IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY CAMARGO,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37791

FILED

AUG 15 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 guilty plea, of robbery with the use of a deadly weapon. The district court sentenced appellant to two consecutive prison terms of 72 to 207 months.

Appellant first contends that the district court erred in granting the State's motion to reconsider joinder of appellant's two burglary trials because there was insufficient evidence of a common scheme or plan to justify joinder pursuant to NRS 173.115.[1] We conclude that appellant's contention lacks merit.

It is well recognized that "joinder decisions are within the sound discretion of the trial court and will not be reversed absent an abuse of discretion."[2] In Tillema v. State,[3] we held that the district court did not abuse its discretion in joining cases arising from two vehicle burglaries because they were part of a common scheme in light

[1]The State had previously filed a motion to join three robbery cases pending against appellant, which was denied by the district court. After the first robbery trial, however, the district court reconsidered its ruling and joined the remaining two robbery cases.

[2]Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 563 (1990) (citing Lovell v. State, 92 Nev. 128, 132, 546 P.2d 1301, 1303 (1976)).

[3]112 Nev. 266, 268-69, 914 P.2d 605, 606-07 (1996).

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of the temporal proximity and the similarities between the crimes. Namely, in Tillema, the factual similarities upon which we relied included that both burglaries involved vehicles parked in casino parking lots and occurred seventeen days apart.[4]

As in Tillema, we conclude that the district court did not abuse its discretion in finding a common scheme or plan in the two robberies charged because sufficient similarities existed between them. First, the robberies occurred approximately one month apart--on August 14, 1999, and on September 16, 1999. Second, both robberies occurred at a convenience store sometime during or near graveyard shift. Third, both robbers employed a similar method in that they entered the store, picked up some candy or gum, went to the counter, and then pointed the gun at the cashier's face and demanded money. Given the temporal proximity and the similar circumstance of the robberies, the district court did not abuse its discretion in concluding that they were part of a common scheme or plan, and that therefore joinder was appropriate.

Appellant next contends that the district court abused its discretion in allowing the State's fingerprint expert witness to testify because the witness's report was untimely and because the late disclosure of the testimony prejudiced appellant. We disagree.

It is undisputed that the State failed to disclose its fingerprint expert within the twenty-one day notice period provided by NRS 174.234(2). The State did not notify

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[4]See id. at 268, 914 P.2d at 606-07; see also Graves v. State, 112 Nev. 118, 128, 912 P.2d 234, 240 (1996) (affirming decision to joint offenses where defendant "systematically walked from casino to casino and acted similarly suspicious at each casino").

appellant of its fingerprint expert until January 16, 2001, and did not provide appellant with the expert's report until January 18, 2001--three days before the January 22 trial.

At a hearing outside the presence of the jury, the State explained the reason for its late disclosure. It pointed out that on January 10, 2001, the district court granted the State's joinder motion. In so doing, the trial in which the fingerprint expert was scheduled to testify was moved up in time from February 9, 2001 to January 22, 2001, and thus the deadline for disclosure was moved from up January 19 to January 1, 2001.

The State explained that as soon as the joinder motion was granted, it attempted to expedite the disclosure of its expert's testimony. On January 11, 2001, one day after the joinder motion was granted, the State sent "everything"[5] to word processing, and then as soon as the fingerprint expert returned from vacation on January 16, 2001, contacted him about the report. On January 18, the expert faxed his report to the State. The report was then hand delivered to appellant. In explaining the delay, the State noted that, a year prior to trial, it had provided appellant with evidence that fingerprints were taken at the scene, and therefore counsel should have anticipated that the State would have the fingerprints examined.

After taking the matter under advisement, the district court found that the State's late disclosure was neither intentional nor made in bad faith, and that its notification would have been timely had the trials not been joined. The district court then advised appellant that it

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[5]It is unclear from the record before us what "everything" consisted of. However, we presume it was evidence or witness lists, which needed to be disclosed.

would prohibit the expert from testifying in the State's case-in-chief if the defense could demonstrate prejudice by the late disclosure, such as impairing appellant's ability to cross-examine the State's expert.

