IN THE SUPREME COURT OF THE STATE OF NEVADA

STANLEY KONS CHOMER, JEFFREY ARTHUR HOWCHIN AND BRUCE KALOSHI,
Appellants,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37469

FILED

OCT 08 2002

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction of conspiracy to cheat at gambling in violation of NRS 465.083 and NRS 465.088(2). On October 17 and 18, 1998, appellants Stanley Chomer, Jeffrey Howchin and Bruce Kaloshi played high-stakes blackjack at the Silver Legacy Hotel and Casino in Reno. After several hours of uneventful play, appellants won approximately $122,000 within a one-half hour time frame. The Silver Legacy refused to redeem appellants' gaming tokens, asserting that the appellants had cheated, and referred the matter to the Nevada Gaming Control Board.

Barry Fisher, an agent from the Control Board, undertook an extensive investigation. After viewing surveillance tapes from the Silver Legacy as well as other casinos, Fisher determined that appellants had cheated by bending the corners of certain playing cards, aces. Fisher concluded that, in addition to the incident at the Silver Legacy, appellants had previously cheated in the same manner at other establishments; the

Peppermill in Reno, on August 31, 1997,[1] and at the Sundowner in Reno, on January 9, 1998.

Based upon Fisher's investigation, the Control Board determined that appellants bent the corners of aces and, when "cutting" the deck, would position the ace so that it would be dealt to one of the players. Normally, it would be necessary to bend corners at both ends to ensure detection of the marked card by the player. The Control Board determined that the appellants played only with dealers who always turned and shuffled the cards in the same manner. In this way, the appellants could, by facing the bent corner in a certain direction when returning the ace, ensure that the bent corner would always face the player cutting the cards.

A grand jury returned a ten-count indictment charging the appellants with multiple counts of cheating, burglary and conspiracy. After the district court granted a writ of habeas corpus dismissing two burglary counts in the indictment, the State proceeded on the remaining counts.

At trial, the State presented testimony from numerous casino employees, including the blackjack dealers involved. Most of the dealers simply testified that the appellants played and that the tables were generally crowded.

One Silver Legacy dealer, Sivaporn Hurley, testified that she observed a bent ace during appellants' play. She testified that, upon noticing the bent card, she straightened it. On cross-examination, Hurley

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[1]Kaloshi did not take part in the Peppermill incident, only Chomer and Howchin.

testified that it is not unusual for cards to become bent during normal play.

Ismael Calvo, a shift manager at the Peppermill, testified that he noticed on approximately two occasions that appellants placed large bets on the first hand after shuffling and received blackjacks. He ordered a change of decks, and noticed a bent ace of spades in the retired deck. He turned the deck over to Peppermill's security, with no action taken. He did, however, watch a surveillance video and noticed that the ace of spades was frequently dealt to one of the appellants on the first hand after a shuffle.

Dennis Chute, a shift boss at the Sundowner Casino, testified to an occasion where appellants were the only players at a table. After the conclusion of play, Chute noticed a bent ace in the deck but took no action.

Jennifer Sitts, a Control Board agent, testified to her search of a suitcase left in Kaloshi's hotel room, and that she found a deck of cards with the nine of clubs "bent like you would dog-ear a page."

The State called William Zender as an expert witness. Zender contrasted the manner in which card counters play to the manner in which cheaters use marked cards. The appellants' manner of play was similar to Zender's description of cheaters.

The State's case depended largely on the testimony of agent Fisher. Fisher explained how he conducted investigations, and that he would arrange for an arrest if he believed he had identified an act constituting cheating. Appellants' counsel objected that Fisher was effectively testifying that he believed the appellants were guilty. The district court overruled this objection.

Fisher prepared numerous charts describing portions of the appellants' play, which the district court admitted as summaries of voluminous evidence. A critical column in Fisher's charts was titled "Did player position ace?" By "position," Fisher was attempting to make some reference to turning the card so that it would it would face the player when the cards were next cut. Yet, it became evident during Fisher's testimony that he did not have a specific definition of the term and did not utilize a consistent standard in determining whether the appellants "positioned" a card.

The charts also contained columns titled "Amounts Bet (Estimates)," or other words to that effect. Because it was difficult to determine the amounts bet from the tapes, Fisher estimated the bets to within one or two chips. On cross-examination, Fisher admitted that many of his estimates exceeded the table limit by as much as $1,000. The appellants often played with $500 chips at tables with game limits of $3,000.

In addition to discussing the charts, Fisher also testified concerning the condition of the playing cards from the appellants' game at the Silver Legacy. The district court excluded the cards as evidence, because the State could not establish a chain of custody. Specifically, once the shift bosses took the cards to the security station, the cards were spread out on a table where various unidentified people handled them over the next two days. The State conceded that many unknown people handled the cards before Fisher received them.

