IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ARNOLD KING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71189

ORDER OF AFFIRMANCE

Arnold King appeals from a judgment of conviction entered pursuant to a jury verdict of possession of a stolen vehicle. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

King argues the State committed prosecutorial misconduct by using a photograph during closing argument that was not admitted into evidence. It is improper for either party to base arguments on facts not admitted into evidence. *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 705, 220 P.3d 684, 694 (2009). We review claims of prosecutorial misconduct for improper conduct and then determine whether reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). King preserved this claim for appellate review; therefore, we review improper conduct, if any, for harmless error. *See id.* at 1188-90, 196 P.3d at 476-77.

During its closing argument, the State utilized a photographic exhibit depicting a license plate on the stolen vehicle. King objected, asserting the photograph had not been admitted into evidence and for that reason the State should not be permitted to refer to that photograph during closing arguments. The district court initially found the photograph was an

enlarged portion of a previously admitted photographic exhibit and overruled the objection. The State then continued its closing argument.

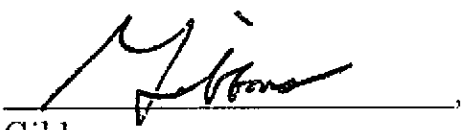
Before commencing his closing argument, King's counsel asserted there were differences between the enlarged photograph and the photograph admitted at trial. It appears the State ultimately acknowledged the enlarged photograph may not be an enlargement of the photograph admitted at trial and could be an enlargement of a different photograph taken on the same day. King's counsel believed the enlarged photograph provided him with an argument he could make on behalf of King and asked that he also be allowed to argue the photograph in his closing argument. King's counsel indicated, however, that he could not make argument on the photograph unless the court allowed King to reopen evidence for the purpose of admitting the photograph as an exhibit. The State said it would not object. After some additional discussion, the district court admitted the enlarged photograph as State's exhibit 33.

After King's counsel utilized exhibit 33 and completed his closing argument, the parties clarified their positions regarding the challenged photograph and King's counsel reiterated he formally objected to the State's introduction of the challenged photograph during its closing argument. Although the district court initially overruled King's objection, at this time, the district court stated King's objection was valid because the State showed the jury a photograph that was not admitted into evidence during trial. The court then acknowledged what the proper cure for this action would have been, but clarified it did not take that action and instead granted the curative technique that was proposed by the parties and admitted the photograph as an exhibit.

We conclude it was improper for the State to use an exhibit in closing argument that was not previously admitted into evidence. *See Glover*, 125 Nev. at 705, 220 P.3d at 694. However, we further conclude the error did not substantially affect the jury's verdict and therefore it was harmless. Specifically, we conclude the error was harmless in light of the significant evidence of King's guilt presented at trial. The evidence consisted of testimony demonstrating a police officer viewed King driving a motorcycle with an Oklahoma license plate. The officer discovered the plate did not match the motorcycle King was driving. A few days later, officers discovered the motorcycle, which had previously been reported stolen, parked at King's residence with a different license plate affixed to it. The second plate also did not match the motorcycle. Therefore, under these facts, we conclude no relief is warranted. *See Valdez*, 124 Nev. at 1188, 196 P.3d at 476 ("[T]his court will not reverse a conviction based on prosecutorial misconduct if it was harmless error."). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Silver



_____, J.
Gibbons

TAO, J., concurring:

The Nevada Supreme Court has held that it's improper for any party to base arguments on "facts" not admitted into evidence. *See Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 705, 220 P.3d 684, 694 (2009).

Here, during closing argument the prosecutor utilized a photograph that had not been previously admitted into evidence during the trial, and on appeal King argues that this constituted prosecutorial misconduct.

But a photograph isn't a "fact." A photograph is merely a visual reproduction of an image that might constitute relevant evidence, and relevant "evidence" is what tends to make a "fact" at issue more or less likely to be true. The kinds of evidence that can be introduced to prove or disprove a fact at issue can take many forms, including witness testimony (both verbal statements and visual gestures as well as demeanor), documents, physical items, video footage, audio recordings, and the like. A visual image depicted in a photograph is merely one form that evidence can take along the way to proving or disproving a fact in dispute.

Say, for example, that a prosecutor wants to establish that a particular firearm was used to commit a crime. There are many different ways the prosecutor could try to do this: an eyewitness could verbally describe the firearm he saw in the defendant's hand; another witness could draw a picture on a notepad depicting the firearm he saw; another witness could authenticate surveillance video showing the defendant holding the firearm; a police office could testify that the defendant verbally confessed to using the firearm in question; the prosecutor could introduce the defendant's signed and written confession to using the weapon; and the weapon itself could be admitted as physical evidence. These are all very different forms of evidence, some testimonial, some documentary, some consisting of physical items. But all tend to prove the same underlying fact: that a particular weapon was used during a particular crime.

So it seems to me that, in the case at hand, the question isn't whether the photograph had been previously admitted into evidence or not.

The question is whether the photograph depicts some evidence that tends to prove or disprove a fact at issue that the jury had not previously been shown and should not have been shown under the rules of evidence. And the answer to this question is quite muddled.

