IN THE SUPREME COURT OF THE STATE OF NEVADA

ASHLEY WILLIAM BENNETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39864

FILED

OCT 0 5 2004

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

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, pursuant to a jury verdict, of one count of first-degree murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael L. Douglas, Judge.

Bennett challenges his conviction on various grounds. We conclude that all of his arguments lack merit, and we affirm his conviction.

Bennett first contends that the district court erred in denying his motion for a mistrial after the State was permitted to introduce evidence that Bennett intimidated and threatened the State's witness Anthony Gantt, causing him to be reluctant to testify. We conclude that the district court did not abuse its discretion in denying Bennett's motion for mistrial.[1] We have noted that the prosecution's suggestions of witness intimidation by a defendant are reversible error, unless the prosecutor also presents substantial credible evidence that the defendant was the source of the intimidation.[2] However, if counsel "opens the door" by

[1]Johnson v. State, 118 Nev. 787, 796, 59 P.3d 450, 456 (2002) (noting that denial of a motion for mistrial is within the district court's sound discretion, and will not be overturned absent a palpable showing of abuse).

[2]See Lay v. State, 110 Nev. 1189, 1193, 886 P. 2d 448, 450-51 (1994).

attacking the credibility of a witness for the other side, opposing counsel may elicit evidence of intimidation as an explanation of the witness's circumstances and to rehabilitate the witness.[3]

Here, the record indicates the district court correctly concluded that Bennett opened the door to the line of questioning regarding threats. Bennett placed Gantt's credibility in issue by inquiring about Gantt's reluctance to testify. Bennett also elicited testimony about the presence of threatening individuals in the courtroom. Additionally, the State presented substantial credible evidence that Bennett was the source of intimidation. Gantt testified that Bennett threatened that he was going to bring Gantt's family in to watch Gantt testify. The record shows that this threat was particularly intimidating to Gantt because Gantt's father and uncle were members of GPK, the same gang to which Bennett belonged, and Gantt's family did not want him to make a deal with the State and to testify. In fact the record reflects that Gantt's initial refusal to testify occurred only after his cousin and others walked into the courtroom. Thus, we conclude that the district court did not err in denying Bennett's motion for a mistrial.

Relying on NRS 48.045(2), Bennett also argues that he must be given a new trial since no pretrial hearing was conducted to determine whether Gantt's allegations of threats and/or intimidation should have been admitted.

NRS 48.045(2) prohibits introduction of evidence of other crimes, wrongs, or acts as proof of a person's character, but allows such

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[3]See Rippo v. State, 113 Nev. 1239, 1253, 946 P. 2d 1017, 1026 (1997) (citing Wesley v. State, 112 Nev. 503, 513, 916 P.2d 793, 800 (1996)); see also United States v. Pierson, 121 F.3d 560 (9th Cir. 1997).

evidence to prove motive, opportunity, intent, or other relevant issues.[4] Prior to admission of collateral act evidence, the district court must conduct a hearing on the record and outside the presence of the jury and make certain determinations.[5] "Failure to conduct a Petrocelli hearing on the record is grounds for reversal on appeal unless either the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad act evidence . . . or where the result would have been the same had the district court not admitted the evidence."[6]

In Evans v. State,[7] we considered application of NRS 48.045(2) to evidence of witness intimidation and determined NRS 48.045(2) to be inapposite. We observed that evidence that a defendant threatened a witness with violence after a crime was committed is directly relevant to the question of the defendant's guilt.[8] We, therefore, concluded that "evidence of such a threat is neither irrelevant character evidence nor evidence of collateral acts requiring a hearing before its admission."[9] Accordingly, in the instant case, we conclude that a Petrocelli hearing was not required and, thus, the district court did not err in failing to conduct a Petrocelli hearing.

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[4]NRS 48.045(2); see also Evans v. State, 117 Nev. 609, 628, 28 P.3d 498, 511 (2001).

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

[6]King v. State, 116 Nev. 349, 354, 998 P.2d 1172, 1175 (2000).

[7]Evans, 117 Nev. 609, 628, 28 P.3d 498, 511-12 (2001).

[8]Id at 628, 28 P.3d at 512.

[9]Id.

Bennett also complains that the district court improperly restricted his cross-examination of Pam Neal, a witness during the State's case-in-chief. Bennett argues that the district court's ruling limited his ability to show Neal's bias and motive to fabricate. We disagree. Bennett was permitted to inquire concerning the events surrounding Neal's arrest, the specific charges she faced, and her belief that a GPK member was responsible for the death of her cousin, Eric Bass. Additionally, Bennett elicited adequate testimony from Neal regarding dismissal of her criminal charges to imply that the charges may have been dismissed in return for her favorable testimony. Since the district court limited Bennett's impeachment of Neal only by the restriction that Bennett was not to try to prove whether Neal in fact committed the crimes she was charged with, we conclude that the district court acted within its discretion and did not err in limiting Bennett's cross-examination of Neal.

Bennett next argues that the district court improperly limited the testimony of two of Bennett's witnesses, Reginald Don Fobbs and Lakiesha Reed. Bennett argues that Fobbs' and Reed's testimony was admissible to impeach the credibility of Neal with a prior inconsistent statement, pursuant to NRS 51.035. We conclude that the district court did not err in limiting Bennett's examination of Fobbs and Reed. Under NRS 51.035, an out-of-court statement that would otherwise be inadmissible hearsay is admissible if the declarant testifies at trial, is subject to cross-examination concerning the statement, and the statement is inconsistent with his testimony.[10] Here, the district court prevented Bennett from questioning Fobbs about a conversation he had with Neal

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[10]NRS 51.035(2)(a).

regarding certain statements of homicide detectives. These statements were clearly hearsay and did not fit within any recognized hearsay exception. Additionally, during Neal's cross-examination, Bennett failed to elicit specific testimony from Neal regarding the homicide detectives' statements. Thus, any testimony of this nature from Fobbs could not possibly be inconsistent with Neal's testimony. Additionally, Bennett's contention that Reed's proposed testimony about a conversation she overheard between Neal and Bennett was admissible under NRS 51.035 is without merit. Bennett never questioned Neal about a conversation she had with Bennett or the content of such a conversation. Thus, as with Fobbs, anything that Reed might testify to regarding such a conversation could not possibly be inconsistent with Neal's testimony.

Bennett also claims that the State violated Brady v. Maryland[11] when it failed to disclose Gantt's pre-sentence report and his statement to the court at the time he entered his plea. We disagree. Whether the State adequately disclosed information under Brady involves both factual and legal questions which we review de novo.[12] Brady established the rule that the prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.[13] Failure to disclose such information violates due process regardless of the prosecutor's

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[11]373 U.S. 83 (1963).

[12]Lay v. State, 116 Nev. 1185, 1193, 14 P.3d 1256, 1262 (2000).

[13]373 U.S. at 87; see also Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996).

motive.[14] Evidence is considered material where there is a reasonable probability of a different outcome had the evidence been disclosed.[15] Further, "[m]ateriality 'does not require demonstration by a preponderance' that disclosure of the evidence would have resulted in acquittal."[16] A reasonable probability that the result would have been different is shown when the non-disclosure undermines confidence in the outcome of the trial.[17] Evidence must also be disclosed to impeach the credibility of the State's witnesses.[18]

Here, the State did not provide Bennett with Gantt's pre-sentence report or Gantt's plea canvass. However, there is no indication in the record that Bennett ever requested these materials or made a timely objection to the State's failure to produce the materials, and the State did provide Bennett with a copy of Gantt's plea memo and his agreement to testify, which was admitted into evidence. Additionally, there is nothing in the record to show that Gantt's pre-sentence report and plea canvass would be favorable to Bennett or that such evidence was material. Accordingly, we conclude that Bennett's bare assertion, based purely on speculation, that it is "reasonably probable" that the documents would show Gantt undermined his involvement in the case, is insufficient to sustain his claim of a Brady violation.

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[14]Lay, 116 Nev. at 1194, 14 P.3d at 1262.

[15]Id.

[16]Id. (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)).

[17]Id.

[18]Id.

Finally, Bennett alleges two instances of error regarding the jury instructions given at his trial: (1) the malice aforethought instruction was meaningless and incomprehensible, and (2) the express and implied malice instruction was unconstitutionally vague. First, we have directly addressed Bennett's argument regarding the malice aforethought instruction in Leonard v. State,[19] and have concluded that the language "a heart fatally bent on mischief" in the malice aforethought instruction is constitutional. We noted that "'[a]lthough these phrases are not common in today's general parlance, . . . their use did not deprive appellant of a fair trial.'"[20] Second, the express and implied malice instruction given at Bennett's trial was essentially the exact definition of express and implied malice as set forth in NRS 200.020. The statutory language used in the instruction is well established in Nevada,[21] and although we have characterized the language as "archaic," we have also found it to be essential.[22] The instruction differed only in that it contained the phrase "may be implied" instead of "shall be implied," a change that we have found to be preferable.[23] Thus, we conclude that Bennett's jury instruction challenges lack merit.

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[19]117 Nev. 53, 79, 17 P.3d 397, 413 (2001).

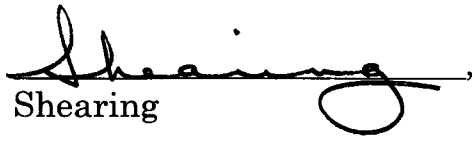
[20]Id. (quoting Leonard v. State, 114 Nev. 1196, 1208, 969 P.2d 288, 296 (1998)).

[21]Leonard, 117 Nev. at 78, 17 P.3d at 413.

[22]Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 272 (1988).

[23]Leonard, 117 Nev. at 78, 17 P.3d at 413.

Having concluded that Bennett's contentions lack merit, we ORDER the judgment of the district court AFFIRMED.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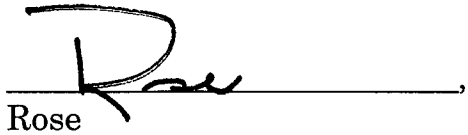
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