The defense presented no evidence. The jury found appellants guilty of one count of conspiracy to cheat at gambling and acquitted them on the remaining counts. Appellants appeal.

We conclude that substantial evidence supports affirming the conviction of appellants.

Summary of voluminous evidence

The district court admitted several charts prepared by Fisher, which described the surveillance tapes, as summaries of voluminous evidence.

The district court has considerable discretion in admitting or excluding evidence.[2] NRS 52.275 provides:

> 1. The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation.
>
> 2. The originals shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that the originals be produced in court.

While NRS 52.275 allows admission of summaries of voluminous writings, recordings or photographs, it does not define or restrict the term "summary." Yet, extensive authority exists interpreting Rule 1006 of the Federal Rules of Evidence, on which NRS 52.275 is based. It is widely recognized that an F.R.E. 1006 summary must accurately reflect the contents of the original voluminous evidence without including extraneous

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[2]See Matter of Parental Rights as to N.J., 116 Nev. 790, 804, 8 P.3d 126, 135 (2000); Collins v. Murphy, 113 Nev. 1380, 1383, 951 P.2d 598, 600 (1997).

information, such as inferences drawn by the person preparing the summary.[3]

The State, while acknowledging that the charts contained the expert's conclusions, argues for admissibility on the ground that the tapes support those conclusions. We are not persuaded. First, the surveillance tapes were equivocal and the charts did not simply reflect what was depicted on the videotapes. Secondly, although an expert may show the jury pedagogical charts explaining his opinions, these charts are inadmissible as evidence, and the court must instruct the jury that the charts are merely illustrations and not to be considered as evidence.[4] Here, in contrast, the district court admitted the conclusions in Fisher's charts as evidence supporting those same conclusions. Accordingly, the district court erred in admitting Fisher's charts into evidence.

We conclude that this error is harmless and does not require reversal. An error is harmless when it is clear beyond a reasonable doubt that the jury would have found the defendant guilty without the error.[5] Fisher, testifying as an expert witness, could have displayed these charts

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[3]See U.S. v. Drougas, 748 F.2d 8, 25 (1st Cir. 1984); see also 6 Jack B. Weinstein et al., Weinstein's Federal Evidence § 1006.07[2] (Joseph M. McLaughlin, ed., 2d ed. 2002) (summaries are inadmissible if they contain "facts or assumptions drawn from the preparer's knowledge or experience").

[4]See U.S. v. Bray, 139 F.3d 1104, 1112 (6th Cir. 1998) (citing 1 Edward J. Devitt et al., Federal Jury Practice And Instructions § 14.02 (4th ed. 1992); 1 Leonard B. Sand et al., Modern Federal Jury Instructions (Criminal) ¶ 5.05, p. 5-34 (1997)); U.S. v. Smyth, 556 F.2d 1179, 1184 (5th Cir. 1977).

[5]Wegner v. State, 116 Nev. 1149, 1155, 14 P.3d 25, 30 (2000).

to the jury to help explain his testimony. Although these charts should not have been presented to the jury as evidence, the jury would still have viewed their contents.

Opinion testimony concerning guilt

As noted, Fisher also gave testimony concerning the investigatory process. Over objection, Fisher explained that, if he determined no criminal conduct had occurred, he would submit a report to his agency and the case would be closed. Alternatively, if Fisher determined that a crime had occurred, he would seek an arrest warrant. Appellants contend that this was the equivalent of stating an opinion that the appellants were guilty. Although Fisher gave no express opinion, the inference is clear that, because the case was not closed and the appellants were arrested, Fisher had determined that appellants committed a violation of Nevada's gaming laws.

A witness may not offer an opinion that a defendant is guilty.[6] This rule has particular importance where, as here, the witness offers credentials as a veteran law enforcement officer.[7] The State responds that the appellants opened the door to this testimony by suggesting in their opening statement that the Silver Legacy caused the prosecution in order to avoid paying the appellants their winnings.

When a defendant introduces inadmissible evidence, the district court has discretion to permit the prosecution to admit related evidence to correct any false statements.[8] Here, the probative value of this

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[6]See Winiarz v. State, 104 Nev. 43, 50, 752 P.2d 761, 766 (1988).

[7]See Cordova v. State, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000).

[8]McKenna v. State, 114 Nev. 1044, 1056, 968 P.2d 739, 747 (1998).

aspect of Fisher's testimony was to demonstrate that a gaming establishment could not itself administratively commence such a criminal prosecution. Yet, the prosecutor went further, inquiring about the investigatory process, and inquired as to what Fisher would do upon determining that a crime had occurred. The district court erred in allowing this line of questioning.

