

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN JOHN SIMMONS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49332

FILED

OCT 04 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT

ORDER AFFIRMING IN PART, REVERSING IN PART AND

REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a deadly weapon and possession of a firearm with the serial number changed, altered, removed or obliterated. Ninth Judicial District Court, Douglas County; Michael P. Gibbons, Judge. The district court sentenced appellant Steven John Simmons to serve two consecutive terms of 36 to 120 months in prison for robbery with the use of a deadly weapon and a concurrent term of 18 to 48 months in prison for the remaining charge.

Simmons argues that the evidence was insufficient to support his conviction for robbery with the use of a deadly weapon. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.¹ In particular, eyewitnesses testified that the robber wore black clothing, a balaclava, and shoes with neon green laces, and used a handgun during the robbery. Douglas County Deputy Sheriff Robert Duff observed

¹See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); Koza v. District Court, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

Simmons walking in a field near the bank where the robbery occurred. Upon seeing Deputy Duff, Simmons ran and was eventually discovered hiding in a dog cage in a residential garage. A search of the area near the bank yielded a backpack containing a loaded Glock handgun with the serial number obliterated, a balaclava, a long-sleeved black tee shirt, black ski gloves, a pair of tennis shoes with neon green laces, ski goggles, and a white trash bag containing \$4,807.00—the amount stolen from the bank. Simmons's DNA was found on the Glock handgun, balaclava, tennis shoes, ski goggles and backpack.

Shawn Johnson testified that he and Simmons traveled from Mammoth, California to South Lake Tahoe the day before the robbery. The next day, Simmons instructed Johnson that if did not hear from Simmons by five o'clock that evening Johnson was to take Simmons's car home, apologize to Simmons's girlfriend, and tell Simmons's roommate that he was "sorry about the rent."

The jury could reasonably infer from the evidence presented that Simmons was guilty of robbery with the use of a deadly weapon despite his argument that no one identified him as the robber, the quality of the surveillance video capturing the robbery was poor, the scientific evidence was problematic, and the clothing Simmons was wearing when arrested differed from the robber's. The jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.² Therefore, we conclude that this claim lacks merit.³

²See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

³Simmons also argues that even if this court upholds the robbery conviction, the deadly weapon enhancement should be reversed in light of
continued on next page . . .

Simmons also challenges his remaining conviction, arguing that no evidence supports a finding that he knew or should have known that the serial number on the handgun had been obliterated.⁴ We disagree. A Glock handgun with the serial number obliterated and Simmons's DNA on the handle was found in a backpack recovered near the bank. Johnson testified that he gave Simmons a Glock handgun in exchange for music equipment and that the serial number was on the weapon at the time of the exchange. Johnson identified the handgun found in the backpack as being similar to the one he gave Simmons. Further, Simmons's roommate testified that he observed Simmons in possession of a Glock handgun similar to the one found in the backpack. The jury could reasonably infer Simmons's guilt from the evidence presented. Therefore, we conclude that this claim lacks merit.

Simmons next contends that his post-arrest statements to law enforcement were involuntary because his waiver of his Miranda⁵ rights was not reduced to writing and the interview was not recorded. However, Simmons points to no authority suggesting that a custodial interrogation

... continued

proposed legislation from the 2007 Congressional term modifying the punishment for deadly weapon enhancements. See A.B. 63, 2007 Leg., 74th Sess. (Nev. 2007). Currently, however, Simmons's deadly weapon enhancement remains constitutional, and we are unpersuaded by his invitation to reconsider this matter. See Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975).

⁴See NRS 202.277(2).

⁵Miranda v. Arizona, 384 U.S. 436 (1966).

must be reduced to writing or recorded to be admissible at trial. Consequently, we conclude that Simmons's claim lacks merit.

Simmons also complains that his trial was unfair because the district court improperly allowed the State's DNA expert to testify, despite the State's untimely notice of the expert's testimony. Simmons argues that the State's untimely notice, filed seven days prior to trial, deprived him of the opportunity to secure a defense expert witness to challenge the State's DNA evidence. NRS 174.234(2) requires a party offering expert testimony to provide written notice to the opposing party not less than 21 days prior to trial. After conducting a hearing, the district court allowed the State's expert witness to testify, concluding that the State's failure to timely notify Simmons was an oversight and not an act of bad faith. The district court further noted that Simmons had the DNA evidence examined by his own expert and that the State's expert witness had testified at the preliminary hearing. At trial, counsel cross-examined the State's DNA expert, eliciting testimony that Simmons's DNA was not found on some of the items in the backpack and that other individuals' DNA was found on other items. This testimony supported the defense's theory that someone else committed the crime. Simmons has not demonstrated that the untimely notice prejudiced him, and we discern no prejudice from the record before us. Therefore, we conclude that the district court did not abuse its discretion in allowing the challenged testimony.⁶

⁶See Sampson v. State, 121 Nev. 820, 827, 122 P.3d 1255, 1259-60 (2005).

