IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAUN MICHAEL KANE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40616

FILED

JAN 3 0 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment entered upon a jury verdict finding appellant, Shaun Kane, guilty of first-degree murder with the use of a deadly weapon.[1] Kane seeks reversal, contending (1) admission of impeachment evidence violated the Sixth Amendment of the Federal Constitution, and the Nevada Evidence Code; (2) the district court erred by admitting uncharged "bad acts" evidence; (3) the district court erred by requiring him to wear an electronic stun belt during trial proceedings; and (4) insufficient evidence supported the jury's guilty verdict. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On November 12, 1999, in West Wendover, Nevada, Kane fatally shot Guillermo Cortez. Although eye-witness reports indicated that the two men were embraced in a face-to-face struggle at the time of the shooting, medical evidence confirmed that two contact-type gunshot wounds with a "back to front" trajectory caused Cortez's demise.

United States Border Patrol agents apprehended Kane on November 23, 1999, in Texas near the United States border with Mexico, following a confrontation during which Kane shot at one of the agents. Federal authorities held Kane for charges stemming from his arrest and a federal court convicted him of attempted murder pursuant to a plea of

[1]See NRS 177.015.

guilty. Thereafter, the State of Nevada charged Kane with open murder with a deadly weapon in connection with the shooting death of Cortez.

The homicide case proceeded to trial before a jury in Elko County on October 30, 2002. One of the percipient witnesses, Christopher Taylor, testified that Kane and Cortez attended a party at Taylor's home during the evening and early morning hours of November 11 and 12, 1999. At some point, Kane and Cortez left the party and, shortly thereafter, Taylor heard gunshots. When he went outside, he saw Cortez lying in a puddle of blood. Police responded to the crime scene and found two .25 caliber shell casings near Cortez. Other witnesses testified that they saw Kane carrying a small handgun in the days before the shooting.

Timothy Tapp, an acquaintance, testified to a telephone conversation with Kane during which Kane stated he had "just shot someone twice," and thought the person was dead. Kane wanted money from Tapp, but Tapp refused.

Charles Gomez and Jack Gibbs, other partygoers, were key witnesses at trial. Gomez testified that he and Gibbs followed Kane and Cortez from the party, and that he, Gomez, observed a brief struggle between Kane and Cortez, heard gunshots, and saw Cortez fall to the ground. Gomez testified that while he was speaking with police on November 12, he suffered an epileptic seizure and, although he could not recall his conversations with police or the events of the day preceding the shooting, he remembered the shooting clearly. He also admitted that his epilepsy medicine sometimes affects his memory.

Gibbs testified that he lived in Wendover in 1999, was acquainted with Cortez, and attended a party at Taylor's house. As discussed below, Gibbs provided police with an account of the shooting, identified Kane as the perpetrator and exonerated a third party who police

wrongfully arrested for the killing of Cortez. At trial, however, Gibbs denied any memory of the date of the party, who was present, the shooting, or speaking with police thereafter. He explained that his memory failure was a result of his heavy use of alcohol and he only knew he was in Wendover during the time of the shooting from what other people told him and from hotel receipts. He also admitted that he might have spoken with police regarding the shooting but, again, could not remember doing so. He did recognize that the failure to testify to the truth while under oath was perjury.

The district court overruled Kane's timely objection to the State's offer to impeach Gibbs with his out-of-court statements to police, concluding that it was "painfully obvious" that Gibbs was feigning memory loss.

Several police officers testified that they interviewed Gibbs on November 12 and 23, 1999, during which Gibbs stated that he observed Kane and Cortez leave the party, saw Kane struggle with Cortez, and saw Kane shoot Cortez. According to the officers, Gibbs also advised them that their arrest of a "Matt Ritter" on November 12 was in error.[2] Officers who testified indicated that Gibbs either appeared to have been drinking but was coherent, or that Gibbs did not appear intoxicated at all.

Scott Nelson, Kane's former cellmate at the United States Penitentiary in Pollock, Louisiana, testified that Kane admitted to killing Cortez. More particularly, on November 11, 1999, Kane sold methamphetamine to two people at the party at Cortez's request; that he

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[2]Kane used several aliases and was variously known as "Matt Ritter," "Matt Rutter," "Brian Davis," and when arrested, carried an ID card identifying him as "Brian Lee Taylor."

became angry at Cortez's repeated requests for payment; that he left the party to retrieve a .25 caliber handgun from "his outside hiding location"; that he told Cortez that they would go outside to discuss payment; that, because he noticed Gibbs and Gomez following them, he started to walk away; and that, when Cortez followed Kane and "jumped into" him, Kane shot Cortez twice in the back of the head.

