IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD LEE SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39492

FILED

NOV 21 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction. Edward Smith was convicted of second-degree murder for the stabbing death of Martinique Tillman.

Smith first claims his right to a speedy trial was violated by a 125-day period between the arraignment and the beginning of the jury trial. The Sixth Amendment of the United States Constitution provides the right to a speedy trial.[1] This right extends to criminal defendants in state courts.[2] "The Sixth Amendment guarantee of a speedy trial attaches once a putative defendant is 'accused' by arrest, indictment, or the filing of a criminal complaint, whichever comes first."[3]

There are four factors the court should balance when making a determination of whether a defendant's Sixth Amendment right to a speedy trial has been violated: (1) the length of the delay; (2) the reason

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[1]See Adams v. Sheriff, 91 Nev. 575, 576 n.1, 540 P.2d 118, 118 n.1 (1975) (citing Klopfer v. North Carolina, 386 U.S. 213 (1967)); McGee v. Sheriff, 86 Nev. 421, 423, 470 P.2d 132, 133 (1970) (citing Klopfer).

[2]Id.

[3]Sheriff v. Berman, 99 Nev. 102, 106, 659 P.2d 298, 301 (1983) (citing Dillingham v. United States, 423 U.S. 64 (1975); United States v. Marion, 404 U.S. 307 (1971)).

for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant from the delay.[4] No single factor is necessary or sufficient, alone, although the final factor, prejudice, may weigh more heavily than the other factors.[5]

Because the right to a speedy trial is "necessarily relative," the United States Supreme Court has refused to quantify the right into a specific number of days or months.[6] The states are given the freedom to determine a "reasonable period consistent with constitutional standards."[7]

In Nevada, if a defendant "is not brought to trial within 60 days after the arraignment on the indictment or information, the district court may dismiss the indictment or information."[8] We have determined that this "60-day rule" has flexibility[9] and is meant to serve as a guide for the determination of deciding speedy trial issues.[10] In addition, "the delay that can be tolerated for an ordinary street crime is considerably less than

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[4]E.g., Byford v. State, 116 Nev. 215, 230, 994 P.2d 700, 710-11 (2000) (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)).

[5]Sheriff v. Berman, 99 Nev. at 107, 659 P.2d at 301 (citations omitted).

[6]Barker v. Wingo, 407 U.S. at 522-23.

[7]Id. at 523.

[8]NRS 178.556(1).

[9]Adams, 91 Nev. at 576, 540 P.2d at 118.

[10]McGee, 86 Nev. at 423, 470 P.2d at 133.

for a serious . . . charge."[11] However, "[d]ismissal is mandatory where there is a lack of good cause shown for the delay."[12]

In this case, there were 125 days between the arraignment and the beginning of the jury trial. The initial delay, of one week, was in response to the State's request to allow it time to find a past victim. The next one-week delay was due to an unavailable witness. Next, the district court ordered the trial date vacated and reset because the judge would be out of the jurisdiction. Next, the trial date was continued because the district court was in the midst of a trial that would not be completed before the scheduled date for this trial. Finally, the trial date was vacated and reset in order to schedule a Petrocelli hearing in this case.

Here, the State has met its burden of showing good cause.[13] We have previously stated that there is good cause to delay a trial to locate a witness.[14] In addition, "'[t]he trial court may give due consideration to the condition of its calendar, other pending cases, public expense, the health of the judge, and the rights of co-defendants.'"[15] In Bailey v. State,[16] where we concluded that there was no deprivation of the

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[11]Barker, 407 U.S. at 531.

[12]Huebner v. State, 103 Nev. 29, 31, 631 P.2d 1330, 1332 (1987) (citing Anderson v. State, 86 Nev. 819, 834, 477 P.2d 595, 598 (1970)).

[13]Id. at 31, 731 P.2d at 1332 (citing Anderson, 86 Nev. at 834, 477 P.2d at 498).

[14]Furbay v. State, 116 Nev. 481, 485, 998 P.2d 553, 555 (2000).

[15]Adams, 91 Nev. at 576, 540 P.2d at 118 (quoting Oberle v. Fogliani, 82 Nev. 428, 430, 420 P.2d 251, 252 (1966)).

[16]94 Nev. 323, 579 P.2d 1247 (1978).

right to a speedy trial, despite a 224-day delay, because the delay was primarily due to the court's schedule.

With regard to the third factor, the defendant's assertion of the right to a speedy trial, the record in this case indicates that Smith asserted his right to a speedy trial at his arraignment and has continually done so since that time.