Simmons next argues that he was deprived of an impartial jury because the district court failed to question jurors individually after a newspaper was discovered in the jury room. During trial, the bailiff reported to the district court that one of the jurors was overheard making a statement about a newspaper article regarding Simmons's case. At counsel's request, the district court questioned the juror, who responded that he saw a picture of counsel and the prosecutor on the front page of a local newspaper and that he "immediately ignored that part of the paper." Counsel stated that he was satisfied with the juror's statement that he did not read the article concerning Simmons's trial. Additionally, a newspaper was found in the jury room; the newspaper included Simmons's picture and an accompanying story about his trial. Again, at counsel's request, the district court questioned the jurors about the matter, albeit not individually, to which none indicated that he or she had read the news story or saw Simmons's picture.

The jury's exposure to extrinsic material, such as newspaper articles, "generally do[es] not raise a presumption of prejudice."⁷ Rather, the "extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict."⁸ Simmons has not shown that querying the jurors individually would have yielded any further information on the matter. In fact, Simmons concedes in his brief that any potential benefit of individual juror questioning is unclear. And there is no indication that

⁷Meyer v. State, 119 Nev. 554, 565, 80 P.3d 447, 456 (2003).

⁸Id.

any juror was unduly influenced by the newspaper found in the jury room. Accordingly, we conclude that relief is not warranted on this claim.

Simmons next contends that he was deprived of a fair sentencing hearing because the district court erroneously considered his lack of remorse and refusal to admit guilt in fashioning Simmons's sentence. We agree. "A defendant retains his Fifth Amendment rights after a jury verdict because the appellate process is still open to him."⁹ Further, the "[i]mposition of a harsher sentence based upon the defendant's exercise of his constitutional rights is an abuse of discretion and the sentence cannot stand."¹⁰ A district court abuses its discretion when it considers a defendant's lack of remorse or refusal to admit guilt in imposing sentence.¹¹

We conclude that the error in this case cannot be considered harmless. The record shows that district court referenced Simmons's lack of remorse several times throughout the sentencing hearing. Considering the district court's statements as a whole, it is evident that Simmons's lack of remorse and refusal to admit guilt significantly influenced the district court's sentencing decision. For example, the district court stated that he had sentenced another defendant who had accepted responsibility for his crime to the minimum sentence allowed for robbery. The district court then advised Simmons that "this case isn't like that for reasons I've

⁹Bushnell v. State, 97 Nev. 591, 593, 637 P.2d 529, 531 (1981).

¹⁰Id.

¹¹Brake v. State, 113 Nev. 579, 584-85, 939 P.2d 1029, 1033 (1997); Brown v. State, 113 Nev. 275, 291, 934 P.2d 235, 245-46 (1997).

discussed and [the prosecutor] mentioned." Moreover, the mitigating circumstances in this case included Simmons's lack of a prior criminal record, his good behavior in prison, and the presence of a supportive family. We conclude that the district court's consideration of Simmons's lack of remorse and refusal to admit guilt after he had maintained his innocence violated Simmons's Fifth Amendment rights and constituted an abuse of discretion. Consequently, Simmons is entitled to a new sentencing hearing.

Finally, Simmons asserts that cumulative error requires reversal of his convictions. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."¹² However, we conclude that Simmons is not entitled to relief respecting any errors committed the guilt phase of Simmons's trial. To the extent that Simmons argues that cumulative error prejudiced the sentencing portion of his trial, we decline to consider this matter in light of our order remanding this case for a new sentencing hearing.

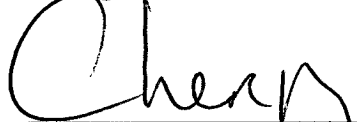
Having concluded that Simmons's arguments respecting alleged errors committed the guilt phase of his trial do not warrant relief, we affirm his convictions. However, we conclude that Simmons is entitled to a new sentencing hearing. Therefore, we remand this case to the district court for a new sentencing hearing before a different district judge. Accordingly, we

¹²Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).


ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹³

 C.J.

Maupin

 J.

Cherry

 J.

Saitta

cc: Hon. Michael P. Gibbons, District Judge
Brooke Shaw Zumpft
Attorney General Catherine Cortez Masto/Carson City
Douglas County District Attorney/Minden
Douglas County Clerk

¹³Simmons complains that the district court erred in denying newly-appointed counsel a transcript of the trial proceedings to prepare for sentencing. He also argues that the prosecutor committed misconduct when he improperly referred to a 10-year-old arrest with details not included in the pre-sentence report, argued that Simmons showed no remorse, and expressed his personal opinion that Simmons would re-offend when released from prison. However, in light of our order remanding this case to the district court for a new sentencing hearing, we decline to consider these matters.