

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM ORLO FILLMORE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38820

FILED

NOV 05 2002

ORDER OF AFFIRMANCE

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

William Orlo Fillmore appeals from his judgment of conviction in district court for the attempted murder of John Hamilton. Since Fillmore's arguments on appeal are without merit, we affirm his conviction.

First, Fillmore asserts that the district court abused its discretion when it denied his motion for mistrial because the prosecutor committed misconduct by: (1) delaying testing exculpatory evidence; (2) falsifying witness testimony; (3) eliciting testimony on Fillmore's post-arrest silence; (4) making unsupported factual statements; and (5) exceeding the scope of Fillmore's closing argument during rebuttal argument.

This court will not overturn a district court's denial of a motion for mistrial unless there is a clear showing of an abuse of discretion.¹ Here, there is no evidence that Fillmore was prejudiced by the State's alleged delay in testing exculpatory evidence, nor is there any evidence, beyond Fillmore's bare allegations, that the State falsified

¹Sparks v. State, 96 Nev. 26, 30, 604 P.2d 802, 804 (1980).

witness testimony. The district court adequately remedied any potential concerns arising from the isolated and unsolicited comment by a witness on Fillmore's post-arrest silence. Additionally, the prosecutor did not make an unsupported factual statement because he was drawing a permissible inference as to the amount of blood that was visible on the murder weapon.² Finally, the prosecutor's rebuttal argument did not exceed the scope of Fillmore's closing argument because all of the issues argued by the State in its rebuttal had been raised by Fillmore in his closing argument. Therefore, we conclude that the district court did not abuse its discretion by denying Fillmore's petition for a mistrial.

Second, Fillmore argues that the district court abused its discretion by admitting certain prior bad acts because the district court did not give a contemporaneous limiting instruction as required in Tavares v. State.³

We conclude that the district court did not abuse its discretion by failing to give a contemporaneous limiting instruction because in Tavares we expressly held that the limiting instruction requirement was to be applied prospectively.⁴ Accordingly, since we decided Tavares after

²See Jimenez v. State, 106 Nev. 769, 772, 801 P.2d 1366, 1367-68 (1990) (holding that prosecutors must be free to express their perceptions of the record, evidence and inferences properly drawn therefrom).

³117 Nev. ___, ___, 30 P.3d 1128, 1132 (2001)

⁴Id. (holding that "the prosecutor shall henceforth have the duty to request that the jury be instructed on the limited use of prior bad act evidence").

the trial in this case had already been concluded, Fillmore's prior bad acts were properly admitted. Moreover, even if the district court had been required to give a contemporaneous limiting instruction, we would affirm Fillmore's conviction because of the overwhelming evidence of his guilt.⁵

Finally, Fillmore asserts that the State did not put forth sufficient evidence to support his conviction for attempted murder. "The standard of review for sufficiency of evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."⁶ Additionally, it is the jury's role to determine what weight and credibility various testimonies will receive.⁷

We conclude that there was sufficient evidence to support Fillmore's conviction for attempted murder. While Fillmore points to several inconsistencies in the testimony of the State's witnesses, these minor inconsistencies fell within the jury's ability to weigh the credibility of witnesses.⁸ Additionally, the inconsistencies raised by Fillmore

⁵See Chappell v. State, 114 Nev. 1403, 1407, 972 P.2d 838, 840 (1998) (holding that a district court's error in admitting evidence of prior bad acts was harmless in light of the overwhelming evidence of the defendant's guilt).

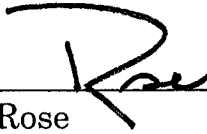
⁶Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

⁷Id.


⁸See id.

generally do not pertain to the testimony of Hamilton, who provided the key testimony against Fillmore. Therefore, we

ORDER that Fillmore's conviction be AFFIRMED.

 _____, J.
Rose

 _____, J.
Young

 _____, J.
Agosti

cc: Hon. J. Michael Memeo, District Judge
Attorney General
Elko County District Attorney
Larry K. Dunn & Associates
Elko County Clerk