The fourth factor, prejudice to the accused, is a "paramount concern in speedy trial cases."[17] However, Smith has not provided any evidence showing how he was prejudiced by the delay. He merely quotes McGee v. State, where we stated, "This constitutional right recognizes that the pendency of a criminal charge may subject an accused to public scorn, deprive him of employment and curtail his speech and associations. It affords protection against these consequences as well as against unreasonable detention before trial."[18] Smith then makes the bare allegation that he "suffered all the prejudice created by delay as envisioned in McGee."

As we have previously stated, bare allegations of prejudice will not suffice.[19] In this case, Smith was convicted of second-degree murder. There is no indication that he suffered any additional public scorn, deprivation of employment, or curtailment of his speech and associations due to a delay in the trial beyond that associated with his conviction.

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[17]Sheriff v. Berman, 99 Nev. at 107, 659 P.2d at 301.

[18]McGee, 86 Nev. at 423. 470 P.2d at 133 (citing Klopfer v. North Carolina, 386 U.S. 213).

[19]State v. Fain, 105 Nev. 567, 569, 779 P.2d 965, 966 (1989) (citing Sheriff, 99 Nev. at 107, 659 P.2d at 301).

We conclude that the good cause for the delay, along with the absence of prejudice to Smith and the serious nature of the crime charged, far outweigh the short length of the delay in this case.

Next, Smith alleges the district court abused its discretion by refusing to allow him to present character evidence of the victim.

During trial, Smith sought to present evidence of Tillman's "propensity toward violence," based on an incident where Tillman resisted arrest. After reviewing the police report, the district court concluded that there was nothing in the report to indicate the type of aggression that would be admissible or that Smith was present or had knowledge of the incident. The court stated that Smith could "testify as to what he had heard, reputation evidence, character evidence or any specific instances that he knew about or heard about. But just simply bringing in the police officers to testify about one incident of resisting arrest . . . doesn't make it relevant to this case." Smith did not testify in the case.

Smith now claims that "[w]hether it was reasonable for Appellant Smith to fear a drug dealer–gang member as being violent was a question of fact to be decided by the jury."

The decision to admit or exclude evidence is within the sound discretion of the district court and will only be disturbed if it is manifestly wrong.[20]

We have previously held that an accused can offer reputation or opinion evidence of the character of the victim in order to show that the victim was the likely aggressor, regardless of whether the accused had

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[20]Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999) (citing Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983)).

knowledge of the victim's character.[21] However, to support a claim of self-defense, evidence of specific acts of violence can only be offered when the accused had knowledge of the specific acts.[22]

In this case, Smith chose not to testify and there was nothing in the police report to indicate that Smith was aware of the incident where Tillman resisted arrest. Therefore, the court correctly excluded this specific act evidence. Moreover, in Petty v. State,[23] where we ruled that a police officer's opinion testimony was admissible, although based on a single incident where the victim assaulted the officer, here, the accused was not seeking to offer opinion testimony of the police officers, but sought to offer evidence of a specific act. Also. in Petty, Tillman did not assault the officer, but merely tried to resist arrest. Therefore, the district court correctly concluded that this was not the type of aggression that was admissible.

Next, during the trial, on Friday, December 14, 2001, the court admitted into evidence a recording of Smith's statement to a police detective. The defense did not object to this evidence, nor did they object to the State providing each jury member with a copy of the transcript of this recording, so they could follow along while the tape was played. The jurors were not required to return the transcript copies and actually took notes on the transcript. Smith now claims that he was denied a fair trial because the jury had these transcripts prior to retiring for deliberations on Monday, December 17, 2001.

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[21]Burgeon v. State, 102 Nev. 43, 46, 714 P.2d 576, 578 (1986).

[22]Id. at 45-46, 714 P.2d at 578.

[23]116 Nev. 321, 997 P.2d 800 (2000).

NRS 175.401 provides that the jury must be given particular admonishments at each adjournment of the court. These admonishments were given in this case, as required. Among these admonishments is a requirement that they not "form or express any opinion on any subject connected with the trial until the cause is finally submitted to them."[24] We have previously stated that there is a presumption that the jury follows the instructions that are given to them.[25]

Jurors are also instructed that they are allowed to take notes during the trial.[26] The jurors are allowed to take these notes with them when they retire for deliberations, along with any materials received as evidence in the case.[27]

In this case, Smith has not provided any evidence to rebut the presumption that the jurors obeyed the admonishment to not prematurely form an opinion regarding the case.

During the course of the trial, the prosecution received information that Eric Orduna, one of Smith's witnesses, was in possession of the knife used to kill Tillman. Police officers were sent to search his residence for the knife. During the search, which occurred the night before Orduna was scheduled to testify, Orduna made a recorded statement to the police officers.

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[24]NRS 175.401(3).

[25]Flores v. State, 114 Nev. 910, 914, 965 P.2d 901, 903 (1998).

