

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM FRENCH A/K/A MICHAEL L.
TIPPENS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38249

FILED

SEP 10 2002

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction entered pursuant to a jury verdict on one count of conspiracy to commit robbery and two counts of robbery with the use of a deadly weapon.

The district court sentenced appellant William French aka Michael L. Tippens to a term of four years in prison for conspiracy to commit robbery (count I). The district court further sentenced French to terms of ten years in prison for each of the two counts of robbery with the use of a deadly weapon, together with two equal and consecutive terms for the deadly weapon enhancement on each count (count II and count III). The district court ordered the sentences on count I and count II to run concurrently and the sentence on count III to run consecutively to the sentences on counts I and II.

French first contends that prosecutorial misconduct during the State's rebuttal closing argument warrants reversal of his convictions. Specifically, French argues that the prosecutor improperly commented on his post-arrest, post-Miranda¹ silence by telling the jury that French did not cooperate with authorities and hindered the investigation in this case. French also contends that the prosecutor improperly injected her personal

¹Miranda v. Arizona, 384 U.S. 436 (1966).

beliefs and opinions into her rebuttal closing argument by “grading” the witnesses to influence their credibility with the jury.

“[P]rosecutorial comment on a defendant’s post-arrest, post-Miranda silence for substantive or impeachment purposes is constitutionally prohibited as it violates a defendant’s due process right to a fair trial.”² However, French did not object during rebuttal closing arguments to the prosecutor’s comments that French did not cooperate with police or that he hindered the police investigation, and therefore, he has waived this issue on appeal.³ Further, even if the prosecutor’s remarks in this case were error, reversal is not mandated here because French has failed to show that the remarks made by the prosecutor were patently prejudicial.⁴

With regard to the prosecutor’s comments on the witnesses’ credibility, this court has stated that “prosecutors must not inject their personal beliefs and opinions into their arguments to the jury.”⁵ Such injection of personal beliefs by a prosecutor “invites undue jury reliance on the conclusion personally endorsed by the prosecuting attorney.”⁶ However, a prosecutor must have reasonable latitude in presenting closing

²Aesoph v. State, 102 Nev. 316, 321, 721 P.2d 379, 382 (1986).

³See Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (in general, the defendant must raise timely objections and seek corrective instructions in order to preserve the issue of prosecutorial misconduct for appeal).

⁴See id. (if defendant failed to object below, this court reviews alleged prosecutorial misconduct only if it is plain error and the defendant must show that the prosecutor’s remarks were patently prejudicial).

⁵Aesoph, 102 Nev. at 322, 721 P.2d at 383.

⁶Id.

arguments, and can make reasonable inferences based on the evidence.⁷ We conclude that the prosecutor's comments were made in the context of permissible argument about the evidence adduced in this case and the strengths and weaknesses of the witnesses' testimony. Further, the district court immediately instructed the jury that counsels' arguments were not evidence following French's objection. Presumably, the jury followed the district court's admonition and was discouraged from relying upon the prosecutor's expertise and authority in reaching a verdict. Accordingly, we conclude that French is not entitled to reversal of his convictions based on this contention.

French next contends that the district court erred by permitting investigator Alexia Conger to testify as a rebuttal witness for the State.

This court has long recognized that the district court has broad discretion in allowing rebuttal evidence and that rebuttal evidence "need not completely and entirely contradict the evidence of the defense, if it has a tendency to contradict or disprove it."⁸ Moreover, the decision to admit or exclude evidence in general is within the discretion of the district court, and such a decision will not be disturbed on appeal absent manifest error.⁹

The record reveals that French failed to object to the admission of Conger's testimony on the basis that it constituted improper

⁷See U.S. v. Jackson, 84 F.3d 1154, 1158 (9th Cir. 1996).

⁸State v. McNeil, 53 Nev. 428, 442, 4 P.2d 889, 892 (1931).

⁹Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

rebuttal evidence and thus, French has waived this issue on appeal.¹⁰ Moreover, Conger's testimony rebutted the defense allegations of bribery and contradicted and disproved French's alibi by highlighting inconsistencies between witnesses' previous statements to Conger and their trial testimony. Accordingly, we conclude that the district court did not abuse its discretion by permitting Conger to testify as a rebuttal witness.

