IN THE SUPREME COURT OF THE STATE OF NEVADA

STANLEY STEVEN HINZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38406

FILED

SEP 10 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, grand larceny, and conspiracy to commit burglary.

Appellant Stanley Hinz and co-defendant Randal Thomas allegedly burglarized Great Basin Beverage Company stealing approximately $23,000.00 in merchandise. Hinz and Thomas lived with Lisa Roberts in a home rented in her name. Several days after the burglary, Roberts and Thomas were stopped and questioned by police regarding the personal sale of cigarettes.

While police officers were requesting a search warrant for the vehicle and the Roberts' residence, Roberts contacted the officers and told them that the merchandise stolen from Great Basin was located in her home and that Hinz had committed the burglary. In a later conversation, Roberts would implicate Thomas in the burglary as well. Execution of the search warrant revealed stolen merchandise in both the residence and the vehicle.

Roberts testified at both the preliminary hearing and the trial. Hinz's theory of the case was that Roberts had sufficient motive to commit the burglary of Great Basin and that the burglary of Great Basin evinced a common plan or scheme as other crimes previously committed by

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Roberts. As a result, the jury heard testimony regarding some of Roberts' prior convictions. The jury returned guilty verdicts against Hinz and Thomas.

Hinz first argues that the district court erred in denying his Batson[1] challenge where the State used a peremptory challenge to remove the only Hispanic from the jury pool.

The State argues that the district court did not err in denying Hinz's Batson challenge where the Hispanic juror in question had previously stabbed a man and was sentenced to a year in custody. The State asserts that this was a proper race neutral explanation for the peremptory challenge.

Jury voir dire was conducted on June 5, 2001. The State exercised a peremptory challenge against Ignacio Palaez who sat on the alternate panel. Hinz challenged the State on the grounds that Palaez was the only juror of Hispanic descent. The district court concluded that Hinz had made a prima facie case for an advance challenge.

The State offered the following non-discriminatory reason for the challenge:

> **State**: [Palaez] stabbed a guy, Judge, and did a year in the Elko County Jail.
>
> . . . .
>
> **Court**: Mr. Lowe, how do we know that?
>
> **State**: Well, we pulled in our records, Judge, in the District Attorney's office.
>
> **Court**: Apparently, Mr. Pelaez – he assaulted somebody and ended up doing a year in jail?

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[1]Batson v. Kentucky, 476 U.S. 79 (1986).

> **State**: That's my understanding. I asked to check with the deputies in Jackpot last night and was informed that these are the facts. Spoke to Deputy Brad Hestor.
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> **Court**: All right. Burden shifts to Mr. Stermitz [counsel for Hinz].
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> **Mr. Stermitz**: It's our position that Mr. Lowe [h]as articulated a basis through Brad Hestor. I appreciate that. We will recognize now that he has a basis and for purposes of making a record we will continue our objection. We don't have anything to rebut that. But solely on the basis that nothing other than hearsay has been used to substantiate that.
>
> **Court**: Okay. The Court's not going to do a trial on whether Mr. Pelaez has been in jail or not. So as far as the Court is concerned the State has offered a non-discriminatory explanation. And, therefore which the Court accepts [sic].

Batson v. Kentucky, and its related progeny, set forth a three-step process for evaluating race-based objections to peremptory challenges: (1) the opponent of the peremptory challenge must make a prima facie showing of racial discrimination; (2) the burden of production then shifts to the proponent of the strike to come forward with a race-neutral explanation; and (3) if a race-neutral explanation is tendered, the trial court must decide whether the opponent of the strike has proved that the proffered race-neutral explanation is merely a pretext for purposeful racial discrimination.[2]

In the present case, Hinz satisfied the first step, as the challenge resulted in a jury without any Hispanic jurors. Regarding the

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[2]Doyle v. State, 112 Nev. 879, 887, 921 P.2d 901, 907 (1996) (citing Purkett v. Elem, 514 U.S. 765, 767-69 (1995); Batson, 476 U.S. at 91-99.

