

IN THE SUPREME COURT OF THE STATE OF NEVADA

PEGGY BENNETTE N/K/A PEGGY
HAMBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52007

FILED

JUN 04 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of selling a controlled substance. Sixth Judicial District Court, Humboldt County; John M. Iroz, Judge.

A jury found appellant Peggy Bennette, n/k/a Peggy Hamby, guilty of selling a controlled substance in violation of NRS 453.321. The district court sentenced Bennette to a minimum of 12 months and a maximum of 36 months, with 11 days credit for time served. The sentence was suspended while Bennette was placed on probation for 60 days, under special conditions, including attending drug court.

On appeal, Bennette argues that (1) the district court erred by permitting the State to file an amended information on the first day of trial; (2) the district court made an improper comment during voir dire; (3) the State committed prosecutorial misconduct; (4) the district court abused its discretion by excluding evidence about the confidential informant; (5) there was insufficient evidence to prove she was predisposed to selling controlled substances; (6) the district court erred by denying her motion to dismiss or, in the alternative, give an advisory instruction to acquit; and (7) the district court erred when it instructed her that she would not avoid conviction by successfully completing drug court.

For the reasons set forth below, we conclude that Bennette's contentions fail, and therefore we affirm the conviction. As the parties are familiar with the facts of this case, we do not recount them except as necessary to our disposition.

DISCUSSION

Amended information

Bennette first contends that the district court committed reversible error when it permitted the State, on the first day of trial, to amend the information from selling a controlled substance to selling or giving away a controlled substance. Bennette argues that the district court had no authority to add that additional count.

A defendant may be convicted of violating NRS 453.321 if the jury finds that she imported, transported, sold, exchanged, bartered, supplied, prescribed, dispensed, gave away or administered a controlled substance. NRS 453.321(1)(a). Under NRS 173.075(2), the State may allege, in a single count, that the defendant committed the offense "by one or more specified means." Pursuant to NRS 173.095(1), "[t]he court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

We conclude that the district court properly allowed the State to amend the information. The amended information charged Bennette with violating NRS 453.321, which is the same offense that she was charged with in the original information. Accordingly, the amendment did not constitute, as Bennette claims, an additional count. NRS 453.321 can be violated by either selling or giving away a controlled substance. Therefore, contrary to Bennette's assertion, the amended information did

not add a count to the information. Rather, it provided the jury with two alternative ways by which it could find that Bennette committed the single offense of violating NRS 453.321. Because the statute provides for several means by which the offense may be committed, we conclude that the district court did not commit reversible error when it allowed the State to amend the information.

Voir dire

Next, Bennette argues that the district court judge committed reversible error when he made a comment to prospective jurors during voir dire about his personal opinion on illegal drugs. While the comment might have been improper, we conclude that any error was harmless.

A district court judge must not “charge juries in respect to matters of fact, but may state the testimony and declare the law.” Gordon v. Hurtado, 91 Nev. 641, 645, 541 P.2d 533, 535 (1975) (quoting Nev. Const. art. 6, § 12). District court judges are further “precluded from commenting upon the probability or improbability of the truth of the evidence or the credibility thereof.” Id. (citing NRS 3.230). A district court judge’s violation of these standards is reviewed for harmless error. Id. at 645, 541 P.2d at 536. An error is harmless if, despite the error, a full and fair trial could still occur. See id.

Here, after two jurors expressed their intolerance for illegal drugs and therefore their inability to remain impartial, the district court judge commented that while he, too, had no tolerance for illegal drugs, that was not the issue at trial. He explained to the prospective jurors that Bennette was presumed innocent until proven guilty, it was the State’s responsibility to prove Bennette’s guilt, and the jurors’ duty was to listen to the evidence and then decide whether the State had met its duty. Upon

Bennette's request, at the beginning of the trial, the district court judge admonished the empanelled jury that if he had said or done anything which suggested his inclination towards one party, then the jury should disregard that statement. Following the admonishment, Bennette stated that it had been sufficient to cover her concern of the district court judge's voir dire comment. This admonishment was also given in the jury instructions at the end of trial.

While it is arguable that the district court judge should not have expressed his personal opinion as to illegal drugs, we conclude that any error was harmless. The comment was not made to sway the jury and was immediately followed with a proper explanation of a trial's process and a juror's role. Further, the district court judge adequately admonished the jury that it should not be influenced by any comment he made and Bennette indicated that the admonishment was sufficient. Therefore, we conclude that even if the district court committed error, that error was harmless.

Prosecutorial misconduct

Bennette argues that the State committed two instances of prosecutorial misconduct.¹ We address each contention in turn and conclude that neither constituted prosecutorial misconduct.

¹Bennette also contends that the State committed prosecutorial misconduct when it improperly vouched for the veracity of Detective Michael Gyll's testimony when, during closing arguments, it argued that Detective Gyll had no motive to lie, especially since he would be fired if he committed perjury. Generally, a party must object in order to preserve an issue for appeal. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). However, this court has discretion to address plain error. Id. Here, Bennette failed to object to the State's comment and, after reviewing the

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Standard of review

This court employs a two-step process when considering claims of prosecutorial misconduct. Valdez v. State, 124 Nev. ____, ____, 196 P.3d 465, 476 (2008). First, we “determine whether the prosecutor’s conduct was improper.” Id. To determine if the prosecutor’s conduct was improper, we consider whether the “prosecutor’s statements so infected the proceedings with unfairness as to make the results a denial of due process.” Thomas v. State, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004). Second, if we conclude that prosecutorial misconduct occurred, we must determine if the misconduct warrants reversal. Valdez, 124 Nev. at ____, 196 P.3d at 476. Prosecutorial misconduct is reviewed for harmless error. See Johnson v. State, 122 Nev. 1344, 1355, 148 P.3d 767, 775 (2006).

Opening statement

Bennette contends that she was prejudiced by the State’s opening statement. Specifically, she takes issue with the State noting that the Legislature created a task force to address Nevada’s methamphetamine problem and that Nevada Governor Jim Gibbons created a derivative of that task force, entitled the Governor’s Traveling Team.² Bennette contends that, in so stating, the State improperly strayed from the prospective evidence and vouched for the righteousness of the prosecution.

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record, we conclude that plain error does not exist. Therefore, this argument is without merit.

²The Governor’s Traveling Team is a narcotics task force that travels throughout Nevada conducting undercover operations.

During opening statements, it is the prosecutor's duty to refrain from making statements that cannot be proved during trial. Id. at 1357, 148 P.3d at 776. However, "[e]ven if the prosecutor overstates in his opening statement what he is later able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith." Id. (internal quotation omitted).

We conclude that the State's comments regarding the Legislature and the Governor's involvement with creating the task force were perhaps inappropriate but did not constitute misconduct. While the State did not present evidence proving that the government was involved in creating the Governor's Traveling Team, there is no evidence that the comments were made in bad faith. Rather, read in context, the comments were a means for the State to introduce the jury to the existence of the Governor's Traveling Team. Ultimately, at trial, testimony from Detective Gyll explained that he had been working with a derivative of the Governor's Traveling Team when he encountered Bennette. Further, the fact that the opening statement was the only time that the State commented about the government's involvement with creating the Governor's Traveling Team indicates that not only was the comment not made in bad faith but it did not infect the trial with unfairness. Therefore, we conclude that the comments did not constitute prosecutorial misconduct.

Questioning Detective Gyll about his undercover identity

Next, Bennette argues that she was prejudiced when the State asked Detective Gyll, who was working undercover when he met Bennette, whether his cover had been compromised by testifying at trial. The detective responded in the affirmative. Bennette asserts that the question

was irrelevant, implied that she should be punished for exercising her Constitutional right to a jury trial, and infringed upon her right to be presumed innocent.

The State's questioning does not rise to the level of misconduct. When the question was asked and answered, Bennette objected and the district court held a sidebar conference with counsel. Bennette presented the same arguments to the district court as she does on appeal and moved for the district court to declare a mistrial. While the district court denied Bennette's motion, it sustained her objection and gave the jury a lengthy admonishment. The district court explained that the jury must disregard Detective Gyll's response, which was irrelevant to the question of whether Bennette was guilty or innocent. Further, the district court noted that Bennette had a Constitutional right to a jury trial and stated that Detective Gyll's status as an undercover officer had no bearing on Bennette's decision to exercise that right. Additionally, when questioning resumed, the State properly moved on to other areas of inquiry and did not return to the subject of Detective Gyll's status as an undercover officer.

We conclude that the State's question cannot be viewed as prosecutorial misconduct. The State's immediate cessation of questions regarding Detective Gyll's cover demonstrates that it was not asked in bad faith. Cf. McGuire v. State, 100 Nev. 153, 158, 677 P.2d 1060, 1064 (1984) (noting that there was prosecutorial misconduct where the prosecution continued to make improper comments after being admonished to stop). Moreover, the district court fully admonished the jury to disregard the question and answer. Thus, any resulting prejudice was cured, and we conclude that the situation did not infect the case with unfairness.

Therefore, because we conclude that neither instance of the State's conduct constituted prosecutorial misconduct, we reject the contention that reversal of Bennette's conviction is warranted on this point.

Exclusion of evidence

Bennette further argues that the district court abused its discretion when it denied her request to admit Exhibit I, the file of the confidential informant. Bennette asserts that the evidence was necessary to prove that the confidential informant had a motive to fabricate evidence and to lie.

Relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). This court reviews "a district court's decision to admit or exclude evidence for an abuse of discretion." Mclellan v. State, 124 Nev. ____, ____, 182 P.3d 106, 109 (2008).

