



IN THE SUPREME COURT OF THE STATE OF NEVADA

JESSE ALEX ABEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 91037

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of driving under the influence with one or more prior felony DUI convictions. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge. Appellant Jesse Abel raises five issues on appeal.

The State committed prosecutorial misconduct in commenting on Abel's refusal to consent to a blood draw, but reversal is not warranted

Abel argues the State committed misconduct in eliciting testimony describing Abel's refusal to consent to a blood draw. The State twice referenced Abel's refusal to consent to a blood draw at the scene of the crash. First, in its opening statement, the State noted that the jury would hear evidence that Abel refused a blood test. Second, the State asked the arresting officer whether Abel refused a blood test.

"When considering claims of prosecutorial misconduct, this court engages in a two-step analysis. First, we must determine whether the prosecutor's conduct was improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008) (citation modified). Eliciting testimony concerning a defendant's invocation of his Fourth Amendment rights is constitutional error. *Sampson v. State*, 121 Nev. 820, 829-30, 122 P.3d 1255, 1261 (2005).

We first conclude that the error was preserved, despite Abel not objecting at trial. Immediately after the officer answered the State's question about Abel's refusal to consent to a blood test, the district court interjected sua sponte and told the jury to disregard the inappropriate statements. We conclude that counsel below was not required to object after the district court itself essentially had preserved the issue. *See Baker v. State*, 906 A.2d 139, 148 (Del. 2006) (finding the issue of prosecutorial misconduct preserved if a trial court intervened sua sponte). Since the error was preserved, we review for harmless error. *Valdez*, 124 Nev. at 1189, 196 P.3d at 476 (reviewing preserved constitutional error for harmlessness beyond a reasonable doubt).

The State erred in referencing and eliciting testimony about Abel's invocation of his Fourth Amendment rights. *Sampson*, 121 Nev. at 830, 122 P.3d at 1261 (“[A]n individual should be able to invoke his Fourth Amendment rights without having his refusal used against him at trial.” (quoting *Mackey v. State*, 507 S.E.2d 482, 484 (Ga. Ct. App. 1998))).

But reversal is not required because evidence of Abel's guilt was overwhelming. *See Sampson*, 121 Nev. at 830, 122 P.3d at 1261 (holding references to a defendant's invocation of his Fourth Amendment rights will be harmless in the face of overwhelming evidence). Abel confessed to driving and a blood test conducted three hours after the crash showed Abel had ten times the per se DUI limit of methamphetamine in his blood. NRS 484C.110(3) (driving under the influence of a controlled substance). Abel argued that he consumed methamphetamine after the crash, but other evidence made that course of events highly improbable. Abel crashed his truck on the interstate, blocking traffic, and the arresting officer arrived within approximately 20 minutes. The officer testified that Abel was sitting

on the side of the road in view of traffic and appeared to be coming down from methamphetamine. And the State's expert testified that given the high concentration of methamphetamine in Abel's bloodstream three hours after the crash, it would have been even higher at the time of the crash. The arresting officer found a vial of methamphetamine in the truck, which Abel denied was his, and the officer found no drug paraphernalia or other methamphetamine at the scene. It is unlikely that Abel consumed methamphetamine on the side of the interstate in front of stopped traffic in the immediate aftermath of a car accident and was able to dispose of any remaining methamphetamine and related paraphernalia before the officer arrived on the scene. Because the evidence overwhelmingly showed that Abel drove his truck while high on methamphetamine, the State's conduct was harmless beyond a reasonable doubt. Accordingly, no relief is warranted on this ground.

The State's reference to a suppression hearing was harmless error

Abel argues the State committed misconduct in referencing a suppression hearing in an objection. We review Abel's claim for harmless error because the district court intervened sua sponte. *See Baker*, 906 A.2d at 148; *Valdez*, 124 Nev. at 1188, 196 P.3d at 476.

The State objected to Abel's attempt to use the arresting officer's search warrant affidavit to impeach the officer. In objecting, the State maintained that Abel was attempting to relitigate the validity of the search warrant, which had already been decided at the suppression hearing. After the district court overruled the State's objection, Abel declined the district court's offer to provide a curative instruction and did not request a mistrial. The State's reference to a prior suppression hearing was improper because it referenced Abel's invocation of his Fourth Amendment rights.

Sampson, 121 Nev. at 829-30, 122 P.3d at 1261. The reference was harmless, however, because the State presented overwhelming evidence of Abel's guilt, as discussed above. *Valdez*, 124 Nev. at 1189, 196 P.3d at 476. And Abel declined a curative instruction and failed to request the mistrial he now contends was required. *See Rice v. State*, 108 Nev. 43, 44, 824 P.2d 281, 282 (1992) (holding references to a defendant's criminal history harmless in part because "[t]he statements were unsolicited, the references were inadvertent, and defense counsel declined the judge's offer to give the jury a limiting instruction"). Further, the reference to the suppression hearing was brief and made in passing. *See Sampson*, 121 Nev. at 830, 122 P.3d at 1261 ("[W]here there is only a mere passing reference, without more, to an accused's invocation of Fourth Amendment rights, there is harmless error."). No relief is therefore warranted on this ground.

The State committed prosecutorial misconduct during closing argument, but reversal is not warranted

Abel maintains the State committed misconduct when it explained in closing argument that DNA testing or fingerprinting had not been completed because such tests are expensive and time-consuming uses of taxpayer dollars. This statement was clearly improper because the State argued facts not in evidence. *See Williams v. State*, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) ("A prosecutor may not argue facts or inferences not supported by the evidence."). Because Abel objected to the misconduct, "we will reverse only if the error substantially affects the jury's verdict." *Valdez*, 124 Nev. at 1189, 196 P.3d at 476.

We conclude the misconduct did not affect the jury's verdict. In addition to the charge of driving under the influence, Abel was charged with possession of a schedule I controlled substance because a vial of methamphetamine was found in Abel's vehicle. No DNA or fingerprint

testing was conducted on the vial, and Abel stated the vial was not his. The jury acquitted Abel on the possession charge, and because the State's statement was only relevant to that charge, we conclude the error did not substantially affect the jury's verdict. No relief is therefore warranted on this ground.

The district court did not abuse its discretion in allowing expert testimony

Abel argues that the district court abused its discretion in allowing the State's expert witness to testify because the State failed to provide the expert's CV until the day of trial. The State must disclose an expert witness's CV at least 21 days before trial. NRS 174.234(2)(b). A district court shall not permit an expert witness to testify "if the court determines that the party acted in bad faith by not timely disclosing that information." NRS 174.234(3)(b).

Eight months before trial, the State provided an expert report that disclosed the expert's current employment but did not include a copy of the expert's CV. Abel objected on the day of trial and moved for the expert to be barred from testifying. The State then provided a CV. The district court granted a recess for Abel to review the CV and interview the expert. After the interview, Abel conceded that the interview and CV did not alter his strategy regarding the witness. Although the State failed to comply with its duty to provide a CV under NRS 174.234(2), the record lacks any indication that the State acted in bad faith in failing to provide the expert witness's CV or that Abel suffered any prejudice because of this failure. Abel has therefore not shown the district court abused its discretion in admitting the expert witness testimony. *See Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008) ("This court reviews a district court's decision

whether to allow an unendorsed witness to testify for abuse of discretion.”). Accordingly, no relief is warranted on this ground.

Cumulative error does not warrant reversal

Abel argues cumulative error deprived him of a fair trial. “The relevant factors to consider when deciding whether cumulative error requires reversal are ‘(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.’” *Rose v. State*, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007) (quoting *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)). The prosecutor committed clear misconduct multiple times: three comments on Abel’s invocation of his Fourth Amendment rights and an appeal to extrinsic policy concerns to explain the lack of DNA evidence in the case. In a closer case, such repeated misconduct would have required a new trial. But this is not a close case. Despite the gravity and quantity of misconduct, the overwhelming evidence of Abel’s guilt and the less serious nature of the crime charged weigh in favor of affirmance. We therefore hold that cumulative error does not warrant reversal. Accordingly, we

ORDER the judgment of conviction AFFIRMED.



Herndon, C.J.



Bell, J.



Stiglich, J.

cc: Hon. Alvin R. Kacin, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk