IN THE SUPREME COURT OF THE STATE OF NEVADA

DOCKERY CLEVELAND,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40255

FILED

MAR 13 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery by a prisoner in lawful custody. The district court sentenced appellant to a prison term of 12 to 30 months.

The underlying charge in this appeal arose on March 13, 2001, when appellant was being placed into disciplinary detention pursuant to a disciplinary hearing conducted on March 12, 2001. Placing appellant into disciplinary detention required correctional officers to remove various items from appellant's cell. Three correctional officers testified that as they were returning appellant to his cell following the removal of the items, appellant head-butted one of the officers in the face, causing the officer to suffer a bloody nose. Appellant then violently resisted the officers' efforts to restrain appellant.

During trial, Lieutenant Scheel, who presided over appellant's disciplinary hearing on March 12, 2001, testified regarding general procedures for discipline. Lt. Scheel further testified that a disciplinary hearing had taken place regarding appellant, and that the outcome of the hearing was that appellant was to be placed in disciplinary detention. During his testimony, Lt. Scheel said, "I believe [appellant] was charged with NJ-25 threats." Lt. Scheel made one other reference to the fact that

appellant had been charged with issuing threats, but these were the only two references to the specific conduct which precipitated the disciplinary hearing.

Appellant contends that the district court erred by allowing Lt. Scheel's testimony. Specifically, appellant argues that the testimony that appellant had been charged with issuing threats constitutes evidence of a prior bad act, and the district court should therefore have conducted a Petrocelli[1] hearing, and instructed the jury on the limited use of the evidence.

Turning to appellant's first argument, this court has held that failure to conduct a Petrocelli hearing does not require reversal if: "(1) the record is sufficient to determine that the evidence is admissible under Tinch; or (2) the result would have been the same if the trial court had not admitted the evidence."[2] Tinch requires that, in order for a prior bad act to be admissible: (1) the act must be relevant to the crime charged; (2) the act must be proven by clear and convincing evidence; and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.[3]

In this case, evidence that appellant had been placed in disciplinary detention was relevant to the crime charged because it explained why corrections officers were returning appellant to his cell. The fact that appellant had been placed in disciplinary detention was

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[1]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[2]McNelton v. State, 115 Nev. 396, 405, 990 P.2d 1263, ___ (1999) (citing Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[3]113 Nev. at 1176, 946 P.2d at 1064-65.

proven by clear and convincing evidence, and we conclude that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. To the extent that appellant specifically challenges the testimony that appellant was accused of issuing threats, we conclude that the outcome of the trial would have been the same without that testimony. The references to the underlying conduct were extremely brief, and three corrections officers testified that appellant head-butted an officer and resisted restraint. We therefore conclude that the failure to conduct a Petrocelli hearing does not warrant reversal.

As to appellant's argument that a limiting instruction should have been given to the jury, the failure to give the instruction is subject to a harmless error analysis.[4] In light of the evidence against appellant, we conclude that the failure to give a limiting instruction did not have a "'substantial and injurious effect or influence in determining the jury's verdict.'"[5]

Appellant also contends that the prosecutor committed misconduct during closing argument by improperly shifting the burden of proof to the defense. In response to an argument by appellant's counsel that perhaps the corrections officer bumped his nose on the back of appellant's head, the prosecutor pointed out that there was no evidence to support that theory. Initially, we note that there was no objection to the prosecutor's comment. "In order to preserve the issue of prosecutorial misconduct for appeal, the defendant must raise timely objections and

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[4]Tavares v. State, 117 Nev. ___, ___, 30 P.3d 1128, 1130-31 (2001).

[5]Id. at ___, 30 P.3d at 1132 (quoting Kotteakos v. United States, 382 U.S. 751132 (quoting Kotteakos v. United States, 382 U.S. 750, 776 (1946).

seek corrective instructions."[6] Accordingly, this issue has not been preserved for appeal.

Moreover, we conclude that even if the issue was preserved for appeal, the issue lacks merit. This court has previously held that a prosecutor may "properly argue that the defense failed to substantiate its theory with supporting evidence."[7] Additionally, the prosecutor's comments did not call attention to appellant's failure to testify.[8] We therefore conclude that the prosecutor's comments did not impermissibly shift the burden.

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

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[6]Parker v. State, 109 Nev. 383, 391, 849 P.2d 1062, 1067 (1993).

[7]Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001).

[8]Id.

cc: Hon. Dan L. Papez, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General Brian Sandoval/Las Vegas
White Pine County District Attorney
White Pine County Clerk