Here, the district court did not abuse its discretion when it excluded Bennette's Exhibit I. The proposed exhibit included information about the confidential informant's past work. When the district court excluded the exhibit, it stated that even if the evidence was relevant, it was impermissible pursuant to NRS 48.035 because its probative value was substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. We agree. As the district court noted, the confidential informant testified at trial and Bennette had ample opportunity to attack her credibility. Therefore, because the district court provided a proper reason for excluding the evidence, we conclude that it did not abuse its discretion.

Sufficiency of the evidence

Bennette contends that the State failed to present sufficient evidence to prove that Bennette was predisposed to sell a controlled substance and thus defeat Bennette's entrapment defense.³

On appeal, the standard of review for challenges to the sufficiency of the evidence is "whether, 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." Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007) (internal quotations omitted). "[I]t is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony." Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994).

Entrapment is an affirmative defense for which the defendant initially bears the burden of proving governmental instigation. State v. Colosimo, 122 Nev. 950, 957, 142 P.3d 352, 357 (2006). "Once the defendant puts forth evidence of governmental instigation, the State bears the burden of proving that the defendant was predisposed to commit the crime." Id. at 957-58, 142 P.3d at 357 (quoting Foster v. State, 116 Nev. 1088, 1091, 13 P.3d 61, 63 (2000)). Five factors that a court may consider in determining whether a defendant was predisposed are: "(1) the character of the defendant; (2) who first suggested the criminal activity;

³As to the issue of entrapment, Bennette additionally contends that the State committed prosecutorial misconduct by misstating the law during closing arguments. She failed to object to this alleged misconduct and, because we find no plain error, we conclude that this argument is without merit. Green, 119 Nev. at 545, 80 P.3d at 95.

(3) whether the defendant engaged in the activity for profit; (4) whether the defendant demonstrated reluctance; and (5) the nature of the government's inducement." Id. at 958, 142 P.3d at 357. The most important factor is whether the defendant demonstrated reluctance. Id.

Here, we conclude that the State put forth sufficient evidence to prove that Bennette was predisposed to sell controlled substances. There was no evidence of Bennette's character beyond the fact that she used illegal drugs the morning she sold Detective Gyll the methamphetamine and that, at trial, she had been able to maintain a job for a year. However, Bennette engaged in the activity for profit because Detective Gyll paid her \$100 for the methamphetamine. While Detective Gyll initiated the sale by asking Bennette if she could obtain methamphetamine for him, Bennette demonstrated no reluctance. Rather, she immediately told Detective Gyll that she could obtain methamphetamine for him and did so the next day, not only selling him a bag of methamphetamine but also giving him some from her personal inventory. Based on this evidence, a rational jury, viewing the evidence in the light most favorable to the State, could conclude that Bennette was predisposed to sell controlled substances and therefore guilty of so doing. Accordingly, we conclude that the State presented sufficient evidence to prove Bennette's predisposition to selling controlled substances.

Motion to dismiss

Bennette next challenges the district court's denial of her motion to dismiss. A district court may not grant a motion to dismiss that is brought mid-trial. See State v. Combs, 116 Nev. 1178, 1180, 14 P.3d 520, 521 (2000) (noting that the respondent's motion to dismiss was improperly made at the close of the State's case-in-chief and should not

have been granted). Here, the motion was brought the second day of trial. Therefore, the district court did not err when it denied Bennette's motion to dismiss because the motion was improperly brought mid-trial, and the district court had no authority to grant it.

Further, to the extent that Bennette challenges the district court's denial of her motion for an advisory instruction to acquit, which she brought along with her motion to dismiss, we find her challenge to be without merit. It is within the district court's discretion whether to grant an advisory instruction to acquit. Middleton v. State, 114 Nev. 1089, 1105, 968 P.2d 296, 307-08 (1998) (noting that there was sufficient evidence to convict Middleton of murder and kidnapping, so the district court did not abuse its discretion when it denied the motion in regard to these counts). Here, the district court did not abuse its discretion, because we conclude that there was sufficient evidence presented to prove that Bennette violated NRS 453.321. Id. at 1105, 968 P.2d at 307-08.

Sentencing

Last, Bennette contends that the district court erred when it instructed her that she would not avoid conviction by successfully completing drug court. Bennette asserts that pursuant to NRS 458.300 and NRS 453.3363, a defendant suffers no conviction upon successful completion of the listed court programs.

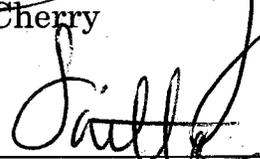
NRS 458.300 governs who is eligible for assignment to a court treatment program. NRS 453.3363 governs when a district court may suspend proceedings for an accused attending a court drug treatment program and provides the effect of discharging and dismissing a proceeding after an accused completes a court drug treatment program. A defendant convicted pursuant to NRS 453.321 does not qualify for

processing pursuant to NRS 453.3363(1). Therefore, we conclude that the district court did not err when it instructed Bennette that her conviction would stand, even if she successfully completed drug court.

Accordingly, for the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Sixth Judicial District Court Dept. 2, District Judge
Humboldt-Pershing County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Humboldt County District Attorney
Humboldt County Clerk