After defense counsel objected to the photograph, the district court reviewed the photo and concluded that it constituted a mere enlargement of another photo previously admitted into evidence and already shown to the jury. If that's all that it was, then the jury saw no new evidence, and thus was presented with no new "facts," that it hadn't already seen before. The jury just saw a larger image of the same evidence previously proffered in another photograph to prove the same facts, and I don't see how that's error. *See United States v. Gipson*, 387 Fed. Appx. 761, 763 (9th Cir. 2010) (holding that a district court had not abused its discretion in admitting enlarged photos because the jury had the originals to compare to the enlarged photos, allowing it to determine whether the photos had been manipulated); *Thomas v. State*, 114 Nev. 1127, 1141, 967 P.2d 1111, 1121 (1998) (determining that the district court did not err in admitting an enlarged version of a previously admitted diagram of the victim's body because it enabled the jury to see the diagram while the medical examiner explained the victim's wounds); *Lloyd v. State*, 94 Nev. 167, 169, 576 P.2d 740, 742 (1978) (concluding that a court properly admitted a photo enlargement because both the enlargement and its source photo were admitted at trial and because counsel repeatedly identified it as an enlargement, leaving the jury under no misapprehension as to its nature); *see also Parrish v. State*, 514 S.E.2d 458, 466 (Ga. Ct. App. 1999) (concluding that "photographs having been admitted . . . it is not error that the state was able to present them in such manner that the entire jury, at

one time, might view them" (quoting *Dalton v. State*, 308 S.E.2d 835 (Ga. 1983)).

But later, during another subsequent colloquy, the district court appeared to change its mind and found, instead, that the photograph depicted a close-up of a license plate that had been depicted in another photo previously admitted, but from a slightly different angle. From this, King argues that the prosecutor's use of the photo was improper because the image contained in it differed from photos previously admitted.

But merely because the images differed doesn't necessarily mean that the "evidence" illustrated by them did. It also doesn't mean that the images were proffered to prove different "facts" other than proven by other photographs. Different photographic images can certainly show different things; that's obvious. But different photos can also show the exact same thing; changing the size or perspective of different images of the same thing doesn't by itself change what a viewer sees in the image. What matters is whether there's a difference in the evidentiary value of the images depicted in the photos, not merely that the images themselves are different in some unimportant way having nothing to do with the jury's decision. If different images of the same thing are otherwise identical in evidentiary value, then illustrating them in different ways is about the same thing as enlarging an image, shrinking it, zooming it around, re-drawing it on a note pad, describing it verbally, or any other of a number of tactics widely permitted during closing argument.

Indeed, if one wants to get technical, a digitalized version of a photo originally taken on film stock is not the same thing as the original; it's a pixelated and artificially colorized version of something that wasn't originally pixelated and that was originally colored in ink. At the level at

which the computer's CPU operates (or if viewed under a microscope), the two images would appear radically different. For example, computer screens can't re-create true circles or curves, because computer pixels are square; all that a computer can do is create a crude facsimile of a curve or circle that is actually made up of tiny squares, and its accuracy (i.e., how jagged the curve appears, like in old versions of the 1980's video game Pong in which the "ball" was quite clearly made up of connected squares) depends upon the resolution of the computer screen on which it's shown. With modern computer resolutions, the squares may be barely visible to the naked eye, but they are there despite not being there in an original. Yet we regularly permit attorneys to digitally reproduce photos and show them to the jury in PowerPoints during closing argument, so long as the digital reproduction isn't so poorly done as to be misleading or confusing at the level at which it holds value to the case and to the jury. What matters isn't what the image is actually composed of, whether true circles in an original photo or invisible jagged squares in a digital reproduction; it's what evidentiary value it holds for the case. The same holds true for a prosecutor or witness drawing stick figures or a crude map on a notepad; the issue isn't artistic fidelity or architectural perfection, but the evidentiary value the drawing has to the issues the jury must decide.

Thus, to me, the question here isn't whether the photo showed something hyper-technically different from other admitted photos. It's whether the photo depicted an image having some different evidentiary value, from which the jury could possibly infer different facts, than other admitted photos did.

Here, during its later reconsideration, the district court seemed to find that the new photo depicted a slightly different image than the jury

had ever seen before, but an image of the exact same automobile license plate that the jury had already seen before in other photographs. Indeed, the photo appeared to have been taken on the same day as, and only minutes apart from, other photos of the same license plate that the jury saw in other admitted exhibits. The question is whether this technically different image of the same license plate displayed something different about the evidence, from which the jury could infer a different set of facts, than depicted in other photos. If all the photo did was show the exact same thing as other photos did, only from a slightly different angle, then in the end the jury saw nothing really new or different at all. In that case, I'm not sure what the "misconduct" here was.

The problem here is that neither party submitted the contested photos to us for our review. King seems to argue on appeal that there's more to the photos than the district court found. Maybe he's right, and maybe there was misconduct that we ought not sanction. Maybe the photos were similar, or maybe they were extremely different. But without the actual photos to compare ourselves, all we have in the appellate record is what the district court said while it held them in hand, and what it said doesn't make them sound all that different in evidentiary value. Lacking anything else in the record, I'm loathe to conclude, as a matter of law, that misconduct occurred. I therefore concur in the judgment of affirmance, but for these slightly different reasons.

Tao, J.

Tao

cc: Hon. Rob Bare, District Judge
Law Offices of Carl E.G. Arnold
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk