IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN PARKS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36928

FILED

MAR 27 2001

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery with the use of a deadly weapon (count I), battery of a police officer (count II), resisting a public officer (count III), and trafficking in a controlled substance (count IV). The district court sentenced appellant to a term of 24 to 96 months for count I, a concurrent term of one year for count II, a concurrent term of 12 to 36 months for count III, and a term of 24 to 60 months for count IV to run consecutively to count I, along with a $1,000 fine.

Appellant first contends that it was a violation of his constitutional rights for the State to characterize in its closing argument appellant's theory of police harassment as racially motivated when no claim was made by the defense that the harassment was racially motivated. Initially, we note that appellant failed to object during the State's closing argument. As a general rule, the failure to object or raise an issue in the district court precludes review by this court.[1] Nonetheless, this court may address plain error.[2]

[1]Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991).

[2]See NRS 178.602; Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996).

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For an issue to be considered under the plain error rule, appellant must demonstrate error that is plain or readily apparent from the record and that affected appellant's substantial rights.[3] An error that affects the substantial rights of a defendant is one that "affected the outcome of the district court proceedings."[4]

Generally, the prosecution's injection of race into the closing arguments of a trial is improper if such remarks promote stereotyping, appeal to racial passion or emotion, or invite the jury to place racial background into the balance.[5] Where the prosecution associates a defendant's ethnicity with illegal activity the defendant's federal due process and equal protection rights are violated.[6] Such improper comments would constitute plain error.[7]

Here, the prosecution's closing argument comments consisted of (1) stating that "no one is condoning any type of racial harassment," (2) comparing appellant's defense of police brutality and harassment to the Rodney King incident, and (3) arguing that detention by the police in a traffic stop is "not always for racial reasons." The State argues that the prosecutor's statements did not invite racial prejudice or ask that appellant be judged on his race. The State further argues that the prosecutor did not use race as a method of

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[3]See NRS 178.602; United States v. Olano, 507 U.S. 725, 733-34 (1993); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995); Libby, 109 Nev. at 911, 859 P.2d at 1054.

[4]Olano, 507 U.S. at 734; see also Libby, 109 Nev. at 911, 859 P.2d at 1054.

[5]See McClesky v. Kemp, 481 U.S. 279 (1987); Bains v. Cambra, 204 F.3d 964 (9th Cir.) cert. denied, 121 S. Ct. 627 (2000).

[6]McClesky, 481 U.S. at 309 n.30; Bains, 204 F.3d at 974.

[7]See United States v. Doe, 903 F.2d 16, 26 (D.C. Cir. 1990).

inflaming the jury, but that the comments were a way of mitigating appellant's theory of police harassment. We agree.

The State's comments did not invite the jury to infer that, because of appellant's race, he was more likely to have committed the charged crimes, or more likely to lie about being harassed by the police. The State's comments were a rebuttal to the inference of racial harassment that could be made based on the defense's theory of police harassment. "During closing argument, the prosecution can argue inferences from the evidence and offer conclusions on contested issues."[8] Thus, appellant has not demonstrated plain error. We conclude that appellant's claim is without merit.

Second, appellant contends that the State withheld information, in violation of Brady v. Maryland,[9] that another witness's statement was taken at the scene of the incident and that another police officer was not called to testify, both of whom appellant alleges could have potentially corroborated his testimony.

Based upon our review of the record on appeal, we conclude that appellant's claim is without merit. Appellant was made aware of the existence of the witness at trial during the prosecution's case in chief through the testimony of another witness. Appellant has failed to show that either witness could have offered exculpatory evidence if called to testify. Moreover, the defense could have called the officer in its case in chief, and appellant failed to move for a continuance at trial in order to find and call the other witness to testify.

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[8]Jones v. State, 113 Nev. 454, 467, 937 P.2d 55. 63 (1997).

[9]373 U.S. 83 (1963).

Third, appellant contends that the district court erred by allowing testimony about prior bad acts of an uncharged co-defendant. Specifically, the district court allowed testimony from one of the arresting officers that the driver of the car in which appellant was riding at the time of appellant's arrest had recently been arrested by the officer for carrying a concealed weapon.[10]

Appellant primarily relies on the recent decision by this court in Flores v. State.[11] In Flores, this court held that the district court abused its discretion by admitting evidence in a severed trial that the defendant's accomplice was convicted of murder in an unrelated case in order to corroborate the identification of the defendant.[12] This court explained in Flores that the unfair prejudice that resulted far outweighed the probative value of the evidence.[13]

Here, the district court explained, outside the jury's presence, that the testimony would be admitted because the State was entitled to show that there were reasons other than police brutality or harassment for appellant's treatment by the police officers. We agree.

This court has held that "[i]t is within the trial court's sound discretion whether prior bad acts are admissible, and such decisions will not be disturbed on appeal

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[10]In addition to the testimony about the driver's gun possession, appellant points out that the officer, apparently inadvertently, also testified that the driver was arrested for possession of drugs with intent to sell. The district court had previously ruled that testimony about the driver's drug possession would be excluded. The district judge immediately admonished the jury to disregard the officer's statement about the driver's drug possession.