second step, the State's given reasons are race neutral under Purkett, which requires only reasons that are "facially neutral" and not necessarily "persuasive, or even plausible."[3] As to the third step, the State indicated that it had plausibly reliable information that Palaez had a prior conviction for assault and had spent a year in jail which could, assertedly, lead him to be biased in favor of the defense.[4] This court has previously held that "[a]ssociation with the criminal justice system is a facially neutral reason to challenge veniremen."[5]

Therefore, we conclude that Hinz has failed to meet the high standard for proving purposeful discrimination in a peremptory challenge that applies after the Supreme Court redefined Batson in Purkett. Further, the district court's determination in this matter is entitled to deference and we find no error.[6]

Second, Hinz argues that comments made by the State during defense counsel's opening statement as well as extra judicial statements made in front of the jury warranted a mistrial, and the district court erred in not granting a mistrial.

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[3]Purkett, 514 U.S. at 768.

[4]Doyle, 112 Nev. at 888-89, 921 P.2d at 908 (noting that a venire person excluded on a peremptory challenge due to the fact that she had a brother who was incarcerated for robbery may be biased towards the State).

[5]Id. at 889, 921 P.2d at 908 (quoting Clem v. State, 104 Nev. 351, 355, 760 P.2d 103, 106 (1988), overruled on other grounds, Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990)).

[6]Id., 112 Nev. at 889-90, 921 P.2d at 908.

"[I]t is within the sound discretion of the trial court to determine whether a mistrial is warranted. Absent a clear showing of abuse of discretion, the trial court's determination will not be disturbed on appeal."[7] With regard to prosecutorial misconduct, this court has stated that "[d]istrict courts have a duty to ensure an accused receives a fair trial," not necessarily a perfect trial.[8]

Where this court determines that improper comments were made by a prosecutor, "it must be . . . determined whether the errors were harmless beyond a reasonable doubt."[9] The relevant inquiry, therefore, is "whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."[10]

I. Opening statements

Hinz argues that the prosecutor made "incessant and child-like objections disparaging the defense" during opening statements. Hinz does not, however, provide any information regarding the substance of the comments. The State indicates it objected to three of Hinz's statements. The State argues the objections were proper in response to statements by defense counsel that included proper personal opinions and judgment.

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[7]Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996) (citing Owens v. State, 96 Nev. 880, 620 P.2d 1236 (1980); Sparks v. State, 96 Nev. 26, 604 P.2d 802 (1980)).

[8]Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997); Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 269 (1997).

[9]Greene, 113 Nev. at 169, 931 P.2d at 62 (quoting Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988)).

[10]Id. (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986)).

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Here, Hinz's allegations of prosecutorial misconduct involve three objections made during defense counsel's opening arguments rather than improper comments made during the prosecution's opening statements.[11] In the first instance, defense counsel referenced his ten years of experience while criticizing the prosecutor's opening statement. The district court overruled the State's objection. In the second instance, defense counsel stated that the "law is oftentimes more forgiving than those individuals." The district court sustained the objection, finding the statement to be improper argument and admonished counsel to stick to his theory of the case and the facts. In the last instance, Hinz suggested that police officers and the prosecutor may have attempted to improperly influence a witness. The district court advised Hinz to clarify what was said to which party and to move on.

We conclude that the State's objections during Hinz's opening statements did not amount to prosecutorial misconduct. In the first two instances, Hinz's comments had nothing to do with the facts of the case or anything Hinz was seeking to prove. In the third instance, the district court admonished Hinz to clarify his allegation that police officers may have improperly influenced Roberts' testimony. Moreover, even assuming that the comments amounted to prosecutorial misconduct, the comments were harmless beyond a reasonable doubt.[12]

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[11]See, e.g., id., 113 Nev. 157, 931 P.2d 54 (1997).

[12]See id., 113 Nev. at 169, 931 P.2d at 62 (quoting Witherow, 104 Nev. at 724, 765 P.2d at 1155).

II. Extra judicial comments

Hinz also asserts that he had been talking to a State's witness prior to the second day of trial. Defense counsel had walked the witness downstairs, away from the jury room which was open, and told the witness he would not be called. During this time, the prosecutor saw defense counsel talking to the witness. Hinz asserted that the prosecutor yelled at him from the second floor of the courthouse and questioned him about speaking to a witness. Hinz contended that jurors currently in or around the jury room might have overheard the prosecutor. Upon disclosure of the incident to the district court, Hinz then moved for a mistrial. The State did not dispute that it had made the comments to Hinz.

The district court stated that it could talk to the jurors to see what, if anything they had heard. However, Hinz indicated that he would settle for a cautionary instruction to the jurors indicating that they should disregard any overheard conversations between the State and defense counsel and decide the case only on the merits. Thereafter, the district court cautioned the jury to disregard any out of court statements and to decide the case based solely on evidence admitted at trial.

Our review of the record indicates there was no dispute that the prosecutor yelled at Hinz and a witness from the second story of the courthouse. There is no evidence that any member of the jury heard the comments. Hinz declined the court's invitation to question the jury members about what they may or may not have heard. There is also no evidence that the prosecutor intended to influence the jury. While such conduct is unseemly, absent additional facts, it does not constitute prosecutorial misconduct. Moreover, even assuming that prosecutorial

misconduct occurred, no prejudice was shown, a cautionary instruction was given, and the comments were harmless beyond a reasonable doubt.

Thirdly, Hinz argues that the district court erred where it refused to admit evidence that tended to demonstrate that Lisa Roberts, Hinz's roommate, committed the burglary at Great Basin Beverage, rather than Hinz. Specifically, Hinz contends that he attempted to introduce evidence of three separate incidents involving Roberts which he claims shared a common scheme or plan with the Great Basin burglary: (1) Roberts' arrest and conviction for embezzlement in Elko, Nevada; (2) Roberts' arrest and conviction for breaking into a trailer in Wells, Nevada; and (3) Roberts' arrest and conviction for burglary in Eureka county.

Hinz contends that the burglary which occurred in Eureka county and the property destruction in Wells, Nevada, are very similar to the burglary which occurred at Great Basin. Hinz argues that the Eureka burglary assertedly involved: (1) a male and female set of perpetrators; (2) the male and female entered the business with the intent to commit larceny; (3) the male and female entered the business at night time; (4) Roberts attempted to sell the items stolen from the burglary; (5) Roberts denied involvement in the burglary; and (6) Roberts appeared to need the money from the sale of the stolen items to pay court ordered fines and restitution. Hinz argues that these instances are similar to the events involved in the Great Basin burglary and, as such, should have been admitted to demonstrate a common plan or scheme pursuant to NRS 48.045.

The State argues that the district court did not err by refusing to admit evidence of Robert's past convictions where the convictions did not share a common scheme or plan with the Great Basin burglary.

We review the district court's decision to admit prior bad acts evidence for manifest error.[13] The district court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference.[14] NRS 48.045(2) contains the general rule for admitting prior bad acts evidence.[15] Prior bad act evidence is admissible if: "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[16]

In the present case, the district court heard argument regarding Roberts' prior convictions, her financial status, and her failure to file a federal tax return. After considering the evidence, the district court allowed Hinz to cross-examine Roberts about a prior embezzlement conviction and her financial status on the grounds that such information potentially demonstrated a motive to commit the Great Basin burglary but disallowed cross-examination on two other convictions. The court

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[13]See Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998).

[14]Id.

[15]NRS 48.045(2) states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[16]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

concluded that the disallowed convictions did not evince a common scheme or plan and, in any event, were more prejudicial than probative.

We conclude that the district court did not err in disallowing Hinz to cross-examine Roberts about two of her prior convictions. Hinz had adequate opportunity to examine Roberts about other prior convictions as well as her lack of funds. Moreover, the incidents may have inculpated Roberts, but they did not exculpate Hinz. Instead, their primary value would be for impeachment. Therefore, we conclude that the district court did not abuse its discretion where it disallowed cross-examination of Roberts regarding two of her prior convictions. However, even if the district court erred, such error was harmless in light of the totality of the evidence presented.

Lastly, Hinz argues that the police department was unable to produce photographs of footprints taken from the scene of the burglary. Hinz contends that the photographs were crucial to his theory of defense that a man and a woman, Randal Thomas and Lisa Roberts, committed the burglary rather than Hinz. Hinz argues that the failure to produce the photographs or inform him of the photographs violates the court's order and discovery statutes as well as causing prejudice to Hinz's case.

The State argues that Hinz's motion for a mistrial was premised on the theory that photographs of the crime scene were not provided to him. The State contends that a police detective was shown pictures of footprints from the crime scene upon which the detective based his opinion that two men were responsible for the burglary at Great Basin. The detective indicated that he was not sure if more photographs existed or not. According to the State, the district court, in denying Hinz's motion for a mistrial, concluded that it was not convinced that additional

photographs of the crime scene existed or that such photographs would have been exculpatory.

As noted above, a district court's determination regarding whether or not a mistrial is warranted is reviewed for an abuse of discretion.[17]

This court has stated that "a conviction may be reversed when the State loses evidence if (1) the defendant is prejudiced by the loss or, (2) the evidence was 'lost' in bad faith by the government."[18] Appellant has the burden to show "that it could be reasonably anticipated that the evidence sought would be exculpatory and material to [his] defense."[19]

We conclude that the district court did not err in denying Hinz's motion for a mistrial. Specifically, there is no evidence suggesting that additional photographs existed. A police detective testified that he was not certain whether or not he had viewed additional photographs, as he had viewed so many in making his determination regarding the footprints. Furthermore, photographs of the footprints discussed and admitted at trial were made available to the defense. Additionally, as it was alleged that the footprint on the door at Great Basin matched co-defendant Thomas' boot which was seized from the parties' residence, it makes little sense that Hinz would challenge the photographic evidence without some assertion that the boot belonged to Roberts. Therefore, we

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[17]See Geiger, 112 Nev. at 942, 920 P.2d at 995.

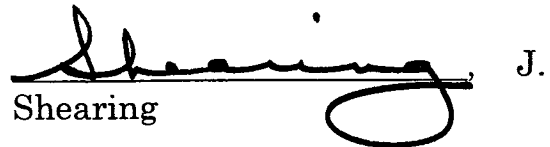
[18]Sparks v. State, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988) (citing Howard v. State, 95 Nev. 580, 582, 600 P.2d 214, 215-16 (1979)).

[19]Id. (citing Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)).

conclude that Hinz failed to demonstrate how he was prejudiced by the asserted failure to provide additional photos, nor has he shown bad faith on the part of the government where it is disputed that additional photographs existed.

Having considered Hinz's arguments and concluded they are without merit, we

ORDER the judgment of the district court AFFIRMED.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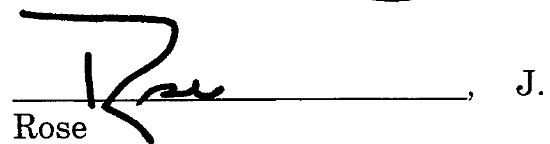
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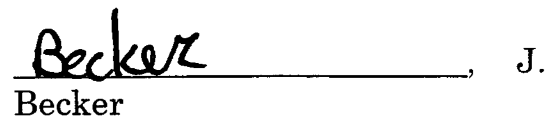
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Becker

cc: Hon. J. Michael Memeo, District Judge
Matthew J. Stermitz
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Elko County District Attorney
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