The court continued the trial to the next day, allowing appellant time to investigate whether he was prejudiced by the late disclosure. Further, the district court allowed appellant to interview the State's fingerprint expert, to examine the expert's exhibits, and even suggested that appellant consider hiring his own fingerprint expert. The district court eventually ruled that the fingerprint expert could testify in the State's case-in-chief.

NRS 174.295(2) sets forth the remedy for violation of a discovery order. Specifically, where a discovery order has been violated the district court may: (1) permit discovery of undisclosed material; (2) grant a continuance; (3) prohibit introduction of the untimely or undisclosed evidence; or (4) enter any order that "it deems just under the circumstances."[6] However, where "the State's non-compliance with a discovery order is inadvertent and the court takes appropriate action to protect the defendant against prejudice, there is no error justifying dismissal of the case."[7]

Here, we conclude that the district court did not abuse its discretion in finding that the State's untimely disclosure of its fingerprint expert was unintentional in light of the State's reasonable explanation for its delay. We further conclude that the district court took adequate measures to ensure that appellant was not prejudiced in

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[6]NRS 174.295(2).

[7]State v. Tapia, 108 Nev. 494, 497, 835 P.2d 22, 24 (1992) (construing NRS 174.295); see also Tinch v. State, 113 Nev. 1170, 1175, 946 P.2d 1061, 1064 (1997).

allowing him time to interview the expert, to examine the report and attached exhibits, and to consider retaining his own fingerprint expert. Accordingly, the district court did not abuse its discretion in allowing the State's fingerprint expert to testify.

Finally, appellant contends that his trial counsel was ineffective in failing to move to suppress evidence obtained as a result of an allegedly illegal seizure. We decline to address this contention because it raises factual issues more appropriately addressed by the district court in a post-conviction proceeding.[8]

Having considered appellant's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Young, J.

Leavitt, J.

cc: Hon. James W. Hardesty, District Judge
Attorney General
Washoe County District Attorney
Richard F. Cornell
John A. Howell
Washoe County Clerk

[8]Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

BECKER, J., concurring:

I concur with the conclusion reached by my colleagues that the district court did not abuse its discretion in granting the State's motion to reconsider joinder of appellant's two burglary trials. I conclude that the joinder of the two burglary trials was within the district court's discretion because the evidence presented at one burglary trial would have been cross-admissible at the second burglary trial pursuant to NRS 48.045(2).[1]

I write separately, however, to express my disapproval of the definition of "common scheme" used in Tillema. Tillema broadly defines evidence of a "common scheme" for purposes of joinder of trials to include modus operandi evidence.[2] I do not believe that common scheme evidence and modus operandi evidence are one and the same. Modus operandi evidence refers to evidence of similarities between crimes that are otherwise unrelated.[3] In contrast, common scheme evidence, by definition, refers to evidence of crimes that have an integral relationship arising from a single plan.[4]

I would therefore modify Tillema to limit the definition of common scheme evidence to include only evidence of crimes that are integrally connected. For example, where a defendant steals a car so that he can rob a bank, the two

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[1]See Tillema v. State, 112 Nev. 266, 268-69, 914 P.2d 605, 606-07 (1996); Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989).

[2]112 Nev. at 268-69, 914 P.2d at 606-07.

[3]Modus operandi is a term used to refer to a "pattern of criminal behavior so distinct that separate crimes or wrongful conduct are recognized as work of [the] same person." Black's Law Dictionary 1004 (6th ed. 1990).

[4]See NRS 173.115(2) (requiring a connection between two crimes).

crimes are part of a common scheme because one crime was committed for the purpose of aiding the defendant in committing a second crime. In my view, joinder is proper based on evidence of common scheme only if the district court finds an integral relationship, meaning that the crimes are essentially links in a single, distinct chain.

Here, there is insufficient evidence of a common scheme because there is no evidence of an integral link or connection between the first and second robbery. Although the majority points out the evidence of the similarities between the two, unrelated robberies, this is evidence of modus operandi--not a common scheme. Accordingly, I cannot agree with the majority that there is evidence in the record of a common scheme sufficient to justify joinder.

Despite my conclusion, because the evidence presented at one burglary trial would have been cross-admissible at the second burglary trial as evidence of appellant's identity, I concur with my colleagues that the district court did not abuse its discretion in joining appellant's two burglary cases in a single trial. Accordingly, the judgment of conviction should be affirmed.

Becker, J.

Becker