[26]NRS 175.131.

[27]NRS 175.441.

The next day, prior to calling Orduna as a witness, the defense sought to obtain a copy of the tape. The defense told the court that "it's, obviously, the same thing he's going to say on the stand but I would like to know exactly what went on, what was said."

The court determined that it was not relevant, since the prosecution did not have the tape and would not bring out any information from the statement. Further, the court ruled that it would not delay the trial in order to obtain the tape.

Smith now argues that by not receiving the tape, "the defense was not given the opportunity to determine what statements, if any, defendant had made to witness Eric Orduna." He further states that "[f]ailure to disclose impeaching evidence on request constitutes error if it deprives defendant of a fair trial." Smith fails, however, to show any prejudice sustained by him.

> NRS 174.235(1)(a) provides, in relevant part:
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> [T]he prosecuting attorney shall permit the defendant to inspect and to copy or photograph any:
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> (a) Written or recorded statements . . . made by a witness the prosecuting attorney intends to call during the case in chief of the state, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney[.]

NRS 174.295(1) creates a continuing duty for the prosecuting attorney to provide any newly discovered material, both before and during trial.

In United States v. Bagley, the United States Supreme Court stated that "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused

that, if suppressed, would deprive the defendant of a fair trial."[28] The prosecution must, however, provide both exculpatory evidence and evidence that could be used to impeach the prosecution's witnesses.[29]

In this case, the witness in question was a defense witness. NRS 174.235(1) only requires the prosecutor to provide recorded statements of prosecution witnesses. In addition, the defense learned about Orduna's statement to the police from Orduna, himself. Certainly, he could have informed them of what he said in that statement. Moreover, neither party used information from the statement or even mentioned the statement during the trial. Therefore, there is no evidence that Smith was prejudiced in any way by not having a copy of Orduna's statement to the police.

We next address whether the jury was properly instructed on the issue of actual danger and self-defense. Jury Instruction Number 28 contained the following:

> Actual danger is not necessary to justify a killing in self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:
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> 1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he is about to be killed or suffer great bodily injury; and
> 2. He acts solely upon these appearances and his fear and actual beliefs; and

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[28]473 U.S. 667, 675 (1985).

[29]Id. at 676.

3. A reasonable person in a similar situation would believe himself to be in like danger.

This instruction is taken directly from Runion v. State.[30] In Runion, we set forth sample instructions for the district courts to use in cases where the defendant asserts a self-defense theory.[31] Smith contends that the jury instruction should have included an additional sentence, also from Runion, as follows: "The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger."[32] Smith argues that without this further sentence, the instruction on actual danger is inadequate and reduced the prosecution's burden of proof, thereby depriving him of a fair trial. Smith's argument is without merit.

First, the additional statement does not affect the prosecution's burden of proof. Second, it was not necessary in this case. In Runion, we stated, "Whether these or other similar instructions are appropriate in any given case depends upon the testimony and evidence of that case. The district courts should tailor instructions to the facts and circumstances of a case, rather than simply relying on 'stock' instructions."[33] In this case, there was no evidence presented regarding mistaken belief of danger. As we have previously stated, it is not error to refuse to offer a party's proffered jury instructions if those instructions are

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[30]116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000).

[31]Id. at 1051. 13 P.3d at 58.

[32]Id. at 1052, 13 P.3d at 59.

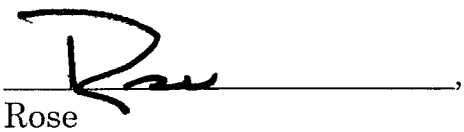
[33]Id. at 1051, 13 P.3d at 58-59.

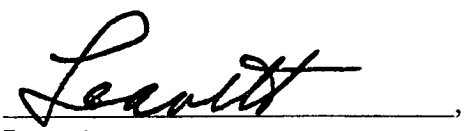
merely embellishments of the proper instructions already provided to the jury.[34] This instruction, if given, would have been a mere embellishment.

Moreover, this court has long held that "'failure to object or to request special instruction to the jury precludes appellate consideration.'"[35] Because Smith did not object to the jury instructions given by the district court, he waived any right to argue that these instructions were erroneous.

Based on the foregoing, we conclude that Smith's assertions of error are without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 , J.
Rose

 , J.
Leavitt

 , J.
Maupin

cc: Hon. Kathy A. Hardcastle, District Judge
Special Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[34]Prell Hotel Corp. v. Antonacci, 86 Nev. 390, 392, 469 P.2d 399, 400 (1970).

[35]Etcheverry v. State, 107 Nev. 782, 784-85, 821 P.2d 350, 351 (1991) (quoting McCall v. State, 91 Nev. 556, 557, 540 P.2d 95, 95 (1975)).