French also contends that the district court erred by denying his motion to dismiss based on the State's discovery violations. French argues that his due process rights were violated by the State's failure to provide him with written notice of witnesses the State intended to call in its case-in-chief five judicial days before trial.

The State must generally disclose the names and addresses of all witnesses and must endorse known witnesses at the time of filing of the information.¹¹ However, Nevada law clearly allows witnesses to be endorsed even after trial has begun so long as the defendant is not prejudiced by the omission.¹² Moreover, although NRS 174.233(5) allows the district court to exclude evidence offered by the State in rebuttal to the defendant's alibi evidence if the State fails to file and serve on the defendant the list of witnesses required by the statute, "[f]or good cause shown the court may waive the requirements of this section."¹³

¹⁰See Clark v. State, 89 Nev. 392, 393, 513 P.2d 1224, 1224-25 (1973) (as a general rule, failure to object precludes appellate review).

¹¹Owens v. State, 96 Nev. 880, 882, 620 P.2d 1236, 1238 (1980); see also NRS 173.045; NRS 174.234.

¹²Jones v. State, 113 Nev. 454, 473, 937 P.2d 55, 67 (1997).

¹³NRS 174.233(5).

Ultimately, the district court has broad discretion to fashion a remedy when, during the course of the proceedings, a party is made aware that another party has failed to comply fully with a discovery order.¹⁴ This court will affirm the district court's decision "in such circumstances unless there is a showing that the State acted in bad faith or that the non-disclosure resulted in substantial prejudice to the defendant."¹⁵

The record reveals that the State did fail to endorse at least two witnesses until after French's trial began. However, the record further reveals that French was not prejudiced by the State's untimely endorsement of the witnesses because they were known to the defense and French had an opportunity to prepare for their cross-examination. Accordingly, we conclude that the district court did not abuse its discretion by denying French's motion to dismiss.

Finally, French contends that he is entitled to a new trial because the victim's one-on-one identification of French was highly suggestive, prejudicial, and tainted the victim's in-court identification of French as the person who robbed him.

The test for determining whether a pretrial identification procedure was unduly suggestive and unreliable based on the totality of the circumstances is whether the confrontation conducted was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was deprived of due process of law.¹⁶ Specifically, a two-fold inquiry is necessary: "(1) whether the procedure is

¹⁴Jones, 113 Nev. at 471, 937 P.2d at 66.

¹⁵Id.

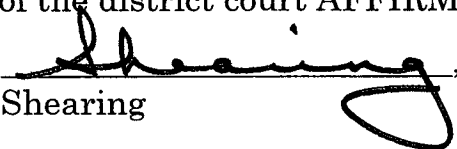
¹⁶Bolin v. State, 114 Nev. 503, 522, 960 P.2d 784, 796 (1998).

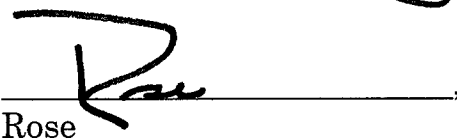
unnecessarily suggestive and (2) if so, whether, under all the circumstances, the identification is reliable despite an unnecessarily suggestive identification procedure.”¹⁷

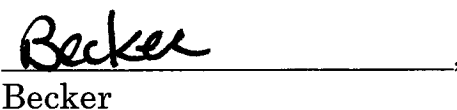
French failed to object at trial to the district court’s admission of evidence concerning the one-on-one identification. Thus, French has waived this issue on appeal.¹⁸ Further, the record reveals that the identification procedure employed by the police was not unnecessarily suggestive or unreliable. Accordingly, we conclude that the district court did not err by admitting evidence of Philippe’s one-on-one identification of French.

Having reviewed French’s contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

 _____, J.
Shearing

 _____, J.
Rose

 _____, J.
Becker

cc: Hon. Mark W. Gibbons, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk

¹⁷Id.

¹⁸See Clark, 89 Nev. at 393, 513 P.2d at 1225.