IN THE SUPREME COURT OF THE STATE OF NEVADA

GINOFLORENTINO TORRES A/K/A
GINO FLORENTINO TORRES,
GINO FLORANTINO TORRES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41066

FILED

MAR 17 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, pursuant to a jury verdict, of guilty of robbery and battery with substantial bodily harm. Eighth Judicial District Court, Sally L. Loehrer, District Judge.

Pursuant to a jury verdict of guilty on charges of robbery and battery with substantial bodily harm, the district court sentenced Ginoflorentino Torres to serve 24 to 84 months on count I, robbery, and 24 to 60 months on count II, battery with substantial bodily harm; sentences to run consecutively, with the possibility of parole after 24 months served. Torres appeals the district court's judgment of conviction.

On January 26, 2001, Torres assaulted Justin Wright in the parking lot of a Pizza Hut outlet on Rampart and Lake Mead Boulevard in Las Vegas, Nevada. Wright had gone to the Pizza Hut to pick up a free pizza from a friend named Uriah Molina, who worked there. Accompanying Wright were his friends Justin Chambers, Sean Ercanbrack, and Nick Allen.

Wright was injured severely in the attack and subsequently taken to UMC Hospital. The results of a CAT scan and X-ray revealed that Wright's injuries included a broken cheekbone and a fractured eye socket and sinus cavity. Following the attack Wright suffered severe pain

and swelling, could not sleep well, and was unable to eat solid food for an extended period of time. Wright ultimately had reconstructive surgery to repair the damage to his face, including titanium eye socket implants.

At the hospital, Wright gave a voluntary statement to the police. At trial, Wright testified that a few days after the incident, he received a telephone call from a girl named Michelle with whom he once worked at Race Rock. However, Wright hadn't spoken with Michelle for about a month prior. Wright believed that Michelle knew what had happened to him before she called, and he made it clear that he did not want to speak with her. Wright testified that he did not know Torres' name until after he spoke with Michelle. Sometime later, Wright identified Torres from a photographic lineup conducted by the detectives assigned to the case. The State charged Torres, by information, with robbery, a category B felony under NRS 200.380 and NRS 193.165, and battery with substantial bodily harm, a category C felony under NRS 200.481.

As a result of plea negotiations, the prosecution agreed to dismiss the robbery charge if Torres entered an Alford[1] plea on the charge of battery with substantial bodily harm. At the sentencing hearing, the judge ordered a continuance and instructed the State to subpoena Michelle Spies as a witness out of concerns over the defendant's innocence despite his guilty plea.[2] When the State submitted additional information obtained from Spies, the court granted a defense motion for a continuance.

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[1]North Carolina v. Alford, 400 U.S. 25 (1970).

[2]At the hearing, Torres suggested that he did not know Michelle Spies and that he was not involved in a relationship with her.

When Torres subsequently withdrew his guilty plea, the case was tried to a jury.

1. Late noticed witnesses

Torres argues on appeal that the district court abused its discretion and committed error when it permitted Spies and Mills to testify because neither was timely noticed on the State's witness list, thus depriving the defense of the ability to prepare for cross-examination. We conclude that Torres' arguments here lack merit. NRS 174.233(5) provides a district court with discretion to exclude witnesses when the State fails to provide a defendant with a list of witnesses the State intends to call; however, as the last sentence of subsection (5) makes clear, a court may waive that requirement and permit late-noticed witnesses to testify when good cause is shown.[3]

The State filed a Supplemental Notice of Witness and Rebuttal Alibi Witnesses listing Spies as a potential witness six days prior

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[3]NRS 174.233(5) provides,

> If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as required by this section, the court may exclude evidence offered by the State in rebuttal to the defendant's evidence of alibi. . . . *For good cause shown the court may waive the requirements of this section.*

(Emphasis added.) See Evans v. State, 112 Nev. 1172, 1189-90, 926 P.2d 265, 277 (1996) (discussing NRS 174.087 substituted in revision by 174.233 (West 2003)) (noting that the primary purpose of NRS 174.233 is to uphold the government's interest in protecting against a belated alibi defense by counter-balancing the suspect nature and ease with which alibi testimony can be fabricated).

to trial, leaving adequate time for discovery and preparation for cross-examination. Torres was well aware of Spies and the possibility of the State calling her as a witness for the prosecution in this case due to their past relationship, the existence of which Torres initially denied. Furthermore, with regard to Mills, the State contends that it became aware of Mills as a potential witness only two days before his testimony, and that it immediately notified the court and Torres of its intent to call Mills as a witness. Under these circumstances it was within the district court's discretion to permit late-noticed witnesses, and nothing in the record suggests that it was a manifest abuse of discretion for the district court to permit Spies and Mills to testify in this case.

