IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY DARNELL BAILEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41912

FILED

MAY 18 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, entered upon a jury verdict finding appellant, Larry Bailey, guilty of second-degree murder. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court sentenced Bailey to life in prison, with the possibility of parole after five years.

FACTS AND PROCEDURAL HISTORY

On the morning of April 22, 1995, the dead body of Sean Wells was discovered at his place of employment, a Las Vegas Pizza Hut restaurant. Wells was a night manager at the store, where Bailey worked as a cook under Wells' supervision. Subsequent investigation revealed allegations that Bailey attacked Wells during the late evening of April 21, 1995, that a considerable sum of money was missing from the store cash register, that the two men were frequent antagonists, and that Bailey, on several occasions, verbalized his enmity towards Wells and his desire to kill or otherwise injure Wells. Forensic evidence at trial confirmed that Wells' death resulted from a criminal agency, strangulation following application of severe blunt force trauma. Police arrested Bailey and the State prosecuted him on charges of murder and robbery.

The primary evidence against Bailey came from another Pizza Hut co-worker, Don Green. Green testified that, on the night in question

05-09659

near closing time, he witnessed the start of an altercation at the restaurant between Wells and Bailey; that Green left during the altercation, which he did not regard as serious; that upon his return, he observed Wells lying on the restaurant floor, badly beaten and unconscious, but still alive; that he ultimately left the premises, at which time he observed Bailey "stomping" on Wells; and that Bailey threatened Green on at least two occasions to insure his silence.

Because of enmity that also existed between Green and Wells, Green's failure to assist Wells or report the incident, and inconsistent statements made by Green concerning a possible weapon used to knock Wells unconscious, the defense theorized in part that Green committed the murder. Bailey elected not to testify in his own defense.

The trial jury acquitted Bailey of robbery and, as noted, convicted him of murder in the second degree. Bailey appeals, asserting the following assignments of error: first, that the district court erred in denying his motion for mistrial after Green referred to Bailey's prior imprisonment for an unrelated offense; second, that the prosecution violated his rights under the Fifth Amendment by drawing attention to his choice to not testify; third, that the district court erred in its instruction concerning implied malice. We affirm.

DISCUSSION

Reference to Bailey's prior prison sentence

Green testified that, two nights after the events in question, Bailey threatened to kill Green and his girlfriend to keep them from reporting the murder:

> At that time he kind of took me aside, walked me, like, up the isles, just him and I. And he made it clear to me that he wouldn't have any problem killing Sofie, me. I mean, he knew where my

> grandkids lived, my family. He wouldn't have any problem killing us to keep him from going back to prison.

(Emphasis added.)

Bailey contends that this mention of his criminal past prejudiced his right to a fair trial. Accordingly, he claims that the district court erred in denying his contemporaneous mistrial motion. This court will not overturn a lower court's ruling on a motion for mistrial absent a clear showing of an abuse of discretion.[1]

We conclude that Bailey's argument lacks merit because Green's mention of Bailey's previous imprisonment arose in the context of Bailey's threats to dissuade Green from informing the authorities. In Evans v. State, this court found no error in admitting a witness's testimony explaining reluctance to cooperate with prosecutors because of threats of violence by the defendant.[2] Similar to the situation presented in Evans, Green's statement was directly relevant to the question of guilt,[3] and the district court was not required to conduct a hearing prior to its admission.[4] Finally, the reference to his past imprisonment implies that Bailey had used these words in making the threat, and demonstrated the lengths to which Bailey would go to prevent Green and his girlfriend from reporting him. Thus, the probative value of the reference extended beyond a gratuitous reference to Bailey's prior criminal misconduct.

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[1]Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 433 (2001).

[2]117 Nev. 609, 628-29, 28 P.3d 498, 512 (2001).

[3]See id. at 628, 28 P.3d at 512.

[4]See id.

We therefore conclude that the district court committed no abuse of discretion in its denial of Bailey's motion for mistrial.[5]

Prosecutorial comment implicating Bailey's choice to not testify

Bailey argues that the prosecution violated his right to a fair trial by referring to his failure to take the stand in closing argument. In this, Bailey urges our consideration of the following exchange:

> [STATE]: You only have two people to consider here, Don Green, or Larry Bailey, the Defendant. That's it.
>
> That's who you need to look at as to who the murderer is in this case.
>
> I would submit to you that the evidence you heard over the past three weeks tells you that it was not Don Green. Let's look at the evidence that you heard.
>
> The killer was in this courtroom all right, Ladies and Gentlemen, but he didn't sit up there. He's been here every - -
>
> [DEFENSE]: Objection to that comment, Your Honor.
>
> THE COURT: Are you referring to Mr. Green?
>
> [STATE]: Yes, I was.
>
> [DEFENSE]: No.
>
> She was referring to Mr. Bailey when she pointed at him.
>
> [STATE]: I'll move on.

(Emphasis added.)

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[5]As discussed below, any error in connection with Green's testimony was harmless.

The accused has the right to not testify against himself in a criminal case.[6] A direct reference to a defendant's decision to not testify at trial violates the Fifth Amendment.[7] If the reference is indirect, it is constitutionally impermissible if "'the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify.'"[8] The standard for determining whether such remarks require reversal is whether any resultant error is harmless beyond a reasonable doubt.[9] A prosecutor's comments are to be viewed in context, and a conviction should not be lightly overturned based on prosecutorial comments alone.[10]

We conclude that the argument in question was calculated to dramatize that the person who did take the witness stand, Green, was not the perpetrator of Wells' murder. Thus, the comment was, at most, an indirect reference to Bailey's refusal to testify. However, the rhetorical flourish was such that the jury would also take it as a comment upon Bailey's failure to testify. Having said this, we also conclude that this reference is harmless beyond a reasonable doubt, given the evidence adduced against Bailey at trial. First, Pizza Hut computer records

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[6]U.S. Const. amend. V; Nev. Const. art. 1, § 8.

[7]Griffin v. California, 380 U.S. 609, 615 (1965); Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991).

[8]Harkness, 107 Nev. at 803, 820 P.2d at 761 (quoting United States v. Lyon, 397 F.2d 505, 509 (7th Cir. 1968)).

[9]Id. (citing Chapman v. California, 386 U.S. 18, 21-24 (1967)).

[10]Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000).

indicated that Wells began the cash count and opened the safe before Bailey left the premises, contrary to Bailey's statement to the police. Second, evidence suggested that considerable cash was missing and in Bailey's possession shortly after his assault upon Wells. Third, Bailey's initial failure in response to police requests to turn over the shoes he wore on the night of Wells' death is probative of his guilt.[11] Fourth, despite considerable impeachment, the jury could have reasonably believed the testimony of Bailey's cellmate in the Clark County Detention Center that Bailey essentially admitted to killing Wells. Fifth, the jury could have attributed significant weight to Green's testimony regarding the circumstances of the murder and the threat conveyed by Bailey to Green if Green contacted police. Sixth, Bailey told police that Wells let him leave early that night because Wells' friends, Jeremy Lingenfelter and Damon Wolters, would help him close the restaurant. Contrary to Bailey's statement, Lingenfelter and Wolters both testified that Wells had not asked either of them to help him close that night. Seventh, several witnesses confirmed Bailey's hatred for Wells and his desire to kill Wells. Finally, Bailey's theory against Green does not necessarily exonerate Bailey. At most, it suggests that Green may have been an accomplice and, as noted, the State's case contained ample independent corroboration.

In light of the above, we conclude that any error in connection with the prosecution's improper closing argument was harmless beyond a reasonable doubt.

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[11]We note that this request occurred during the pre-arrest investigation of Wells' demise.

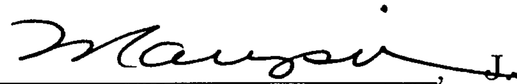
Instruction on implied malice

Bailey argues that the district court's instruction on implied malice is unconstitutionally vague. He argues that the words "abandoned and malignant heart" convey nothing in modern language and allow jurors to simply find malice if they think the defendant is an evil person. We conclude that this argument lacks merit, as this court has consistently rejected similar arguments concerning this particular jury instruction in previous cases.[12]

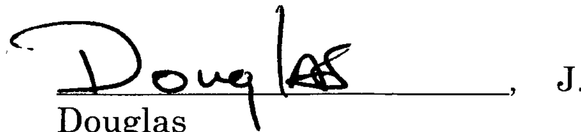
CONCLUSION

We conclude that none of Bailey's alleged errors deprived him of a fair trial. Therefore, we

ORDER the judgment of the district court AFFIRMED.



Maupin, J.



Douglas, J.

Parraguirre, J.

cc: Hon. Donald M. Mosley, District Judge
David M. Schieck
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[12]See Leonard v. State, 117 Nev. 53, 79, 17 P.3d 397, 413 (2001).