Finally, over objection, United States Border Patrol Agents Brian Pigg and Humberto Hernandez testified that after Kane shot at Agent Pigg on November 23, 1999, Agent Hernandez apprehended Kane near the Texas/Mexico border.[3]

The jury found Kane guilty of first-degree murder with the use of a deadly weapon and, after the penalty phase of the trial, returned a sentence of life imprisonment without the possibility of parole. The district court enhanced Kane's sentence for the use of a deadly weapon and imposed two consecutive terms of life in prison without the possibility of parole, to run concurrently with Kane's federal sentence for attempted murder. Additionally, the district court ordered Kane to submit to DNA testing and pay an administrative fee of $25.00 and a DNA testing fee of $150.00. Kane appeals.

## DISCUSSION

### Impeachment evidence

Kane contends that the admission of Gibbs' out-of-court statements violated his Sixth Amendment right of confrontation.[4] He

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[3]Agent Hernandez had difficulty identifying Kane as the person arrested in Texas. Thus, another witness identified Kane from a photograph taken when Kane was arrested.

[4]The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the

*continued on next page . . .*

asserts that the Sixth Amendment "guarantees a defendant the right to engage in cross-examination sufficient to afford the trier of fact a satisfactory basis for evaluating the truth of a prior statement," and that legally sufficient cross-examination may only occur when a witness testifies at trial under oath and responds willingly to questions. Because Gibbs did not willingly testify given his feigned memory loss and refused to answer any questions about his statements to police, Kane contends that he did not have the opportunity to conduct an effective cross-examination. Kane also asserts that the prosecution may only properly use out-of-court statements for impeachment when the witness willingly testifies. We disagree and conclude that the admission of Gibbs' out-of-court statements did not violate the Confrontation Clause of the Sixth Amendment.

"Trial courts have considerable discretion in determining the relevance and admissibility of evidence. An appellate court should not disturb the trial court's ruling absent a clear abuse of that discretion."[5] Additionally, we review alleged hearsay and Confrontation Clause errors using harmless error analysis.[6]

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. . . *continued*
accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The requirements of the federal clause apply to the states through the Fourteenth Amendment to the United States Constitution. Pointer v. State, 380 U.S. 400, 403-05 (1965).

[5]Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996) (citation omitted).

[6]Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993).

The United States Supreme Court stated in California v. Green[7] that

> the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories.[8]

Additionally:

> "The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony."[9]

Also, as the Court stated in Delaware v. Fensterer: "Generally speaking, the Confrontation Clause guarantees an opportunity for

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[7]399 U.S. 149 (1970).

[8]Id. at 164.

[9]United States v. Owens, 484 U.S. 554, 558 (1988) (quoting Delaware v. Fensterer, 474 U.S. 15, 21-22 (1985)); see also Vogel v. Percy, 691 F.2d 843, 845-46 (7th Cir. 1982) (quoting United States v. Shoupe, 548 F.2d 636, 643 (6th Cir. 1977) (No violation of Confrontation Clause by admitting a witness's out-of-court statement, notwithstanding defendant's assertion that witness's "lack of memory concerning the statement precluded full and effective cross-examination." A witness's memory loss at trial, based upon his assertion that he was intoxicated when he made his out of court statement, was "'so selective as to be incredible.'").

effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[10]

In the present case, Gibbs took the witness stand, testified under oath to questioning, and admitted he might have spoken to police. He did not actively refuse to testify, for example, by asserting a Fifth Amendment right against self-incrimination. While Kane's cross-examination may have been more fruitful had Gibbs not suffered a memory lapse, Kane was afforded an adequate opportunity to test Gibbs' lack of recall and show to the jury that it should not rely upon either Gibbs' in-court or out-of-court statements. Kane's counsel questioned Gibbs regarding why he himself was in prison, his current drinking habits, his selective memory loss, his friendship with Gomez, his level of intoxication when speaking with police, and his apparent inability to remember any statements he made to police.[11] After this questioning, as well as the State's direct examination, Gibbs' credibility was substantially diminished. Gibbs was unable to reconcile his lapses in memory with his selective memory of other events, dates, and people. Because Kane was able to question Gibbs on these inconsistencies, and because Gibbs was present at the trial and testified under oath, the admission of Gibbs' out-of-court statements to police did not violate Kane's rights to confrontation.

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[10]474 U.S. at 20 (alteration in original).