Torres also argues that Mills testified as a percipient witness and not as a rebuttal alibi witness.[4] The record belies this argument. Mills' testimony was offered to rebut Torres' alibi testimony that he was not at the Pizza Hut located at Rampart and Lake Mead Boulevard on the night of the incident, and that he had never visited that particular Pizza Hut location. Furthermore, under NRS 51.085, present sense impressions are not inadmissible as hearsay, and may, in fact, be offered to prove the truth of the matter asserted, i.e., that Torres was involved in a confrontation at that particular Pizza Hut location on the evening of

[4]Torres cites FRE 801(d)(1) and United States v. Pistante, 453 F.2d 412 (9th Cir. 1971) in support. However, Pistante stands for the proposition that the hearsay statements of a party-defendant may be used against him at trial; no hearsay statements by Torres are implicated here.

January 26, 2001.[5] We fail to see how the district court committed an abuse of discretion by permitting Mills to testify in this case.

2. Confrontation Clause

Torres argues that the district court erred when it limited the cross-examination of Spies by date and subject matter, thus preventing the defense from attacking her credibility and depriving Torres of his Sixth Amendment right to confront the witnesses against him at trial. During the defense's cross-examination of Spies, the court sustained the State's objections based on relevancy and the fact that the defense's questions were outside the scope of direct examination. The district court limited cross-examination of Spies to activities between herself and Torres that occurred prior to February 10, 2001, and also ruled that questions pertaining to Spies' tattoos and alleged drug use were irrelevant and outside the scope of the State's direct examination.

It is within the sound discretion of a trial court to limit the scope and extent of cross-examination as to bias, and absent an abuse of discretion, this court will not reverse a guilty verdict.[6] As this court has noted, it is not inconsistent with the Confrontation Clause of the Sixth Amendment for a trial judge to restrict the latitude of counsel on cross-examination even when exploring potential bias, out of concerns over harassment of the witness, confusion of the issues, or interrogation that is

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[5]NRS 51.085; see also Browne v. State, 113 Nev. 305, 312, 933 P.2d 187, 191 (1997) (noting that present sense impressions are admissible because "the statement is more trustworthy if made contemporaneously with the event described").

[6]Azbill v. State, 88 Nev. 240, 246, 495 P.2d 1064, 1068 (1972) (citing Smith v. Illinois, 390 U.S. 129 (1968)).

repetitive or only marginally relevant.[7] We conclude that the district court's limitation of Spies' testimony does not run afoul of the Sixth Amendment. Counsel for the defense questioned Spies regarding her testimony and relevant facts surrounding her relationship with Torres at the time of the incident. The record indicates that the defense had ample opportunity to confront and cross-examine Spies on the stand.

For the same reasons we conclude that it was not error for the district court to limit the testimony of Chanice Kornegay. Kornegay, a private investigator, was called by the defense as a rebuttal witness to Nick Allen's testimony. The State objected on grounds of late notice because Kornegay was known to the defense and conducted her investigation well in advance of trial. The court overruled the objection and permitted Kornegay to testify, but limited her testimony to the written notes she took during a brief telephone interview with Allen. Kornegay was not permitted to testify regarding her impressions of his responses during that interview. Torres argues that this limitation deprived him of his right to confront and cross-examine Allen at trial.

Torres' argument here is moot because he actually cross-examined Nick Allen at trial.[8] Torres' defense counsel questioned Allen at length regarding his testimony and the events that transpired on the

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[7]See Leonard v. State, 117 Nev. 53, 72, 17 P.3d 397, 409 (2001); Jackson v. State, 104 Nev. 409, 412, 760 P.2d 131, 133 (1988) (citing Von Arsdall v. State, 475 U.S. 673, 679, (1986)); Alford v. United States, 282 U.S. 687 (1931).

[8]See Grant v. State, 117 Nev. 427, 432, n.5, 24 P.3d 761, 769 n.5 (2001) ("we need not reach this distinction in this case because [the defendant] actually cross-examined [the witness]").

evening of January 26, 2001. Based on this fact alone, we conclude that there was no Confrontation Clause violation on these facts. Furthermore, we conclude that the limitations placed on Kornegay's testimony did not amount to an abuse of discretion by the district court.

3. Closing argument and jury instructions

Torres argues that the district court erred by making improper rulings regarding the State's comments on the testimony of Chambers and Spies during closing argument, thereby tainting the verdict and depriving Torres of a fair trial. Torres also argues that the district court erred when it allowed the State to characterize Chambers' testimony as an eyewitness identification and permitted the State to argue that Torres' jealousy offered a motive for the crime. As this court has noted, prosecutors during closing argument are free to express their perceptions of the record, evidence, and inferences, properly drawn therefrom, but may not place their own personal certification on arguments presented to the jury.[9] The test to determine if inappropriate comments by counsel require reversal is whether those comments, viewed within context, infected the trial to such an extent that it affected the fairness of the trial.[10]

Chambers testified that on the evening of January 26, 2001, he accompanied Wright, Allen, and Ercanbrack to the Pizza Hut on Rampart and Lake Mead where he saw Torres batter Wright, knock him to the ground, and kick him in the face and chest. Chambers later identified Torres from a photocopy of a photographic lineup shown to him

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[9]Jimenez v. State, 106 Nev. 769, 772, 801 P.2d 1366, 1367-68 (1990).

[10]Bennett v. State, 111 Nev. 1099, 1105, 901 P.2d 676, 680 (1995) (quoting Darden v. Wainwright, 477 U.S. 168 (1986)); see also United States v. Young, 470 U.S. 1, 11 (1985).

by a private investigator. Thus, we conclude that the record adequately supports the State's closing argument in this case. As a result, we hold that no impermissible mischaracterization occurred and, subsequently, no error by the district court.

In regard to Spies, Torres argues that the district court erred by allowing the State to comment on Spies' relationship with Torres, referring to it as "the common element" in the case. During the trial, Spies testified that she met Justin Wright while working at the Race Rock during 2000 and 2001. Spies further testified that she and Torres had an on-again, off-again relationship lasting about four years. According to Spies, Torres telephoned her on the night of January 26, 2001, and left a message stating, "Justin had gotten beaten up." Spies said that when she later asked Torres why he beat up Wright, Torres responded with comments implicating himself. Again, we conclude that the record supports the State's closing argument regarding Spies' relationship with Torres. It was not a mischaracterization to assert that it provided motive for the crime, and, therefore, the district court did not err.

Next, Torres assigns error to the district court's refusal to allow him to stand during closing argument in order to demonstrate for the jury the difference between his stature and the descriptions provided by witnesses. The State objected on grounds that this would constitute testimonial evidence. We note that, generally, counsel is free to argue evidence and factual matters contained in the record during closing arguments, but matters outside the record lack relevance and are

improper argument to the jury.[11] We deem that permitting a defendant to stand during closing is evidentiary in nature. While counsel was free to comment on evidence brought out at trial, he may not properly present evidence during closing arguments to the jury.

Torres argues that the court erred in giving a jury instruction on robbery because "the case involves an assault and not the offense of robbery" because the defendant lacked the requisite intent at the time the assault occurred. This argument is unpersuasive. It is irrelevant when a defendant forms the intent to steal if, taking advantage of a terrifying situation he created, he absconds with the victim's property.[12]

4. Prosecutorial misconduct

Torres next argues that the State engaged in improper vouching and mischaracterization of Justin Chambers' testimony during closing argument when the prosecution referred to a photographic lineup authenticated by Detective Gray and noted that Chambers' identification of Torres was based on a "gut feeling." We conclude that Torres' argument here is without merit.

Chambers testified that he was shown a photocopy of the photographic lineup by a private investigator. While it is true that Detective Gray did not show Chambers a photo array, he did authenticate

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[11]Cf., Collier v. State, 101 Nev. 473, 481-82, 705 P.2d 1126, 1131-32 (1985) ("It is the responsibility of the [trial] court to ensure that final argument to the jury is kept within proper, accepted bounds."); Herring v. New York, 422 U.S. 853 (1975).

[12]Chappel v. State, 114 Nev. 1403, 1408, 972 P.2d 838, 841 (1998) (quoting Norman v. Sheriff, 92 Nev. 695, 697, 558 P.2d 541, 542 (1976); also citing Sheriff v. Jefferson, 98 Nev. 392, 394, 649 P.2d 1365, 1366-67 (1982); Patterson v. Sheriff, 93 Nev. 238, 239, 562 P.2d 1134, 1135 (1977)).

the item of evidence at trial. Furthermore, when asked how certain he was of his in-court identification of Torres, Chambers responded, "I'm pretty sure. You get -- I have like a feeling you know, because I've never been in a situation that was like that, and it is just like, like a feeling that you can tell it is not right. You can -- it is one of those *gut feelings*." In the context of this case, the prosecutor's use of the phrase "gut feeling" did not equate to vouching for the veracity of the defendant.[13] As a result, we discern no error with the prosecutorial comments addressed here.

Torres next argues that the State's remarks during closing argument accorded inappropriate deference to what Torres terms "mere furtive glances and body movements" by Nick Allen during his testimony. During closing arguments the State noted that:

> Nick Allen was never shown a photographic lineup, but during his questioning as you watched Nick Allen, the State submits to you he looked over at the Defendant several times during his testimony. When asked by the State were you able to identify that individual here in the courtroom today, Nick Allen said, yeah, that's the guy, the Defendant, so Nick Allen identified the Defendant as the man who committed these crimes.

According to Torres, by noting that Allen looked over at the defendant several times, the State suggested to the jury that information not

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[13]In Randolph v. State, 117 Nev. 970, 979-82, 36 P.3d 424, 431-33 (2001), we held that even when counsel incorrectly described the reasonable doubt standard to the jury as, "[if] you have a *gut feeling* he's guilty, he's guilty," such a statement although constituting misconduct did not result in reversible error under the circumstances (emphasis added).

presented at trial supported the witness' testimony.[14] However, nothing in the prosecutor's statement pertained to information outside the purview of the jury. The record reflects that Nick Allen made an in-court identification of Torres during his testimony. We conclude that no error or prosecutorial misconduct occurred on these facts.

Finally, Torres argues that the State impermissibly mischaracterized Brandon Mills' testimony as an eyewitness identification. During closing arguments, the State said:

> Brandon Mills testified, and he readily admitted he couldn't identify the Defendant. He didn't get a good look at him from where he was standing, but he testified when he walked up to Uriah, who multiple witnesses have testified was a friend of the Defendant, he asked what's going on, referring to the confrontation that Uriah was watching. Uriah said, Gino. Gino is getting into a confrontation. The State submits to you that is an identification as well . . . .

Having previously ruled the hearsay statement of Uriah admissible as a present sense impression, we conclude that the record supports the prosecutor's statement. As such, the statement is permissible because it accurately reflects Mills' testimony. Therefore, we conclude that this statement does not constitute impermissible vouching that affected the fairness of the proceeding.

5. Sentencing based on extraordinary factors

Torres argues that the district court sentenced him on the basis of extraordinary factors unrelated to the criminal charges against him. According to Torres, the judge's comments at the sentencing hearing

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[14]See, e.g., United States v. Roberts, 618 F.2d 530 (9th Cir. 1980).

constitute a violation of his Fifth Amendment right against self-incrimination and clear abuse of discretion. The full text of the judge's comments read:

> Mr. Torres, the reason that you are standing here before the Court is because you have trouble with the truth. Back when you first came in and had entered a plea and were to be sentenced, you told me you didn't even know nobody by the name of whatever the girl's name is [referring to Michelle Spies]. And I'm very happy for you that you've turned your life around. However, it's about a day late and a dollar short on this case, and you are going to have to do the time.
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> What you did was totally unacceptable in this society. You have seriously and permanently injured another human being, and you're going to have to pay with at least two years of your life being deprived of your freedom, and it's small payment to the fellow who's injured who will suffer for the rest of his life with his injuries.

Indeed, it is well settled that the Fifth Amendment allows a defendant to refuse "to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[15] Moreover, because the right against self-incrimination continues throughout the sentencing process, the imposition of additional penalties merely because a defendant seeks to invoke his Fifth Amendment rights amounts to an abuse of discretion.[16]

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[15]Dzul v. State, 118 Nev. 681, 688-89, 56 P.3d 875, 880 (2002) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).

[16]Id. (noting that a sentencing court may not draw any adverse inference from a defendant's silence during sentencing).

Reframing Torres' argument, he suggests that the district court sentenced him to additional time because he exercised his right not to make incriminating statements when, at the sentencing hearing on his later withdrawn Alford plea, he responded to an inquiry by the court as to whether he had a girlfriend that worked at the 'Race Rock,' (i.e. referring to Michelle Spies) by stating, "No. My girlfriend is present right there." However, putting the court's comment into context, the statement "the reason that you are standing here before the court is because you have trouble with the truth," was in response to the statements of Torres' defense counsel immediately prior to sentencing. At sentencing defense counsel urged the court to impose probation instead of jail time because Torres had cleaned up his act and turned his life around. Viewed within context, the judge's comments do not indicate that the district court sentenced Torres on the basis of extraneous factors.

Moreover, comparing the sentence recommendation contained in the pre-sentence report to that imposed by the district court suggests that the court followed the recommendation of 24 to 84 months on count I, but sentenced Torres to 24 to 60 months (concurrently) on count II, instead of the recommended 12 to 32 months. The district court permitted the possibility of parole after the minimum 24 months served. Given that the sentence imposed on count I, the harsher and more lengthy of the two, was in-line with the pre-sentence report, we cannot conclude that the district court abused its discretion or otherwise violated Torres' rights. Under the sentence imposed for count I, Torres is ineligible for parole for a minimum of 24 months regardless of what the court elected to do on count II.

6. Decorum of the court

Finally, Torres argues that this court should reverse the conviction because the district court exceeded the bounds of judicial discretion by interjecting itself into the proceedings and interacting with counsel in such a way as to undermine the credibility of the defense and deprive Torres of the right to a fair trial. Torres asserts that the district court judge improperly questioned witnesses, offered inappropriate commentary, mocked and belittled defense counsel, offered personal observations on evidentiary matters, and demonstrated a general bias against the defendant throughout the trial. The crux of Torres' argument tracks issues raised throughout the brief in a "totality of the atmosphere" argument; ergo that the decorum of the court and its interactions with counsel deprived Torres of a fair and impartial proceeding.

It is within the discretion of a trial judge to question potential witnesses and determine whether they possess firsthand knowledge relevant to the case and are qualified to testify.[17] Thus, it is not prejudicial error for the judge in a criminal trial to question witnesses directly where the district court feels that matters inquired into by counsel require further explanation.[18] As we see it, when done for the purpose of

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[17]C.f. Duckett v. State, 104 Nev. 6, 13, 752 P.2d 752, 756 (1988); Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000) (whether to permit a witness to testify is within the trial court's discretion and absent an abuse of discretion that determination will not be disturbed on appeal).

[18]104 Nev. at 13, 752 P.2d at 756.

exploring or clarifying relevant matters before the district court, judicial questioning of witnesses, though not favored, is permissible at trial.[19]

First, Torres argues that the district court improperly questioned Brandon Mills during voir dire examination outside the presence of the jury to determine the admissibility of his testimony; and further argues that without the district court's independent examination, no basis existed for the admission of Mills' testimony. Next, Torres asserts that the district court's commentary at various points during the trial resulted in prejudicial bias.[20]

We conclude that in this case the judicial commentary is less obtrusive than Torres suggests. Many of the comments cited on appeal occurred outside the presence of the jury or in response to defense counsel's decision to pursue a line of questioning that the district court had repeatedly indicated was irrelevant to the proceedings. While it is true that judges should be mindful of the language they use because the

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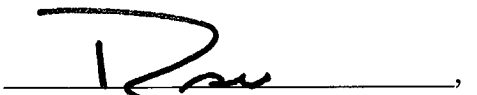
[19]Id. (noting that although the trial judge's commentary was ill-advised and inappropriate for the forum, judicial questioning of witnesses is not in and of itself so prejudicial as to require reversal of a conviction).

[20]Specifically, Torres notes a warning by the court to "be careful what you talk about," when the defense cross-examined Jay Wright regarding illicit activities possibly involving the defendant. Torres notes other comments by the court including: "you know when you order pork chops, you got no beef coming"; "well if the dog hadn't stopped to scratch he would have caught the fox"; and "I don't think her relationship has anything to do with the price of tea in china." Torres takes issue with the district court's response to his objection to the prejudicial nature of the final comment noted here, when district court responded: "You may think so, and you may move for mistrial and that motion is denied. You may move along on anything that this witness has bears [sic] on what happened on that day . . ."

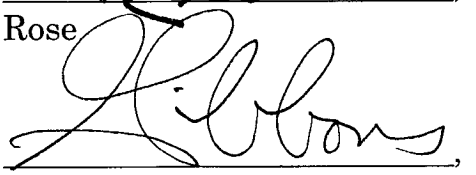
influence they wield has the power to mold the opinion of jurors and may prejudice a party,[21] we hold that the comments from the bench throughout the trial do not rise to a level that warrants a reversal of the conviction in this case.

Accordingly we,

ORDER the judgment of conviction AFFIRMED.



_____, J.
Rose



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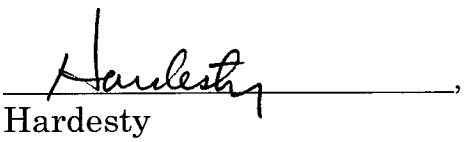

_____, J.
Hardesty

cc: Hon. Sally L. Loehrer, District Judge
David Lee Phillips
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[21]Randolph, 117 Nev. at 984-85, 36 P.3d at 433 (2001).