We conclude, however, that any error in this connection was limited in scope. Fisher's testimony merely established that he made a determination that the appellants had committed some crime. Naturally, any criminal prosecution involves a strong likelihood that someone in an official capacity has determined that the person charged is guilty of criminal misconduct. Fisher did not discuss any specific crimes, or state the basis of his opinion. We conclude that this error is harmless and does not require reversal.

Testimony describing inadmissible real evidence

The State sought to introduce into evidence several decks of Silver Legacy cards containing bent aces. Fisher retrieved these cards from the Silver Legacy two days after the conclusion of appellants' play. Prior to Fisher's acquisition of the playing cards, a casino employee placed them on a table, bagged them, and numerous unnamed persons handled them. The State, therefore, could not establish that the cards offered into evidence were in the same condition when impounded as when they were last used. Accordingly, the district court excluded the decks for lack of foundation, due to failure to properly establish their chain of custody.

Nevertheless, the district court allowed Fisher to testify, over objection, to the physical appearance of the decks. The appellants argue that this was an abuse of discretion. Proposed evidence is not admissible

unless logically and legally relevant.[9] A party seeking to introduce evidence must lay a foundation establishing its relevance.[10] A chain of custody is necessary in order to lay a foundation.[11] Fisher did not see the cards until after the chain of custody had been broken. Accordingly, Fisher's testimony described excluded evidence and the district court abused its discretion in admitting it.

The State presented testimony from witnesses who saw bent aces in various decks used in the games in question. Thus, Fisher's testimony was partially cumulative of other evidence. Yet, the properly admitted evidence indicated only a single bent ace at the Silver Legacy, while Fisher testified to numerous bent aces in several of the retrieved decks. Therefore, this evidence caused a degree of unfair prejudice. We conclude that this error is harmless and does not require reversal.

Substantial evidence

Although all three of appellants' alleged errors are harmless,[12] we must determine whether there was substantial evidence to support

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[9]See Matter of Estate of Garrett, 111 Nev. 1397, 1398-99, 906 P.2d 254, 255 (1995) (error to admit rebuttal evidence where risk of unfair prejudice heavily outweighed probative value).

[10]See State v. Smith, 941 P.2d 725, 726 (Wash. Ct. App. 1997).

[11]See Hughes v. State, 116 Nev. 975, 981, 12 P.3d 948, 952 (2000).

[12]The appellants allege other errors, but we find no merit in those arguments. William Zender's expert testimony explained how the appellants' play was itself an act of cheating. This was not testimony that the appellants matched a criminal profile. Additionally, the indictment was not unconstitutionally vague. The appellants could reasonably understand that their alleged conduct of marking aces to influence the odds of the game was proscribed. See U.S. v. Harriss, 347 U.S. 612, 617

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their conviction.[13] This court will review a sufficiency of the evidence claim by looking at the facts in "the light most favorable to the State."[14] This court must also consider "whether there is substantial evidence in the record to support the jury's verdict, and whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[15] The State charged the appellants with multiple felony counts, and the appellants were convicted of conspiracy to cheat at gambling, a category B felony.

The totality of testimonial and documentary evidence submitted at trial supports the jury's finding of guilt as to the conspiracy charge. The fact that the appellants played together in a similar manner on multiple occasions is sufficient circumstantial evidence to prove a conspiracy.[16] In addition, appellants are professional gamblers who use false names and alter their appearances to gain entry into casinos including Reno's Silver Legacy, Sundowner, and Peppermill. In this case, they dominated a table with a dealer who only played with a single deck

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(1954). We will also not consider the appellants' hearsay argument first raised in their reply brief. See NRAP 28(c).

[13]See Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000).

[14]Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) (citing Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)).

[15]Id. at 435, 24 P.3d at 766 (citing Koza v. State, 100 Nev. 245, 250-51, 681 P.2d 44, 47 (1984) (citing Jackson v. Virginia, 443 U.S. 307 (1979)).

[16]See McNair v. State, 108 Nev. 53, 61, 825 P.2d 571, 576 (1992) ("Circumstantial evidence alone may sustain a conviction.").

and who showed the cards to be cut in a particular way. Multiple bent aces appeared in the deck.

Barry Fisher, the agent assigned to the case from the Control Board, introduced summaries, charts, and other expert opinion detailing the methods and means used by appellants to cheat. Ismael Calvo, a shift manager at the Peppermill testified to noticing on two occasions, appellants placing large bets on the first hand after shuffling and receiving blackjacks. Upon ordering a change of decks, Mr. Calvo noticed a bent ace of spades in the retired deck. A surveillance tape later confirmed that the ace of spades was frequently dealt to one of the appellants on the first hand after a shuffle.

We conclude that there is substantial evidence to support the conviction of appellants. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C. J.
Maupin

_____, J.
Shearing

_____, J.
Becker

cc: Hon. Steven R. Kosach, District Judge
Ohlson & Springgate
JoNell Thomas
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Washoe County District Attorney
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