[11]116 Nev. ___, 5 P.3d 1066 (2000).

[12]Id. at ___, 5 P.3d at 1068. In Flores, ballistics tests connected the gun used in the unrelated murder to the murder for which the defendant was being tried.

[13]Id.

unless manifestly wrong."[14] Appellant has failed to show that the district court's decision in this case was manifestly wrong or unduly prejudicial. We conclude that appellant's claim is without merit.[15]

Finally, appellant contends that the district court erred by overruling three specific defense objections and by sustaining two specific objections of the State. First, appellant argues that the district court abused its discretion by sustaining the State's objections to defense counsel's opening statements (1) that related what a State witness would testify to, and (2) that described the series of events which lead to appellant's arrest.

Appellant argues that because there was sufficient evidence to support a jury instruction for the defense's theory, there was sufficient evidence to support defense counsel's assertions during her opening statement. The State argues that the district court was merely preventing the defense from engaging in argument during its opening statement. Based on our review of the record on appeal, we conclude that the district court did not abuse its discretion. It appears from the record that the court prevented defense counsel from phrasing her statements in the form of argument. After the objection, defense counsel rephrased her statements to articulate instead what the evidence would show. Moreover,

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[14]Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991); see also Bolin v. State, 114 Nev. 503, 517-18, 960 P.2d 784, 793 (1998); Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

[15]As to appellant's complaint about the officer's testimony that the driver was also arrested for drug possession, the judge gave a curative instruction to the jury. Thus, any error was cured by the admonition to the jury. Cf Byford v. State, 116 Nev. 215, 226, 994 P.2d 700, 708 (2000), cert. denied, 121 S. Ct. 576 (2000); Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 281-82 (1992).

appellant has not provided any authority to support this assertion.[16]

Next, appellant argues that the district court abused its discretion by overruling three of the defense's objections. First, defense counsel objected to testimony from an arresting officer that, based on his training and experience, the twenty-five rocks of cocaine found in appellant's shoe were packaged for sale. Appellant argues that because appellant was charged only with possession and not sale, the testimony was irrelevant. "The decision to admit or exclude evidence, after balancing the prejudicial effect against the probative value, is within the discretion of the trial judge, and such a decision will not be overturned absent manifest error."[17] We conclude that it was not manifest error to permit the officer to testify that the rock cocaine was packaged for sale. The testimony was relevant to show appellant's motive to resist arrest. Moreover, any error was harmless.[18]

Second, defense counsel objected to jury instruction number 16. Appellant argues that the instruction included definitions of crimes that the appellant was not accused of committing. The State argues that the instruction was properly included to mitigate the defense's theory of police harassment by showing that the car in which appellant was riding was stopped by the police for a legitimate reason. We agree. The State presented evidence that the car was stopped

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[16]See Jones, 113 Nev. at 468, 937 P.2d at 64 (holding that a contention unsupported by specific argument or authority should be summarily rejected on appeal).

[17]Id. at 466-67, 937 P.2d at 63.

[18]See Manley v. State, 115 Nev. 114, 122-23, 979 P.2d 703, 708-09 (1999); Jones, 113 Nev. at 467-68, 937 P.2d at 65; Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991).

by police for a legitimate traffic violation, and thus was entitled to have an instruction on that point to rebut the defense's theory. Moreover, any error in allowing instruction number 16 is subject to harmless error analysis, and was harmless.[19] Furthermore, appellant provides no authority to support this contention.[20]

Third, defense counsel objected to testimony by a State witness that while officers were attempting to apprehend appellant, appellant "looked like he was going to throw" a stroller at arresting officers. Appellant argues that the testimony was impermissible speculation, not subject to harmless error review because it went to the heart of appellant's defense. The State argues that the witness was merely testifying as to what he observed.

We conclude that it was not manifest error for the district court to overrule appellant's objection and allow the witness's testimony. The witness's testimony was in the form of a lay opinion which is admissible if the testimony is (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.[21] Our review of the record on appeal reveals that the witness was testifying as to what he observed the appellant and police doing. The witness's opining that it "looked like [appellant] was going to throw [the stroller]," was essential to help the jury understand a material fact in issue. Accordingly, we conclude that the

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[19]See Collman v. State, 116 Nev. ___, ___, 7 P.3d 426, 447-49 (2000), petition for cert. filed, No. 00-8510 (U.S. January 22, 2001).

[20]See Jones, 113 Nev. at 468, 937 P.2d at 64.

[21]NRS 50.265.

district court did not abuse its discretion by admitting the witness's statement at trial.[22]

Having considered appellant's contentions and concluded they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. Jack Lehman, District Judge
Attorney General
Clark County District Attorney
Gloria M. Navarro
Clark County Clerk

[22]See id.; Petrocelli, 101 Nev. at 52, 692 P.2d at 508 (decision to admit evidence is within the sound discretion of the district court, and this court will not disturb that decision unless it is manifestly wrong); Milender v. Marcum, 110 Nev. 972, 977, 879 P.2d 748, 751 (1994) ("[I]t is well established that this court may affirm rulings of the district court on grounds different from those relied upon by the district court.").