[11]Kane could also have questioned Gibbs regarding his ability to remember the events of the shooting when he spoke with Sergeant Dale Lotspeich on November 23, 1999, eleven days after the shooting. And, he could have questioned Gibbs about his eyesight, his normal short-term memory, and whether he held any bias against Kane to give him a reason to fabricate his statements to police.

We also conclude that the district court properly admitted Gibbs' out-of-court statements under the Nevada Evidence Code. NRS 51.035(2)(a) provides that an out-of-court statement is not hearsay and is admissible if the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . [i]nconsistent with his testimony." Thus, after establishing a proper foundation under NRS 51.035, the statements may be admissible for both substantive and impeachment purposes.[12]

Gibbs testified at trial and was subject to cross-examination on his out-of-court statements. Gibbs' testimony as to his professed lack of memory regarding his statements to police was effectively a denial of his prior statements and thus the statements were inconsistent with his testimony at trial.[13] Accordingly, the district court properly admitted Gibbs' out-of-court statements because the State presented a proper foundation for admission under NRS 51.035(2)(a).[14]

Uncharged bad act evidence

Kane concedes that the State may present evidence of flight, but argues that the district court erroneously admitted Agent Pigg's testimony regarding the attempted murder charge in Texas, because the separate event was too remote in time from the Cortez shooting. He also argues that the probative value of the evidence was minimal and was thus outweighed by its highly prejudicial effect.

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[12]Atkins, 112 Nev. at 1129, 923 Nev. at 1124.

[13]See Crowley v. State, 120 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 6, Jan. 30 2004).

[14]Id.

"The trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference. It will not be reversed absent manifest error."[15]

This court has defined flight as "something more than a mere going away. It embodies the idea of going away with a consciousness of guilt, for the purpose of avoiding arrest."[16] While NRS 48.045 prohibits the admission of other crimes, wrongs, or acts to prove a defendant acted in conformity with his character, NRS 48.045(2) provides an exception to this rule. Evidence of other crimes, wrongs, or acts "'may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'"[17]

> In determining whether such acts are admissible, the district court must conduct a hearing and determine whether "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[18]

We conclude that the evidence of flight elicited via the federal agents was admissible to show Kane's consciousness of guilt. In this, the district court properly considered whether Agent Pigg's testimony was admissible under Tinch and Braunstein. First, the district court found

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[15]Braunstein v. State, 118 Nev. ___, ___, 40 P.3d 413, 416 (2002).

[16]State v Rothrock, 45 Nev. 214, 229, 200 P. 525, 529 (1921).

[17]Braunstein, 118 Nev. at ___ n.4, 40 P.3d at 417 n.4 (quoting NRS 48.045(2)).

[18]Id. at ___, 40 P.3d at 416-17 (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)).

that Agent Pigg's testimony was highly probative of Kane's consciousness of guilt because it showed Kane's willingness to take extreme measures to effect an escape to Mexico. Second, Kane's admission that he shot at Agent Pigg as part of his plea of guilty in federal court clearly and convincingly proves the prior "bad act." Finally, the probative value of the evidence of Kane's flight was not substantially outweighed by the danger of unfair prejudice. Thus, by conducting the proper three-step analysis under 48.045(2), the district court properly exercised its discretion in admitting the testimony.

Electric stun belt – courtroom safety

Kane argues that the district court violated his Sixth Amendment rights[19] when it required him to wear an electric stun belt during trial. He asserts that the evidence presented at the pre-trial hearing concerning courtroom safety established only that he had committed disruptive behavior in the past, and no evidence showed specific instances of an attempted escape or violent behavior.[20] He also contends that the security personnel in the courtroom, armed with Taser

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[19]Kane does not state with particularity which of his Sixth Amendment rights the district court violated when it ordered him to wear the stun belt.

[20]Kane relies heavily upon Hawkins v. Comparet-Cassani, 251 F.3d 1230 (9th Cir. 2001), for the proposition that a stun belt should not be used to control merely disruptive behavior. In Hawkins, the United States Court of Appeals for the Ninth Circuit affirmed in part a district court's injunction regarding use of stun belts. The court ruled that the injunction permissibly enjoined use of a stun belt to control disruptive behavior, but it was overbroad to the extent that it prevented use of the belt to protect courtroom security. Id. at 1242-43. Thus, this decision is fact specific and does not control our resolution of this issue here.

devices, would have been sufficient to provide security at trial, and thus there was no need for the stun belt. We disagree.

First, a criminal defendant's views as to the extent courtroom security is necessary is suspect. Second, Kane's claims in this regard are belied by a substantial body of evidence considered by the district court on this issue. Finally, this court's review of a district court's decision to impose courtroom security measures is to "'determine whether what [the jurors] saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial.'"[21] If the challenged practice of restraint is not inherently prejudicial, then the defendant must show actual prejudice resulting from a district court's ruling regarding courtroom security.[22]

Here, detention officials testified that the stun belt was necessary because Kane presented a security and escape risk. Kane flooded his cell and the general population area of the jail, damaged a fire suppression system, threatened a fellow inmate, broke his leg shackles during transportation from federal prison, and attempted to break his handcuffs while in jail. Detention officials cogently expressed their belief that more security personnel would have been required absent use of the stun belt.

Nelson, Kane's former cellmate and a veteran of the federal prison system, testified that Kane was one of the most dangerous and violent persons he had ever met. Nelson testified to Kane's statements

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[21]McKenna v. State, 114 Nev. 1044, 1050, 968 P.2d 739, 743 (1998) (quoting Holbrook v. Flynn, 475 U.S. 560, 572 (1986)).

[22]Id. at 1050, 968 P.2d 743 (defendant did not show actual prejudice from the number of security officers in courtroom during trial).

that he was planning an escape, Kane's threats addressed to Nelson and to other inmates, Kane's explosive temper when faced with any disagreement, Kane's destruction of prison property, and Kane's expressed desire to "go back and shoot everybody at that party on November 12, 1999."

Finally, although the bulge from the stun belt was visible, security personnel did not activate the device and the parties never mentioned its use in the presence of the jury. It therefore was unlikely that the jury ever became aware of the belt's existence.[23]

We conclude that the district court did not err in ordering Kane to wear the stun belt. Kane was clearly a security risk and he has failed to demonstrate any resultant prejudice from its use.

Sufficiency of the evidence

Kane asserts that the evidence presented at trial was insufficient as a matter of law to support the jury's verdict. He claims that no forensic evidence linked him to the shooting, that the identification testimony was highly unreliable, and that the accounts attributable to Gomez and Gibbs were unworthy of belief. More particularly, Kane assails the statements that he shot Cortez while they were facing each other, given the medical testimony that the bullets in Cortez's head traveled left to right and back to front.

"In reviewing evidence supporting a jury's verdict, this court must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by the

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[23]Contrast Hollaway v. State, 116 Nev. 732, 742, 6 P.3d 987, 994 (2000) (accidental activation of stun belt during prosecutor's closing argument was actual prejudice and one of several factors warranting reversal of death sentence).

competent evidence."[24] The relevant question is ""[w]hether, 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."""[25]

The evidence of Kane's guilt presented at trial was more than sufficient for the jury to determine beyond a reasonable doubt that the essential elements of the crime of murder with a deadly weapon were satisfied. The State presented evidence identifying Kane as the shooter, placed him at the scene of the shooting, linked him to ownership of a small handgun, proved his opportunity and motive to kill Cortez, and clearly demonstrated his consciousness of guilt thereafter. While both Gibbs' and Gomez's statements and testimony were possibly unreliable given their alleged memory lapses, this unreliability merely goes towards credibility and the weight to be given to the testimony by the trier of fact.[26] Even if the jury discounted Gibbs' and Gomez's testimony, the jury could reasonably have reached a conclusion of guilt based upon Kane's admissions of guilt to Nelson and Tapp. Further, while the medical examiner testified that the path of the bullets in Cortez's head traveled in a back to front trajectory, the jury could have resolved this conflict by not giving any credibility to Gibbs' and Gomez's account of the relative

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[24]Braunstein, 118 Nev. at ___, 40 P.3d at 421.

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

[26]Pasarelli v. State, 93 Nev. 292, 294, 564 P.2d 608, 610 (1977).

positions of the antagonists.[27] We therefore conclude that sufficient evidence supports the jury's verdict.

## CONCLUSION

The district court properly admitted Gibbs' out-of-court statements for impeachment purposes, properly admitted testimony regarding Kane's flight, and properly ordered Kane to wear an electric stun belt. We also conclude that sufficient evidence supports the jury's verdict. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[28]

_____, C.J.
Shearing

_____, J.
Agosti

_____, J.
Rose

_____, J.
Becker

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Maupin

_____, J.
Gibbons

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[27]Thomas v. State, 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998) ("The jury must determine the weight and credibility to give conflicting testimony, and its verdict will not be disturbed on appeal where sufficient evidence supports the verdict.").

[28]This matter was submitted for decision by the seven-justice court. The Honorable Myron E. Leavitt, Justice, having died in office on January 9, 2004, this matter was decided by a six-justice court.

cc: Hon. J. Michael Memeo, District Judge
Lockie & Macfarlan, Ltd.
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk