that the phone calls Ruetten made from the county jail were monitored, and, during one of these phone calls, Ruetten urged a female to go to his motel room and retrieve some property. Ruetten cross-examined the detective regarding the phone calls in the following colloquy:

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> Q The phone calls, you gave your opinion as to what they mean. Well, there could be other explanations. Isn't that true?
>
> A No.
>
> Q There's no other explanation? Let me give you one; he knows the drugs are there, but he's never touched them and they're not his. Is that a reasonable explanation?
>
> A I would think if that were the case, then he'd be concerned about being in trouble for the drugs in his room and perhaps the opportunity to speak with the officers when he was arrested --
>
> Q Wait a minute, wait a minute.

Ruetten objected "to any reference involving [his] Fifth Amendment right to remain silent." The district court sustained the objection, ordered that portion of the detective's response to be stricken, and directed the jury to disregard the detective's response. And the district court denied Ruetten's subsequent motion for a mistrial after finding the language used by the detective was not a basis for a Fifth Amendment violation or a mistrial, the answer had been stricken, and the jury was instructed to disregard the answer.[1]

We conclude the detective's testimony was, at most, a passing reference to Ruetten's post-arrest silence; any prejudice arising from this testimony was cured by the district court's admonishment to the jury; and the district court did not abuse its discretion in denying Ruetten's motion

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[1]After denying Ruetten's motion for a mistrial, the district court further instructed the jury that, "[A]s I instructed you at the beginning of this trial and as you will be instructed at the end of the trial in more detail, the defendant has a Fifth Amendment right not to speak with law enforcement. I previously indicated to you that a portion of the officer's testimony should be stricken and you should disregard it, and I will ask you anything that was perceived as speaking to law enforcement be disregarded from that question."

for a mistrial. *See generally Sampson v. State,* 121 Nev. 820, 830, 122 P.3d 1255, 1261 (2005) ("[R]eferences to a defendant's exercise of her Fifth Amendment rights are harmless beyond a reasonable doubt and do not require reversal of a conviction if . . . there was only a mere passing reference, without more, to an accused's post-arrest silence." (internal quotation marks omitted)); *Rudin v. State,* 120 Nev. 121, 144, 86 P.3d 572, 587 (2004) ("A defendant's request for a mistrial may be granted . . . where some prejudice occurs that prevents the defendant from receiving a fair trial.").

Defense witness

Ruetten claims the district court unfairly infringed upon his ability to present a witness material to his defense because the district court would not limit the State's cross-examination of that witness. Ruetten sought a ruling to prevent the State from impeaching defense witness Robert Guy's testimony on cross-examination with questions about Guy's pending charges for attempting to cash a fraudulent check. Ruetten argued that Guy's pending charges were too collateral and not relevant to his case.

The district court ruled that Ruetten would be allowed to call his witness and the State would be allowed to cross-examine the witness. Even assuming, without deciding, the district court abused its discretion by denying Ruetten's request to impose limitations on the State's cross-examination of a potential defense witness, we conclude any error was harmless beyond a reasonable doubt. *See* NRS 178.598 ("Harmless error"); *Valdez v. State,* 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008) (discussing harmless-error review).

Electronic stun device relevancy

Ruetten claims the district court erred by admitting the actual stun device into evidence. Ruetten argues the stun device found in his

backpack was irrelevant to his drug charges and his felon-in-possession-of-an-electronic-stun-device charge had been bifurcated and was not before the jury.

The record reveals Ruetten objected to the admission of the actual stun device into evidence on relevance grounds, and he argued admitting the stun device into evidence would be more prejudicial than probative. The State responded that the stun device was relevant to the charges of trafficking, possession, and maintaining a place for the sale of controlled substances because drug dealers carry protection and a stun device is used for protection. And the district court concurred with the State's argument and overruled Ruetten's objection.

Even assuming the district court erred by not articulating any findings as to whether the probative value of the actual stun device was outweighed by its prejudicial effect, any error was harmless because the evidence was relevant and the jury had already heard testimony about the stun device. *See* NRS 48.015; NRS 178.598; *Mclellan*, 124 Nev. at 267, 182 P.3d at 109.

Ruetten further claims the evidence of the stun device was improper other-bad-acts evidence. However, Ruetten did not challenge the admission of the stun device on this basis is the court below and we conclude he has not demonstrated plain error on appeal. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (discussing plain-error review).

Audio recording foundation

Ruetten claims the district court erred by allowing a State's witness to lay a foundation for, and narrate an audio recording of phone calls he made from the county jail. Ruetten argues Officer Alfred Del Vecchio lacked sufficient personal knowledge to testify as to the voice on

an audio recording and the officer's narrative of that recording invaded the province of the jury and reduced the State's burden of proof.

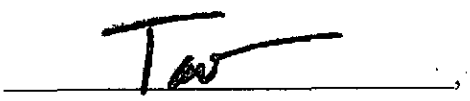
Ruetten objected to the officer's testimony that Ruetten's voice was on the disc, and he argued that the officer lacked the personal knowledge necessary to make such a representation. Ruetten conducted a voir dire examination of the officer, during which the officer testified his knowledge of Ruetten's voice was based on the traffic stop and the arrest made in the instant case, and an interview he conducted in another case some three years before.

We conclude the district court did not abuse its discretion in finding the State had met the very low threshold for admitting Officer Del Vecchio's voice recognition testimony into evidence and the officer's testimony regarding the contents of the audio recording did not constitute a narrative. *See* NRS 50.025; NRS 52.065; *Mclellan*, 124 Nev. at 267, 182 P.3d at 109; *Emil v. State*, 105 Nev. 858, 862, 784 P.2d 956, 958 (1989).

Having concluded Ruetten is not entitled to relief, we

ORDER the second corrected judgment of conviction AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Lynne K. Simons, District Judge
Law Office of Thomas L. Qualls, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk